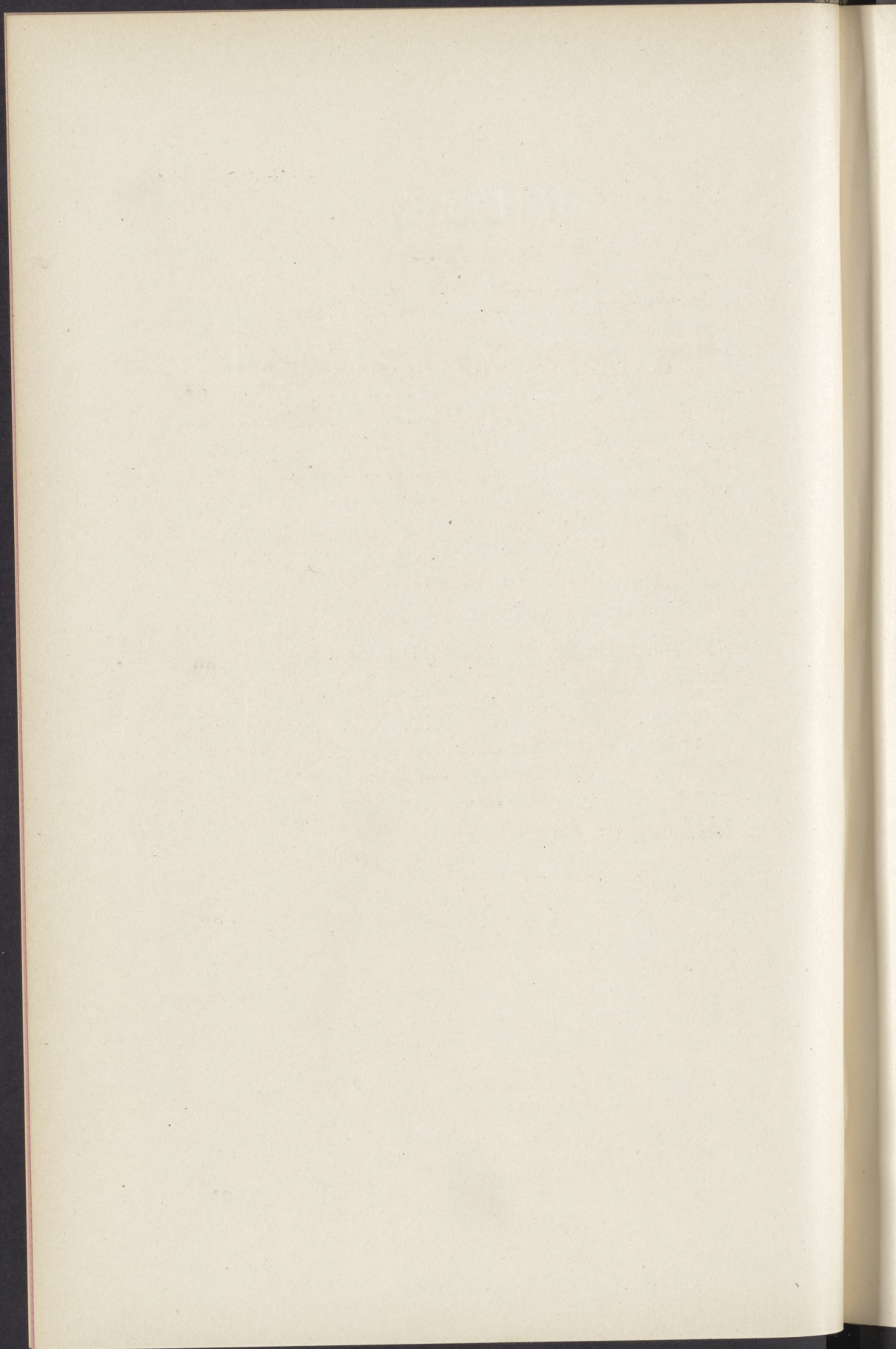


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Notice of Appeal.

Notice of Appeal.

Filed June 26th, 1916.

New Jersey Supreme Court. 10

HERMAN MAX,

Plaintiff,

vs.

GUSTAV KAHN,

Defendant.

*Action at
Law.*

*Notice of
Appeal.*

To Benjamin M. Weinberg, Esq., attorney of 20
plaintiff.

Sir:—

Take notice that the defendant appeals to the
Court of Errors and Appeals from the judg-
ment entered in this cause.

Dated, June 24th, 1916.

Respectfully,

EDWARD SCHOEN, 30
Attorney of Appellant.

Service of a copy of the within Notice of
Appeal is hereby acknowledged this 26th day
of June, A. D. 1916.

BENJAMIN M. WEINBERG,
Attorney for the Plaintiff.

Stipulation.

Stipulation.

NEW JERSEY SUPREME COURT.

10	HERMAN MAX,	<i>Plaintiff,</i>	}	<i>Action at</i>
	<i>vs.</i>			<i>Law.</i>
	GUSTAV KAHN,	<i>Defendant.</i>		<i>Stipulation.</i>

20 It is hereby stipulated and agreed by and between Benjamin M. Weinberg, Esquire, attorney for plaintiff, and Edward Schoen, Esquire, attorney for defendant, that the time to file reasons for appeal be, and the same is hereby extended until August fifteenth, nineteen hundred and sixteen.

Dated, July 18th, 1916.

EDWARD SCHOEN,
Attorney for Defendant.

BENJAMIN M. WEINBERG,
Attorney for Plaintiff.

30

40

Grounds of Appeal.

Grounds of Appeal.

Filed Aug. 14, 1916.

New Jersey Court of Errors and Appeals

<p>HERMAN MAX, <i>Plaintiff-Respondent.</i> <i>vs.</i> GUSTAV KAHN, <i>Defendant-Appellant.</i></p>	}	<p><i>Grounds of Appeal.</i></p>	<p>10</p>
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The appellant states the following grounds of appeal:

1. The Court charged the jury:—

“As to the slander. If you find the defendant was guilty of intentionally slandering the plaintiff—or, slandering the plaintiff because that includes intention, the intent is one of the elements of slander—if he slandered the plaintiff, then the plaintiff is entitled to such damages as you may find to be the direct and proximate result of the publication of the slander; such as injury to occupation, mental suffering and business losses. The business loss, if you believe the plaintiff’s testimony, would be the loss of this position. Mr. Miller, you will remember, testifies—or the plaintiff testifies—that at that time he was getting about \$10.50 a week. Mr. Miller had offered him \$18 a week salary, and Mr. Miller says the commission, the extras he would earn, would bring it up to \$20 or \$22 a week; if he lost that position and it appears that he subsequently went to work for his father

20

30

40

Grounds of Appeal.

at \$12 a week, that would be the measure of his loss, so far as the business is concerned. Of course, the mental suffering and humiliation, and loss to reputation, are matters aside from the business losses, which I am now mentioning and that should be considered also, but

10 as to the business loss you have a right to take into consideration the salary, if the contract of employment with Mr. Miller had been fulfilled he would have received in that position; deducting from it what he received from another position in which he was employed; and the difference for the length of time you believe from the testimony he would have received, the higher salary would be his business loss."

20 2. The Court refused to charge the defendant's sixth request to charge as follows:

"(6) Conviction of crime affects the credibility of a witness. The jury is justified, in this case, in taking into consideration the plaintiff's conviction of crime, in determining the weight of his testimony."

EDWARD SCHOEN,
Attorney of Appellant.

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40

Complaint.

Judgment Record.

HERMAN MAX, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 0 10px;"><i>vs.</i></div> GUSTAV KAHN, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Judgment Record.</i>	10
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Gustav Kahn, the defendant in this cause, was summoned to answer unto Herman Max, the plaintiff therein, in an action at law, upon the following Complaint.

Complaint.

20

Filed August 31, 1915.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

HERMAN MAX, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 0 10px;"><i>vs.</i></div> GUSTAV KAHN, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law.</i>	30
		<i>Complaint.</i>	

Plaintiff, Herman Max, residing at Newark, New Jersey, says:

FIRST COUNT.

1. That on January 1st, 1914, he was lawfully married to Jennie Kahn, daughter of the

40

Complaint.

said defendant, at the city of Newark, New Jersey.

2. That immediately following his marriage with the said Jennie Kahn, he took up his residence with her in the said city of Newark, where he lived happily with her until the time
10 hereinafter mentioned.

3. That from the time of his marriage to his said wife, the said defendant willfully and maliciously exerted his influence, by false and derogatory statements concerning him and by other unlawful means to destroy the affection of his wife for him, and did harbor his said wife against his will and protests.

4. That on or about August 6th, 1915, the said defendant willfully and maliciously enticed
20 his wife away from his home and induced her to abandon him, the said plaintiff, although, he, the said plaintiff, had theretofore lavished upon his said wife all the care, attention and affection of a true husband, which attention and affection had all along been reciprocated by his said wife.

5. That the defendant, ever since the said August 6th, 1915, has harbored, and still does continue to harbor plaintiff's said wife against
30 his will, and has ever since and still does, continue to alienate her affections from him.

6. That since the said August 6th, 1915, the said plaintiff has lost the comfort, society, affection and assistance of his wife which he would otherwise have had, but for the willful and malicious actions of the said defendant, as aforesaid.

Complaint.

SECOND COUNT.

Plaintiff says:

1. That on various days in the month of July, 1915, and particularly on July 25th, 1915, the said defendant, with the assistance of divers persons, assaulted and struck him about the head and body. 10
2. Said battery injured plaintiff severely and disabled him from attending to his business as a salesman and driver of a milk wagon for a long time thereafter, whereby he was deprived of part of his earnings.

THIRD COUNT.

Plaintiff says:

1. That on or about July 15th, 1915, and on divers other days in said month of July, the said defendant said to one Simon Miller, concerning the said plaintiff: "He is a thief. He has robbed me and I advise you not to have anything to do with him. He collects money and keeps it for himself. He was short six dollars on me in one week and if you employ him he will get your business away and put you out of business. You are a stranger and I want to warn you to have nothing to do with him." 20 30
2. Plaintiff was then seeking employment as a driver and collector for said Simon Miller, and was thereby, by means of said statements refused such employment which had previously been promised him at eighteen dollars per week, with added commission on new trade.
3. That the said defendant made similar remarks and statements to divers other persons on said July 15th, 1915, and on other days of said month to the damage of said plaintiff. 40
4. Said words were false and malicious.

Complaint.

FOURTH COUNT.

Plaintiff says:

1. That on August 2, 1915, plaintiff was lawfully possessed of the following goods and chattels, to wit:

10 Cut glass: 3 fern dishes and mirrors, 1 wine set, 1 lemonade set, 1 fruit set, 3 pitchers, 1 berry set, salt and pepper set, 4 large vases, 6 small vases, 4 flower vases, 1 butter bowl, 1 sugar bowl, 2 candy dishes, 5 fruit bowls.

China ware: 4 sets of china ware dishes, 3 china vases, 3 china painted clocks, pictures.

20 Silverware: 1 case silver 30 pieces, 1 case silver 32 pieces, 1 set silver 27 pieces, 3 ladles, 1 cake platter, 1 breakfast set, 6 nut picks, 1 dozen teaspoons, 1 dozen fruit knives, 1 set Rogers silverware, 1/2 dozen fruit spoons, 1 bread plate, 1 manicure set, 6 nut crackers.

Linens: 1 cluney lace table cloth, 1 cluney lace scarf, 3 kitchen table cloths, bed linens, blankets, 6 cluney lace napkins, 1 cluney lace bedspread, 3 dozen napkins, 4 pairs lace curtains.

Furniture (parlor): parlor suit, rug, rocker, parlor table.

30 Bedroom: Bedspread, chiffonier, costumer, spring and mattresses, dresser, rug.

Dining room: Table, buffet, china closet, 6 chairs, 1 rug.

Kitchen: Table, oilcloth, chairs, baby carriage, ice box, household goods, etc.

All of the above being of the value of fifteen hundred (\$1500) dollars.

40 2. That on August 2, 1915, defendant forcibly took all of the cut glass above enumerated, and carried them away; and on August 6, 1915, the said defendant did further forcibly take and

Complaint.

carry away the balance of the goods and chattels hereinabove enumerated.

Plaintiff demands:

1. On the First Count, \$5,000 damages.
2. On the Second Count, \$1,000 damages.
3. On the Third Count, \$2,000 damages.
4. On the Fourth Count, \$2,000 damages.

10

BENJAMIN M. WEINBERG,
Attorney of Plaintiff.

Notice to the within named defendant:

In case the within summons and complaint are served upon you personally then take notice that if you intend to make a defense to this action, you must file your answer within twenty days from the date of such service, and in default of the filing of such answer, judgment will be entered against you.

20

BENJAMIN M. WEINBERG,
Attorney of Plaintiff.

30

40

*Answer.***Answer.**

Filed September 2, 1915.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

HERMAN MAX,

*Plaintiff,**Action at
Law.**vs.*

GUSTAV KAHN,

*Defendant.**Answer.*

20

The defendant, Gustav Kahn, residing in the City of Newark, Essex County, New Jersey, answering the First Count of plaintiff's declaration, says:

FIRST COUNT.

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1. He admits the first paragraph.
2. He admits so much of paragraph two as relates to the residence of the plaintiff and the defendant, but denies that he lived happily with Jennie Kahn as therein alleged.
3. He denies the third paragraph.
4. He denies the fourth paragraph.
5. He denies the fifth paragraph.
6. He denies the sixth paragraph.

SECOND COUNT.

The defendant, answering the Second Count of the plaintiff's complaint, says:

40

1. He denies the first paragraph.
2. He denies the second paragraph.

Answer.

THIRD COUNT.

The defendant, answering the Third Count of the plaintiff's complaint, says:

1. He denies the first paragraph.

2. He admits so much of the said paragraph as states that plaintiff was then seeking employment as a driver for said Simon Miller; but he has no knowledge of the remainder of the said paragraph and leaves the plaintiff to make proof thereof. 10

3. He denies the third paragraph.

4. He denies the fourth paragraph.

FIRST DEFENSE TO THE THIRD COUNT.

1. Plaintiff had been a driver and collector for defendant. Said Simon Miller was engaged in the same business and applied to the defendant for advice as to the character of the plaintiff, who was seeking employment of him. 20

2. The words alleged to have been spoken are privileged for the reason that they were spoken while truthfully giving to said Simon Miller, in confidence for the purpose aforesaid, the information asked by the said Simon Miller.

SECOND DEFENSE TO THE THIRD COUNT.

1. Defendant will object that the third paragraph of the Third Count of the complaint discloses no cause of action. 30

2. It fails to specify, with particularity, remarks and statements complained of, and fails to name the persons to whom the said remarks are alleged to have been made.

3. It fails to specify the particular days of said month when the remarks are alleged to have been made and to whom. 40

Answer.

4. The whole paragraph is too general and too vague to require defendant to answer there-to, or to enable him to prepare for the trial.

FOURTH COUNT.

The defendant, answering this Count of the
10 complaint, says:

1. He denies the first paragraph.
2. He denies the second paragraph.
3. He denies the damages demanded by the plaintiff in the first, second, third and fourth counts.

EDWARD SCHOEN,
Attorney for Defendant.

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Judgment.

Judgment.

This action was tried before Judge Nelson Y. Dungan, with a jury, in the presence of the counsel for the respective parties, at the Essex Circuit, on May 31, June 1st, June 2nd and June 3rd, 1916.

10

The cause was heard, and submitted to the jury upon the following questions, to which the jury returned the following answers:

1. Do you find that the defendant, Gustav Kahn, alienated from the plaintiff the affections of his wife, and enticed her away from his home, and induced her to abandon him, the said plaintiff? Answer: "No."

You may answer that "Yes," or "No." If you say he did do that, answer "Yes." If you answer "No," then the next question should be answered.

20

2. If the answer to question No. 1 be "Yes" what amount of damages do you award to the plaintiff therefor? That question is only answered if the first question is answered "Yes."

3. Do you find that in the month of July, 1915, the defendant committed an assault and battery upon the plaintiff? Answer: "No."

If you say "No," then the next question is not to be answered. If you say "Yes," then the fourth question should be answered.

30

4. If your answer to question No. 3 be "Yes," what amount of damages do you award to the plaintiff therefor?

5. Do you find that in the month of July, 1913, the defendant made the statements of and concerning the plaintiff, or any of them set forth in the third count of the plaintiff's complaint, namely, "He is a thief. He has robbed me, and

40

Judgment.

I advise you not to have anything to do with him. He collects money and keeps it for himself. He was short \$6. on me in one week," with intent to injure the plaintiff? Answer: "Yes."

If your answer be "No," that ends it.

6. If your answer to question No. 5 be "Yes,"
10 what amount of damages do you award to the plaintiff therefor? Answer: "\$387.60."

7. Do you find that in the month of August, 1915, the plaintiff was the owner of the goods and chattels set forth in the fourth count of the plaintiff's complaint? Answer: "No."

8. Do you find that the defendant, Gustav Kahn, in the month of August, 1915, took and carried away the said goods and chattels? Answer: "No."

20 If either the seventh or eighth question is answered "No," then you do not answer the ninth question, but if they are both answered "Yes," then you are asked to say what amount of damages do you award to the plaintiff therefor?

You will take these questions with you into the jury-room, and write opposite the word "Answer" what your answer is to each one of them, except the questions which need not be answered if your answer to the previous question
30 is "No."

Thereupon the Court order Judgment entered in favor of the plaintiff and against the defendant at Three Hundred and Eighty-seven Dollars, 60/100 damages.

Judgment entered June 3, 1916.

WM. S. GUMMERE,
C. J.

Simon Miller, direct.

NEW JERSEY SUPREME COURT.

HERMAN MAX,

vs.

GUSTAV KAHN.

10

Newark, N. J., May 31, 1916.

Before Hon. Nelson Y. Dungan, Judge, and
a jury.

Benjamin M. Weinberg, for plaintiff.

Edward Schoen, for defendant.

SIMON MILLER, sworn for the plaintiff.

Direct examination by Mr. Weinberg.

20

Q Mr. Miller, what is your business? A
Well, I am in the retail milk business; was at
that time.

Q What is your business? A At that time
it was retail milk business.

Q Won't you answer the question, please?
I ask you what is your business? A Well,
milk dealer.

Q And where do you live? A Well, 112 30
Clinton place.

Q How long have you lived in Newark? A
Two years and a half.

Q And what was your business July, 1915?
A Well, selling milk.

Q Wholesale or retail? A Retail.

Q How? A Well, I had a few wagons, and
used to buy my milk and sell it to customers.

Q Do you know Mr. Kahn, the defendant in
this case? A Well, I knew him from some 40
time ago as a cow dealer.

Simon Miller, direct.

Q Do you know Mr. Max, the plaintiff in this case? A Well, I didn't have business with him, but I knew him as a milk dealer.

Q Do you remember any conversation with Mr. Kahn about Mr. Max, A Well—

Q Yes or no? A Yes, I do.

10 Q When and where was it, the first time?

A The first time he stopped me down town near the Hudson depot and—

Q When was it? A That was the early part of July; I don't remember the date exactly.

Q (*By the Court.*) Last year? A Last year, 1915, yes, your Honor.

Q (*By Mr. Weinberg.*) Who was with him at the time? A His son.

20 Q How many sons has he got? A I don't know, sir.

Q Which son? A The oldest one.

Q Do you see him here? A Not now.

Q All right. Where were you? A I was in my horse and carriage, and he was with his son in a horse and carriage, too.

Q You were both driving? A Yes.

Q Now, what happened? How did you come to speak to him? A Well, he seen me coming down, and he cut me off short, and he said—

30 Q What do you mean by "cut you off short?" A He just turned his horse around and blocked my way, so I was stopped.

Q Well, now what happened? A And then he says to me, "You hired my son-in-law, I hear." I says, "Yes, I did; I had need of a man and I hired him as salesman in the milk business." "Well," he says, "don't you know what he is?" I said, "I didn't come to ask you any reference, as much as I know he is a good man." "No," he says, "he isn't." I

40

Simon Miller, direct.

said, "What makes you think so?" "Well," he says, "The condition I can give it to you is, he is a thief and liar." I said, "Can you prove that?" He said, "Yes." I said, "Can you prove it to me right away?" He says, "Yes, come up to Kearny, that is where my office is." I was in my horse and carriage, and he and his son went right straight to Kearny, and after spending an hour or so I tried to investigate where the stealing was committed, or lying, and so on, and he couldn't prove nothing to me. His son-in-law was book-keeper at that time, and said it was short some change last week. I said, "Open your book and let me see it." He said, "No my word is good." I said, "So his word is good." I left the place, and on Monday he was supposed to come to work, and Mr. Kahn and his son came to my place again with his horse and carriage, and made a sensation in my house, he wanted to discourage me of hiring him; and also had a conversation with my wife, and tried to convince her he was no good.

Q Was anybody with him? A His son.

Q Anybody else? A Not at that time.

Q Now, did he have a conversation with you at that time? A Well, the conversation when he left, I didn't pay much attention, but he came again about a week later.

Q Now, wait a minute, I am talking about this same day, was anything said to you at all by Mr. Kahn? You say he came over there?

A That afternoon when he came there?

Q Yes. A He said, "He is a thief and liar, and he isn't fit to be put on a milk wagon and collect money," and he said he is going to ruin me, because he will take my trade, and

Simon Miller, direct.

so on. Well, I didn't pay much attention to that.

10 Q What is the next thing? A A week later he came there, because I told the man when I hired him he should give notice to his father-in-law he was going to leave him and I would give notice to my man also, he wasn't
 20 fit for the job. When he came the second time he seen that he can't do nothing to me, because I am in favor of that man to be put on the job. He said, "Well, I am worth fifty or sixty thousand, and I am willing to spend every cent I got to put you out of business if you interfere with family affairs," and he said, "I will do it, too." And when I went out on the outside I seen him with a horse and wagon, besides his buggy, he had a few dollars with
 20 him and he said, "You start something, and I will show you right away what I can do with you." And I was a stranger in Newark, I didn't care to get in a family matter, and I told him I didn't care to put myself in trouble, and wouldn't hire him.

Q Had you agreed with him before that time what wages you would give him? A Pay him at the time about \$18 a week, and with
 30 commissions make about \$22, \$25 a week, depend on what business he has, but \$18 was his salary.

Q Now, did you meet Mr. Kahn after that? A I met him a long, long time after that; he met me and he says, "Now, you are a gentleman, you took my advice, and you didn't hire him," he said, "but I fixed him all right, took his wife away on him"; "my girl," he didn't say "his wife"; he said, "I took my girl away, and I took his furniture away, and I took the
 40 child away; I left him naked as his mother

Simon Miller, cross.

brought him into this world; now let him go where he belongs, to his father, that is his place."

Q After that did you have anything to do with Mr. Kahn? A Well, in fact, about two months ago he came to my place, but I am not in the milk business now, and he start off in conversation. I told him I didn't want anything to listen to that case, that is the way I answered him, and I ordered him out, because he insulted me. 10

Cross examination by Mr. Schoen.

Q Who insulted you? A Him and his son.

Q Kahn? A Yes, the last time two months ago.

Q You ordered him out of your house? A My store. 20

Q You ordered him out? A Yes, sir.

Q Your feelings toward him are not very friendly then? A Well, he insulted me in my place.

Q You still carry a grudge against him? A No, I haven't got any grudge against the man.

Q Your grudge was strong enough to order him out of your place? A Well, because he insulted me.

Q Got friendly feeling toward him, have you? A Not friendly, nor not a bad feeling. 30

Q Are you still in the milk business? A No, sir.

Q When did you get out of the milk business? A Last February, 1916.

Q Were you in business the same place Mr. Kahn was in business? A No, sir.

Q Did you come in conflict with your customers at all? A No, sir; I am in a different line of business. 40

Simon Miller, cross.

Q Do you know Max, the plaintiff in this case? A Yes, sir, I do.

Q How long have you known him? A Well, I knowed him for the last couple of years.

Q How long have you known his father? A Mr. Max's father?

10 Q Yes. A About the same time since I am in Newark.

Q How long are you in Newark? A About two and a half years.

Q Where did you come from when you came to Newark? A My place of business was in Brooklyn, New York.

Q Did you know Mr. Max before you came to Newark? A No, sir.

20 Q Did you know him in the old country? A No, sir.

Q Did you come from the same country? A No, sir.

Q What part of Europe did you come from? A I came from the part where the war is now.

Q Is that the part Max and his father came from, Russia? A I don't know where they came from.

30 Q Ever have any business with the plaintiff's father? A Nothing particular, sir.

Q Has Mr. Max's father bought any business through you or did you buy a business through Mr. Max? A No, sir, never bought any business from him.

Q Did you buy a business from a man by the name of Himley? A Yes, sir.

Q Did you buy that business through Mr. Max? A No, sir.

40 Q Did Max have anything to do with it? A No, sir; I never knew Mr. Max that time when I bought it.

Simon Miller, cross.

Q Had you ever known Mr. Kahn? A Yes, sir.

Q How did you know him? A I bought a farm, and I bought a horse and cow of him before I knew Mr. Max.

Q And you say that Mr. Kahn stopped you and started to talk about this young man? A Yes, sir; cut me off short right in the middle of the street. 10

Q And you refused hearing the information, said you didn't want to know anything about it? A No, sir. In fact, I was anxious for information; asked him if he could prove to me he was a thief and liar.

Q You were anxious to get information about this boy? A Yes, sir.

Q Did you ask him any questions? A No, sir. 20

Q And did you say you were anxious to get information? A I asked him if he could prove to me it was so.

Q He couldn't prove anything to you? A No, sir, nothing of that kind.

Q He didn't satisfy you that the boy was not right? A No, sir; he didn't satisfy me.

Q Why didn't you hire him? A Because the second time he said he would put me out of business, he came with a whole gang, and if I would start something, wanted to get me out of the house. 30

Q So Kahn came to beat you up, too, didn't he? A Yes, sir.

Q Did you ever make any complaint against him? A No, I didn't make any complaint against him.

Q Did you ever call any police to protect you from him and his gang? A No, it didn't go as far as that. 40

Simon Miller, cross.

Q You mean to say Kahn was in front of your place with a wagon load of people, and threatened to beat you there? A He told me to come out, and asked if I wanted to buy a horse and wagon from him, and he had the fellows in the wagon.

10 Q You didn't get very far with your negotiations about buying a horse and wagon, did you? Did you offer him a price on that horse and wagon? A No, sir.

Q Did he give you a price? A No, sir; didn't give no price whatever.

Q Then, although you were offered this horse and wagon, nobody said anything about price? A He came just as excuse about horse and wagon, but he came out strong afterwards.

20 Q Who told you he came there as an excuse? A He told me himself. He said, "Never mind the horse and wagon, but," he said, "let us talk about the boy."

Q He said, "Here is the horse and wagon I want to sell you," and afterwards he said, "That is an excuse, I don't want to sell the horse and wagon, I want to talk about the boy." A He didn't say "Excuse"; he said, "Never mind the horse and wagon, I want to talk about the boy."

30 Then he came out strong.

Q Did he say he had these men in the wagon to beat you up with? A He said, "If you start something I will just show you what I am going to do with you."

Q Although you had been perfectly friendly before that? A Friendly? No friendly about it.

Q And he came there to sell you a horse and wagon? A I bought from him before, and he thought maybe—that was the way he came

40 over to my house.

Simon Miller, cross.

Q Now this conversation about the boy took place where? A That was in my yard. The second time, or the first time?

Q The first time. A The first time was in my house, right in the house.

Q I thought you said the first time he met you on Broad street driving the wagon? A 10
Why, he came over to my house; that was already the second time; the first time he met me downtown; the same day he came to my house with a horse and wagon, and his son with him, on the same day; that was on Friday.

Q Was that the same day he came to your house to sell you the horse and wagon? A No, no, that was the following week.

Q When did you tell Max you wouldn't employ him? A Well, after the second week, 20
when he came over and told me he was going to put me out of business, and all such scheme like that, I refused to give him the job then, because he was supposed to give ten days' notice.

Q When did you tell Max about this that you had heard from Kahn? A Well, the first time when I met Max, Mr. Kahn, was on Friday, that was the following Friday I told him I couldn't hire him, after he left me with the two fellows he had in the wagon, I decided not 30
to interfere.

Q Do you know what month this was? A That was the early part of July, or around the middle of July, 1915.

Q How long after Kahn told you that this boy was dishonest, was a thief, did you tell Max about this? A The following week. He didn't show up until about a week. He wasn't supposed to come for the job until his week's notice was up. 40

Simon Miller, cross.

Q When did you tell him that Kahn had told you this? A Well, after that day, the second time he left me.

Q What time was that, what month? A That was in the early end, or around the middle of July, 1915.

10 Q When you told Max what Kahn had told you about it? A I told him I can't hire him, his father-in-law is interfering too much with me, and I am a new man around here, and didn't want to start any quarrel with other dealers if I could help.

Q When was this? A I can't exactly recall the date.

Q Do you know what month it was? A It was July month, 1915.

20 Q And did he come to your house? A Yes, he was right in my house.

Q I mean did Max come to your house? A Max came to my house, and wanted to know when he was to start to work. I told him I can't hire him, because his father-in-law interfered with me of hiring him.

Q Now you said that you wanted this information from Mr. Kahn? A When he stopped me and began to tell me he is a thief and liar, I said I would like to find out—

30 Q Why did you want information? A Well, any man would be anxious when he wants to hire a man to collect money for him.

Q Did you want information because you were going to employ Max in your business? A I didn't come to ask information, but when he told me I was anxious to know what he knows about.

40 Q I said, did you want this information because you were about to employ him? A Well, naturally, any man would want it.

Herman Max, direct.

Q Were you going to trust him with money?

A Yes, sir.

Q The position you were going to give him was one in which he would collect money? A Yes, sir.

Q So you were interested in finding out what his habits were, were you? A I don't know 10
about habits, but his own word, I want he should prove it to me, what he said that he is a thief and liar.

Q Why should you want that proven? A Because he came out so strong that he is a thief.

Q What interest was that to you? A Naturally I would like to know, maybe he is prove it to me I wouldn't give him the job.

Q But he couldn't prove it? A If he would prove it, certainly I wouldn't give him a job. 20

Q But you didn't give him a job, even though he didn't prove it? A He didn't prove it, but he came out other ways; he interfered with me in other ways.

HERMAN MAX, sworn for plaintiff.

Direct examination by Mr. Weinberg.

* * *

Q Now you say you had determined to leave, and you sought employment of a man by the name of Miller? A Mr. Miller, yes, sir. 30

Q What is his first name? A Simon Miller.

Q What was his business? A In the milk business.

Q Did you go to him for a position? A I asked Mr. Miller whether he has a place open for me, a position, and he said yes. I asked him what would he give me a week. He said he would give me \$18 a week, and commission, that 40

Herman Max, cross.

is fifty cents on every customer I would get; he said the average would be from \$20 to \$22 a week; so I says, "All right."

Q Did you get that position? A Yes, sir. And he told me to give my father-in-law notice. And I went down and told my father-in-law,
10. "See here, father, I have got a position, and I am willing to stay with you until a new man can get broke on that route, I will stay as long as it takes." He don't say nothing, but he went up to Mr. Miller.

Q Were you there when he went up to Mr. Miller? A No, sir. Mr. Miller told me he went there.

Q Don't tell what Mr. Miller told you. Did you get the position? A No, sir, not after he
20. went there.

Q In the meanwhile had you left Mr. Kahn? A Well, I stayed with him until the end of that week, and I never got my last week's salary.

* * *

Cross examination by Mr. Schoen.

* * *

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

30. Q Never? A No, sir.

Q Positive about that? A Yes, sir.

Q What? A Yes, sir.

Q Do you want to think of that, or do you want to state that? A Convicted of crime?

Q Convicted of crime, yes. A No, sir.

Q Do you remember on December 20, 1912, you were charged with larceny—

Mr. Weinberg. Objected to.

40. *The Court.* Not what he was charged with.

Herman Max, re-cross.

Q Were you not convicted of crime on December 20, 1912? A No, sir.

Q Are you positive about that? A 1912?

Q Yes, 1912. A Yes, sir.

* * *

Re-cross examination.

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* * *

Q Now, did you live in 119 Bergen street?

A Yes, I lived there before I was married.

Q In 1912. 119 Bergen street was your address? A Yes, sir.

Q That is your father's house? A That is my father's place.

Q How many families lived in that house? A Just one.

Q Any other Herman Max live there? A 20
Just one that I know of.

Q You are the only Herman Max that you know of? A Yes.

Q That lived in that house in 1912? A Yes.

Q Do you know a woman by the name of Nellie Lasanti, 347 Fairmount avenue? A No, not that I can think of.

Q Ever hear that name before? A Lasanti?

Q Yes. A There is a party by that name
live next door to us now. 30

Q Did you hear that name in 1912, December 20, 1912? A Not that I can remember.

Q You don't recall anything of that incident? A Not of that name.

Q Do you recall being before Judge Herr in December, 1912? A Yes, I remember that.

Q You do remember that? A Yes.

Q You remember being convicted of crime there? A Yes, I know I was fined something,
but— 40

Herman Max, re-cross.

Q Do you remember being convicted of crime there? A Of crime?

Q Yes. A It has not been me that done that crime.

Q Never mind that; do you remember being convicted there? A Yes, I remember that.

10 Q Why did you deny it before? A I wasn't arrested, or anything.

Q Why did you deny you had been convicted in December, 1912, and now admit it? A I haven't been arrested.

Q I didn't ask you anything about being arrested. A I was thinking you meant that; whether I was arrested or anything.

Q Don't you know what it means to be convicted? A I know now what you mean.

20 Q What do you think I mean by being convicted? A Whether I was fined.

Q Found guilty? A Found guilty, yes. I know what you mean now, but I didn't know before. I understand, the way you talk, what you mean now.

Q In 1912 you were found guilty of crime, were you? A Yes.

Q That is all. A Won't you let me explain what it was for?

30 *The Court.* No, that is all.

*Charge to Jury.***Charge of the Court.**

The Court charged the jury as follows:

DUNGAN, J.

Gentlemen: * * * In view of the fact that these four separate charges are distinct, I shall ask the jury to return in writing answers to written questions which I have prepared, and which I shall presently explain. * * *

As to the slander. If you find the defendant was guilty of intentionally slandering the plaintiff—or, slandering the plaintiff, because that includes intention, the intent is one of the elements of slander—if he slandered the plaintiff, then the plaintiff is entitled to such damages as you may find to be the direct and proximate result of the publication of the slander; such as injury to occupation, mental suffering, and business losses. The business loss, if you believe the plaintiff's testimony, would be the loss of this position. Mr. Miller, you will remember, testifies—or the plaintiff testifies that at that time he was getting about \$10.50 a week. Mr. Miller had offered him \$18 a week salary, and Mr. Miller says the commission, the extras he would earn, would bring it up to \$20 or \$22 a week, if he lost that position, and it appears that he subsequently went to work for his father at \$12 a week, that would be the measure of his loss so far as the business is concerned. Of course, the mental suffering and humiliation, and loss to reputation, are matters aside from the business losses, which I am now mentioning, and that should be considered also. But as to the business loss, you have a right to take into consideration the salary, if the contract of employment with Mr. Miller had been fulfilled, he would

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Charge to Jury.

have received in that position; deducting from it what he received from another position in which he was employed; and the difference for the length of time you believe from the testimony he would have received the higher salary, would be his business loss.

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* * * *

Here are the questions which I shall ask you to answer:

1. Do you find that the defendant, Gustav Kahn, alienated from the plaintiff the affections of his wife, and enticed her away from his home, and induced her to abandon him, the said plaintiff?

20

You may answer that "yes" or "no." If you say he did do that, answer "yes." If you answer "no," then the next question should be answered.

2. If the answer to question No. 1 be "yes" what amount of damages do you award to the plaintiff therefor?

That question is only answered if the first question be answered "yes."

30

3. Do you find that in the month of July, 1915, the defendant committed an assault and battery upon the plaintiff?

If you say "no," then the next question is not to be answered. If you say "yes," then the fourth question should be answered.

4. If your answer to question No. 3 be "yes," what amount of damages do you award to the plaintiff therefor?

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5. Do you find that in the month of July, 1915, the defendant made the statements of and concerning the plaintiff, or any of them, set forth in the third count of the plaintiff's complaint,

Charge to Jury.

namely, "He is a thief. He has robbed me, and I advise you not to have anything to do with him. He collects money and keeps it for himself. He was short \$6 on me in one week," with intent to injure the plaintiff?

If your answer be "no," that ends it.

6. If your answer to question No. 5 be "yes," what amount of damages do you award to the plaintiff therefor? 10

7. Do you find that in the month of August, 1915, the plaintiff was the owner of the goods and chattels set forth in the fourth count of the plaintiff's complaint?

8. Do you find that the defendant, Gustav Kahn, in the month of August, 1915, took and carried away the said goods and chattels? 20

If either the seventh or eighth question is answered "no," then you do not answer the ninth question; but if they are both answered "yes" then you are asked to say what amount of damages you award to the plaintiff therefor?

You will take these questions with you into the jury room, and write opposite the word "Answer" what your answer is to each one of them, except the questions which need not be answered if your answer to the previous question is "no." 30

I am requested by the defendant to charge:

* * * *

6. Conviction of crime affects the credibility of a witness. The jury is justified, in this case, in taking into consideration the plaintiff's conviction of crime, in determining the weight of his testimony.

That I decline to charge you. It has not been shown, either by the admission of the plaintiff in 40

Exceptions to charge.

this case, or by proof, that he has been convicted of any crime which should affect his credibility in this case.

* * * *

The jury may retire.

10 (The jury retires.)

Mr. Schoen. I desire to enter an exception to the refusal of the Court to charge each of the requests specifically as requested.

The exception is noted as ground of appeal.

Mr. Schoen. I also want to ask for an exception to the comments, discussion, of the Court upon those requests which were refused.

The exception is noted as ground of appeal.

20 *Mr. Schoen.* I also wish to ask for an exception to that portion of the charge with regard to the damage chargeable to the defendant by reason of the failure of the witness Miller to employ the plaintiff.

The Court. The exception may be noted to what I said on that subject.

The exception is noted as ground of appeal.

30 *Mr. Schoen.* I also wish to enter an exception to that portion of your Honor's charge, and to what the Court said, with regard to the business losses of the plaintiff from the alleged slander, in which the Court said the business loss would be the loss of this position, referring to the position which Miller claimed to have contracted for.

The Court. An exception may be noted to what the Court said on that subject.

The exception is noted as ground of appeal.

40 *Mr. Schoen.* I also wish to take exception to that portion of your Honor's charge in which

Exceptions to charge.

you state that exemplary damages may be awarded for the taking of the goods set forth in the complaint.

The Court. An exception may be noted to what the Court said on that subject.

The exception is noted as ground of appeal. 10

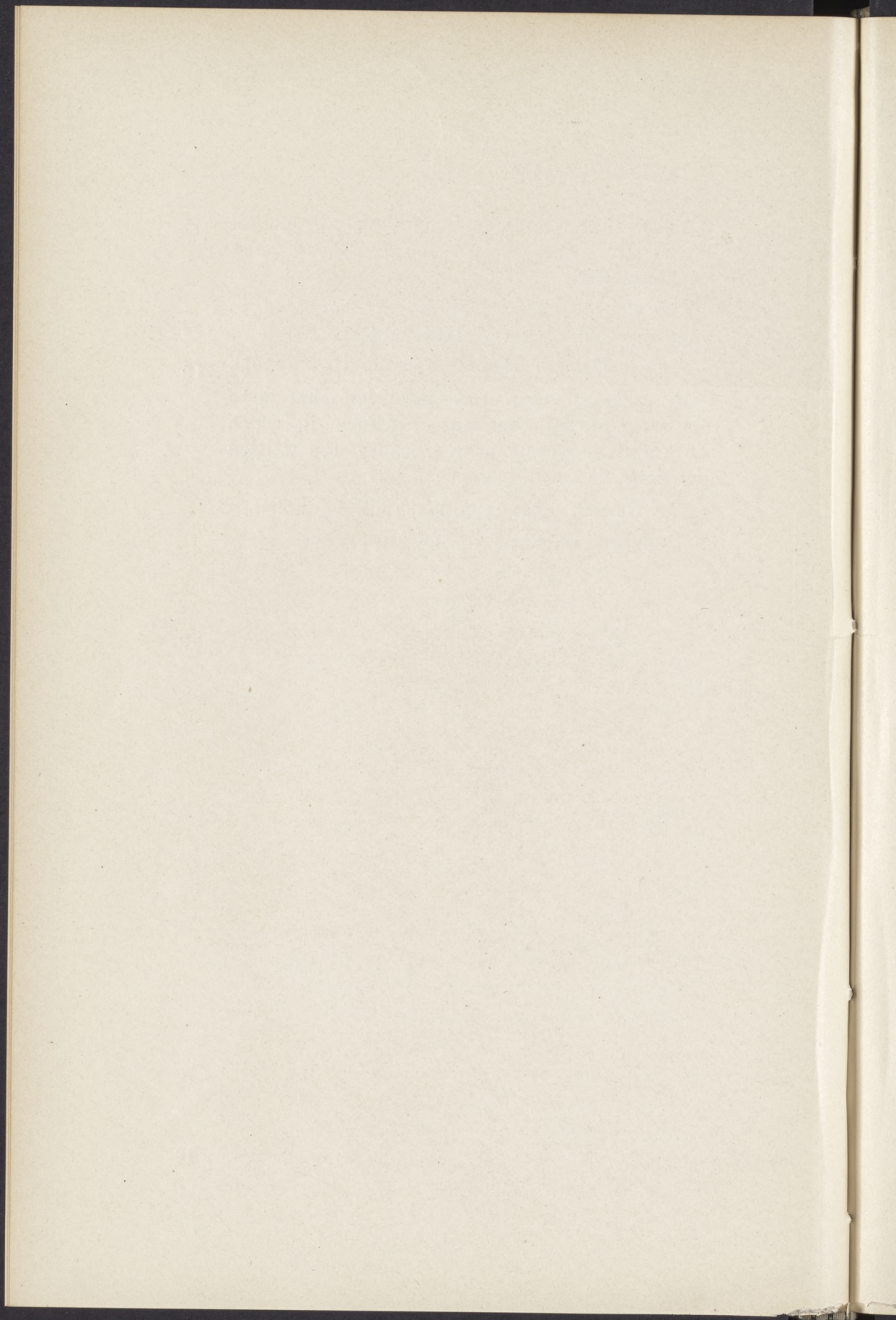
Mr. Schoen. One other exception, that is to the form of the questions, the form in which the questions were put to the jury, the written questions, in each instance.

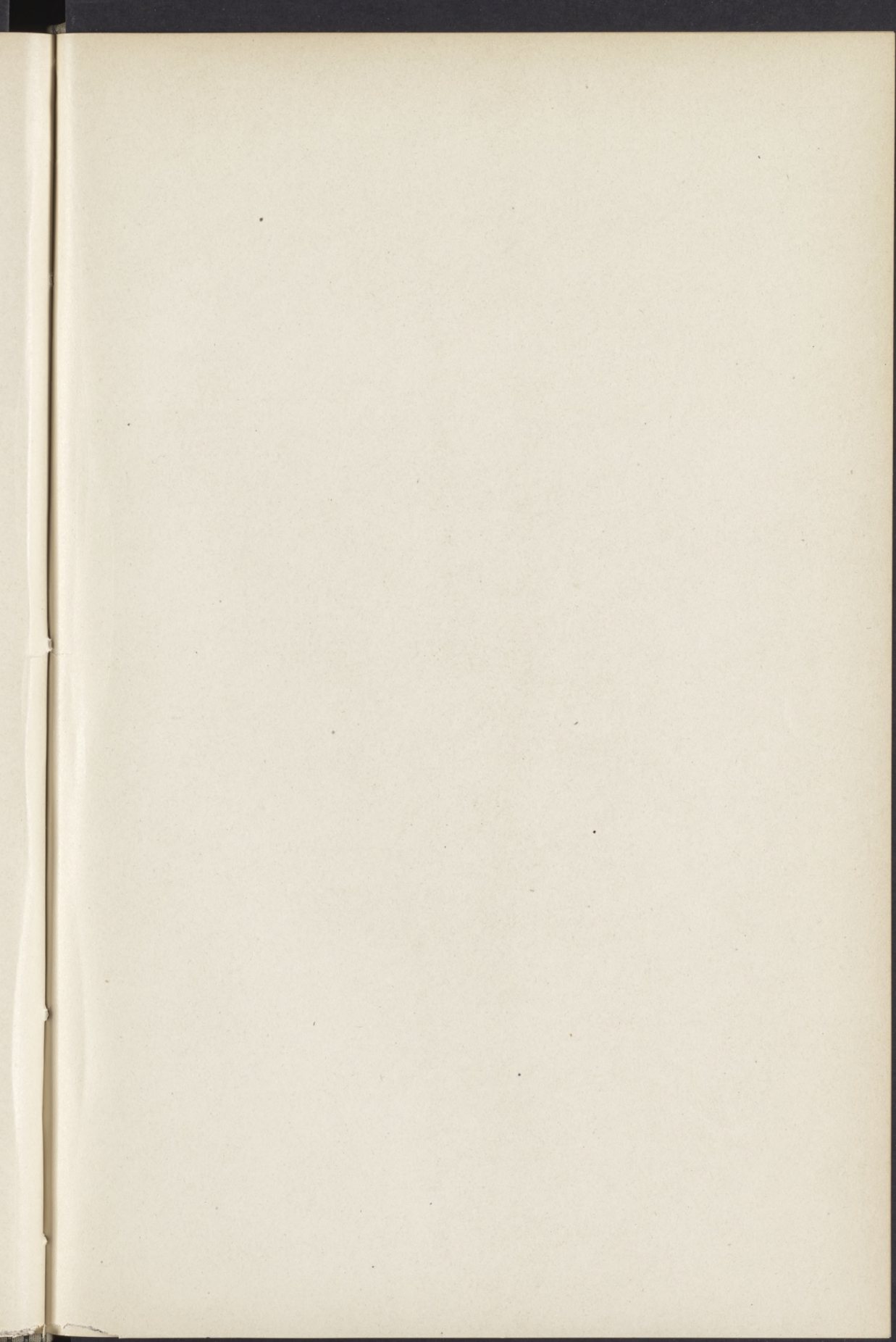
The Court. The exceptions will be noted.
Exceptions noted as ground of appeal.

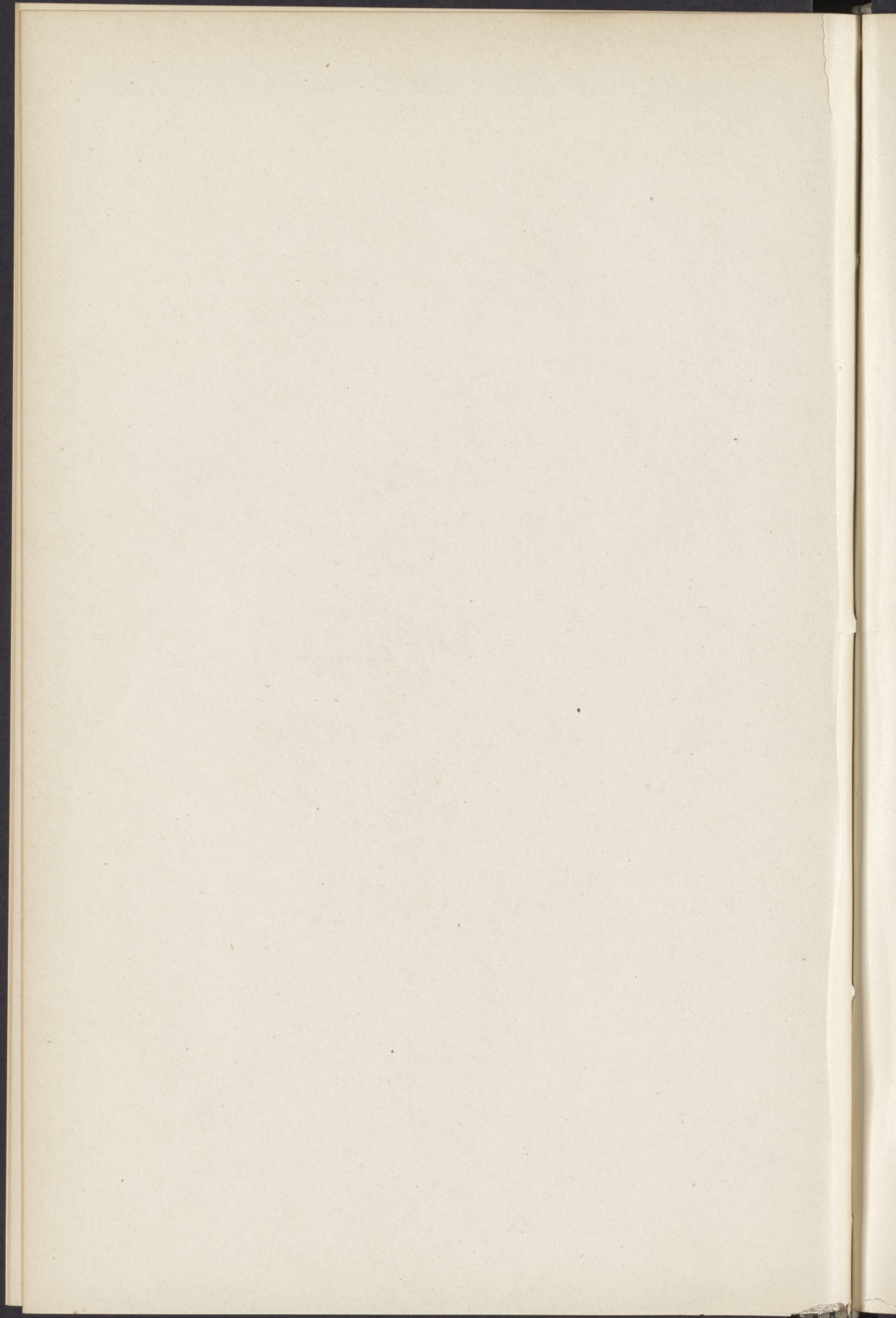
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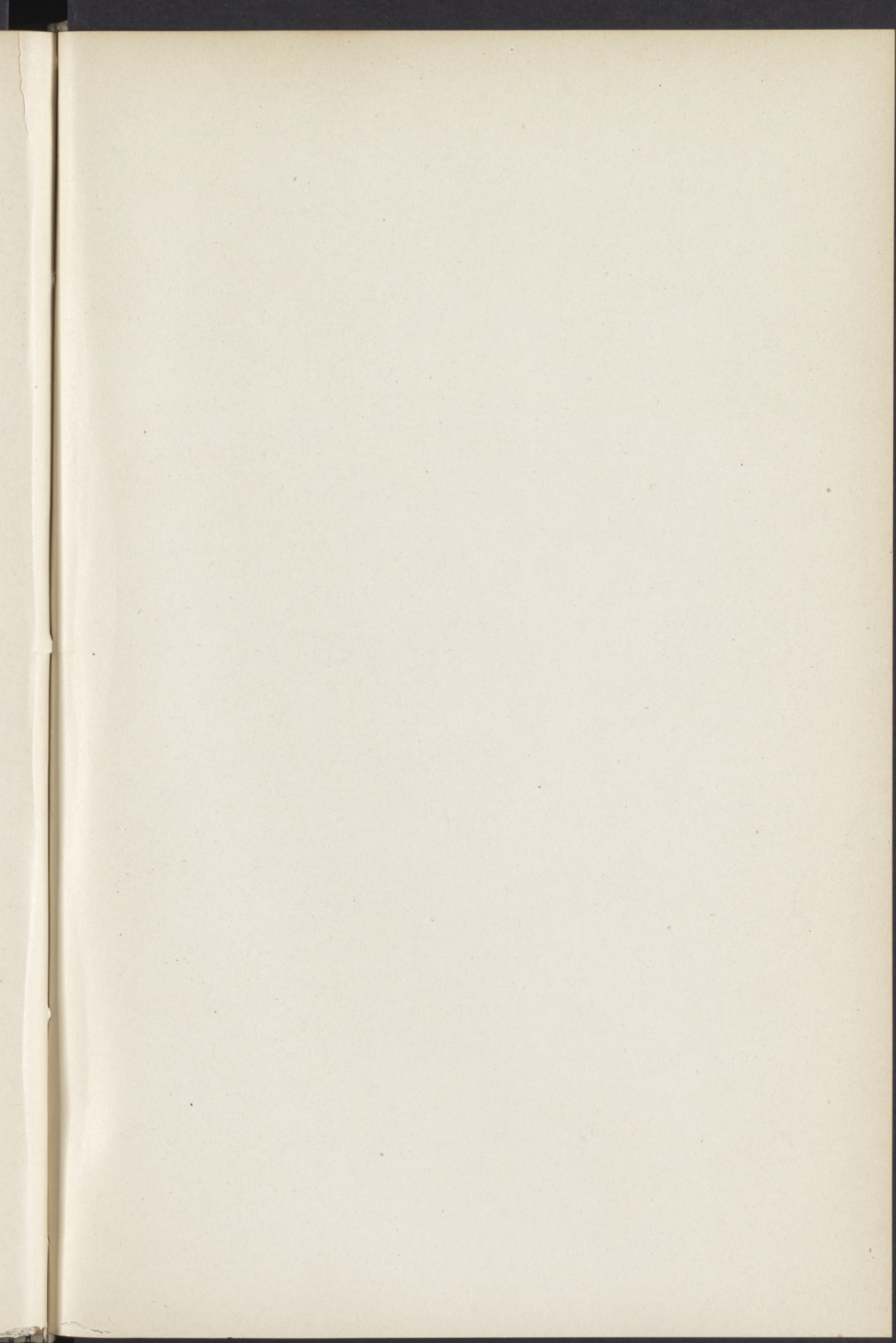
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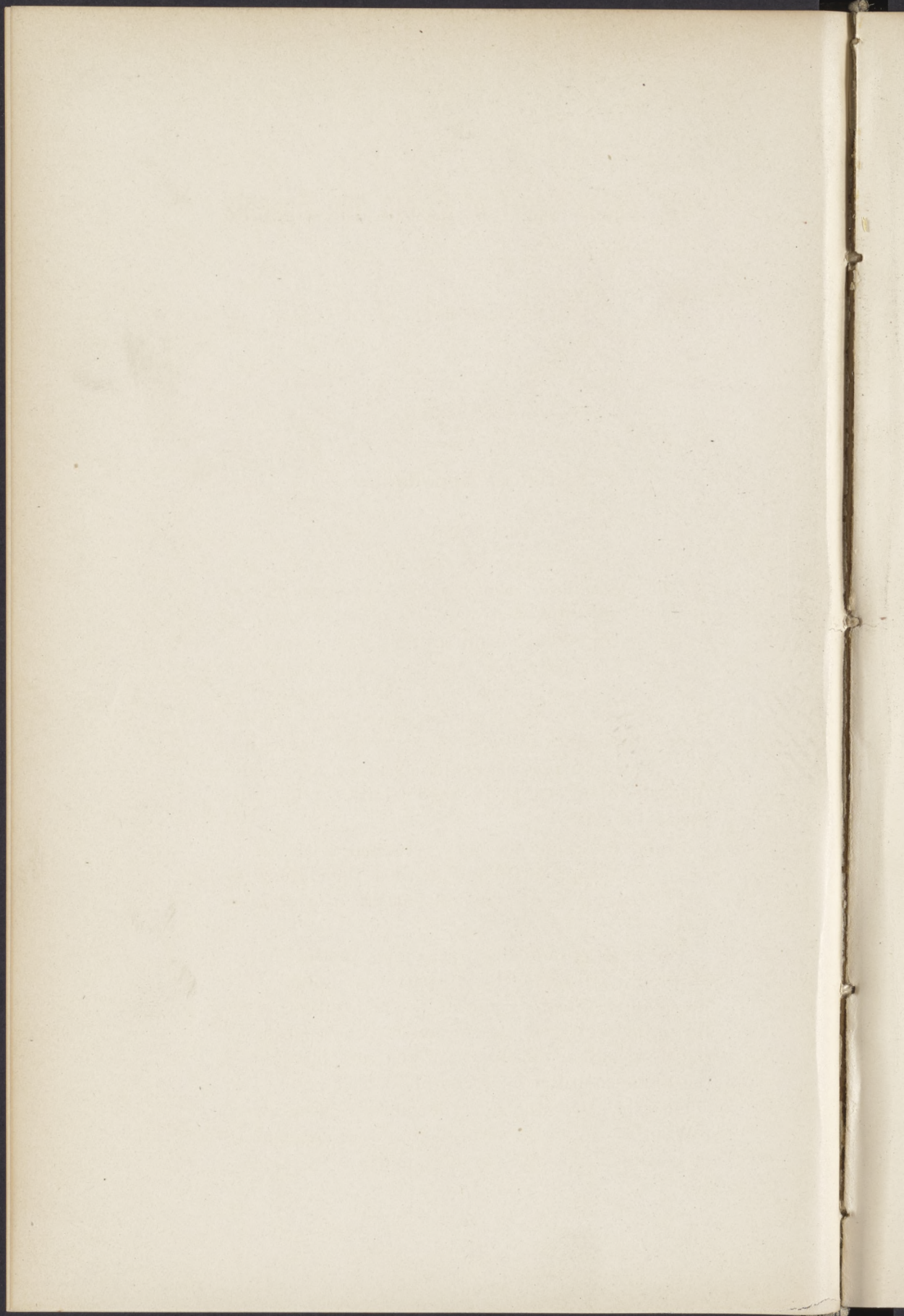
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New Jersey Court of Errors and Appeals

HERMAN MAX, <i>Plaintiff-Respondent,</i>	}	<i>Action at Law.</i>
<i>vs.</i>		
GUSTAV KAHN, <i>Defendant-Appellant.</i>	}	<i>Brief.</i>

Brief of Appellant.

Facts.

The action was by the plaintiff, a son-in-law of the defendant, for damages arising out of marital difficulties between the plaintiff and his wife, the defendant's daughter. The complaint contained four separate counts. The third count was for slander. The case was submitted to the jury by the Court upon questions and answers applicable to each count in the complaint. The jury returned a verdict in favor of the defendant upon each of the counts except the count for slander.

Upon this count the jury returned a verdict in favor of the plaintiff and against the defendant for \$387.60, a most unusual verdict in a slander suit.

The first ground of appeal goes to the charge of the Court upon the measure of damage for the slander alleged, and it is the contention of the appellant that the erroneous instruction of the Court upon this phase of the case occasioned the unique verdict here complained of.

On cross examination, the plaintiff was asked, "Whether he had ever been convicted of crime." It required two and one-half pages of testimony

(pp. 26, 27 and 28) to elicit from him the admission that he had been convicted of crime.

This was made the basis for a request to charge (p. 31). The refusal of the Court to charge as requested, constitutes the second ground of appeal.

POINT 1.

That portion of the charge with regard to the damage chargeable to the defendant by reason of the failure of the witness Miller to employ the plaintiff was erroneous.

The complaint alleged the publication of certain defamatory words to one Simon Miller. The special damage charged was that:

“Plaintiff was then seeking employment as a driver and collector for said Simon Miller and was thereby, *by means of said statements*, refused such employment which had previously been promised him at \$18 per week with added commission on new trade” (p. 7).

The evidence on this point was as follows:

“Q Now you say you had determined to leave, and you sought employment of a man by the name of Miller? A Mr. Miller, yes, sir (p. 25).

Q Did you go to him for a position? A I asked Mr. Miller whether he has a place open for me, a position, and he said, ‘Yes.’ I asked him what would he give me a week. He said he would give me \$18 a week and commission, that is 50c on every customer I would get, he said the average would be from \$20 to \$22 a week; so I says, ‘alright.’

Q Did you get that position? A Yes,
sir * * *"

It appears from the evidence that Miller subsequently refused to carry out his contract of employment with the plaintiff, Max. It does *not* appear, however, that his refusal to employ him was the result of the alleged slanderous words. On the contrary, the witness Miller testified that he did not believe the slanderous words, that they were not proven to him, but that he did not employ the plaintiff because he was afraid of threats of harm to his business made by the defendant, as appears by the following testimony:

"Q And did you say you were anxious to get information? A I asked him if he could prove to me it was so

Q He didn't prove anything to you? A No, sir; nothing of that kind.

Q He didn't satisfy you that the boy was not right? A No, sir; he didn't satisfy me.

Q Why didn't you hire him? A Because the second time he said he would put me out of business * * * (p. 21).

Q When did you tell Max you wouldn't employ him? A Well, after the second week, when he came over and told me he was going to put me out of business, and all such scheme like that, I refused to give him the job then, because he was supposed to give ten days' notice * * * (p. 23).

Q When you told Max what Kahn had told you about it? A I told him I can't hire him, his father-in-law is interfering too much with me and I am new man around here and didn't want to start any quarrels with other dealers if I could help it (p. 24).

Q But you didn't give him a job even though he didn't prove it? A He didn't prove it but he came out other ways; he interfered with me in other ways" (p. 25).

Yet the Court charged the jury that:

"The business loss, if you believe the plaintiff's testimony, would be the loss of this position. Mr. Miller, you will remember, testifies—or the plaintiff testifies that at that time he was getting about \$10.50 a week. Mr. Miller had offered him \$18 a week salary and Mr. Miller says the commission, the extras he would earn would bring it up to \$20 or \$22 a week. If he lost that position, and it appears that he subsequently went to work for his father at \$12, that would be the measure of his loss, so far as the business is concerned * * *. But as to the business loss, you have a right to take into consideration the salary, if *the contract of employment* with Mr. Miller had been fulfilled he would have received in that position; deducting from it what he received in another position in which he was employed, and the difference for the length of time you believe from the testimony, he would have received the higher salary would be his business loss."

The charge of the Court that "The business loss, *if you believe the plaintiff's testimony*, would be the loss of this position," is clearly erroneous, and directly contrary to the evidence. If you believe the plaintiff's testimony (*supra*, pp. 21, 23, 24 and 25), Miller refused to believe the slanderous words; said he was not satisfied that they were proven, and when asked directly why he did not give the plaintiff employment said:

“Well, after the second week, when he came over and told me he was going to put me out of business, and all such scheme like that, I refused to give him the job then, because he was supposed to give ten days’ notice (p. 23). A I told him I can’t hire him, his father-in-law is interfering too much with me and I am a new man around here and didn’t want to start any quarrel with other dealers if I could help it (p. 24).

Q. But you wouldn’t give him a job even though he didn’t prove it? A. He didn’t prove it, but he came out other ways; he interfered with me in other ways” (p. 25).

The charge is too broad on the question of the loss of the position. The Court says:

“If he lost *that* position, and it appears that he subsequently went to work for his father at \$12. that would be the measure of his loss so far as the business is concerned.”

The Court here permits the jury to find a verdict against the defendant for damages for the loss of the position, regardless of whether the position was lost as the result of the slander or otherwise.

POINT 2.

There is no liability if a distinct cause intervenes between the defendant’s wrong and the damage.

The plaintiff charges a slander. He alleges as special damage, the breach of a contract of employment with one Miller, as the result of which he lost certain prospective earnings. The fact accomplished, as claimed by the plaintiff, was the loss of a position. The alleged cause,

the slander. What was the proximate cause of the loss of the position?

“One of the most valuable criteria furnished us by the authorities is to ascertain whether any *new cause* intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.” (*Ins. Co. v. Tweed*, 7 Wall, 52.)

To apply this criterion to the case before us, it seems too plain for argument that the injury complained of by the plaintiff was the *direct consequence of Miller's breach of contract*. Miller was a free agent. There was a contract of employment between him and the plaintiff. Miller was bound to carry out his contract. His breach was actionable by plaintiff. Miller could not excuse performance because of what Kahn was alleged to have said to him concerning the plaintiff. His breach of contract was illegal. Having agreed to employ Max, he was in law bound to perform the contract on his part by employing the plaintiff, and the fact that slanderous words were spoken of the plaintiff to him was no legal justification for the abandonment of the contract. His failure to employ the plaintiff was therefore such an intervening, culpable, efficient agency between the defendant's dereliction and the loss, that it breaks the causal connection between defendant's act and the injury complained of. It is a new intervening cause, of itself sufficient to stand as the cause of the misfortune, and being subsequent to the original wrong, the former must be considered as too remote and the damage is therefore not proximately attributable to the appellant.

Where the party last in fault was chargeable with some duty to the other, which if performed, would have prevented the injury, the law will attribute to his culpable conduct the injurious consequence, and refuse to look beyond it.

Texas & P. R. Co. v. Doherty (Tex.) Nov. 8, 1890.

Brandon v. Gulf City, C. C. & Mfg. Co., 51 Tex. 121.

Lawyers' Reports, Annotated, Book 12, p. 283.

In this case Miller was chargeable with the duty of employing plaintiff, he having contracted to do so, which, if performed, would have prevented the injury complained of by the plaintiff, to wit, the loss of the position with Miller.

“A man is responsible only for the natural consequences of his own misdeeds and he is not answerable for detriments that ensue from the misdeeds of others.”

“If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause and not to that which was more remote.” *Cooley on Torts*, page 76.

The loss of the position is squarely attributable to Miller's breach of contract, and it is this wrongful act of Miller which is the proximate cause of plaintiff's loss and not the slander. It is clear that a culpable, efficient agency intervened between defendant's dereliction and the loss.

Vicars v. Wilcocks, 8 East, 1, seems to be the leading case upon the subject under discussion and is directly in point here. In that case, the special damage from defamation, for which a recovery was sought, was the discharge of the plaintiff from his employment before the time for which he had been engaged had expired. The ground of this decision was that this discharge of the plaintiff from his employment was illegal, and was the act of a third party, *for which the defendant was not responsible*, and that, as the wrong of the slander became detrimental only by reason of *an independent wrongful act of another*, the injury was to be imputed to the last wrong and not that which was farther distant one remove. In his elucidation of the law of this case Lord Ellenborough says, alluding to the discharge of the plaintiff from his employment that,

“It was a mere *wrongful act of the master* for which the defendant was no more answerable, than if in consequence of the words, other persons had afterwards assembled and seized the plaintiff and thrown him into a horse-pond by way of punishment for his supposed transgression.”

The defendant in this case respectfully submits that the facts of the present case are identically analogous with the facts in *Vicars v. Wilcocks*, and that as the special damage alleged by the plaintiff arose only by reason of an independent act of another (Miller), the injury should be imputed to the last wrong, and not to that of the defendant, and it follows that the charge of the Court complained of was in this respect erroneous and harmful to the defendant.

POINT 3.

That portion of the Judge's charge in which the defendant is charged with responsibility for Miller's act in refusing to carry out his contract of employment with Max was erroneous.

"Where there has intervened between the defendant's act and the injury an independent illegal act of a third person producing the injury, and without which it would not have happened, the latter is held the proximate cause of the loss *and the defendant is excused*. Or, as the principle has been expressed, though there may have been an original wrongful act, if it only produced injury through the intervening, independent and wrongful acts of others, the author of the former is not liable in damages."

Vicars v. Wilcocks, 8 East, 1.

Shugart v. Egan, 83 Ill., 55; 25 Am. Rep. 359.

Bosworth v. Brand, 1 Dana, (Ky.) 377.

BEASLEY, C. J., in *Hughes v. McDonough*, 43 N. J. L., 459; 39 Am. Rep. 603.

Olmsted v. Brown, 12 Barb. (N. Y.), 657.

Beach v. Ranney, 2 Hill (N. Y.), 314.

Carpenter v. Pennsylvania R. Co., 13 N. Y., App. Div., 328.

WARDLAW, J., in *Harrison v. Berkley*, 1 Strobb. L. (S Car.), 547; 47 Am. Dec., 578.

State v. Ward, 9 Heisk (Tenn.), 100.

And see *Crain v. Petrie*, 6 Hill (N. Y.), 523; 41 Am. Dec., 765.

"The law can not undertake to trace back the chain of causes indefinitely, for it is obvious that this would lead to inquiries far

beyond human power and wisdom—in fact, infinite in their scope. It therefore stops at the first link in the chain of causation, and looks only to the person who is the proximate cause of the injury.”

Shearman & Redfield on Negligence, Art. 9.

The authorities cited seem to settle it beyond dispute that where successive events follow the original wrong before the damage is suffered, the original cause becomes remote if the *wrong of a third party intervenes*, and it is only in cases where subsequent intervening acts of third parties are *innocent and legal*, or, as has been otherwise expressed, *blameless*, that the original cause is considered as the proximate cause.

Commencing at the damage and going back to the first wrongful act from which it resulted, which is the method laid down by the authorities for determining the proximate cause of an injury, we are confronted at once in this case with *Miller's breach of contract* and it is his act which is the proximate cause of the damage alleged to have been sustained by the plaintiff. This portion of the charge of the Court therefore was erroneous and prejudicial and harmful to the defendant.

POINT 4.

That portion of the Judge's charge in which the jury was instructed as to the mode of computing the amount of the loss was erroneous.

On this point the Court said:

“But as to the business loss you have a right to take into consideration the salary

if the contract of employment with Miller would have been fulfilled he would have received in that position; deducting from it what he received in another position in which he was employed; and the difference for the length of time you believe from the testimony he would have received the higher salary, would be his business loss."

Damages are of two kinds. Compensatory and ^{punitive} speculative. This portion of the charge dealt with the question of compensatory damage and was clearly erroneous in pointing out the method of computing the business loss on a compensatory basis, because it was speculative and permitted the jury to compute the damage upon speculative and uncertain standards.

There is no evidence whatever in the case that the contract between Max and Miller was certain as to its duration. The only evidence of the terms of the contract related to the amount of salary which the plaintiff was to receive. There is an entire absence of evidence as to how long Miller intended to keep Max in his employ. Under the terms of the contract as testified to, the only fair inference is that it was a hiring by the week and that Miller could have terminated the contract at any time after the first week. There was no evidence whatever to indicate how long Miller was *likely* to have kept Max in his employ. Under these circumstances it was clearly harmful to the defendant for the Court to permit the jury to speculate as to the length of time they *believed* Max would have received the higher salary from Miller, and it is the latitude permitted to the jury by this erroneous instruction that undoubtedly gave rise to the unique verdict of \$387.60 as damages in an action for slander.

POINT 5.

The Court erred in refusing to charge the defendant's sixth request to charge as follows:

CONVICTION OF CRIME AFFECTS THE CREDIBILITY OF A WITNESS.

THE JURY IS JUSTIFIED, IN THIS CASE, IN TAKING INTO CONSIDERATION THE PLAINTIFF'S CONVICTION OF CRIME IN DETERMINING THE WEIGHT OF HIS TESTIMONY.

On cross examination of the plaintiff, he admitted with great reluctance that he had been convicted of crime in 1912. The testimony on this point follows:

“Q Have you been convicted of crime?

A No, sir.

Q Never? A No, sir.

Q Positive about that? A Yes, sir.

Q What? A Yes, sir.

Q Do you want to think of that, or do you want to state that? A Convicted of crime?

Q Convicted of crime, yes. A No, sir.

Q Do you remember on December 20, 1912, you were charged with larceny—

Mr. Weinberg. Objected to.

The Court. Not what he was charged with.

Q Were you not convicted of crime on December 20, 1912? A No, sir.

Q Are you positive about that? A 1912?

Q Yes, 1912. A Yes, sir.

Q Now, did you live in 119 Bergen street? A Yes, I lived there before I was married.

Q In 1912, 119 Bergen street was your address? A Yes, sir.

Q That is your father's house? A That is my father's place.

Q How many families lived in that house? A Just one.

Q Any other Herman Max live there? A Just one that I know of.

Q You are the only Herman Max that you know of? A Yes.

Q That lived in that house in 1912? A Yes.

Q Do you know a woman by the name of Nellie Lasanti, 347 Fairmount avenue? A No, not that I can think of.

Q Ever hear that name before? A Lasanti?

Q Yes. A There is a party by that name lives next door to us now.

Q Did you hear that name in 1912, December 20, 1912? A Not that I can remember.

Q You don't recall anything of that incident? A Not of that name.

Q Do you recall being before Judge Herr in December, 1912? A Yes, I remember that.

Q You do remember that? A Yes.

Q You remember of being convicted of crime there? A Yes, I know I was fined something, but—

Q Do you remember being convicted of crime there? A Of crime?

Q Yes. A It has not been me that done that crime.

Q Never mind that; do you remember being convicted there? A Yes, I remember that.

Q Why did you deny it before? A I wasn't arrested, or anything.

Q Why did you deny you had been convicted in December, 1912, and now admit it? A I haven't been arrested.

Q I didn't ask you anything about being arrested. A I was thinking you meant that; whether I was arrested or anything.

Q Don't you know what it means to be convicted? A Whether I was fined.

Q Found guilty? A Found guilty, yes. I know what you mean now, but I didn't know before. I understand, the way you talk, what you mean now.

Q In 1912 you were found guilty of crime, were you? A Yes.

Q That is all. A Won't you let me explain what it was for?

The Court. No, that is all."

When a witness is cross examined, he may be asked any questions which tend to affect his credibility, and by legislative sanction conviction of crime may be shown for the purpose of affecting his credit.

"No person offered as a witness in any action or proceeding of a civil or criminal nature shall be excluded by reason of his having been convicted of crime, but such conviction may be shown by the cross examination of the witness, or, by the production of the record thereof, for the purpose of affecting his credit. C. S. Volume 2, page 217."

In *State v. Henson*, 37 Vr. page 601, this section of the evidence act has been construed and followed:

"It is the conviction of crime which is to affect credibility. The word 'crime,' being

used without qualification, must be held to be used in its general sense to include any crime. It is not a word of doubtful meaning * * *. It may be that conviction of the crime of assault and battery in many instances would be no substantial ground for impairing credibility, but the legislature may designate the crimes, a conviction of which will affect credibility, and the courts cannot restrict or enlarge the enactment of the law maker, upon their view that some crimes do and others do not evince unreliability. The act of 1874 does not submit to the Court as a question of law, whether the crimes charged should affect credibility; it is a question for the jury, whose province alone it is to say to what extent, if any, credibility shall be affected. *State v. Henson, supra.*”

Both the statute and the cases sanction the inquiry as to whether a witness has been convicted of crime for the purpose, as stated in the statute, of affecting his credibility. The plaintiff, Max, was cross examined, without objection, upon this point and admitted a conviction of crime in 1912 (pp. 26, 27 & 28). The admission of the plaintiff that he had been convicted of crime was a proper basis upon which to request the Court to charge as requested:

“Conviction of Crime affects the credibility of a witness.

The jury is justified, in this case, in taking into consideration the plaintiff’s conviction of crime in determining the weight of his testimony.”

The only competent purpose under the statute for which a witness may be interrogated as to his previous conviction of crime is to af-

fect his credibility with the jury and the refusal of the Court in this case to instruct the jury that it is justified in taking into consideration, the plaintiff's conviction of crime, in determining the weight of his testimony, was contrary to law and harmful to the defendant in that it deprived him of the benefit of the undisputed testimony in the case on this point, and of the provision of the statute.

For the reasons above set forth it is respectfully submitted that the errors complained of are sufficient to set aside the verdict and judgment in this cause and to grant a trial *de novo*.

Respectfully submitted,

EDWARD SCHOEN,
Of Counsel with Defendant-Appellant.

New Jersey Court of Errors and Appeals

HERMAN MAX, Plaintiff-Respondent,	} Action at Law.
vs.	
GUSTAV KAHN, Defendant-Appellant.	} Brief.

BRIEF OF BENJAMIN M. WEINBERG, FOR RESPONDENT

Statement of Facts

The plaintiff brought suit against the defendant, to recover damages for four separate offenses alleged to have been committed by the defendant against him, to wit:

1. Alienation of the affections of the plaintiff's wife; 2. Assault and Battery committed upon the plaintiff; 3. Slander of the plaintiff; 4. Trespass for taking and carrying away certain household furniture, etc., belonging to the plaintiff.

The jury rendered a verdict in favor of the defendant on the 1st, 2d and 4th counts of the complaint, but rendered a verdict in favor of the plaintiff on the 3d (the slander count and assessed his damages at \$387.60, upon which verdict, judgment was entered.

The defendant appeals from that judgment and alleges several grounds of appeal, which will be taken up in the order argued by defendant counsel in his brief.

Before discussing the case, the attention of the Court is drawn to the fact that although it is apparent that much testimony was taken during the trial, only small and scattering extracts are presented to the Court. No consent appears to such an abbreviated state of the case, and, while it is true that under the rule of this Court, the plaintiff had the right of objecting to the same, still in view of the fact that the case was tried over a year ago, and that the books and briefs have but recently been served upon the plaintiff, he is, at this late date, unable to state just how much, or what evidence was taken at the trial, which affects, or might affect the questions now presented. This omission will be commented upon further on.

Discussion of the Law

The first and second points made by the defendant, are, that the defendant is not responsible for any damage sustained by the plaintiff, which resulted because of one Miller's failure to employ the plaintiff, after the defendant had slandered him to the said Miller.

It is said that it does not appear, firstly, that Miller refused to employ the plaintiff because of these slanderous statements made by the defendant, and secondly, because Miller's action in refusing to employ the plaintiff was a distinct, intervening an independent act for which the defendant is not responsible.

There is nothing in the reason firstly assigned, because it appears that, not only did the defend-

ant tell Mr. Miller, who was about to employ the plaintiff, that he, the plaintiff was a thief, and was dishonest, but followed it up by threatening the said Miller to drive him out of town, if he employed the plaintiff.

The reasons therefore for Miller refusing the plaintiff employment, were so intermingled, that it was clearly a question for the jury to say which one, if not both of the causes, resulted in the refusal of Miller to give him the employment theretofore promised him.

As to the second reason given, the defendant clearly shows in his brief, that, where the cause of the loss sustained by the slandered person is attributable to the defendant he is responsible for such loss or damage.

In *Hughes vs. McDonough*, 43 N. J. L., Beasley, C. J. in discussing the authorities, stated the sound rule that a person is "conclusively chargeable with the knowledge of the injurious effect of his conduct," and that,

"Where the effect was reasonable to have been foreseen and where, in the usual course of events, it was likely to follow from the cause, the person putting such cause in motion, will be responsible even though there may have been many concurring events or agencies between such cause and its consequences" (p. 462).

The case of *Vicars vs. Wilcocks*, 8 East, 1, cited in the defendant's brief is considered by the learned Chief Justice, in the decision *supra*, from which it appears that the discharge of the plaintiff by his employer in that case, was illegal,

"and was the act of a third party, for which the defendant was not responsible."

In the case we are now considering, the slanderous remarks were maliciously made, directly to the intended employer, with the intent and purpose that the said statements should be acted upon to the injury of the plaintiff, and having been acted upon to the plaintiff's damage, the defendant is liable therefor.

The Fourth Point made by the defendant, is, that the Court's charge to the jury, with respect to the method of computing plaintiff's damages, was erroneous.

Inasmuch as a mere extract of the Court's charge is given, it is hardly fair, either to the Court or the plaintiff, to say just what was said on the subject of damages. What is printed however, seems to be faultless. The Court did not charge, as the defendant claims in his exceptions (p. 32) that "the plaintiff's business loss, would be the loss of this position" but was told that the jury had

"a right to take into consideration the salary, *if the contract of employment with Miller would have been fulfilled*, he would have received in that position, deducting from it, what he received in another in which he was employed, etc." (pp. 29-30).

This charge gave the jury the right to find that no losses were sustained by the plaintiff in this respect, but their having, perhaps, found otherwise, is no legal reason for defendant's present complaint.

As above stated, the charge of the Court has not been completed in full. There is nothing to show, but everything to indicate, that the award was principally of a punitive nature. Certain it is that the amount of the verdict, based upon the

theories of punishment or compensation or both, was comparatively trifling, and in no manner reflects excessiveness.

In the case of *Johnston vs. N. Y. & Long Branch R. R. Co.*, 65 N. J. L., 421, where it was clear that the lower Court committed error in its charge to the jury on the question of damages which might be recovered by the plaintiff, the Supreme Court held that

“in view of the reasonableness of the damages awarded in the case, considering the character of the injuries * * * and the evident lack of harm arising from the erroneous instruction, the verdict should not be set aside.”

The next objection is to the refusal of the Court to charge defendant's request as follows:

“Conviction of crime affects the credibility of a witness. The jury is justified in this case in taking into consideration the plaintiff's conviction of crime in determining the weight of his testimony.”

It appears from the short extract of the testimony given on pages 12-14 that the plaintiff both denied and admitted his conviction of some sort of crime. Without going into the question raised by the defendant under this head, as to what grade or nature of crime may be shown under the statute, it is pointed out that all the defendant was entitled to have charged, was that conviction of a crime *may* affect the credibility of a witness.

State vs. Fox, 70 N. J. L., 253.

State vs. Mount, 73 N. J. L., 583.

In the case of the *State vs. Henson*, 66 N. J. L., 601, (p. 606), the Court said,

“It *may* be that conviction of the crime of assault and battery in many instances, would be no substantial ground for impairing credibility, etc.”

It has never been held that conviction of a crime *per se*, affects the credit of a witness; but simply that it “may” affect the credit of a witness; yet the complaint of the defendant in this case is, that the learned Court refused to charge the proposition that “*Conviction of crime affects the credibility of a witness.*” Such a mandatory instruction would manifestly have been error. It is immaterial that the Court’s refusal to charge the request was based upon a different theory. If his action was proper, his reasons are a matter of indifference

Conclusion

Taking the case as presented by the printed book, can this Court determine the nature and extent of the evidence?

It is apparent that important evidence is missing—*viz.*: The defense in the case. Was any such presented? If so, did it strengthen the plaintiff’s claim or weaken it? What was the general tone of the Court’s charge on all of the questions involved?

The answer of the defendant to the third count admits the accusation in the complaint, but sets up the defense of privilege.

Was this maintained or abandoned? All of these and many other important questions must be answered in order to determine whether substantial justice has been done in the case.

As was said by this Court in *Kargman vs. Carlo*, 85 N. M. L., 682,

“No judgment will be reversed on the ground of misdirection, or the improper admission or exclusion of evidence, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party.”

Only extracts of the testimony and the charge of the Court below are brought here for review. But what has been extracted, fails to show wherein any substantial rights of the defendant have been affected. The damages were small, and the guilt of the defendant was clear. No error has been shown, and it is therefore respectfully submitted that the appeal, from the judgment of the Court below, should be dismissed with costs.

Respectfully submitted by,

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