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[Faint, illegible handwritten text]

New Jersey Supreme Court

SUMMONS

NEW JERSEY SUPREME COURT. 10
HUNTERDON COUNTY.

WILLARD HAFNER,
Plaintiff,
v.

WARREN F. BROOKS and
SUN OIL COMPANY,
Defendants.

Action at Law.

20

The State of New Jersey to Warren F. Brooks and
Sun Oil Company:

You are summoned to answer the an-
[SEAL] nexed complaint of Willard Hafner in an
action at law in the New Jersey Supreme
Court. And take notice that unless you file your
answer to said complaint with the clerk of the said New
Jersey Supreme Court, at Trenton, New Jersey, within
twenty days after the service upon you of this writ and
the annexed complaint, the plaintiff may proceed in the
suit and judgment may be entered against you. 30

Witness, Honorable William S. Gummere, Chief Jus-
tice of the New Jersey Supreme Court, at Trenton,
New Jersey, this eleventh day of June, nineteen hundred
and thirty.

FRED BLOODGOOD,
Clerk.

RYMAN HERR,
Attorney.

1

40

(Filed July 5, 1930.)

COMPLAINT

NEW JERSEY SUPREME COURT,
HUNTERDON COUNTY.

10	WILLARD HAFNER,	}
	<i>Plaintiff,</i>	
	<i>v.</i>	
	WARREN F. BROOKS and	}
	SUN OIL COMPANY,	
	<i>Defendants.</i>	

20 Warren F. Brooks and Sun Oil Company, the defendants in this cause, were summoned to answer unto Willard Hafner, the plaintiff therein in an action at law upon the following complaint :

(Summons issued June 11, 1930.)

The plaintiff, residing in the township of East Amwell, County of Hunterdon and State of New Jersey, says that :

30 1. Warren F. Brooks acting for and on behalf of the Sun Oil Company, and as their officer and agent, did on the 15th day of April, 1930, falsely and maliciously, with intent to harm plaintiff, make a complaint against the plaintiff before George Webster, a justice of the peace of the County of Hunterdon, charging that plaintiff did on or about the third day of March, 1930, and on or about the twelfth day of March, 1930, and at divers other times at the township of East Amwell, in the County of Hunterdon, store, sell, expose and offer for sale a liquid fuel so as to deceive or intend to deceive the purchaser thereof as to the nature, quality and identity of the same by false representation, by the

use of a disguised camouflaged pump or pumps and by imitating the design and color of such pumps under which a recognized liquid is marked, namely the brand of the Sun Oil Company known as blue Sunoco motor fuel, against the peace of the State and in violation of our statutes chapter 116 laws of 1928.

2. As a result of the said act or acts of said Warren F. Brooks, agent for the Sun Oil Company, the plaintiff was thereafter arrested, deprived of his liberty and conducted by a police officer to Flemington, the county seat of Hunterdon, and was there by reason of said acts of said Brooks held in custody and deprived of his liberty and freedom of action, for a period of five hours. 10

3. Defendants caused said warrant to issue without probable cause and with an intent to maliciously prosecute and harm the plaintiff and to deprive him of his business and his liberty, and as a result of said action plaintiff has been brought into disrepute among his neighbors and friends and has been caused great physical pain and suffering; has lost the love and respect of his friends and business associates which he formerly enjoyed; has lost the profits from his gasoline business, and has suffered great financial harm and damage, and ever since the said arrest has been unable to secure any gainful occupation or perform any labor. 20

4. Plaintiff was tried before a traverse jury of the County of Hunterdon in the April term of the Quarter Sessions Court of the County of Hunterdon and was acquitted by said jury of the charges made against him by defendant. 30

Plaintiff demands as damages the sum of five thousand (\$5,000) dollars.

RYMAN HERR,
Attorney of Plaintiff.

(Filed July 1, 1930.)

ANSWER

NEW JERSEY SUPREME COURT,
HUNTERDON COUNTY.

10	WILLARD HAFNER,	}	Action at Law.
	<i>Plaintiff,</i>		
	<i>v.</i>		
	WARREN F. BROOKS and		
	SUN OIL COMPANY,		
	<i>Defendants.</i>		

20 The defendant, Warren F. Brooks, residing in the city of Trenton, County of Mercer, and State of New Jersey, and the defendant, Sun Oil Company, a corporation of the State of New Jersey, answering the complaint in the above-entitled cause, say:

30 1. Admit that Warren F. Brooks as agent for the Sun Oil Company on the 15th day of April, 1930, made a complaint against Hafner, proprietor of the O. K. Service Station, Ringoes, New Jersey, before George Webster, a justice of the peace of the County of Hunterdon, charging that on or about the 3d day of March, 1930, and on or about the 12th day of March, 1930, and at divers other times in the township of East Amwell in the County of Hunterdon, did store, sell, expose and offer for sale, a liquid fuel so as to deceive or intend to deceive the purchaser thereof as to the nature, quality and identity of the same by false representation, by the use of disguised camouflaged pump or pumps and by imitating the design and color of such pumps under which a recognized liquid fuel is marketed; namely, the brand of the Sun Oil Company, known as blue Sunoco

motor fuel, against the peace of the State and in violation of our statute, chapter 116 laws of 1928, but deny all other matters alleged in said paragraph.

2. Admit that said plaintiff was arrested, and as to the other matters alleged therein, they have not sufficient knowledge or information to form a belief.

3. Deny paragraph three.

4. Admit paragraph four.

10

For separate and distinct defenses to said action, defendants say :

FIRST DEFENSE.

That said complaint was made on the advice of counsel and in reliance and good faith on such advice given after a full and fair statement to the counsel of all the facts.

20

SECOND DEFENSE.

That any and all acts done, committed or performed by the defendant, Sun Oil Company, through its agent, Warren F. Brooks, were so done, committed or performed in the honest belief of the guilt of the plaintiff of the charge made against him, based upon reasonable grounds for suspicion, with probable cause, and supported by circumstances sufficiently strong in themselves to warrant a cautious man in so believing.

30

H. W. BACKES,
Attorney of Defendants.

40

(Filed August 26, 1930.)

REPLY

NEW JERSEY SUPREME COURT.
HUNTERDON COUNTY.

10

WILLARD HAFNER,
Plaintiff,

v.

WARREN F. BROOKS and
SUN OIL COMPANY,
Defendants.

} Action at Law.

20

The plaintiff, replying to the answer of the defendants, says that:

1. He denies each and every allegation contained therein, except so much thereof as admits facts stated in the complaint.

RYMAN HERR,
Attorney of Plaintiff.

30

40

(Filed December 15, 1930.)

JUDGMENT RECORD

NEW JERSEY SUPREME COURT.
HUNTERDON COUNTY.

WILLARD HAFNER, <i>Plaintiff,</i> <i>v.</i> WARREN F. BROOKS and SUN OIL COMPANY, <i>Defendants.</i>	}	Action at Law. Postea.	10
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This case was tried before Judge Henry H. Eldredge, with a jury, at Flemington, New Jersey, in the Hunterdon Circuit, trial of said issue commencing December 9, 1930, and ending December 12, 1930. 20

The jury rendered a general verdict against the defendants and in favor of the plaintiff for two thousand (\$2,000) dollars.

Whereupon it is adjudged that the plaintiff, Willard Hafner, do recover of the said defendants Warren F. Brooks and Sun Oil Company, the sum of two thousand dollars damages together with his costs which have been \$2,000.00 taxed at the sum of seventy-one dollars 30
 71.24 and twenty-four cents, making in the
 ——— whole the sum of two thousand and
 \$2,071.24 seventy-one dollars and twenty-four cents.
 Judgment signed and entered December 15, 1930.

JOSEPH F. S. FITZPATRICK,
Clerk.

(Filed December 19, 1930.)

NOTICE OF APPEAL

NEW JERSEY SUPREME COURT,
HUNTERDON COUNTY.

10

VILLARD HAFNER,

Plaintiff,

v.

WARREN F. BROOKS and

SUN OIL COMPANY,

Defendants.

Action at Law.

20

To RYMAN HERR, Attorney of Plaintiff, or to whom it
may concern:

Sir:

Please take notice that the defendants in the above
entitled cause appeals to the Court of Errors and Ap-
peals in the last resort in all causes in New Jersey from
the whole of the judgment entered in this cause.

Respectfully yours,

H. W. BACKES,

Attorney of Defendants.

30

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } *ss.*

Herbert W. Backes, being duly sworn according to
law, upon his oath deposes and says:

I mailed to Ryman Herr, Esq., a copy of the annexed
notice of appeal, that said copy of the notice was de-
posited in the mail by me in a stamped envelope ad-
dressed to the said Ryman Herr, Esq., at Flemington,

40

New Jersey, with postage paid thereon and that said envelope had a return address of Backes & Backes.

H. W. BACKES.

Sworn and subscribed to before me this 19th day of December, 1930.

PETER BACKES,

Master in Chancery of New Jersey.

10

I, Fred L. Bloodgood, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said court at Trenton, this twenty-ninth day of December, A. D. nineteen hundred and thirty.

FRED L. BLOODGOOD,

[SEAL.]

Clerk.

30.

40

(Filed January 30, 1931.)

GROUNDS OF APPEAL

COURT OF ERRORS AND APPEALS OF
NEW JERSEY.

10	WILLARD HAFNER, <i>Plaintiff-Respondent,</i>	}	Action at Law.
	<i>v.</i>		
	WARREN F. BROOKS and SUN OIL COMPANY, <i>Defendants-Appellants.</i>		

To RYMAN HERR, Esq., attorney for plaintiff-respondent, or to who mit may concern:

20 Sir:

The defendants-appellants states the following grounds of appeal:

1. The trial court erred in refusing defendants-appellants' motion for a nonsuit.
2. The trial court erred in refusing the defendants-appellants' motion for direction of a verdict.

Respectfully yours,

H. W. BACKES,

30 *Attorney of Defendants-Appellants.*

Service of a copy of the within grounds of appeal hereby acknowledged this 24th day of January, 1931.

RYMAN HERR,

Attorney of Plaintiff.

TESTIMONY

WILLARD HAFNER, <i>Plaintiff,</i>	}	Action at Law.	10
<i>v.</i>			
WARREN F. BROOKS and SUN OIL COMPANY, <i>Defendants.</i>	}		

Transcript of shorthand notes of testimony, etc., taken in the above-entitled cause on the trial thereof before Hon. Henry H. Eldredge, Circuit Court Judge, and a jury, at the Court House, Flemington, New Jersey, on Tuesday, December 9, 1930.

Appearances:

RYMAN HERR and LLOYD FISHER, 20
Attorneys for Plaintiff.

HERBERT W. BACKES and HARRY J. ABLE,
Attorneys for Defendants.

(Jury empaneled and sworn.)

(Mr. Herr opened for the plaintiff.)

(Mr. Abel opened for the defendants.)

Mr. Herr—I offer in evidence certified copy of the record of the Court of Quarter Sessions.

Mr. Able—I think, if your honor please, that if 30
it is the record of the criminal case we could offer no objection because I think the answer of the defendants states that the plaintiff was arrested—No, they leave that to the proof. This is a certified copy of what? (After examining papers.) I think, if your honor please, that while a certified copy is most advantageous to use in the trial of the case, that the record itself should be offered and it would be admissible in a case of this kind.

The Court—Is there any question about this part of it, Mr. Able? Is it not an admitted fact that this man was arrested, tried and acquitted?

Mr. Able—There is no doubt about it. This man was arrested, indicted, tried and acquitted.

The Court—Does the certified copy of the record show that?

10 Mr. Able—I assume so, and if we consent that the record itself should go in we can use this for all the purposes of the court, but I think that the record itself ought to be controlling rather than this paper itself. In other words, the records are before the court and they are the best evidence of what happened.

The Court—I am only trying to save time.

20 Mr. Able—They are the best evidence of what happened and I think that best evidence should go in in the case. That is what I am requesting should be done.

The Court—You are entitled to have it if you insist on it.

Mr. Herr—Well, now, is he? I think the rule is well established that a certified copy of any record in the clerk's office is competent evidence in any court in this state.

The Court—What about that, Mr. Able?

30 Mr. Able—I think that when the record is at hand and is in the court that a certified copy of the record would not be admitted as against the record itself.

Mr. Herr—This court has no jurisdiction over the Quarter Sessions Court.

Mr. Able—All we have to do is simply subpoena the clerk to produce the record.

Mr. Herr—On the other hand, I understand that cannot be done.

40 The Court—I think that cannot now be done,

under a recent statute that prohibits the county clerk from taking his records outside.

(After discussion.)

Mr. Able—We do not object to the record but we ask that the record be properly before this court. If that be true I would say that we ask for the production of the record and if the court denies that we do not question but what this is a certified copy. 10

The Court—I will deny the request for the record then. Now do you object to the use of the certified copy?

Mr. Able—No.

The Court—It may be admitted.

(Certified copy referred to and offered in evidence is marked *Exhibit P-1*.)

Mr. Herr—Now, I offer certified copy of the indictment. 20

Mr. Able—(After examining papers.) I do not object to the indictment but I do say this, that there has not been any allegation in the complaint that there was an indictment found. We say this man was indicted but there is no allegation in the complaint of the indictment.

Mr. Herr—I do not care whether it is in the complaint or not. It is a necessary part of the proof. We have to show the termination of the action in the Quarter Sessions Court before we are entitled to come into this court. 30

The Court—Do you object to the admission, Mr. Able?

Mr. Able—At this time, yes, your honor, because the complaint makes no allegation that there was an indictment found and the plaintiff is proving the case upon which they have brought suit as indicated by the complaint filed in this court.

The Court—What have you to say, Captain

Herr? The complaint charges the arrest and the acquittal.

Mr. Herr—I allege that the plaintiff was brought before a traverse jury of the County of Hunterdon in the April term of the Quarter Sessions and acquitted. Now, he obviously could not have been tried in the Quarter Sessions Court unless an indictment was returned against him.

Mr. Able—Oh, yes. It does not take an indictment to bring a case before a traverse jury. He can waive indictment and have a trial and may be acquitted or convicted.

The Court—Yes, but the complaint states that he was tried by a traverse jury of the county, and my understanding of the law is that where an indictment is waived there is a trial before the Court of Special Sessions.

Mr. Able—I just simply would ask for an exception to the admission at this time. I object to it.

The Court—I will admit the indictment.

(Indictment referred to is marked *Exhibit P-2*.)

(At 12:15 o'clock in the afternoon a recess was taken until 1:15 o'clock in the afternoon.)

George Webster, sworn for the plaintiff.

Direct examination by Mr. Herr.

30 Q. Mr. Webster, what official position do you hold?

A. Justice of the peace.

Q. Were you a justice of the peace in April of this year?

A. I was.

Q. What did you do with the complaint and warrant in this case?

A. Turned them in to the prosecutor.

Q. Have you made inquiry of the prosecutor for them?

A. I have of the county clerk; not of the prosecutor himself, but I have of the county clerk.

Q. What did you find out?

A. I found out there were no papers filed with the clerk.

Mr. Able—What is the answer?

The Witness—No papers were filed in the clerk's office.

10

Q. I show you a paper marked—

(Paper referred to is marked *P-1* for identification.)

Q. —*P-1* for identification, and ask you what that paper represents?

A. It represents a sheet out of my docket, that I had in my docket.

Q. Was that entered by you in the regular course of your duties?

A. It was; it was entered the same as all cases of that nature are.

20

Q. I show you a paper, marked—

(Paper referred to is marked *P-2* for identification.)

Q. —*P-2* for identification and ask you if that is a copy of the complaint in this matter?

A. That is a copy of the complaint.

Q. I show you a paper marked—

(Paper referred to is marked *P-3* for identification.)

Q. —*P-3* for identification, and ask you if that is a copy of the warrant?

A. That is a copy of the warrant I issued, a carbon copy.

30

Q. Did the original bear your signature?

A. It did, yes, sir.

Mr. Herr—I offer all three papers in evidence.

Mr. Able—(After examining papers.) If your honor please, the offer of the paper marked *P-1* for identification is objected to because the same has no place in this suit, being an entry that was made from another paper, as it appears, a copy for the benefit of the court in the criminal matter, not in

40

a civil matter; and that it is offered as purporting to be a complaint as coming from a book which purports to be an official record and the record itself is not presented, and it is objected to unless there is some reason—

Mr. Herr—That is the record. That is not a copy; that is the original.

10 Mr. Able—The paper has no signature attached thereto indicating who it was made by or that it is a record other than being a mere copy of a paper, and it is conceded to be extracted from a record when the record is not shown. For that reason we object to the introduction of the purported copy of the complaint as contained in the records of the justice.

20 And as to *Exhibit P-2* for identification and *P-3* for identification, which have been stated to be copies of a complaint and warrant in criminal proceedings wherein the plaintiff in this suit was arrested, because they are not properly admissible in evidence as copies until it is shown to the satisfaction of the court that the records cannot be produced; neither is it shown that the original was in hand when the copies were made. The witness in identifying the papers has not stated they were anything except a copy of a complaint and a warrant; and he has not stated that either of them was made from the complaint or from the warrant, and unless those things are shown, if your honor please, we object to them being admissible in evidence for the purpose for which they are offered.

30 Mr. Herr—Now, if the court please, as to the paper marked *P-1* for identification, the witness has testified that it is an original record, part and parcel of his docket. It is an original record produced here by the man who made it, by the man in whose custody it has been and by the man who
40 has always had charge of it, and it is brought here

an an original, not as a copy. Therefore, it cannot help but be admissible.

The Court—Are they not admitted in your answer, Mr. Able?

Mr. Able—We admit that the man was arrested; we admit that the man was indicted, and we admit that the man was acquitted, but we do not admit the making of the plaintiff's suit in this case. 10

The Court—You do not admit the facts contained in it, you mean?

Mr. Able—We do not admit the facts as a matter of record, except that a complaint was made. If your honor will look at the answer filed in this case you will find that they admit they made the complaint and they admit what was in that complaint, and to that extent we are bound; but by making this admission we do not admit that any paper that this man made, without showing the 20 source or showing it as a *bona fide* copy, is a proper entry in the matter of evidence in this suit.

The Court—I think that objection is well taken with respect to the latter two.

Mr. Herr—I am not arguing as to those two.

The Court—As to the first one the witness has testified with respect to that, that it is his original record.

Mr. Able—Yes. What place has the record of that court here when the complaint itself should be 30 obtainable?

Mr. Herr—I will put that in later. I am taking it as I come to it.

Mr. Able—We object to the record of the court because there is nothing to show it is a record of the court. It is not signed. He says it is a copy from his docket.

Mr. Herr—No. He says it is an original.

The Court—He says it is his docket.

Mr. Able—Then why not produce the docket in order that it may be shown that it is a part thereof? This is an extracted paper.

Mr. Herr—If Mr. Able wants to let the witness go and get his docket I am agreeable.

The Court—I will not require that.

10 Mr. Able—What did the defendants have to do with the making of the docket? The plaintiff was arrested upon that complaint and we ought not to be charged with this being an absolute copy of that complaint as a matter of evidence upon the proof which this man gives that it is a copy unless he shows where he made the copy from.

The Court—We are talking about the first paper now, Mr. Able.

Mr. Able—Well, the principal objection I have is that it is irrelevant in this suit.

20 The Court—Are you prepared to prove the original complaint, Captain Herr?

Mr. Herr—I am not in a position to answer that just now. I am in a position to prove that it has disappeared and that I have a right to offer this as a true copy. The purpose of offering this record is to show the date on which the complaint was made, the date on which the prisoner was apprehended and brought into court, and such other facts as the record made by the justice at that time may disclose concerning this arrest and this complaint, and it is perfectly proper and legitimate evidence.

30 The Court—I will admit the copy of the record.

Mr. Able—As presented at this time?

The Court—Yes.

Mr. Able—You admit *P-1* for identification?

The Court—Yes.

Mr. Able—I ask an exception.

(Paper heretofore marked *P-1* for identification is marked *Exhibit P-1*.)

Mr. Herr—I will withdraw the witness and call the county clerk at this time.

C. Lloyd Fell, sworn for the plaintiff.

Direct examination by Mr. Herr.

Q. Mr. Fell, are you the county clerk of Hunterdon County?

A. I am. 10

Q. And as such you have custody of warrants and complaints and so forth made before the justices in this county?

A. When they are filed.

Q. Have you looked in the original folder in this matter?

A. In the original folder in the case against Willard Hafner I find a memorandum made when I had other papers, "No papers other than a copy of the minutes," which you have here in court, "on file." In other words 20 I have no papers on file in the Hafner case.

Q. Have you made inquiry of the prosecutor for them?

A. I have.

Q. Does he know where they are?

A. He does not seem to know.

Q. Is there any other officer beside Squire Webster in whose hands in the normal course those papers would go?

A. Not to my knowledge. 30

Cross-examination by Mr. Able.

Q. Do I understand you to say that the minutes that you have there indicates a copy of the page of the docket of the justice was filed in your office?

A. No. I have a carbon copy of a certified copy of the minutes which was introduced this morning in the file, and that is the only thing I have.

Q. You do not refer then to the paper which purports to be or which has been admitted as a record of the magistrate's office?

A. I do not.

Q. And you have no files, with the exception of the certified copy of the record which you placed there after having made a copy thereof for the benefit of the plaintiff in this suit?

A. That is correct.

George Webster, recalled for the plaintiff.

Direct examination by Mr. Herr.

Q. I show you a paper marked *P-2* for identification and ask you if that is a true copy of the original complaint in this matter?

A. It is a true copy, yes.

Q. Compared by you?

A. I made this myself. I drew it myself and drew it from the copy of the complaint that is also on that docket page, too. That is a copy of it on there.

Q. So you know of your own knowledge that that is a copy of the complaint made before you?

A. I know this is a copy of the original complaint.

Mr. Herr—I offer it in evidence.

The Court—When was it made?

The Witness—When was the copy made?

Mr. Able—When did you make that paper?

The Witness—I do not remember. I think I copied this from the docket in September. I am not positive. I did not make any minute of the date I copied it, but that docket was made at the time before I sent the papers to the prosecutor. The original warrant and complaint were sent into the prosecutor.

By Mr. Able.

Q. When did you say you made this paper marked *Exhibit P-2* for identification?

A. I think I made that in September because at that time you wanted the complaint and warrant and the prosecutor then could not find what he had done with the papers or had lost them, and I think you and Mr. Herr both asked for a copy of the complaint and I did not have the original and I made this.

Q. What did you have before you when you made the copy? 10

A. The docket.

Q. So that copy which you now show is a copy of the complaint made in this criminal suit against Willard Hafner, made from the complaint itself?

A. It is made from the docket.

Q. Made from your docket?

A. Yes.

Q. And not from the original complaint?

A. No, because the prosecutor had that when I made this copy. 20

Q. If this copy was not made from the original complaint itself how are you able to say that it is a copy of the complaint?

A. Because I had it on the docket. I copied it from the docket, and it was put in immediately.

Q. Then this copy which purports to be a copy of the complaint is a copy of your docket?

A. Yes.

Q. And the testimony that you have just given, that it is a copy of the complaint, is untrue then? 30

Mr. Herr—That does not follow, Mr. Able.

Mr. Able—Necessarily. He cannot make a copy of the docket and call it a copy of the complaint.

A. Well, the complaint is in the docket.

Mr. Able—We object to the admission of that if your honor please.

Mr. Herr—But the complaint is in the docket and that was compared by you with the original complaint.

The Witness—It was, yes.

Mr. Herr—And the copy you have here was compared with the one in the docket?

The Witness—Yes.

By Mr. Herr.

Q. So you know this one is the same as the original?

A. I know the one in the docket is the same as the
10 original.

Q. Well, do you know that this one is the same as the original?

A. I do.

Mr. Able—Let me see the paper please.

Mr. Herr—You admit it in your answer, Mr. Able.

Mr. Able—We admit this man was arrested—

Mr. Herr—I think the court will take judicial
20 notice that the answer states that Warren F. Brooks as agent for the Sun Oil Company on the fifteenth day of April, 1930, made complaint against Mr. Hafner before George Webster, justice of the peace of the County of Hunterdon, and then follows the identical words of the complaint, and then for counsel to come here and argue before this court that this is not a copy of the complaint and seek to take advantage of some little technicality that does not exist is beyond my comprehension.

30 Mr. Able—If your honor please, everything that counsel has said is agreed to except where he attempts to make a play with his last remarks for the purpose of effect. That we object to.

Mr. Herr—I will withdraw that because I do not want to do anything Mr. Able objects to.

(After discussion.)

The Court—I do not think you have completely proven the loss of the paper. The testimony of the justice of the peace is to the effect that he sent it to
40

the prosecutors office and now he says the prosecutor says he cannot find it. That is hearsay.

Mr. Herr—The clerk says he asked the prosecutor for them.

The Court—That is hearsay again.

Mr. Herr—If the court wants me to withdraw this witness and call the prosecutor I will do that, although I cannot see how that is necessary when 10 the answer admits it.

The Court—That is true, but the fact the answer admits it does not permit you to prove it by incompetent evidence.

Mr. Able—That is my objection, if the court please.

Mr. Herr—I will ask permission then to bring the prosecutor out of his office, although it seems to me a statement in which the prosecutor tells the clerk they are gone does not seem to be hearsay 20 evidence.

The Court—Why not?

Mr. Herr—For the reason that in the case of a lost instrument I can put an investigator on the stand and have him testify to what efforts he made to locate the paper.

The Court—Yes, but under the testimony of the present witness it was located in the prosecutor's office.

Mr. Herr—And under the testimony of the clerk, 30 when he went to the prosecutor to get it, the prosecutor could not find it.

The Court—I do not understand the clerk has made any search of the prosecutor's office.

Mr. Herr—No, that is true.

The Court—Then I say it is hearsay. Call the prosecutor and prove its loss.

(After discussion.)

Mr. Herr—I will withdraw the paper, if the court please.

Q. Mr. Webster, I show you a paper marked P-3 for identification and ask you what that paper is?

A. This paper is a carbon copy of the warrant at the time I drew the warrant, made at the same time I made the warrant and it is a carbon copy of the original
10 warrant exactly.

Q. Then it is a copy of the original?

A. That is a copy of the original. It is a carbon copy of the original warrant made with a carbon at the time I drew the warrant, the same thing, both made at once, the warrant and this both.

Mr. Herr—Now, Mr. Able, do you object to that?

By Mr. Able.

Q. From what did you make the copy?

A. It was a carbon copy, when I made the warrant.
20 I made it at the same time.

Q. From what paper did you make this purported copy of the warrant which is marked P-3 for identification?

A. From the complaint. That is the warrant. There was no copy. This original carbon copy was made at the time I drew the warrant. I drew them both at once.

Q. Is this a carbon copy that you made at the time you drew the warrant?

A. Yes.
30

Q. Was the warrant all in typewriting?

A. Yes.

Q. You say this is a carbon copy of the original warrant?

A. Of the original warrant, made at the same time I drew the warrant.

Mr. Herr—I offer that in evidence.

Mr. Able—The paper is objected to because it is not the best evidence that can be produced, if your

honor please, until such time as the loss of the original papers is shown.

Mr. Herr—I refuse to take up any more of the court's time.

The Court—We are back in the prosecutor's office.

Mr. Herr—Mr. Able sat with the prosecutor in this case and helped him conduct it and he had full 10 chance to examine all the papers.

The Court—That is not evidential here. Proceed.

Mr. Herr—Squire, will you go in and get the prosecutor to come out here, please?

The Court—The docket was admitted and marked, was it not?

Mr. Herr—Yes.

Johnson V. Aller, sworn for the plaintiff. 20

Direct examination by Mr. Herr.

Q. Mr. Aller, you are the prosecutor of Hunterdon County?

A. Yes, sir.

Q. Do you remember trying an indictment on behalf of the State against Willard Hafner?

A. Well, Hafner. I am not certain of the first name—down at Ringoes.

Q. This gentleman sitting at my right?

A. I could not swear to the man. I think that is the 30 man.

Q. What other counsel sat at the State's table beside yourself in the trial of that case?

A. Harry J. Able.

Q. What other counsel? Did the other gentleman who sits there with Mr. Able sit at the State's table?

A. Yes, or at least he was in court, and I think he sat at the table.

Q. At that trial you had the warrant and complaint in this case?

A. Yes.

Q. Do you remember me calling you in the early part of September of this year and asking you for them?

A. Something was said about that, yes.

Q. And do you remember telling me you could not
10 find them? As a matter of fact I called at your office, did I not?

A. I could not find them at the time. I think they were mislaid.

Q. And you do not know where they are?

A. Not right now, no.

Q. You did not know when I came to your office to get them?

A. No.

Q. And you do not know now?

20 A. I think they probably are around my office, or at home, but I have not made a search for them.

Q. Didn't you search for them last September?

A. I did but I could not lay my hands on them.

Q. You have not seen them since?

A. No, sir.

Q. What makes you think you can produce them
now?

A. I don't think so, in particular.

Mr. Herr—That is all.

30 Mr. Able—No questions.

Mr. Herr—Now I offer the warrant in evidence, if the court please.

The Court—Is there further objection, Mr. Able?

Mr. Able—We retain the objection.

The Court—I will overrule the objection and grant an exception.

(Paper referred to as warrant is marked *Exhibit P-4.*)

Mr. Herr—Now I offer the complaint, also.

Mr. Able—I think, if your honor please, I stated the objection that we had to the complaint itself.

The Court—The complaint being a copy of a copy.

Mr. Able—Of a copy; and more than a copy of a copy. In other words, there is something on the complaint that was not on the copy which he 10 says he made it from, particularly the heading and the conclusion. If your honor will look at the papers you will find that is true.

The Court—I will permit it to be admitted and grant an exception, Mr. Able.

(Copy of complaint marked *Exhibit P-5.*)

Willard Hafner, plaintiff, sworn.

Direct examination by Mr. Herr.

Q. Mr. Hafner, where do you have a service station? 20

A. Lambertville Road, Route 29.

Q. When did the constable pick you up under the complaint and warrant that was just offered in evidence?

A. In April some time. I do not just know the date.

Q. What time of the day did he come to your place?

A. Between half-past five and six o'clock at night.

Q. Did he bring you up to this building?

A. Yes.

Q. How long were you detained here?

A. Two or three hours altogether. 30

Q. Were you paroled that evening in the custody of Mr. Barton Hoffman, of Ringoes?

A. Yes.

Q. When did you have to come back again?

A. The next day about ten o'clock, I think.

Q. And was the gentleman who sits at the counsel table with Mr. Able here representing the State on that occasion?

Mr. Able—I object to that as immaterial.

10 Mr. Herr—No. Here we have supposedly a State matter in which the counsel for the Sun Oil Company appears to prosecute on behalf of the State of New Jersey in a criminal action, and it is highly important to this man's case that these various efforts of the Sun Oil Company to throw this man out of business be shown and shown clearly. Now here is a case where he is brought into a criminal court before a justice, which is a matter for the State of New Jersey to deal with, and despite that fact it is counsel for the Sun Oil Company who appeared there against him.

(After argument.)

Mr. Herr—If Mr. Able objects to the question in the form in which it is I will withdraw the question and reframe it.

20 Q. Did the gentleman who sits there at the counsel table at Mr. Able's left, and who is a counselor-at-law with offices at Trenton, appear at that hearing and interrogate the witnesses before Squire Webster at the time you had your hearing?

Mr. Able—One minute.

30 Mr. Herr—I offer that evidence because I have already shown by the prosecutor that Mr. Able and the gentleman who sits at his left sat at the State's table during the trial of this indictment, and one of the elements of this man's cause of action is malice, and there is no more fundamental rule established in the criminal jurisprudence of this State than that a criminal prosecution shall be conducted by the States' attorney and no person, I do not care whether he represents the complainant or what his relation may be has a right to interfere in the conduct of the State's case, and when the Sun Oil Company sent their representative up here to participate in a criminal hearing I have a right to show

40

that he participated in that hearing, and I am going to go further and show by subsequent evidence that he is the attorney of the Sun Oil Company.

Mr. Able—He must be or he would not be here.

Mr. Herr—Then that is admitted?

Mr. Able—I object to the question because, in the first place, it places language in the mouth of the witness and, in the second place, it requires the witness to draw conclusions as to certain facts which he may not know to be true, and I object to the question because of that fact. 10

Mr. Herr—I will withdraw that question and frame it another way.

Q. Did the gentleman who sits at Mr. Able's left appear at that trial and participate in it before Squire Webster by interrogating witnesses?

A. He was there.

Q. And were those witnesses that he interrogated sworn to testify against you? 20

A. Yes.

Q. And he also appeared at the States' counsel table in the conduct of the State's case against you at the trial of the indictment?

A. Yes.

Q. At the time you were arrested did you have a sign on this particular pump bearing the name "Genoco?"

A. No, sir. 30

Q. I am not asking you about the date of the complaint. I am asking you about the time that you were arrested.

A. At the time I was arrested I did.

Q. When had you put that tank in?

A. I think the second day of March.

Q. When the tank came was it equipped with a light and a globe?

A. There is no globes comes with them.

Q. Some time subsequent to the installation and before your arrest was a globe inserted in the light?

A. The globe was in the light at the time of my arrest.

Q. And what words did that have on it?

A. "Genoco."

Q. How do you spell it?

10 A. G-e-n-o-c-o.

Q. Were they spelled in readable letters?

A. They were spelled out so you could read it easy enough.

Q. How big was the lettering?

A. Oh, that high (illustrating).

Q. And that was on there at the time you were arrested?

A. Yes, sir.

20 Q. Now, I ask you to take a piece of paper and draw me a picture of the tank from which you dispensed this gas.

A. (Witness draws on paper.)

The Court—For what purpose is this, Captain Herr?

Mr. Herr—I am going to show the difference between the Genoco container and the Sunoco container.

(Mr. Able produces paper.)

30 Q. Now, Mr. Able I think has saved you the trouble of showing your artistic ability, the other side has allowed me to use, and I suppose offer in evidence that sheet, which I will ask to have marked.

(Paper referred to is marked *Exhibit P-6*.)

Q. Now, which of these standards, which type of standard would be the type erected at your place?

A. I would say that one over there (indicating).

Q. This one?

A. Yes, a little bit on that order.

Mr. Herr—He says this one here, Mr. Able.

Mr. Able—Put a—

Mr. Herr—Put an "A" over it.

(Mr. Able marks on paper.)

Q. Did that tank have a globe on it with the word "Sunoco" spelled out?

A. No; "Genoco."

Q. Did it have a label on it such as I am pointing to about in the center of the upright, entitled in the upper part of it "Sun Oils" and on the lower part of it "Blue Sunoco Motor Fuels?"

A. No, sir.

Q. Did that tank have the word "Sunoco" on it at any place?

A. No, sir.

Q. Did it have a label at all in the region in which this label appears?

A. No label whatever.

Q. At the time at which you are alleged to have sold Sunoco, namely, March thirteenth and fifteenth, did you have any globe at all on your tank?

A. No. It was about three weeks after the pump was put in before the globe came.

Q. Did you have a yellow base on your tank?

A. No, sir.

Q. You do not have electricity down there, do you?

A. Yes.

Q. Was this an electric pump?

A. No, sir.

30

Q. Didn't you have a hand pump like that one there (indicating)?

A. Maybe that is an electric pump, but it was on this design, only a handle was out here (indicating). This is a narrow type pump, where mine was a full type.

Q. Suppose you draw a handle on there so we will know where that handle was.

A. (Witness draws on paper.)

40

The Court—Are you introducing this to show that this was the tank that was used by the plaintiff?

Mr. Herr—To show it was an entirely different tank.

The Court—Then why do you put a handle on this tank?

10 Mr. Herr—Because he says his tank was of the same general design as this one except that it had a handle instead of being like the other one there. This, I take it, is an electric pump, although I do not know, but his pump had a handle on it.

The Court—If I understand the proof you were using this to show what the Sunoco tanks were like and then were going to prove his tank was different.

Mr. Herr—That is it exactly.

20 The Court—But you are now making his tank like this.

Mr. Herr—No. I prove by this witness that the Sun Oil tank usually has these signs here and here, and his tank did not have those signs.

The Court—That his tank did have a handle and this one does not.

Mr. Herr—That is it exactly.

The Court—All right.

Mr. Herr—I would ask to have this put up.

30 (Paper referred to is fastened to the wall.)

Mr. Herr—Every seller of gasoline in this county has a pump similar to that, somewhat.

The Court—Proceed.

Q. Now, did you purchase that tank yourself?

A. No.

Q. Where did you get it from?

A. Why, the Genoco distributors furnishes the tank.

Q. So that you did not purchase the tank but it was furnished you by the distributor?

40

A. That is it.

Q. And you erected it the way it came to you?

A. They erected it, not me.

Q. And they put the gas in it?

A. They put the gas in it.

Q. And they furnished you with the gas?

A. Yes.

Q. Now, did your tank have any yellow around the 10
bottom?

A. No, sir.

Q. And it bore no placard or sign of any nature
reading "Sunoco?"

A. No, sir.

Q. On the contrary, at the time of your arrest it did
bear a sign reading "Genoco?"

Mr. Able—I object to that as leading.

The Court—It is very leading.

Q. State how you sold this gasoline, under what 20
name?

Mr. Able—I object to that question, if your
honor please.

The Court—What is the objection to it?

Mr. Able—It was leading.

Mr. Herr—Did you object to this question or
the one before this one?

Mr. Able—The one in which you suggested what
the answer should be.

(Last question read.)

30

Mr. Able—The question before was the one I
objected to, if your honor please, when your honor
said it was decidedly leading.

(Last question again read.)

The Court—Now, you have no objection to the
present question?

Mr. Able—No.

(Last question again read.)

A. "Genoco."

40

Q. Do you recall the trial of your indictment?

A. Yes, sir.

Q. Do you recall the appearance of a chemist from the Sun Oil Company?

A. Yes, sir.

Q. Do you recall him testifying that the gas that you were selling as Genoco gas was a gas of vastly inferior
10 qualities to Sunoco?

A. Yes; he said ten gallons of it would blow your car up.

Q. Did he say anything about what effect Genoco gas would have on your engine?

Mr. Able—Who said it?

Mr. Herr—The chemist of the Sun Oil Company.

Mr. Able—I object to that.

The Court—What bearing does that have?

20 Mr. Herr—It shows the malice of the Sun Oil Company toward this man. When they come here with their own chemist and put him on the witness stand and have him testify that the gas that this man is selling is likely to blow your car up if you use ten gallons of it, it shows very clearly the malice of the Sun Oil Company toward this defendant. I am alleging as part of the damages in this case a loss of profits as a result of the business lost by
30 this man due to the warrant issued for his arrest, and I have a right to introduce at this trial the evidence of the natural result of that warrant, and I am going to show what the chemist said and then I am going to show the effect of that in business that this man suffered due to the testimony of that chemist and of the other witnesses produced on behalf of the Sun Oil Company.

Mr. Able—The question is objected to, if your honor please, because it calls for hearsay, so far as this witness is concerned; because it is imma-

terial wherein it does not tend to show what was in mind with regard to malice of the man who made the complaint, who is now here, one of the defendants. It has no application to him whatsoever, and neither has it any application to the Sun Oil Company, except insofar as this witness testified to the quality of the gas at that time that he was selling as Sun Oil, and if that testimony is to be taken we submit, if your honor please, that it should be taken from the record and not from the mouth of this witness; and we object to the competency of the witness to testify in answer to the question that was asked by counsel. 10

Mr. Herr—Now, I would ask Mr. Able if there is any record of that trial. The court probably knows that in criminal trials in this county there is no stenographer.

Mr. Able—That is true. I had forgotten that there was no stenographer. I might say here, if your honor please, in order to straighten up some of the matters that have been adverted to by counsel, with reference to myself, that I appeared in that case but I did not appear for the Sun Oil Company. I appeared for the prosecutor of the pleas of the County of Hunterdon. I had no connection at that time with the Sun Oil Company and I never had seen them before, and I think I have a right to make that statement. 20 30

The Court—What do you say to this question as showing or as being an element from which damage may have resulted by reason of this prosecution?

Mr. Able—I object to it, your honor, upon the ground that it is irrelevant and that it has no application so far as the testimony was concerned, to show that this man lost a dollar, unless he can specifically produce witnesses before he introduces 40

10 this testimony, to show the reason why they did not buy the gas. If he suffered any damage he has got to prove it and trace it to that witness's testimony or the testimony given on the trial. We are here to answer for malicious prosecution which means that we maliciously and without probable cause had this man arrested. Now, this testimony that he is introducing was not in existence at the time the arrest took place. This all took place afterward, at the trial. Nothing of this kind had ever been heard tell of before the trial and we are not to be held accountable in any wise for what happened at the trial or for what was done antecedent to the trial, so it is irrelevant and incompetent and this witness is not competent to give evidence of that.

20 The Court—It is irrelevant as proving malice. I do not think there is any question about that. Now, the only thought I have in mind is its relevancy with respect to being one of the things which may have caused damage as a result of the prosecution, being one of the elements of damage which he suffered.

30 Mr. Able—I do not think that these defendants in this suit could be charged in this case with having caused him damage by reason of this complaint having been made through the testimony. That testimony would not be applicable to show damage in this suit. It is entirely irrelevant as an item of damage.

Mr. Herr—(After discussion.) The idea is that they are responsible for the probable result of everything they set in motion. They set in motion this man's arrest.

(After argument.)

The Court—I will sustain the objection to it at the present time.

Q. When were you arrested?

A. In April, sometime. I do not know. The fifteenth I guess, or somewhere along there.

Q. And you were tried on the sixth day of May, 1930?

A. Yes, sir.

Q. Approximately twenty-five days thereafter?

A. I guess it was something like that.

Q. Now, following your trial, did you lose any sales 10
of Genoco gas?

A. Pretty near all of it.

Q. How much had you been selling prior to the trial?

A. Well, I supposed two thousand a month or better.

Q. How much a month have you sold since the trial?

A. I do not suppose I have sold five hundred—three hundred; very little.

Q. What net profit do you make off the sale of Genoco gas?

A. Sometimes three cents, sometimes two cents; it 20
is according to how the price changed. One time you make more than you do others.

Q. So when you were selling two thousand gallons a month or more you were making ninety dollars a month net?

A. Yes.

Q. And it has dropped down now to—

A. At that time I made four cents, at the time of the trial.

Mr. Able—What is that? 30

The Witness—Before the cut came in gas lately

I made four cents a gallon, and when the cut came it went to three, and now it is down to two.

Q. At the time of the trial you were netting a hundred and twenty dollars a month or better for Genoco gas?

A. Yes.

Q. And since the trial you have been cut down to nine or ten dollars a month?

A. Practically nothing.

Q. Now I show you a letter marked—

(Paper referred to is marked *P-4* for identification.)

Q. —*P-4* for identification, and ask you if you received that in the regular course of the mail?

A. I received it from the Ringoes post office.

Q. Following your trial?

A. Yes, sir.

10 Q. And I show you another letter marked—

(Paper referred to is marked *P-5* for identification.)

Q. —*P-5* for identification, and ask you if you received that?

A. That was shoved under the door, the store door.

Q. When was that done?

A. That was shortly after the trial. That had a little bottle of ink along with it.

Q. Prior to your trial which gas was selling the best at your station?

20 A. Genoco was the leader.

Mr. Able—I do not see, if your honor please, how we are to be bound by this manner of testimony. The question before the court is whether or not this man was arrested and tried upon a complaint which was made maliciously and without probable cause.

The Court—Does it not come under the allegation for damages?

(After argument.)

30 The Court—I will overrule the objection to the present line of testimony because the plaintiff has asked in the complaint for damages for loss of business, and this testimony goes to the question of the loss of business.

Mr. Herr—Then I suppose when I come to introduce the newspaper articles that resulted from this trial Mr. Able will object to those?

The Court—We will meet that when we come to it.

Mr. Able—Now, if your honor please, you will grant an exception to the ruling.

The Court—Yes.

Mr. Able—Secondly, I would ask that counsel refrain from making these statements until he comes to the argument.

The Court—Yes.

Mr. Herr—May I have the question that was 10
objected to?

(Last question and answer read.)

The Court—I overruled the objection to that and will let the answer stand.

Q. Do you read the local press?

A. Hunterdon County?

Q. Yes.

A. No, sir.

Q. Do you read the Democrat, Advertiser and Hun-
terdon County Democrat? 20

A. No, sir.

Q. You do not read any county newspaper?

A. No, sir.

Q. I show you a number of slips and ask you what
those slips show?

A. They show slips for Genoco gas.

Mr. Able—If the court please, before he testi-
fies with regard to the contents of those slips I
think they should be at least offered in evidence.
I think he is testifying to their contents in reply to 30
the question of counsel.

Mr. Herr—Perhaps the question is too broad.
I will qualify it.

Q. Do those slips show your original record of pur-
chases of Genoco gas?

A. Yes, that is what they are for; they are my re-
ceipts.

Mr. Herr—Now, I will offer those in evidence.

Mr. Able—The offer of them is objected to be-
cause we do not know just what the purport is. 40

Mr. Herr—The objection a moment ago was that the original records were not produced, and I am now producing them and they are objected to now.

Mr. Able—Are they original records of sales or purchases? What does this purport to be? We do not know. We object to them because of their irrelevancy.

10 The Court—How do you know they are irrelevant if you do not know what they are?

Mr. Able—Here are purchases purporting to be from—There is one in February, 1930, and so on down, and January, 1930, and July and April and back in November, 1929. Is this an item or element of damage as to whether or not this man's sales were up or down? We do not know anything about that. Are we to be held responsible unless he shows it was on account of the arrest? I cannot see the application of these. I think they are entirely irrelevant for any purpose for which the suit is brought.

20 (After argument.)

Mr. Herr—It is a self-evident truth that I cannot prove the entire case in one question. Therefore I have got to prove it in parts. I am proving now the loss of business. Subsequently I shall prove the broadcasting of this trial in the local press. I shall prove there was no other cause known to this man for the loss of this business. Now, if that does not show a probable loss of business under the rules of evidence then I am at a loss as to how to show it.

30 The Court—I will overrule the objection.

Mr. Able—If your honor please, I was going to ask permission, before you made the ruling, to cross-examine upon these slips.

The Court—You may do that, Mr. Able.
By Mr. Able.

Q. Who delivers Genoco gas to your place?

A. The Augustine boys; there are two brothers, Joe and Walter.

Q. Do they drive a truck?

A. Yes, sir.

Q. They always deliver to your station down here?

A. Yes, sir.

Q. Does one or the other always drive the truck?

A. Joe most generally.

10

Q. Does Walter ever do it?

A. Walter has done it.

Q. With what frequency would you say?

A. Well, practically all through, different times he has been there.

Q. When?

A. Well, not lately. I do not know as he has been to my place at all since the trial.

Q. Was he there before the trial?

A. Oh, yes.

20

Q. I notice that there is marked on each one of those slips the word "Paid," and then the signature "J. A." Will you kindly tell us whose signature that is?

A. That is Joe's.

Q. And will you tell us when these papers were made up?

A. They would be marked paid when they were paid. They wasn't always paid when they were delivered.

Q. Now, will you tell the court just which one of those papers was delivered by any other person than 30 Joe, as you call him?

A. I could not; that would be impossible.

Q. Who signs the receipts?

A. Well, now, sometimes I don't pay them for three or four loads, but when I paid I always paid Joe.

Q. You never paid anybody but Joe?

A. No.

Q. And Joe always signs these?

A. Yes. The bill always comes when the gas comes.

40

Q. Is Joe the man who owns this Genoco concern?

A. That is more than I know. There are two brothers in it.

Q. What is his relationship to the Genoco Company or its business?

A. I cannot answer that.

Q. You do not know?

10 A. No.

Q. You know that you buy what you call Genoco gas from Joe Augustine and from his brother?

A. Yes.

Q. And you say that Joe or his brother always drive the truck?

A. Yes.

Q. You are sure about that?

A. I know it. I never seen anybody else but them.

Q. And you never paid anybody but Joe?

20 A. I never paid anybody but Joe.

Mr. Able—If your honor please, you will allow an exception upon the introduction of the slips?

The Court—Yes.

(Papers fastened together are marked *Exhibit P-7.*)

By Mr. Herr.

Q. Did you sell Genoco gas prior to 1930?

A. Yes; I think the pump was put in around July, 1929.

30 Q. And that was the sale of what is known as white Genoco?

A. Yes.

Q. So that you say another pump was put in in the early part of March?

A. March second.

Q. Do you mean the pump for the blue Genoco?

A. Yes.

Mr. Able—I object to that line of interrogation because it is entirely leading.

40

The Court—Very.

Mr. Herr—I am doing it to save time.

The Court—You have no right to save time that way. You are putting words in the witness' mouth, which you know is not proper.

Q. State how you sold Genoco when the color was changed and when the new pump was put in to take care of it, to take care of the changed color? 10

A. Say that over.

Q. State when you commenced to sell white Genoco?

A. I think it was in July, 1929.

Q. Now, did you use the same pump to sell blue Genoco?

A. No, sir; there was a new pump put in.

Q. When was that pump put in?

A. The second day of March, 1930.

Q. When did you say you put the blue Genoco tank in? 20

A. The second day of March, 1930.

Q. Now, I show you a photograph marked—
(Photograph marked P-6 for identification.)

Q. — P-6 for identification, and ask you if that shows the condition of the gas pumps in front of your service station at the time of your arrest?

A. Yes, sir.

Mr. Herr—I will offer this photograph in evidence.

Mr. Able—If your honor please, the photograph 30 is objected to, not because it is a photograph but because it is not shown or has not been shown, so far as I heard, that it was an exact representation of the conditions that existed at the time when sales were made upon which this—

The Court—I think the question was directed to—

Mr. Able—He said at the time of the arrest, I think. This arrest was made upon the represen-

tation of people who went there and bought this gas at a certain time. When was it made?

Mr. Herr—It is immaterial when it was made. The question is does it represent the service station as of the date of the arrest?

10 The Court—That would be immaterial. The point at issue would be the representation of the place at the time of these sales.

Mr. Herr—It might be if this complaint was made by a person other than the Sun Oil Company. This is not a complaint made by a customer. It is not a complaint made by the general public. It is a complaint made by the seller of a competitive product. Now, my contention is that if they had this man arrested and made a complaint at the time when his pumps bore the word "Genoco," that then this jury is entitled to know that fact, because that shows malice on their part as a competitor to arrest a man when he clearly has marked on his pumps the word "Genoco." I would not press my question if these people were not a competitor, if the complaint was not made by a competitor, but it is a case where a competitor comes in and tries to stifle out another.

20

The Court—Of course, that is an improper remark.

Mr. Able—If your honor please, that is objected to.

30

The Court—It is a question where a person came in and made a complaint under the statute, and that is all it is, so far as this trial is concerned.

Mr. Able—These statements ought not to be made.

The Court—No; they ought not to be made.

Mr. Herr—I take exception to that statement. They should be made.

The Court—No. If you can substantiate it by facts you may prove it, and if the facts justify it you may argue that to the jury, but there is nothing so far to justify counsel in making statements of that kind.

(Last question and answer read.)

Mr. Able—I object because that does not show the condition of the gas pumps at the time the arrest was made. The arrest was made upon purchases that had been previously made. The grounds for arrest were such as may have existed at the time that the act was committed which is complained of, and the act which was committed, which was complained of, occurred on March third and March tenth, 1930. 10

(After argument.)

Mr. Herr—The picture is admissible on another ground. They charge in their criminal complaint that this Genoco gas was sold for the purpose of misleading the general public into thinking that they were buying Sunoco gas. Now, the complaint is dated on the fifteenth day of April. I am going to reframe my question so as to show, if I can, that these pictures represent the condition the day prior to the complaint, namely, the fourteenth, so that I can show very plainly that prior to any complaint being made this man had received and placed on this tank a sign called "Genoco." 20 30

The Court—Yes, but how would that discharge him from responsibility for anything which occurred on the third and tenth?

Mr. Herr—In this way: Part of the necessary influence to sustain their complaint must be that he was handling this gas with an intent to deceive people. That is part of their necessary complaint. Now, if I can show before any complaint was made that this man had placed upon this tank the word 40

“Genoco,” that is an element to be considered by the jury in determining whether or not these complainants had probable cause for seeking his arrest.

The Court—Do you wish to be heard in reply, Mr. Able?

(After discussion.)

10 The Court—I will sustain the objection, Mr. Able.

Mr. Herr—I pray an exception on the ground I have already noted.

The Court—All right.

Q. Now, does that picture show the true condition of the pumps in front of your stand on the twelfth day of March, 1930, and the third day of March, 1930, with the exception of the disk at the top of the pump which contains the word “Genoco?”

20 A. Well, that was not put on until I suppose three weeks later. The pump comes without the bulb.

Q. Except for that bulb does the picture represent the condition there?

A. Just the same. That was put in on the second day of March, and they claim they were there the third.

Q. What was put in on the second day of March?

A. The pump was put in the ground the second day of March and their charge is the third. It wasn't hardly buried yet.

30 Mr. Herr—Now, I offer the photograph, subject to the condition this witness has testified to, that the dial with the word “Genoco,” was not inserted in the pump at that time.

Mr. Able—If your honor please, the witness has stated that the word “Genoco” was not on the tank on the days when the complaint was made, and he now offers this photograph with the oral statement that that part of the picture is to be excluded. I think that makes the offer of doubtless value as evidence and might be prejudicial to the defend-

ants' case to consent to it being admitted in evidence. I therefore object.

The Court—What is its evidential value now, Mr. Herr?

Mr. Herr—Its evidential value is to show the type of pump, to show the situation of the pump and to show that it has no markings on it. Now, other pumps have distinct markings on them. I 10 want to show that this pump had no such markings. That is the evidential value of these photographs.

The Court—The photograph does not prove that. The photograph itself shows there is a marking on there.

Mr. Herr—Yes, but I am consenting, if the court please, to permitting the court to instruct the jury and admitting that that disk was not there at the time the complaint was made. If Mr. Able con- 20 sidered that detrimental to his case I am willing to leave it out.

Mr. Able—The photograph would be useful to show the relative position of the tanks along there if they are all in. But as to its probative force, with regard to showing the true appearance of the tank, except its general shape, of course that is objectionable.

The Court—Yes, the fact of the matter is it shows just the exact opposite to— 30

Mr. Able—To what they purport to introduce it for?

The Court—Yes. Do you object to its admission for the purpose of showing the location of the tanks as they were on the day in question?

Mr. Herr—This photograph was introduced by the State in the criminal case.

The Court—I have nothing to do with that. That is another matter.

Mr. Able—If your honor please, for the purpose of showing the number of tanks that were on there, and their relative position as it may be distorted to a certain extent as photographs are, we have no objections to them, of course.

The Court—Do you want to offer it for that purpose?

10 Mr. Herr—Yes. Then I want the witness to point out—

The Court—Let it be marked.

(Photograph referred to is marked *Exhibit P-8*.)

Q. Now, I show you photograph marked *Exhibit P-8* and I ask you to step down in front of the jury and point out where the coloring is different on that tank than on the tank which you have marked "A" on the sheet.

20 A. Well, the difference in this tank—This tank on the picture has yellow here and here, and all the rest is blue, all the way down; where this (indicating) has got yellow.

Q. In other words there is no yellow on the base at all?

A. No. After you leave that (indicating) it is all blue.

Q. Is there any plate or mark on the tank in the photograph similar to the mark or plate appearing in the center of the body of the Sunoco pump?

30 A. No; there is none on this pump at all.

Q. So that you have no mark of any kind, nature or description, at that point, and it is solid color from there clear to the ground?

A. Yes, sir.

Q. Now, point out to the jury on that photograph where the tank containing the white Genoco gas is.

A. The third tank. Right there (indicating).

Mr. Herr—Cross-examine.

Cross-examination by Mr. Able.

Q. Now, let us refer to this tank. You have just stated that the tank which you have there, if I gather you correctly, is identical in shape, form and presumably in the size of the regulation tank, of this Sunoco tank, with the exception that it does not have any yellow band around it; there is no distinction between the Sunoco and what you call the Genoco tank, except that, is 10 that right?

A. There is no label on my pump.

Q. And the label. That is my mistake. There is no label?

A. No.

Q. Would you mind telling the court and jury as to whether or not that little yellow streak down there at the bottom has not been overpainted in blue?

A. No; it was never on there. The pump came right from the Wayne people. 20

Q. And in every other particular, from what you stated, the pump you are using is a counterpart of that pump (indicating)?

A. Yes, sir.

Q. In shape and size?

A. It is made by the same people.

Q. Made by the same people?

A. Made by the Wayne people, yes. The Wayne people sells them to anybody who wants them.

Q. So we have the idea that that pump is identical 30 with the Sunoco pump—

Mr. Herr—I object to that statement. That is summing up the case to the jury.

The Court—There is more latitude allowed on cross-examination.

Mr. Herr—Yes, but he was not asking a question.

Q. At the expense of an accusation of repetition then, see if I get you correctly. There is no distinction be-

tween the pump that you are using for Genoco at the present time and which you were using at the time when this complaint was made—I do not mean the date of the warrant, but the date when the purchase was said to have been made—excepting a little stamp in front there and that yellow band on the front of it?

10 Mr. Herr—I object to that question because it uses the word “little,” indicating the stamp, whereas it takes up the whole front of the tank.

Mr. Able—We will eliminate the word “little” and say “the stamp and the band at the bottom.”

Mr. Herr—And the sign at the top.

The Witness—Ask that question over, please.

(Last question read.)

A. It is the same Wayne pump.

Q. Do you know what color Sunoco gas is sold under?

20 A. Their gas?

Q. Yes.

A. It is blue.

Q. How long has that color been used by the Sunoco, if you know, or as long as you know?

A. It has been used quite a while; I could not say how long; two or three years.

Q. The color is well established under the name of Sunoco, is it not?

30 Mr. Herr—Now, that is not a proper question, if the court please. I object to the question. I did not ask the witness anything about what the Sun Oil Company was doing or was not doing, and he has not proved he is a competent witness to testify as to what the Sun Oil Company did or did not use it for.

The Court—If he does not know he must say so.

(Last question read.)

A. That is the name of their gas, “Sunoco.”

Q. And the color is what?

40

A. They are blue, the same as many others.

Q. It has a blue color then?

A. Yes.

Q. And it is an old established gas, is it?

A. I cannot say; I do not know.

Q. You know it has been sold for a number of years?

A. I know when it was white they couldn't hardly sell it and they turned it blue and that helped sell it. 10

Q. What is that?

A. When it was white they couldn't hardly sell it, and they put a little bluing in it and that helped sell it.

Q. Then it was sold as blue gas?

A. Yes.

Q. And it was sold from pumps which you have testified were the same shape as your pump?

A. Yes, the same as the Wayne Company puts out.

Q. What color is Genoco gas?

A. A bluish green. 20

Q. What is the difference between the color of the Genoco and the Sunoco?

A. There must be a lot of difference.

Q. No. What is the difference, if any?

A. Sunoco advertises the only true blue, so there can't be only the one true blue.

Q. Is there any similarity in the color?

A. This is a greenish blue, while the rs is a bluey blue

Q. But the Genoco has a blue cast, is that right?

A. Yes. 30

Q. Will you tell me who Genoco is, or whether they are incorporated or what it is?

A. I could not tell you that. The Augustine boys are distributors.

Q. Do you know whether there is a company by the name of Genoco?

A. No, I don't know. They are distributors.

Q. Augustine Brothers are distributors then, and do you know whether they are distributing gas that is manufactured by a company that is well known? 40

A. No; that is their own name; that is a trade name.

Q. Taken by the Augustine Brothers?

A. Yes; that is a trade name.

Q. Do you know—If you do not you need not answer—Do you know whether the gas called Genoco is a generally sold gas?

A. Well, it is Mexican petroleum, so they tell me, and
10 that is a good gas.

Q. Do you know whether it is a generally sold gas and advertised?

A. Well, it is sold quite a bit I guess at some places.

Q. Tell me what stations you know that sell this gas?

A. Well, there is Powell at Clarksville, near Princeton.

Q. Yes.

A. And there is one down the River Road. I do not know who has got that, I can't tell you; and there is
20 one on the River Road, and there is several around Trenton, but I cannot tell you.

Q. You know of two?

A. I have seen several of them around the city but it is beyond me to tell you.

Q. What is the color of the gas that is sold from these Genoco tanks that you know about?

A. Some of them has blue and some of them has white.

Q. And do those tanks or pumps have Genoco signs
30 on them?

A. Yes.

Q. Have you seen them?

A. Yes. There is one down the River Road—Yes, I have seen them with Genoco signs on.

Q. Where did you see them?

A. Down the river there is one.

Q. Well, where?

A. I think his name is Harry Wharton, down near Titusville. I think that is his name. I ain't telling you
40 that to be the truth, but I think so to my best knowledge.

Q. And then, so far as you know, the Genoco gas is a gas sold under a name taken or assumed for this purpose by the Augustine brothers, as you call them, and is not a manufactured gas by a manufacturing gas or gasoline company, is that right?

A. Well, it is manufactured by the Mexican Petroleum Company.

Q. Do you know where the Genoco gas obtains its 10 gasoline from?

A. No.

Mr. Herr—If the court please, I do not see the relevancy of this as cross-examination. It seems to me it is going far afield to inquire about the manufacture and production, with which this man has nothing to do, and asking about the financial status.

The Court—The question has been answered in the negative, so it is entirely harmless. 20

Q. You were present at the trial of the State against you on a complaint made by Mr. Brooks, were you not?

A. Yes.

Q. Mr. Augustine was a witness for you?

A. Yes.

Q. To refresh your memory, do you recall Mr. Augustine's statement that he colored the Genoco gas himself?

Mr. Herr—I object to that as not proper cross-examination. It is irrelevant to the testimony that 30 the witness gave in the examination in chief. It has nothing to do with this issue, what the witnesses testified to at the former trial where the State was the plaintiff and this man was the defendant.

The Court—What have you to say, Mr. Able?

Mr. Able—I say it is immaterial.

The Court—Then strike it out.

Q. You know it to be a fact, however, that there is what you call white gas called Genoco and a blue gas called Genoco and that you sell the blue gas?

A. Blue and white both—or try to. I don't sell it since the trial; I don't sell much since the trial.

Q. Do you know this gentleman sitting here, Mr. Warren F. Brooks?

10 A. They tell me he is Mr. Brooks. I only seen him on the run one time at my place; that is the only time I seen him.

Q. You never had any acquaintance with this man?

A. No, and dont want any. He seen me coming and he flew and got into his car.

Q. You had no words with this man before you were arrested under this statute which was read to the court and jury this morning?

A. I only seen him that one time.

20 Q. You did not know him and so far as you know he did not know you?

A. He did not want to know me.

Q. Do you attend to the selling of all the gas that comes from that tank?

A. No.

Q. You have people to attend those tanks have you?

A. Yes.

Q. And do you on occasion have people go out and serve gas, that do it in a friendly way, that you do not
30 pay them for it?

A. Yes, I have.

Q. And they all do it for you?

A. I have had them do it, and at most any station people will do it.

Q. So when they go out to the pump and sell gas out they are serving you, is that correct, out of these tanks?

A. They are serving the car that is out front.

Q. For you?

A. I suppose it is for me, certainly.

Q. How many tanks have you in all?

A. Well, I have got ten at present. I had twelve, but after this trial the Standard took their pumps out and now it leaves me ten.

Q. You have ten at present?

A. Yes.

Q. How many did you have during the month of March, 1930?

10

A. After the second of March I had twelve.

Q. And, if you know, when was the word "Genoco" placed on top of this tank that you are talking about?

A. About three weeks after the pump was put in.

Q. And it was put in on the second of March?

A. Yes.

Q. Was there any distinguishing feature about that pump which would indicate the kind of gas that was being sold therefrom when you served the public?

A. The pump was a different color and the gas was 20 on a greenish blue, where theirs was on a true blue.

Q. For three weeks was there any sign of Genoco?

A. No; there was no bulb there.

Q. There was no sign on the pump at all?

A. No; they did not have any bulb there.

Q. Now, you have stated that your sales of Genoco—tell us the exact name, will you?

A. Genoco.

Q. Now you say your sales from the Genoco gas have depreciated in amount since you were charged 30 under the complaint and indictment?

A. Yes. I will say I lost pretty near all my business.

Q. How about your general business, has that kept up?

A. I do fair, but when people thinks you are a bootlegger they don't want nothing to do with you, the way I was represented here as being a bootlegger and selling "gyp" gas, and of course that done me lots of harm.

Q. You have a Standard tank haven't you?

40

A. No; they took it out after the trial, and they would not have it there. These people represented me as a crook and they took their gas away from me.

Mr. Able—I move to strike that statement from the record.

The Court—It may be stricken out.

Q. Now, Mr. Hafner, will you please respond to my
10 questions?

A. Yes, I will try to.

Q. You say you no longer sell Standard oil?

A. No.

Q. Will you enumerate the kind of oils and gas you do sell?

A. I sell Gulf, Atlantic, Tydol, Pan-Am and Genoco. I guess that is all.

Q. How many?

A. Four or five different kinds.

20 Q. And you have two pumps for one kind of gas?

A. Yes.

Q. Were you selling what you call Genoco gas prior to the time that you put that pump in?

A. I sold the white gas ever since July, 1929.

Q. These sales slips which you have presented here that are antecedent to March 2, 1930, were all of white gas, is that true?

A. Well, whatever it is, yes.

Q. What is that?

30 A. Of course there is some blue there. They start in—I forget just where, but you have got them in front of you there.

Q. When did your sales of blue gas commence?

A. Not until I got the pump in.

Q. And that was March 2, 1930?

A. Yes, and they were there, they claim, on the third, but I did not see them.

Q. Then the sales of this gas that you have produced the purchase slips for took place prior to March, 1930?

40

A. Well, they are dated. That is the best I can tell you. There is some afterwards and before. We sold a little blue but very little blue.

Q. Where did you have the blue at that time, in what kind of a tank?

A. Right where it is now.

Q. If you did not have the tank before March 2, 1930, you could not have sold it. 10

A. Until we got the blue pump put in.

Q. Then you have never sold any Genoco blue gas prior to March 2, 1930, and these sales slips that you have here prior to March 1, 1930, would relate to white gas and have no relationship to blue gas whatsoever?

A. No, no relationship to the blue until after March second.

Q. When you purchased the white gas, as you call it, and when you purchased the blue gas did you differentiate the price any, did you pay a different price 20 for that?

A. No, just the same.

Q. And these sales that you have here, or purchases of gas for sale, rather, represent, do they, white and blue gas?

A. That is after March second.

Q. How are you able to say how much of this gas you purchased as indicated by these slips indicated blue gas?

A. I could not say. That would be hard for me to 30 say, because after the trial my gas just fell off, and that is all I know.

Q. You have white gas and you have blue gas, and each one of those slips after March 2, 1930, represents white and blue gas?

A. Yes. I bought very little blue.

Q. Now, will you tell us, and tell this jury and the Court, how much of that gas is blue, that you bought, and how much of it is white?

A. Well, that is hard to tell because it has no mark to represent blue or white.

Q. You cannot tell?

A. No.

Q. Then if all these slips prior to March 2, 1930, were for white gas, and if it should appear, as it does from the papers that you have that the purchases of
10 gas were so much more before you bought the blue gas than they have been since, why do you seek to charge these defendants for the loss, which you are unable to say how much it is?

Mr. Herr—I would like to have that question repeated.

Mr. Able—It was complicated and I will strike it out.

The Court—All right.

Q. You have made a claim for reduced sales in gas.
20 You have produced purchase slips of gas that antedates March 2, 1930, before you sold any blue gas?

A. Yes.

Q. And since that time the slips represent white gas and blue gas?

A. And blue gas.

Q. Now, I say why do you seek by presenting these slips to claim damages for loss of the sale of blue gas in this suit?

A. Well, it is the Genoco products. They hurt the
30 Genoco business, no matter whether it is white or blue or green; they wrecked the Genoco trade, they ran the Genoco trade away when they called it "gyp" gas, that hurt me.

Q. You have stated that your loss was a certain amount, the amount of sales being reduced on your sales of Genoco gas since you were arrested. What have you to say about the other gas which you were selling?

A. Well, it hurt my business in general.

Q. You do not sell so much of any of it, is that right?

A. No, sir, not so much.

Q. And you do not attribute any of the loss to business conditions but you think it was all because of this suit having been brought against you from a criminal angle, is that right?

A. That is the way I feel about it.

Q. And business depression makes no difference in 10
your business, is that true, is that the way you look at it?

A. Well I look at it that the trial hurt me.

Q. I show you a photograph which purports to be another and a different photograph of your premises, and which will be marked—

(Photograph referred to marked *D-1* for identification.)

Q. —*D-1* for identification, and would inquire whether that is an exact reproduction of your premises, including the tank which has been under consideration, 20
with the exception of the gas which is in the top?

A. No.

Q. It is not?

A. No. Somebody has painted yellow around the bottom of this with chalk or took the picture and colored this up.

Q. Is that a fair representation of it?

A. No; that don't look nothing like mine.

Q. Nothing at all?

A. No. 30

Q. Well, this is blue where yours is blue, is it not?

A. Yes, but they have yellow around here (indicating). That is that camouflage you have been talking about. Somebody has tried to camouflage this.

Q. Is there a yellow mark there?

A. Yes. Can't you see it?

Q. No, I do not, but it may be there. You say that is not a representation of your place.

A. Of course it is my place and my pump, but they have used yellow chalk on top and yellowed it all up all the way along down the pump.

Q. That is your pumps?

A. Yes.

Q. But you say this is—

A. That is that camouflage you talked about.

10 Q. You say that has been—

A. Done by chalk or something; I don't know what.

Q. It has been colored?

A. Yes, since the picture was taken.

Q. Is there any other place it has been colored?

A. I don't see any. Otherwise, outside of that, it looks all right.

Q. Is that a fair representation, except for what you have just stated, of your place since you were arrested?

20 A. Well, when that picture was taken it was all right, but it ain't like it is now, because the Standard pump is out there now. At the time that was taken it was all right.

Q. In all particulars except what you have called a little yellow mark at the bottom there—

A. Yes; that don't belong there.

Q. —that is a reproduction?

A. Yes, sir.

30 Q. I take the liberty of showing you what purports to be another photograph of a part of your premises, particularly that part which contains the pump under consideration, and would inquire whether that is a correct representation of the location and appearance of your pump without coloring of any kind at the time, March 3 and March 12, which are the dates when you were complained of having made a breach of the law of this State.

A. That is the pump when it was first put in, after they sent the pump to me.

Q. Then that would be a correct representation before you were arrested and before the Genoco sign was put on the pump?

A. That was before they sent that sign, yes. That is the way they come, and there was a cap here (indicating) and they took that off and put the bulb on.

Mr. Able—This will be marked for identification.

(Photograph referred to is marked *D-2* for 10 identification.)

Q. There is no coloring of any kind on this picture, is that right?

A. No.

Q. So you would not question its authenticity at the time it was taken?

A. No; that is all right.

Q. Was there at any time a complaint made to you by letter of your selling gas from this pump?

A. Why, a Mr. ——— whatever his name is, there, 20 wrote me a letter.

Q. Have you that letter?

A. No.

Q. What did you do with it?

A. I do not know where it is.

Q. You have no knowledge of where it is?

A. No.

Q. I show you what purports to be a copy of a letter dated April 5, 1930, and which is marked—

(Paper referred to is marked *D-3* for identification.) 30

Q. —*D-3* for identification, and would inquire whether you received the original of which that is a copy?

A. (After examining paper.) Yes, to my best knowledge that is about the same thing.

Mr. Able—If you honor please, we will offer in evidence the photograph marked *D-2* for identification and also the carbon copy of the letter dated April 5, 1930, marked *D-3* for identification.

Mr. Herr—If the court please, I heard something just before recess or just after recess about the production of the original. I want the originals produced.

Mr. Able—We call for the original from the man who said he received it.

10 Mr. Herr—That is no call for the original. You have got to serve me with written notice before the commencement of the trial, for the production of the original, and unless you do that you are barred from proving it by any other means.

20 Mr. Able—We take issue upon that statement of the law and we offer this carbon copy at this time. I think it has been decided, I am not sure about in New Jersey, but I know it has been decided more than once that a carbon copy is not a copy and it becomes an original because it is made with the same stroke, at the same time and under the same circumstances, and he has stated that it is a carbon copy of a letter which he received and I think upon that ground it is admissible.

The Court—I think so.

Mr. Herr—I pray an exception.

The Court—It will be allowed. You make no objection to the photograph?

30 Mr. Herr—I make the further objection, however, at this time, that counsel cannot introduce anything while my case is pending.

The Court—That may be true, that the offer is out of order.

Mr. Herr—And if your honor will allow me I would like to produce some law over night on the point of this carbon copy. My understanding of the law is contrary to that stated by counsel. He argued to the contrary when I offered the carbon copy of the warrant.

40

The Court—No. His complaint was that the copy was not a carbon copy. Are you insisting upon your objection upon the ground that it is offered out of order?

Mr. Herr—I insist on that also.

The Court—I suppose that is well taken.

Mr. Able—If your honor please—

Mr. Herr—I might say that if Mr. Able had not been so technical this morning I would be glad to admit all this stuff. 10

Mr. Able—If your honor has not already ruled, I would like to be heard with regard to the admissibility of that carbon copy on cross-examination. If you have ruled I will simply abide by it and leave it until another time.

The Court—Well, I will sustain the objection to it at the present time.

Mr. Able—All right. We will not take the time. It is simply shut out because it is out of time. 20

The Court—That is all I am saying at the present time.

Mr. Able—And in regard to the photograph I suppose there will be the same ruling?

The Court—Yes. Do you object to the photograph also, Captain Herr?

Mr. Herr—Most assuredly.

The Court—Then there will be the same ruling, as far as being out of time. 30

Mr. Able—All right.

Q. Did you receive from either of the defendants or anyone in their behalf a complaint that you were selling illegally a gas or fuel oil which purported to be Sunoco oil before you were arrested?

Mr. Herr—I object to that question. I understood Mr. Able limited me to the time prior to the alleged acts in the complaint.

(After argument.)

The Court—I will overrule the objection.

Mr. Herr—May I have the question? I may want to make a further objection.

(Last question read.)

10 Mr. Herr—Now, if the court please, I think you limited me this morning to such things as took place prior to the sale alleged in the complaint. Now, if it is going to be opened for the defense to go into that I suppose it is also open for me?

The Court—That had to do with the question of the photographs, did it not?

Mr. Able—Yes, sir.

(After argument.)

The Court—I will overrule the objection to the present question.

Mr. Herr—I pray an exception.

(Last question again read.)

20 A. Mr. Backes sent me a letter.

Q. Was the effect of that letter as I stated in my preceding question?

Mr. Herr—I object to that. That is asking for a conclusion. Counsel cannot do that.

The Court—It is cross-examination, so I will permit that question.

Mr. Herr—I pray an exception.

The Court—Note an exception.

(Last question read.)

30 A. What effect of the letter?

The Court—I do not know that the witness would hardly understand the question in that form.

Mr. Able—I will withdraw the second question. He says he received a letter from Mr. Backes.

Mr. Herr—If counsel will let me have the letter and Mr. Hafner's answer—

Mr. Able—It is open. It lays there on the desk.

Mr. Herr—Maybe after I have considered it over night I will be glad to admit it in the morning.

Mr. Able—Go ahead, captain.

Mr. Herr—Where is the answer?

Q. Now, with regard to this loss of profits which you allege, will you tell us what the profits on the Standard oil tank were prior to your arrest on this complaint?

A. I used to sell about three or four hundred gallons a week of Standard before the trial and shortly afterwards they took the tanks away.

10

Mr. Herr—I will admit that in evidence, if the court please, and would ask that it be marked and admitted.

The Court—You cannot do that. Mr. Able will have to decide that question.

Q. Have you got any slips similar to these which you produced here this morning with regard to the Genoco gas?

A. Of the Standard?

Q. Yes.

20

A. I guess I have got some of them around.

Q. Where are they?

A. Home.

Q. Have you got the slips for the same time that you produced this morning, for sales of Gulf gas?

A. I have some of them home, yes.

Q. What was the average amount of Gulf gas sold before you were arrested?

A. I do not know. I would have to look up my bills.

Q. You do not know what the average was before and since with regard to Gulf?

30

A. No.

Q. What about the average sales of Pan-Am before and after your arrest?

A. Well, it all fell down in general.

Q. And that you ascribe to the fact that you were arrested for the cause mentioned in the complaint which was made before the justice of the peace, is that right?

A. How is that?

40

Q. You ascribe the loss all because you were arrested under this complaint made before the justice of the peace?

A. I would feel that way. I do not think it done me any good.

Q. That is the way you look at it?

A. Yes.

10 Q. You do not concede that a depression in business would have any effect upon your gas sale?

A. I do not feel that way.

Mr. Herr—May I have these letters marked before recess?

The Court—They have not been offered.

Mr. Herr—The carbon has been offered.

The Court—I ruled it out and unless they reoffer it will be out.

20 Mr. Herr—I ask counsel to keep these letters in court so I can offer them myself.

Mr. Backes—We will do what we want with them.

Mr. Herr—If it is necessary to serve a subpoena to get them I will do it, but I thought you would be gentlemen enough to produce them on request.

Mr. Backes—I think counsel should be instructed to be the least bit courteous to the other side. Some of these remarks are unfair.

(After discussion.)

30 (Adjourned until Wednesday, December 10, 1930, at 10 o'clock in the forenoon.)

Willard Hafner, the plaintiff, resumes the stand.

Cross-examination continued by Mr. Able.

Q. Mr. Hafner, I believe it was testified by you that you sold a white gas which you termed Genoco and a blue gas which you termed Genoco?

A. Yes, sir.

Q. Did you sell them both at the same price?

40

A. Yes, sir.

Q. Both at the same price from your tanks?

A. At that time I didn't, but I do now.

Q. At that time you did not, but you do now?

A. I do.

Q. When you purchased you paid the same price for both kinds of gas?

A. I used to pay a cent more and— 10

Q. Does your statement that you have presented here before the court show that you made certain purchases of your distributors, Augustine I believe the name is, and show any differentiation in price between the white and blue gas?

A. No.

Q. It was so many gallons at so much a gallon?

A. Yes, sir.

Q. And so far as they are concerned it shows you paid the same for the white as you paid for the blue gas? 20

A. Yes, sir.

Mr. Able—That is all.

Mr. Herr—I would like the letters which were here yesterday, if the court please.

Mr. Backes—What do you want?

Mr. Herr—I want both of them.

(Papers produced.)

Redirect examination by Mr. Herr.

Q. Now, I ask you if that (indicating) is a copy of 30
a letter that you received?

A. To my best knowledge it is.

Q. (Indicating.) And is that the answer that you sent to that letter?

A. Yes.

Mr. Herr—I offer both papers in evidence.

Mr. Able—Now, if your honor please, without raising the particular objection, we understand that the matter of these papers going in out of time is

now waived. That objection was made yesterday and they were excluded on the offer of the defendant, and counsel now hands them to the same witness and waives his objection as to their being out of time.

10 The Court—They would not be out of time, as far as he is concerned, for he is offering them. They are being offered now as his evidence.

Mr. Able—I just want it to be known to the court that the papers are the identical ones that we offered yesterday.

The Court—Yes.

(Papers referred to are marked, respectively, *Exhibit P-9* and *Exhibit P-10*.)

Q. Now, I show you a photograph and ask you if that shows the pump in question as it was on the third and thirteenth day of March, 1930?

20 A. Yes, sir.

Mr. Able—I believe this is the identical photograph that we called to his attention yesterday.

The Court—Was that not admitted yesterday?

Mr. Herr—It was just marked for identification.

Mr. Able—I do not recall whether it was admitted or not, but it was the identical photograph that was presented yesterday.

Mr. Herr—I offer it and ask to have it marked.

The Court—Do you object to its admission now?

30 Mr. Able—No.

(Photograph referred to is marked *Exhibit P-11*.)

Q. Now, showing you *Exhibit P-11*, I ask you whether or not this pump of yours on the days when you were alleged to have been selling Sun gas had any—

Mr. Able—I understand you refer to the picture marked *Exhibit D-11*.

Mr. Herr—*P-11*.

Mr. Able—Has there been such picture offered here?

Mr. Herr—Yes, this one right here.

Mr. Able—Have there been eleven exhibits offered?

The Court—I did not think so, but if that is so marked I suppose there have.

Mr. Herr—I will reframe the question. 10

Q. Point out on the blueprint on the wall—

Mr. Able—Before that question is answered may I hear the question read?

The Court—The question was withdrawn.

Q. Point out to the jury what part of the pump was entirely missing from that pump on March second and March thirteenth.

A. (Indicating.) Why, this here; that was not on there.

Q. No part of it? 20

A. No part. It was off right there (indicating).

Q. Now, I show you *Exhibit P-10* and ask you whose name was signed to that letter?

A. When I received the original letter?

Q. Yes.

A. I am sure Mr. Backes' name.

Mr. Herr—This letter is dated Trenton, N. J., April 5, 1930.

(Mr. Herr reads *Exhibit P-9* and *Exhibit P-10* to the jury.) 30

Q. Mr. Able asked you something yesterday about volunteers working around your station. State what authority those people had?

A. They did not have any.

Q. Did you ever give anyone, during the period from March second to March thirteenth, 1930, inclusive, authority or permission to represent you in the sale of gas?

A. No, sir.

Q. Do you remember seeing any photographs taken of your property by Mr. Brooks?

A. I seen one taken by somebody. I could not say who it was.

Q. When was that?

A. I think about the twelfth or thirteenth, somewhere along there, of March.

10 Q. Can you recall from memory any customers that you lost as a result of the former trial?

A. I can recall several, some I do not know by name. I lost a man named Young, and one named Prall, and I lost a man from Pennsylvania who used to come over with a drum and get fifty gallons at a time, and numerous different ones that would stop there, and when they heard tell of it they would not buy off of me.

Recross-examination by Mr. Able.

20 Q. Heard tell of what?

A. Well, as it was described, "gyp gas."

Q. Well, it was not a regularly recognized gas, was it, as far as the public knew?

A. I cannot answer.

Q. Now, you recall having stated on cross-examination yesterday that you permitted people to attend those pumps that you had there, some of whom were not under your pay but you consented to their drawing gas for other people, did you not?

30 A. I never stopped them but I never gave them any permission.

Q. Then they have done so with your knowledge, have they?

A. Yes, they have.

Q. You received the money from those people that delivered gas under those circumstances?

A. Yes.

Q. You raised no objection to them for having made the sale?

A. No, sir.

Q. Now, this photo which is marked *Exhibit P-11*, when did you say that that was an exact counterpart of conditions that existed at your place?

A. What date?

Q. Yes.

A. Well, I can't just answer what date, but I think around the twelfth or thirteenth or sometime. 10

Q. Do you know when that photograph was made?

A. Well, I seen a fellow had a camera in his hand. That is all I could see.

Q. When did you put the top on this pump?

A. About three weeks, as near as I can recollect, after the pump was put in.

Q. About three weeks, as near as you can recollect?

A. Yes.

Q. That would be twenty-one days after March second? 20

A. Yes.

Q. Do you recall having offered in evidence on the trial of the criminal action in this matter a photograph which had a globe on the pump and removed from the photograph to represent the exact way it appeared at the arrest?

A. No.

Q. Do you remember offering such a photograph yourself?

A. I didn't offer any, I don't remember any, not at 30 the arrest.

Mr. Able—That is all.

Ralph Berger, sworn for the plaintiff.

Direct examination by Mr. Herr.

Q. Mr. Berger, where do you live?

A. Ringoes.

Q. How long have you lived there?

A. About thirteen years.

Q. Are you acquainted with the O. K. Service Station?

A. I am.

Q. Did you use to purchase gas there?

A. I still do.

Q. Did you purchase gas there in March, 1930?

10 A. Yes.

Q. What kind of gas did you purchase?

A. Genoco.

Q. Did you make any inquiry at the service station as to whether it was any other gas?

A. I simply asked what kind of gas he was putting in and he stated that it was his own blue gas.

Q. Did you ask him if it was any specific kind of gas?

A. No, I did not. I— No; I did not.

20 Q. Did he make any statement to you about it not being a particular kind of gas?

Mr. Able—Objected to.

Q. Tell us the conversation you had with the service station man.

The Court—How would that conversation bind the defendants? Unless this conversation was in the presence of a defendant it would have no binding effect upon them.

30 Mr. Herr—It is just an offer to show the trade knew what kind of gas they were buying and that he did not misrepresent it.

The Court—No, but you asked for the conversation. That conversation would not be binding at all upon the defendants.

Mr. Herr—I think it would upon the ground it is collateral to the issue, but I will withdraw the question. That is all.

Mr. Able—No questions.

Frank L. Miller, sworn for the plaintiff.

Direct examination by Mr. Herr.

Q. Mr. Miller, where do you live?

A. Ringoes.

Q. How long have you lived there?

A. About twenty-six years.

Q. Did you purchase gas from the O. K. Service Station in March, 1930?

10

A. Yes, sir.

Q. Did you purchase from this pump that has been talked about in this trial?

A. Yes, sir.

Q. Did you know what kind of gas you were purchasing?

A. Yes.

Q. What kind was it?

A. Genoco.

20

Cross-examination by Mr. Able.

Q. What was the appearance of the pump from which you purchased the gas?

A. It was a blue pump, blue gas.

Q. Are you familiar with the appearance of the Sunoco pumps?

A. Yes; I have used Sunoco gas.

Q. Did this pump look like a Sunoco pump?

A. Well, a little, yes.

Q. And unless you were told, if you drove up and procured gas from that pump would you believe you were purchasing from a Sunoco pump?

30

A. Well, I do not know that I would.

Q. Why? You said it looked like one.

A. It looked like one, but Mr. Hafner told me that he could not get Sunoco gas; that he had tried one time to get Sunoco gas and he could not get it at that one time.

Q. What else did he say?

A. That was all.

40

Q. How did he come to tell you that he could not get Sunoco gas?

A. Well, I had used Sunoco gas and I asked him if he could get it and he said no.

Q. What was the occasion of your asking for his gas?

A. Well, I dont know. I just seen he had this gas.

10 Q. Did you want Sunoco gas?

A. No; I was not particular about it. I had not been using Sunoco gas for a while.

Q. And when you drove up to get gas you say it appeared to be a Sunoco pump as far as you were concerned; it impressed you as being a Sunoco pump, is that right?

A. I don't know as it did.

Q. Didn't you inquire of him whether he had Sunoco gas when you saw this pump?

20 A. I just do not remember.

Q. You do not remember?

A. No.

Q. There was some occasion for this conversation about Sunoco gas between you and Mr. Hafner, was there not?

A. At what time do you mean?

Q. At the time of the conversation which you have related.

A. Some time previous to this.

30 Q. In other words, you asked him if he had Sunoco gas and he told you he tried to get it but could not get it?

A. That was previous to this.

Q. And then afterward you drove up there and you saw the pump and it to you appeared like a Sunoco pump, isn't that correct?

A. Well, it looked a little like it in appearance, yes.

Q. And, having that appearance to you, did you not then inquire whether or not he had procured Sunoco,

following the conversation you had previously had with him?

A. He told me it was Genoco.

Q. Didn't you ask him whether he had Sunoco when you saw this pump?

A. I do not recall that I did.

Q. Do you recall that you did not ask him?

A. I don't think I did.

10

Q. Did he volunteer the fact when you drove up there that he had Genoco.

A. I asked what kind he had and he said "Genoco."

Q. Wasn't there anything mentioned about Sunoco at that time?

A. I do not recall that there was.

Q. You made this inquiry because of the appearance of the pump, did you not?

A. Well, I suppose I did, yes.

Mr. Able—That is all.

20

Redirect examination by Mr. Herr.

Q. You saw there was new gas there?

A. Yes.

Q. And when you talked about Sunoco to him how long before this was that?

A. Oh, it was quite some time previous; I do not know just how long.

Q. Well a year or more?

A. Oh, I suppose six or eight months, likely.

30

Q. And there was no hesitancy on Mr. Hafner's part in telling you it was Genoco?

A. No.

Q. And no attempt made to deceive you?

A. No.

Q. Now, you are acquainted with the Sunoco gas stations between here and Ringoes, are you not?

A. Yes.

40

Q. And they all have displayed in very large signs, do they not, the word "Sunoco?"

Mr. Able—I do not see the relevancy of this. It is leading.

Mr. Herr—I will withdraw the question.

Q. State, if you can, how Sunoco gas is advertised at the points where it is sold, as you have observed it?

10 Mr. Able—I object to that as irrelevant.

The Court—Objection sustained.

Mr. Herr—I pray an exception.

The Court—An exception may be noted.

Q. How did you find Genoco gas as to quality?

Mr. Able—That is objected to.

The Court—What is the relevancy of that?

Mr. Herr—I will withdraw the witness if counsel objects to it.

20 *Walter Augustine*, sworn for the plaintiff.

Direct examination by Mr. Herr.

Q. Mr. Augustine, are you in the gasoline business?

A. Yes, sir.

Q. Are you acquainted with the Sun Oil Company tanks?

A. Yes, sir.

Q. And are you also acquainted with the tank that Mr. Hafner was using on March second and thirteenth, 1930?

30 A. Yes, sir.

Q. I wish you would point out to the jury the difference between the two tanks.

A. On the chart?

Q. Yes.

A. (Indicating.) The tank Mr. Hafner has over there is a little bit different, here. This has about, I imagine, four or five inches of yellow in here (indicating), where the tank Mr. Hafner has has only two inches of yellow around that band in here underneath

the bowl; and from there on down it is all blue, or it was at the time when Mr. Hafner was arrested. From there on down to the base it is all blue. And the top, from here on around, is all yellow as far as here, and around the globe on the top it is black instead of yellow. And it has no sign in here. It has just a plain band all the way and blue from this band down to the basin.

Q. What does the sign that you have pointed to represent on the Sunoco tank, what does it read, down on the main body of it? 10

A. It has no sign at all. It is just plain blue paint.

Q. Yes, but on the Sunoco tank itself what does the sign say?

A. "Blue Sunoco."

Q. Is it painted in letters legible to read?

A. Yes.

Q. Who installed the Hafner pump?

A. I did. 20

Q. When did you put it in?

A. About the second of March, 1930.

Q. Do you know when gas was put in it?

A. About the third, I think.

Q. Do you know who furnished the globe?

A. Yes.

Q. Do you know the date it was furnished?

A. It was furnished about three weeks after it was installed. We were all out of globes at the time we installed the pump. 30

Q. Where did the pump come from?

A. The Wayne Pump Company in Philadelphia.

Q. How was it procured?

A. By a truck; we went after it with a truck.

Q. Is that a standard pump with the Wayne Pump Company?

A. Yes.

Q. How do they ship it as to color?

A. Just exactly as it was installed. 40

Q. Do you know whether that is a stock pump or stock color with the Wayne Pump Company?

A. Yes.

Q. Is it?

A. Yes, sir.

Q. What words did the globe have on it when it was placed in position?

10 A. "Genoco."

Q. What is the difference between the color of Sunoco gas and Genoco gas?

A. Well, the Sunoco is a little more blue than the Genoco. Genoco is kind of a green blue.

Q. Is there enough difference in the color to differentiate the two?

A. Yes.

Q. Do you know of other places where this same type of tank is used?

20 A. Yes, sir.

Q. Have you made it a point, as you have driven around the country, to observe gas tanks?

A. Do you mean as to the color they paint the pump?

Q. Yes.

A. Yes.

Q. How many pumps have you seen of a similar nature to this used by Mr. Hafner?

A. Well, I seen several of them in the city of Trenton.

Q. What color gas do they dispense?

30 A. Blue.

Q. And is all that gas dispensed by your firm?

A. No.

Q. How many other firms do you know using this same type of tank?

A. Well, I know one firm in particular is using the blue gas and a pump painted similar to the ones that the Sun Oil Company has.

Q. Do you mean identical in color and structure?

A. Close to it.

40

Q. Where did Mr. Hafner get the gas that he was using?

A. From my brother.

Q. Was that your brother's own business?

A. My brother's own business. I solicit the business and install the pump and then I turn it over to my brother. That is his territory to work in.

Q. Do you know how many pumps you have out? 10

A. Well, I could not tell you just exactly how many but I presume about thirty or thirty-five.

Mr. Able—I object, if your honor please, because it is immaterial to the issue being tried.

The Court—The question was answered. Do you move to strike out the answer?

Mr. Able—Yes.

The Court—The answer may be stricken out.

Q. Did you have some trouble with the Sun Oil Company? 20

A. I did.

Mr. Able—I object to that, if your honor please. Whatever trouble he may have with the Sun Oil Company would not have anything to do with a suit between this man Hafner and an agent of the Sun Oil Company.

Mr. Herr—You better argue that point in chambers, because I want to prove certain things and I do not want to state them before the jury to the detriment of Mr. Able until his honor has ruled. 30

The Court—Are you going further with the present line?

Mr. Herr—Yes. I want to prove what steps were taken—

The Court—I will hear you in chambers.

(Court and counsel retire to chambers.)

Mr. Herr—I propose to prove by this witness that the same identical oil pump has been placed all about the city of Trenton and as a result of

that the Sun Oil Company had him arrested and indicted and that at the trial the jury was directed by the court to bring in a verdict of not guilty.

10 Mr. Backes—Let me say something about that, your honor. He was indicted jointly with another man who was convicted. The direction of verdict was made by Judge Robbins purely on the ground that the indictment was improperly drawn. This matter has again been brought to the grand jury of Mercer County. The case itself has not been disposed of. I say that such an issue as that is absolutely immaterial to this matter here.

Mr. Herr—My understanding was that the other gentleman who was convicted was convicted because he put other gas in your tank.

20 Mr. Backes—That is correct. This man Augustine came in and put his gas into our tanks and we had them both arrested. The indictment was improperly drawn and as a result of that fact Judge Robbins directed a verdict in favor of Augustine and the other man was convicted.

The Court—In this particular case the gas was actually put in your tanks?

Mr. Backes—Actually put in our tanks by these people.

Mr. Herr—If that is true I will not press that question.

30 The Court—I doubt whether it would have any relevancy anyway.

(After discussion.)

Mr. Herr—While we are here we might as well settle another matter. The Sun Oil Company admits that the complaint and warrant and indictment were sought at their instance.

Mr. Able—We are not making any admission at all. All we admit is that this man Brooks made a complaint, as he had a right to do. I think any

40

court will support that statement. And if he did not do it maliciously and if he had grounds recognized by law to do it we are not to be held.

The Court—Are you making any distinction between Brooks and the Sun Oil Company? Are you denying Brooks is your agent?

Mr. Backes—No.

Mr. Able—He was employed by the Sun Oil 10 Company and his attention was called to this fact and he ferreted it out and took it up with the attorneys to see whether or not this man had a right to do what they thought was wrong.

The Court—Was he acting as agent for the Sun Oil Company?

Mr. Backes—Oh, certainly.

The Court—Then if he is chargeable in damages the Sun Oil Company would be, would they not?

Mr. Backes—Certainly. He was an agent of 20 the Sun Oil Company; he was their salesman.

Mr. Able—I am not so sure that this thing could be charged onto the Sun Oil Company. As a matter of fact it might be but I am not sure of that.

Mr. Herr—And you want me to prove that?

Mr. Able—It is one of those cases where you have to prove your case.

The Court—If you admit agency, what is there to prove? 30

Mr. Able—This man was their agent. The question is whether he was an agent for this purpose or not, but as a matter of fact we can admit that; it does not change the issue any at all.

The Court—But it does the question of responsibility.

Mr. Able—If there is any responsibility, of course.

Mr. Herr—I am asking now whether you stand by the answer.

Mr. Able—Yes, we do stand by our answer.

Mr. Herr—And by the statement made a few minutes ago, that you admit that the complaint and warrant and indictment were sought by the Sun Oil Company?

10 Mr. Able—Were made by Brooks.

Mr. Herr—By the Sun Oil Company?

Mr. Able—No; we do not admit that.

Mr. Herr—Your answer says that Warren Brooks as agent of the Sun Oil Company made the complaint. Now my contention is—

Mr. Backes—Then what is the use of proof of it?

20 Mr. Herr—My contention is that that is an admission in your answer that the Sun Oil Company knew about and authorized the action of Brooks. And I understand now that your position is that whatever Brooks did is Brooks' business and the Sun Oil Company does not assume responsibility for it.

Mr. Able—I do not know as that has anything to do with this issue being tried, whether they assume it or whether they do not, but if I was Brooks and was working for them I would want them to assume it.

30 Mr. Backes—I think the answer admits all that.

The Court—It is a question of whether you are admitting agency.

Mr. Able—This man was the agent of this company at that time.

(After discussion.)

The Court—The answer admits that Warren F. Brooks, as agent for the Sun Oil Company, made the complaint against Hafner. Then if there is an issue against one it should be against both.

40

Mr. Herr—I suppose, under the law of New Jersey, in order to charge a corporation with the act of its agent it must be shown that the corporation somehow or other authorized or directed it.

Mr. Backes—It is admitted in the answer.

The Court—They admitted that Warren F. Brooks is agent for the Sun Oil Company.

Mr. Herr—I am afraid that if the case goes up 10 that under their answer, the way it stands, they can take advantage of the technical side of the law in the State of New Jersey. Now, rather than have that possibility exist, that they do not admit—

Mr. Able—Why not try this case now?

Mr. Herr—If they take the position their answer merely says Brooks did it as agent and not for the company with the company's consent, then I have got to go ahead with the rest of my proof. Otherwise I am through. 20

The Court—They admit that Warren F. Brooks as agent for the Sun Oil Company—I do not see how they can say any more.

Mr. Backes—I think our plea is partly a plea of justification.

The Court—Exactly. The Supreme Court may not agree with me.

Mr. Backes—The facts that are not denied are admitted, under our Practice Act.

(After discussion.) 30

The Court—I see the distinction which Mr. Herr wants to make. The question of agency has nothing to do with the issues we came back here to determine.

Mr. Herr—No. I brought it up for the purpose of cutting down my testimony.

Mr. Able—Your purpose is to ascertain whether this man was there for the Sun Oil Company—

The Court—That has been disposed of. This is another question which Mr. Herr raises, as to how much you admit, in order to determine how far he has to go with his proof in order to charge the Sun Oil Company.

Mr. Able—No matter what we say, we cannot go behind our papers.

10 Mr. Herr—No, but the answer is susceptible of two constructions.

The Court—Mr. Herr's position is that while you admit agency you might allege at the same time that your agent was acting outside of the scope of his authority.

Mr. Backes—We do not make any such allegation.

The Court—No, but you admit agency only.

Mr. Able—That is all he charges.

20 Mr. Herr—Oh, no.

The Court—(After discussion.) Well, the present question is disposed of.

(Court and counsel return into court.)

Mr. Herr—Cross-examine.

Cross-examination by Mr. Able.

Q. You said on your direct examination, Mr. Augustine, that there was a difference in the color of the Genoco gas, from the Sunoco gas. Would that difference
30 be apparent to a person unless one was set along side of the other for comparison?

A. I think it would.

Q. To the average person who buys gas you think he could tell the difference from the color if he walked up to a pump and said, "Put in this gas?"

A. I can see the difference twenty-five feet away from it.

Q. You are familiar with what you call Genoco gas, are you not?

40

- A. I would say I am.
- Q. Where is that gas manufactured?
- A. I do not know where it is manufactured. It is coming from the Mexican Petroleum Company.
- Q. And it is purchased by your firm or your brother?
- A. Yes.
- Q. Is it purchased in a blue color?
- A. No. 10
- Q. Where is the coloring put in?
- A. At our plant.
- Q. And was that gas that you sold to this man Hafner that had been colored in your plant?
- A. That is right.
- Q. And that you called Genoco?
- A. Yes.
- Q. Is the word "Genoco" a trade-mark name?
- A. It is our trade-mark, yes.
- Q. Has your trade-mark been registered? 20
- A. Well, I don't know about that. My brother knows more about that than I do.
- Q. Don't you know as a matter of fact there is no registration of that name?
- A. I don't know.
- Q. You do not know?
- A. No.
- Q. You do know that you call it Genoco?
- A. That is right.
- Q. This pump is identical in shape and form with the Sun Oil Company's recognized distributing pump, is it not? 30
- A. It is not.
- Q. It is not?
- A. It is not.
- Q. Then explain to us the difference between your pump and any pump that you may see on that chart which is before you?

A. The Sun Oil Company has a sign here (indicating) on the pump, and they have a yellow band on the bottom—

Q. I asked you whether it was identical in shape and form?

A. Well, it is different than this.

Q. What is that?

10 A. It is a little different than this. It is different than any pump on this chart.

Q. Wherein lies the difference?

A. In here (indicating).

Q. That is shape and form?

A. Yes.

Q. I am not asking about the coloring.

A. No, in the build of it.

Q. Where?

A. Right in here (indicating).

20 Q. Tell us the difference.

A. This pump here has got a longer flange in here. I should think it has about five or six inches flange on here; about two inches in here, instead of four or five.

Q. Your testimony on direct examination is that there is a difference in the coloring there. My question is whether or not you have purchased a pump that is similar in shape and form to the Sun Oil Company pump?

30 A. Well, it is similar to it.

Q. You purchase from the same people that they procure their pumps from?

A. Yes, but we have four or five different models.

Q. There are four or five different models?

A. Yes.

Q. You do not know there is half a dozen more than shown on that chart?

A. There may be. I do not know.

Q. There is no question about the coloring on the pump that you place in as being identical with the coloring on the Sun Oil Company pump, is there?

A. I do not place the coloring. That was the standard paint on the pump when we bought it.

Q. There is no question about the coloring being the same, is there?

A. It is not exactly the same. 10

Q. Tell us what the difference is?

A. It don't have a yellow band on the bottom.

Q. I said the coloring.

Mr. Herr—That is coloring, Mr. Able.

Q. The color of blue—is your pump lighter or darker or—

A. I would not say anything about the blue, whether it is lighter or darker, but I know our pump don't have any yellow band on the bottom piece, on the pump base.

Q. Did you ever look at that pump to see whether 20 the yellow band has been painted off or not?

A. No, it has not.

Q. Did you ever examine it?

A. I examined it. When I bought it new it was in a crate.

Q. Now, you had sold what you called Genoco before March second last, had you not?

A. Yes.

Q. And you had sold it to Mr. Hafner, the plaintiff here? 30

A. Yes, sir.

Q. What was the color of the gas that you had sold him prior to that time?

A. White.

Q. And then you manufactured a blue gas by putting coloring matter in the identical white gas which you had sold to this man prior to that time, isn't that true?

A. No, the blue is different gas from the white.

Q. It is a different gas? 40

A. Yes, sir.

Q. It comes to you as white gas, as they call it, does it not?

A. Yes.

Q. And you put the blue in?

A. We get two kinds of white gas.

Q. You put the blue in at your station?

10 A. Yes.

Q. After you had blued your gas you purchased blue pumps, didn't you?

A. Well, we put this gas into a blue pump.

Q. Before you furnished the blue gas to this man or any other man, was there ever a blue pump used by the Genoco people or by your brother Augustine?

A. We did not put the blue gas out before March.

Q. And you had no blue pumps out before that time, had you?

20 A. I do not remember having any blue pumps out.

Q. And with the advent of the blue gas your blue pump came isn't that true?

A. That is all depending on how the Wayne people paint their pumps. We put them out as we buy them.

Q. You did not paint this pump, did you?

A. No.

Q. You bought this pump with the same shape, form and appearance as the Sun Oil Company pump, did you not?

30 Mr. Herr—I object to that unless he expresses in his question more fully what he means. The witness has testified that he purchased a stock pump, and Mr. Able's question is capable of the inference that the pump as purchased was of the same general contour, and the further inference that he purchased it because it was of the same general contour.

(Last question read.)

The Court—I will allow the question.

Mr. Herr—I ask an exception.

The Court—An exception will be noted.

A. No, I did not.

Q. What is that?

A. I did not.

Q. Well, it happens to be the same form and color of the Sun Oil Company pump, does it not?

A. That is the only kind of pump I could purchase 10 from the Wayne Pump Company of Philadelphia.

Q. Do you know whether the Wayne Pump Company manufactures a pump that is used almost exclusively by the Sun Oil Company?

A. I do not.

Q. Then I assume from that that you do not know whether or not through accident or otherwise you procured one of their pumps?

A. I just put an order in for a pump regardless of the color of it. 20

Q. Do they make other colored pumps?

A. They made red, too. I purchased several red pumps, and at the time I purchased this pump that was the only pump they had on hand in stock.

Q. And the only pump they had on hand in stock at the time you purchased this pump was a pump that contained the Sun Oil Company's colors?

A. No, a blue color in a visible pump.

Q. Have you had experience in purchasing from the Wayne Pump Company, other than the purchase of this 30 particular pump?

A. Well, I have bought several pumps off of them the two or three years previous.

Q. What kind were they?

A. Red.

Q. Isn't there a standard pump, except the pumps they manufacture for the Sun Oil Company, red?

A. I understand all the visible pumps now that the Wayne Pump Company has are blue.

Q. Do you know that to be true or have you heard it?

A. Well, I asked the salesman from the company.

Q. Do they have yellow on it?

A. They had yellow on the top and underneath the bowl.

Q. Do you know—and you have stated that you are familiar with various kinds of stations and pumps dealing in gas—any other pump on the market of a well known, recognized, advertised gas that is sold from a blue and yellow pump other than the Sun Oil Company's product?

A. A major oil company or a jobber?

Q. A recognized pump from which sales are made to the public?

A. Yes.

Q. Tell us what companies sell a recognized gas from a blue and yellow pump, other than the Sun Oil Company?

A. Gaydos Brothers, Trenton, New Jersey.

Q. Where do they get their oil from?

A. I do not know.

Q. What kind of oil do they sell from it?

A. I do not know.

Q. Were you in the courtroom yesterday?

A. Yes, sir.

Q. Did you hear Mr. Hafner testify?

A. Yes.

Q. If Gaydos Brothers—have Gaydos Brothers got a station near Princeton?

A. I do not know.

Q. Well, how do you know, then, that they are selling from such a pump?

A. In their station on Chambers Street in Trenton.

Q. What are they selling from that pump?

A. Blue gasoline.

Q. What kind?

A. I do not know.

Q. Why, if you do not know, do you say that they are selling a different gas from the Sun Oil Company's product?

A. I know they don't sell the Sun Oil Company product. I do not know what other kind they sell but I do know that they do not sell the Sun Oil Company product.

Q. Then you do not know of any recognized brand 10 that is being sold from such pump other than the Sun Oil Company's product?

A. I do not know.

Q. No, you do not know, do you?

A. No.

Mr. Able—That is all.

Redirect examination by Mr. Herr.

Q. Now, Mr. Able has taken up with you the question of other users of this pump. Do you know any jobbers 20 that use this same type of pump?

A. Do you mean in the blue gasoline or just the same kind of pump?

Q. Just the same kind of pump.

A. Well, I know Friar's, in Camden, is selling the same blue gasoline.

Q. Do they use the same type of pump?

A. That is something I do not know. They use different types of pumps.

Mr. Able—Then I ask that the answer be stricken 30 out, if your honor please.

The Court—The answer is not responsive, is it?

Mr. Herr—No, but it is german nevertheless. It shows that other people sell blue gas.

The Court—That was not the question.

Mr. Herr—No, but I understand the rule as to striking out for unresponsiveness relates to the attorney examining the witness.

The Court—Let me have the question and answer.

(Last question and answer read.)

The Court—What is the objection?

Mr. Able—It is irrelevant to the issue.

The Court—I will permit the question and answer to stand. An exception may be noted.

10

Mr. Herr—That is all.

Clinton H. Wright, sworn for the plaintiff.

Direct examination by Mr. Herr.

Q. Mr. Wright, where do you live?

A. I live in Trenton.

Q. Who do you work for?

A. Sun Oil Company.

Q. How long have you been employed by them?

A. Since the first of March, 1927.

20

Q. What is your position with them?

A. I am district manager of the Trenton district.

Q. So you are the executive that has charge of this particular district for the company?

A. I am.

Q. Who is the counsel for the company in this district?

A. Mr. Backes.

Q. And he was counsel on March second and fifteenth, 1930?

30

A. He was.

Q. Were you subpoenaed to appear at the trial of the indictment against Mr. Hafner?

A. I was.

Q. Do you understand what a subpoena is?

A. I do.

Q. Who subpoenaed you?

A. The court, the District Court in Trenton.

Q. The District Court in Trenton subpoenaed you?

A. The district attorneys office, I mean.

40

Q. In Trenton?

A. Yes, sir.

Q. They subpoenaed you to come here?

A. No, not here—Oh, Hafner. I beg your pardon.

I was not subpoenaed.

Q. You came here of your own volition?

A. Absolutely. I have two names mixed.

Q. Who directed the chemist of the Sun Oil Com- 10
pany to appear here?

Mr. Able—I object to that question, if your honor please.

Q. If you know.

Mr. Able—It is entirely immaterial who directed the chemist to come here.

Mr. Herr—I will change the question.

The Court—The question is withdrawn.

Q. Did you direct the chemist to come here to testify in the trial of the indictment against Mr. Hafner? 20

A. I did not.

Q. Do you know who did?

A. No. That would be entirely up to the legal department, and who in the legal department would have done it I would not know.

Q. But the Sun Oil Company's legal department produced him here?

A. Yes. Well, I would be familiar with probably anybody who would come here. He would not be brought here at my suggestion. 30

Q. I beg pardon?

A. I would be familiar with anybody who would come here, being acquainted with all of them, but that would not necessarily mean that I brought them here, for I would not be arranging the case.

Q. Where does the chemist reside?

A. His home, do you mean?

Q. Yes.

A. I do not know where his home is; Philadelphia or a suburb.

Q. Somewhere in Pennsylvania?

A. Yes.

Q. Where is the Sun Oil Company plant at which he works?

A. The refinery is at Marcus Hook.

10 Q. What State?

A. Pennsylvania.

Q. You say you have been with the Sun Oil Company how long?

A. Since the first of March, 1927.

Q. Do you know whether or not the United States Government refused to grant a trade-mark to the Sun Oil Company on the color of its gas?

A. No.

Mr. Able—That is objected to as immaterial.

20

The Court—I do not see the materiality of that. I do not know whether the question was answered or not.

Mr. Herr—He does not know.

The Court—Then if he does not know that is all, I suppose.

Mr. Herr—That is all.

Mr. Able—No questions.

Dr. William E. McCorkle, sworn for the plaintiff.

30

Direct Examination by Mr. Herr.

Q. Doctor, where do you reside?

A. Ringoes.

Q. How long have you resided there?

A. Two years.

Q. What is your profession?

A. Physician.

Q. Do you buy gas at the O. K. Service Station?

A. I do.

Q. And did you in March, 1930?

40

A. I did.

Q. Did you ever purchase any blue gas there in March, 1930?

A. I did not.

Q. Did you see any there in March, 1930?

A. Blue gas?

Q. Yes.

A. Yes.

10

Q. Do you know what kind of gas it was?

A. Yes.

Q. What kind was it?

Mr. Able—Just a moment. I object to the witness answering the question, if your honor please, because he stated he never bought a blue gas from this station, and it necessarily and logically follows if he never bought blue gas from that station he does not know what kind of blue gas might have been at that station, and therefore the witness is 20 incompetent to answer the question.

Mr. Herr—I suppose the witness has eyes and ears.

The Court—The ears are not sufficient. The eyes might be. It might be hearsay.

Mr. Herr—It is a question of what was physically on the property.

Mr. Herr—Yes, that is what I asked.

The Court—If he knows.

Mr. Able—Never having bought any it would be 30 entirely hearsay from him as to what kind of gas was in there. He testified he saw blue gas there.

The Court—Yes. Now, he asks what kind of gas it was.

Q. What kind of gas was it?

Mr. Able—Do you know what kind of gas?

The Witness—On March 9, 1930?

Mr. Able—Yes, of your own knowledge do you know what kind of blue gas was there?

40

Mr. Herr—I am examining this witness.

Mr. Able—I object to the question. I want the witness to answer responsively. The question is do you know what kind of blue gas was there of your own knowledge, or were you told what kind was there? If he was told I object to the answer.

10 Mr. Herr—The witness is in my hands. Your honor has ruled on the question, and I have a right to have the witness answer in the way I want it and not as Mr. Able wants it.

The Court—I think that question is proper as it stands. The answer may be improper but I will permit the question.

Q. Will you answer the question, whether there was any blue gas there, whether you knew what kind of gas it was?

A. I saw blue gas there in a Sunoco tank.

20 Mr. Able—The answer must be categorical, whether he knew what kind was there—Yes or no.

Mr. Backes—Will you repeat the answer?

(Last answer read.)

Mr. Able—We ought not to object to that.

Q. Do you know what kind of gas was there?

A. Well, there were several tanks there.

Q. No, what kind of blue gas it was, I mean.

A. No, I don't.

30 Mr. Herr—Then I ask to have his answer stricken out as not being responsive.

Mr. Able—We object to having the answer stricken out, under the circumstances. We tried to get the answer legally responsive and the witness has stated just what he saw there and we think it should stand.

(After discussion.)

The Court—I will permit the answer to stand.

Mr. Herr—I pray an exception.

The Court—An exception will be noted.

Q. Were there any signs on that pump reading "Sunoco?"

A. Yes.

Q. I am talking about the pump at the O. K. Service Station at Ringoes, New Jersey, not about the pump on the wall there, but the pump at the O. K. Service Station at Ringoes, New Jersey.

A. If I remember correctly there was a sign on the 10 pump.

Q. Was it "Genoco" or "Sunoco?"

A. "Sunoco."

Q. When you used the word "Sunoco" a few minutes ago, did you mean to use the word "Genoco?"

A. No. I said "Sunoco," didn't I?

Mr. Able—You said "Sunoco," didn't you?

The Witness—Yes.

Mr. Herr—Now, the witness is my witness, Mr.

Able. Let him alone, please.

20

Q. Now, tell us what words you saw on the pump.

A. S-u-n-o-c-o.

Q. (Showing witness photograph.) You can read, can't you?

A. Yes.

Q. Did you see that word at that time or did you see some other word?

Mr. Able—If your honor please, the photograph speaks for itself and we object to this line of examination.

30

The Court—Well, the photograph is not being used except for the purpose of identifying the word. The witness is asked whether he saw that word or some other word.

Mr. Able—This picture was admittedly taken later on.

Mr. Herr—Yes, but it was taken during the month of March, Mr. Able.

(Last question read.)

40

The Court—Now, that question is directed to about the ninth of March, I understand, according to the testimony of this witness. Is that correct?

Mr. Herr—Maybe I better fix the date.

Q. What date did you see the name on that tank there, what date in March?

A. I do not remember what day it was or what date
10 of the month.

Q. Do you remember whether it was in March at all or not?

A. It was in March, if I remember correctly, it was the latter part of March, but just what date I do not know.

Q. Do you remember driving past the station a number of times?

A. Yes.

Q. And you stopped in a number of times during the
20 month of March?

A. Several; twice a day sometimes.

Q. Did you use that blue gas?

A. No.

Q. Did you have any particular reason for—

Mr. Able—I object to that, if your honor please.

The Court—Let him finish it.

Q. Was there anything in particular that drew your attention to that tank?

A. Nothing in particular, no.

30 Q. Did you take any particular notice of it?

A. Of the tank?

Q. Yes.

A. Nothing special.

Q. Then are you able to testify whether it had the word "Genoco" or the word "Sunoco" on?

Mr. Able—I object to that because I do not think it is proper to impeach his own witness.

Mr. Herr—I have a right to explain the answer.

The Court—The question is leading. You are

suggesting the word "Genoco" to the witness. I will sustain the objection to the question in its present form.

Q. Does that photograph refresh your memory any, Doctor?

A. It does.

Q. Do you wish to change your testimony then?

Mr. Able—If your honor please, I object to this 10
impeaching of this witness—

Mr. Herr—Any witness can change his testimony.

Mr. Able—By Counsel.

The Court—I will permit the question.

Mr. Able—I pray an exception.

The Court—Note an exception.

(Last question read.)

A. Yes, I do. After looking at this photograph I—

Mr. Able—Is your memory refreshed after look- 20
ing at the photograph?

The Witness—Yes; it brings back to my mind the different tanks that I saw in front of the O. K. station.

Mr. Able—I object to any further response to that question at this time.

The Court—On what ground?

Mr. Able—Because this witness upon suggestion stated that his mind is refreshed as to the number of tanks that were there and so forth, and because of that suggestion, which is nothing more or less than suggestion by way of interrogation, he may or may not desire to change his testimony. Now, I submit that that is not the manner in which a man may change his testimony, and I object to the question for that reason. 30

Mr. Herr—If the court please, the doctor is an exceedingly busy man. I know that because I know some of the work he does.

Mr. Able—We will admit that.

Mr. Herr—He testified in the criminal trial, and Mr. Able knows he did, and his testimony there was different than it is here—

10 The Court—That is not evidential, either. The question I have in mind now is whether I can permit this examination to go on, which through the suggestion of the photographs, would lead this witness to change his testimony.

Mr. Herr—As I understand the rule, it is very well settled that a witness can change his own testimony—

The Court—When was this photograph taken?

Mr. Herr—The latter part of March.

20 Mr. Able—I do not think there is any proof as to the date it was taken, except that it was taken about three weeks from the time the tank was put in, which would be twenty-one days after March second; that would be March twenty-third. The allegation is as of March third and March twelfth.

Q. Now, I also show you another photograph—

The Court—Let us get this one disposed of. You have a question pending yet.

Mr. Herr—I want to corroborate this photograph with the other one.

30 Q. —marked *Exhibit P-11*, which I think counsel admits is the photograph of the service station between March second and the time the globe was put on, and I ask you to examine that photograph.

A. This last one looks familiar also.

Q. After examining these photographs, do you desire to change your testimony?

A. Yes. Since I got the photograph I desire to change my testimony, because it brought back to my mind the number of pumps at the gas station and what was there.

Q. Now, what was there?

A. In the early part of March there were two Atlantic tanks on the one end, and there was a red—

The Court—Are you testifying from memory or from what the photographs show you? You cannot take the photographs and tell what the photographs show.

Mr. Able—If you are through with the photograph will you kindly lay it on the desk? 10

The Witness—Yes, but I cannot tell right off hand what number of tanks the man had there.

Q. Can you tell about this tank that had the blue gas in? That is the one that we are particularly interested in.

A. This tank that had the blue gas in was at the end of the line, towards Lambertville.

Q. Did it have any globe on it when you first saw it?

A. It did not. 20

Q. What did the globe have on it when you did see it?

A. "Genoco."

Q. Did you ever buy any gas out of that pump?

A. I did not.

Q. Did you ever see any advertisement of any Sunoco gas about that place?

Mr. Able—I object to that.

Mr. Herr—I will withdraw it.

Q. Tell the jury what you have noticed about the business at the O. K. Service Station since the criminal trial against Mr. Hafner? 30

Mr. Able—I object to that question being answered by this witness, if your honor please, because what he may have noticed there under the opportunities which may have been afforded him, from the testimony he has already adduced he is not competent to answer that question.

The Court—I suppose that question could only

be directed towards the question of the loss of business.

Mr. Herr—That is right.

The Court—I think I will sustain the objection on the ground that this witness is not competent to testify to that with any degree of definiteness that would be helpful at all.

10 Q. Doctor, as you went by this stand at different times prior to April fifteenth, 1930, did you take notice of the number of customers being served?

A. I did, at times.

Q. And when you would stop there sometimes as often as twice a day or more, did you notice the number of customers?

A. I did.

Q. And have you taken the same notice since the fifteenth of April, 1930?

20 A. Yes.

Q. State to the jury what the difference is, if any?

A. Well, prior to April, 1930, when I would pass by the O. K. Service Station there would at times be three or four cars stopped, and when I would stop for gas there were sometimes two and three there; and since 1930 I have passed up and down there quite often and I may say, quite a good many times, there would be no cars there, and when I stopped, myself, there may have been another one or so pulled up; but the number of
30 cars that stopped there since 1930 has been less in number than stopped there before 1930, that is, April, 1930.

Cross-examination by Mr. Able.

Q. That you saw?

A. Yes.

Q. But you have seen cars pull up there while you were there only you say there was not the number while you were there?

A. Yes.

Q. Do you know as a matter of fact, of your own knowledge, that there has been any lessening of the number of cars as a whole that have pulled up there since March, 1930; do you know of your own knowledge?

A. No.

Q. Therefore you do not know whether this man's business is as good now as it was before, of your own knowledge, do you?

A. From my own knowledge, no; that is from what I saw of the number of cars.

Q. And your testimony is given because you are a friend of this plaintiff, are you not?

A. A friend?

Q. Yes.

A. Well, I buy gas there, that is all.

Q. You are perfectly friendly with him, are you not?

A. Yes.

20

Q. Now, then, doctor, do you recall having noticed a blue pump at this station in March last?

A. A blue pump?

Q. Yes.

A. I did not see a blue pump there.

Q. Well, a blue and yellow pump?

A. No; I did not see a blue and yellow pump.

Q. You stated that you saw a pump upon which Sunoco was advertised, and then afterwards stated, after you looked at the picture, that it was Genoco. 30
What kind of a pump was that, what color?

A. If I remember, it was red when it was first put in there; if I remember correctly.

Q. Red when it was first put in?

A. A red pump.

Q. The one that you call a Sunoco pump?

A. The one I called the Sunoco, yes.

Q. Now, this pump at the extreme westerly end of this photograph, marked—

40

Mr. Able—We object, if your honor please, to this photograph having been used unless it was offered in evidence.

The Court—I think the same thing was introduced in another one.

10 Mr. Able—This is not the same photograph. This man has been interrogated upon a photograph that was not admitted in evidence. We object and move that testimony be all stricken out.

Mr. Herr—If the photographs are different, I did not know it.

Mr. Able—The photographs are different, and I submit them to the court, and I object to that method of trying a case.

Mr. Herr—I never saw the photographs, Mr. Able, until Mrs. Green sent them to me.

20 The Court—They are different.

Mr. Able—Yes, they are, and these answers were all given because of that advertisement (indicating), and here is what they purport to have on there.

Mr. Herr—I guess I failed to have that marked. I see here is another one marked.

30 Mr. Able—Yes, but you have none like this one marked. At any rate, this examination was made by the witness of a picture that was not admitted in evidence, without any opportunity to examine the picture, and upon the assumption that it was admitted in evidence, and we therefore move it be stricken out entirely.

Mr. Herr—I will ask permission to withdraw the witness to prove the photographs. The photographs were handed to me from Mrs. Green's studio yesterday morning while they were still wet from the printing, we having lost the ones we had at the criminal trial. Mr. Able has seen this before and he has no doubt about it being what it

purports to represent. I want an opportunity to put in proof to show that this shows the conditions that were there.

Mr. Able—I do not make any imputation as to counsel, but I do say this, that if counsel thought that photograph had been introduced in evidence it is all right, there has a mistake been made, but the evidence should be stricken out because the picture has been used, which has no right to be used. The photograph is taken from an entirely different angle and shows an entirely different state of affairs so far as what is in the photograph is concerned. One is taken from one end of the plant and the other from the other end. I make no imputations as to Captain Herr, but I do say we are entitled to have this testimony go in in the proper manner. 10

Mr. Herr—I will ask to withdraw the witness. 20
The Court—All right.

Willard Hafner, the plaintiff, recalled.

Direct examination by Mr. Herr.

Q. I show you a photograph, marked—

(Photograph marked *P-7* for identification.)

Q. — *P-7* for identification, and ask you if it shows the true condition in front of your service station in the latter part of March, 1930?

A. Yes; that is just the way it was. 30

Mr. Herr—I offer the photograph in evidence.

Mr. Able—The photograph is objected to, if your honor please. Now, may I look at it to see which one it is? The photograph is objected to because it does not refer to the condition of affairs that existed at the time when this original cause of action, you might say, started, and that it does not purport to show the condition of affairs that existed at the time when this complaint was made, 40

and that being true, any evidence that may be offered here to show the condition latterly existing would be improper evidence before the jury for the purpose of this case, and for that reason I object to this particular photograph. I might say further, by using the statement of my good friend that the photograph was stated to have just come from the press—I do not know when it was taken, but he said they just came from the press yesterday before they got in his hands and he has used that inadvertently and I assume that to be true that they did just come from the press and that he used them inadvertently, but that does not change the situation with regard to this trial.

Mr. Herr—Mr. Able saw this photograph at the criminal trial.

The Court—I am not in the slightest interested in the criminal trial. Mr. Able's objection is that this photograph does not show the condition of the place at the time when these sales were alleged to have taken place, that they show a condition existing subsequently. Now, the question involved in this case is whether or not the defendants had reasonable ground for bringing the criminal prosecution, and that reasonable ground depends not on what existed on the first of April but on what existed at the time the facts are alleged to have occurred, in the complaint. It might very well be that a crime was committed in January and not in March.

Q. Does that show the conditions as of the second day of March and of the thirteenth day of March, 1930, with the exception of the globe in the Sunoco tank?

A. Yes.

(After argument.)

The Court—I will admit this photograph for the same limited purpose that the other was, as showing the conditions that existed there—

Mr. Able—Your honor will take care of that matter in the charge, because we do not want to be bound by a photograph of conditions that did not exist at the time.

(Photograph referred to is marked *Exhibit P-12.*)

Dr. William E. McCorkle, resumes the stand. 10

The Court—Now, Mr. Able, there is a motion of yours pending, to strike out the testimony that has been given as the result of the use of this photograph, and the photograph now having been admitted, do you still press your motion to have the testimony stricken out?

Mr. Able—Yes, your honor, I do.

The Court—(After discussion.) The photograph now having been admitted, I will deny the motion to strike the testimony out. 20

Mr. Able—And grant an exception?

The Court—An exception will be noted.

Mr. Herr—That is all.

The Court—Cross-examine, Mr. Able.

Cross-examination by Mr. Able.

Q. Do you know the colors of the Sun Oil Company pump?

A. Yes.

Q. When you saw this pump first on the ground of the O. K. Service Station did it impress you as a Sun Oil Company pump? 30

A. No.

Q. It did not so impress you?

A. No.

Q. Tell us what impression you had when you saw this new blue pump on the place?

A. What impression I had?

Q. Yes.

A. I just saw this pump at the end of the line and there was no impression made on me.

Q. Well, doctor, when you stated on your direct examination that you saw a Sun Oil Company pump there, what did you mean?

A. Personally I do not think that I had seen Sunoco.

Q. Well, you used the word "Sunoco" a number of
10 times. Your statement was that you saw a blue gas there in a Sunoco tank. Now, since your attention has been called to the matter that there was an advertisement on that pump you have stated that it was Genoco gas. Now, why did you make the change in your testimony?

A. The first time I saw the pump it had a blue colored gas in it, and later on there was a globe on it "Genoco."

Q. Before the globe was on did you have any impression as to the kind of gas that was being sold from
20 that pump?

A. No.

Q. Was it, in appearance of the pump and in appearance of the gas, in your opinion similar to the Sunoco?

A. Oh, I don't know. It was a blue colored gas.

Q. Was it similar to the Sunoco as it appeared to your eye?

A. I could not say. I never examined the Sunoco gas and Genoco gas that close.

Q. It is not a question as to your comparison between
30 the two gases. What impression was made upon your mind as to the kind of gas that was being sold there from that pump when you first saw it upon the O. K. Service station gas plant?

Mr. Herr—I object to that. The witness is being intimidated by counsel raising his voice and pointing his finger at him, and that question has been answered three times.

The Court—I think that so far it is within the bounds of propriety, so I overrule the objection.

The Witness—Will you repeat the question, please?

(Last question read.)

A. What impression when I first saw it?

Q. Yes.

A. There was really no definite impression. I just saw the blue gas there.

Q. You had seen Sunoco gas pumps before? 10

A. Yes, many times.

Q. You had seen Sunoco gas, and it was blue, as you had seen it?

A. Yes.

Q. Had you seen any other gas at that time that would impress you as being sold from this tank other than Sunoco?

Mr. Herr—I did not quite get the import of that question.

(Last question read.) 20

Mr. Herr—I object to that. That is not a fair question.

Mr. Able—Counsel assumes all the time this is my witness.

The Court—It is cross-examination. Objection overruled.

Mr. Herr—I pray an exception.

The Court—Note an exception. Do you understand the question?

The Witness—Not clearly. 30

(Last question again read.)

Mr. Herr—Now, if the court please, that question—

The Court—I have ruled on it Captain Herr. Can you answer that, doctor?

The Witness—No, I cannot.

Q. You cannot answer it?

A. No.

Q. Did it look like a Sunoco gas pump to you?

A. The Sunoco gas pump is blue and yellow, if I remember correctly.

Q. Was this pump blue and yellow?

A. I thought it was red.

Mr. Able—That is all.

Howard Moreau, sworn for the plaintiff.

10 Direct examination by Mr. Herr.

Q. Mr. Moreau, what is your business?

A. Newspaper business.

Q. What paper do you publish?

A. Hunterdon County Democrat.

Q. What is its circulation?

A. Well, the circulation varies from about 3,150 up to 3,300.

Q. How does that compare in circulation with other county papers?

20 A. I cannot answer that very accurately.

Q. Can you give us a rough estimate?

A. I think it is probably double any other county paper.

Q. Does it have a circulation in and about Flemington and in and about Ringoes, New Jersey?

A. Yes.

Q. Will you turn to the copies of your papers that had reports of the Hafner indictment and trial, please?

A. (Witness produces papers).

30 Q. Which one have you before you?

A. I have the issue of May 1, 1930.

Mr. Able—What date?

The Witness—May 1, 1930.

Q. In what part of the paper does the report of the Hafner trial appear?

Mr. Able—If your honor please, I object to that question because if this was a trial that occurred in this court it would be a strange newspaper that was published in this town that would

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not have a report of it in; and I cannot see where-
 in any report that might have been in this news-
 paper, unless it is shown to have come through
 or from or by the authority of the defendants in
 this case could be admissible in the trial of this
 issue. I therefore object to the introduction of
 anything that pertains to this case when it was
 tried or when the case was originally tried as a 10
 criminal case. We do not doubt that there was
 something in the newspaper. It would be a strange
 newspaper if it was not there. But how are we to
 be held responsible for what might be published in
 that paper, unless he shows that we caused the
 same to be published?

The Court—If you are responsible at all you are
 responsible for whatever injury you caused by rea-
 son of what you did. The third count in the com-
 plaint charges that this man was brought into dis- 20
 repute among his neighbors, and so on. Repute
 is not what we do. It is what people think of us.
 I suppose the newspaper articles would be ad-
 missible as proving that.

(After discussion.)

Mr. Able—I do not think it is proper to charge
 these defendants with anything that may be in the
 newspaper. I assume that it is news. I assume
 that everything that is printed in the paper, for
 the purpose of this argument, is true and correct, 30
 but it has no place in this trial, notwithstanding the
 fact this man alleges he has been injured in his
 reputation by reason of having been arrested.
 Reputation is a generic term, it must be proved
 generally, and I make the objection upon the ground
 stated.

(At 12:10 o'clock in the afternoon a recess was
 taken until 1:15 o'clock in the afternoon.)

The Court—Now, gentlemen, what have you to say further on the question of the admissibility of this testimony?

(After argument.)

The Court—I think we need not argue the question any further, Mr. Able. I think we are up to the point where I am ready to rule on it.

10 Mr. Able—There is a further objection to it, that it is in the nature of hearsay.

The Court—Reputation is always hearsay.

(After further argument.)

20 The Court—I am going to admit the testimony, for this reason: In the first place the opinion written by Chief Justice Beasley, which you have cited, has to do with the proof of the reputation of the party in question. The offer of this evidence has nothing to do with proof or lack of proof of good reputation. It is merely evidence introduced as being a thing which is the natural and probable consequence of your act, which might have or does have a tendency to affect the reputation, be that reputation good or bad. In *Corpus Juris*, Volume 38, page 495, there are two cases cited, neither of them in New Jersey, which hold that publication in the newspaper is a probable consequence of an unlawful arrest and such publication may be shown in evidence to aid the jury in estimating the damages sustained.

30 Mr. Able—That is true, if your honor please, but that does not change the trend of my argument that this is an improper way to prove reputation.

The Court—I will grant you an exception.

Mr. Able—I ask an exception to the ruling of the court.

The Court—Yes. I will admit the testimony, and an exception is granted. I think the statement in *Corpus Juris* is flat-footed on the question.

40

There is no decision in New Jersey to support that but there are from other states. Now proceed, Captain Herr.

By Mr. Herr.

Q. Have you your articles on the subject of the Hafner indictment, as published in your paper?

A. Yes. 10

Q. Where is the first one found?

A. The first one is in the issue of May 1, 1930.

Mr. Herr—I offer it.

The Court—It may be admitted.

Mr. Able—It is objected to on the grounds that are stated. Are we required to restate the grounds each time?

The Court—No, I think not.

(Newspaper referred to and offered in evidence, is marked *Exhibit P-13.*) 20

Q. And where is the next article?

A. In the issue of the following week, the eighth of May.

Mr. Herr—I offer that in evidence.

The Court—It may be admitted.

Mr. Able—That is excepted to.

The Court—The same ruling.

Mr. Able—For the same reasons, as stated heretofore.

(Newspaper last referred to and offered in evidence is marked *Exhibit P-14.*) 30

Q. Are there any other articles?

A. I do not think there are any others. I have not made a complete search.

Q. The one article deals with the indictment?

A. The first article deals with the various indictments made and mentions that Mr. Hafner is a defendant.

Q. And the other article deals with—

A. The second article deals with the trial.

Mr. Backes—I object to that. The articles speak for themselves.

The Court—Yes, it does, if it is objected to.

Mr. Able—I thought he was reading from the article. If he reads it it is unobjectionable.

The Court—The answers to the last two questions may be stricken out.

10 Mr. Herr—Then he will have to read the article, because I cannot prove the circulation of the fact of the indictment and of the trial otherwise, if he objects.

The Court—Yes.

Q. Will you please read the first article, or have you already read part of it?

A. No; I have not read any of it. I just made reference to it.

Q. Just read that so far as it concerns this case.

20 A. (Reading) "Charged with fraud in the sale of liquid fuel John Hafner, who operates a filling station in East Amwell Township, plead not guilty and was held in \$200 bail for trial. The complainant in the case is Sun Oil Company, who claim that Hafner sold colored gasoline from pumps designed and colored like those used in exhibiting the company's product." (Reads.)

Q. Now, the next article, please?

A. This is the sub-title in the general court article relative to the trial of this case, and the sub-title is
30 "Trial of alleged gas fraud."

Mr. Backes—Your honor, is he to read the entire article?

Mr. Herr—I am willing to have the entire article read.

The Court—He is reading that part of the article which has reference to this trial. Is that true, Mr. Moreau?

Mr. Backes—I do not think he was.

The Court—I do not want to have the whole newspaper read just to get this.

Is that paragraph all that has to do with this particular trial?

The Witness—No. There is a head which refers to it.

Mr. Herr—Counsel has asked for the entire article. I think his request should be granted. 10

The Court—There is so much of that that is entirely—

Mr. Able—Does it all refer to this trial?

The Court—No; it is a general article with respect to what took place in court—is it not?

The Witness—Yes, sir.

The Court—You should read only such portion of it as has to do with the criminal trial.

The Witness—The headline is “Courtroom swelters in open session—” Hot Weather—“Acquit 20 gas station owner of fraud after two-day trial.” The first two paragraphs deal with the weather principally and we come down to “Trial of alleged gas fraud” is the sub-title.

Mr. Able—Are you reading now or making a statement?

Mr. Herr—I am willing to have Mr. Able read it, if he does not like the way the witness reads it.

Mr. Able—I am inquiring what he is doing.

The Witness—I read the title of the article and 30 then I explained that I jumped down to the “Trial of alleged gas fraud,” and there I made a statement of my own.

Mr. Able—Were you stating it yourself or reading it?

The Court—Is “Trial of alleged gas fraud” a part of the article?

The Witness—Indeed it is, yes.

Q. Those words are part of the article?

A. Yes. (Reading) "The interest of the jury box—"
(Reads) "a motion for a directed verdict of acquittal
was made by the defense and denied by the court."

Mr. Herr—Cross-examine.

10 Mr. Able—There is no cross-examination, if
your honor please, but after having heard the arti-
cles read, I still feel that they have no place in this
suit under the circumstances in which they are of-
fered and I move that they be stricken out.

The Court—The motion is overruled for the
reasons already stated.

Mr. Able—I ask an exception.

The Court—An exception will be noted.

Sarah Strong, sworn for the plaintiff.

Direct examination by Mr. Herr.

20 Q. Miss Strong, where do you live?

A. About a mile south of Ringoes.

Q. How long have you lived there?

A. Since 1926.

Q. Do you know the O. K. Service Station?

A. I do.

Q. How long have you known it?

A. Ever since it has been there, both places.

Q. Did you deal there in March, 1930?

A. I did.

30 Q. Did you notice the tank erected there, which tank
is shown in the photograph marked *Exhibit P-11*?

A. I did.

Q. And shown more fully in *Exhibit P-12*?

A. Yes.

Q. Do you know the kind of gas the tank nearest to
your home contained?

A. Yes. The name was over it.

Mr. Able—What was the answer?

The Witness—I said the name was over it.

40

Q. What name was placed over it?

A. "Genoco."

Q. Did you purchase gas there in March?

A. I purchased white Genoco gas.

Q. But not the blue?

A. No.

Q. Were any representations made to you about the blue gas?

10

A. None whatever.

Mr. Herr—Cross-examine.

Cross-examination by Mr. Able.

Q. What kind of gas did you say you bought?

A. White Genoco.

Q. Did you make any inquiry about the blue gas?

A. I did not.

Q. Therefore no representations were made to you. You made no inquiry about it and therefore there were no representations made. When you first bought white Genoco gas was the blue pump on the ground of the O. K. Service Station?

20

A. Not when I first started buying it, no.

Q. Do you recall when the blue pump was placed there?

A. I do not know the exact date except from the dates as stated in this trial.

Q. You have no knowledge yourself?

A. I was not concerned with it.

30

Q. When you first saw the pump did it have any globe on top of it?

A. It did not.

Q. Do you know approximately how long it stayed that way, without a globe being thereon?

A. I should say about two or three weeks.

Q. Well, do you know?

A. I do not know exactly, no.

Q. It might have been longer, for all you know?

40

A. I don't know.

Q. Are you familiar with the appearance of the recognized Sunoco pumps and the blue-colored gas sold therefrom?

A. I am.

Q. This pump that was placed on this O. K. Service Station plant was similar in shape and form and color,
10 was it not?

A. It was in shape.

Q. And without any advertisement being noticed thereon would you take that to be a Sunoco pump?

A. I would not have.

Q. What would you take it for?

A. I would not take it for any kind of a pump until I saw the name over it.

Q. Well, did the appearance of the pump appeal to you as being like the Sunoco?

20 A. It did not, because there was no Sunoco globe above it.

Q. I am speaking of the general form and appearance and color of the pump; was there anything that indicated to you that it appeared like a Sunoco pump?

A. From the general form, yes; not from the color or from appearance. The color was not identical.

Q. Tell us wherein it was different?

A. The band at the bottom of the pump and the seal on the front of the pump.

30 Q. Did you notice that when you first looked at it?

A. I did.

Q. You noticed the pump was different. Wherein was it different?

A. There was no yellow band on the bottom of it.

Q. And you were familiar with the fact that the Sunoco pump had a yellow band on the bottom?

A. Naturally.

Q. You knew that before this occasion, did you?

A. Having used Sunoco before, yes.

40

Q. You knew that other pumps had a yellow band on the bottom and because you saw there was no yellow band there you knew that was not a Sunoco pump, is that it?

Mr. Herr—I object. The witness has already answered that question.

The Court—It is cross-examination.

(Last question read.)

10

A. I had no cause to until I saw the name on it or over it. I judge no gas until I see the name on it or over it.

Q. Oh, you “judge” none. I did not ask you about your judgment.

A. I do not know any gas until I see it labeled.

Q. What did it appear like?

A. It appeared like a gas colored blue.

Q. Did it appear in color and general appearance like any other gas that you knew that was publicly sold in 20 the market?

A. It had a blue color, similar to Sunoco.

Mr. Able—That is all.

Mr. Herr—We rest, if the court please.

Mr. Able—If your honor please, I have a motion I would like to make. Will you hear it here?

The Court—We will take it in chambers.

(Court and counsel retire to chambers.)

Mr. Able—Now, I move that a nonsuit be granted in this case:

30

First, because of the failure to prove the circumstances under which the prosecution was instituted.

Secondly, because of the failure to establish that the defendants made the complaint maliciously and without reasonable or probable cause.

Further, because there has been no testimony to show that there was any illegal intention whatsoever on the part of the defendants in the matter of making the criminal complaint upon which this suit for damages is based.

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Further, because it has been shown on the part of the plaintiff that the indictment by the grand jury was found upon a complaint that was made by the defendants in this case in a criminal action and that by reason of such indictment having been found it became *prima facie* proof of probable cause, and the burden of the plaintiff has not been sustained in disproving the same.

10

(After argument.)

The Court—Let us have Captain Herr argue that one question, of whether or not he has proven a lack of probable cause.

(After further argument.)

The Court—Your motion now, Mr. Able, is for a verdict of nonsuit on four different grounds, all of which in the judgment of the court come right back to the single question as to whether or not the defendants had reasonable ground for bringing the criminal prosecution, or to put it in another way, as to whether or not the plaintiff in this suit has failed to prove a lack of probable cause such as would justify the court in granting a nonsuit.

20

That question rests upon the further question of whether or not under the testimony it shows that the tank was similar to that of the Sun Oil Company and that the gas exposed for sale therefrom was similar in color to the Sun Oil Company's gas and that the gas was exposed for sale without any name being attached thereto, whether those facts would justify a reasonable man in believing that the statute had been violated; or, in other words, whether such facts as just stated show probable cause justifying the prosecution.

30

It is the judgment of the court that they do not, and that the motion for a nonsuit should be denied.

40

Mr. Able—The defendants take exception to the ruling of the court—

The Court—An exception to that ruling will be noted.

Mr. Able— —to the ruling of the court, wherein it is found by the ruling that the court has found want of probable cause in the defendants or one of them in making the complaint as and when the same was made, it being the contention of the defendants that there is no evidence to show on the part of the plaintiff that there was not a similarity in the tank, that there was not a similarity in the fuel which was sold or exposed for sale, and that the plaintiff has in every particular, for the grounds stated on making the motion, failed in his proof. 10

Exception is taken to the ruling of the court on the motion for nonsuit.

The Court—An exception will be noted. 20

(Court and counsel return into court.)

Warren R. Brooks, one of the defendants, sworn.

Direct examination by Mr. Able.

Q. Mr. Brooks, where do you reside and what is your business?

A. I live in Trenton, New Jersey. I am manager of the Motor Oil and Gasoline Department for the Sun Oil Company.

Q. How long have you occupied that position? 30

A. About a year and a half.

Q. Did you occupy that position in the months of March and April, 1930?

A. I did.

Q. And since then?

A. Yes, sir.

Q. Do you know the plaintiff in this suit, Hafner, who sits here to my right?

A. I know who he is.

Q. Do you know what his business is?

A. He operates a service station near Ringoes.

Q. What is the name of it?

A. O. K. Service Station.

Q. When did you first see this plaintiff, if you recall?

A. The day he was arrested.

Q. On what day was that?

10 A. It was some time in April, I think about the fifteenth.

Q. Have you been upon the grounds of the O. K. Service Station?

A. Yes, sir.

Q. When were you there, what did you do when there and what did you see when there?

A. I was there, the first call, about March 2nd. I had had some complaints that—

Mr. Herr—I object to that, if the court please.

20 The Court—Stop with that. As a result of those complaints what did you do?

The Witness—As a result of those complaints I visited the O. K. Service Station and made purchases of gasoline from a pump that was painted similar to those of the Sun Oil Company, a gasoline colored blue. I asked the attendant if the gasoline—

30 Mr. Herr—If the court please, I do not want to interrupt, but if counsel will not ask questions I will have to interfere with him while he is testifying. If he is going to go into conversation I think he should fasten it on the plaintiff. If some bystander engaged him in conversation it is hearsay.

Mr. Able—I think my question was comprehensive and that the witness is endeavoring to answer the question that was asked.

The Court—He cannot introduce conversations that somebody else had with him unless the plaintiff was present.

40

Mr. Able—At this point may I take the time of the court to say that we do not want to fall into error as to the rights of this witness. He is one of the defendants, and, as I understand the law relative to a defendant in this class of cases, they have a right to show everything that may have occurred surrounding the making of the original complaint in the criminal proceedings, whatever 10 they may have been, thereby overriding a great part of the rules of evidence that would otherwise exclude such testimony.

(After argument.)

The Court—I will permit the witness to continue.

Mr. Herr—It is limited, of course, by the opinion rule, namely, that he cannot testify as to what somebody told him their opinion was. He can testify as to the facts given, but as to opinions given, he cannot. 20

(Previous testimony read, as follows: “As a result of those complaints I visited the O. K. Service Station and made purchases in gasoline, from a pump that was painted similar to those of the Sun Oil Company, a gasoline colored blue. I asked the attendant if the gasoline—”)

The Court—Go ahead.

The Witness—I asked the attendant if the gasoline I had purchased and had placed in the tank of my car was blue Sunoco. I had made a purchase 30 of five gallons of gasoline and had it placed in the tank of my car. With me at the time was Mr. George W. Eck, at that time a salesman for the Sun Oil Company. Mr. Eck asked if he was positive—that is, if the attendant was positive—that this was blue Sunoco, and the reply was, “It is blue Sunoco.” I had some business in Flemington and I concluded my business on the second of March. I communicated this conversation to our—

Mr. Herr—Now I think we better stop right there.

Mr. Able—Is there objection?

Mr. Herr—Yes. What he communicated is irrelevant.

Mr. Able—What is the objection?

Mr. Herr—What he communicated is irrelevant.

10 The Court—Why?

Mr. Herr—I do not see that it is germane or material to the issue. He received this information, and he is accused of acting on information that he had and acting unjustly. Now the fact that he may have communicated it—

The Court—You are charging the Sun Oil Company with acting unjustly also. I do not know with whom he communicated, but if he communicated it to one of the defendants I suppose it would be admissible for the same reason that the conversation with him was admissible.

20

Mr. Able—He is inquired of what he did, and he says he communicated—as one of the things that he did with reference to the purchase of this gas.

The Court—I will overrule the objection.

Mr. Herr—If the purpose is to show that he communicated it to the Sun Oil Company, I withdraw the objection, with the privilege of afterward moving to strike out that part of the testimony.

30

Mr. Able—If there is any testimony offered on the part of the defendant that is not applicable to the trial of this issue we will consent to it being stricken out.

The Court—Go ahead.

The Witness—I communicated this to the legal department of the Sun Oil Company and was advised by them to secure samples of this gasoline. So, on a later date, on or about March 12th, I re-

40

turned to this O. K. Service Station and secured a one-gallon sample in a can.

Q. Was anyone with you?

A. I had with me at the time this same George W. Eck and another salesman from Trenton, Mr. John B. Connell.

Mr. Fisher—Connell or Connor?

The Witness—Connell. I asked if this was blue Sunoco, and Mr. Eck asked if this blue Sunoco would clean clothes, and I asked again if the attendant was sure this was blue Sunoco, to which he replied it was. I distinctly recall three distinct questions and three distinct answers when this gasoline sample was secured. I took this gasoline sample the next day, in person, to our chemical laboratory at Marcus Hook Refinery and delivered it in person to Mr. Angstadt over there, labeled as to when it was taken and wherefrom, and wrote a letter from my office in Trenton the next day verifying the action that I had taken in delivering this sample to him. Later on, at the advice of the legal department and in conjunction with our attorney at Trenton, Mr. Backes, I made a complaint against Mr. Hafner. 10 20

Q. I now present a letter for your inspection, dated March 14, 1930, addressed to Mr. Harold D. Saylor, Lamberton and Moffett, 1608 Walnut Street, Philadelphia, Pa., and which is marked— 30

(Paper referred to is marked *D-4* for identification.)

Q. —*D-4* for identification. Is that the letter which you addressed to the legal department, that you have just mentioned?

A. Yes, it is.

Q. Is the signature that is hereto annexed your signature?

A. It is.

Q. After you had written this letter what else did you do?

A. I awaited advice that should come from the legal department on that letter.

Q. Did you receive any advice?

A. I did.

Q. A letter is presented to you for inspection, dated
10 March 17, 1930, addressed to Warren—

Mr. Herr—I object to having the address read. The date may be given and the letter marked for identification. I do not want any part of the main body of the letter put in evidence until it is properly offered.

The Court—I do not see any objection to identifying the letter by stating the person to whom it is addressed. Objection overruled.

Mr. Herr—Exception.

20 The Court—Note an exception.

Q. —Addressed to Warren F. Brooks, manager Motor Oil and Gasoline Department, Sun Oil Company, P. O. Box 675, Trenton, N. J. It is signed “Harold D. Saylor.” I would ask whether that is the reply which you got from the letter which you wrote and which is marked *D-4* for identification, the present letter presented to you being marked—

(Paper referred to is marked *D-5* for identification.)

Q. —*D-5* for identification?

30 A. Yes, sir.

Q. This *D-5* for identification, you say, is a reply to the letter marked *D-4* for identification?

A. That is right.

Q. I now present to you a copy of a paper marked “Copy” of a letter dated March 14, 1930, and addressed to Mr. Harry—

Mr. Herr—The same objection.

The Court—The same ruling.

Q. —Angstadt, Sun Oil Company, Marcus Hook, Pa., signed in typewriting, "Sun Oil Company, Warren F. Brooks, Manager Motor Oil-Gasoline Department."

Mr. Herr—Same objection.

The Court—Same ruling.

Q. Is that a copy of a letter that was written by you?

A. Yes.

Q. You identify it?

10

A. I do, sir.

Mr. Able—And for reference it will be marked—

(Paper referred to is marked *D-6* for identification.)

Q. Do you know whether the sample of gasoline which you procured from the tank at the gasoline station of the plaintiff in this case was ever analyzed?

A. Yes, it was.

Q. Did you ever receive any reply or any letter indicating that the same had been done?

20

A. I did.

Q. The letter, which is marked—

(Paper referred to is marked *D-7* for identification.)

Q. The letter which is marked *D-7* for identification and which is dated March 29, 1930, signed by H. F. Angstadt—

Mr. Herr—Same objection and exception.

The Court—Note an exception.

Q. —Apparently addressed to Mr. Arthur E. Pew, Jr., with a statement thereto attached, is shown to you 30 and you are inquired what that paper is?

A. This paper sets forth the findings—

Mr. Herr—I object to him stating what the paper is, if the court please. That paper speaks for itself if it is competent evidence, and if it is not he cannot tell what is in it.

The Court—Objection sustained.

Mr. Able—I am asking him to state what it is, whether it is an analysis or whether it is a state-

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ment of account or what it is. I am identifying it so that when we read it a little later we will know what we are talking about.

The Court—I think it is sufficiently identified by its date and the person to whom it is addressed.

Q. Was that letter with the paper attached brought to your attention?

10 A. It was, sir.

Q. And did all this occur before a complaint was made before a justice of the peace?

A. It did.

Q. Against this man Hafner?

A. Yes.

Q. You are shown another copy of a letter, dated March 3, 1930, addressed to Lamberton & Moffett—

Mr. Herr—Same objection and exception.

The Court—The same ruling.

20 Q. —1608 Walnut Street, Philadelphia, Pa., and which is marked—

(Paper referred to is marked *D-8* for identification.)

Q. —*D-8* for identification, and I ask you whether the original of that letter was prepared by you or at your instance?

A. Yes, sir.

Q. Is that a carbon copy of a letter which you sent?

A. Yes, sir.

30 Q. A letter addressed to you, signed "Harold D. Saylor," dated March 7, 1930, marked—

(Paper referred to is marked *D-9* for identification.)

Q. —*D-9* for identification, is presented and you are asked whether that letter was received by you from the sender?

A. Yes, sir.

Q. Another letter, dated March 25, 1930, addressed to Mr. Harold D. Saylor, purporting to be signed by yourself—

(Paper referred to is marked *D-10* for identification.)

Q. —Marked D-10 for identification, is presented to you for your inspection, and I ask you whether that letter was written by you?

A. Yes, that is my letter.

Q. Mr. Brooks, when you were at the O. K. Service Station, conducted by the plaintiff, Hafner, did you have any conversation with anyone relating to a blue tank on this location, other than you have stated? 10

A. Yes; I asked him if—

Mr. Herr—If the court please, I would like to have the name of the person he talked to in both instances, and I want to know whether it was the same person.

The Witness—It was the same person, the attendant at the station.

Mr. Herr—Do you know his name?

The Witness—I cannot give you his name.

Mr. Herr—Then I think I am entitled to a description of him. 20

The Witness—Do you want me to point him out?

Mr. Herr—Yes.

Q. Is he in the courtroom?

A. In the first row in the central tier, the gentleman between Mr. ——— and Mr. Wright.

Q. (Indicating) This man?

A. Yes.

Q. Both times? 30

A. Both times.

Q. All right. Now what happened?

A. I asked him where he secured his blue Sunoco from and he said he didn't know, and I told him I had bought some gasoline earlier in the day and it purported to be blue Sunoco, and he said, "All I say is it is a good blue gas," and he denied that he said it was blue Sunoco.

Q. How is that?

A. He denied that he said it was blue Sunoco. 40

Q. When—

Mr. Herr—I want the stenographer to read the whole answer.

(Previous answer read, as follows: "I asked him where he secured his blue Sunoco from and he said he didn't know and I told him I had bought some gasoline earlier in the day and it purported to be blue Sunoco, and he said, 'All I say is it is a good blue gas,' and he denied he said it was blue Sunoco.")

Q. When did that conversation take place?

A. My recollection is that it took place later the same day, on March 12th, after I bought gas and I insisted that he had sold me blue Sunoco and advised him that our records showed there was no blue Sunoco purchased.

Q. Did you tell him who you were?

A. I told him who I was, and that there was no blue Sunoco purchased from the Sun Oil Company and no record of our trucks ever having delivered any there and that it could not be.

Mr. Herr—I do not like to interrupt the witness, but I do not like him to put into the record a lot of stuff not germane to the issue. What he told the attendant has nothing to do with it.

Mr. Able—This took place after he had made two purchases, and immediately upon being informed that no blue Sunoco had been sold the man denied that it was blue Sunoco, showing exactly what this man had a right to rely on when the purchase was made.

Mr. Herr—That is a misstatement of fact, as I understand the testimony.

The Court—I will overrule the objection.

Mr. Herr—My reason for an exception is that the testimony which the witness has given, namely, statements by him to a third party, are self-serving

declarations and are made to a party not in interest and not heretofore shown to have been an employee or agent of the plaintiff.

The Court—Ask the next question.

Mr. Able—Is that the objection?

The Court—The objection is overruled.

Q. Go on and tell us what else happened.

A. I insisted on stating that he had sold me blue Sunoco on two occasions, and that it was not blue Sunoco; that he had no blue Sunoco; and I asked him where he purchased it from and why he sold it as blue Sunoco, to which he made no reply that I can recall. 10

Mr. Herr—I would ask to have all that stricken out.

The Court—The motion is overruled for the same reason.

Mr. Herr—Exception.

The Court—Note an exception. 20

Q. Will you describe the tank that you saw on that place and from which you purchased this gas—the pump, rather.

A. It is the pump above ground. The pump was a product of the Wayne Pump Company, similar to the second pump from the left (indicating).

Q. Was it exactly like it?

A. It is not exactly like it.

Q. Well, then, wherein did the pump that is on the O. K. Service Station ground differ from that pump that is marked "A" on top? 30

A. The line along each side of the Pennsylvania pump, which is the second one on the left as you face it—

Q. I call your attention to the fact—

Mr. Herr—I ask that the witness be allowed to answer the question.

The Court—Proceed, Mr. Able.

Q. I call your attention to the fact there is a lead

pencil mark "A" above the pump on this chart, which is Penna. Model 1717-71; underneath this one I am calling your attention to. Now, will you tell us wherein, if any, the pump from which you purchased the gas about which you have just testified differed.

A. The detail difference is very small. What is known as the skirt of the pump—the lines on the outside running up and down—are a little nearer parallel on the Pennsylvania pump than on the Wayne, and in all probability the yellow band about the center of the pump is not quite so deep on Wayne; otherwise the Wayne pump is very similar to the Pennsylvania pump. To the average observer they would all look alike. The Wayne is so near the Pennsylvania model that—

Mr. Herr—One minute.

The Court—Let the question be answered, Captain Herr.

20 Mr. Herr—Will your honor hear me on this question?

The Court—No. He may answer the question and if it is improper I will strike it out.

The Witness—The Wayne pump is so near like the Pennsylvania pump that in our color specifications for painting pumps we do not picture the Wayne, the Pennsylvania being so near to it. The handle of the pump is immaterial and it can be off to the side. It is usually on what would be the right of that pump. It works from one side.

30 Mr. Herr—I move to strike out the witness's answer on the ground he has given a conclusion as to how this pump looks, compared with the pump on the Hafner place. It is for the jury to state what the comparison is and not the witness.

The Court—Read the answer.

(Last answer read.)

Mr. Herr—If that is the answer I will withdraw my objection.

40 The Court—All right.

Q. Do you know whether the Sun Oil Company uses pumps exactly similar to the one that is on the O. K. Service Station plant?

A. A great many of them.

Q. Did you examine the pump on the O. K. Station plant?

A. Well, I knew it was a Wayne pump by looking at it. 10

Q. What have you to say with regard to the colors and the places where the coloring was placed?

A. The coloring on the Wayne pump at the O. K. Service Station was exactly like the coloring on the Wayne pumps that the Sun Oil Company used in dispensing their products when the purchases of gasoline were made.

Q. What about the placement of yellow color at the top, middle and bottom, if any?

A. There was yellow at the top and a yellow band 20 at the middle, and there was yellow on the base of the pump.

Q. When?

A. At the time I purchased gasoline, March 2nd and March 12th.

Q. Do you know whether that same thing is there now or do you know whether it has disappeared or not?

A. I noticed that after my conversation with the attendant, when I referred to his sales of blue Sunoco, that the yellow band disappeared from the bottom of 30 the pump, and after the arrest a globe appeared on the top of the pump.

Q. After the arrest?

A. After the arrest.

Q. Are you confident of that?

A. Positive.

Q. What further was there about the pump at the O. K. Service Station that was similar to the Sun Oil Companys pumps, if anything?

A. The color of the gasoline being marketed.

Q. Was there any dissimilarity between the pump used by the Sun Oil Company and the pump at the O. K. Station?

A. It was an exact replica of the Wayne pumps we used.

Q. How about the label or something of that kind
10 on the side of the pump?

A. There was no label at all.

Q. And when you saw it there was no top on it, you said?

A. No globe on the top.

Q. Now, with regard to the gasoline, tell us what you know about the color and the kind of gasoline that you actually did get.

A. The gasoline was colored blue. The color used
20 makes a very clever imitation of the color of blue Sunoco.

Mr. Herr—I object to that.

The Court—That portion of the answer may be stricken out. What color was it? was the question.

The Witness—The gasoline was blue.

Q. What have you to say with regard to the similarity of the color with the Sunoco blue gasoline?

A. The color was very similar. It would take a very experienced person to tell the difference. As a matter of fact, the only—

30 Mr. Herr—If the court please, that is not for the witness to say. He can give the physical qualities, as they appeared, and stop.

The Court—I will permit the answer to stand. Do you want an exception?

Mr. Herr—If you please.

The Court—Note an exception.

The Witness—The only way I could distinguish between the color of this gasoline and the color of blue Sunoco was to fill two test tubes and put white

paper beneath them and look down through them, and I think the average person might confuse one with the other even then.

Mr. Herr—I ask an exception to that latter statement.

The Court—The latter part may be stricken out, what he thinks.

Q. Do you know whether the Sun Oil Company have 10
any pumps, out in your territory at least, without globes
on them?

A. We have some instances where there is a canopy
extends from a building or where a canopy has been
erected over the pumps, that the pump is too tall to ad-
mit a globe being placed on it.

Q. But those in locations such as at the O. K. Serv-
ice Station, what have you to say with regard to the
omission of the globe?

A. There is no pump installed where there is no can- 20
opy overhead where a globe does not appear on it.

Q. Do you know how long the same color has been
used by the Sun Oil Company?

A. About four years.

Q. And the same that was used in March and April,
last?

A. Yes, sir.

Q. And is it widely and generally sold and marketed?

A. It is.

Q. What have you to say about its being advertised 30
as a blue fuel or blue gasoline?

A. The Sun Oil Company in 1930 spent about two
million dollars advertising blue Sunoco, and about a
million and a half in 1929 and approximately a million
in 1928.

Q. What have you to say as to the colors that are
generally and universally used by the Sun Oil Com-
pany in this territory or in the State of New Jersey,
if you know? Do you understand the question?

A. No, I do not.

Q. Do they distribute their products, that is, their gasoline, from pumps of a different color or do they have only one colored pump?

A. No; all of the pumps are painted alike and the specifications go from the advertising department of the company to all the branches.

10 Q. In what colors?

A. In blue and yellow.

Q. Identical with the O. K. Station pump?

A. Identical with the appearance, I think.

Q. Did you tell us, and if you did you need not repeat your answer, when you noticed that the yellow band at the bottom had been painted off this pump at the O. K. Station?

A. After I had made the purchases and after I had engaged in conversation with the attendant and he was
20 aware of the fact that I was connected with the Sun Oil Company.

Q. How long afterward did you notice it?

A. Well, I saw it the next time I passed; perhaps a week, it might have been.

Q. While there, did you or did anyone in your presence take any photographs of the O. K. Station and its pumps?

A. Yes, sir.

Q. Who took the photographs?

30 A. I had instructed Mr. Connell to take photographs. I was with him and watched him and helped him take them.

Q. Did you see him take them?

A. Yes.

Q. I show you a photograph which purports to be of the O. K. Service Station.

Mr. Herr—We have no objection to that.

Q. And which is marked—

(Photograph referred to is marked *D-11* for identification.)

Q. —and ask you whether that is one of the photographs which were taken under your direction and made in your presence?

A. Yes, sir.

Q. When I say "made," I mean snapped or whatever they do to take them. 10

Mr. Herr—I have no objection. You may offer that.

Mr. Able—If the court please, I now offer *D-11* for identification in evidence.

Mr. Herr—No objection.

(Photograph referred to is marked *Exhibit D-1*.)

Q. I show you photograph marked *Exhibit D-1* and inquire what you know about that photograph having been made and as to who made it and when it was made? 20

A. That photograph was made in my presence by a Trenton photographer by the name of Raw. That was after the trial.

Q. After the trial or after the arrest?

A. It was after the arrest. It may have been even after the trial.

Q. If it was taken after the trial that is all I want to know. Do you know about that?

A. I cannot recall the date I had it taken. 30

Q. There are some markings and colorings on that photograph. Who made them, if you know?

A. I had two artists color photographs for me.

Mr. Herr—It does not require any declamation to answer that question. Either he knows or he does not know.

Mr. Able—Of course you will give him an opportunity to tell whether he knows, will you not?

Mr. Herr—He was starting off with his usual

declamation. I have been very liberal and not objected, but I want him to confine himself within the rule.

Mr. Able—He has made a statement that is not very valuable for proof on either side. I do not believe that he had two colorings made by artists. Now he is going on to tell about that, I presume.

10 Mr. Herr—If the court permits him to.

The Court—I will permit him if he knows. If he does not, he must say so.

Q. What do you know about the coloring of them, if anything?

Mr. Herr—I ask to have the witness cautioned that he is to answer only who put the color on. Mr. Able's question is, "What do you know about the color?"

20 The Court—I suppose on the basis of your objection every question asked in court ought to be objected to. Go ahead.

Q. Answer the question?

A. I had two artists make colorings and took them both to different places where blue and yellow pumps dispensed gasoline.

The Court—The question is, who put the coloring on that?

The Witness—I could not say which one did the coloring.

30 Q. Was the coloring done at your request?

A. It was.

Q. What does the coloring purport to show?

A. It purports to show the pump as it appeared.

Q. When?

A. I would have to consult my records on that.

Q. Were the artists who did the coloring— Did they see the pump?

A. They saw the pump.

Mr. Herr—That is a conclusion on the part of the witness, whether they saw it or not.

The Court—Were you present when the coloring was done?

The Witness—I took the artists to the place and they made a sketch of the pump and took their paints and matched the color in my presence and did it in their studios.

10

Mr. Herr—I do not object to it.

Q. Now I notice there is a slight yellowish cast at the bottom of the pump. Was that made by the artist in your presence, that yellowish mark, or what does it indicate?

Mr. Herr—Let him answer whether it was made in his presence.

A. The yellow indicates that this pump had some yellow at the bottom at that time.

Mr. Herr—If the court please, that is not an answer.

The Court—It is a conclusion.

The Witness—It is a fact, your honor.

The Court—I suppose it is a conclusion, Mr. Able.

Mr. Able—I want to show the condition of the pump at the time it was made, and I want to show when it was made, if the witness knows.

The Court—The photograph will speak for itself.

30

Q. There is a yellowish line around the bottom?

A. Yes, sir.

Q. When was that line made by the artist, if you recall?

A. I do not recall exactly. I would have to consult notes.

Q. Was it before the man Hafner was arrested in the criminal suit?

Mr. Herr—I object?

40

A. This was following that. This pump has changed its complexion a couple of score of times.

Q. To your knowledge?

A. Yes, sir. It has changed its complexion a half dozen times or more to my knowledge. Every time I drive past it is painted differently. The thing is half red and blue now. One time a yellow band is on it
10 and another time it is off.

Q. I want to know how it was when this charge was made against the man?

A. When this charge was made against the man a yellow band was on the bottom.

The Court—Are you anywhere near through with this witness?

Mr. Able—Well, yes; but not quite, if your honor please.

(Adjourned until Thursday, December 11, 1930,
20 at 10 o'clock in the forenoon.)

Warren R. Brooks, one of the defendants, resumes the stand.

Direct examination by Mr. Able.

Q. How often have you been, or approximately how often have you been, on the premises of the O. K. Service Station conducted by the plaintiff in this case at Ringoes, New Jersey, besides that visit of March 3 and March 12?

30 A. I think I was there March 2 or thereabouts and March 12, and later on in the day on March 12, and once following that; about four times.

Q. Have you been by the place since that time?

A. Yes, a great many times.

Q. And have you observed the conditions with regard to the tanks there when you went by? When I say "tanks" I mean pumps.

A. Yes, I have.

40 Q. What change, if any, did you observe in the pump

that is asserted to have been similar to the Sun Oil Company pump?

A. On the first two visits the pump was painted identically like the Sun Oil Company paints a Wayne pump of the type that was there. After I had made known to the attendant that I was interested in the camoufflage the yellow paint, the yellow band, disappeared from the bottom. After the trial the yellow band appeared on the bottom again. The pump has had several coats of paint until yesterday and the day before and for the last week or so it has had half the bottom of the pump painted red. In between I have noticed some different changes in it. 10

Q. You stated that you noticed after the trial—what trial do you mean, here in this court?

A. The trial in this court.

Q. On April 15 last?

A. That is right. 20

Q. No. It was May, if I am not mistaken. Do you recall when the hearing was before the justice of the peace?

A. I think it was early in April.

Q. And the trial was held in this courtroom about that time?

A. About the middle of April, the fiteenth, I think.

Q. Did you appear as a witness before the grand jury?

A. I did. 30

Q. Following the complaint which was made before the justice of the peace?

A. That is right.

Q. Now, the days when you purchased gas, I think you have stated, was about March 2 or 3 and March 12. Have you told us all that you did with regard to that purchase? Did you tell us all that you did when you were on the stand yesterday? Did you report to the company any different from that stated yesterday? 40

A. I reported the fact to the legal department of the Sun Oil Company in Philadelphia, delivered the gasoline sample in person to Mr. Angstadt at the chemical laboratory at Marcus Hook, Pa., and on the advice of the legal department I took the matter up with Mr. Backes in Trenton.

Q. Who do you mean by "legal department"?

10 A. It is called the legal department, the same as another department is called "sales" and another "industrial oil," at Lamberton & Moffett. There are several attorneys working for them.

Q. Who are Lamberton & Moffett?

A. A law firm retained by the Sun Oil Company to take care of their legal affairs, with offices in the building where the main offices of the Sun Oil Company are.

Q. Is there a man named Saylor connected with the firm of Lamberton & Moffett?

20 A. Mr. Harold Saylor is one of the lawyers in that firm.

Q. And did you relate to them what you had seen and what you had done with regard to the purchase of gasoline and observation of the pump at the O. K. Service Station?

A. I did.

Q. Did you tell them all that you have related here on the stand?

A. Yes, I told them every detail connected with it.

30 Q. Before going to see them did you make any investigations in addition to what you have already testified to regarding the tendency of this pump to deceive?

A. Yes. It was first called to my attention by Joseph Hyland, of Flemington, who at that time was distributor of Sunoco products in Hunterdon County. Mr. Hyland had been informed that his contract with the Sun Oil Company would be cancelled when it expired in April and that—

Mr. Herr—If the court please, we do not like to object to—

The Court—This is entirely with another party, is it not, Mr. Able?

Mr. Able—No, if your honor please, it is a circumstance surrounding this particular case and showing the occasion for the investigation which was made before any complaint was made. In 10 other words, it shows cautiousness and investigation before any complaint was made.

Mr. Herr—I do not object to that. He is going into a contract that the Sun Oil Company had with other people.

Mr. Able—That was incidental.

Mr. Herr—And he is going to introduce next evidence which under this class of cases is not legitimate testimony. If the witness would answer the question and stop we would get right along. 20

Mr. Able—I am asking this witness to tell all that he knows about this case.

The Court—The trouble is, where a witness is asked to tell all he knows about a case, not being familiar with the rules of evidence, he is very apt to wander far afield.

Mr. Able—So far as I know there has not been any wandering, so far.

The Court—Proceed.

Q. Tell what you did? 30

A. And I had agreed with Mr. Hyland that I would place no more Sunoco pumps in Hunterdon County between the time when I put a salesman in this territory and the time when his contract expired. Mr. Hyland had called Mr. Wright, district manager, and complained that we had placed a pump—

Mr. Herr—That is hearsay, if the court please.

The Witness—Mr. Wright—

Mr. Herr—I dislike to object.

The Court—There was a complaint made.

Mr. Herr—Not to this man; to Mr. Wright. If they want to prove that complaint, put Wright on the witness stand.

The Court—What have you to say, Mr. Able?

10 Mr. Able—The only thing I can say is that the witness has, as I believe, a legal right to tell how he got information of the conditions that existed at the O. K. Station, and that is what he is endeavoring to do.

The Witness—I do not remember now whether Mr. Wright—

The Court—I will permit the testimony so far.

Mr. Herr—I pray an exception to the witness telling anything that somebody told somebody else.

The Court—You are perfectly right there. Now, what did he do, as a result of the complaint?

20 The Witness—Mr. Wright had asked me to handle the situation.

Q. What did you do?

A. And before I could call Mr. Hyland on Monday morning Mr. Hyland had called me, very much perturbed and excited because I had violated my promise to him and had placed a pump at the O. K. Service Station. I told him to sit quiet and I would investigate. It was the morning of March 2 when I visited the station and noticed a pump similar to ours, with blue
30 gasoline in the bowl, and purchased gasoline as blue Sunoco gasoline. Mr. Hyland had informed me that several of those who were selling gasoline for him were complaining. I made an investigation among the dealers, that is, those who were selling Sunoco products nearby, and, while they did not want their names brought into it, they complained of the conditions as they existed and wondered what we were going to do to keep a man from selling a gasoline that looked similar to and from a pump that was similar to those of the Sun Oil Com-

pany, out of which they were deriving a profit and for which they felt they needed protection.

Q. Yes. Did you talk with Mr. Hyland after his complaint?

A. I did.

Q. Was this first purchase that you have referred to made on March 2' or March 3? I have got both dates and I would like to know what the date is.

10

A. My recollection is the 2nd.

Q. I think the complaint shows March 3. Would that refresh your recollection any? Is the correct date stated in the complaint?

A. The correct date is stated in the complaint.

The Court—March 3, the complaint shows.

Q. Now proceed and tell us what you did after you got the complaint?

A. Following the complaint I made these purchases—

Q. Did you go to see Mr. Hyland and have a talk with him? What happened between you and Mr. Hyland?

20

A. From there I came to see Mr. Hyland. I told him the pump was placed there by someone else, it was not our pump, we had not painted it and we had not made any deliveries—

The Court—I do not see how this conversation between Hyland and this man is evidential as being binding at all upon the plaintiff.

Mr. Able—Ordinarily, if your honor please, I would say that that is a correct assumption of the law. But we have got a different case here, wherein this man is entitled to show every circumstance which led up to the point—

30

The Court—But not conversations with other people and so on.

Mr. Able—We are not trying to prove the truth of the statements which were made to him, but we are trying to prove conversations upon which

40

this man premised his action in making the complaint for which this suit has now been brought. It is a fact these things occurred. This conversation took place, and all these things taken into consideration would, I assume, call for the protection which the law gives, for the action which was taken in this original case. That is the idea—not to
10 prove any fact by the conversation, but that a conversational did occur as a fact, and that fact is one of the elements that go to show the circumstances under which this man acted. That is the purpose of it.

The Court—All right.

The Witness—Mr. Hyland informed me that he had several people—his recollection was at least a half a dozen—who had noticed the pump and who had remarked that he had placed a Sunoco pump
20 in the O. K. Service Station.

Q. Go ahead and tell everything that you did?

A. I told Mr. Hyland that I would take that matter up with our legal department and find out what law there was on the point and would advise him of our action.

Q. Well, did you do so?

A. Yes, I did.

Q. And did you have any talk with anybody else before going to your legal department—I mean all the
30 time referring to the matter of the pump at the O. K. Station?

A. I have talked with—I have mentioned that—with those who sold Sunoco products nearby.

Q. You need not repeat. What was the conversation that you had with these people regarding this pump, to the best of your recollection?

A. I had a conversation with Herbert W. Meeker, who is a Sunoco dealer in Ringoes, and Mr. Meeker informed me at the time that he was deceived by the
40

pump. The conversation was more to inform him that it was not our pump; that we were taking care of our duties to him.

Mr. Herr—I ask that be stricken out, if the court please. He says this conversation with Meeker was to inform him, Meeker, that he was protecting him. That has nothing to do with this case at all.

10

The Court—I will permit it on the ground that these are circumstances which led up to—

Mr. Able—We are proving nothing by the conversation. We are proving it occurred.

Mr. Herr—That is my ground of exception, and this all concerns third parties.

The Court—Yes.

The Witness—I had a conversation with Mr. T. J. McGuire, in Lambertville, who is a Sunoco dealer. He told me he had heard of people being deceived by the pump at the O. K. Service Station, that they had purchased gasoline there and believed it to be blue Sunoco. I had a conversation with Mr. E. S. Brady, below Lambertville, on the River Road, and he had heard of the infringement through people who had stopped at his station and wondered how the blue gasoline was sold cheaper in Ringoes. I talked on the telephone with Mr. Richard Slattery, of Flemington, who said that the pump would deceive him and that he had heard the facts and gossip before he had seen the pump.

20

30

Mr. Herr—I ask an exception to all this, of course.

The Court—Yes.

The Witness—I cannot recall now of any more I spoke to before making any decision.

Q. Did you communicate these things to your principal, to the legal department?

A. I did, sir.

40

Q. All that you have related here?

A. Everything.

Q. After you had done so then what happened?

A. The legal department referred me to Mr. Backes in Trenton and I spent the biggest part of a day going over all these details with Mr. Backes.

Q. What did you say to Mr. Backes? You refer to
10 Mr. Herbert W. Backes, on my left?

A. That is right.

Q. What did you tell Mr. Backes?

A. I produced the correspondence that I had with the legal department to him and they turned over their correspondence to him and we went over the letters and I explained all the details and incidents surrounding and everything.

Q. Did you inform Mr. Backes as attorney for the
20 purpose of having his advice in the matter of all the things which you have here testified to on this witness stand?

A. I did. That was instructions from the officers of the company.

Q. My question is, did you inform him of everything?

A. I did.

Q. Did you conceal anything from him at all, of the matters that you have here testified to?

A. Not a thing.

30 Q. And did you particularly tell about the appearance of the pump, its condition, color, and the gas and color of the gas, and the purchases which you had made and the circumstances which surrounded those purchases?

Mr. Herr—I must object to that, on the ground it is leading. I have tried to be patient, but I must ask him to stop now.

The Court—The objection is sustained on the ground the question is leading.

40 Mr. Able—It is leading.

Q. Tell us all you told Mr. Backes.

A. I went over all the letters and told Mr. Backes everything that had taken place.

Q. What was it?

A. Do you want me to go over everything I went over yesterday and all that?

Q. Yes.

A. I told Mr. Backes that on the third day of March, 10
about nine o'clock in the morning, or ten o'clock, I visited the O. K. Service Station in company with Mr. Eck, purchased five gallons of gasoline from a pump that was painted similar to—exactly like—those of the Sun Oil Company; that I asked the attendant if it was blue Sunoco gasoline and he said it was, and Mr. Eck, who was in my company, a salesman for the Sun Oil Company, just beginning in this territory, asked him if it was blue Sunoco gasoline, to which he replied it was; and that from there we came to Flemington where I 20
talked with Mr. Hyland and Mr. Hyland told me that he had been deceived by the pump and gave a very dramatic story of how he had passed the O. K. Service Station on Sunday night and late at night, driving at a very high rate of speed, he saw the blue and yellow pump and the blue gasoline and his ire was aroused immediately and he threw on the brakes so as to throw the occupants from the rear seat and took time to curse Mr. Wright and myself up and down.

Q. Did you tell that to Mr. Backes?

30

A. I told that to Mr. Backes. I told Mr. Backes that I would follow on his advice and his suggestions to make some more inquiries from other folks who had been deceived, and later on I reported to him what had been told me by Mr. Brady and Mr. Meeker and Mr. Slatery and Mr. McGuire. I told Mr. Backes of my visit on March thirteenth, that I had purchased gasoline in company with Mr. Eck and Mr. Connell, and I had asked again if this was blue Sunoco and was told that

40

it was, and that Mr. Eck had asked, "Is this blue Sunoco good for cleaning?" and the reply was that blue Sunoco was good for cleaning; that I left and before I left I had two gallons in a can and I said to the attendant, "Are you positive this is blue Sunoco?" and he said, "It is blue Sunoco." I told Mr. Backes that we had taken a picture of the O. K. Service Station, that Mr. Connell
10 used the camera and I stood with my head over his shoulder so we could focus it and get the picture exactly as I wanted the photograph taken, and produced the photographs to Mr. Backes.

Q. Did you say you showed him the photographs?

A. I showed him the photograph.

Q. I show you a photograph which will be marked—
(Photograph marked *D-12* for identification..)

Q. — *D-12* for identification and I ask you—

Mr. Fisher—That will certainly be objected to.
20 I will let the court have a look at it.

(Photograph handed to the court.)

Q. —and I ask you whether that is a photograph in the condition in which you presented it to Mr. Backes at the time you were relating the circumstances which occurred antecedent to the bringing of the complaint in this matter?

A. It is.

Q. Is that the identical picture?

A. That is it.

30 Q. Was it marked as it is now?

A. It was.

Q. And that was presented to Mr. Backes?

A. It was presented to Mr. Backes.

Mr. Able—Now, if your honor please, I offer it.

Mr. Fisher—We have no objection to that if he acknowledges he marked it.

The Witness—This is my writing.

The Court—All right.

(Photograph referred to and offered in evidence is marked *Exhibit D-2*.)

Q. Now, proceed with the things that you told Mr. Backes.

A. I told Mr. Backes that I had taken the gasoline sample in person to Mr. Angstadt at the Marcus Hook laboratory; that I had written him a letter the next day, and gave Mr. Backes a copy of the letter which would restate in writing what I had told Mr. Angstadt verbally. 10

Q. Did you show Mr. Backes the correspondence that you had had with the legal department of the Sun Oil Company?

A. I did. That was all turned over to him.

Q. I show you letters marked *D-9* for identification, *D-6* for identification, *D-4* for identification, *D-5* for identification, *D-7* for identification and *D-10* for identification. Were those all turned over by you to Mr. Backes? 20

A. (After examining papers.) Yes, sir.

Q. Was that all before you made any complaint in this matter?

A. Yes, sir.

Mr. Able—If your honor please, at this stage I will offer those letters in evidence.

Mr. Herr—I would like to read them, Mr. Able, if you do not mind.

Mr. Able—They are offered for the purpose of showing exactly what he did with regard to the investigation before he brought the complaint. 30

Mr. Herr—(After examining papers.) I object to the admission of the letters. There is no rule better founded than that a man cannot introduce in evidence letters passing from one part of this corporation to another part of it, to bind a party suing him by those letters. Furthermore the letters are offered from Brooks to Pennsylvania lawyers

whose advice to him has nothing to do with the law of New Jersey and is not a legal excuse to him for any action he may take. And the letters are purely self-serving documents. They are not accompanied by the envelopes in which they were mailed, and, as I stated in the first place, they are between departments of the same company and they are
10 clearly incompetent. It amounts to me writing a letter to myself setting out facts that I think would justify an arrest, and receiving a letter and taking it to my counsel and asking his advice on it. Obviously such a document is incompetent.

The Court—I suppose you are offering them, Mr. Able, as showing the information which Brooks gave his counsel and as being part of the information upon which counsel acted in advising
him.

20 Mr. Able—That is all it is offered for. We are not seeking to prove anything except what this man did as a matter of precaution before he ever made any complaint.

Mr. Herr—If that is the sole purpose of the offer the letters are clearly incompetent because all that he could legally tell his counsel was what he himself saw. He cannot tell what people told him their information was or anything of that nature.

30 The Court—I will admit the letters not for the purpose of proving the truth of the facts contained in them but as being part of the information which the defendant conveyed to his counsel.

Mr. Able—That is all we are seeking to do. We are offering them to show what information he gave counsel.

The Court—They may be admitted for that purpose.

Mr. Herr—I ask an exception.

The Court—Note an exception.

40

(Letters referred to, fastened together, are marked *Exhibit D-3*.)

Mr. Herr—Your honor will allow me at the noon recess to argue the point of law, because I have a number of cases on it and I do not want to take the time now.

The Court—All right.

Q. What else, if anything, did you tell counsel before 10
you brought this complaint?

A. I told him of my visit on the twelfth of March, the second visit to the O. K. Service Station, when I engaged in conversation with the attendant, and told him that he had sold me gas as blue Sunoco that was not, which at first he denied and then later when I pressed him and reminded him of the occasion he refused to talk. I told Mr. Backes of my interviews with Mr. Slattery and Mr. Meeker and Mr. McGuire and Mr. Brady, and I think I have mentioned Mr. Hyland. 20
Furthermore, I took Mr. Backes in my car and drove out to show him the pump so that he could see with his own eyes the color scheme and the color of the gasoline, the location of the station, and could verify the facts as I had stated to him.

Q. Was this all before the complaint was made?

A. This was all before the complaint was made. There were no letters that passed bearing on the subject between myself and anyone, or any conversation, that I withheld from Mr. Backes. 30

Q. In consequence of the information which you furnished to Mr. Backes and after Mr. Backes had made the inspection himself as your counsel, what happened?

A. Several days intervened and Mr. Backes sent for me and acquainted me with the law and said I had sufficient evidence, to his mind, to enter a complaint, and following his advice I entered complaint against Mr. Hafner.

Q. He directed you to make a complaint?

A. He directed me to make a complaint. He went with me when we made the complaint, and we were in Squire Websters office and made a search for the squire or justice of the peace or whatever you call him in New Jersey—magistrate—and after half a day's search we found Mr. Webster, and Mr. Backes dictated the complaint and I wrote it on Mr. Webster's typewriter. The
10 next thing, as I recall, was the day the arrest was made and I appeared before Squire Webster—

The Court—I suppose this is not material now.

Mr. Able—It is a matter of the completion of the testimony.

Mr. Herr—I am not objecting.

Q. Was there a hearing?

A. There was a hearing.

Q. As a result of that hearing do you know whether he was held for the grand jury?

20 A. The result of that hearing was that he was held for the grand jury, and I appeared before the grand jury that same day.

Q. And you afterward appeared and gave evidence in the suit, after an indictment had been found?

A. Yes.

Mr. Able—Cross-examine.

Cross-examination by Mr. Fisher.

Q. Mr. Brooks, you say that you had some talk with
30 Mr. Slattery of Flemington, New Jersey?

A. Yes.

Q. How did you get in touch with Mr. Slattery?

A. By telephone.

Q. How did you come to get in touch with Mr. Richard Slattery?

A. I cannot say just how.

Q. Now, you can say, can't you, who told you to get in touch with Mr. Slattery?

A. I said I could not say so.

Q. You now say that you met people who told you to get in touch with Richard Slattery?

A. There was one or two present.

Q. Who were they?

A. His daughter, and Mr. Joseph Hyland.

Q. What is his daughter's capacity in your company?

A. Stenographer.

Q. In your office?

10

A. Yes.

Q. You did not tell us that on direct examination, did you?

A. I wasn't asked it.

Q. You did not mention it in the trial of the indictment, did you?

Mr. Able—That is objected to, if your honor please.

The Court—It is immaterial.

Q. So that Mr. Hyland, the witness you mention here as having a conversation with, is the father of your stenographer, is that correct? 20

A. That is correct.

Q. And Mr. Meeker is one of your agents at Ringoes, New Jersey?

A. That is correct.

Q. And Mr. McGuire is one of your agents at Lambertville, New Jersey?

A. That is correct.

Mr. Able—He so stated.

30

Mr. Fisher—Now, may it please the court, am I to be interrupted constantly by counsel?

The Court—No.

Q. And Mr. Brady, whom you mentioned as having a service station on the River Road is one of your agents?

A. That is correct.

Q. Will you tell the court and jury, please, who outside of an employee or agent of the Sun Oil Company

40

made any complaint whatever to you about the Hafner Service Station?

A. Directly, none.

Q. None at all. So that all this talk you are talking about people being deceived comes to you through the mouths of agents or employees of the Sun Oil Company?

A. In the natural way it would.

10 Q. That does not answer my question. Will you please answer that question?

Mr. Able—That is an answer.

Mr. Fisher—No. It calls for a yes or no answer.
(Last question read.)

The Witness—Mr. Fisher answered the question when he asked it. I say that is the natural way for it to come.

The Court—Did it come that way or not?

The Witness—Yes, it did.

20 Q. Now, Mr. Brooks, you remember being before Justice of the Peace Webster in this case, don't you?

A. Yes.

Q. And you remember testifying here in the trial of the criminal case?

A. Yes.

Q. When you were before Mr. Webster did you or not testify that Mr. Hafner sold you this gasoline?

A. I cannot exactly recall the testimony. I would say that I testified that I purchased the gasoline at his station.
30

Q. I am asking you whether or not you did not testify on the trial of the criminal indictment that in presenting your case before Justice of the Peace Webster upon the original complaint—you stated "I testified that Hafner sold me this gasoline but I was mistaken."

A. I never said that.

Q. Now, I ask you—

Mr. Able—When was that?

Mr. Fisher—On the trial of the criminal indictment.
40

Q. I ask you if on the trial of the criminal indictment you were not asked this question, "Didn't you say in the hearing before Justice of the Peace Webster that the gas was sold to you by Mr. Hafner?" And didn't you answer, "Yes, I said that, but I was mistaken. It was sold by an attendant?"

A. I do not recall that.

Q. Do you now say that you did not testify before 10 Justice of the Peace George Webster that this gas was sold to you by Hafner?

A. I will say that I testified that I purchased gasoline at that station.

Q. Did you say before Justice Webster that this gas was sold to you by Mr. Hafner?

A. I don't think I did.

Q. Will you say that you did not?

A. Not positively, no, sir.

Q. And on the trial of the criminal indictment wasn't 20 that statement called to your attention and didn't you say it was a mistake, that you bought it at the station but not from Mr. Hafner?

A. I do not recall saying anything like that.

Q. Well, you did not buy it from Mr. Hafner, did you?

A. No, sir.

Q. You say you never saw Mr. Hafner around there?

A. That is right.

Q. Did you ever ask to see Mr. Hafner? 30

A. No, sir.

Q. You never asked the man whom you say you did see if you could talk to Mr. Hafner or if Mr. Hafner was around?

A. I asked him where he was.

Q. And didn't he say, "He is in the place. I will go get him," on one occasion?

A. He said he was out; he didn't know where he was.

Q. Didn't he say on one occasion, "He is in the store. I will go get him?"

A. No, sir, not that I recall.

Q. On the twelfth day of March, 1930, when you called at this service station didn't Mr. Eggert tell you in answer to your question that Mr. Hafner was in the service station and he would go get him?

10 A. He told me he did not know where he was.

Q. Will you answer that question, yes or no? Did he tell you that or didn't he?

A. No.

Q. And when Hafner started out of the store toward your car didn't you step on the gas and beat it down the road?

A. I do not recall ever "beating" it. I did not know Mr. Hafner to "beat" it from him.

20 Q. You remember testifying in the trial of the criminal indictment, don't you?

A. I recall some of it.

Q. I know you don't recall it all. I just found that out.

Mr. Backes—I move to strike that out.

The Court—Strike it out.

Q. Didn't you testify under oath in that case that the attendant did not make any special representation except he said it was blue gas?

A. No, sir.

30 Q. You say that you did not?

A. I say that I did not.

Q. Didn't you testify in the trial of the criminal indictment that as a person rode along the road this looked like a Sunoco pump but, of course, when you got closer to it you could see the difference?

A. No, sir.

Q. You did not testify to that?

A. No, sir. My testimony was that it was very similar, an exact imitation.

Q. Which did you testify to, that it was similar or that it was exact?

A. I used the words "similar" or "exact imitation" repeatedly through the trial.

Q. Which was it?

A. It was an exact imitation.

Q. Then it was not just similar. Now, Mr. Brooks, having sworn under your oath that it was an exact replica, as you said, of the Sunoco tank, I call your attention to this sign— 10

Mr. Able—I object to the form of the question.

The Court—The question may be stricken out in the present form.

Q. You just testified that the tank you saw there was an exact replica of the Sunoco tank. I ask you whether or not that seal was on the tank that you saw at the Hafner Service Station either the third or twelfth of March? 20

A. It was not on.

Q. Then when you say it was an exact replica you are telling something that is not true, aren't you?

A. No, sir.

Q. Then the seal was on there, was it?

A. No, sir.

Q. Then are you telling the truth—

The Court—The form of that question is improper. It is for the jury to say whether this man is telling the truth or not. 30

Q. I ask you was this canopy or cap on the tank you saw down there?

A. No, sir.

Q. And yet it was an exact replica that you saw, eh?

A. The cap on the pump, I do not consider that—

Q. That is part of the replica. To be a replica of anything it must be the same—explain what you mean by a replica.

A. A pump that is painted to look like a pump belong-

ing to another company through which it markets its products so that to the average observer it would appear to be the same thing is a replica.

Q. That is your idea of a replica?

A. There are no two things that can be exactly alike. You cannot use the same iron in making the second pump that you use in the first.

10 Q. Now your idea of a pump which looks exactly like this one, marked "A," a pump that does not have a cap on and does not have this seal on—your idea is that they are replicas?

A. Yes, because we have some pumps where from certain angles you cannot see the Sunoco sign, and we have some with the globes not on.

Q. Do you have many that you could not see the top of?

A. We have some that the top is not on.

20 Q. I understood you to say not later than yesterday afternoon that the only pumps you had in all Hunterdon County without this cap is pumps under a canopy?

A. That is right.

Q. Then there is no pump in Hunterdon County standing out in the open like this pump that does not have that top on?

A. That is true, but there are pumps under canopies without that on.

30 Q. Then this pump at Hafner's could not be a replica of any other pump in Hunterdon County?

Mr. Able—I object because that is arguing the question with the witness.

The Court—He may answer that question.

Q. How about that, Mr. Brooks?

A. It could if we had some pumps in Hunterdon County that are under a canopy.

The Court—The question may be answered.

Q. Do you have any pumps like that in Hunterdon County?

A. At that time we had two pumps at the station of P. J. McGuire, that did not have a globe on the top.

Q. How many pumps do you have in Hunterdon County?

A. About a hundred.

Q. And you pick out two that did not have a canopy on. Now, can you pick out any more that did not have a canopy on top, or whatever you call it? 10

A. I think so, if I had—

Q. Well, you have lots of time.

A. There is a man named Lowerman, above Califon.

Q. What is the town?

A. I suppose that would be Califon, R. F. D. Some of these I do not remember their names, but I know there are such pumps to be found.

Q. Now, you compel your dealers to take certain advertising materials from you, don't you?

A. I do not know of any compulsion. 20

Q. Do you have a station in Hunterdon County that does not have some sort of advertising sign erected from the ground up?

A. We usually try to place a sign.

Q. Can you tell me a station where you do not have them? How about Meekers station at Ringoes?

A. That has a sign.

Q. How about Mr. Apgar, here in Flemington, who sells your gas?

A. It has a sign. 30

Q. All the stations from here to Ringoes have a Sunoco gas ad erected?

A. I think they all have signs.

Q. As a matter of fact that is one of the ways people tell your signs, by seeing these diamond signs suspended from a pole?

A. In the city of New Brunswick there are no signs.

Q. That is in Middlesex County?

A. Not far from here.

Q. And in a city?

A. There are a great many communities in which we cannot erect a sign.

Q. Point to one in Hunterdon County that does not have your sign?

A. I cannot recall any now.

Q. Now I ask you was there any such sign as that
10 at the Hafner service station either on the second or
third or twelfth of March?

A. There was no sign there at all.

Q. Will you tell me the size of those diamond signs that hang suspended from all your stations?

A. They come in several sizes; some of them two feet six by five feet in length.

Q. A pretty sizable sign?

A. A very good sign.

Q. You did not see any such sign as that at the Haf-
20 ner station, did you?

A. No, sir.

Q. Did you tell Mr. Backes that when you went to him?

A. I told him about that, yes.

Q. You told him there were no signs there, did you?

A. I took him out to see the station.

Q. Will you please answer my question? Did you tell Mr. Backes there were no signs there?

A. I told him there were no signs anywhere saying
30 "Blue Sunoco" at that station.

Q. There was no cap on here saying "Blue Sunoco" was there?

A. No, sir.

Q. There was no seal here?

A. No, sir.

Q. There wasn't any diamond sign saying "Blue Sunoco?"

A. No.

Q. No ground signs as you approached the station, saying "Blue Sunoco," for sale?

A. No, sir.

Q. There wasn't anything there to indicate there was blue Sunoco there for sale, was there?

A. I said that the pump was a replica of our pumps.

Q. I believe you testified yesterday that your corporation spent two million dollars for advertising? 10

A. In 1930, yes.

Q. And a large part of that advertising went for these diamond signs that hang suspended out here, didn't it?

A. Yes.

Q. And it went for this Sunoco—this type of advertising, the globe?

A. Yes.

Q. And it went for this seal pasted on here, didn't it?

A. I think that is all in the maintenance expense.

Q. Did you see anything around Mr. Hafner's service station that in any way infringed on any of your advertisements, other than blue gas in a tank and a tank that was somewhat similar in color? 20

A. Not a thing.

Q. You are not the only company that sells blue gasoline, are you?

A. We are the only company that sells blue gasoline out of a blue and yellow pump.

Q. Are you the only company that sells blue gasoline?

A. You are thinking of Purol. Their gasoline is green with a blue tint. 30

Q. What do you think it is?

A. I think it is a decidedly different color from ours.

Q. Don't you think Genoco is a decidedly different color than yours?

A. No, sir, I cannot see the difference.

Q. You think it is exactly the same, do you?

A. I think to the naked eye it is exactly the same, two feet away.

Q. Are you and the Genoco and the Purol Company the only people who sell blue gasoline?

A. There have been quite a few racketeers with blue gasoline.

Mr. Fisher—I move to strike that out.

Mr. Able—I submit that is responsive.

10 The Court—I do not think the answer is entirely responsive. It may be stricken out.

Mr. Able—He might be asked what the term “racketeers” means in the gasoline business.

The Court—Strike out the answer. Repeat the question.

(Last question read.)

Q. Why could you answer Mr. Able so fast when you cannot seem to answer me at all?

A. I cannot say how many brands of blue gasoline are marketed.

20 Q. Well, there are several?

A. Yes.

Q. They have all got a right to sell blue gas too, haven't they? You found that out in the Patent Office, didn't you, that they have a right to sell blue gasoline?

Mr. Able—I object to that as not cross-examination.

Mr. Fisher—It is in the case and he is a defendant in the case.

30 Mr. Able—It is not cross-examination and it is impertinent.

The Court—I will permit the question.

Q. You found out in Washington that you were not the only people who could sell blue gasoline?

A. I was never in Washington on it.

Q. Do you know from your connection with the company that your company attempted to get a trade-mark on blue gasoline and failed?

A. The first time I heard about it was when you showed it to me.

Q. Well, you know it, then?

A. I know you showed it to me.

Q. Well, do you know whether it is true or not? Don't you know, regardless of anything I told you, that your company failed to trade-mark blue gasoline?

A. No, I do not know that as a positive fact.

Q. Have you been told by any member of your company—

Mr. Able—Well—

A. No, sir.

Q. Well, now, Mr. Brooks, you know the Gaydos Company in Trenton?

A. I have heard of them.

Q. They sell blue gasoline?

A. Yes.

Q. And from a yellow and blue pump?

A. Yes.

Q. And they are keeping on selling it, and they are selling it today; if you go there and drive up you can buy some, can't you?

A. I don't know, I suppose so.

Q. Now, I hand you a little clipping from a newspaper and ask you whether or not that refreshes your mind as to whether or not you were refused a trade-mark on blue gas?

A. You showed me this before, and that is all I ever heard about it.

Q. You know that your company does not have a trade-mark on blue gasoline, don't you?

A. I do know that the Sun Oil Company has won several suits where others have sought to sell blue gasoline from blue and yellow pumps.

Mr. Fisher—That is not responsive to the question and I ask that the answer be stricken out.

The Court—What was the question?

Mr. Fisher—Whether they had a trade-mark on blue gasoline.

The Court—Do they or do they not, Mr. Brooks?

The Witness—I do not know, your honor.

The Court—If you do not know, say so.

The witness—I have said that several times.

Q. Now, let us go back to your testimony, as to this trial. What did you testify was the date of the hearing before Squire Webster?

10 A. I said early in April.

Q. And what did you testify to as being the date of the trial?

A. April fifteenth.

Q. Now, you had a picture there that counsel showed you while ago—

Mr. Fisher—May I use this picture to ask the witness questions?

Mr. Able—Surely.

Q. Will you tell me when that picture was taken,
20 please? You are trying hard to—

The Court—Mr. Fisher, let us refrain from these continual comments.

Q. When was that picture taken?

A. After the trial.

Q. How long after the trial?

A. Very shortly after.

Q. Then you fix the date of that picture as being very shortly after the middle of April, is that right?

A. Yes, sir.

30 Q. And do you say that very shortly after the middle of April Willard Hafner had a yellow streak painted around the bottom of his tank, is that right?

A. The picture shows.

Q. And at that stage of the game he had a big sign, "Genoco," up there, didn't he?

A. Yes.

Q. You have that very clearly in mind, that very shortly after the middle of April that yellow streak was around there?

A. Yes.

Q. Now you testified this morning that one week after you went there on March twelfth that yellow streak disappeared?

A. The yellow streak disappeared and reappeared several times.

Q. It is sort of a Houdini pump there, is that right?

A. It is quite a pump. 10

Q. And it disappeared a week after the twelfth of March and it reappeared shortly after the middle of April. Now, has it disappeared again, now?

A. I think it has disappeared.

Q. But it was there shortly after the fifteenth of April. Now, do you know any prospective customer for gasoline that was deceived by Mr. Hafner's pump?

A. None that I am prepared to say here.

Q. Do you know any member of that great body of people known as the traveling public, other than the servants or employees of the Sun Oil Company, who was deceived by this pump as they passed by over on the Lambertville road? 20

A. I have not tried to secure them.

Q. I would like you to answer my question, please.

A. I said I did not.

Q. I think I understood you to say that you did not make any effort to find anybody, is that correct?

A. I made an effort to interview among our dealers in that line. 30

Q. All interested people, I suppose?

Mr. Able—I object to that comment.

Q. Were they all interested people that you spoke to?

A. I do not know that they were more interested than the general public, no.

Q. Now, you don't mean that, do you?

A. I mean the general public is interested in receiving properly branded gas.

Q. Don't get away from the subject. You do not mean that a dealer who is selling Sunoco oil as a means of making a living would not be more interested in competition than a man riding along the highway who has no interest in the sale of gas?

A. The man riding along the highway is interested.

Q. Do you mean to tell this court and jury that a
10 dealer selling blue Sunoco gas to make a living would not be any more interested than anybody riding along the highway, in stifling competition?

A. He would be interested from the point of competition.

Q. Did you attempt to find anybody else who had been deceived by this pump?

A. I had the salesman keep his ear to the ground for whatever he could hear.

Q. Well, did he hear anything other than from your
20 dealers? If he had his ear to the ground?

Mr. Able—I move to strike that out.

Mr. Fisher—I am paraphrasing the witness.

Q. As a result of his information did you produce anybody either before the justice of the peace or in the criminal trial of this indictment that he gathered any information from?

A. No, sir.

Q. Then what you did is this, you relied absolutely on members of your organization or your agents to pro-
30 ceed against Hafner, is that true?

A. No; I relied on the facts and the law of the state.

Q. Well, who did you rely on to prove your facts?

A. On observation and my own purchases.

Q. You are paid by the Sun Oil Company?

A. Yes.

Q. Who else did you rely on for your facts?

A. That gentleman back there, Mr. Connell.

Q. That is one. He is paid by the Sun Oil Company?

The Court—You have been all over that.

Mr. Fisher—No, I have not, your honor. I have not asked a single thing about what he relied on.

The Court—All right.

A. I relied on Mr. Hyland.

Q. He was an agent at that time of the Sun Oil Company?

A. That is true.

Q. Who else? 10

A. Mr. Eck.

Q. He was a paid employee of the Sun Oil Company?

A. Yes.

Q. Who else?

A. Mr. Meeker.

Q. Mr. Meeker was the agent at Ringoes?

A. Yes, sir.

Q. Mr. Eck was the agent at Lambertville?

A. That is right.

Q. Who else? 20

A. Mr. Brady.

Q. Mr. Brady was the agent on the River Road?

A. That is true.

Q. Who else? Anybody else?

A. A telephone conversation with Mr. Slattery.

Q. Mr. Slattery, whose daughter is your stenographer?

Mr. Able—I do not see any reason for these remarks and I object to them.

Mr. Fisher—They are questions. 30

The Court—It is cross-examination, Mr. Able.

Q. She is your stenographer, isn't she?

A. Yes.

Q. Who else did you rely on for your facts in this prosecution?

A. That is all.

Q. Now, every single person you have named either is a paid employee on the payroll of the Sun Oil Company or is an agent of the Sun Oil Company, isn't that right? 40

A. Mr. Slattery was not on the payroll.

Q. But his daughter is your stenographer?

A. Yes.

Q. And you got your information about him riding by there from his daughter, didn't you?

A. I am inclined to think Mr. Hyland told me of that first.

10 Q. Now, Mr. Brooks, your company is interested in stopping the sale of blue gas by other companies, aren't they?

A. Not that I know of. They are interested in stopping the sale of blue gas when it is being sold as an imitation of blue Sunoco from pumps imitating our color.

Q. Are you interested in stopping the sale of blue gasoline?

A. Throughout the country?

20 Q. Throughout Hunterdon County?

A. No, not that I know of.

Q. Are you right now attempting to get every dealer selling your gasoline in Hunterdon County to take out Purol gasoline?

A. No, sir.

30 Mr. Able—I object to that because that cannot have any possible relevancy, and neither is it cross-examination, as to whether or not his company is endeavoring to persuade some other dealer to take out the other company's gas and replace it by Sunoco. That has really no place here. It is entirely immaterial and is not cross-examination in this case.

Mr. Fisher—My answer is this: This is a case in which, if I understand the nature of the action, the plaintiff is compelled to show some degree of malice or lack of probable cause. If I can show that not only is this man Brooks and his company trying to stifle competition such as was furnished

by Hafner, but that they were endeavoring to run out every other legitimate fuel oil in the county, by one means or the other, that shows why he caused this complaint in this case to be made. In other words, if he goes from station to station and tries to find fault with every blue gas that shows he has malice and is trying to stifle competition, and I submit this is highly proper. He is a party to the action, and when Mr. Hafner was on the stand Mr. Able went far afield, and he was sustained constantly by the theory that he was a party to the case and that it was cross-examination, and I submit this is proper cross-examination. 10

Mr. Able—Counsel apparently does not realize what kind of a case he is trying—

Mr. Fisher—Now, I ask that be stricken from the record. Such remarks are simply for the sake of the jury, and I ask that remark be stricken from the record. 20

The Court—It may be stricken from the record. Now, what is your reply to the argument?

Mr. Able—The reply is this, that the mere fact—I do not know whether it is true or not, but if it is true it would not have any materiality or relation to the issue in this case; it could not show malice in the particular case as against this individual who has been in this suit here by reason of being arrested for selling this gas. This plaintiff cannot make his own case on cross-examination unless the door is opened to him and the door has not been opened to him on any such matter as that and there was no direct examination that referred to any such condition whatsoever whereby it could by any possible imagination be brought in as a question upon cross-examination, and, as I say, having not been examined upon and having not been brought before the court upon the direct ex- 30

amination of this witness in his own behalf, it is improper from that standpoint, and it is improper from any angle because it has no relevancy to this case that we are trying now. It is merely for another purpose that this question is asked, and I really object, if your honor please, to the submission of any such question.

10 Mr. Fisher—This is a case for malicious prosecution. Certainly an element of the prosecution would be to show it is the common practice of these people to go about the county trying to do their best to stifle competition fairly or unfairly.

Mr. Backes—Your honor, I move for a mistrial in this case. It has no materiality at all, attacking the methods of this company. It is absolutely irrelevant to the issue and it is for the purpose of prejudicing the jury and I move for the withdrawal of a juror and a mistrial.

20 Mr. Fisher—Of course, your honor, that is absolutely ridiculous, because I am citing from our pleadings and trying to show what the effect would be if these people did certain things. Mr. Able's remarks were far more improper than anything I have said.

The Court—I think I have heard as much argument as I care to. The objection is sustained.

30 Mr. Backes—I should like a ruling on my motion, if your honor please.

The Court—I will overrule the motion for a mistrial.

Mr. Fisher—Now, I should like to know before I proceed further which of counsel are proceeding with the case at this time. I do not want to be assailed by both of them.

The Court—I do not know whether Mr. Able is retiring, but I think we may proceed.

Q. Now, Mr. Brooks, this was not the first complaint you had made against service station proprietors similar to Mr. Hafner's service station, was it?

Mr. Backes—Objected to as not being material.

Mr. Fisher—How can I show malice if I do not show his actions generally throughout this territory? Certainly, if he has done this it is material to show his actions in the Hafner case and his 10 malice in the Hafner case.

Mr. Backes—He is asking about these other matters again to prejudice this jury, whether this company has gone out and brought similar actions against other people.

Mr. Fisher—It would show their attitude and their method of proceeding and their malice.

The Court—You cannot show malice generally, Mr. Fisher. I will sustain the objection.

Q. Now, Mr. Brooks, you put five gallons of this 20 Genoco gas in your tank on one occasion, didn't you, down at Hafner's service station?

A. It was Mr. Eck's car I think.

Q. You put it in a car you were riding in?

A. Yes.

Q. And on another occasion you put five gallons of gas in at the service station?

A. Yes.

Q. Did you manage to get home with that car with that gas in? 30

Mr. Able—That is objected to.

Mr. Fisher—They have testified the gas was poor.

The Court—I do not think that it is material. The quality of the gas is absolutely not material so far as this case is concerned. The question is whether it was sold intentionally as an imitation of Sun Oil Company gas, or exposed for sale.

Q. Now, we will revert back to the trial of the criminal indictment. Didn't you testify in that case that if a person used that gas in their car it would knock their car to pieces?

A. No, sir.

Q. You did not testify to that, eh?

A. No, sir.

10 Q. What date did you go there the first time?

A. The third of March.

Q. Was it the third or was it the second?

A. If the complaint says the third, it was the third.

Q. Can't you remember?

The Court—The question is answered.

A. I can easily get confused with all your hollering.

Q. Well, you might easily be confused about the conversation you had with this attendant.

A. No, sir.

20 Q. Why can't you as easily be confused about the conversation as about the dates?

Mr. Able—That is argumentative. I object to it.

A. The notes were made then.

Q. Where are the notes?

A. In these letters.

Q. Do you mean you sat down and wrote these various letters at the Hafner service station?

A. I mean they contained facts that I made notations of at the time.

30 Q. Where are your notes?

A. I have not produced them.

Q. Wouldn't the notes show what date it was you were there?

A. These letters will show what date it was.

Q. Now, you say you were there what time in the morning, the first time you went there?

A. I would say between nine and ten o'clock.

Q. And you now fix it as the third day of March?

A. I should say on or about the third day of March.

40

Q. When you got there was there a lot of dirt thrown up in a pile a little bit off from where this tank had been put in?

A. I do not recall.

Q. Do you remember testifying in the criminal case?

A. Yes.

Q. Do you remember testifying that there was dirt there?

10

A. I do not remember that.

Q. Do you remember the testimony of Mr. Eck, who said there was dirt there?

A. No, sir.

Q. Do you remember the testimony of Joe Stockton of Lambertville, who said he almost upset his car on a pile of dirt that stood there?

A. I do not recall.

Q. Well, was there any dirt there?

A. I do not recall whether there was or not.

20

Q. Now, I hand you a paper and ask you if that is a contract which you have your dealers sign when they put in Sunoco gas?

Mr. Able—That is objected to because a contract which he may have made with anybody has nothing to do with the probable cause or lack of probable cause in bringing this complaint.

The Court—What is the relevancy of it?

(After argument.)

The Court—Objection overruled.

30

Mr. Able—I pray an exception.

The Court—Note an exception.

(Last question read.)

A. It is one of the contracts.

Mr. Fisher—I ask to have it marked for identification.

(Paper referred to is marked P-15 for identification.)

40

Q. Now, do you still say that your company makes no effort to stop the sale of blue gas by people who are legitimately selling it?

A. In that particular contract when we have been induced to install blue Sunoco gasoline at a station the distributor thereby warrants that he has sufficient dispensing equipment, that he will not put in any more.
10 It becomes unprofitable for the company to go into an oil city where there is pump after pump. The contract states that this man will not sell blue gasoline at his station but we don't say that he cannot sell it at another station. We have nothing to say whatever about what other places do, but to protect us and to protect our buying public and those who are using blue Sunoco, we say that this man, if he wants to sell blue Sunoco, must agree that he will not sell any other brand of blue gasoline in the same station. It is not stopping anyone else
20 from manufacturing blue gasoline. Let them have their own outlets, like we do.

Q. Look at paragraph No. 9 and tell me if that coincides with the testimony you have just given, that you tell him he can put in other gas and it only limits it to the time of the duration of the contract.

A. The distributor agrees that for a period of one year after termination of this—one year after—(reads).

Mr. Able—(After discussion.) I object to this being introduced.

30 The Court—I will overrule the objection.

Q. Go ahead.

A. A man cannot build up a business on the sales of blue Sunoco and then turn around when his contract expires with the Sun Oil Company and put in another blue gas that in any way would deceive the public. It is a contract written purely to protect the buying public and there is nothing in this which contradicts my testimony that we are not opposing the sale of blue gasoline. We are opposing it in the one particular station where

this is signed, and there are plenty of stations throughout this county and throughout the country where there isn't a blue Sunoco pump where the stations do sell blue gasoline.

Q. Now, you said to me this not only stops them from selling other blue gas but restrains them from selling any other gas. Were you right or wrong?

A. "The distributor hereby represents to the company that upon the installation—"

Q. Now, just a minute. You said that contract precludes dealers from selling any other gas than Sunoco during the term of the contract?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Read me where that is—

A. "The distributor hereby represents to the company that upon the installation of the equipment herein provided that distributor will have all the gasoline storage and dispensing equipment required for the proper operation of the distributors' business upon the above premises during the term of this agreement, and it is the distributor's intention not to install any additional gasoline storage or dispensing equipment on said premises, or to sell on said premises or within five hundred feet thereof any gasoline other than that manufactured and sold by the company."

Q. Now, that does not limit them, then, does it, to sell just Sunoco?

A. It prohibits them installing any more pumps.

Q. Is that what you said before?

A. That is what I said.

Mr. Fisher—I ask that the record be referred to and his answer read, whether he said that prohibited the sale of any other gas. He has exactly changed his testimony and it is absolutely opposite and he says they cannot sell any other gas. I would like to have the record referred to.

The Court—The record speaks for itself and the jury are the judges of the evidence. If the witness has contradicted himself it is for the jury to say.

Q. Now, Mr. Brooks, you have seen a great number of pumps come from the Wayne Pump Company?

A. Yes.

Q. Were they shipped to other plants? Did you ever
10 see any Wayne pumps shipped to anybody beside your own company?

A. I cannot say that I have.

Q. Did you see the Purol pumps that came into this territory of Hunterdon County from the Wayne Company?

A. No, sir.

Q. Do you know as a matter of fact that when the Purol pumps at the Meeker service station arrived at the Meeker service station from the Wayne Pump Com-
20 pany they were painted blue and yellow, just exactly as the Hafner pump was painted when it arrived there?

A. I remember having a conversation with the Purol Company, that they had bought a job lot of pumps painted in Sunoco colors and they would repaint them in their colors after they had installed them.

Q. So it is common practice for the Wayne Company to send out pumps painted blue and yellow?

A. No, it is not.

Q. They have sold them that way?

A. It happened twice, once with Purol and with Key-
30 stone.

Q. So you know there are occasions when they send out pumps from the Wayne Company almost the color of your pumps?

A. With the explanation—Right at this season of the year the swing is from visible pumps to electric pumps and the Wayne Pump Company always kept a supply on hand painted in Sun Oil Company colors and in Gulf Refining colors so that when the business conditions

would change they could supply the pump already painted. The average shipments to the ordinary individual are made with a pump painted red and when the swing came to electric pumps the pump companies had quite a few of the visibles on hand and have gotten rid of them in job lots and at lower prices.

Q. Do you know whether or not the pump shipped by the Purol Company to Meeker at Ringoes was erected 10 and there was gas being sold from it before it was repainted?

A. I am not acquainted with that one in particular.

Q. You do not know whether that is true or not?

A. No, I do not.

Q. It might be, might it not?

Mr. Able—He says he does not know. I object to the question.

Q. Well, now, the Wayne Pump Company sends the pump out in those colors, don't they—they send them 20 to the Purol Company and to Augustine?

A. They did that twice.

Q. A man buys a pump and without any effort on his part it is delivered to him blue and yellow, isn't that true?

A. No; there would be an explanation on the part of the Wayne Company that they were selling these pumps in Sun Oil Company colors.

Q. Now, as an experienced pump man what would you say was a reasonable time for a dealer to get his 30 pump repainted?

Mr. Able—I think that is outside the case entirely, if your honor please. I object to the question because it is not proper cross-examination.

(After discussion.)

The Court—I will permit it.

(Last question read.)

A. A week or ten days, with other conditions entering into it.

Q. And your last visit for the purpose of obtaining evidence was to the Hafner station on the twelfth day of March, is that true?

A. Yes.

Q. In addition to the Wayne Pump Company selling some of these blue and yellow pumps you, yourselves, sell some of them outright, dont' you, your own company?

A. We will sell them. We will paint them red and sell them or we will sell them to a man if he agrees to paint them.

Q. In other words, you would take this very pump that we see right here, just exactly as it is, and sell it to a man who is not going to use your oil?

A. I have never—I did it once.

Q. Who is in charge of the territory between Trenton and South Langhorne?

A. That is ours.

Q. Do you know a dealer there named Harry P. Hewitt?

A. Yes.

Q. Did you sell him two pumps?

A. Yes, but he agreed to paint them another color.

Q. When you sold them to him they were like this exactly, weren't they?

A. They were on his premises at the time.

Q. Like that there, painted blue and yellow?

A. Yes, sir.

Q. You sold them to him?

A. Yes, sir.

Q. Without repainting them yourself?

A. With a promise from him that he would repaint them.

Q. No, without your painting them yourselves, didn't you?

A. Yes, sir.

Q. And you knew at the time he was going to sell some other gas?

A. Yes.

Q. Would you have gone in and had him arrested for using those pumps?

Mr. Able—Objected to.

The Court—Objection sustained.

Q. You said as a positive fact that at the time this 10 arrest was made this globe showing "Genoco" in block letters was not on the pump?

A. That is true, yes, sir.

Q. Who made the arrest there?

A. I do not know.

Q. Did Constable Saunders make the arrest?

A. I do not know.

Mr. Fisher—Is Constable Saunders in the room?

Q. Were you present when the man was brought in under the warrant? 20

A. No, sir.

Q. Would you say that was not on there the day the arrest was made?

A. Yes.

Mr. Able—What is that?

Mr. Fisher—The cap that says "Genoco" on it.

Q. Between the time you were there at the service station on the twelfth of March and the time you made your complaint, on the thirteenth day of April, your counsel wrote a letter to Mr. Hafner and got an answer, 30 did he not?

A. Yes.

Q. Did you see those letters?

A. Yes, sir.

Q. You knew then on the tenth or eleventh day of April that Mr. Hafner contended that he was not selling blue gas in imitation of Sunoco, that he was not selling it from a pump disguised as a Sunoco pump, that

he clearly stated it was his own gas and from his own pump, didn't you; in other words, you had seen that letter?

A. Yes.

Q. You knew that from his letter, didn't you?

A. I knew otherwise from the fact—

The Court—I do not think the question is proper
10 in form. He says he received a letter.

Q. And you had had a chance to read the letter and knew what its contents were?

A. Yes.

Q. So you knew Mr. Hafner contended at that time, from the letter, that he did not violate or infringe on your rights, didn't you?

Mr. Able—The letter will speak for itself. It is
in evidence and the man says he has seen it and he
knows what is in the letter, and for him to try to
20 explain now just what it means—If he opens that
avenue we will be a long time on the letters.

Mr. Fisher—I will withdraw that question.

Q. You saw the letter?

A. Yes, sir.

Q. Now, after seeing the letter and before you made the complaint before Squire Webster did you go up to the service station to get any additional evidence?

A. I saw the station on the day I made the complaint.

Q. Did you go back there to make another buy of
30 gasoline?

A. I only made two purchases.

Q. Having been put on notice by this letter, did you go back there and make a buy of gas between the tenth and thirteenth day of April?

A. I bought gas on the twelfth of March and that was the last.

Q. Did you go back there between the tenth and thirteenth of April and take any additional photographs?

A. No, sir.

Q. You say the cap was not on there yet at that time. Did you go back and take a photograph under date of the tenth, eleventh or twelfth or thirteenth of April to show it was not on there?

A. No, sir.

Q. And despite having seen the letter you still made the complaint on information alleged to have been gotten the third of March and the twelfth day of March? 10

Mr. Able—That is objected to. The fact the complaint was made shows for itself.

The Court—Yes.

Q. Do you have a pump anywhere in service without the seal on?

A. With the name "Blue Sunoco?"

Q. Yes.

A. Why, I feel positive that we do.

Q. Then you are not truly representing the gas, are you? 20

A. There is never one without a globe or a seal.

Q. There is never one of your tanks without a globe or a seal. Now you were not positive at Hafner's place, were you? You knew that was not a Sun Oil Company pump, didn't you?

A. It would be pretty hard to deceive me when I have to O. K. every pump that is installed.

Q. And you were not the least bit deceived, were you?

A. I knew it was not a Sun Oil Company pump because if it had been I would have had to approve of 30 putting it in.

Q. You also knew it was not Sun Oil Company gas in that pump, didn't you? You were not deceived by that blue gas, were you?

A. No. I knew it was another article.

Q. And your Mr. Eck was not deceived, was he?

A. I do not know about that. It was Eck's first day with the company.

Q. You think he might have been deceived, do you? 40

A. I think he could have been deceived.

Q. And your Mr. Connell who was there, he was not deceived, was he?

A. He knew what it was before he went there.

Q. Can you produce anybody who was deceived by that?

The Court—That question has been asked.

10 A. Yes.

Mr. Fisher—All right. I will withdraw it.

Q. Now, about the twelfth. What time of the day did you go there and buy your gallon of gasoline for cleaning purposes?

A. In the morning.

Q. What time in the morning?

A. I should say between ten and eleven o'clock.

Q. And where did you go after making your buy?

A. I think we made some other purchases from some
20 other pumps.

Q. Not at Hafner's?

A. Not at Hafner's.

Mr. Able—I did not hear you.

The Witness—I think we made a trip to the Superhighway and I called below Bordentown.

Q. Is that the Virelli station?

A. The Virelli station.

Q. Did you make a buy there?

A. Yes.

30 Q. And make a complaint as a result of that buy?

Mr. Able—I object to that.

The Court—Objection sustained.

Q. Then you went from Hafner's station down to the Superhighway station near Trenton?

A. Clarksville.

Q. And then you went from there to Bordentown and made a buy at Virelli's?

A. Yes.

Q. Then where did you go with all your buys?

40

A. To my office.

Q. And what did you do after you got there?

A. The regular routine.

Q. You stayed in your office that afternoon. When did you take this stuff to Marcus Hook?

A. It may have been that afternoon or the following afternoon.

Q. Well, which was it? 10

A. I cannot recall exactly now.

Q. After you came in with these samples you stayed in the office, and do you know whether you went to Marcus Hook or whether you did not?

A. I am inclined to think I took them that afternoon. I may have had to postpone it a day.

Q. Now, you are sure you told me all you did that day?

A. Well, I have stated I think on that day when I returned and made a statement to the attendant at the station. 20

Q. What date was that? You have gotten a long time in there now. What date did you go back to the station?

A. I cannot recall the exact day. I may have drove back shortly afterward.

Q. You just testified you stayed in your office all the afternoon.

A. I may have drove back there before I came to the office. 30

Q. You testified you went from the Virelli station to your office?

A. I may have drove down the road and came back to the O. K. Service Station. I cannot recall.

Q. Why can't you? You recall all these conversations. Why can't you recall what you did?

The Court—The witness says he cannot recall.

Q. Do you remember testifying, in answer to Mr. Able's questions, that you took this gas to Marcus Hook the same afternoon, yourself? 40

A. I said I thought the same afternoon.

Q. Now, did you go to Hafner's or did you go to Marcus Hook?

A. I may have returned to Hafner's earlier in the day and I may have went to Marcus Hook the following day. I know that at some time I returned to the O. K. Service Station and at another time I went to
10 Marcus Hook.

Q. Now, Mr. Brooks, as to the samples, did anybody stay with you from the time you took the sample until you arrived at Marcus Hook?

A. No, sir. As soon as the sample was taken we properly labeled it and I delivered it in person.

Q. The only way that the chemist at Marcus Hook knew that you had gas from the O. K. Service Station at Ringoes was because you told him you had it?

A. Yes.

20 Q. No one was with you from the time you took the gas until you gave it to the chemist, is that right?

A. Well, Mr. Connell and Mr. Eck were with me until I got back to Trenton.

Q. Did they go with you to the refinery?

A. No, sir. I took my wife along to the refinery for the drive.

Q. Then the report made by the chemist to the legal department is based solely on the container that you personally took there, is that correct?

30 A. That is correct.

Q. So that the advice to the legal department is based solely on information you and you alone gave them, isn't that correct?

A. That is correct.

Q. What is your position with the Sun Oil Company?

A. Manager of the Motor Oil and Gasoline Department.

Q. Are you what they call an executive of the company?

A. I do not know about that.

Q. Do you have charge of a department?

A. Yes.

Q. And are you the executive head of that department?

A. That is right, sir.

Q. Now, let me understand about this complaint. You say that the complaint before the justice was dictated by your counsel, Mr. Backes, and that you, personally, wrote it upon the justices' typewriter? 10

A. Yes, sir.

Q. And even the justice of the peace had nothing to do with making this complaint, except putting his seal on it, is that right?

A. He read it over. He was there while the complaint was being typed.

Q. At that time you were under the impression that you had talked to Hafner at the O. K. Service Station? 20

A. I do not know whether that had entered my mind. What I had in mind was that I had actually purchased gas there at that station as blue Sunoco which I knew not to be blue Sunoco.

Q. Did you know whether the man you talked to was the proprietor or the attendant?

A. I dont know as I had reached any conclusions on it.

Mr. Fisher—Is Mr. Eggert in the room?

Q. (Indicating.) Is that the gentleman you bought it off? 30

A. Yes.

Q. Did you see him sitting in the front row, under a state subpoena, all during the trial of the indictment in this case?

Mr. Able—I object to that. What difference does it make if he sat here a month?

The Court—No difference.

Mr. Fisher—I will withdraw the question.

Q. Was he called as a witness for the State in the trial of the indictment against Hafner?

Mr. Able—I object.

The Court—You need not answer that question.

Mr. Fisher—Is William Saunders in the room?

Q. (Indicating.) Do you know this man who served the warrant on Mr. Hafner?

10 A. No, I don't.

Q. Now, upon your advice there was a young man named Holcombe subpoenaed here during the trial of the indictment, wasn't there?

Mr. Able—I object to that question because it has no relevancy and no place in the cross-examination whatsoever.

(After discussion.)

The Court—I will sustain the objection to the question.

20 Q. Was there anybody else present down there the day you claim to have made this purchase from Eggert, beside you and Eck and Eggert?

A. I do not know.

Q. Was there a young man named Holcombe down there at the time and standing by?

A. I do not know.

Q. Was there anybody else standing by?

A. I don't know. I was not interested or concerned about it.

30 Q. Well, you were there, weren't you?

A. I was there but I was not there to—

Q. You were there to take pictures, weren't you?

A. Yes.

Q. Well, you have to take a pretty good look at a place to get a picture of it, don't you?

A. I did not take a picture of the entire place. I took a picture of one pump.

Q. Did you see anybody else there at that time?

A. I do not recall.

Q. Did you have a conversation with a young man named Holcombe?

A. I do not recall it.

Q. Did you inquire of the man back here, who you say you bought the gasoline from, as to whether or not he was an employee of Hafner's?

A. No, sir.

Q. Then you came up to Flemington and had Hafner arrested and confined on a statement some man made to you, whom you didn't even know was connected with the service station, other than he poured gas in the car?

A. That man served me, took my money and gave me change.

Q. You did not know who it was?

A. No.

Q. And you thought it was Hafner, didn't you?

Mr. Able—I object.

The Court—He has been asked that question, 20
Mr. Fisher, not less than seven different times to my personal knowledge.

Q. Now, as district manager of the Sun Oil Company you are interested in keeping out as much competition as you can in Hunterdon County, aren't you?

Mr. Able—Objected to.

The Court—Objection sustained.

Q. The Gaydos Company are still selling blue gas from a yellow and blue pump, aren't they?

A. I don't know. 30

Mr. Able—I object to that.

The Court—The answer was "I don't know."

So that it is harmless.

Q. Will you tell me please how the color got on that picture (indicating)?

Mr. Able—Just a moment. Let us be sure if it has been introduced in evidence.

Mr. Fisher—It was marked for identification and you asked a lot of questions about it.

Mr. Able—I think that is a picture that was produced and there was some discussion about it. It has not been marked in evidence.

Mr. Fisher—There was a lot of questions asked about it and he explained about the two artists. That is all.

10 Mr. Able—I used it on examination as to its identification and—

The Court—Have you any redirect examination?

Mr. Able—Yes.

Redirect examination by Mr. Able.

Q. Now, your acquaintanceship with Hafner has been questioned upon cross-examination. When did it occur?

A. The first time I saw Mr. Hafner was the day he was arrested.

20 Q. Did you ever know of him before this, did you know who he was before?

A. No, sir; I didn't even —

Mr. Fisher—I object to that question because the court just told me it had been answered seven times and I suppose if it was answered seven times for me it has been for him.

Mr. Able—I will withdraw the question.

30 Q. Now, have you any other explanation than that you gave during the cross-examination, of what you term to be a replica or exact imitation of a Sun Oil Company pump?

A. In my estimation it is a pump that is designed similar to ours and that is painted in the same color scheme as the Sun Oil Company uses on theirs.

Q. It was inquired of you by counsel whether this top was on and whether this—what do you call that label?

A. A decalcomania, it is called in the trade.

Q. And your answer was given. Now, what effect, if any, does the fact that that was not on when you examined it have with your statement that your pump was an exact replica of the Sun Oil Company pump?

A. I was speaking in terms of the design of the pump and the color scheme and not stating the markings that might be there in making reference to that so emphatic as I might have made them. 10

Q. Inquiry has been made on the cross-examination relative to the placement of signs of the Sun Oil Company at these various stations. Are they placed there always immediately after the pumps are put in or when the station is opened?

A. Not always, but they don't follow long afterward.

Q. You have to take time to do all that, do you not?

A. We have to take time.

Q. Now, the matter of how much it costs for advertising for the Sun Oil Company and for its different 20 branches, do you know anything about that, is that any part of your duty?

Mr. Herr—I object to that as impeaching his own witness. He stated that in 1930 they spent two million dollars and in 1929 a million and a half and in 1928 a million.

The Court—I will permit the question.

A. The advertising department furnishes my department with those figures so that we can use them in sales talks and sales arguments. 30

Q. You get that information through the different departments?

A. Yes, sir.

Q. And was it from that source that you made those statements?

A. Yes, sir.

Mr. Able—I believe that these dates are satisfactorily established, but they have been somewhat mixed up I think.

The Court—Do you mean between the second and third?

Mr. Able—Yes.

Q. Now, what did you mean occurred on April fifteenth, when you said that was the date of the trial?

Mr. Fisher—I object to that.

The Court—Objection overruled.

10 (Last question read.)

A. (No response.)

Q. I understood—

Mr. Fisher—Now, I object to helping him any further.

The Court—Ask the question, Mr. Able, and I will rule on it when it is asked.

Q. I understood you to say, or at least it led me to believe that you stated, that the trial was to be on the fifteenth. What trial do you mean?

20 A. The hearing.

Q. When you used the word “trial” did you mean the hearing before the justice of the peace?

A. I did.

Mr. Fisher—I object. That is putting words in the witness' mouth.

The Court—That question was leading, Mr. Able. Ask what he meant.

Mr. Able—I will withdraw it, but it can do no harm.

30 The Court—It cannot do a bit of harm, and it is immaterial in this trial. This man was arrested, a hearing was held, he was tried and acquitted. Now, I do not know that it makes a bit of difference so far as the testimony so far is concerned, whether the hearing was held on the fifteenth or when it was held, so far as that is concerned. The question is whether the circumstances at the time when the evidence was collected justified this man in

believing that there was an offer of gas under an assumed name or under a wrong label.

(After discussion.)

(Last question and answer read.)

The Court—Strike it out. Reframe the question.

Q. What occurred on April 15, 1930?

A. Hafner was brought before Squire Webster and 10
hearing was held and he was held until the grand jury met.

Mr. Fisher—I move to strike that out because it has been answered both on direct examination and cross-examination that the hearing was in the early part of April and the trial was the fifteenth.

The Court—I will overrule the objection on the ground it is for the jury to say which is correct.

Mr. Fisher—I ask an exception.

The Court—Note an exception. 20

Q. When, if you recall, was the trial of the indictment following the complaint in the original criminal suit in this matter held in this courtroom?

Mr. Fisher—That is objected to for the same reason. It is an attempt on the part of counsel to get his witness to change his testimony.

The Court—Objection overruled.

Mr. Fisher—I pray an exception.

The Court—Note an exception.

A. I am going to admit that these dates are confused 30
in my mind just now.

Q. Do you know when the court was in session here for the trial of indictments?

A. I cannot give you the exact date right now.

Q. Do you know whether it was in April or—

Mr. Fisher—I object to that as leading.

The Court—Objection overruled.

Mr. Fisher—I pray an exception.

The Court—An exception may be noted.

Q. Do you know whether it was in April or in May or approximately the time?

A. I think it was the last of April or the beginning of May.

Q. As to the inquiry as to the specific sales of gas from the tanks, about which so much testimony has been given, how, if at all, did you obtain information of specific sales, and did you obtain information of any specific sales?

A. The only specific sales are the two purchases that I made myself.

Q. With regard to the inquiries which you have made of the different dealers in gasoline, what response did you get from those inquiries among the dealers, their attitude?

A. Among the dealers, their attitude is that without exception—

20 Mr. Fisher—I object.

The Court—That is not responsive.

Q. Upon inquiries what response did you get with regard to sales having been made from this tank?

A. That sales had been made from this tank, that people had complained to the dealers.

Q. Did you get the names of the persons to whom the sales had been made, from the dealers?

A. I secured a name but promised the man I would not repeat it.

30 Q. I do not care what you promised. My question is, did you obtain names of persons who purchased at the Hafner station?

A. I did, yes.

Mr. Fisher—I object unless he incorporates in the question that they purchased this gas thinking in was blue Sunoco gas.

Mr. Able—My questions all refer to the sale of gas and the appearance of—

The Court—From this particular tank?

40

Mr. Able—Yes, sir.

(Last question read.)

Mr. Fisher—I object on the ground the information comes from the mouth of a third party and the plaintiff would not be bound by it.

The Court—No, he would not be bound, so far as the truth of the statement is concerned, but it would be information upon which this man acted 10 as giving probable cause for the action he took. I will admit it.

The Witness—Yes. Mr. Hyland told me.

(At 12:30 o'clock in the afternoon a recess was taken until 1:30 o'clock in the afternoon.)

The Court—Mr. Able, now I understand you are willing to stipulate that the original papers in the criminal prosecution may be substituted for the copies that are now in.

Mr. Able—Yes. I assume they are the originals. 20 Of course, the costs of the justice are here. They ought to be extracted.

The Court—You may take out what you do not want.

(Papers fastened together are marked *Exhibit P-16*.)

Q. On cross-examination, Mr. Brooks, it was inquired of you how you were able to fix the dates and the details as to what you saw at the O. K. Service Station, and you stated that you had made memoranda at the 30 time from which you wrote your letters to the legal department, I believe, of your company?

A. Yes.

Q. I show you a paper which will be marked—

(Paper referred to is marked *D-13* for identification.)

Q. —*D-13* for identification and ask whether this paper was made by you or at your direction?

A. Yes. That is a memorandum—
Mr. Fisher—I object.

Q. When was it made?

A. That memorandum was made on the third of
March, when I returned from the O. K. Service Station.
It was dictated and a copy placed in my file.

10 Mr. Fisher—I objected. That is something he
did not write down at the time.

The Court—Was it made immediately upon your
return?

The Witness—Immediately upon my return
from the O. K. Service Station.

Mr. Fisher—He has testified he drove around
to three or four other service stations.

The Witness—This is March third.

20 The Court—The memorandum would not be ad-
missible in evidence in any event. It could merely
be used to refresh his memory.

(After discussion.)

The Court—It is not admissible in evidence. It
would be a self-serving declaration. If the witness
wants to use it to refresh his memory he has a
right to do that.

Q. You said that this memorandum was made on the
same day of the visit to the O. K. Service Station near
Ringoos?

A. Yes.

30 Q. And from this memorandum did you prepare, in
part, your report to your company?

A. I did.

Mr. Able—I presume that your honor has made
the statement that you do not consider it admissible.
I do not presume to offer it for the purpose of prov-
ing a single thing that is in it, but I think that it
would be admissible to show that he did make a
memorandum.

The Court—No. He has stated that in his testimony.

Mr. Able—I will not offer it except for the purpose for which it is now intended to inquire about, to show that a memorandum was made. I will not offer that itself other than the testimony that has been given relative to the paper. It has been inquired about and identified as having been made 10 at that time.

Q. Now, Mr. Brooks, you were previously interrogated upon cross-examination with regard to what you did with the sample of gasoline which you purchased in a can and which you stated that you took to Marcus Hook. Just tell us what happened to that can, to your knowledge, and its contents, from the time it was procured by you from the tank in question until you delivered it at Marcus Hook.

A. It was immediately labeled with the name of the 20 station from whence it was taken, and the date and the time. It was a tin container with a cap screwed securely on the top. It was kept in my car; it never got out of my car. It was placed in the rear of my car until I delivered it in person to Mr. Angstadt.

Q. Was it opened between the time it was purchased and the time it was delivered at Marcus Hook?

A. It was not opened.

Q. Are you able to say whether the contents of that can as received by you at the O. K. Station remained 30 exactly the same as they were at the time you received it when you delivered it to Marcus Hook?

A. Yes, it did.

Q. Mr. Brooks—

Mr. Able—If your honor please, I ask permission to use this question as direct examination and not as redirect examination upon the cross-examination, if your honor will grant that privilege.

The Court—I will permit it, Mr. Able.

Q. After you made your inspection and had seen and done the things that you have stated that you saw and did prior to the making of the complaint before the justice of the peace, did you at the time when the complaint was presented believe that the statements therein made to be true and as constituting guilt under the statute?

10 A. I did.

Mr. Able—That is all.

Recross-examination by Mr. Fisher.

Q. Now, I want you to fix definitely for me the order of your procedure on the third of March. On your direct examination you say you had a conference with Mr. Hyland. Now, will you trace your movements for me on the third of March, 1930?

20 A. On the third day of March it was from the office in Trenton to the O. K. Service Station and then to Mr. Hyland.

Q. You went first to Mr. Hafner's and then to Mr. Hyland's?

A. Yes.

Q. A moment ago, on cross-examination, you stated you went from Hafner's to the Airway Service Station?

A. That was on the twelfth.

Q. What time were you at the Hafner place?

A. To what date do you refer?

30 Q. The third of March.

A. I would say nine or ten o'clock in the morning.

Q. Where did you go from there?

A. To Mr. Hyland's.

Q. At Flemington?

A. Yes.

Q. And what time did you get there?

A. Before the lunch hour.

Q. Did you have your lunch in Flemington?

A. I cannot recall.

40

Q. What time did you leave Flemington?

A. I cannot recall that exactly.

Q. What time did you get to the Airway Service Station?

A. I did not go to the Airway Service Station on the third.

Q. You did not go there on the third, eh?

A. No.

10

Q. Where did you go from Flemington?

A. I cannot recall where I went from Flemington. It was on some other business.

Q. Now, on the twelfth, what time did you get to the Hafner station?

A. Some time in the morning, approximately ten o'clock.

Q. Where did you go from there that morning?

A. To the Airway Service Station.

Q. What time did you get there?

20

A. Before noon.

Q. Then where did you go from the Airway Service Station?

A. To the Virelli Service Station, between Yardville and Bordentown.

Q. What time did you get there?

A. Around the noon hour.

Q. Then you had been to the Airway Service Station and gotten to the Virelli station before noon, is that correct?

30

A. Around noon, yes.

Q. Then where did you go from the Virelli station?

A. I think I had lunch in Trenton and went back to my office.

Q. Then from there where did you go that day?

A. I cannot recall distinctly just where I went that afternoon, whether it was that afternoon or the following that I went to Marcus Hook.

Q. So you do not know where you went that afternoon, is that correct?

40

A. I cannot recall distinctly, no.

Q. Didn't you testify less than an hour ago on that stand that you went back to Hafner's that afternoon?

A. I said I thought that afternoon.

Q. Now you are not sure about it, eh?

A. Either that afternoon or some time subsequent to that.

10 Q. Now, I show you papers marked *Exhibit D-3* and ask you if that refreshes your memory as to what time you got to the Virelli Service Station that day?

A. These are—

Q. Were you right when you said it was at noon?

A. Well, I wasn't so far wrong.

Q. No, you were only two hours wrong.

A. Less than two hours.

Q. One hour and forty minutes?

A. Whatever is in there.

20 Q. And you won't say whether you returned to Hafner's that afternoon or not, will you?

A. No, sir; I cannot recall.

Q. But you were mistaken when you definitely said that you did?

A. I did not definitely state it before. I said "later".

Q. You did not say from the witness stand that you returned to Hafner's that afternoon, making two trips on the twelfth of March, and when you went back the second time the man denied he had sold you any blue

30 Sunoco?

A. I said I went back at a later time, and I think yet it was the same day, but I am not positive.

Mr. Fisher—That is all.

Clinton H. Wright, recalled for the defendant.

Direct examination by Mr. Able.

Q. Mr. Wright, you are connected with the Sun Oil Company, one of the defendants in this suit?

A. I am.

Q. State your connection, please.

A. I am district manager of the Trenton Division.

Q. Where are you located?

A. My office is in Trenton.

Q. Are you familiar with the appearance, that is, the size, shape and color and design, of the Sun Oil Company's pumps as they are usually used?

A. I am.

10

Q. Have you ever seen a blue pump on the premises near the O. K. Service Station near Ringoes?

A. Between the fifteenth and thirtieth of April.

Q. Just tell us what you saw and what happened after you saw it.

Mr. Fisher—I suppose he ought to fix a time.

The Court—He just did. Between the fifteenth and thirtieth of April.

Mr. Fisher—I object to that on the ground it is after the time of the complaint and after the 20 time of the two alleged offenses and could not possibly be evidential in this case.

Mr. Able—If your honor please, I assume that if I had visited the station today and saw a tank there that resembled a Sun Oil Company tank and it could be shown that that tank was there on the day which the complaint was made about and it had certain colors and certain appearance that I would be qualified to testify how that pump appeared? That is just exactly what I propose to ask 30 this witness, what was the impression that he received of that pump, as to whose pump it was.

Mr. Fisher—I cannot see that it makes the least bit of difference, your honor. It has been settled time after time that it is the condition on the third of March and the twelfth of March. I cannot see how what the pump looked like on the fifteenth of April could be evidential.

(After argument.)

The Court—I think it is objectionable without the laying of the ground for the testimony of this witness by showing there was no change in the condition of the pump between the time when the violation was alleged to have occurred and the time you want to prove this.

10 Mr. Able—That testimony is already before your honor. We can very easily perform that function if your honor desires to hear us, but it has been shown that the tank still remains there. There is some testimony that it has been changed since, that there is some red on it now. I do not know. I have not seen it lately. But here is a case where a man says he drove by a place and saw a tank there. He saw there was such a tank there of a certain appearance, and now if we ask what the appearance was at the time when he saw it and
20 the appearance is the same as it was on the date when we made this allegations, in April, I think that goes to show what the impression might be upon the mind of the casual observer.

The Court—I will overrule the objection and admit this testimony.

Q. Now, tell us what you saw and what your impression was and what you did with regard to your observation?

30 A. Between the fifteenth and thirtieth I drove past the O. K. Service Station in company with Mr. Brooks, who was driving his own car, and with us was the assistant advertising manager, Mr. Fred Cunane, from Philadelphia, and a man named Weiss, who was the manager of the Lampfield Advertising Company of Philadelphia, and my purpose for being out that day was to make inspection for billboard locations, and I drove past this station.

Mr. Fisher—Are we supposed to—

The Court—I think that is immaterial.

Q. You drove past this station?

A. And my first impression of the place, and the only one I have or ever had, was that it was a Sun Oil Company pump, and I immediately said to Brooks, "You haven't got a globe on that pump."

The Court—This was all after the occurrence?

Mr. Able—It shows what was communicated to the defendant. It goes to show whether or not 10 that tank or pump was susceptible of tending to deceive someone.

The Court—No; the conversations would not show that. I do not think the conversations are admissible, that occurred after that date.

Mr. Able—Does your honor think that does not constitute a part of the observation which this man made at that time, he being concededly a man who was familiar with the pump? If he was deceived he has a right to show how he was deceived. 20

The Court—What he said to somebody else will have nothing to do with that. He may tell this jury how he was deceived. (After discussion.) I will sustain the objection to it.

Mr. Able—Your honor will grant an exception?

The Court—Yes.

Q. What was your impression, gained from your observation of that pump?

Mr. Herr—I object to that. He stated it once.

The Court—He may repeat it. 30

A. My impression was that it was a Sun pump installation and also that it must have been a new one because of the fact that there was no sign erected there and no globe on the pump, no advertising globe.

Q. You say there was no globe on the pump at that time?

A. As I recall the pump, there was no globe on it.

Cross-examination by Mr. Fisher.

Q. Look at the picture marked "A" there. That is a typical Sun pump, isn't it?

A. Yes.

Q. That is the same type of pump that was at the Hafner place?

A. Well, the general appearance is, because I did not
10 get out to make a detailed examination.

Q. Was this cap on there?

A. No, there was no globe on it.

Q. Was this seal on here (indicating) "Blue Sun-
oco"?

A. I would say no, from a very hasty examination.

Q. Even a hasty examination would show you if a Sunoco pump would have that, wouldn't it?

A. No, it would not, for the simple reason that these
20 are decalcomanias and are easily washed off or rubbed
off with a hose; that is, our delivery hose, and we have
quite a few pumps that those are taken off through acci-
dent. We are continually replacing that decalcomania.

Q. And when you do that you might be camouflaging
that pump, might you not?

A. When we do what?

Q. When you permit this thing to be washed off. In
other words, you might then be selling gasoline out of
a tank that might mislead people?

Mr. Able—I object.

30 The Court—Objection sustained.

Q. Do you have any outdoor tanks that do not have
the top on?

A. Yes.

Q. Where?

A. In a place where it is impossible to put them un-
der canopies.

Q. I meant out from under canopies.

A. They are all supposed to have them. When they
40 are first installed they are sometimes not put in imme-
diately.

Q. That is true, isn't it, when a pump is first installed sometimes the cap does not come, does it?

A. It is supposed to be put on.

Q. But it may be several days before they get there?

A. Yes.

Q. And it is not unlikely that it might be as much as ten days, is it?

A. I would not say ten days, because they are immediately inspected after installation. 10

Q. But invariably when they are put in there is a period when there is no cap on them?

A. Not invariably. I say it does happen.

Q. You buy pumps from the Wayne Pump Company, don't you.

A. We did. We have not recently.

Q. The Wayne Pump Company sells other people pumps too?

A. Yes. 20

Q. And they sold this particular pump there at Hafner's?

A. I have been told they did.

Q. And they sell pumps to the Purol Company?

A. I believe so.

Q. And when those pumps are shipped out of the factory they are shipped out in that identical color?

A. Only to us.

Q. How about the Purol people?

Mr. Able—I submit that is not cross-examination. 30

The Court—He has not been qualified as an expert at all. He was questioned only on the one pump at the O. K. station. I think the cross-examination will have to be limited to circumstances surrounding this pump.

Q. Now, this company has sold that type of pump to outsiders, haven't they?

A. Not that I know of.

Q. This man over in South Langhorne, did you sell him two pumps?

Mr. Able—I object to that question.

A. I do not know about that.

The Court—The question is immaterial.

Mr. Fisher—That is all.

10 *Harry F. Angstadt*, sworn for the defendants.

Direct examination by Mr. Able.

Q. Mr. Angstadt, where do you reside?

A. Philadelphia.

Q. In what capacity are you employed?

A. Chief chemist.

Q. For whom?

A. The Sun Oil Company.

Q. At what place?

A. Marcus Hook, Pennsylvania.

20 Q. How long have you been so employed or engaged?

A. I have been with the company eleven years.

Q. How long have you been engaged in Marcus Hook?

A. Principally all of the eleven years.

Q. You were there then in March and April and May, 1930?

A. I was.

The Court—What do you intend to prove by this witness, Mr. Able?

30 Mr. Able—We expect to prove that this man analyzed the sample which was brought to him from that tank by Mr. Brooks, and by his analysis we expect to show that it was not Sun Oil Company gas.

The Court—That is admitted, is it not?

Mr. Herr—Certainly.

The Court—That is just what they claim, that it was not.

Mr. Able—It also goes to show, if your honor

please, the good faith in which the defendant Brooks acted, because it shows that after he had bought this as Sun Oil Company gas, not believing it was Sun Oil Company gas, he takes it and has it analyzed to see if it was.

The Court—That is already shown.

Mr. Able—And he exercised the degree of care which a man necessarily should before ever there 10 was any charge made against the plaintiff.

The Court—I am just trying to save time. I see no reason for going into this, because I have admitted the letters coming from the department to show the information given to counsel. They are admitted for that purpose. Now, whether this was good or bad gas is entirely immaterial.

Mr. Able—We are only endeavoring to show what was done by the defendant anterior to the making of the complaint, and trying to prove what 20 the situation was that induced his action. We have no further questions.

Mr. Fisher—We have no objection to his testimony, your honor.

The Court—I have, so far as time is concerned.

Mr. Fisher—Yes, but we do feel we ought to have a right to examine him.

The Court—You cannot examine him, only on what he has already been asked.

Mr. Fisher—He has been called by the other 30 side.

The Court—You may examine him on cross-examination on the questions that have been asked so far, which I suppose have to do with the position that he holds as a chemist for the Sun Oil Company. He cannot go further than that.

Mr. Fisher—We will not ask a question, but will ask the court to ask the witness to remain in the room. We will want to use him in rebuttal.

The Court—All right.

Q. It has been testified upon the direct examination of the plaintiff in this suit, that Angstadt said that ten gallons of gas, of the gas which was analyzed by you, "would blow your car up." Is that true?

A. I did not testify to that.

Mr. Able—That is all.

10

Cross-examination by Mr. Herr.

Q. You did testify as to the quality of this gas in that trial, didn't you?

A. I did.

Q. And you made many remarks that were derogatory of the quality of the gas, didn't you?

Mr. Able—If your honor please, this is outside the direct examination.

20

The Court—No. Your direct examination had to do with derogatory remarks. That is the very question you asked.

Mr. Able—No, the examination was directed to the testimony of this plaintiff. Go ahead. Ask him anything you want to.

The Court—All right. Go ahead.

(Last question read.)

A. I cannot by any means say what I said specifically, but I did testify, no doubt, that the quality of the gasoline was not equal to our blue Sunoco gasoline.

30

Q. What did you say about it fouling an engine?

A. The question is not clear to me, about fouling an engine.

Q. What effect did you say it would have on an engine using that gas?

A. I should think it would make the engine run if you put it into the car. I do not know what you mean by what effect it would have.

Q. Would it cause a great amount of carbon to be deposited?

40

A. I would not think so.

Q. Well, there is considerable difference in the gravity of the two fuels, isn't there?

A. What two fuels?

Q. The fuel that you were testing and the regular Sunoco fuel.

A. There is a difference in the gravity, yes.

The Court—Now, Captain Herr, I want you to 10
limit yourself to what he said or did not say.

Mr. Herr—I will do that.

Q. Didn't you testify at that trial to a difference in the gravity?

A. There is a difference in the gravity.

Q. No. Didn't you testify at that trial to a difference in the gravity?

A. I very likely did.

Q. And didn't you testify as to a difference in the distillation range? 20

A. No doubt I did.

Q. And to a difference in the sulphur content?

A. There is a difference in the—

Q. Didn't you testify to that at the other trial?

A. I may have.

Q. And didn't you testify as to a difference in the ductile (?) test?

A. I do not remember.

Q. And didn't you testify to a difference in the detonation qualities? 30

A. Very likely I did.

Q. And didn't you testify it was only fifty-eight per cent. as good as your regular Sunoco gas?

A. If I may see the report, it says it was fifty-six per cent. as good.

Q. That was your testimony, wasn't it?

A. I imagine so. Yes, it is.

George W. Eck, called for the defendants.

The Sheriff—The subpoena was not served. He could not be found.

Mr. Able—What endeavor did you make to find him?

10 The Sheriff—I have been to Hylan's garage and to his home three or four different times and no one was at his home.

Mr. Able—How often do you say you were there?

The Sheriff—Three different times. I was there this morning.

Mr. Able—Has he been at home, that you know of?

The Sheriff—Not that I know of.

Mr. Able—How many—

20 Mr. Herr—I do not know what the purpose of these questions is.

Mr. Able—It is to show we endeavored to get the witness and he is not here. I was under the impression he was served.

The Court—The questions are perfectly proper, I think.

Mr. Able—Suppose we ask the sheriff to come before the court and make that statement.

30 The Court—I suppose that would be the proper method but I shall not require that unless you desire.

Mr. Able—We do not want to show any lack of courtesy or anything.

The Court—No.

Mr. Able—When did you first make an effort to serve the subpoena?

The Sheriff—The same evening you gave it to me. When was that, Tuesday evening?

Mr. Able—Was that the first?

The Sheriff—Yes.

40

Mr. Able—And you did not find him that day?

The Sheriff—No. Yesterday I was at Mr. Hylan's garage and they expected him at three o'clock and I had an officer stationed there from half past two to half past three and he wasn't home, and I was there about half past nine last night and there was no one at his home and there was nobody there this morning.

10

Joseph Hylan, sworn for the defendants.

Direct examination by Mr. Able.

Q. Mr. Hylan, what is your business?

A. Garage and gasoline.

Q. Ahe distributors of gasoline?

A. Yes.

Q. Were you engaged in the same business in March, 1930?

A. Yes.

20

Q. You are distributor of what gasoline at the present time?

A. Purol.

Q. Of what gasoline were you distributor in March, last?

A. Sun.

Q. Sun Oil Company?

A. Yes.

Q. Do you know where the O. K. Service Station is?

A. Yes, sir.

30

Q. Have you noticed a blue pump on the grounds of that service station?

A. Yes.

Q. When did you first notice it?

A. I would say real early in March.

Q. And when you saw the blue pump what was the impression that it gave you, as to whose pump it was?

A. Well, it was at night when I saw the pump first, probably about eleven-thirty, and at that particular time

40

it gave me the impression it was a Sun pump, about which I immediately called Mr. Brooks.

Q. What did you do in consequence of the impression it then gave you?

A. I called Mr. Brooks and asked him about it—I believe it was Mr. Wright that I told. I was unable to get Mr. Brooks and I called Mr. Wright.

10 Q. Will you state the occasion for your call? What did you call them for?

Mr. Herr—If your honor please, I would like to know what that is for. It is a statement made to Mr. Wright, not to the defendant here.

Q. Who did you get on the telephone?

A. Mr. Wright.

Q. Did you afterwards get in touch with Mr. Brooks?

A. Mr. Brooks came to see me the following Monday.

Q. Did you then make a complaint to Mr. Brooks
20 about the pump?

A. Not particularly, no. I told Mr. Wright about it.

Q. What did you tell him?

A. I told him that—

Mr. Herr—Wait.

The Court—This is what he told Wright.

Mr. Backes—That is for the Sun Oil Company. They are a defendant.

The Court—What have you to say to that, Mr. Herr?

30 Mr. Herr—I have no objection if it is their intention to prove that Mr. Wright told this to their counsel.

The Court—I suppose, Wright being manager of the Sun Oil Company, this would be admissible.

Q. What did you tell him, Mr. Hylan?

A. Practically, I accused him of putting a pump in the territory which I was under contract to fulfill until June first. I thought the company had put a pump in

there unbeknown to me. That was my only desire, to find out why that should be done.

Q. And when you saw Brooks did you make the same complaint?

A. Yes.

Mr. Able—That is all.

The Court—Have you any cross-examination?

10

Cross-examination by Mr. Herr.

Q. You had a talk with Mr. Brooks too, didn't you?

A. The following Monday.

Q. Did you cuss and swear during that talk?

Mr. Able—Oh—

The Court—Strike out the question.

Mr. Herr—That is the words out of the mouth of Mr. Brooks. He said when he saw Mr. Hylan he cussed and swore. That is his testimony. Now, I have a right to refute that.

20

Mr. Able—Let us assume that that happenend.

The Court—If that is in the testimony, if Brooks so testified, of course it may be cross-examination.

I will permit it. I think I recall it myself.

A. Yes, I did some cussing.

Q. Do you recall that?

A. Yes.

Q. So Mr. Brooks told the truth there?

A. Yes.

Q. What speed were you traveling when you went 30 by this pump?

A. Oh, probably forty-five or fifty.

Q. What hour of the night was it?

A. Around eleven or eleven-thirty?

Q. Were there any floodlights around the station?

A. It was dark.

Q. And you told Brooks you were going pretty fast when you went by, didn't you?

A. Yes.

40

Q. How far from the part of the road you were occupying was this pump?

A. Oh, I should say fifty or sixty feet.

Q. Now, was this cussing and swearing about this particular pump or was it some other racket between you and Brooks?

Mr. Able—I object to that, if your honor please.
10 There is no direct examination as to any "racket" between Mr. Hylan and Mr. Brooks.

The Court—This is cross-examination. I will permit the question.

A. It was in regard to the pump—two pumps out there.

Q. Two pumps?

A. It was in regard to placing the pumps, this one in particular.

Q. Did you have any conversation with him about
20 putting the brakes on your automobile?

A. No, sir.

Q. Did you put your brakes on so hard you threw people on the floor?

Mr. Able—I object to that as not material.

A. Not that I recall.

Mr. Able—I will withdraw the objection.

Q. When did you next see this tank?

A. The following day.

Q. Look at the tank shown on the wall, marked "A"
30 there, the second one from your left?

A. Yes.

Q. What did you see about the Hafner tank that differed in comparison with the tank there on the picture?

A. Well, in the first place, there was no advertising globe; there was nothing only the cap that was shipped from the factory; and there was no yellow sign displayed; there was no decalomania?

Q. What do you mean by decalomania?

A. The sign that says "Blue Sunoco."

Q. Point it out to the jury, please.

A. (Witness indicates.)

Q. Is that of sufficient size to be read quite easily?

A. Yes.

Q. How far away is it readable to the eye, ten or fifteen feet?

A. I should say so.

10

Q. Did you notice the base on the pump?

A. I did.

Q. What color was that painted?

A. I would say it was blue.

Q. It was blue?

A. Yes.

Q. After you had looked the pump over in the daylight could you tell that it was not a Sunoco pump?

A. Well, yes. Of course I had been talking to the office in the meantime, and when I went down and looked at the pump you could see there wasn't any advertising signs or nothing to prove that it was a Sunoco pump—and nothing to prove that it wasn't.

20

Q. Have you in the Purol business received that same type of pump as Hafner had there, in shipments from the Wayne Pump Company?

Mr. Able—That is objected to because it is not cross-examination and it is immaterial as to what type of pump the Purol people purchased, whether they purchased of this company or the Wayne company; and the evidence is that the Wayne company furnished the pump, and this pump is a Pennsylvania pump, whatever that may be.

30

Mr. Herr—I will withdraw the question.

The Court—All right.

Q. Are you acquainted with the type of pump furnished by the Wayne Pump Company of this general design, where the gas is exhibited in a tank above the ground?

40

A. Yes.

Q. Where did you get your knowledge of the Wayne pump?

A. By being a distributor for the Sun Oil Company, or the Sunoco Service Corporation, originally.

Q. Any other company?

A. We are using at the present time the same pumps
10 ourselves.

Q. So you are thoroughly familiar with this type of pump made by the Wayne Pump Company?

A. Yes, sir.

Q. And you have used it both in distributing Sunoco products and Pure Oil products?

A. Yes.

Q. What color do they come in when they are shipped from the Wayne factory to you?

A. Yellow at the top, and a yellow cap and yellow
20 advertising globe with the words "Blue Sunoco"; yellow at the bottom and blue at the balance of the pump.

Q. How do they come when you purchase them for the Pure Oil Company?

A. That is the way they come for the Pure Oil Company.

Q. So you have had delivered from the Wayne Pump Company identically the same pump for the Pure Oil Company as for the Sunoco company?

A. We have had, yes.

30 Q. Have you noticed the color of the gas in the Hafner tanks?

A. Yes.

Q. Are you familiar with the color of the gas sold by the Sun Oil Company?

A. Yes, very much.

Q. When you went down there to look at the pump, could you tell from your observation whether Sun gas was in the pump or not?

A. Well, of course, the gas that was in that tank

is really not a true blue gas, as the Sun gas is. It is a much lighter blue. With the naked eye you can see a difference.

Q. How many feet away could you see that difference?

A. Oh, I should say, depending on the range of the light shining on the pump.

Q. But it was clearly visible to the naked eye? 10

A. Yes, I would say so.

Q. Then you would not say that anybody driving up to that pump accustomed to the use of Sunoco gas would be deceived by it, would you?

A. Well, I wouldn't say. I wouldn't drive up to it myself.

Q. You would not be deceived by it?

A. No.

Q. How many Sunoco dealers did you have in this territory when you were their general agent? 20

Mr. Able—That is objected to.

The Court—I will sustain the objection on the ground it is outside the limits of the examination in chief.

Q. It is the policy of the Sunoco company, is it not, to distribute advertising matter to their stations?

Mr. Able—That is objected to because the policy of the Sun Oil Company as to the distribution of their advertising matter is not an issue and cannot be in any wise material to the issue. 30

Mr. Herr—I will withdraw the question.

Q. Is it the policy of the Sun company at places in this county where their gas is sold to display advertising matter separate and distinct from that contained on the pump itself?

A. Yes.

Mr. Able—That is objected to, if your honor please, because it is not cross-examination of this witness to attempt to show what the policy of the

Sun Oil Company might be in the conduct of its business.

The Court—I will sustain the objection.

Mr. Herr—Will your honor hear me on that?

The Court—No. It is outside the scope of the examination in chief.

Mr. Herr—May I be heard on it?

10 The Court—Yes.

(After discussion.)

The Court—I will sustain the objection to the question for the reasons already stated.

Mr. Herr—I pray an exception.

The Court—An exception may be noted.

Q. How long were you distributors for the Sun people in this district?

A. Twenty-seven months.

20 Q. During that time you had charge of all the pumps in Hunterdon County?

A. Yes.

Q. And it was your business as jobber to supply those dealers with Sun oil and gas?

A. Yes.

Q. And in the performance of your duties did you visit the different stations?

A. Yes.

Q. And did you familiarize yourself with the conditions surrounding the stations?

30 A. Yes.

Q. Now, didn't it occur to you when you visited the Hafner station that there were no signs displayed there such as is ordinarily displayed at all Sun stations?

Mr. Able—Objected to. That is asking the witness for a conclusion of what occurred to him.

The Court—I will permit that question.

Mr. Able—Your honor will grant an exception?

The Court—Yes.

(Last question read.)

40

A. There were no signs of it being a Sun station, no, sir.

Q. And the glimpse you had of the pump was a hasty one, at night, as you went by on the highway, that is the original glimpse that you had of it?

A. Yes.

Redirect examination by Mr. Able. 10

Q. You knew at that time what a Sun Oil Company pump looked like?

A. I should have. I was in the business two years at that time.

Thomas Percetti, sworn for the defendants.

Direct examination by Mr. Able.

Q. Mr. Percetti, what is your business?

A. Cash register salesman.

Q. Do you travel through the district of Hunterdon 20
County?

A. Occasionally.

Q. Have you ever been at a gasoline service station called the O. K. station near Ringoes, New Jersey?

A. Yes.

Q. Do you know the proprietor of that station, Mr. Hafner, who sits here to my right ?

A. I have met Mr. Hafner.

Q. Have you been on the premises?

A. Yes, I was in his place of business. 30

Q. Tell us when, please?

A. I have no recollection of the dates.

Q. Well, approximately how long ago?

A. This was in the month of April.

Q. Of what year?

A. This year—coming through from Lambertville I stopped at the O. K. Service Station to see if I could interest him in a Remington cash register, and while I was talking to him—

Mr. Herr—I do not know that there is any question.

Q. Did you talk with Mr. Hafner, this gentleman here (indicating)?

A. Yes.

Q. On your stop there?

A. Yes.

10 Q. Did your conversation have any relation whatsoever to the pumps or any of the pumps on the outside of the station?

A. Yes.

Q. Tell us just what the conversation was?

A. I was telling him about our system, the Remington cash register, where he could keep track of every gallon of gas sold from each pump, and then I happened to state, "You have a Sunoco pump or standard there. You can keep a record of each one of those pumps on
20 the Remington cash register, which would give you an entire record of the whole gasoline station for the day," and we talked on the cash register and that dropped out of my mind, the gas pumps.

Q. Why did you say that he had a Sunoco pump there?

A. When I drove into the station I took a glance there and I seen a Sunoco pump.

Q. That was the occasion for your calling his attention to it?

30 A. Well, his being a Sunoco user, that came to my mind first.

Q. You having seen this particular pump before you talked to him?

A. Yes, sir.

Mr. Able—Cross-examine.

Cross-examination by Mr. Herr.

Q. You testified in the criminal case, didn't you?

A. Yes.

Q. And in that case you had your view of this particular tank on your way out of the place, didn't you?

A. What do you mean?

Q. On your way back to your automobile after you had a talk with Hafner?

A. No. I parked my car across the highway and I walked in and I walked right by the pumps.

Q. Didn't you testify in the criminal case that you saw the pump on your way out, and isn't that the only mention that you made of the pump in your testimony in the criminal case? 10

A. I do not know what I testified to there.

Q. I think you don't. Now you did not say a word about mentioning to Hafner anything about a Sunoco pump or a cash register, did you?

A. Yes, I mentioned that because I explained all the pumps there was keeping a record of the gasoline.

Q. How many pumps were there and in what order did they run? 20

A. I do not know. I did not stop to read them.

Q. Where was the Standard Oil pump in that line of pumps?

A. I do not know, but it was in that line.

Q. Where was the Tydol pump?

A. I do not know.

Q. What pumps were there?

A. There was quite a bunch of pumps there.

Q. Name them to me? 30

A. I just recall that one because it was at the end and I walked right by it, and if I had been familiar with the gas pumps by being a Sunoco gasoline user—I just glanced over it. I didn't know whether it was Sunoco gas or what it was; I was not interested in it.

Q. You didn't have any idea?

A. No.

Q. And because you happened to see blue gas there you took it for granted it was Sun gas?

A. Yes.

Q. And that was all there was to it?

A. It was all there was to it as far as I was concerned.

Q. How did the Sun Oil Company get hold of you as a witness?

10 Mr. Able—I object to that as being entirely irrelevant.

The Court—I will sustain the objection to the question.

Q. Let me see the subpoena you have to be here today?

Q. I haven't got any.

Q. Who brought you here?

A. I just came up here on business.

Q. Who told you to be here?

A. Mr. Connell.

20 Q. You tried to sell a cash register to Hafner, didn't you?

A. Yes.

Q. And you did not succeed, did you?

A. No.

Mr. Herr—That is all.

Redirect examination by Mr. Able.

30 Q. After you had seen this Sun Oil Company gas pump at the O. K. station, as you believed, did you see anyone connected with the Sun Oil Company that you knew or had an acquaintanceship with?

Mr. Herr—I object to this.

The Court—I think you had raised the question.

Mr. Herr—Your honor did not allow me to go into that testimony.

The Court—Yes, but you did, whether I allowed it or not. Go ahead.

Q. Did you see anyone that you knew who was in anyway connected with the Sun Oil Company?

A. Yes, I saw a short time afterward Mr. Connell.

40

Q. Who was Mr. Connell?

A. The gentleman sitting there on the second seat.

Q. Do you know him?

A. Yes; I have known him quite a number of years.

Q. Tell us what happened with regard to this pump?

A. We just merely got talking in a general conversation and I said, "I see you got a Sunoco pump at the O. K. Service Station at Ringoes." That was all I said 10
about it.

Mr. Able—That is all.

Recross-examination by Mr. Herr.

Q. Were you trying to sell Connell a cash register?

A. No, sir.

Q. What were you talking to him about?

A. Just in a friendly way. I had known him for years.

Q. Do you live near him? 20

A. No. Well, we live in the same city now.

Q. How often do you see him?

A. Oh, I would say every two or three weeks or once a month, or maybe once a week, depending on how I run into him.

Q. How did you come on this particular occasion to mention this fact to Connell?

A. Well, we generally mention those things.

Q. All right. Tell me how many pumps you told him were between here and Ringoes, Sun pumps? 30

A. I do not know as I told him any, especially. I may have mentioned it to him, but I did not keep any record of those things.

Q. But you did make a record of the fact that you told him about this particular one at the Hafner place?

A. No, this came up afterward.

Q. Oh, it was only after Connell started to talk to you about the Hafner pump—

A. After it was in the trial.

Q. Yes. That is how you came to know about it. Where were you going that day?

A. What day?

Q. When you stopped there?

A. Stopped where?

Q. At the O. K. Service Station.

10 A. Canvassing around Ringoes.

Q. Were you going to spend a whole day canvassing Ringoes?

A. Well, I don't know how I might spend the rest of the day.

Mr. Able—I do not think that is material. I object to it.

The Court—What is the purpose?

Mr. Herr—I want to fix the time that he was there.

20 Q. What time were you there?

A. I have no recollection.

Mr. Herr—Now, I say his testimony is not germane and I ask it be stricken out.

Mr. Able—He said it was in April in his direct testimony.

The Court—In his direct examination he fixed it in April.

Mr. Herr—All right.

Q. On that pump was there a globe?

30 A. I didn't notice it.

Q. Well, let me see if I can refresh your memory a little bit by showing you a photograph?

A. I don't—

Mr. Able—Let me see that exhibit, will you, that you are using?

Mr. Herr—*Exhibit P-12.*

Q. Now, does that refresh your memory any?

A. No, it does not.

Q. Then your memory is not very clear of what you did see there, is it?

A. I know I seen the pumps there and I seen the color of the Sunoco and that is all I can tell you.

John V. Connell, sworn for the defendants.

Direct examination by Mr. Able.

Q. Mr. Connell, you work for the Sun Oil Company 10
in Trenton?

A. Yes.

Q. Were you with Mr. Brooks, who has preceded you on the witness stand, at any time at the O. K. station in Ringoes, New Jersey?

A. Yes, sir.

Q. Tell us when it was?

A. On March twelfth of this year.

Q. What happened at that station while you were there present? 20

A. In Mr. Brooks' car, in company with Mr. Eck and myself, we purchased some gasoline in the tank of Mr. Brooks' car, and also purchased a one-gallon sample.

Q. Who purchased it?

A. Mr. Brooks.

Q. Did you hear anything said at the time of the purchase?

A. He asked for so many gallons of Sunoco gasoline.

Q. What happened then?

A. He said, "Yes." And I took a one-gallon sample 30
can out of the car and asked him to fill it so we would have some in case of emergency.

Q. Did you or Eck say anything to the attendant?

A. Eck asked if it was Sunoco gasoline and I asked him what was the right way to pronounce the word, "Sunoco" or "Sunoco?" He said "most of them call it "Sunoco."

Q. Did you see what was done with the gallon of gasoline that was placed in the can?

A. I was sitting in the rear of the car and Mr. Brooks asked me to mark it and I marked on the can "O. K. Service Station," and the date.

Q. Have you seen these photographs that have been offered here in evidence? Did you take any of these photographs?

A. (After examining photographs.) I took the small
10 one here.

Q. Who was present when you took it?

A. Mr. Brooks.

Q. What date was it taken?

A. On March twelfth.

Q. Did you at that time observe the pump that was on the most westerly side of the row of pumps of the O. K. Service Station, toward Lambertville?

A. Yes.

Q. What kind of a pump was that?

A. It was a Wayne pump.
20

Q. What was its appearance?

A. It was painted like we paint our Sunoco pumps. It had blue gasoline in it. There was no globe on the top on March twelfth.

Q. Did you notice markings on it, yellow colored markings?

A. Yes.

Q. What were they, if you noticed in particular?

A. Do you want me to show it on the chart?

Q. Yes, just show it on the chart there?
30

A. (Indicating.) Practically the same as I am showing, without the globe.

Q. Where was the next coloring?

A. (Witness indicates.)

The Court—The testimony was "practically the same" except the part that is covered.

Mr. Able—Yes.

The Witness—(Indicating.) It was blue here and blue here and a blue band around the bottom.

Q. Where was the yellow, was there yellow at the top?

A. (Indicating.) There was yellow here and yellow here and a yellow band around the base of the pump.

Q. Was it there at the time you were there in that condition?

A. Yes.

Q. A yellow band around the bottom? 10

A. Yes.

Q. What about that stamp or whatever it is on the side, did you notice any of that?

A. No, sir; there wasn't any.

Q. Was the shape and size the same that pump?

A. Very little difference; the difference was not noticeable.

Mr. Able—That is all.

Cross-examination by Mr. Fisher. 20

Q. How do you spell your name, Connell?

A. That is right.

Q. Were you ever convicted of a crime in the State of New Jersey?

A. Parking an auto or something like that.

Q. That is not a crime. That is something we all do frequently. Were you ever convicted of a crime?

A. Will you state more specifically what you mean?

Q. Were you ever convicted of the crime of misrepresenting gasoline, putting it in tanks that were not properly marked? 30

A. No, sir, never.

Q. You say you never were?

A. No, sir, not me.

Q. Are you employed by the Sun Oil Company?

A. Yes.

Q. Let me have your full name and address, please?

A. John Vincent Connell, Orchard Avenue, Trenton, New Jersey.

Q. And the number, please?

A. 82 Orchard Avenue.

Q. How long have you been employed by the Sun Oil Company?

A. Since October, 1929.

Q. Who was present with you on March twelfth at the O. K. Service Station?

10 A. Mr. Brooks, Mr. Eck and myself.

Q. I understood you to say that you were seated in the back seat of the car?

A. Yes.

Q. Whose car was it?

A. Mr. Brooks.'

Q. What kind of a car?

A. A Graham Paige sedan.

Q. On the twelfth of March?

A. Yes.

20 Q. You were on the back seat of the car?

A. Yes.

Q. And Mr. Brooks handed you this can and asked you to mark it?

A. I handed it out to either Mr. Eck or Mr. Brooks from the rear of the car and I took it back in the rear of the car after the sample was purchased.

Q. And I understand you to say you told the man you wanted some gas to take along in that can, that you might need it?

30 A. I said to Mr. Brooks and Mr. Eck, "Here, get this can filled in case we run out, in case of an emergency."

Q. Didn't you just say that you said to the attendant "Here, get this can filled. We might need it in case of an emergency?"

A. I handed it either to Mr. Brooks or to Mr. Eck. I was on the inside of the car when I said that.

Q. You sat there, didn't you?

A. No.

40

Q. You were there to take the can back in again?

A. I went back again.

Q. You handed the can out first and told them something and then got out yourself and then you climbed back in again and they handed you back the can?

A. Mr. Brooks told me to see that he purchased Sunoco gasoline in his tank.

Q. But you got in before they were in? 10

A. I do not remember anyone else having gotten in the rear of the car. I believe Mr. Eck was in front.

Q. You were the first man out of the car and the first one back in?

A. I do not know whether I was the first one back in or not.

Q. Brooks must have been outside to hand you the gas in, wasn't he?

A. I don't remember that.

Q. Who bought the gas, you or Brooks or Eck, in the 20 gallon container?

A. Mr. Brooks paid for it.

Q. Who ordered it?

A. Mr. Brooks.

Q. Then Mr. Brooks is mistaken when he said Mr. Eck ordered it and said he wanted to clean his wife's clothes, isn't he?

A. What happened between Mr. Eck and Mr. Brooks I do not know.

Q. But you were there and heard the conversation? 30

A. Yes, sir.

Q. Well, who ordered the gas from the attendant, Mr. Brooks or Mr. Eck?

A. Mr. Brooks ordered the gasoline. I heard him say, "Put five gallons in the tank," or something like that.

Q. How about the gallon can? Did you hear that bought at all?

A. Yes.

Q. Well, who bought it?

A. I believe Mr. Brooks bought it.

Q. Then Mr. Brooks is mistaken when he said Mr. Eck bought it and said he wanted to clean his wife's silk dress?

Mr. Able—That is objected to.

Mr. Fisher—I will withdraw it.

10 Q. Did you hear Mr. Brooks testify on examination in this courtroom today that Mr. Eck bought the gallon of gasoline and told the attendant he wanted it to clean his wife's silk dress with it?

A. I do not know what Mr. Brooks said, but I know Mr. Eck held the can while the man was filling it.

Q. Now, tell me just exactly what conversation was had between anybody there at that time.

A. Mr. Brooks asked the attendant if that was good gas and he said, "Yes, it is darned good gas and we sell
20 a lot of it."

Q. What else was said? Is that all that was said?

A. After I got out of the car I asked what was the proper way to pronounce the name of the gas "*Sunoco*" or "*Sunoco*," and he said "*Sunoco*," most people called it "*Sunoco*."

Q. Is that all?

A. Mr. Brooks asked him where they got this gas and he said the truck came from Trenton, I believe.

Q. Now, you have given me all the conversation that
30 was had there, have you?

A. That I can recall at this time.

Mr. Fisher—That is all.

Herbert W. Backes, sworn for the defendants.

Direct examination by Mr. Able.

Q. Mr. Backes, your residence is in Trenton, New Jersey?

A. That is correct.

Q. And your business is what?

A. I am a lawyer?

Q. How long have you been practicing law?

A. Since 1913.

Q. You are an attorney and counsellor at law of the State of New Jersey?

A. That is correct.

Q. And a member of the firm of Backes & Backes?

A. Yes.

10

Q. With offices at what place?

A. In the Trenton Trust Building, Trenton, New Jersey.

Q. Do you represent the Sun Oil Company?

A. I do, locally.

Q. How long have you represented them?

A. About a year or so.

Q. Do you know Warren F. Brooks?

A. Yes, sir.

Q. Did Mr. Brooks consult with you regarding the probable criminality of having a blue pump on the O. K. Service Station property in Ringoes, New Jersey? 20

Mr. Herr—That is objected to on the ground that it asks the witness to draw a conclusion. I suppose the proper thing would be to tell the conversation between them.

The Court—I suppose the form of the question, as to "Probable criminality" is objectionable.

Q. Did he consult you regarding the criminality of the state of affairs that existed there? 30

Mr. Herr—That is still objectionable.

The Court—Objection overruled.

Mr. Herr—I ask an exception.

The Court—Note an exception.

A. Yes, he did.

Q. And about when were you consulted?

A. It was first brought to my attention in the early part of April, 1930, through Lamberton & Moffett, the general counsel of the Sun Oil Company.

40

Q. Was that before you had seen Mr. Brooks?

A. Yes.

Q. When did Mr. Brooks come to see you, as near as you can recall?

A. I suppose it may have been three or four days after Mr. Saylor came up from Philadelphia and discussed the situation with me and showed me the reports
10 that he had, which he went over and discussed generally the facts in the case, and then I sent for Mr. Brooks.

Q. When Mr. Brooks came to your office did you have a conversation with him?

A. I did.

Q. Will you tell us what that conversation was?

A. Well, I repeated, first of all, the conversation that I had with Mr. Saylor of Lamberton & Moffett's office and the reports that had been submitted to me of this supposed violation, and we went over the facts that had
20 been presented and he then went into detail at my request of exactly what he knew about the situation. He told me that he had—I might repeat first of all that I repeated the conversation I had with Mr. Saylor, that I had told Mr. Saylor that I would attempt to find a remedy—

Mr. Herr—Now, I do not want to object but I do not see what his conversation with a Philadelphia lawyer has got to do with the case.

Mr. Able—If you do not want to object, why
30 object?

The Court—I do not think the conversation between the attorneys would be relevant. The objection is sustained to that part of it.

The Witness—My conversation is the conversation that I had with Mr. Brooks in which I repeated to Mr. Brooks exactly what was said by Mr. Saylor and myself.

Mr. Able—If your honor please, I submit the testimony is relevant then.

Mr. Herr—I never heard of anything that a lawyer told his client that somebody else said was germane to the issue in a malicious prosecution suit.

The Court—No. It is what the defendant told his attorneys.

The Witness—The Sun Oil Company is a defendant, your honor.

Mr. Able—The witness said the matter was first called to his attention by the general counsel of the company and a visit by Mr. Brooks was made to the local counsel's office and there the local counsel informed him of a certain state of facts. That is the purpose of the testimony and it becomes a part of the conversation that took place at the time when we claim his advice was given that the proceeding be taken to institute criminal action. I conceive that probably the whole conversation would be irrelevant.

Mr. Herr—I am not going to talk any more, if the court please.

The Court—I will permit the witness to go on, so far.

Mr. Herr—And I pray an exception.

The Court—Yes.

Mr. Herr—The exception will run to all the conversation that the witness may have related to Mr. Brooks.

The Court—Yes.

The Witness—I told him that Mr. Saylor had submitted these reports which indicated the fact that Mr. Hafner had exposed gasoline for sale from a blue and yellow pump similar in color, design and form to the Sun pump and that as a result of the conversation that I had examined the law and discovered this act that was passed in 1928 which, to my mind, fully covered such an action as the O. K. Service Station was taking in using pumps re-

sembling or of a recognized brand or dispensing of gasoline from such pumps, and then I asked him to repeat to me and tell me all the details as he had them. He then told me—before going up to the station at Ringoes he described to me the pump that was there. He told me that it was a blue pump with yellow bands, dispensing a gasoline colored blue, similar in every particular to the pump used by the Sun Oil Company, resembling the pump of the Sun Oil Company, with the exception of the fact that it had no globe, that there was no name "Sun Oil" written on it, but that the resemblance of the pump itself, as far as color and form were concerned, was that of the Sun Oil Company. He, at that time, showed me the photograph, *Exhibit D-2*, which indicated, he told me, the condition that existed at that station and which he had marked with the colors as it appeared on the pump at the O. K. Service Station. He then told me of his trips to the station, of having gone to the station with two other persons, one of whom was Mr. Eck and the other Mr. Connell, and having purchased gasoline there and they having told him at that time that it was blue Sunoco gasoline. He also at that time gave me *Exhibit D-13* for identification, which was his report of the purchase that he had made at that station, one or more purchases, on that report.

30 Mr. Herr—That is not an exhibit, if the court please.

The Witness—That referred to a visit that he made to the station on March third. He also told me of a visit that he made on March twelfth and repeated to me the conversation that he had with the person who served them gasoline at the station.

Q. Can you repeat what he told you the conversation was?

A. Not in so many words, but the best of my recollection is that he had gone there and inquired for a certain quantity of gasoline and asked if it were "blue Sunoco," and they told him it was blue Sunoco and he bought some.

Q. On both occasions?

A. On both occasions when he was up there. There was submitted to me by Mr. Saylor the report of the 10 investigation made by Mr. Eck, which was also in writing, in one of these exhibits here, and all of the correspondence that took place between Mr. Brooks, making up the reports, and Mr. Saylor of Lamberton & Moffett's office. He also submitted to me the analysis made by the chemist. I think that was practically all of the conversation that took place that day.

Q. Did you hear the testimony of Mr. Brooks while on the stand?

A. Yes.

20

Q. As to what he saw and what happened?

A. Yes.

Q. Was there any part of that testimony that he gave that he omitted to tell you?

A. No, sir. I knew the whole story from beginning to end.

Q. Did you afterwards have an opportunity to see this particular pump in question?

A. I did. I went out with Mr. Brooks and he pointed out to me other pumps of the Sun Oil Company. 30

Q. What have you to say of your investigation of the pump and premises, as to the truthfulness of the statements that were made to you by Mr. Brooks?

A. Well, everyone of the statements he made was perfectly true. He represented thoroughly to me the conditions as I saw them. I do not recollect whether it was the next day or the day following that or not. As a result of this conversation I had with Mr. Brooks, as a result of the conference I had had in my office with

40

Mr. Saylor of Lamberton & Moffett, as a result of two or three telephone conferences I had with Lamberton & Moffett's office—

Mr. Fisher—Your honor, that is not competent here.

Q. You need not continue with that any further. Tell us what you did as a result of the information that you
10 obtained directly from Mr. Brooks. What advice did you give Mr. Brooks?

A. Well, I was concerned, you realize, Mr. Able, with the Sun Oil Company as well as with Mr. Brooks. Mr. Brooks was the agent of the Sun Oil Company.

Mr. Able—As has been said, we are very apt to talk too much about Mr. Brooks. The Sun Oil Company is also a defendant here and all these people we are talking about were representatives of
20 the Sun Oil Company, and I assume that all this information that he got is on the part of the defendants themselves, the two that are charged in this complaint. I am very apt to overlook the fact the Sun Oil Company is included here, myself.

Mr. Herr—The testimony is that Lamberton & Moffett are Philadelphia attorneys. There is no testimony by any officer of the corporation to show the relation of Lamberton & Moffett to the Sun Oil Company.

(After discussion.)

30 Mr. Able.—Let me ask the witness whether he knows of the relationship of the firm of Lamberton & Moffett with the Sun Oil Company?

The Witness—I have testified that they are the general counsel of the Sun Oil Company.

Q. Is either Lamberton or Moffett related to the company by way of office?

A. I do not know. They are general counsel of the Sun Oil Company.

Q. I mean, an officer in the company?

A. I do not know.

The Court—The question as I understand it now is that an objection is raised to counsel's advice to Brooks being the result of a conference or telephone conversation held with the Philadelphia counsel of one of the defendants. Now, I am exceedingly doubtful of advice given upon advice as being a 10 justification for that advice.

Mr. Able—He has not stated yet just exactly what the advice was.

Q. Did you give any opinion or advice to Mr. Brooks what to do? Did you tell him what to do?

A. This matter was placed entirely in my hands as local counsel for the Sun Oil Company. I had represented them before in other matters and acted as local counsel and I was very familiar with Lamberton & Moffett as the general counsel and had a lot of dealings 20 with them. Now, this matter was placed entirely in my hands after the report was made, by Lamberton & Moffett.

Q. After these reports you received information from Mr. Brooks, is that right?

A. I have so testified.

Q. Upon the receipt of that information from Mr. Brooks what did you advise him to do thereupon?

A. That is exactly what I have been attempting to say, that after the information I received from Mr. 30 Brooks and after going up and seeing this place I sent for Mr. Brooks again and told Mr. Brooks that he as the person with the knowledge of these events should be a complaining witness on the part of the Sun Oil Company to make this complaint against Hafner, and I asked him to go with me to a justice of the peace for the purpose of making the complaint. I advised that a complaint should be made and advised Mr. Brooks to sign such a complaint.

Q. Do you know whether, by reason of your advice, he did make such complaint?

A. Mr. Brooks accompanied me to the office of the justice of the peace, and there signed the complaint.

Q. Do you know, except for your advice, whether Mr. Brooks was acting of his own accord in the matter?

A. Oh, no. Mr. Brooks acted entirely on my advice.
10 I was the one who told him to do it.

Q. Now, this particular advice which you gave to Mr. Brooks to make this complaint, was it made entirely upon the statement of facts which he made to you?

A. The statement of facts which he had disclosed to me was the entire basis.

Q. I ask that because I thought I heard you say a moment ago you confirmed it by your own observation.

A. That is correct.

Mr. Able—Cross-examine.

20

Cross-examination by Mr. Herr.

Q. Now, the advice that you gave Mr. Brooks was in the nature of an order, wasn't it?

A. Well, our office tries to be a little more gentle than orders.

Q. Well, it was a suggestion that had the form of an order?

A. It was left to me what to do and I said Mr. Brooks was the one to make the complaint.

30 Q. You are the one who decided that the proper thing to do was to make a complaint?

A. That is correct.

Q. You sent for Brooks?

A. That is right.

Q. And told him that as counsel for the Sun Oil Company you thought that the proper procedure was to make a complaint?

A. No, I do not know as I said that. I have said that the proper procedure was to make a complaint.

40

Q. How did you come to pick on Mr. Brooks as the man to make the complaint?

A. I was not picking on anybody at all. We were after information and I had the employee of the company who was giving me this information and he was the man who had this particular knowledge and was the person with the knowledge who could make the complaint and verify exactly the facts in the case. 10

Q. The primary thing you wanted was somebody to make the complaint and when you looked over the available list you decided Brooks was the most available man.

Mr. Able—That is immaterial, if the court please.

The Court—The question is objectionable, I think.

Mr. Herr—Will your honor mind telling me upon what grounds?

The Court—Because I think you are attempting 20 to put into the witness' mouth things that are not in the witness' testimony at all. The testimony so far is that acting as attorney for Brooks he advised Brooks to make the complaint. There is no testimony that he looked around and found Brooks was the most available man to do it.

Mr. Herr—That is what he answered, that he sent for Brooks. He said he sent for Brooks. There is a very great distinction. He sent for Brooks. Brooks did not go to him to get advice 30 about how to handle this matter, that is, whether or not this was a criminal affair. He testified he sent for Brooks.

The Court—What difference does it make?

Mr. Herr—It makes all the difference in the world. It shows very distinctly that Brooks had no intention of starting this thing when he made the complaint. He did not know a crime had been committed.

(After discussion.)

The Court—What difference does it make where it started if it was started under the advice of counsel? That is the very purpose for consulting counsel, for advice on what steps to take.

Q. You assume the responsibility for advising the arrest?

10 A. I suppose all lawyers assume responsibility when they give advice.

Q. You assumed this responsibility, didn't you?

A. I gave the advice, if there was any responsibility connected with it.

Q. All right. Who had talked to you about making the arrest?

A. I have told you that this matter was brought to my attention and was left in my hands.

Q. But nobody asked you about making an arrest?

20 A. They came to me and asked me to see if there was any possible way in which this situation could be stopped, this apparent violation could be stopped, and I made an investigation and discovered that statute and conferred with Lamberton & Moffett and told them an arrest could be made. I then sent for Mr. Brooks and got the facts and advised Mr. Brooks to make the complaint.

Q. Define what you mean by the word "violation."

Mr. Able—Violation of what?

Q. You used the word "violation."

30 A. I suppose the court would take judicial notice of the meaning of the word "violation."

Q. Well, the court may, but I don't.

The Court—What is the question?

Mr. Able—To define the word "violation."

Mr. Herr—As used by the witness. He says this violation was brought to his attention, and I am asking what he means by "violation."

The Court—Well, violation of what?

The Witness—Of the rights of the Sun Oil Com-

pany, in having other people camouflage their pumps and disguise their pumps to dispose of gasoline.

Q. And that was the violation—

Mr. Able—How about the violation of the rights of the public and violation of the statute?

Mr. Herr—I object.

The Court—Proceed, Captain Herr. 10

Q. What they consulted you about was the marketing and sale of gas that they thought was an imitation of their gas, wasn't it?

A. Well, I do not think that they thought so. They knew the fact from the investigation they had.

Q. That was their conclusion and they called upon you?

A. That is correct.

Q. And rather than file a bill in a court of equity or file a lawsuit to collect damages you advised the arrest? 20

A. I suppose that remedy was left up to me.

Q. And nobody had ever mentioned arrest, had they?

A. No. Nobody ever talked to me about arrest.

Q. When did you discover this 1928 statute?

A. Well, I presume within a day or so after the first conference I had with Mr. Saylor.

(Adjourned until Friday, December 12, 1930, at ten o'clock in the forenoon.)

(Case resumed pursuant to adjournment.)

The Court—Mr. Backes was on the stand. 30

Mr. Herr—I am through with him.

The Court—Call your next witness.

Mr. Able—Is Mr. Eck in the room?

(No response.)

The Clerk—The sheriff told me this morning that he has not found him.

Mr. Able—Then we rest.

The Court—Have you any rebuttal, Captain Herr?

Mr. Herr—Yes. 40

Wesley Meeker, called for the plaintiff in rebuttal.

(No response.)

Mr. Herr—He is under subpoena by the defendants. Have you got Mr. Meeker here this morning?

Mr. Able—We subpoenaed the man but we did not find it necessary to use him.

Mr. Fisher—He is not here.

10

William Saunders, sworn for the plaintiff in rebuttal.

Direct examination by Mr. Herr.

Q. Are you the constable who served the warrant in this case?

A. Yes.

Q. I show you photograph marked *Exhibit P-12*, and ask you at the time you arrested this present plaintiff whether or not the globe appearing in that photograph was on that tank at that time?

20 A. Yes, the end tank there.

Mr. Herr—That is all.

Cross-examination by Mr. Able.

Q. What is the end tank?

A. A gas tank.

Q. What kind of a tank is it, what kind of gas?

A. Why, it is blue gas.

Q. What kind of gas did it look like to you? Did it look like Sunoco?

30 A. I do not know much about gas.

Q. Did you particularly notice the appearance of the tank?

A. I did, yes.

Q. What color was it?

A. The tank was blue.

Q. What color was the gas in it?

A. Blue.

Q. Are you familiar with the appearance of the usual and commonly used gas tanks of the Sun Oil Company?

40

A. No.

Q. You do not know what they look like?

A. Well, certainly, I saw them.

Q. What is your business?

A. I am a constable of Hunterdon County.

Q. Have you any other business?

A. Yes, several jobs.

Q. What?

10

A. I had the mail, from the Lehigh Valley station to the post office.

Q. What time in the day did you serve this warrant?

A. About six-thirty.

Q. In the evening or morning?

A. In the evening.

Q. What time of the year was it?

A. I didn't make any note of it.

Q. What was the date that you served it?

A. I could not tell you that.

20

Q. Did daylight still exist or not?

A. No, it was dark. I had lights lit on the car.

Q. Was there anything about the case that occasioned you to pay any particular attention to this tank?

A. When the warrant was given to me the justice told me that there was a complaint made against this man and to look around and see what kind of a gas tank it was and what the name of it was.

Q. Did you tell the justice when you came back?

A. Yes.

30

Q. If you went up there to look at it why are you unable to describe it with more certainty than, that is regarding the globe?

A. He told me particularly to look at the globe.

Q. You did not look at the tank particularly, eh?

A. Yes.

Q. But you do not know what a Sunoco tank looks like ordinarily?

A. Well, yes.

40

Q. Did this look like a Sunoco tank to you?

A. It was painted the same color I think.

Q. Did it look like a Sunoco tank to you?

A. It looked like a gas tank. I am not familiar with gas tanks.

Q. You have seen the Sunoco. Now, was it similar in appearance?

10 A. I have never investigated it thoroughly.

Q. Was it similar in appearance?

A. I don't know.

Willard Hafner, for the plaintiff, recalled in rebuttal.
Direct examination by Mr. Herr.

Q. Mr. Brooks has testified that he did not leave your place as you came out the door of the place. Is that so or isn't it?

A. That is not so.

20 Q. Did you see him leave?

A. I seen him leave.

Mr. Herr—That is all.

Cross-examination by Mr. Able.

Q. Didn't you testify on your direct examination that you did not know Brooks and had never seen Brooks until the time when you were arrested?

A. I did not.

30 Mr. Able—All right. The jury will remember that.

Mr. Herr—That is what Brooks testified to, Mr. Able.

Mr. Able—So did he.

Lewis F. Eggert, sworn for the plaintiff in rebuttal.
Direct examination by Mr. Herr.

Q. Mr. Eggert, where do you live?

A. Ringoes.

Q. How long have you lived there?

A. Oh, I guess about, I should say, three months.

Q. Where did you live in March, 1930?

A. Just at that time I was living at Ringoes, but my home was in Trenton then.

Q. Where did you live in April, 1930?

A. Well, I was living between Ringoes and Trenton. Sometimes in Trenton and sometimes in Ringoes. 10

Q. Do you know Mr. Brooks?

A. Yes, I know who he is; I know him by sight.

Q. Did you serve him with some gas down at this O. K. station.

A. Yes.

Q. Did you hear him testify yesterday that you said it was blue Sunoco, or words to that effect?

A. I heard him say so, yes.

Q. Did you make any such statement?

A. I did not. 20

Q. Did you make any representations to anybody with Mr. Brooks of that or a similar kind?

A. No. The only thing that I said in regard to the gas was on the second trip there, when they got the gas in a gallon can, the nozzle of the hoze would not go in the neck of the can and I spilled a lot of it and he said it didn't make any difference, that he only wanted a little bit to clean his wife's dress anyway, and he wanted to know if it was good for that and I told him I wouldn't recommend it on account of the gas being colored. That 30 was Mr. Eck made that remark.

Q. Were you a paid employee at that time of Mr. Hafner?

A. No.

Mr. Able—Now, if your honor please—I have no objection. Let it go.

The Court—All right.

Mr. Herr—That is all.

Cross-examination by Mr. Able.

Q. What is your business, Mr. Eggert?

A. Chauffeur.

Q. Who do you work for in Ringoes?

A. A man named Gray.

Q. How long have you worked for him?

A. Since September.

10 Q. How long have you known Hafner?

A. Oh, I should say three or four years.

Q. Did you know him before you came to Ringoes?

A. Oh, yes.

Q. Where did he live when you knew him before?

A. He lived on the Ringoes-Lambertville road, on the same property where he lives now, only in a different building.

Q. At the time that these sales were made from the blue pump at his station you were not attached to anyone
20 by way of employment?

A. No, no steady employment at that time.

Q. Who were you living with then?

A. I was living mostly in Trenton, at home.

Q. Who were you staying with at Ringoes at the time you made these sales?

A. I was staying on Jamison's farm some of the time and some of the time at Mr. Hafner's.

Q. You were staying at Hafner's at the time that you afforded this service, when you sold this gas, weren't
30 you?

A. Just at that present time.

Q. But you were at the gas station there with Hafner, helping him about his business, weren't you?

A. I was just there as a friend.

Q. Were you helping him—

A. I was not there to help. I was not engaged for any help.

Q. Were you paying any board to Hafner?

A. I was not.

Q. You were a guest at his place?

A. Yes.

Q. And in the capacity of his guest you attended his gas station?

A. Occasionally.

Q. Was this one of the occasions when you attended it?

A. Yes.

10

Q. And did you do it by and with the consent of Hafner?

A. No, I just stepped out to wait on a customer.

Q. Did he object to your doing it?

A. No.

Q. Did he take the money that you collected for the gas when it was sold?

A. Yes.

Q. Did he take the money for the gas which was sold to Mr. Brooks?

20

A. He did.

Q. Did he make any objection to your having served the gas at that time?

A. No.

Q. Now, when Mr. Brooks came there the first time who was with him?

A. The first time there were two other men with him.

Q. Did you know who they were?

A. I did not know at the time, but since I know that it was Mr. Eck and Mr. Connell, I believe.

30

Q. And Mr. Connell is one of the men who was on the witness stand yesterday?

A. Yes.

Q. And when they first came there you were then visiting and staying as a guest of Hafner?

A. Yes.

Q. And that visit continued and you were still staying there as a guest on the twelfth?

A. No; I had been away in the meantime.

40

Q. And you had come back?

A. Yes. I was only there for that one day at that time.

Q. At that time you were again a guest at the Hafner house?

A. I could not say I was exactly a guest there, for I did not stay there any length of time at all at that time.

10 Q. You were staying at the Hafner house at that time?

A. I was just there at that time.

Q. And you were just there at the occasions, at the time you made this service, too, weren't you—you were right there at the gas station?

A. Sure, I was there.

Q. And both on the first and second times of the purchase of gas by Mr. Brooks you served him?

A. Yes, sir.

20 Q. And both times you presented or paid the money to Hafner?

A. I did.

Q. Now, can you relate the conversation at the time that Mr. Brooks first drove up to the tank and asked for gas?

A. He just asked for gas.

Q. Did he make any other statement?

A. I believe he asked me if it was Sun gas. I do not exactly recall that. One of the times he did, but I do

30 not know whether it was that time or not.

Q. Did he say anything else?

A. He asked me if it was any good, I believe, or words to that effect.

Q. When, the first or second call?

A. I cannot say which.

Q. When he asked you if it was Sun gas what did you tell him?

A. I told him I did not think so.

Q. And which time was this?

A. I cannot say.

Q. Do you recall who was with him when he came there the second time?

A. The same three were together.

Q. The same three men?

A. Yes, sir.

Q. What was said to you at that time when they drove up to the pump for gas? 10

A. That is the time they got the gas in the gallon can and they asked me if it was all right for cleaning.

Q. What did they say before they procured the gas in the gallon can?

A. They only asked for gas in their tank.

Q. How is that?

A. They only asked for gas in their car.

Q. Did you serve them?

A. I did.

Q. What else did they say? 20

A. I think Mr. Eck asked for gas in the can and when I spilled the gas they said it did not make much difference, they only wanted a little.

Q. Was that all he said?

A. He asked if it was good for cleaning his wife's silk dress and I said I did not think so, I would not recommend it, on account of it being colored gas.

Q. Those two times are not the only times that you served gas from tanks of Mr. Hafner?

A. Oh, no. 30

Q. You have done it numbers of times?

A. Several times.

Q. Whenever you were at the Hafner place you assisted him by waiting upon customers that came to his station, isn't that true?

A. That is right.

Q. And Mr. Hafner always accepted your services and took the money for the gas that you sold?

A. Yes.

Q. Did he pay you for your services at any time?

A. No, sir.

Q. Well, you had your board didn't you?

A. What board I got I had there, yes.

Q. You did not pay for that, did you?

A. No.

Q. And to that extent you received remuneration,
10 didn't you?

A. Well, I guess you might call it that.

Q. Now, have you told us all that was said by these three men or either of them when they came to that tank on the third and twelfth of March, last?

A. I think so, to the best of my knowledge.

Q. Do you recall one of the gentlemen at the time that they purchased the gallon can remarking that they were representing the Sun Oil Company?

A. I don't recall that, but a time later they did make
20 that remark.

Q. When was that time later?

A. I think it was the day Mr. Backes was with Mr. Brooks when they stopped there. They just stopped there and asked me a question or two and went on.

Q. Have you ever served any gas to Mr. Brooks when Mr. Backes was with him?

A. No, sir, not to the best of my knowledge.

Q. Have you ever had a conversation with Mr. Backes at any time?

30 A. No, sir.

Q. Then how are you able to say you think it was that day when you were informed that they were representing the Sun Oil Company?

A. Because Mr. Brooks told me that they were from the Sun Oil Company at that time.

Q. Were you talking with Mr. Brooks on the day that Mr. Backes was with him?

A. Only what I have already told you.

Q. Have you ever seen Mr. Backes stop at that station where that tank was?

A. Only at that time.

Q. Did they stop there?

A. They stopped right at the pump.

Q. And did he get out?

A. No, sir.

Q. Did he talk to you at all?

10

A. No, sir.

Q. Did Brooks talk to you?

A. Yes, sir.

Q. What did he say?

A. He just told me he was a representative of the Sun Oil Company, or words to that effect.

Q. What else did he say?

A. I cannot exactly remember but I believe he asked me if we were selling that for Sun gas.

Q. You are sure that is the time Mr. Backes was with him?

20

A. He said, "Is that Sun gas there?"

Q. You are sure that is the time Mr. Backes was with him?

A. Yes, I am positive of that.

Q. Did Mr. Brooks get out of the car?

A. He never got out of the car.

Q. And Mr. Backes sat alongside of him?

A. Yes.

Q. And heard him ask you that?

30

A. I believe so.

Q. And heard him tell you he was a representative of the Sun Oil Company and ask you if that was Sun oil?

A. Yes.

Q. Are you sure about that?

A. I am positive of it.

Q. Are you also as positive that nothing was said to you about the gas you were serving being Sun Oil gas on March second and twelfth?

40

A. Yes. I believe I was asked if it was Sun gas. They either asked me if it was Sun gas or what kind of gas it was.

Q. And are you sure that was the time when Mr. Backes and Mr. Brooks were present?

Mr. Herr—I ask to have the question before that read, so the witness is not confused. Mr. Able is now asking the question a different way.

The Court—I think that question is plain enough as it is, Captain Herr. If the witness does not understand it he may say so.

(Last question read.)

A. I am quite sure of it.

Q. And are you also certain that that is the only time when any question was put to you as to whether the gas you were selling was Sun Oil gas?

A. No, I am not. I told you that I think that they asked me on a previous occasion.

Joseph Hylan, recalled.

Mr. Able—Are you calling Mr. Hylan on the subpoena that was presented by the defendant or have you subpoenaed him? I want to know the nature of the examination.

Mr. Herr—Since Mr. Able has suggested it, it is further cross-examination.

Mr. Able—If it is cross-examination that is one thing and if it is direct examination that is another.

The Court—Then it is not rebuttal?

Mr. Herr—Since Mr. Able has suggested it, I would ask permission to use the witness for further cross-examination.

Mr. Able—If he is using him for further cross-examination we want to know, and it will be for the court then to rule upon the question. We want to know for what purpose the witness is produced.

Mr. Herr—I refuse to answer counsel.

The Court—You have called him. Now, is he called for rebuttal or are you asking the privilege of further cross-examining him?

Mr. Herr—I am asking the privilege of further cross-examining him and they apparently have not granted it.

The Court—I have not heard you ask for it until now. Now, which is it? Are you calling this 10 man as your own witness or do you ask the privilege of further cross-examination?

Mr. Herr—Further cross-examination.

Mr. Able—That is for your honor to decide. It is discretionary with the court.

The Court—(After discussion.) Proceed.

Further cross-examination by Mr. Herr.

Q. I interrogated you yesterday concerning a conversation alleged to have been had between you and Mr. 20 Brooks on the third day of March at your place at Flemington, New Jersey. I failed to ask you whether or not at that time you told Mr. Brooks that you had received several complaints against this Hafner tank.

A. No, I did not.

Mr. Herr—That is all.

By Mr. Able.

Q. But you did recall that you did complain to Mr. Brooks? 30

A. I complained to Mr. Wright the first time I saw it.

* Q. Did you make complaint to Mr. Brooks following your complaint to Wright?

A. When Mr. Brooks came in.

Q. You told him you did not want that tank down there?

A. If it was a Sun Oil Company tank I did not want it there.

Q. You were under the impression it was when you were talking to him?

A. Yes, when I was talking to Mr. Wright.

Q. What impression did you have when you were talking to Mr. Brooks?

A. I knew different then.

Q. Who had told you differently?

10 A. Mr. Wright.

Mr. Able—That is all.

Mr. Herr—We rest.

Mr. Able—Is Justice Webster in the room?

The Court—Yes.

George Webster, recalled for the defendants in sur-rebuttal.

Direct examination by Mr. Able.

Q. Mr. Webster, you are a justice of the peace in
20 this county?

A. Yes, sir.

Q. And are the justice of the peace who issued the warrant upon which Mr. Hafner was arrested in the criminal proceeding, is that true?

A. Yes, sir.

Q. Who served the process from your magistrate's office?

A. Mr. Saunders.

Q. Have you been in the courtroom and did you
30 hear Mr. Saunders give his testimony?

A. I heard part of it.

Q. Did you hear Mr. Saunders say that at your direction he had examined the pump at the station of Hafner?

A. I understood him to say that he looked at it. I did not hear him use the word "examined."

Q. Did you hear him say that he examined it at your direction?

40 A. No. I did not tell him to examine it. I told him to look around and see what he saw, and see if it was a blue tank with blue gas. I understood he said he did.

Q. When he came back did he make any report to you?

A. He said it was a blue tank and blue gas and he said that was all he knew about it, when he came back.

Q. Did he say anything about the name on it?

Mr. Herr—That is objected to. I do not see where conversations between this witness and the constable are at all legitimate here. I think we 10 have reached the point where we can stop.

The Court—I do not see what prohibitive value that would have, anything the constable may have said to the justice of the peace.

Q. Did Mr. Saunders say that this tank had the name "Genoco" on it?

Mr. Herr—I object to the question.

The Court—How is that evidential, Mr. Able?

Q. Did Mr. Saunders tell you that the tank had a globe with a name on it? 20

Mr. Herr—I object to that.

The Court—I do not see that what the constable said to the justice of the peace has any prohibitive value.

Mr. Able—It has in this way.

The Court—Well, how?

Mr. Able—As to the truthfulness of the witness.

(After discussion.)

The Court—I suppose the question is admissible as testing the credibility of the witness. 30

Mr. Herr—May I note an exception?

The Court—Yes. I will permit the question.

Mr. Herr—I object to the question upon the ground that it is hearsay testimony, that it is not material to the issue, that it is not proper rebuttal, and that, at the most, it is refuting an issue not directly in point but collateral to the main trial and not admissible under any circumstances.

The Court—I will overrule the objection and permit the question on the ground that it is an attack upon the credibility of the previous witness.

The Witness—Now what was the question?

(Last question read.)

A. He did.

Q. That it had no globe, do you say?

10 A. That it had a globe on it. To the best of my recollection he told me it had a globe on.

Q. Did he say there was no name and that the tank was blue?

A. He said the tank was blue and there was no name on the tank but it had a globe on with a name on. That is the best of my recollection.

Mr. Able—That is all.

Mr. Herr—That is all.

20 *Herbert W. Backes*, recalled for the defendants in sur-rebuttal.

Direct examination by Mr. Able.

Q. Mr. Backes, you heard the testimony of Lewis Eggert?

A. Yes.

Q. A few moments ago?

A. Yes.

Q. Wherein Mr. Eggert testified that you together with Mr. Brooks stopped at the O. K. station and that
30 in your presence Mr. Brooks inquired whether it was Sun Oil that they were selling in that tank. Is that true or untrue?

A. No, it is not true. As I testified on my direct examination, we went by the place in a car—

Mr. Herr—I suppose the question has been answered.

The Witness—We did not stop—

Mr. Herr—I object to what the witness has said and ask to have it stricken out.

The Court—The answer may be stricken out except the portion, "No, it is not true."

Q. Did you and Mr. Brooks entirely stop at that station and talk to anyone that day?

A. We did not.

Mr. Able—That is all.

Mr. Herr—That is all.

10

Warren F. Brooks, recalled for the defendants in sur-rebuttal.

Direct examination by Mr. Able.

Q. Mr. Brooks, did you hear the testimony given by Lewis Eggert?

A. I did.

Q. Did you hear Mr. Eggert testify that you inquired of him as to whether Sun Oil was being exposed to sale or sold from a blue tank on the O. K. Service Station premises, in the presence of Mr. Backes?

20

A. I did.

Q. Is that true or untrue?

A. It is not true.

Q. Did you at any time talk with Mr. Eggert in the presence of Mr. Backes?

A. No, I did not.

Q. Did you entirely stop at the O. K. Service Station when Mr. Backes was in your car?

A. No, sir, I did not.

30

Cross-examination by Mr. Herr.

Q. Well, now, let us know just how fast you went by that station?

A. A reasonable rate of speed.

Q. I did not ask you that. I asked you how fast?

A. I probably slowed down to ten or fifteen miles an hour.

Q. Did you go off the concrete?

A. I cannot recall whether I did or not.

40

Q. You seem to be able to recall this conversation—

The Court—No; he recalls the lack of it.

Q. Did you go off the concrete or didn't you?

A. I cannot recall.

Q. Then you do not know what speed you went by, do you?

A. I know on that occasion we slowed down so that

10 Mr. Backes could observe what he wanted to observe about the jump.

Q. You went there for the purpose of observation. Now tell me, whether you went off the concrete or whether you did not?

A. I cannot answer that truthfully, whether we did or not.

Q. Where did you go that day after you left the Hafner place?

A. To Lambertville.

20 Q. Where did you turn around?

Mr. Able—If your honor please, I think that—

A. Lambertville.

Mr. Able— —that counsel is again beyond the scope of the examination.

The Court—Yes. The question has been answered. You may test the testimony of the witness heretofore given with respect to what they did at the station, but I think it is entirely immaterial as to what transpired thereafter.

30 Mr. Herr—This is for the purpose of testing his recollection.

The Court—I shall not permit you to go very far in that.

Mr. Herr—I will be very brief.

The Court—All right.

Q. You went then to Hafner's station from Trenton, didn't you?

A. We came from Trenton to Ringoes and went from Ringoes past the station to Lambertville.

Q. Where did you turn around?

A. In Lambertville.

Q. How did you come up from Trenton?

A. Through Pennington.

Q. And you went to Ringoes, is that correct?

A. Yes.

Q. And then you made the swing and went direct
to Lambertville? 10

A. That is correct.

Q. What did you do when you turned around at
Lambertville?

A. We came back past it.

Q. Then instead of stopping at the station, what you
did was make two visits, one each way?

A. We slowed down when we went past.

Q. And still you are unable to say at what speed you
went by there?

A. A slow rate of speed. 20

Q. What day was it that you and Mr. Backes were
there?

A. The fourteenth of April.

The Court—Is that all?

Mr. Herr—I am through.

Mr. Able—We are through. If your honor
please, I desire to make a motion for a direction of
verdict.

(Court and counsel retire to chambers.)

Mr. Able—If your honor please, the defendants 30
feel they are entitled to a direction of verdict, and
we would briefly state the grounds to be:

First: The same as urged on the motion for
nonsuit, failure to prove the circumstances under
which the prosecution was instituted.

Second: Failure to establish that defendants
made the complaint maliciously or without reason-
able or probable cause.

Third: That the testimony, undisputed, is that all material facts were submitted to counsel before criminal complaint was made, and that defendants were justified in making the complaint on advice of counsel.

10 Fourth: That the fact that an indictment was found by grand jury precludes recovery because the indictment is *prima facie* proof of probable cause.

The Court—I have already passed upon your first two grounds, have I not?

Mr. Able—Yes. There is another ground that I omitted to state: That the plaintiff has entirely failed to carry his burden of the proof of want of probable cause on the part of the defendants, and that there is an absolute failure, in fact a failure to such an extent that the case ought not to be presented to the jury, because of the great preponderance of the evidence against the charge or allegation of the plaintiff.

20

And because the result of the preliminary examination before the justice as a magistrate was *prima facie* evidence of probable cause unless the same has been overthrown by any testimony that the action of the magistrate was obtained by improper means or false testimony, and that no such attempt has been made or undertaken by or on the part of the plaintiff.

30

(After argument.)

The Court—The motion is overruled with respect to the first two grounds because they were already passed upon in the motion for a nonsuit.

With respect to the ground urged that a complaint was issued after an investigation by the justice of the peace and that an indictment was found, none of the jurisdictions go further than to hold that they are *prima facie* evidence of lack

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of probable cause and it would be for the jury to say whether that presumption, even though it existed in this suit, had been overcome by the testimony.

Now, with respect to the other reason urged, namely, that a complete and full disclosure was made to counsel and that counsel advised the prosecution, it seems to me that under the testimony 10 as it exists in this case there are disputed questions of fact sufficient to justify its submission to the jury on that question, of whether or not a complete and full disclosure was made.

So that the motion for a directed verdict is overruled.

Mr. Able—If your honor please, I would like to take an exception to your honor's decision as to the first point named, as to the second point, as to the third and fourth points and as to all the other 20 points, respectively.

The Court—Note an exception.

(Court and counsel return into court.)

(Mr. Able summed up for the defendants.)

(Mr. Herr summed up for the plaintiff.)

CHARGE

The Court (Eldredge, J.)—Members of the Jury: I want to say to you in the very beginning that I com- 30 mend you for your patience in listening to this rather lengthy case which has extended over a period of approximately four days, and I am sure from the attention that you have already given that it is going to receive your careful attention after you have received my charge and have retired to your room to deliberate.

Willard Hafner, as plaintiff, has brought suit against Warren F. Brooks and the Sun Oil Company to recover damages for injuries alleged to have been sustained

through the criminal prosecution of the plaintiff Hafner, under a complaint made by Brooks and alleged to have been made for and on behalf of the Sun Oil Company, as its officer or agent.

The pleadings admit that Brooks made the complaint as agent for the Sun Oil Company on the fifteenth day of April, 1930, so that in rendering your verdict
10 it should be for no cause of action as respects both defendants or your verdict should be against both defendants, against them jointly, and not so much against one and so much against the other. If you find any amount due the plaintiff for the injuries which he alleges he suffered, that amount would be against both defendants, as I have already stated.

I want, if I may, to point out to you just exactly what this case means and upon what it is based. Perhaps counsel has already done that clearly enough for
20 you to understand it plainly, but I feel obliged to state to you, in addition to what they have already said, that you are not to determine to-day whether or not Hafner sold the Sun Oil Company's gas. That is not the question involved. The question for you to decide is whether or not Brooks had reasonable ground to believe that the statute under which the prosecution was brought was being violated in that through camouflage or otherwise he was exhibiting for sale gas that would deceive people into believing that it was the Sun Oil Company's gas.
30 Now I reiterate or repeat my statement that you are not called upon to determine whether or not Hafner, the plaintiff, was actually selling the gas in question.

In order for the plaintiff to recover in this case he must prove by a preponderance of the evidence three things. First, that the prosecution of which he complains was ended and that he was duly discharged. In the second place he must prove that the defendants instituted the original proceedings without reasonable or probable cause for so doing.

In the third place, if the plaintiff is to recover he must prove by a preponderance of the evidence that the defendants were actuated by a malicious motive. Those three things are essential to be proven by the plaintiff before he is entitled to recover damages in this case.

Now, taking those up in order, the first one to which I referred, that the prosecution upon which the plaintiff relies was ended and that he was duly discharged is not only proven but is not denied and is admitted by the defendants in this case. There can be no question about that element necessary in the proof. So that I say the plaintiff has discharged the burden placed upon him respecting that requisite in his proof. There is documentary evidence before you proving conclusively that fact, in addition to the fact that the prosecution and the acquittal by a jury is not denied. 10

Respecting the other two elements essential to the proof the matter is not so simple. Malice and lack of probable cause, while they are separate elements requiring to be proven, are more or less associated and connected with each other, for if there be no probable cause malice may be presumed. Before discussing the question of probable cause with you I think I ought to call your attention to the statute under which the original prosecution was brought. It is entitled Chapter 116 of the Laws of 1928, and reads as follows: 20

"It shall be unlawful for any person, firm, partnership, association or corporation, their agents and servants, to store, sell, expose or offer for sale, or sell, in any manner whatsoever, or aid or assist in the same, any liquid fuels, lubricating oils or other similar products, so as to deceive or tend to deceive the purchaser thereof as to the nature, quality and identity of the same, by false representation or by substitution, mixing, or adulteration thereof, or by the use of false or fictitious names, or by the use of disguised, camouflaged or falsely labelled containers, tanks, pumps or other dis- 30

tributing equipment, or by imitating the design, symbol, or trade name under which recognized brands of such products are generally marketed; provided, however, that this act shall not prevent any person, firm, partnership, association, or corporation, their agents and servants, to store, sell, expose or offer for sale, or sell any such fuels, lubricating oils, or similar products under
10 a trade name, symbol, sign, or distinguishing mark adopted and used by such person, firm, partnership, association or corporation in good faith, if such trade name, symbol, sign or distinguishing mark is not deceitfully similar to that already in general use by any manufacturer of such products."

It was under that statute, as I have read it to you, that the original prosecution in this case was brought, the complaint alleging a violation thereof. Of that charge the plaintiff was acquitted, as I have already
20 stated to you. The acquittal of the plaintiff, however, will not of itself charge the complainant with liability for damages for having brought the original charge. The defendants are not liable in this case unless they made the alleged charge without probable cause and with malice. So I repeat to you that the acquittal of the plaintiff will not of itself charge the complainant with liability and damages for having made the charge. They can only be liable provided the plaintiff has proven that the charge was made without probable cause and
30 with malice.

Probable cause means the existence of certain facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. It is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. It does not depend

upon the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party prosecuting. The complaint may be false, but if you believe under the proof that the affiant, which would be Brooks in this case, had reasonable and probable cause to believe it an action for malicious prosecution will not lie and your verdict should be no cause of action. To discharge the defendants from liability for their acts there must be a real belief in their truth or a reasonable ground for that belief. Mere belief of itself is not enough. There must be reasonable ground for the belief, and they must exercise the caution exercised by men ordinarily in such circumstances. Now, with these principles in mind, I want you to consider the facts and for yourselves determine whether Brooks had reasonable grounds to believe that Hafner had violated the statute in question, the statute which I have read in your hearing, in that he had exposed or offered for sale or sold gasoline in such a manner that it tended to deceive or did deceive purchasers, and that he did so by the use of camouflage or false labelled containers, tanks, pumps or other distributing equipment.

10

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Now, I say I want you to consider all the evidence in this case and then determine whether or not the plaintiff has borne the burden of proof, of sustaining his allegation that Brooks was not justified in believing this or that he had reasonable cause to believe that Hafner had violated the statute in question.

30

I am not going into detail with respect to the evidence with you because I assume that your memory is as good as mine, and, in the second place, I am not going to because the consideration and recollection of the evidence is entirely within your province, and in the end anything which I may say with respect to the evidence would not be binding upon you. It is my province to give you the law involved in the case. Any comment which I may make upon the evidence would not be binding upon you.

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I want, however, to call your attention to the salient points in the testimony as it has been given during the last four days in this trial. I think I need say nothing more on the question of the criminal proceedings. The records of those are before you and are to be taken with you into the jury room and are for your consideration.

10 There was one misstatement, I think, made by counsel for the plaintiff in the case, that was probably inadvertently made. My own recollection is that he said the complaint was made within ten days of the time that the tank was installed. I think you will find that the record will show that the tank was installed about the second of March, while the complaint was not made until approximately about the fifteenth of April.

Mr. Herr—If the court please, I meant to say the offense alleged was within ten days.

20 The Court—Well, I make that statement now. You may recall what it was, but I want there to be no misunderstanding about what the facts were by reason of anything which may have been said by counsel.

Now, so much for the record of the criminal proceeding. It has appeared in the testimony that was given you by the witnesses on the stand that the pump installed there was a Wayne pump, the same kind, in form, that was used by the Sun Oil Company; that it was painted blue and yellow; that there was no top upon the pump; that no name was placed upon its side; that it contained blue gasoline, and you also have the testimony of the defendant Brooks to the effect that from that tank there was sold him on two occasions blue gasoline which was represented to be the Sun Oil Company gas. He says Eggert admittedly sold the gas. The witness Eggert, who admittedly sold the gas, in his testimony denies having represented that the gas was Sun Oil Company gas, but he did, as I recall it in his testimony,

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admit that the question was asked him, without giving what his answer was except as to the additional gallon, which he said he told them was not fit to use for cleaning clothes by reason of the dye that was in it.

Now, there is other evidence for your consideration, such as photographs which were admitted for a particular purpose; that is, for the purpose of showing the location of the tank in question. You will recollect in your consideration of the photographs that it does not show the exact condition that existed prior to the alleged purchase. That has been explained to you in the testimony. There are also certain letters for your consideration, which were introduced not to prove the truth of the facts stated in them, but merely for the purpose of showing the effort that was put forth by the defendant Brooks before the complaint was made, in order to show that he had probable cause for taking the action which he did take. And then there was introduced in evidence two newspaper articles. I want to say just a word concerning that, because they were introduced also not for the purpose of proving the truth of the facts contained within them, but one of the elements of damage alleged to have resulted in this case was the loss of reputation, and the newspaper articles were admitted purely for the purpose of showing that the criminal prosecution had been given wide publication, that either tending or not tending, as you may think, to affect the man's reputation.

Now, I shall mention, I think, no more of the evidence. I merely wanted to point out to you a few of the salient facts. You are to consider all of those and determine for yourselves whether the defendant Brooks did believe that the statute was being violated or whether he had reasonable and probable cause for so believing. If he did, your verdict should be no cause of action. If he did not have such probable cause, then your next question is to determine whether there was malice. I have al-

ready indicated to you that malice and lack of probable cause are somewhat alike, but they are not one and the same. Malice must be proven, but not, however, be proven by direct evidence. It may be inferred from all the facts and circumstances, and among other things, it may be inferred from a lack of probable cause. Bear in mind, then, that the two are not the same. Both must
10 be found, but one can be inferred from the other. Lack of probable cause is not malice but is evidence of malice and malice may be inferred from it. Our courts have defined malice as the intentional doing of a wrongful act without just cause or excuse. It may be a careless or wanton disregard for the rights of others or the doing of an act complained of without ordinary prudence or discretion, which persons of sufficient age and sound mind are presumed to have. If you find there was a lack of malice as I have defined it, again your verdict
20 should be no cause of action.

On the other hand, if you find both a lack of probable cause as I have defined it and malice as it has been defined to you, then there is another circumstance for your consideration. Our law provides that if the prosecution was instituted in reliance upon advice of counsel and in good faith therein after all the material facts were disclosed to counsel, it is a complete defense and the plaintiff cannot recover. There has been some suggestion by way of argument that the attorney who did the advising
30 in this case represented the Sun Oil Company. In the judgment of the court, that has little material force for your consideration, that inference or that fact. The question for you to determine is whether or not this defendant Brooks acted upon the advice of counsel, whether it be counsel for the Sun Oil Company or otherwise, after he had made a full disclosure of all of the facts to counsel. If the defendant fairly states the facts in his possession to counsel and is advised that he has a right to make a complaint an action will not lie against

him. Now that principle, as I have already indicated, has its application to the present case. The defendant Brooks alleges and has testified that he disclosed to counsel for the Sun Oil Company, Mr. Backes, fairly and honestly all the facts in his possession, and in addition to that, took Mr. Backes to the O. K. station that he might, himself, verify his statements. If you find that Brooks did fairly state all the facts in his possession 10 to Mr. Backes and that Mr. Backes advised that a complaint be made, that is a complete defense and again your verdict should be no cause of action. If the facts were not honestly and fairly stated to counsel, then his advice would be no defense.

In the beginning of my charge I used the term "preponderance of evidence" and stated that the plaintiff must prove the elements necessary to recover by a preponderance of the evidence. By that is meant the greater weight of the believable evidence. In other 20 words, it is for you to weigh the evidence presented by the two sides in this controversy and then determine whether the greater weight of the evidence favors the plaintiff. If it does, he may recover; if it does not, he cannot recover. By the greater weight of the evidence we do not mean the greater number of witnesses; we are talking about quality rather than quantity. It is not the greater amount but the greater weight to which we refer. And in order that there may be a recovery the plaintiff must sustain his case by the greater weight 30 or by a preponderance of the evidence.

Now, there is one more matter to which I want to call your attention, and that concerns the question of damages. There are two elements of damages that appear in the proof. One is for loss of business. The plaintiff has testified that following his arrest the sale of Genoco gas fell from two thousand gallons per month to five hundred gallons per month, and that he made a profit of from two to four cents per gallon. He also

testified that shortly after his prosecution the Standard Oil tanks were taken out, from which he suffered an additional loss. He also says that he suffered a loss by reason of his loss of reputation, that is, a loss of business. So that there is that first element concerning the loss of business to which I have referred and have given you figures as they were testified to in the case, and
10 then there is the second element, loss of reputation. There has been no evidence introduced in the trial with respect to what the reputation of the plaintiff was prior to the criminal prosecution. It is, however, a presumption of law that a man has a good reputation until it is proven otherwise. The plaintiff seeks damages for the loss of reputation. I can give you no yardstick by which you can measure that. A good name, however, has value, and if it has been injured, if this man has been injured in his good name and reputation, he would
20 be entitled to compensation therefor. There is one other element of damages and that is this, that in cases of this kind, where there is actual malice found, not merely malice inferred, but actual malice found, such as abuse and injury, then such malice as that contains the elements which justify an award of punitive damages; so that if you find there was an intentional injury inflicted upon this man you are justified in finding some sum in the nature of punitive damages. Damages, like the other elements in the case, however, must be proven by
30 the preponderance of the evidence. The plaintiff assumes the burden of proving all his damages, what his damages were, as well as improving that he is entitled to damages at all.

I have been asked to charge you as follows, by counsel for both the plaintiff and the defendants:

The first request is refused because it is already covered in the general charge.

Mr. Herr—Which one is your honor referring to now?

The Court—The plaintiff's requests. The first is refused because it has already been covered in the general charge.

The second refused for the same reason.

The third, "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable if done without just 10 cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong."

I so charge you.

"When a party makes a criminal charge against another without having reasonable ground for believing it to be true, the presumption is that in doing so he is actuated by a malicious motive. When the charge is unfounded and is purposely made without the existence of probable cause, the general malice sufficient to sustain 20 on an action for criminal prosecution is inferable."

"Five—" The fifth request has been covered.

The sixth request has been covered by my general charge.

The seventh request is refused.

Eight: "Assuming that defendant informed his counsel of all the facts, all the details, as he said he did, counsel's advice would protect him only if none of the material statements were false to defendants' knowledge. If you find that any of the facts related by defendants to 30 counsel were false to defendants' knowledge, or that they did not reveal all the facts then in their possession, or which with due diligence they might have known, then the advice of counsel would not protect defendants."

I so charge you.

Number Nine has been covered in my general charge.

Number Ten: "Where the known facts are of a nature to put a reasonable and cautious man upon inquiry, the person instituting a criminal prosecution or civil suit

will be held to have knowledge of such facts as inquiry would have disclosed."

I so charge you.

I have been asked by counsel for the defendants to charge as follows:—

Mr. Herr—Is Number Eleven refused?

The Court—Number Eleven was covered in the
10 general charge and it is refused for that reason.

"One: Malice must be proven and the acquittal of the plaintiff in the criminal proceedings is no evidence that the prosecution of Hafner was commenced without probable cause."

I so charge you.

Number Two is refused.

Number Three: "The acquittal by the jury in the criminal case is not evidence of either the defendants' malice or want of probable cause."

20 I so charge.

Number Four is covered in my general charge.

Number Five: "If you find that the defendant Brooks acted in good faith on the advice of counsel that criminal complaint should be made, after having stated all the material facts to counsel and without knowledge of the falsity of such facts, you will find that they, the defendants, acted upon probable cause and your verdict should be for the defendants."

I think I have covered that in my general charge,
30 perhaps, but I so charge you.

Six: "If you find that the defendants had reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that the plaintiff was guilty of the offense of which he was charged in the criminal complaint made by the defendant Brooks, then you must find that defendants acted upon probable cause and your verdict should be for the defendants."

Number Seven is refused.

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Number Eight: "If you find that the knowledge of facts in possession of the defendant Brooks at the time of causing the arrest of plaintiff was such as being uncontroverted would establish reasonable justification for making the charge against the plaintiff, then there was reasonable cause on the part of the defendants in taking action on the criminal case and your verdict should be for the defendants." 10

Nine: "Malice alone will not in itself establish want of probable cause on the part of the defendants."

Ten: "The plaintiff is held to prove by preponderance of evidence that the complaint upon which he was arrested was known to be false by the defendant who made complaint and that such defendant did not have reasonable and probable cause to believe it to be true. If plaintiff has failed in this your verdict should be for defendants."

I so charge. 20

Eleven: "Unless you find that the criminal proceedings against plaintiff were instituted from an improper or wrongful motive your verdict should be for the defendants."

I so charge.

Now, members of the jury, I think that completes all that I desire to say and you may retire to deliberate and when you have arrived at your verdict return.

Mr. Herr—I take exception to the charging of the ninth, tenth and eleventh requests presented by the defendants. 30

And to the failure to charge the first, second, seventh, eighth and eleventh requests of the plaintiff.

(Court and counsel confer at side bar.)

The Court—Members of the jury, my attention has been called to the fact that I said that if the plaintiff had been injured in his good name he should receive damages therefor. I will add to

that: Provided you find that he is entitled to damages at all by reason of the fact that there was a lack of probable cause in bringing the prosecution and malice.

(Plaintiff's counsel requested the court to charge as follows:

10 1. 78 L. 672—*Lane v. Penn. Ry. Co.*, p. 674—
“In cases of criminal prosecutions probable cause means reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that the accused is guilty of the offense with which he is charged.” 32 L. 100; 60 L. 230.

20 2. 38 C. J. 409—“A real belief and reasonable grounds for it must concur. A mere suspicion of a party's guilt, although honestly entertained, does not constitute probable cause for the institution of criminal proceedings.”

3. 73 L. at 745—*Brenan v. United Hatters*—
“Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong.”

30 4. 81 L. 601—*Weisner v. Hansen E. & A.*, p. 603—“When a party makes a criminal charge against another without having reasonable ground for believing it to be true, the presumption is that in doing so he is actuated by a malicious motive. When the charge is unfounded and is purposely made without the existence of probable cause, the general malice sufficient to sustain on an action for criminal prosecution is inferable.”

40 5. 38 C. J., p. 425—“The rule is well settled that jury may infer malice from want of probable

cause." 89 L. 575; 81 L. 601; 71 L. 624; 66 L. 620.

6. 113 *Atl.* 709; 95 L. 65—*Collins v. Cody*. Supreme Court.

J. Black. "Malice in a legal sense signifies nothing more than a wrongful act done intentionally without just cause or excuse." 49 L. 419; 88 L. 267.

10

7. 38 *C. J.*, p. 424—"If one makes use of the criminal law for some collateral or private purpose and not to vindicate the law, such proceedings will be considered malicious." 16 *Atl.* 554; 19 *Amer. & Eng. Ency. of Law*, p. 676.

8. "Assuming that defendant informed his counsel of all the facts, all the details, as he said he did, counsel's advice would protect him only if none of the material statements were false to defendant's knowledge." 97 L. 459, *Court of Errors and Appeals*. If you find that any of the facts related by defendants to counsel were false to defendants' knowledge, or that they did not reveal all the facts then in their possession, or which with due diligence they might have known (26 *Cyc.* 54), then the advice of counsel would not protect defendants. (See first defense in answer.)

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9. *Amer. & Eng. Ency. of Law*, p. 687—"Requisites of Rule—Full and Fair Disclosure—In General. In order that the advice of counsel may operate as a defense to the action it must be shown, primarily, that such advice was predicated upon a full and fair disclosure of the known facts."

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10. *Amer. & Eng. Ency. of Law*, p. 661—"Party's Duty to Make Inquiries. Where the known facts are of a nature to put a reasonable and cautious man upon inquiry, the person instituting a criminal prosecution or civil suit will be held to

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have knowledge of such facts as inquiry would have disclosed."

11. "Plaintiff is entitled to damages for mental suffering, and change of conduct and manner of acquaintances toward him, any financial loss resulting directly from the prosecution and such punitive or exemplary damages as you think the malice shown in the case, if you find that the same has been shown, would justify.")

(Defendants' counsel requested the court to charge as follows:

1. Malice must be proven and the acquittal of the plaintiff in the criminal proceedings is no evidence that the prosecution of Hafner was commenced without probable cause.

2. If you find that materially the same facts were produced before the grand jury as have been proven by the defendant to justify the criminal charge, then you must find a verdict for the defendants.

3. The acquittal by the jury in the criminal case is not evidence of either the defendants' malice or of want of probable cause.

4. If you find the defendants made the criminal complaint on such information as a prudent and cautious man might reasonably accept in the ordinary affairs of life then you must find for the defendants.

5. If you find that the defendant Brooks acted in good faith on the advice of counsel that criminal complaint should be made, after having stated all the material facts to counsel and without knowledge of the falsity of such facts, you will find that they (defendants) acted upon probable cause and your verdict should be for the defendants.

6. If you find that the defendants had reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cau-

tious man to believe that the plaintiff was guilty of the offense of which he was charged in the criminal complaint made by the defendant Brooks, then you must find that defendants acted upon probable cause and your verdict should be for the defendants.

7. It will be necessary for you to find that defendants acted with malice toward plaintiff before you can find that defendant acted without probable cause. 10

8. If you find that the knowledge of facts in possession of the defendant Brooks at the time of causing the arrest of plaintiff were such as being uncontroverted would establish reasonable justification for making the charge against plaintiff, then there was reasonable cause on the part of defendants in taking action on the criminal case and your verdict should be for defendants. 20

9. Malice alone will not in itself establish want of probable cause on the part of defendants.

10. The plaintiff is held to prove by preponderance of evidence that the complaint upon which he was arrested was known to be false by the defendant who made complaint and that such defendant did not have reasonable and probable cause to believe it to be true. If plaintiff has failed in this, your verdict should be for defendants.

11. Unless you find that the criminal proceedings against plaintiff were instituted from an improper or wrongful motive your verdict should be for the defendants.) 30

EXHIBITS.

EXHIBIT P-1

COURT OF QUARTER SESSIONS

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April 24, 1930.
10.00 A. M.

Judge A. O. Robbins,

Court held for the hearing of Pleas to Indictments.

STATE

v.

JOHN HAFNER

} Indictment.

Charged by the Prosecutor with Fraud in sale of
Liquid Fuel.20 Defense pleads not guilty. Placed under \$200.00
Bail for trial.

COURT OF QUARTER SESSIONS

May 6, 1930.

10.00 A. M. Standard Time.

Judge A. O. Robbins,

Prosecutor J. V. Aller moved for the trial of the In-
dictment against John Hafner.

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STATE

v.

WILLARD HAFNER

} Indictment charging sale of
liquid fuel by Fraud.J. V. Aller and H. J. Able
Attorneys for the State.Lloyd Fisher for
Defendant.

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JURY

- | | | |
|----------------------|-----------------------|----|
| 1. Irvin Benard | 7. Reginald Miller | |
| 2. Charles P. Young | 8. Frances Gardner | |
| 3. Joseph A. Snook | 9. Richard Nobmann | |
| 4. William P. Mason | 10. Margaretta Kisz | |
| 5. Bertha H. Robbins | 11. Lily B. Carpenter | |
| 6. Mary E. Shurts | 12. Mabel Wilson | 10 |

Judge Robbins directed the Clerk to note on the record that both sides consent to the Jury as finally selected regardless of any error in checking the challenges.

Opening to Court and Jury by Mr. Able for State. Court directed the Clerk to make the name of the Defendant Willard Hafner, the name of "John" having been fictitious.

State Witnesses

Warren F. Brooks

Recess 1 to 2 o'clock 20

Warren F. Brooks, cont'd

Harry Austadt

two photographs marked for identification—S-4, & S-5.

Admitted.

George Eck

John V. Connell

Jos. W. Hylan

Richard Slattery

Thomas Parcetti 30

Donald Holcombe

Wesley Meeker

two photographs marked for Identification D-1 & D-2.

State Rests.

Motion made to direct the verdict of acquittal for Mr. Fisher.

Motion denied.

Mr. Fisher opens for defense.

Defense Witnesses

Ralph O. Berger 40

Court adjourned at 4.00 P. M. until 10.00 A. M. next day.

May 7, 1930.

9.20 A. M. Standard Time

Ralph O. Berger, cont'd.

Dr. William E. McCorkle

Sarah Strong

10

Warren F. Brooks—sworn

John D. Stockton III

Joseph Sylvester

Richard Slattery—called by defense for future examination.

Walter Augustine

two letters read in evidence

Willard Haffner

Johnson V. Aller

Motion for a directed verdict for acquittal was denied.

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Exception prayed and allowed.

* * * * *

Exception taken to Judge's charge.

Jury retired at 3.00 P. M. and returned at 3:30 P. M. with a verdict of NOT GUILTY.

STATE OF NEW JERSEY }
COUNTY OF HUNTERDON } ss.

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I, C. Lloyd Fell, Clerk of said County and of the several Courts thereof do hereby certify the above to be a copy of the minutes of our Court of Quarter Sessions showing the pleading and the trial of the Indictment against Willard Hafner.

Given under my hand and the Seal of said County this 10th day of September, 1930.

C. LLOYD FELL,
County Clerk.

[SEAL]

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EXHIBIT P-2

HUNTERDON OYER AND TERMINER

April Term A. D. 1930

Hunterdon County, to wit:

The Grand Inquest for the State of New Jersey, and
 for the body of the County of Hunterdon upon their
 respective oaths Present, That John Hafner (first name
 fictitious and unknown) late of the Township of East
 Amwell, in the said County of Hunterdon, on the third
 day of March in the year of our Lord Nineteen Hun-
 dred and thirty and on the twelfth day of March, 1930,
 and at divers other times at the Township aforesaid, in
 the County aforesaid, and within the jurisdiction of this
 Court, did store, sell, expose and offer for sale a blue
 liquid fuel so as to deceive or intend to deceive the pur-
 chaser thereof as to the nature, quality and identity
 of the same by the use of disguised, camouflaged and
 falsely appearing pump or pumps and by imitating the
 design and color of such pumps under which a recog-
 nized liquid fuel is marketed, namely: The brand of
 the Sun Oil Company, known as Blue Sunoco Fuel
 contrary to the form of the Statute in such case made
 and provided, and against the peace of this State the
 Government and dignity of the same.

J. C. ALLER, 30
 Prosecutor of the Pleas.

STATE OF NEW JERSEY }
 COUNTY OF HUNTERDON } ss.

I, Charles Lloyd Fell,
 Clerk of the County of
 Hunterdon in the State of New Jersey aforesaid, do
 hereby certify the foregoing to be a true copy of the

record of a certain Indictment as the same was presented to the Court by the April Term 1930 Grand Jury.

In Testimony Whereof, I have hereunto set my hand and seal of said County this

[SEAL]

9th day of September, A. D. 1930.

C. LLOYD, FELL,

County Clerk.

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By B. N. CARTER, JR.,

Deputy Clerk.

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EXHIBIT P-4

STATE OF NEW JERSEY }
 COUNTY OF HUNTERDON } ss.

STATE OF NEW JERSEY, To the Sheriff or any Constable
 of said County:

WHEREAS, complaint has this day been made to me, 10
 one of the Justices of the Peace, in and for the
 County of Hunterdon, on oath by Warren F. Brooks,
 Manager of the Sun Oil Co. Sunport Trenton New Jer-
 sey, residing at 940 Parkside Ave. Trenton N. J. that
 on or about the third day of March 1930, and or about
 the twelfth day of March 1930, and at divers other
 times at the Township of East Amwell, in the County
 aforesaid one John Hafner (first name fictitious and
 unknown) proprietor of the O. K. Service Station lo- 20
 cated on the Ringoes-Lambertville road, did store, sell,
 expose and offer for sale a liquoid fuel so to deceive or
 intend to deceive the purchaser thereof as to the nature,
 quality and identity of the same by false representation,
 by the use of disguised camouflaged pump or pumps and
 by imitating the design and color of such pumps under
 which a recognized liquod fuel is marketed namely the
 brand of the Sun Oil Co. known as Blue Sunco Motor
 Fuel, against the peace of the State and in violation of
 our statutes Chapter 116 laws 1928. 30

These are, therefore in the name of the State of New
 Jersey, to command you to apprehend the said John
 Hafner (first name fictitious) if in your County he may
 be found, and bring him forthwith before me, or some
 other Justice of the Peace, or Judge of the Common
 Pleas in and for said County, to answer said complaint,
 and be further dealt as the law directs. Hereof you
 are not to fail, and for so doing this shall be your war-
 rant.

Given under my hand and seal, at the Borough of Flemington in said County this fifteenth day of April 1930.

Justice of the Peace.

Returned April 17 W. L. Saunders.

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EXHIBIT P-5

STATE OF NEW JERSEY }
COUNTY OF HUNTERDON } ss.

Warren F. Brooks, Manager of the Sun Oil Co. Sun-
port Trenton New Jersey, residing at Trenton New
Jersey 940 Parkside upon his oath complains that 10
on or about the third day of March 1930, and on or
about the twelfth day of March 1930, and at divers
other times at the Township of East Amwell, in the
County of Hunterdon the John Hafner (first name
fictitious and unknown proprietor of the O. K. Service
Station located on the Goes-Lambertville road, did
store, sell, expose and offer for sale a liquoid fuel
so as to deceive or intend to deceive the purchaser thereof
as to the nature, quality and identity of the same by false
representation, by the use of disguised camouflaged 20
pump or pumps and imitating the design and color
of such pumps under which a recognized liquoid is mar-
keted namely the brand of the Sun Oil Co. known as
Blue Sunco Motor fuel, against the peace of the
State and in violation of our statutes Chapter 116 laws
of 1928.

Wherefore he prays that the said Willard Hafner
may be apprehended and held to answer to said com-
plaint and dealt with as law and justice may require.

WARREN F. BROOKS. 30

Subscribed Sworn to at Flemington
the fifteenth day of April 1930
Before

GEO. WEBSTER
Justice of the Peace.

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Gas slips, omitted by consent

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Photograph, omitted by consent

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EXHIBIT P-9

Ringoos, N.J. April 10 1930

Backes & Backes

Dear Sir :-

In referents to yours of the 5th. stating that we are seling Blue Gas. under the name of 10 SUNOCO, and I will say that we are not we are selling our own Blue Gas. under our own name from our own PUMP. further more the SUN OIL CO., or any other Co. have no Patents on Colors of any Kind.

And as far as the Public is concirned thay get more than thay pay for thay see what amount thay ar geting and thay also know what kind of Motor Full thay ar geting. I am.

Yours very truly. 20
O. K. Service Station
Ringoos, N.J.

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COPY

EXHIBIT P-10

Trenton, N.J. April 5, 1930.

Dear Sirs:

10 Our client, Sun Oil Company has brought to our attention the fact that you are selling a gasoline or motor fuel colored blue and purporting to be Blue Sunoco at your service station.

This gasoline is dispensed from a pump colored yellow and blue which are the Sun Oil Company's colors. Your use of these colors on your pump and your sale of a blue gasoline therefrom is intended to deceive the public and is a violation of the law so far as unfair trade competition is concerned.

20 As a matter of record, we write this letter to notify you to desist forthwith in dispensing a blue gasoline from yellow and blue pumps. Upon your failure to respect this notice, we shall be obliged to take such legal action as the circumstances warrant. Please be governed accordingly.

Very truly yours

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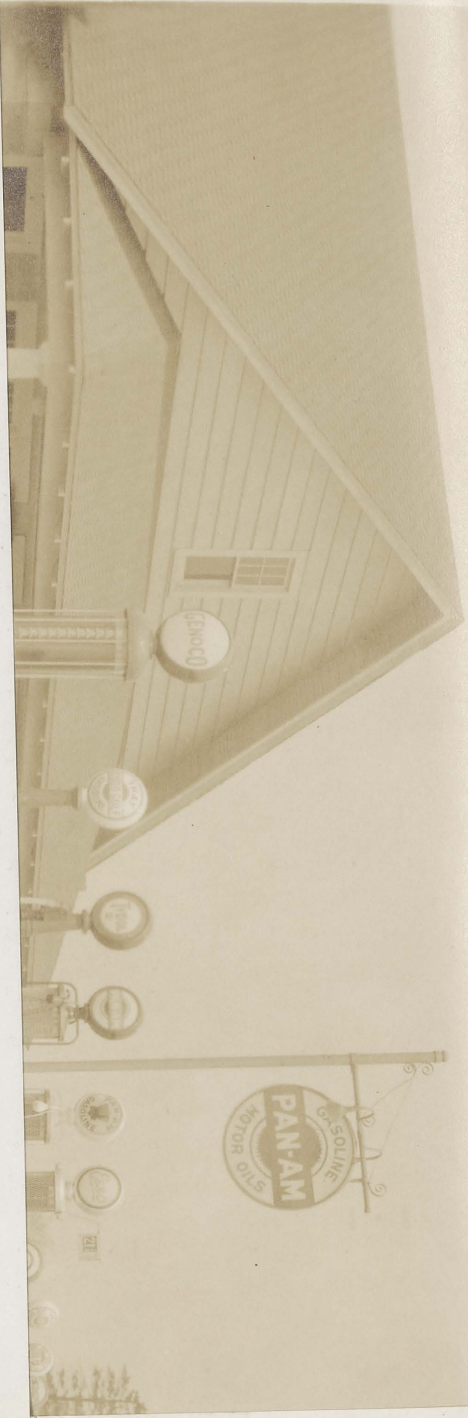
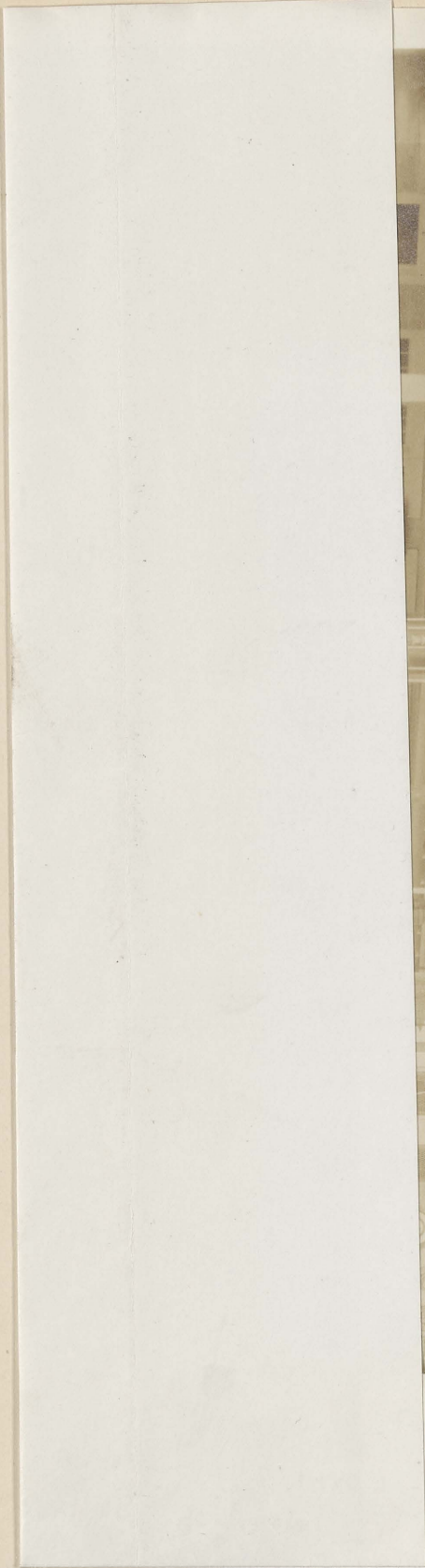
Photograph, omitted by consent

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EXHIBIT P-13

THREE PLEAD GUILTY;
THREE TO STAND TRIALFraud In Gas Sales and Concealed Weapons Charges
To Go to Jury

Fined \$100 on Liquor Charge

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Three trials of criminal indictments will result from responses of not guilty to allegations found by the April Grand Jury. Of six indictments returned, three pleas of guilty were entered on the pleading date, last Thursday, before Judge Adam O. Robbins in the criminal session of the Hunterdon Oyer and Terminer Court. Trials will begin Tuesday, May 6.

Pleas of not guilty were entered by Herbert Brenon 20 and Oscar J. Friend on the indictments charging them with carrying dangerous weapons concealed in their car without the permits required in New Jersey. Brenon and Friend, the latter a novelist of some note, were arrested at Clinton March 25 with a pair of loaded automatics in their possession. The men were on a cross-county trip from Arkansas to New York City, where they were scheduled for theatrical engagements, and claimed they carried the guns for protection. This and ignorance of New Jersey law relative to concealed weapons will undoubtedly be their defense. Each was held 30 in \$500 bail for appearance at the trial. Bail was previously placed at \$10,000 each.

Charged with fraud in the sale of liquid fuel, John Hafner, who operates a filling station in East Amwell township, plead not guilty and was held in \$200 bail for trial. Complainant in the case is the Sun Oil Company, who claim that Hafner sold colored gasoline from pumps designed and colored like those used in distribu-

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ting the company's product. Hafner sold the imitation gasoline, it is alleged, intending to deceive patrons as to its quality and brand.

Guilty of Liquor Transportation

10 W. Alfred Allen, who was arrested in possession of a gallon of alleged intoxicating liquor, was sentenced to pay a \$100 fine in monthly installments upon his plea of guilty. He was placed on probation for one year. Allen was arrested in the Boro for a motor vehicle violation April 19. Search of his car revealed the contraband.

20 Charles Swanson, of Lambertville, thru his attorney H. G. Prall, waived the reading of an indictment charge in public indecency and entered a plea of guilty. Imposition of sentence was deferred until April 30. Swanson was alleged to have committed a "grossly scandalous act, tending to debauch the morals and manners of several persons present" in Lambertville March 18.

John Fink, of the Boro, plead guilty to larceny of a bicycle from a Pittstown youth April 21. He was placed on probation for one year to make monthly reports to Recorder George Webster of the Boro.

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EXHIBIT P-14

COURTROOM SWELTERS
IN OPENING SESSION

Acquit Gas Station Owner of Fraud After 2-Day
Trial

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Lengthy Verdict Very Likely

In striking contrast with the shivering session of court in the December term, what promises to be a long, hot session of court opened Tuesday morning before Judge Adam O. Robbins. The excessive heat Tuesday and Wednesday led to the shedding of coats among the audience. But in the hottest place in the room, the witness chair, known during warm sessions as the "sweat box," all appearing found it mandatory upon the order of the court to be invested in a proper coat. 20

Those in the audience who inelegantly sat in shirt-sleeves were generously permitted to get away with it. Members of the bar and court attaches bore their well-dressed propriety with enduring sufferance. Those in the jury box stuck to their coats tolerantly, exercising brow-mopping handkerchiefs vigorously. Windows were kept open to their full extent. In the frequent recesses the entire assemblage sought cooler regions for breathers that usually overlapped the announced five 30 minutes. The session may be a lengthy one. A large volume of business may extend the term until the end of next week. No Common Pleas cases were ready at the calling of the list. At least three criminal indictments are to be tried in the Court of Quarter Sessions and other cases may be found.

Trial of Alleged Gas Fraud

The interest of jury and audience might have wilted in such an atmosphere had it not been for the energetic 40

attorneys, who kept on the jump in the trial of the indictment charging Willard Hafner, of Ringoes, with fraud in the sale of gasoline. Harry J. Able, trying the case for Prosecutor J. V. Aller, was at continual contest with Lloyd Fisher, defending attorney, and vice versa.

The allegation charged that Hafner sold a blue gasoline in imitation of the product of the Sun Oil Company from a distributing tank painted like and with all the earmarks of the Sun Oil Company tanks at his filling station near Ringoes. The defense contended that altho the tank used and the product may have resembled those of the complainant, there was no intention of defrauding the motoring public. It was pointed out that no trade name appeared on the tank. The gas and tank were furnished by another concern, dealing under the trade name "Genoco," supposedly being the General Oil Company.

Witnesses for the state included representatives of the Sun Oil Company, customers and garage owners. They were Warren F. Brooks, Harry Austadt and John V. Connell, all of Trenton; George Eck, Richard Slattery, Joseph Hylan and Wesley Meeker of Flemington, and Donald Holcombe and Thomas Parcetti of Ringoes. Brooks and Slattery were recalled by the defense for cross-examination.

Defense witnesses were Ralph O. Berger, Dr. W. E. McCorkle, Miss Sarah Strong, John D. Stockton, Joseph Sylvester, Walter Augustine and Willard Hafner, the proprietor.

Hafner Not Guilty

The weakness of the case for the state was evident from the outset and it was no surprise when the jury returned with a verdict of not guilty in less than half an hour yesterday afternoon. The indications were that the wrong man had been indicted if an indictment was necessary. Hafner's counsel apparently proved to the

satisfaction of the jury that whatever crime had been committed by the company furnishing him with the tank and gasoline. At no point in the testimony was anything said regarding Hafner's misrepresentation of the motor fuel to customers. Responsibility for the alleged fraud seemed to rest with the Genoco representative, Walter Augustine, who was a defense witness.

To motions for a directed verdict of acquittal were 10 made by the defense and denied by the court.

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EXHIBIT D-3

SUN OIL COMPANY

Sales Department

C. P. Cox,

Regional Sales Manager

10 C. H. Wright,

District Sales Manager

P. O. Box 675

Trenton, N. J.

March 14, 1930.

Mr. Harold D. Saylor

Lamberton & Moffett

1608 Walnut St.

Philadelphia, Pa.

Dear Sir:

20 Enclosed are photographs of three stations where Gaydos Bros. gas is being sold. It is not possible for us to find out where this gasoline is purchased and it is only an assumption on our part that it is Gaydos Brothers.

30 So far as the writer can learn Gaydos Brothers is not a corporation nor are they listed under any trade name. A search of the records of the Court House and in the office of the Secretary of State show no such listing. In all probability they are Julius and Andrew Gaydos trading as Gaydos Bros. without any registration. They are licensed to sell gasoline under license 8431. We can further check this by having the Trenton Credit Association give us a statement of who they are and how they do business and if you so desire and will advise me, I can secure this information.

In each of the three stations of the photographs attached, we submit the following facts:

Re. O.K. Service Station, Ringoes, N.J.

This station is located about one quarter of a mile from Ringoes on the Highway leading from Ringoes to Lambertville. On March 3rd, W. F. Brooks and George W. Eck stopped at the above station and purchased two gallons of blue gasoline and the following is the conversation:

Mr. Eck: "Is this Blue Sunoco?"

Attendant: "It is."

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When the gasoline was being placed in the car, Mr. Brooks asked,

"Is this really Blue Sunoco?"

Attendant: "Yes sir, it is."

Following the transaction, Mr. Eck asked,

"Are you sure this is Blue Sunoco?"

The attendant replied: "It is Blue Sunoco and a very good gas."

On March 12th at 12:16 P.M., W. F. Brooks, George W. Eck and John V. Connell again called at this station. Mr. Brooks purchased five gallons of gasoline having the five gallons placed in the tank of his car and another gallon placed in a can for a sample. Before making the purchase he asked if this was Blue Sunoco and was told that it was. In reply to the question, "Do you also have Sunoco Motor Oil?", he replied, "No". Mr. Eck asked, "Is this Blue Sunoco good to clean silk dresses?" to which the attendant replied, "It is." When asked by Mr. Brooks where he purchased this gasoline he said he did not know and that the equipment he thought was owned by "The Boss".

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The gallon sample is labeled and will be delivered by the writer to the Laboratories of the Sun Oil Company properly labeled so that there will be no confusion in its identity.

RE: Airway Service Station, L. Armitage, Propr.
Trenton-Brunswick Pike

W. F. Brooks, George W. Eck and J. V. Connell called

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at this station at 12:30 P.M. March 12, 1930. Mr. Eck purchased one gallon of gasoline in a can under the disguise that he had run out of gas along the Highway. Mrs. Armitage served the gasoline. Mr. Eck asked, "Is this Blue Sunoco?" to which she replied, "It is", and added "Sun gas is not different than others, just dyeing". Mr. Eck asked the question "Is Blue Sunoco good
10 to wash dresses?" to which she replied, "You had better not use it for cleaning on account of the dye." This gallon sample along with the other samples will also be given to the laboratory of the Sun Oil Co.

RE: Virelli Service Station

On March 3rd at 1:40 P. M., W. F. Brooks, George W. Eck and J. V. Connell visited this station and a purchase of Blue Gas was made by Messrs Brooks and Eck. To the question asked by Mr. Brooks, "Is this Blue Sunoco", the attendant replied, "It is". Purchase was made
20 by Mr. Brooks, Mr. Eck securing the gasoline in a can under the guise that it was needed for his car which had run out of gasoline and standing about 100 yards down the road from the Service Station. Mr. Eck asked where the gasoline was purchased and he said in Trenton. Mr. Eck again asked, "From the Sun Oil Company in Trenton?", and the attendant answered, "Yes." This man is located on the Yardville-Bordentown Road less than one quarter of a mile from Yardville, N.J. The gallon sample of this we will also deliver to the Labora-
30 tories of the Sun Oil Company for analysis.

I can probably find out definitely that this gasoline was bought from Gaydos by calling as a representative of the Sun Oil Company and demanding to know where they bought their gasoline. If you wish me to definitely establish that this was bought from Gaydos Bros., I will do this.

I trust this is the information you desire and if there is anything further you want to know or any fur-

ther data that the writer can secure, I will be only too glad to do my best in securing it for you.

Yours very truly,
SUN OIL COMPANY

WARREN F. BROOKS

WFB:S Mgr. Motor Oil-Gasoline Dept.
P.S. Since writing this letter I delivered in person the three samples from these stations to the Refinery 10 so that there can be no doubt as to the fact that these samples are the actual ones tested by our chemist.

Law Offices
LAMBERTON & MOFFETT
Sixteenth Floor
1608 Walnut Street
Philadelphia

Robert E. Lamberton

John Blair Moffett

2C

Claude L. Roth

Harold D. Saylor

Vernon L. Stover

William F. Leopold, Jr.

Frank B. Gummey, II

March 17, 1930.

Warren F. Brooks, Mgr.

Motor Oil-Gasoline Department,

Sun Oil Company,

P. O. Box 675, Trenton, N. J.

3C

Dear Mr. Brooks:

I have your letter of March 14th which gives me exactly the information I want. You did not, however, enclose the photographs. Please let me have them.

When you can, send me copies of the tax reports on the gasoline purchased, as stated by you, so that I will know that it is not Blue Sunoco, and so I will also know how the pumps out of which this gasoline is sold actually appear.

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Please find out whether or not it actually was Gaydos Brothers' gasoline sold at these places, if you can. If you can have all this information to me by next Thursday or Friday, I will get in touch with Trenton counsel to take action against these people immediately.

Very truly yours,

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HDS:S

HAROLD D. SAYLOR

Received

Mar 18 1930

SUN OIL COMPANY

File—Answered Mar. 25, 1930—W. F. B.

COPY

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SUN OIL COMPANY

Sales Department

SUNOCO

p. o. box 675

TRENTON, N.J.

March 14, 1930

Mr. Harry Angstadt
Sun Oil Company
Marcus Hook, Pa.

Dear Sir:

30 With further reference to the three samples of gasoline taken from O.K. Service Station, Airway Service Station and Virelli Service Station, and delivered to you by the writer on March 13th, please analyze these very carefully and make every test possible, because we want to use this analysis in a court proceeding.

Yours very truly,

SUN OIL COMPANY

(SGD) WARREN F. BROOKS

WFB:S

Mgr. Motor-Oil Gasoline Dept.

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GASOLINE SAMPLES

March 20, 1930

Mr. Harry F. Angstadt

Mr. Arthur E. Pew, Jr.

Dear Sir:

We are attaching carbon copy of letter from Mr. Warren F. Brooks and also the results of our tests on the three samples of gasoline submitted. Mr. Brooks originally stopped at the Norwood Laboratory and saw 10
Dr. Alleman who, in turn, called the writer. As a result of this Mr. Brooks delivered the samples to me in person, assuring me that they were very important as they contemplated court proceedings should the analyses indicate substitution.

The results of the tests very clearly and definitely prove that the three samples submitted are not standard Blue Sunoco Gasoline, but, on the contrary, are a very inferior grade of gasoline from various angles. Regarding the various characteristics of the samples 20
submitted the following are outstanding:

GRAVITY

Virtually all three samples are lighter in Gravity than our current shipments and particularly sample No. 1, representing material from the O. K. Service Station, Ringols, New Jersey.

DISTILLATION RANGE

You will note none of the boiling ranges of the samples approximate our current shipments of Blue Sunoco Gasoline. 30

SULPHUR

You will note the Sulphurs are rather high, particularly with reference to samples No. 2 and 3.

DOCTOR TEST

All three samples are negative to Doctor or sweet; this would further indicate substitution for Blue Sunoco Gasoline. 40

DETONATION

You will notice that all three samples are extremely poor in anti-denoating characteristics as compared to our Marcus Hook Blue Standard No. 3.

Yours very truly,

H. F. ANGSTADT.

HFA:RAD

10

March 18, 1930.

Samples of gasoline purchased in the State of New Jersey, 3/12/30, being sold as "Blue Sunoco" were tested at Marcus Hook, with the following results:

O. K. Service
Station, Ringols,
New Jersey,
Purchased 3/12/30
Sold as "Blue
Sunoco"

20

Gravity 61.3

Initial 79

5% 105

10 117

20 151

30 188

40 222

50 252

60 280

30

70 308

80 338

90 376

95 400

End Point 418

Recovery 98%

221° F. 40%

284° F. 62%

392° F. 93%

40

Color	Blue-green	
	Much darker than	
	regular Blue Sunoco	
Sulphur Content	0.08%	
Doctor	Sweet	
Gum	6 mgs.	
Detonation versus		
Marcus Hook No. 3		10
Blue Standard	56	

None of the above tests are representative of regular Blue Sunoco Gasoline.

Law Offices
LAMBERTON & MOFFETT
Sixteenth Floor
1608 Walnut Street
Philadelphia

Robert E. Lamberton	20
John Blair Moffett	
Claude L. Roth	
Harold D. Saylor	
Vernon L. Stover	
William F. Leopold, Jr.	
Frank B. Gummey, II.	

March 7, 1930.

Warren F. Brooks, Mgr.,	
Motor Oil-Gasoline Dept.,	
Sun Oil Company,	30
P. O. Box 675,	
Trenton, New Jersey.	

Dear Sir:

I have yours of the 3rd inst.

The description you give of the Gaydos Bros. pumps would make it appear that they are imitating the company's colors sufficiently closely to entitle the company to a cause of action in equity against them. In order to prepare for such an action, if necessary, it will be

wise to secure photographs of these pumps and to have the photographs colored in such a way as to show clearly the way the pumps appear.

Furthermore, I would like to know the exact name of the Gaydos Brothers, whether it be a corporation or a partnership—if the latter, the names and addresses of the members, if the former, the correct name of the corporation and the state creating it. It may be that you will not be able to secure this information without the services of an attorney, in which case please advise me and I will have someone there in Trenton secure the data for me.

Furthermore, it is necessary to list the number of pumps at different stations which are colored like those of the company, with the accurate locations, and the name of the station in each case.

Relative to the purchase recently by you and one of the salesmen of what was called "Blue Sunoco" at one of the Gaydos stations, I would like to know the exact name and location of the station, the date of the purchase, the name of the salesman, and what procedure was taken to determine whether or not the gasoline was Blue Sunoco. I presume, of course, it had not been sold to the dealer by the company, but that alone is not sufficient. I suggest that a gallon or two be purchased in a can, and then delivered to the refinery at Marcus Hook for test, the can being carefully marked so there will be no question about the validity of our chemists' findings.

If there is any question about the various matters covered in this letter, I shall be pleased to have you talk to me on the telephone. It seems clear to me that the way Gaydos Brothers are doing business is illegal, and we should use every means to get accurate data so we can go into court, if necessary, to restrain them.

Very truly yours,

HAROLD D. SAYLOR.

40 HDS:S

SUN OIL COMPANY

Sales Department

C. P. Cox,

Regional Sales Manager

C. H. Wright,

District Sales Manager

P. O. Box 675,

Trenton, N. J.

March 25, 1930. 10

Mr. Harold D. Saylor

Lamberton & Moffett

1608 Walnut St.

Philadelphia, Pa.

Dear Sir:

I am enclosing, this time, the photographs which were not in condition to be looked at when I wrote you last. However, we took more photographs of the buildings and I have sent you the last two of each building, one of them with the pumps marked and the other with the 20 pumps not marked and hope that this amateur effort will give you the information you desire.

I have also visited the office of the Tax Commissioner and find that there is no information available from the Tax Reports and that Gaydos Bros. do not pay any tax. The method of paying tax in New Jersey is different from Pennsylvania. In Pennsylvania the distributor pays the tax on all the gasoline he sells and in New Jersey the company pays the tax. Gaydos Brothers may buy from Crew Levick or Gulf, which tax is 30 paid by the Gulf Refining Company and charged to Gaydos Brothers.

The writer visited each of the three situations in question and was told at Virelli's Service Station that the gas was bought from Gaydos and that the equipment was owned by Virelli's Service Station. The same thing was true of Airway Service Station. The case was somewhat different at O. K. Service Station, Ringoes, N. J., where they said the gasoline was Blue Sun-

40

oco and when I told them they did not buy from the Sun Oil Company or from a distributor we have nearby, they refused to give out any information whatsoever.

It seems to me that our case is against these stations and not so much against Gaydos Brothers.

Hoping this is the information you desire, I am

Yours very truly,

10

SUN OIL COMPANY,

WARREN F. BROOKS,

WFB:S

Mgr. Motor Oil-Gasoline Dept.

20

30

4C

New Jersey Court of Errors and Appeals

WILLARD HAFNER, <i>Plaintiff-Respondent,</i>	}	Action at Law.
<i>v.</i>		
WARREN F. BROOKS and SUN OIL COMPANY, <i>Defendants-Appellants.</i>	}	On Appeal from New Jersey Supreme Court, Hunterdon County.

BRIEF OF DEFENDANTS-APPELLANTS

HISTORY.

This appeal has origin from a suit for malicious prosecution brought by the plaintiff against the defendants in the New Jersey Supreme Court, and which was tried before a jury in Hunterdon County Circuit on December 9, 10, 11 and 12, 1930, of December term, 1930.

The plaintiff, Hafner, was arrested on complaint made by the defendant Warren F. Brooks (case, p. 285, *Exhibit P-5*), April 15, 1930, for violation of chapter 116 of the Laws of 1928, p. 235, and at the sitting of the Grand Jury, in Hunterdon County for April term, A. D. 1930, was indicted, and on said indictment (case, p. 281, *Exhibit P-2*) was tried before a petit jury in Hunterdon County Court of Quarter Sessions, on May 6, 1930, and acquitted.

The present suit for damages for malicious prosecution, and/or false arrest in the above briefly recited criminal proceedings was thereafter commenced by the issuance of summons on or about June 11, 1930 (case, p. 2), and after issue framed was tried as above recited, and judgment rendered in favor of plaintiff for \$2,000, besides \$71.24 costs.

The grounds of appeal are two in number:

The First being for alleged error of this court in refusing defendants-appellants' motion for nonsuit (case, p. 10).

And the Second for alleged error of the court in refusing defendants-appellants' motion for direction of a verdict.

I.

AS TO THE FIRST GROUND OF APPEAL, ALLEGED, THAT OF ERROR OF THE COURT IN REFUSING TO DIRECT A NONSUIT.

The burden is on the plaintiff, Hafner, to prove

- (1) The arrest
- (2) Malice
- (3) Want of probable cause
- (4) Plaintiff's acquittal and discharge.

Toth v. Gressen, 51 Atl. Rep. 927 (New Jersey Supreme Court).

Failing in any of these elements, the plaintiff's case must fall.

As to burden of proof see, also, Magowan v. Rickey, 64 N. J. L. 402-403.

It is uncontroverted that the plaintiff was arrested on complaint of the defendant, Warren F. Brooks, for an alleged violation of chapter 116 of the Laws of 1928

(case, p. 285), and that an indictment followed (case, *Exhibit P-2*, p. 281) and that on the trial under said indictment, he was acquitted.

The complaint charges that on or about the third day of March, 1930, and on or about the twelfth day of March, 1930, the plaintiff, whose first name was then unknown and was fictitiously stated as "John," proprietor of the O. K. Service Station, located on the Ringoes-Lambertville Road, did store, sell, expose and offer for sale a liquid fuel so as to deceive or intend to deceive the purchaser thereof as to the nature, quality and identity of the same, by false representation, by the use of disguised camouflaged pump or pumps and by imitating the design and color of such pumps under which a recognized liquid fuel is marketed, namely the brand of the Sun Oil Company, known as Blue Sunoco motor fuel (case, p. 285).

Has the plaintiff sustained those elements of his burden in establishing a *prima facie* case by showing that the defendants acted maliciously and without reasonable and probable cause in preferring the above charge?

There was no acquaintanceship between the plaintiff and defendant, Brooks (case, p. 54, l. 8-22), so that personal animus as a possible inducement for making the charge must be eliminated.

The evidence as a whole on the part of the plaintiff fails to show that the criminal proceeding was instituted from any improper or wrongful motive, so that want of probable cause involving malice should have been required to be proven by competent evidence on the part of the plaintiff before the defendants were put to their proofs. This, it is contended, was not done.

"The existence of an illegal intention on the part of the defendant in this action is as essential to its support as were the falsity of the crimi-

nation, and the absence of a reasonable ground for a belief in its truth."

Magowan v. Rickey, 64 N. J. L. 402-403.

"Malice in the law is the intentional doing of a wrongful act without just cause or excuse."

McFadden v. Lane, 71 N. J. L. 624, 630.

Dalton v. Godfrey, 97 N. J. L. 455, 459.

The plaintiff conducted a (gasoline) service station along "Lambertville Road, Route 29" (case, p. 27, l. 20-21), and on March 2, 1930, he had a tank (pump) placed on his premises (case, p. 29, l. 34-35, and p. 43, l. 13-18) and at and after that time he had twelve pumps in all (case, pp. 60, 71, *Exhibit P-11*), until two "Standard Oil" pumps were removed after the criminal case (case, p. 55, l. 1-11).

The photograph which was first marked "*D-2 for Identification*" (case, p. 61, l. 10) and afterwards admitted in evidence as "*Exhibit P-11*" (case, pp. 68, 71) (also, see, *Exhibit D-2*, pp. 150-151) shows the position of the pump on the premises of plaintiff at the time of the alleged violation of the statute as charged in the complaint of the defendant Brooks, and the appearance with possible exception of color of several pumps at that time.

The gasoline pump and the fuel it contained, to which reference is made in the testimony on the part of plaintiff principally by referring to photographs, is shown thereby to be the extreme westerly pump on plaintiff's premises which in the testimony is referred to at times as "O. K. Service Station." The witness, William E. McCorkle, says: "This tank that had the blue gas in was at the end of the line, towards Lambertville." (Case, p. 101, l. 14-18.)

The words "tank" and "pump" it will be noted are used interchangeably to indicate the same object, that is, principally a blue pump with container at top dis-

playing a blue liquid fuel to the public, on the premises of plaintiff.

The plaintiff, by the bringing of his suit, assumes the burden of proving that the charges made in the complaint above recited, were unfounded in law, and that the defendant Brooks had no probable cause to make the charge. The circumstances under which the prosecution was instituted should have been fully and clearly shown by him.

The plaintiff admits the pump on his premises is a counter-part of a pump conceded to be a Sun Oil Company pump, excepting a certain yellow band and a label—that it was made by the same manufacturers as the certain pump then referred to on "*Exhibit P-6*" (case, p. 286), following direct examination, referring to that exhibit (case, pp. 48-49). All the pumps on "*Exhibit P-6*" were Sun Oil Company pumps in design including the coloring.

The testimony on the part of the plaintiff and nearly every witness produced by him in speaking of appearance of pump or gas is to the effect that the plaintiff, at the time charged in the complaint, to wit, on March 3 and 12, 1930, at his O. K. Service Station, was in possession, and use of, a blue colored pump, from which was exposed, offered for sale or sold a blue gasoline, and that in design and appearance was similar to the Sun Oil Company pump, and similar to the Sunoco motor fuel of said company, which said company marketed, and that such pump and fuel were well recognized by the purchasing public of motor fuels.

See testimony of Willard Hafner (case, p. 49, l. 20-28; p. 50, l. 17 to bottom; p. 51 to l. 18). As to whether the gas which plaintiff said he sold was a regularly recognized gas as far as the public knew. Note his answer to question, p. 70, l. 24.

Frank L. Miller (case, p. 73 and see p. 74, l. 34-37, and p. 75, l. 17-19).

Walter Augustine (case, p. 86, l. 25-30; p. 89 to l. 11).

Dr. William E. McCorkle (case p. 96). This witness afterwards made an attempt to change his testimony.

Sarah Strong (case, p. 119, l. 19-22).

From all the testimony on the part of the plaintiff, taking into consideration the character of the evidence, it is hardly conceivable that any conclusion should be reached other than that the Sun Oil Company's recognized pump from which its motor fuel "Sunoco" was marketed, was simulated by the plaintiff both as to pump and fuel, and that the difference in either or both at the dates alleged in the complaint as attempted to be shown was such only as to bring the same within the purview of the statute (chapter 116, Laws of 1928) as a disguised or camouflaged pump, which under the meaning of the statute would constitute false representation, and would, and did, deceive or tend to deceive purchasers of motor fuel from such pump, unless informed of the lack of identity, and it is contended that the plaintiff before resting his case and putting the defendants to their proof failed in sustaining his burden to show want of probable cause with malicious intent on the part of the defendant Brooks, in making the criminal complaint, and that the court erred in refusing the motion to nonsuit.

II.

AS TO THE SECOND GROUND OF APPEAL— THAT OF AN ALLEGED ERROR OF THE COURT IN REFUSING DEFENDANTS- APPELLANTS' MOTION FOR DI- RECTION OF A VERDICT.

In addition to the failure alleged on the part of the plaintiff to show that the complaint made by the defend-

ant against the plaintiff was done maliciously and without reasonable or probable cause as is claimed in Section I. of this brief in the matter of refusal to nonsuit at the closing of the case of the plaintiff, the defendants allege that on the evidence as contained in the entire case the plaintiff's action should fail.

(a) Because of want of probable cause with malice in making the complaint by the defendant Brooks has not been shown by the evidence.

(b) Because the defendants acted in making the charge or complaint against the plaintiff on the advice of counsel after first submitting all the material facts and circumstances under which the prosecution was instituted to a regular practicing attorney and counselor-at-law of this State.

AS TO FAILURE TO SHOW WANT OF PROBABLE CAUSE.

The testimony on the part of the defendants shows that complaints had been made to the defendant as a result of which the defendant Brooks visited the O. K. Service Station belonging to the plaintiff and made purchases of gasoline from a pump that was painted similar to those of the Sun Oil Company, and that such gasoline was colored blue (case, pp. 122-123).

The witness, Brooks, says, at the bottom of page 123:

"I asked the attendant if the gasoline I had purchased and had placed in the tank of my car was blue Sunoco. I had made a purchase of five gallons of gasoline and had it placed in the tank of my car. With me at the time was Mr. George W. Eck, at that time a salesman for the Sun Oil Company. Mr. Eck asked if he was positive, that is, if the attendant was positive, that this was

blue Sunoco, and the reply was, 'It is blue Sunoco.' I had some business in Flemington and I concluded my business on the second of March. I communicated this conversation to our * * *."

And then again (case, p. 124 bottom) the witness continuing testified:

"I communicated this to the legal department of the Sun Oil Company and was advised by them to secure samples of this gasoline. So, on a later date, on or about March 12, I returned to this O. K. Service Station and secured a one-gallon sample in a can."

The second purchase was in the presence of one, George W. Eck, and another salesman of the Sun Oil Company from Trenton, New Jersey, Mr. John B. Connell. And the same witness, Brooks, continuing at page 125, testifies further as follows:

"I asked if this was blue Sunoco, and Mr. Eck asked if this blue Sunoco would clean clothes, and I asked again if the attendant was sure this was blue Sunoco, to which he replied it was. I distinctly recall three distinct questions and three distinct answers when this gasoline sample was secured. I took this gasoline sample the next day, in person, to our chemical laboratory at Marcus Hook Refinery and delivered it in person to Mr. Angstadt over there, labeled as to when it was taken and wherefrom, and wrote a letter from my office in Trenton the next day verifying the action that I had taken in delivering this sample to him. Later on, at the advice of the legal department, and in conjunction with our attorney at Trenton, Mr. Backes, I made a complaint against Mr. Hafner."

The foregoing quoted testimony, it is contended, shows that the plaintiff at the times mentioned, March 2 or 3, and March 12, 1930, was selling from a blue pump, similar to the Sun Oil Company pumps, a product which was stated to be Sunoco, and which was a blue motor fuel largely advertised by the Sun Oil Company, one of the defendants herein. The testimony is supported by another witness, John B. Connell (case, pp. 225, 226, 227).

Another witness, George W. Eck, was attempted to be served with a subpoena, but was unable to be found and could not be produced (case, pp. 210-211).

The witnesses on the part of the plaintiff, as stated in Section I., had testified as to the similarity of the pump and appearance of the liquid fuel.

The fact that a distributing agent of the defendants was deceived by the appearance of the pump and accused defendants of putting a pump in his territory (case, pp. 211-213) is most significant of the tendency of the apparatus to deceive a purchaser, who might not be so technically acquainted with the design and colorings of the Sun Oil Company pump as a person actually acquainted with the details thereof.

And then the fact that an attendant on the premises, stated, and sold, the gasoline to be "Sunoco" would be a potent circumstance in creating a belief on the part of the defendant Brooks that the plaintiff was attempting to deceive the public and that the pump and sales therefrom were at the times alleged in the criminal complaint fraudulent under the statute mentioned above.

It is true that the attendant, Eggert, attempts to deny the statements made to Brooks and Connell, that the gasoline was Sunoco (case, p. 245 and sur-rebuttal, p. 256, l. 28-34; p. 257, l. 17-25), but it is submitted that the attempt was unsuccessful. Assuming, *arguendo* only, that this witness did not say or admit that the

gasoline purchased by Mr. Brooks was "Sunoco," that fact would be immaterial as to whether the pump or container was a simulated, disguised or camouflaged pump. In other words, this pump spoke for itself as to whether it tended to deceive.

The defendant Brooks says that he did believe that all the things he had seen and heard and done as stated by him, prior to the complaint, constituted guilt under the statute as charged (case, p. 198, l. 1-10).

To confirm the reasonableness of such belief, see the testimony of Clinton H. Wright (case, p. 203, l. 30 to bottom and p. 204, l. 18-22) and of Thomas Percetti (case, p. 220, l. 10-35; p. 223, l. 6-11; p. 225, top).

On the whole case we are unable to discover from the evidence that the essential facts which formed the basis of the charge or original complaint, are materially disputed whereby it could legally be submitted to the jury as to whether the defendants had reasonable and probable cause for making the complaint in this case—the similarity of the pump used by plaintiff, and the gasoline or liquid fuel exposed and offered for sale from such pump is conceded, and the circumstances as they existed on March 3 and March 12, 1930, are shown by the defendants and are not legally controverted, as is claimed. The purchases on the part of defendant are not denied and only an attempt is made to controvert the facts stated by the witnesses Brooks and Connell that the gasoline was sold as "blue Sunoco" and this by the testimony of Lewis F. Eggert (case, p. 245) who simply denies the statements of the purchasers and explains what he said by alluding to that part of the conversation referring to fitness of gasoline to clean a dress and is silent as to the remainder of the conversation, but afterwards the same witness admits inquiry for "Sun gas," and when pressed for an answer to the question:

"Q. When he asked you if it was Sun gas, what did you tell him?" His answer was:

"A. I told him I did not *think so.*" (Case, p. 248.)

It is claimed that this witness' testimony is such that it cannot be considered as controverting the statements of defendants' witnesses, because it indicates by an irresistible inference that other conversation was had between him and the then purchasers, and a failure to fairly state what it was (case, pp. 249-252).

See comment in charge of his Honor, Judge Eldridge (case, pp. 266-267).

And further, as stated above, the apparatus involved, which was in full view of the public, showed whether it tended to deceive.

The plaintiff does not show that the facts stated in the complaint made by defendant were false. He admits the similarity of pump, and the evidence on his part goes mainly to immaterial differences, the very existence of which, it is contended, constitute the disguising or camouflaging, and the imitating of the design and color of the pump as charged, and it is not shown that the color of gasoline lacked similarity to "Blue Sunoco."

Without falsity being shown, an inference of want of probable cause and malice cannot be justified.

Vladar v. Klopman, 89 N. J. L. 475-576, citing Navarino v. Dudrap, 66 N. J. L. 620; Weiner v. Harrison, 81 N. J. L. 601.

"Where the facts are not controverted the question of probable cause is one of law to be determined by the court, its submission to the jury is improper."

Vladar v. Klopman, 89 N. J. L. 575-578.

But when the question as to "whether or not the defendant had probable cause for instituting the prosecution against the plaintiff, depends, in part, at least, upon facts, the existence of which is in dispute, it is the func-

tion of the jury to settle those facts, and upon doing so, to determine on the whole case whether or not probable cause has been shown, such determination being based upon proper instruction from the court."

Dalton v. Godfrey, 97 N. J. L. 455, 459.

Vladar v. Klopman, 89 N. J. L. at p. 578.

The same case at page 576 states: "The fundamental grounds upon which an action for malicious prosecution rests are that it was instituted against the plaintiff without reasonable or probable cause; and that the defendant was actuated by a malicious motive in making the charge. Unless the evidence in the case establishes the existence of both these grounds, the plaintiff's suit must fail."

Of course, it is well settled that in cases of malicious prosecution, it is not only necessary to prove on the part of the plaintiff that the affidavit made by the defendant was false, but also that he knew it was false, or did not have reasonable and probable cause to believe it to be true.

Dalton v. Godfrey, 97 N. J. L. at page 461.

Izzo v. Viscount, 74 N. J. L. 65-67.

It is contended that the plaintiff failed to show the falsity of defendant's affidavit and it is further contended that the facts showing reasonable and probable cause for making the affidavit by the defendant Brooks have not been materially controverted, and it is submitted that the motion to direct a verdict was erroneously refused.

ADVICE OF COUNSEL.

It is further contended that the trial judge should have directed a verdict for the defendants, because the complaint in the criminal proceeding was made only after the defendant Brooks had conferred with counsel and had been advised to make the complaint after a full and true statement of the facts on which the complaining affidavit was based.

The testimony of Warren F. Brooks shows that after he had made an investigation of the circumstances surrounding the blue pump with yellow markings and the liquid fuel exposed to sale, or sold therefrom, that he reported the same to his principal, the Sun Oil Company, through its legal department; and that he was referred to Mr. Herbert W. Backes for legal advice concerning the then supposed violation of the above-mentioned statute.

That he did take the matter up with Mr. Backes and related to him all the facts and circumstances which he had discovered, or which had come to his attention, and was advised by Mr. Backes to make the complaint, following which the indictment was found. (Case, pp. 148-154.)

In full confirmation referring to the seeking for and receiving, and acting upon the advice of counsel. (See testimony of Herbert W. Backes, case, pp. 231-238).

There seems to be no question as to the full and complete statement of all the facts and circumstances relating to the situation involved in this suit by the affiant, Brooks, to counsel, Mr. Backes. Not only was the statement made by Mr. Brooks that the complaint was entered under advice of counsel, but that all the facts were stated fully by him to counsel in seeking advice; and the same is fully and in detail corroborated by counsel himself.

At page 238 of State of the Case, Mr. Backes says: "Mr. Brooks acted entirely on my advice. I was the one who told him to do it." (See page 237 where the witness says:

"That after the information I received from Mr. Brooks and after going up and seeing this place I sent for Mr. Brooks again and told Mr. Brooks that he, as the person with the knowledge of this evidence should be a complaining witness on the part of the Sun Oil Company to make this complaint against Hafner, and I asked him to go with me to a justice of the peace for the purpose of making the complaint. I advised that a complaint should be made and advised Mr. Brooks to sign such a complaint.")

In *Bennett v. Pillion*, 105 N. J. L. pp. 359-362, it is stated:

"But the advice of an attorney will not protect the party who consults him unless all the facts relating to the situation—that is, which would justify or negative making the complaint—are submitted to the attorney * * *."

And in *Dalton v. Godfrey*, *supra* (97 N. J. L. 455-459), Chancellor Walker, speaking for the Court of Errors and Appeals, upon the question as to whether advice of counsel is ground for the direction of a verdict says:

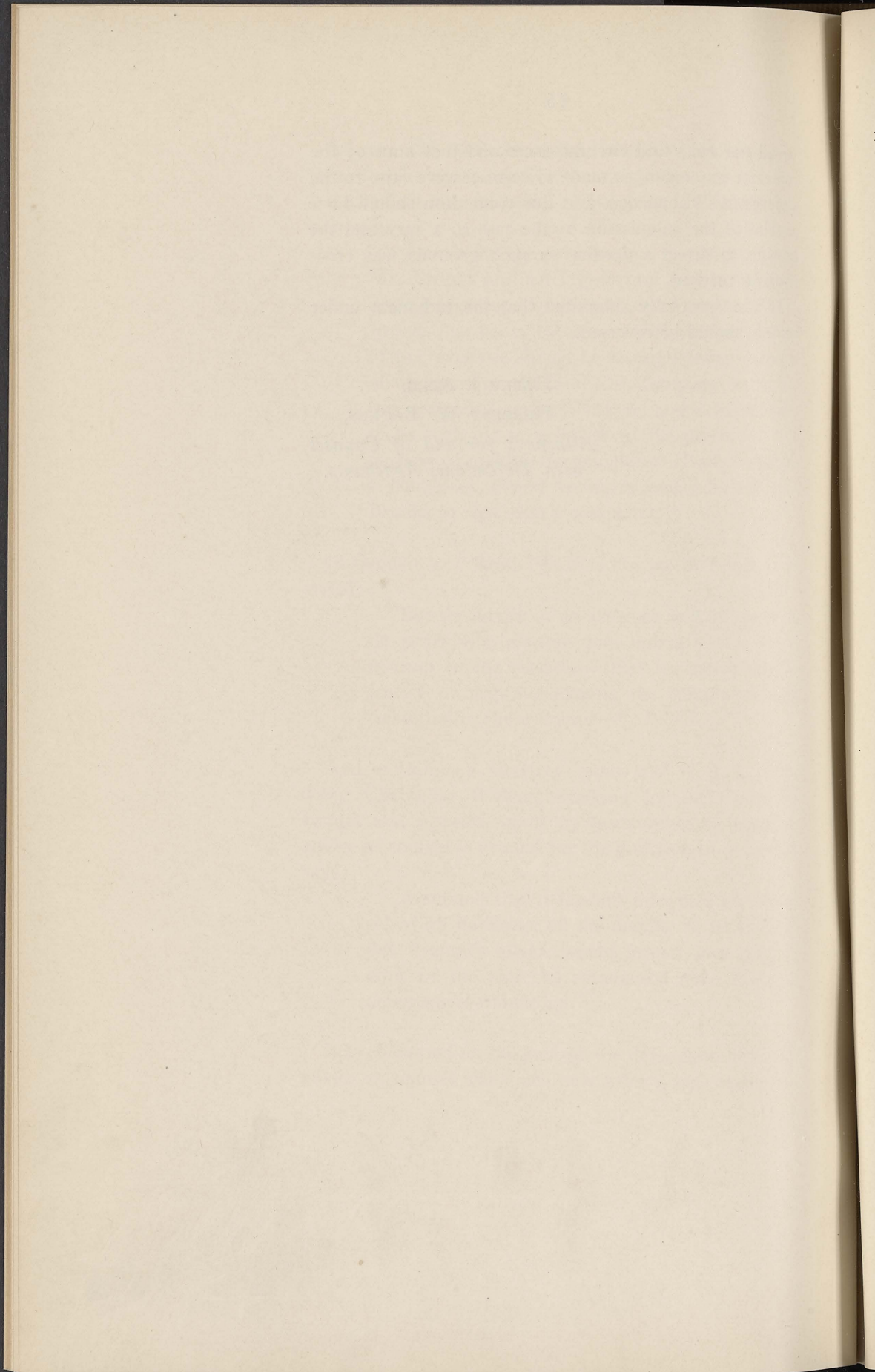
"Assuming that defendant informed his counsel of all the facts, all the details, as he said he did, counsel's advice would protect him only if none of the material statements were false to defendant's knowledge."

It is submitted on the part of the defendants that the advice of counsel was given only after a true statement

of all the facts and circumstances and that none of the material statements so made to counsel were false to the defendant's knowledge, and this contention should have precluded the submission of the case to a jury and the motion to direct a verdict on such grounds was erroneously refused.

It is respectfully submitted that the judgment under review should be reversed.

HARRY J. ABLE,
HERBERT W. BACKES,
*Attorneys for and of Counsel
with Defendants-Appellants.*



New Jersey Court of Errors and Appeals

WILLARD HAFNER,

Plaintiff-Respondent,

-vs-

WARREN F. BROOKS and

SUN OIL COMPANY,

Defendants-Appellants.

Action at Law.

On Appeal From
New Jersey
Supreme Court,
Hunterdon County

BRIEF OF PLAINTIFF-RESPONDENT

THE COURT COMMITTED NO ERROR IN REFUSING DEFENDANTS-APPELLANTS' MOTION FOR A NON SUIT.

Three subjects will be discussed under this heading as follows:

- A. The criminal complaint.
- B. The evidence and conclusions therefrom.
- C. The Law of Malicious Prosecution and conclusions.

A. The criminal complaint stripped of its verbiage charges as follows:

1. Sale by false representation.
2. Sale by disguised camouflaged pumps or pump.

3. Sale by imitating the *design* and color of such pumps under which a recognized fuel is marketed.

The meaning of the word "design" has not been defined by the courts of this state as it is used in Laws of 1928, Chapter 116, under which the complaint was drawn. The statute is set out in full in the State of the Case, page 263, line 29 to line 15, page 264. The word design appears in the following clause "or by imitating the design, symbol, or trade name under which recognized brands of such products are generally marketed." The word design is, as used in the statute, the equivalent of sign, symbol, or trade name. It does not give to anyone the exclusive right to the use of a pump of a certain or particular design—or the exclusive right to the use of a certain combination of colors.

The use of a pump of the same physical design and color as that of another company of itself does not constitute a crime under the Act. It is only evidential in determining whether or not the one charged with violating the act is making use of disguised, camouflaged or falsely labeled pumps.

Plaintiff-Respondent's proof was clear that there was no direct misrepresentation. Defendants-Appellants' case must therefore rest exclusively upon the second charge of the complaint that plaintiff-respondent used a "disguised, camouflaged pump." Defendants-Appellants take this view in the last paragraph of his brief under his first point.

B. Evidence.

It is uncontroverted that a complaint was made April 15th charging a violation of the Act on March 2nd and 12th. *Ex. P-5, p. 285.* That the Plaintiff-Respondent was arrested April 17th. *Ex. P-4, p. 283.* That he was indicted in the April Term and acquitted by a traverse jury May 7th, *Ex. P-1, page 279.*

Plaintiff-Respondent was not charged with imitating the symbol or trade name of Defendant-

Appellant. The charge involved the sale of gas from a single pump, that at the most southerly end of a line of twelve pumps located in front of Plaintiff-Respondent's gas station. This pump was erected by Gaydos Brothers, distributors of a blue gas, and was erected as received by them from the Wayne Pump Company. See testimony of Walter Augustine, page 77, lines 19-22.

“Q. Who installed the Hafner pump?

A. I did.

Q. When did you put it in?

A. About the second of March, 1930.”

and lines 31-40—

“Q. Where did the pump come from?

A. The Wayne Pump Company in Philadelphia.

Q. How was it procured?

A. By a truck; we went after it with a truck.

Q. Is that a standard pump with the Wayne Pump Company?

A. Yes.

Q. How do they ship it as to color?

A. Just exactly as it was installed.

and page 78, lines 1-5—

“Q. Do you know whether that is a stock pump or stock color with the Wayne Pump Company?

A. Yes.

Q. Is it?

A. Yes, sir.”

The pump had no symbol, design or trade name upon it and was without a globe on March third and March twelfth, 1930, the dates alleged in the complaint. See testimony of Walter Augustine, page 77, lines 25-30 inclusive:

“Q. Do you know who furnished the globe?

A. Yes.

Q. Do you know the date it was furnished?

A. It was furnished about three weeks

after it was installed. We were all out of globes at the time we installed the pump.”

and cross-examination of the plaintiff-respondent, page 49, lines 12-15 inclusive:

“A. There is no label on my pump.

Q. And the label. That is my mistake. There is no label?

A. No.”

and direct examination of the same witness, page 31, lines 17-19 inclusive:

“Q. Did it have a label at all in the region in which this label appears?

A. No label whatever.”

See *Exhibits D—No. 1 and No. 2*, p. 298-299 which shows the tank as it was prior to the placing of the globe, and *P No. 12* which shows the tank after the placing of the globe. This shows clearly there was no design, symbol or trade name upon the pump.

Genoco was a standard white gas and had been sold by the plaintiff-respondent since July 1929, page 42, lines 27-29 inclusive:

“Did you sell Genoco gas prior to 1930?

A. Yes, I think the pump was put in around July 1929.”

The Sun Oil Company has no exclusive right and can obtain none under our law to the use of the color blue in its gas. Likewise it has no exclusive right and can obtain none under our law, to the use of blue or yellow coloring on its pumps. Yet it is upon this charge that it sought to hold the plaintiff-respondent in a criminal action. See letter of the attorney of the Sun Oil Company to plaintiff-respondent prior to the making of the complaint, and which is herewith set out in full, *the underscoring* being ours. (*P-10*, page 290).

COPY

Exhibit P-10

Trenton, N. J., April 5, 1930.

Dear Sirs:

Our client, Sun Oil Company, has brought to our attention the fact that you are selling a gasoline or motor fuel colored blue and purporting to be Blue Sunoco at your service station.

This gasoline is dispensed from a pump colored yellow or blue which are the Sun Oil Company's colors. Your use of these colors on your pump and your sale of a blue gasoline therefrom is intended to deceive the public and is a violation of the law so far as unfair trade competition is concerned.

As a matter of record, we write this letter to notify you to desist forthwith in dispensing *a blue gasoline from yellow and blue pumps*. Upon your failure to respect this notice, we shall be obliged to take such legal action as the circumstances warrant. Please be governed accordingly.

Very truly yours,

There was nothing about the tank to deceive anyone, the color of the gas was different from that sold by the Sun Oil Company, and the placing of the colors upon the pump was different than that used by the Sun Oil Company, and the physical features of the pump differed from the pumps of the Sun Oil Company.

Plaintiff-respondent in his direct testimony, page 48, lines 14-34:

“Q. Now, I show you photograph marked Exhibit P-8 and I ask you to step down in front of the jury and point out where the coloring is different on that tank than on the tank which you have marked “A” on the sheet.

A. Well, the difference in this tank—This tank on the picture has yellow here and here, and all the rest is blue, all

the way down; where this (indicating) has got yellow.

Q. In other words there is no yellow on the base at all?

A. No. After you leave that (indicating) it is all blue.

Q. Is there any plate or mark on the tank in the photograph similar to the mark or plate appearing in the center of the body of the Sunoco pump?

A. No, there is none on this pump at all.

Q. So that you have no mark of any kind, nature or description, at that point, and it is solid color from there clear to the ground?

A. Yes sir."

Under cross-examination the same witness at *page 51, lines 27-30, inclusive*, speaks of the difference in color of the gasoline:

"Q. Is there any similarity in the color?

A. This is a greenish blue, while theirs is a bluey blue.

Q. But the Genoco has a blue cast, is that right?

A. Yes."

and the same witness at *page 55, lines 17-26 inclusive*:

"Q. Was there any distinguishing feature about that pump which would indicate the kind of gas that was being sold therefrom when you served the public?

A. The pump was a different color and the gas was on a greenish blue, where theirs was on a true blue.

Q. For three weeks was there any sign of Genoco?

A. No; there was no bulb there.

Q. There was no sign on the pump at all?

A. No; they did not have any bulb there."

and the same witness at *page 33, lines 20 and 39*

indicates that he sold this gas under the name of Genoco.

“Q. State how you sold this gasoline, under what name?

A. Genoco.”

Walter Augustine, at *page 76, lines 31-39 inclusive*, and *page 77, lines 1-9 inclusive*:

“Q. I wish you would point out to the jury the difference between the two tanks.

A. On the chart?

Q. Yes.

A. (indicating). The tank Mr. Hafner has over there is a little bit different here. This has about, I imagine, four or five inches of yellow in here, (indicating), where the tank Mr. Hafner has has only two inches of yellow around that band in here underneath the bowl; and from there on down it is all blue, or it was at the time Mr. Hafner was arrested. From there on down to the base it is all blue. And the top, from here on around is all yellow as far as here, and around the globe on the top it is black instead of yellow. And it has no sign in here. It has just a plain band all the way and blue from this band down to the basin.”

And the same witness speaking of the color of the two gases, at *page 84, lines 26-38 inclusive*:

“Q. You said on your direct examination, Mr. Augustine, that there was a difference in the color of the Genoco gas from the Sunoco gas. Would that difference be apparent to a person unless one was set along side of the other for comparison?

A. I think it would.

Q. To the average person who buys gas

you think he could tell the difference from the color if he walked up to a pump and said, "Put in this gas?"

A. I can see the difference twenty-five feet away from it."

And the same witness at *page 86, line 3-25* gives the difference in physical forms:

"Q. I asked you whether it was identical in shape and form?

A. Well it is different than this.

Q. What is that?

A. It is a little different than this. It is different than any pump on this chart.

Q. Wherein lies the difference?

A. In here (indicating).

Q. That is shape and form?

A. Yes.

Q. I am not asking about the coloring.

A. No, in the build of it.

Q. Where?

A. Right in here (indicating).

Q. Tell us the difference.

A. This pump here has got a longer flange in here. I should think it has about five or six inches flange on here; about two inches in here, instead of four or five.

Purchasers of the gas at the plaintiff-respondent's station were not deceived as to what they purchased. Ralph Berger at *page 72, line 15*, says:

"A. I simply asked what kind of gas he was putting in and he stated that it was his own blue gas."

and Mr. Miller at *page 73, lines 12-19* inclusive, says:

"Q. Did you purchase from this pump that has been talked about in this trial?

Yes, sir.

Q. Did you know what kind of gas you were purchasing?

A. Yes.

Q. What kind was it?

A. Genoco."

and Dr. McCorkle under cross-examination by Mr. Able at *page 107, lines 27-35*, says as follows:

"Q. Do you know the colors of the Sun Oil Company pump?

A. Yes.

Q. When you saw this pump first on the ground of the O. K. Service Station did it impress you as a Sun Oil Company pump?

A. No.

Q. It did not so impress you?

A. No."

L

Sarah Strong, under cross-examination by Mr. Able, at *page 118, lines 2-40 inclusive*, says as follows:

"Q. Are you familiar with the appearance of the recognized Sunoco pumps and the blue-colored gas sold therefrom?

A. I am.

Q. This pump that was placed on this O. K. Service Station plant was similar in shape and form and color, was it not?

A. It was in shape.

Q. And without any advertisement being noticed thereon would you take that to be a Sunoco pump?

A. I would not have.

Q. And what would you take it for?

A. I would not take it for any kind of a pump until I saw the name over it.

Q. Well, did the appearance of the pump appeal to you as being like the Sunoco?

A. It did not because there was no Sunoco globe above it.

Q. I am speaking of the general form and appearance and color of the pump; was

there anything that indicated to you that it appeared like a Sunoco pump?

- A. From the general form, yes; not from color or from appearance. The color was not identical.
- Q. Tell us wherein it was different.
- A. The band at the bottom of the pump and the seal on the front of the pump.
- Q. Did you notice that when you first looked at it?
- A. I did.
- Q. You noticed the pump was different? Wherein was it different?
- A. There was no yellow band on the bottom of it.
- Q. And you were familiar with the fact that the Sunoco pump had a yellow band on the bottom?
- A. Naturally.
- Q. You knew that before this occasion, did you?
- A. Having used Sunoco before, yes."

It appears from the testimony of Mr. Hafner, *pages 28 and 29*, that the attorney of the Sun Oil Company appeared at the hearing before Squire Webster, and interrogated witnesses there sworn on behalf of the State, and sat at the State's table at the trial of the indictment.

The answer admits that Warren F. Brooks, as agent for the Sun Oil Company, on the 15th day of April 1930, made the complaint upon which this suit is founded.

The defendant-appellant, Warren F. Brooks, typed the complaint at the dictation of the attorney of the defendant-appellant, the Sun Oil Company, while the two of them were in the office of the Justice of the Peace. *Page 154, lines 1-11 inclusive:*

- "A. He directed me to make a complaint. He went with me when we made the complaint, and we were in Squire Web-

ster's office and made a search for the squire or justice of the peace or whatever you call him in New Jersey—Magistrate—and after half a day's search we found Mr. Webster, and Mr. Backes dictated the complaint and I wrote it on Mr. Webster's typewriter. The next thing, as I recall, was the day the arrest was made and I appeared before Squire Webster."

C. Law of Malicious Prosecution.

It has long been the law of New Jersey that in order to sustain a suit for malicious prosecution three things must be proved: *Weisner vs. Hanson*, 81 *Law*, page 603:

First, a criminal prosecution against the plaintiff and its ending in a manner favorable to the plaintiff.

Second, that it was instituted by the defendant without reasonable or probable cause.

Third, that the defendant was actuated by malicious motive in making the charge.

In the case now before the Court it is uncontroverted that the criminal charge was made and an acquittal followed. The Chief Justice in the case last above cited, says:

"When a party makes a criminal charge against another without having reasonable ground for believing it to be true, the presumption is that in doing so he is actuated by a malicious motive."

Justice Van Syckel speaking for the Court of Errors and Appeals in the case of *Navarino vs. Durap*, 66 *Law*, at page 621, says as follows:

"From the untruthfulness of the facts stated in the affidavit, malice and want of probable cause could be inferred."

And again the Chief Justice in speaking for the Court of Errors and Appeals in the case of

Vladar vs. Klopman, 89 *Law*, at page 576, says as follows:

“There was proof submitted by the plaintiff which showed that the charge of larceny made against her was false. When she rested her case, therefore, this proof was sufficient to justify an inference of want of probable cause, and of malice,” citing the two cases last above mentioned.

Justice Pitney in an exhaustive opinion in the case of Brennan vs. U. S. Hatters, 73 *N. J. Law*, at page 745 adopts the following words:

“Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which in fact does damage another in that other person’s property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong.”

The Chancellor speaking for the Court of Errors and Appeals in the case of Dalton vs. Godfred, 97 *N. J. Law* at page 458:

“If the jury had believed the story told by the defendant, they might have found reasonable and probable cause for the prosecution; but on the contrary, if they disbelieved him and believed the plaintiff, then it was proper for them to find that the prosecution was malicious, because without either reasonable or probable cause.”

and at the top of the same page the Chancellor says:

“From this evidence the guilt of the plaintiff could not reasonably be inferred, and, therefore, the denial of a non-suit was right.”

The Court of Errors and Appeals in Maudsley vs. Richardson & Boynton Co., 101 *N. J. Law*, at page 562, says as follows:

“In passing upon a motion to non suit the

court cannot weigh the evidence, but must take as true all testimony which supports the view of the party against whom the motion was made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor. *Mulrooney v. O'Keefe*, 98 *N. J. Law*, 853."

Counsel for Defendants-Appellants stated four reasons for a non-suit in his motion before the court at *page 119, lines 30 to 40, and at page 120, lines 1 to 10*. In his brief he has abandoned all these reasons except the second which is that plaintiff failed to establish that the defendants made the complaint maliciously and without reasonable or probable cause.

Plaintiff-Respondent expressly testified that he sold the gas as Genoco—a standard gas which he had been selling in its white form since July 1929. There was no claim at the trial or at the indictment that the word "Genoco" in any way tended to deceive any one, as indeed it could not, because of the large number of other gases using similar names, such as the Continental Oil Company's "Conoco"; the Standard Oil Company's "Socony", etc. The defendant produced Exhibit P-6 and an examination of that exhibit will show that all of the Sun Oil Company tanks have placed upon them in a very conspicuous position, the design, symbol, or trade name which is known in the trade as a decalcomania. In the case of the Sun Oil Company tanks, this design, symbol, or trade name appears in large legible printing, on what is known as the skirt or body of the tank, and also on what is known as the globe, so that no one could have been deceived by the tank used by the plaintiff-respondent.

In addition there is the testimony that the attorney of the defendants-appellants personally dictated the complaint in the office of the justice, while the defendant, Warren F. Brooks, typed it; that he attended the hearing before the justice and

interrogated the witnesses, and sat at the State's table during the trial. And these acts alone are sufficient to justify an inference of malice.

It is submitted that it has been very clearly shown that the public was not deceived and that no attempt was made to deceive the public. Furthermore, the various witnesses pointed out the physical difference between the pumps, the difference in the placing of the colors and the difference in the coloring of the gas itself. The testimony is clear and convincing that the pump used by the plaintiff-respondent was of sufficient difference in coloring and in physical form to be differentiated from the pumps of the Sun Oil Company.

It is submitted that the testimony on behalf of the plaintiff-respondent showed clearly want of probable cause and a legal inference therefrom of malice.

The placing of the colors was different. The physical features of the pump were different, the color of the gas was different, and the pump itself was without any globe, and bore no inscription of any kind to mislead anyone.

It is submitted that the court was correct in refusing a non-suit.

II

The Court committed no error in refusing the Defendants-Appellants' motion for a directed verdict.

Three subjects will be discussed under this heading as follows:

A. The Evidence.

B. The Law of Malicious Prosecution as to advice of counsel.

C. The bringing of a criminal complaint to accomplish a private end.

A. *Evidence.*

The Defendant-Appellant Brooks sold pumps

of the Sun Oil Company to be used in the sale of other gas. See *page 180, lines 7-13 inclusive*:

“Q. In addition to the Wayne Pump Company selling some of these blue and yellow pumps you, yourselves, sell some of them outright, don't you, your own company?

A. We will sell them. We will paint them red and sell them or we will sell them to a man if he agrees to paint them.”

Brooks knew the Wayne Company was selling the same pump to others, *page 178, lines 26-31 inclusive*:

“Q. So it is common practice for the Wayne Company to send out pumps painted blue and yellow?

A. No, it is not.

Q. They have sold them that way?

A. It happened twice, once with Purol and with Keystone.”

And at the bottom of *page 178* and top of *page 179*, Brooks indicates he knew the Wayne Company were selling these very pumps to others. The Wayne Company had a large stock of these pumps left on hand and unsold because the sale of this type of pump had declined in favor of the electric pump.

Brooks gives a week or ten days as the time required to repaint a pump. *Page 179, lines 29-31 and 38-39*:

“Q. Now, as an experienced pump man what would you say was a reasonable time for a dealer to get his pump repainted?

A. A week or ten days, with other conditions entering into it.” L

Yet he had plaintiff-respondent arrested for two sales, one made the day following the erection of the pump and the other within ten days after the installation of the pump.

Brooks knew, prior to making the complaint, that the plaintiff had informed the counsel of the

Sun Oil Company in writing that he was not selling a blue gas as Sunoco. *Page 181, lines 27-40 inclusive, and page 182, lines 1-4 inclusive:*

“Q. Between the time you were there at the service station on the twelfth of March and the time you made your complaint, on the thirteenth day of April, your counsel wrote a letter to Mr. Hafner and got an answer, did he not?

A. Yes.

Q. Did you see those letters?

A. Yes, sir.

Q. You knew then on the tenth or eleventh day of April that Mr. Hafner contended that he was not selling blue gas in imitation of Sunoco, that he was not selling it from a pump disguised as a Sunoco pump, that he clearly stated it was his his own gas and from his own pump, didn't you; in other words, you had seen that letter?

A. Yes.”

Brooks admits on his direct examination that on his last visit to the plaintiff's place on March 12th, he was informed the gas was not Sunoco, *page 129, lines 32-40:*

“Q. All right. Now what happened?

A. I asked him where he secured his Blue Sunoco from and he said he didn't know, and I told him I had bought some gasoline earlier in the day and it purported to be Blue Sunoco, and he said, 'All I say is it is a good blue gas,' and he denied that he said it was Blue Sunoco.

Q. How is that?

A. He denied that he said it was Blue Sunoco.”

Nowhere does he repeat this conversation to his counsel. Brooks admits that the pump on Hafner's place is different than the pumps shown

on the Sun Oil Company's chart, *Exhibit P-No. 6. Page 132, lines 8-18:*

"A. The detail difference is very small. What is known as the skirt of the pump—the lines on the outside running up and down—are a little nearer parallel on the Pennsylvania pump than on the Wayne, and in all probability the yellow band about the center of the pump is not quite so deep on Wayne; otherwise the Wayne pump is very similar to the Pennsylvania pump. To the average observer they would all look alike. The Wayne is so near the Pennsylvania model that —."

The witness also admitted on his direct examination that the pump had no globe and no label, *page 134, lines 9-14:*

"Q. How about the label or something of that kind on the side of the pump?

A. There was no label at all.

And when you saw it there was no top on it, you said?

A. No globe on the top."

Witness admits that the Sun Oil Company had no pumps standing in the open without globes, *page 135, lines 20-21:*

"A. There is no pump installed where there is no canopy overhead where a globe does not appear on it."

and at *page 183, line 21:*

"A. There is never one without a globe or seal."

Joseph Hylan, a witness produced by the defendant, tells of the difference in the pump, *page 214, lines 32-40:*

"Q. What did you see about the Hafner tank that differed in comparison with the tank there on the picture?

A. Well, in the first place, there was no

advertising globe; there was nothing only the cap that was shipped from the factory; and there was no yellow sign displayed; there was no decalcomania."

The same witness received the same pump from the Wayne Company for both the Purol Company and the Sun Oil Company, *page 216, lines 26-29*:

"Q. So you have had delivered from the Wayne Pump Company identically the same pump for the Purol Company as for Sunoco Company?

A. We have had, yes."

Hylan was not deceived by the color of the gas, *page 216, lines 36-40, and page 217, lines 1-10*:

"Q. When you went down there to look at the pump could you tell from your observation whether Sun gas was in the pump or not?

A. Well, of course the gas that was in that tank is really not a true blue gas, as the Sun gas is. It is a much lighter blue. With the naked eye you can see a difference.

Q. How many feet away could you see that difference?

A. Oh, I should say, depending on the range of the light shining on the pump.

Q. But it was clearly visible to the naked eye?

A. Yes, I would say so."

Brooks admitted on cross-examination that several brands of blue gas are marketed, *page 164, lines 18-21*:

"A. I cannot say how many brands of blue gasoline are marketed.

Q. Well, there are several?

A. Yes."

There is also testimony quoted in Point One showing the difference in the color of the gases.

The plaintiff displayed no misleading signs or other advertising material. The Sun Oil stations in that territory all had advertising signs in addition to signs on the pumps. Brooks' testimony—
page 161, lines 31-33:

“Q. All the stations from here to Ringoes have a Sunoco gas ad erected?”

A. I think they all have signs.”

page 162, lines 4-12:

“Q. Point to one in Hunterdon County that does not have your sign?”

A. I cannot recall any now.

Q. Now I ask you was there any such sign as that at the Hafner service station either on the second or third or twelfth of March?

A. There was no sign there at all.”

page 162, lines 31-40:

“Q. There was no cap on here saying ‘Blue Sunoco’ was there?”

A. No, sir.

Q. There was no seal here?

A. No, sir.

Q. There wasn't any diamond sign saying ‘Blue Sunoco’?

A. No.”

page 163, lines 19-23:

“Q. Did you see anything around Mr. Hafner's service station that in any way infringed on any of your advertisements, other than blue gas in a tank and a tank that was somewhat similar in color?”

A. Not a thing.”

The testimony of Mr. Hylan under cross-examination, *page 218, lines 15-33; and page 219, lines 1 and 2:*

“Q. How long were you distributors for the Sun people in this district?”

A. Twenty-seven months.

Q. During that time you had charge of all

the pumps in Hunterdon County?

A. Yes.

Q. And it was your business as jobber to supply those dealers with Sun oil and gas?

A. Yes.

Q. And in the performance of your duties did you visit the different stations?

A. Yes.

Q. And did you familiarize yourself with the conditions surrounding the stations?

A. Yes.

Q. Now, didn't it occur to you when you visited the Hafner station that there were no signs displayed there such as is ordinarily displayed at all Sun stations?

A. There were no signs of it being a Sun station, no, sir."

Mr. Brooks admits on cross-examination he never bought anything from Hafner personally and never knew him until he was arrested, *page 157, lines 26-31*:

"Q. Well, you did not buy it from Mr. Hafner, did you?

A. No, sir.

Q. You say you never saw Mr. Hafner around there?

A. That is right.

Q. Did you ever ask to see Mr. Hafner?

A. No, sir."

and at *page 190, lines 18 and 19*:

"A. The first time I saw Mr. Hafner was the day he was arrested."

Further admits under cross-examination that he never ascertained if the man who served him was an employee of the plaintiff. *Page 189, line 4-18*:

"Q. Did you inquire of the man back here, who you say you bought the gasoline from, as to whether or not he was an employee of Hafner's?

A. No, sir.

Q. Then you came up to Flemington and had Hafner arrested and confined on a statement some man made to you, whom you didn't even know was connected with the service station, other than he poured gas in the car?

A. That man served me, took my money and gave me change.

Q. You did not know who it was?

A. No."

Mr. Brooks gives a list of persons whom he alleged complained about the Hafner pump. The only one he produced in court was Mr. Hylan. At *page 144, line 31*, Brooks in his testimony says, 'Mr. Hylan had informed me that several of those who were selling gasoline for him were complaining.' At *page 146, lines 15 to 20*, on his direct examination, Brooks says, 'Mr. Hylan informed me that he had several people, his recollection was at least a half dozen, who had noticed the pump and who had remarked that he had placed a Sunoco pump in the O. K. Service Station.' This is directly denied by Mr. Hylan in his cross-examination, *page 253, lines 19-25*:

"Q. I interrogated you yesterday concerning a conversation alleged to have been had between you and Mr. Brooks on the third day of March at your place in Flemington, New Jersey. I failed to ask you whether or not at that time you told Mr. Brooks that you had received several complaints against this Hafner tank.

A. No, I did not."

Brooks upon his cross-examination, *page 167, lines 15-24*, admits he knew of no customer who had been deceived, and made no attempt to find any:

"Q. But it was there shortly after the fifteenth of April. Now, do you know any prospective customer for gasoline that

was deceived by Mr. Hafner's pump?

A. None that I am prepared to say here.

Q. Do you know any member of that great body of people known as the travelling public, other than the servants or employees of the Sun Oil Company, who was deceived by this pump as they passed by over on the Lambertville road?

A. I have not tried to secure them."

Brooks in his cross-examination, *page* 154, says that he got in touch with Mr. Slattery who had complained about the Hafner station, by phone. At *page* 155 and *page* 169 he admits Mr. Slattery's daughter was his personal stenographer.

All the alleged sales were made by Lewis F. Eggert. He expressly denies he ever stated it was Sun gas, *page* 245, *lines* 16-20.

B. Law of Malicious Prosecution As to Advice of Counsel:

The Court of Errors and Appeals takes this question up in the case of Dalton vs. Godfrey, 97 *Law*, *page* 455. In that case the defendant told his counsel that the plaintiff admitted the taking of his money. Plaintiff denied she made any such statement. The court says at *page* 459 " assuming that defendant informed his counsel of all the facts, all the details, as he said he did, counsel's advice would protect him only if none of the material statements were false to defendant's knowledge. Here, again, the issue depends upon the question of fact, namely whether it is true that the plaintiff admitted to the defendant that she took his money." The court there held that this presented a question of fact which would have to be decided by the jury.

In the case now before the court, the defendant Brooks is contradicted by his own witness, Hylan, as to the complaints which Brooks told his counsel had been made to Hylan, *page* 253, *lines* 19-26 inclusive: (Heretofore quoted).

Further, Brooks' own testimony reveals that

he failed to disclose to his counsel the fact that the attendant from whom he had purchased gas had expressly denied to him on his second visit on March 12th that he had said it was Blue Sunoco, *page 129, lines 32-40, inclusive:*

“Q. All right. Now what happened?

A. I asked him where he secured his Blue Sunoco from and he said he didn't know, and I told him I had bought some gasoline earlier in the day and it purported to be Blue Sunoco, and he said, 'All I say is it is a good blue gas,' and he denied that he said it was Blue Sunoco.

Q. How is that?

A. He denied that he said it was Blue Sunoco.”

He related to his counsel only the conversation which he, Brooks, alleges took place earlier in the day, and which Brooks relates as follows, *page 149, line 15:* “That I asked the attendant if it was Blue Sunoco gasoline and he said it was.” He never mentioned to his counsel Egbert's denial, although it was made on the same day as the alleged admission. Further, Egbert, in his testimony, denied making any such statement, *page 245, lines 16-20 inclusive:*

“Q. Did you hear him testify yesterday that you said it was Blue Sunoco, or words to that effect?

A. I heard him say so, yes.

Q. Did you make any such statement?

A. I did not.”

He did not tell his counsel that all Sun pumps in Hunterdon County had advertising material with them and that there was no advertising of any kind, nature or description on the premises of the plaintiff. He did not tell his counsel that there was no exposed Sun pump without a globe on it. He did not tell his counsel that the difference in color was visible to the naked eye. In addition to

these discrepancies in Brooks' own testimony, there is the uncontradicted testimony of the plaintiff's witnesses as well as the defendant's witness, Hylan, that there was a distinct physical difference in the pumps, in their coloring and in the color of the gas.

Court of Errors and Appeals. Bennet vs. Pillion, 105 *Law*, page 359, at page 362, says: "But the advice of an attorney will not protect the party who consults him unless all the facts relating to the situation, that is, which would justify or negative the making of the complaint, are submitted to the attorney; and there is no proof in the present case that this was done."

In the case before the court Brooks plainly made only such statements to his counsel as were favorable to his own interests.

The Court of Errors and Appeals in the case of Vladar vs. Klopman, 89 *Law*, page 575; at page 578, the court says as follows: "Where the question whether or not the defendant had probable cause for instituting the prosecution against the plaintiff depends, in part, at least, upon facts the existence of which are in dispute; it is the function of the jury to settle those facts, and, upon doing so, to determine on the whole case whether or not probable cause has been shown, such determination being based upon proper instructions submitted by the trial court."

Weisner vs. Hansen, 81 *Law*, page 601. Court of Errors and Appeals. Paragraph two of the synopsis reads as follows: "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 proper instructions."

It is submitted from the foregoing that there were clearly disputed questions of fact here which

were properly left to the jury and that the court correctly refused a directed verdict.

C. The Bringing of a Criminal Complaint to Accomplish a Private End.

The writer has been unable to find any case in New Jersey dealing with the subject matter of this sub-heading. Volume 19 of the American and English Encyclopedia of Law, at page 676 says as follows: "In general. Where a criminal prosecution is begun under circumstances making it apparent that the person instituting it had some collateral private purpose in view, rather than the vindication of the law, legal malice is shown," and 38 Corpus Juris, page 424 says as follows: "If one makes use of the criminal law for some collateral or private purpose and not to vindicate the law, such proceeding will be considered malicious."

It is clear from a reading of the case that neither the Sun Oil Company nor Mr. Brooks had any idea of making a criminal complaint or an arrest, but consulted their attorney solely for the purpose of preventing Hafner from selling a blue gasoline. The attorney says at *page 240, lines 20-26 inclusive*:

"A. They came to me and asked me to see if there was any possible way in which this situation could be stopped, this apparent *violation* could be stopped, and I made an investigation and discovered that statute and conferred with Lambertson & Moffett and told them that an arrest could be made. I then sent for Mr. Brooks and got the facts and advised Mr. Brooks to make the complaint."

and the *same page, lines 33-40 inclusive, and lines 1-3, page 241*:

"The Court—What is the question?"

Mr. Able—To define the word 'violation.'

Mr. Herr—As used by the witness. He says this violation was brought to his atten-

tion, and I am asking what he means by 'violation'.

The Court—Well, violation of what?

The Witness—Of the rights of the Sun Oil Company, in having other people camouflage their pumps and disguise their pumps to dispose of gasoline."

and at page 241, the attorney shows clearly that no one had ever talked to him about an arrest. *Lines 19-24, page 241:*

"Q. And rather than file a bill in a court of equity or file a law suit to collect damages you advised the arrest?

A. I suppose that remedy was left up to me.

Q. And nobody had ever mentioned arrest, had they?

A. No. Nobody ever talked to me about arrest."

It is clear from this testimony that the plaintiff was arrested for the sole purpose of stopping what the defendant thought was an invasion of its commercial or trade rights. The complaint was not made to vindicate the law or protect the public.

It is submitted that the quotations from the American and English Encyclopedia of Law, and from Corpus Juris heretofore quoted should be the law of New Jersey and that in the case before the court, the defendants clearly made use of the law for a collateral private purpose rather than the vindication of the law, and that such action should constitute malice in New Jersey. This should certainly be so in the present case where it is clearly apparent that defendants failed to reveal all facts to counsel and misstated other facts. In addition to the foregoing, malice is clearly shown in the present case as pointed out in Point One, subdivision "C" at the beginning of this brief.

Conclusion.

It is submitted that it is clearly proved by the

evidence heretofore quoted that the defendant Brooks knew at the time he made the complaint that the plaintiff expressly denied he was selling Sun gas in a Sun pump; that he concealed from his attorney the conversation that he had with the attendant on his second visit on March 12th in which the attendant told him that it was not Sun gas; that the defendant knew that no sign or symbol appeared about the premises or upon the tank indicating that it was Sun gas, although every other Sun tank in Hunterdon County had signs or symbols upon it, as well as advertising matter adjacent thereto; that the pump in question had no globe on it although every other Sun pump standing in the open had a globe upon it. Brooks knew that the Sun Oil Company sold the same pumps to others and allowed them ten days in which to repaint the same, although here a criminal complaint was made on sales alleged to have been made within ten days after the erection of the pump. Brooks knew that the pump was a standard pump which the Wayne Company shipped to other users as well as the Sun Oil Company, and he knew that there were several brands of blue gas on the market and that the Sun Oil Company had no exclusive right to the use of that color. Mr. Hylan denies that he told Brooks that several people had complained about the pump, and it is clear from the testimony of the plaintiff's witnesses that the tank was different in color than the Sun Oil Company, that its physical features were different, that the color of the gasoline disclosed in the pump was different, that the pump bore no inscription of any kind, or description, and therefore could not have misled a purchaser. It is plain from the testimony of plaintiff's witnesses that they were not misled or deceived in purchasing gas from the pump, and the defense did not produce a single disinterested witness to testify that the pump in any manner tended to deceive them.

It is submitted that the court properly left the question to the jury, and the court should be sustained.

RYMAN HERR
ATTORNEY FOR AND OF COUNSEL WITH
PLAINTIFF-RESPONDENT

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