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Notice of Appeal.

New Jersey Supreme Court

Filed April 14, 1926.

ROBERT STURLA, JOHN MILLER
and CHARLES REIFF,
Plaintiffs-Respondent,

vs.

THE CENTRAL RAILROAD COM-
PANY OF NEW JERSEY,
Defendant-Appellant.

Action
at Law.

10

To: STOKES & McDERMOTT, Esqs.,
Attorneys for Plaintiffs-Respondent.

20

Sirs:

PLEASE TAKE NOTICE that the defendant-appellant, The Central Railroad Company of New Jersey, hereby appeals to the Court of Errors and Appeals from the whole and every part of the judgment entered in this cause, on the following grounds: first, that the New Jersey Supreme Court erred in giving judgment for the plaintiffs-respondent, Robert Sturla, John Miller and Charles Reiff, instead of for the defendant-appellant, The Central Railroad Company of New Jersey; and second, that the said New Jersey Supreme Court erred in affirming the judgment of the Monmouth County Court of Common Pleas.

30

Dated, April 8th, 1926.

WM. A. BARKALOW,
Attorney for Defendant-Appellant. 40

Rule of Affirmance.

NEW JERSEY SUPREME COURT.

10	ROBERT STURLA, JOHN MILLER and CHARLES REIFF, Plaintiffs-Respondent,	}	Action at Law.
	<i>vs.</i>		
	THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, Defendant-Appellant.		

20 The cause having been duly argued at the October Term, 1925, of this Court by DeVoe Tomlinson of counsel for the defendant-appellant and Stokes & McDermott and William Hartshorne of counsel for the plaintiffs-respondent, and the Court having considered the same and finding no error in the record of proceeding in the Monmouth Common Pleas Court;

30 It is thereupon ORDERED AND ADJUDGED that the judgment of the said Common Pleas Court removed by appeal in this cause be affirmed with costs; and that the record be remitted to the Monmouth Common Pleas Court to be proceeded with in accordance with this judgment and the practice of said Court.

Entered March 26, 1926, on motion of

STOKES & McDERMOTT,
Attorneys of Plaintiffs-Respondent.

A true copy

40 EDWARD J. KELLEHER,
Clerk.

Summons.

THE STATE OF NEW JERSEY TO THE CENTRAL RAIL-
ROAD COMPANY OF NEW JERSEY:

You are summoned to answer the annexed complaint of Robert Sturla, John
(L. s.) Miller and Charles Reiff, in an action 10
at law in the Monmouth County Common Pleas Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Monmouth County Common Pleas Court, at Freehold, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

Witness Hon. Rulif V. Lawrence, Judge of the Monmouth County Common Pleas Court, at Freehold, this eighteenth day of August, nineteen hundred and twenty-four. 20

JOSEPH McDERMOTT,
Clerk.

STOKES & McDERMOTT,
Attorneys. 30

Complaint.MONMOUTH COUNTY COMMON PLEAS
COURT.

10	ROBERT STURLA, JOHN MILLER and CHARLES REIFF, Plaintiffs, <i>vs.</i> THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, Defendant.	}	Action at Law.
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20 The plaintiffs, Robert Sturla and John Miller, residing in Farmingdale, Monmouth County, New Jersey, and Charles Reiff, residing in the Village of Adelpia, Monmouth County, New Jersey, show that:—

1. That plaintiffs each have a cause of action against the defendant involving a common question of law and fact growing out of the same transaction.

30 2. On or about the twenty-second day of July, 1924, and on divers days prior to and after that date and on all the days hereinafter mentioned, the defendant owned and operated a railroad leading from Freehold to Matawan in Monmouth County, New Jersey, which at Matawan made connections with another branch of the said railroad for the city of New York.

40 3. The plaintiffs are business men employed in their respective lines in the city of New York

Complaint.

and reside in Monmouth County, New Jersey, as above set forth, making daily trips to and from their offices over the railroad line above described operated by the defendant, and on or about the said twenty-second day of July, 1924, they were passengers and in company with each other on the train operated by the defendant, leaving Jersey City at 4:42 Eastern Standard time connecting at Matawan with the train leaving at 5:29 Eastern Standard time for Freehold where they were due to arrive at 5:56 Standard time, the said train being #4927. From Matawan to Freehold they occupied seats in the smoker which on that occasion was one part of a combination baggage and passenger car.

4. In the usual course of their business the plaintiffs left Freehold every morning on the train leaving 6:03 Eastern Standard time, which train is #4902.

5. On or about July 29th, the plaintiffs were riding together as was their usual custom on train No. 4902; when the train pulled out of Freneau station and before arriving at Matawan, the plaintiffs were accosted by a constable who placed all three of the plaintiffs under arrest stating merely that he had a warrant for his action on a complaint for disorderly conduct. This constable escorted the plaintiffs from the car at Matawan and took them to Keyport in Monmouth County, New Jersey, and confined them in the police station or lockup at that place. From the time of their arrival there about seven o'clock Standard time, until about ten o'clock Standard time, at which time they were released on bail for appearance before

Complaint.

10 Thomas L. Smith, Esq., Mayor, in the Mayor's Court of the Borough of Keyport, on Monday, August 4, 1924, the said Mayor, Thomas L. Smith, having issued the warrant of arrest on the complaint of George W. Robinson, a detective in the employ of the defendant, the Central Railroad Company of New Jersey.

20 6. On or about the twenty-eighth day of July, 1924, the said George W. Robinson acting within the scope of his employment by the defendant, maliciously and without probable cause, charged the three plaintiffs herein each on a separate written complaint with the same offense and each in the same words and figures, as follows: "that on the 22nd day of July A. D., 1924, at the Boro of Freehold, in the County aforesaid; One (defendant's name) of (village) county and state above written, as he is informed and believes, did on the above named date pull the emergency cord on train No. 4297 going into Freehold station, and after train stopped at station, he again pulled cord and blew whistle causing engineer to start train, and an accident was avoided when Conductor Creby who was in charge of said train signalled for engineer to stop, thereby said Robert Sterling becomes a disorderly person; the said George W. Robinson, acting in the scope of his authority as an employee of the defendant as aforesaid lodged said complaints with the said Mayor, Thomas L. Smith, in the Mayor's Court of the Borough of Keyport as aforesaid and thereupon caused the arrest on the warrant of the said Mayor of all three of the plaintiffs on said charge; the plaintiffs were thereupon arrested and lodged in said police station or lockup as hereinabove

30

40

Complaint.

set forth and there each of his liberty was deprived for the space of three hours.

7. On the fourth day of August, 1924, in accordance with their bail bond above mentioned, the plaintiffs appeared in the Mayor's Court of the Borough of Keyport before Thomas L. Smith sitting as a magistrate of said court and the defendant then and there appeared by Theodore J. R. Brown, Esq., its attorney, and Joseph Creby, Wesley Pierce and John Iverson, its witnesses, and then and there maliciously and without probable cause again charged plaintiffs with said offense; thereupon plaintiffs were duly tried on said charge before said magistrate and duly acquitted thereof and each restored to his liberty, and the proceeding was duly dismissed by said magistrate; by reason aforesaid the said charge and the proceedings thereupon have fully terminated and in plaintiffs' favor. 10
20

8. The said George W. Robinson, Theodore J. R. Brown, Esq., Joseph Creby, Wesley Pierce and John Iverson were at the said time, detective, attorney and trainmen employed by defendant, each in his capacity as a special officer to preserve order at defendant's stations, as attorney to prosecute and defend actions at law for the said defendant, as conductor, brakeman and baggage master, to conduct and control the train of the defendant between its appointed terminals, and in arresting, imprisoning and prosecuting the plaintiffs as above set forth were each acting within the scope of his respective employment and within the regular course of his duty, and all in the interest of the defendant. 30
40

Complaint.

9. Each of the plaintiffs has been injured in his reputation and has suffered great mental and bodily distress during his said imprisonment and afterwards and each has suffered severe financial losses by reason of the time lost from his respective business on the day of the arrest and imprisonment and on the day of the trial; and the plaintiffs have been forced to spend large sums of money in costs and counsel fees in defending themselves upon said charge and in procuring bail, all to plaintiffs' damage, \$30,000, distributed as follows: Robert Sturla \$10,000, John Miller \$10,000 and Charles Reiff \$10,000.

STOKES & McDERMOTT,
Attorneys for Plaintiffs.

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Answer.

Filed September 5, 1924.

MONMOUTH COUNTY COMMON PLEAS
COURT.

 ROBERT STURLA, JOHN MILLER
and CHARLES REIFF,
Plaintiffs,
vs.
 THE CENTRAL RAILROAD COM-
PANY OF NEW JERSEY,
Defendant.

Action at Law

10

The answer of The Central Railroad Company of New Jersey, a corporation of the State of New Jersey, having its principal office for the transaction of business in the City of Jersey City, County of Hudson and State of New Jersey, says that:

20

I. It denies paragraph 1 of the complaint.

II. It admits paragraph 2 of the complaint.

III. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 3 and 4 of the complaint.

IV. It denies paragraphs 5, 6, 7, 8 and 9 of the complaint.

AS A SEPARATE DEFENSE, it alleges that at all of the times and during all of the occurrences mentioned in the complaint the said George W. Robinson was a railway policeman of the State of New Jersey, duly appointed and commissioned as such by the Governor of said State of New Jersey, and was a state officer charged with public duties, for the proper discharge of which duties he was responsible to said State of New Jersey alone.

30

 WM. A. BARKALOW,
Attorney for Defendant.

40

Reply.

Filed September 9, 1924.

MONMOUTH COUNTY COMMON PLEAS
COURT.

10

ROBERT STURLA, JOHN MILLER
and CHARLES REIFF,
Plaintiffs,

vs.

THE CENTRAL RAILROAD COM-
PANY OF NEW JERSEY,
Defendant.

Action at Law

20

The plaintiffs, Robert Sturla, John Miller and Charles Reiff, by way of reply to the Answer of the defendant herein, say:

They deny each and every allegation contained in said Answer and in the Separate Defense.

STOKES & McDERMOTT,
Attorneys for Plaintiffs.

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Testimony.

MONMOUTH COUNTY COURT OF
COMMON PLEAS.

ROBERT STURLA, JOHN MILLER and CHARLES REIFF, Plaintiffs,	10
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vs.

THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, Defendant.	
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Transcript of testimony taken in the above 20
 stated cause, before Judge Ruliff V. Lawrence,
 Judge of the Monmouth County Court of Com-
 mon Pleas, and a Jury, at the Court House, Main
 Street, Freehold, New Jersey, on Monday, June
 8, 1925, at 10 o'clock in the forenoon.

APPEARANCES:

MESSRS. STOKES AND McDERMOTT (by ANDREW
 STOKES, Esq.), Attorneys of Plaintiffs.

DEVOE TOMLINSON, Esq., and JAMES D.
 CARTON, Esq., Attorneys of Defendant.

30

Mr. Stokes: We have served on the railroad
 company a notice to produce, first, the commis-
 sion or certificate of authority under which
 George W. Robinson now acts and acted in the
 month of July, 1924.

40

Opening of Case.

Mr. Tomlinson: Mr. Robinson will produce it for you.

Mr. Stokes: You haven't it?

Mr. Tomlinson: No.

10 Mr. Stokes: The written, printed or other order directing said Robinson to investigate the subject matter of said complaint, and his report thereon.

Mr. Tomlinson: There is no such order.

Mr. Stokes: Written, printed or other authority, I mean.

Mr. Tomlinson: No such order.

Mr. Stokes: A written, printed or other order authorizing the said George W. Robinson to make and sign the said affidavits or complaints.

20 Mr. Tomlinson: No such order.

Mr. Stokes: A memorandum, correspondence or other written or printed matter that was laid before Theodore J. R. Brown, attorney, and the said Theodore J. R. Brown's written or printed authority to prosecute the said complaint on August 4, 1924.

Mr. Tomlinson: We have no such memorandum of authority.

30 Mr. Stokes: A written or printed or other notice addressed to and calling upon the employees of the Central Railroad of New Jersey to testify in support of said complaint on August 4, 1924.

Mr. Tomlinson: No such notice.

Mr. Stokes: You mean -to say the Railroad people appeared before Smith without the order to appear from anybody?

Mr. Tomlinson: I say there is no such notice that you are calling for.

40 Mr. Stokes: The vouchers or other evidence

Opening of Case.

of payment made by the said Central Railroad of New Jersey to said George W. Robinson for his services rendered in securing data and making said complaint.

Mr. Tomlinson: Officer Robinson is paid a stated salary; he received no compensation for this particular work; that is included in his stated salary for that month. I can give you the vouchers covering that month. 10

Mr. Stokes: For the months of July and August?

Mr. Tomlinson: This is for the first half of July and this is for the second half of July (handing checks to Mr. Stokes).

Mr. Stokes: And the first part of August; have you got that? 20

Mr. Tomlinson: No.

Mr. Stokes: I ask that they be marked for identification.

(Checks are marked P-1 and P-2 respectively for identification.)

Mr. Stokes: Central Railroad Company of New Jersey pay roll showing names and salaries of all the railroad detectives and other police officers employed by said company on said company's New York and Long Branch Division and on said company's Freehold and Atlantic Highlands Division during the month of July, 1924. 30

Mr. Tomlinson: Objected to as irrelevant, incompetent and immaterial.

The Court: How do you say that is immaterial in view of the fact that you in your opening stated that the railroad official was— 40

George W. Robinson—For Plaintiff—Direct.

Mr. Tomlinson: On the ground that this man is not in our employ; he is a detective of the State of New Jersey.

The Court: He is in the railroad employ by virtue of the authority created by the statute; you have the statute back of you on that.

10 Mr. Tomlinson: I will now hand you, Mr. Stokes—tender to you a certificate authorizing George W. Robinson as a railroad policeman, and also a certificate from the Secretary of State.

Mr. Stokes: Have you got the application for his appointment?

20 Mr. Tomlinson: Mr. Stokes has called for these papers; I understand the rule to be that when counsel for one party serves notice upon the other party to produce certain documents or papers, that they should be put in evidence; he has not offered any of them.

(Certificate and card are offered and received in evidence and marked Exhibits P-3 and P-4.)

30 GEORGE W. ROBINSON, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Stokes.

Q. In whose employ are you? A. Central Railroad.

Q. How long have you been employed by the Central Railroad? A. Nine years.

Q. Were you in their employ on the 22nd day of July, 1924? A. Yes, sir.

40 Q. Were you in their employ on the 28th day of July, 1924? A. Yes, sir.

George W. Robinson—For Plaintiff—Direct.

Q. Were you in their employ on the 29th day of July, 1924? A. Yes, sir.

Q. And who made your application for your appointment as a railroad detective? A. I don't know.

Q. You don't know? A. No, sir; I couldn't say positively. I presume my chief— 10

Mr. Tomlinson: I object to that.

The Court: Strike it out.

Q. Did you produce this paper just now? A. Yes, sir.

Q. Kindly look at that and see if that refreshes your memory as to who made your application. A. (Referring to paper.) It says the Central Railroad Company of New Jersey. 20

Q. You have never been in anybody else's employ since you received this commission, have you? A. No, sir.

Q. Except the Central Railroad, have you, as a railroad detective? A. No, sir.

Q. Were you in Freehold on the 22nd day of July, 1924? A. No, sir.

Q. I refer to this date of this disorderly conduct— A. I was not in Freehold that day. 30

Q. Where were you, sir, that day? A. If my memory is correct, I was at Atlantic Highlands.

Q. That is how far distant from Freehold? A. Somewhere around twenty miles.

Q. On the 28th day of July, you made this complaint? A. Yes, sir.

Q. How did you come to make this complaint? Did you know Robert Sturla? Did you know Charles Reiff and did you know John R. Miller? A. No, sir. 40

George W. Robinson—For Plaintiff—Direct.

Q. You knew none of these men? A. No, sir.

Q. Had never seen them, as far as you knew?

A. No, sir.

Q. And never talked to any of them? A. No, sir.

10 Q. From the 22nd day of July until the time you made the complaint? A. No, sir.

Q. On the 28th of July, you went clear to Keyport and made this complaint; is that right?

Mr. Tomlinson: That has not yet been shown that he did make this complaint.

The Court: No.

Mr. Tomlinson: The complaint has not been put in evidence; it should be in evidence before he is questioned on that.

20

Q. Did you make a complaint before Mr. Smith, Justice of the Peace at Keyport? A. Yes.

Mr. Tomlinson: I object; the complaint is the best evidence. After the complaint is produced here, this witness can be examined. I don't think you should—

The Court: Produce the complaint; show the complaint to him and ask him if he ever saw that before.

30

Mr. Stokes: I cannot find the paper. It was in the Prosecutor's office, and cannot be found. I have a copy of it.

Mr. Tomlinson: That is satisfactory.

Q. Mr. Robinson, did you make that complaint, or a complaint in that wording, before Mr. Smith, the original of which that is a copy? A. Yes, sir.

40 Q. And did you make a complaint like that against each of the other men? A. Yes, sir.

George W. Robinson—For Plaintiff—Direct.

Q. And in the same wording? A. Yes, sir.
(After examining paper.)

Q. Exactly? A. Yes, sir.

Mr. Stokes: I offer that in evidence.

(Received in evidence and marked Exhibit P-5.) 10

Mr. Stokes: It is stipulated that there are three of them—three complaints made out by the detective, that the order shows three of these complaints—one for each of these men.

Q. How did you come to swear out these complaints the 28th of July? A. Upon information and the result of my investigations. 20

Q. Upon information and the result of your investigations? A. Yes.

Q. And when were you first called into this matter?

Mr. Tomlinson: It has not been shown yet that he was called into this matter.

Q. Were you called into this matter? A. I received word that the whistle cord had been interfered with on this particular train; I received word on the night of the 22nd of July, and on the afternoon of the 23rd, I went to Matawan— 30

Q. Who did you receive word from? A. From the dispatcher at East Long Branch.

Q. Dispatcher for whom? A. Railroad dispatcher; train dispatcher.

Q. Central Railroad? A. Central Railroad.

Q. Did you go to Jersey City in this matter?
A. No. 40

George W. Robinson—For Plaintiff—Direct.

Q. Did you file a report in Jersey City? A. Not until after I was through with my work.

Q. And on what date did you file your report? A. Probably the 24th or 25th.

Q. July 24th or 25th? A. Yes.

10 Q. Where did you file that report? A. Jersey City.

Q. Did you file it personally, or mail it? A. Mailed it.

Q. After filing that report, what directions or orders did you receive from the Central Railroad Company?

Mr. Tomlinson: I object.

20 Q. Did you receive any orders from the Central Railroad? A. No, sir.

Q. You did not? A. No, sir.

Q. Did you have a consultation with Mr. Brown, the attorney for the Central Railroad Company?

Mr. Tomlinson: I object. Mr. Brown is an attorney at law.

30 The Court: You may show that there was an issuance of an order and ask him under what circumstances it was made, if he knows.

Q. Now, you didn't make this complaint until July 28th? A. No, sir.

Q. Have you power as a railroad detective, to make arrests? A. Yes, sir.

Q. And you directed the Justice in this case to turn this over to someone else? A. No, I did not.

40 Q. You did not? A. No, sir.

George W. Robinson—For Plaintiff—Direct.

Q. Didn't you also direct the man to get on the train at Freneau, and not at Matawan?

Mr. Tomlinson: That is objected to.

A. I will explain it.

The Court: It is leading. 10

Q. Did you give the Justice of the Peace any directions as to what to do with the warrant, and how it should be served? A. I didn't give any directions to him; I told him where the persons could be seen and where—

Q. What did you tell him? A. That they were coming on the first train in the morning, and he could meet them on the train.

Q. There were lots of people that came up on the first train in the morning— A. Yes, I guess there was. 20

Q. Did you tell him where you were to meet them? A. I told him I would probably be at Matawan.

Q. And you were at Matawan? A. Yes.

Q. Did you go with them then, from Matawan to Keyport? A. Yes, sir.

Q. You rode over in the same car? A. Yes, sir.

Q. And did you go to the jail when they were put in jail? A. Yes, sir. 30

Q. Saw them locked up? A. Yes, sir.

Q. And you were present at the hearing which was held at some subsequent date? A. Yes, sir.

Q. Who appeared at that time for the Railroad Company?

Mr. Tomlinson: I object.

Q. If you know.

40

George W. Robinson—For Plaintiff—Direct.

Mr. Tomlinson: This is a case in which the State is the prosecuting party; this is a criminal charge.

10 Q. Did Mr. Sexton, the Prosecutor of Monmouth County—was he there? A. No.

Q. Was Mr. Quinn, the Assistant Prosecutor of Monmouth County there? A. No.

Mr. Tomlinson: Objected to as immaterial, incompetent and irrelevant.

Objection overruled.

Q. Who did appear? A. Mr. Brown.

Q. Who is he, as far as you know? A. Attorney.

20 Q. Employed where? A. I don't know.

Q. Ever been in his office? A. No, sir.

Q. You have not? A. Never been in his office.

Q. Do you know where his office is? A. Never been in his office.

Q. Theodore J. R. Brown? A. Never been in his office.

Q. Do you know where his office is? A. No, sir, I do not.

30 Q. Is his office in the same building as the Central Railroad Company's in New York? A. I don't know where Mr. Brown's office is. I have never been in his office.

Q. Have you ever been in any other case for the Central Railroad in which Mr. Brown appeared as its attorney? A. No, sir.

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

40

George W. Robinson—For Plaintiff—Direct.

By the Court:

Q. Do you know why Brown appeared at all? A. No, sir, I do not. I never saw Mr. Brown until he came there that time; I didn't know he was coming or anything; I never spoke to him before.

10

By Mr. Stokes:

Q. You talked to Mr. Brown? A. At the hearing?

Q. Before the hearing? A. Downstairs.

Q. You talked to him about the hearing that was to take place against these three defendants? A. Certainly.

Q. Did you ask him what he was doing there? A. No, sir.

20

Q. Did he ask you what you were doing there? A. No, sir.

Mr. Tomlinson: I object to anything that Mr. Brown said.

The Court: He must lay a foundation, and ask these questions—

Q. You went over the subject matter of the case before Mr. Smith with Mr. Brown that morning? A. I don't quite understand that.

30

Q. As to the testimony that was to be produced—you went over that with Mr. Brown before the case was called before Mr. Smith. A. When I was talking downstairs with him.

Q. You were talking about this case? A. Yes.

Q. What the witnesses were going to testify to? A. Yes.

Q. You told him about the complaint? A. I don't know as I told Mr. Brown anything; I didn't know anything about it myself.

40

George W. Robinson—For Plaintiff—Direct.

Q. You made identically the same case, the same complaint against the three men? A. Yes, sir.

Q. For the same offense? A. Yes, sir.

Q. On the same day? A. Yes, sir.

10 Q. Now, you said you made an investigation and you received certain information; who from?
A. From the train crew.

Q. Which ones of the train crew? A. John Iverson——

Q. Who? A. John Iverson.

Q. "Iverson"? A. Yes.

Q. He was the brakeman on the rear car? A. Yes.

20 Q. Who else did you get it from? A. Wesley Pierce.

Q. Who is he? A. Brakeman also.

Q. And on the front car? A. Yes, sir.

Q. Are they here? A. I don't know whether they are or not.

Q. They were at Keyport at the hearing? A. Yes, sir.

Q. How did they come to be there? A. I asked for them to be there.

30 Q. And who did you ask that they be there?
A. I told the train dispatcher I wanted them at Keyport that morning.

Q. That was the train dispatcher of the Central Railroad? A. Yes.

Q. They were there as you requested? A. Yes.

40 Q. This check dated July 31, for \$92.90; is part of that check for your services in investigating this case? A. I could tell you better if I could look at it.

George W. Robinson—For Plaintiff—Cross.

Q. All right, sir. (Handing witness checks.)

A. Yes, sir; this is for the first period in July.

Q. That includes your services in investigating this case? A. That's my half monthly salary.

Q. Tell me how this check pays you for one-half your salary when this check is for a different amount (comparing two checks). A. If I can explain it—I am paid a monthly salary. There is thirty-one days in the month; that first half is for fifteen days, and the second half is for sixteen days. 10

Q. No expenses, is there? A. No, sir.

Q. Just a straight salary? A. Yes.

Q. How much is your salary a month? A. \$180.00. 20

Q. This check does include your services in investigating this case? A. Yes, that's part of my monthly salary.

Cross examination by Mr. Tomlinson.

Q. In other words, you get paid a salary of \$180.00 a month? A. Yes, sir.

Q. You didn't get paid anything in addition for this case, did you? A. No, sir. 30

Q. You are paid \$180.00 a month no matter what you do; is that correct? A. Yes, sir.

Q. Now, you have said that you are employed by the Central Railroad Company, and that you were employed by the Central Railroad Company in July, 1924. In what capacity were you employed? A. As a State Railroad Policeman.

Q. As a State Railroad Policeman? A. Yes.

Q. And how are you now employed? A. As a State Railroad Policeman. 40

George W. Robinson—For Plaintiff—Cross.

Q. Now? A. Yes.

Q. The certificate of your appointment as a State Railroad Policeman has been produced here; was this certificate ever revoked? A. No, sir.

10 Q. Was your authority ever revoked as a State Railroad Policeman? A. No, sir.

Q. You were a Railroad State Policeman during all of July, 1924? A. Yes, sir.

Q. Your duties as a State Railroad Policeman are to observe the public peace and keep order, are they not? A. Yes, sir.

Mr. Stokes: I object; the card tells exactly who he could work for, and no one else.

20 The Court: I think you may reframe the question. I will allow you to ask what his duties are.

By the Court:

Q. What was the last time report? A. In the last ten days.

Mr. Tomlinson: I have it here (produces it).

30 The Court: Let me have it, will you? The case of Rockwell vs. Erie Railroad.

Mr. Tomlinson: Here is the per curiam opinion heard before the Chief Justice and Justices Katzenbach and Parker.

The Court: Proceed.

By Mr. Stokes:

40 Q. What were your duties, Mr. Robinson, as a Railroad State Policeman? A. To preserve order.

Francis J. Hughes—For Plaintiff—Direct.

Q. And as a State Policeman, did you do any other work than would be involved in connection with the Railroad Company? A. Yes, sir.

Q. Criminal work? A. Yes, sir.

Q. What sort of work was that? A. I helped certain other officers, certain of the State Police and any officer; running down criminals, and in different institutions, and all kinds of criminal work. 10

Q. Now, you have testified that you signed these complaints, or this complaint of which this is a copy? A. Yes, sir.

Q. You did that on information and belief, didn't you? A. Yes, sir.

Q. As a result of the conversation you have had with the train crew— A. Yes, sir. 20

Q. —did you ask Justice Smith to have the arrests made at any particular place? A. I did not ask him to have it made at any particular place, no, sir.

Q. Before signing the complaints, did you submit to Justice Smith the information that you had received relative to this matter? A. Yes, sir.

FRANCIS J. HUGHES, being duly sworn, according to law, on his oath testifies as follows: 30

Direct examination by Mr. Stokes.

Q. What is your profession, sir? A. I beg your pardon?

Q. What is your profession? A. Attorney at law.

Q. How long have you been an attorney? A. Three years and three months. 40

Francis J. Hughes—For Plaintiff—Direct.

Q. And on July 22, 1924, what connection, if any, did you have with the law? A. I was an attorney for the Ocean Accident and Guarantee Corporation, at its office at 59 John Street, New York.

10 Q. Do you know Robert Sturla? A. I do.

Q. Who was Mr. Sturla employed by at that time? A. The same corporation.

Q. Do you recall the 22nd day of July, 1924? A. I do.

Q. Whereabouts were you on that afternoon and that evening? A. I accompanied Mr. Sturla from New York to Freehold on the train. The train left New York around five o'clock or thereabouts; I don't recall the exact time.

20 Q. Who else were in your company, if anybody, do you know? A. These two other gentlemen that at that time I didn't know—I didn't know them until that time when they were introduced to me,—Mr. Miller and Mr. Reiff; we met them on the ferry and we took our train at the Jersey terminal.

Q. Did you come across to Jersey with these two gentlemen? A. Yes, and there was another gentleman.

30 Q. You boarded the train at Jersey City? A. Yes.

Q. You came on together? A. Yes.

Q. You came to where? A. First we came to Matawan and then we came from Matawan to Freehold.

Q. You changed cars at Matawan? A. Right.

40 Q. In which car were you four gentlemen seated coming from Matawan to Freehold? A. We were seated in the rear car coming from Matawan to Freehold.

Francis J. Hughes—For Plaintiff—Direct.

Q. In what direction—in what portion of the rear car? A. In the passenger portion.

Q. There is a front and a rear portion of the car as the train was made up. A. It was the last car, and the baggage compartment, I believe, was in the rear of the passenger compartment.

Q. How did you four gentlemen alight from that train that night, if you know? A. You mean by which door? 10

Q. By which door? A. By the rear.

Q. Passing through the baggage car and on out? A. Correct.

Q. And how many passengers were on that train, if you recall, when you arrived at Freehold? A. In both cars?

Q. No, in the baggage car—in the car where you were? A. I should say there were about— 20
between fifteen and twenty in each car.

Q. Was there anyone else besides you four gentlemen that got off the rear car? A. There was.

Q. You saw others getting off? A. Yes; there was a gentleman from the office—an agent for the Ocean Accident—Mr. Hanley.

Q. Was Mr. Hanley anywhere about there? A. Yes. 30

Q. Is he here? A. He is pressed for business—

Q. Anybody else you noticed getting off the back car? A. Mr. Hanley, Mr. Reiff, Mr. Sturla, Mr. Miller, and there were two or three other gentlemen and myself; we all got off the rear platform.

Q. Do you know who was the last man to get off; do you recall that? A. The last of those that I know I believe was Mr. Sturla.

Q. Do you know who was the first of those 40

Francis J. Hughes—For Plaintiff—Direct.

you know, to get off? A. The first of those that I knew was Mr. Reiff. Mr. Reiff got off first.

Q. And did Mr. Sturla get off ahead of you or behind you? A. Mr. Sturla got off right immediately behind me.

10

Q. Did you hear any blowing of any whistle as you got off the train, sir? A. I did not.

Q. Did Mr. Sturla blow any whistle? A. I didn't see anyone blow any whistle.

Q. What was the noise that you heard? A. I heard no noise whatsoever.

Q. You heard no whistle or—— A. I heard no whistle or no signal.

20

Q. While you were in the front part of that baggage combination car, did any one of these three gentlemen blow the bell or pull the whistle cord (indicating three plaintiffs)? A. Not that I saw; I was with them and looking at them and talking to and with them.

Q. Did you hear any signal given of any kind? A. I did not.

Q. After the train came around by the rug mill, or after the train actually stopped at the Freehold depot? A. I heard nothing; nothing I noticed.

30

Q. Do you know what Mr. Sturla had in his hands that night? A. Mr. Sturla had some packages; I don't know what they contained, and some groceries, and I believe he had some films that he had bought at the foot of Liberty Street before he took the ferry, and some provisions.

Q. Anything else? A. He had a brief case; some papers; I also had a brief case.

40

Q. Did you notice whether either of the other

Francis J. Hughes—For Plaintiff—Cross.

gentlemen had any bundles? A. They did; Mr. Miller had rather a large bundle, and he seemed to be having quite a job carrying it; rather heavy. And Mr. Reiff had some packages in one arm.

Q. And you said you saw neither of these gentlemen pull the bell cord or blow any whistle? 10

Mr. Tomlinson: I object; that has already been answered.

Q. What day of the month was this, if you recall, sir? A. It was a Tuesday.

Cross examination by Mr. Tomlinson.

Q. Where do you live, Mr. Hughes? A. In Brooklyn, New York. 20

Q. What's your address? Brooklyn is a large city. A. 1236 Pacific Street, Brooklyn.

Q. You say you are an attorney at law? A. Yes, sir.

Q. Of what State? A. New York State.

Q. Attorney in New Jersey? A. New Jersey?

Q. Are you a member of the New Jersey Bar? A. I am not.

Q. You have been an attorney for about three years? A. Yes, sir. 30

Q. You are connected with the Ocean Accident and Indemnity Company? A. Ocean Accident and Guaranty Corporation and the Columbia Casualty Company, a subsidiary corporation.

Q. 59 John Street? A. Yes.

Q. Do you know by whom Mr. Sturla is employed? A. At present?

Q. At the time of this occurrence? A. At the time of this occurrence, by the same company that I was connected with as trial counsel. 40

Francis J. Hughes—For Plaintiff—Cross.

Q. Do you mean Mr. Sturla was trial counsel— A. No, the company I was connected with as trial counsel was the same company which employed Mr. Sturla in July, 1924.

10 Q. In what courts were you trial counsel? A. Mostly municipal courts at that time, and city courts.

Q. Where were you bound for that evening? A. My destination was in Mr. Sturla's home in Farmingdale.

Q. Do you remember what time you took this train? A. From New York, took the train around 5:30 if I recall correctly—some time after five.

20 Q. Had you ever been down here before? A. I had never been down before.

Q. You had never been down here before? A. No.

Q. Now, you say that on the train was Chief Adjuster Hanley of your company? A. Correct.

Q. Was he in your party, or riding apart from you? A. He was in our company riding with us.

Q. Where does he reside? A. He lives uptown in New York somewhere; I just can't tell you the address, where he lives.

30 Q. And you rode from Matawan to Freehold, as I understand it, you rode in what is called the combination car? A. Correct.

Q. And the passenger compartment of the combination car was on the head end of the car? A. Yes.

40 Q. Now, with whom were you riding? A. I believe we had two seats turned together, toward each other, and Mr. Hanley was sitting alongside of me, riding in the direction in which the train was proceeding.

Francis J. Hughes—For Plaintiff—Cross.

Q. Riding forward? A. Right; and Mr. Sturla and Mr. Reiff were sitting opposite to us; Mr. Miller was in one of the seats adjoining, and talking with two or three other gentlemen that he knew.

Q. Then Mr. Miller was not in your immediate seat at the time? A. Mr. Miller was not in our seat, no. 10

Q. Were you riding on the right-hand side of the car, or on the left? A. We were riding on the right-hand side of the car.

Q. In the direction in which you were going? A. Correct.

Q. Towards the middle of the car or towards the back part? A. Why, nearer the middle.

Q. Now, where was it, Mr. Hughes, that you got up and got ready to get out of the car? A. Why, the train was about to come to a stop at Freehold when we got up to leave. 20

Q. Had it actually stopped, or was it slowing down? A. It was slowing down; you could tell it was slackening speed coming into the station.

Q. And then the five of you went out through the baggage compartment, is that right? A. That's right. 30

Q. And which was the first member of your group to get out? A. The first member to leave was Mr. Reiff.

Q. And then the next one—— A. The next one to go out was Mr. Hanley.

Q. And the next? A. And then I followed Mr. Hanley and Mr. Sturla followed me, and then there was Mr. Miller talking with a couple of other gentlemen that he had been conversing with all the way up on the train. 40

Thomas Smith—For Plaintiff—Direct.

Q. Then you went out ahead of Mr. Sturla and ahead of Mr. Miller? A. I did.

Q. And Sturla—Mr. Sturla went out ahead of Mr. Miller? A. Correct.

10 Q. How could you see that? Were you between them as you went out? A. They were talking all the way out, we were talking—sort of side-glancing and conversing.

Q. You were not listening for any whistle or other noise of the train, were you? A. I was not listening for anything, no, sir.

Q. Whistle signals are very common noises to hear, especially in a large city? A. Quite so.

20 Q. You get used to them, and your mind was concentrated on something else, wasn't it? A. It was concentrated on getting home and getting something to eat just then.

Q. Did you have any bundles with you? A. I had a brief case with me.

Q. What else did you have, anything? A. No; I only had one arm occupied.

Q. You said Mr. Sturla had some bundles and also a brief case in one hand; in which hand was he carrying his brief case? A. In the left hand.

30

THOMAS SMITH, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Stokes.

Q. Mr. Smith, you live at Keyport? A. I do.

Q. You were a Justice of the Peace there on July, 1924? A. Yes, sir.

40 Q. Do you know George W. Robinson? A. Yes.

Thomas Smith—For Plaintiff—Direct.

Q. Where did you first see him in connection with this case? A. In my office.

Q. Can you tell when that was? A. July 28, 1924.

Q. About what time of the day did he come to your office on that day? A. He came, if I 10
remember correctly, in the morning.

Q. About what time? A. About ten o'clock, if I remember correctly.

Q. What did he say to you? A. He said—

Mr. Tomlinson: I object to the question on the ground that anything that Mr. Robinson could have said could not bind the defendant.

The Court: That is the conversation with Robinson? 20

Mr. Tomlinson: Yes.

The Court: I think the objection is well taken; as a result, what was done. That's the question.

Q. As a result of that information he gave to you, was a complaint prepared? A. It was.

Q. Have you a copy of that complaint here? A. I have.

Q. Will you kindly read that complaint and 30
see if it compares with the one I have here?

Mr. Tomlinson: I don't think that is—

Mr. Stokes: This has been offered in evidence. I want to be sure it is the same.

Mr. Tomlinson: Why not have the Justice read it over and see if it is the same.

Mr. Stokes: I will offer this original.

Witness: This is a copy. You see, all this is exactly the same (indicating papers). 40

Thomas Smith—For Plaintiff—Direct.

The Court: I understand that this is a copy of the original which was signed by Mr. Robinson?

Witness: Which was signed by Mr. Robinson before me.

10 Mr. Stokes: They are the same?

Witness: Yes.

The Court: What is the date?

Witness: July 28, 1924.

By the Court:

Q. And the original was signed by Robinson?

A. Yes.

Q. And he swore to it? A. Yes.

20 By Mr. Stokes:

Q. Why didn't you allow Mr. Robinson to take the warrant, Mr. Smith?

Mr. Tomlinson: Objected to as immaterial, irrelevant and incompetent.

The Court: What do you want to show?

Mr. Stokes: That he didn't take the warrant, but directed that it be given to somebody else.

30 The Court: I will allow you to ask whether Robinson took the warrant.

Q. Did Robinson take the warrant? A. No.

By the Court:

Q. Was it delivered to an officer by you? A. It was.

Q. Who was the officer? A. Crawford.

40

Thomas Smith—For Plaintiff—Direct.

By Mr. Stokes:

Q. Was any instructions left with you by Robinson as to what Crawford should do with that warrant?

Mr. Tomlinson: Objected to on the ground that it cannot bind the defendant what Mr. Robinson might have said. 10

By the Court:

Q. As a result of the information given you, what did you do with the warrant? A. I gave it to Officer Crawford to serve.

Q. From whom did you receive information? A. From whom?

Q. Yes. A. George Robinson. 20

Q. The complainant? A. Yes, sir.

The Court: Proceed.

By Mr. Stokes:

Q. And do you know whether Crawford executed that warrant at Matawan or Freneau? A. He executed it at Freneau.

Q. Do you know how he happened to execute it at Freneau? A. Yes. 30

Mr. Tomlinson: Objected to as immaterial, incompetent and irrelevant. The Justice gave the warrant to a constable—

The Court: I know; that may be, but I have in mind Robinson's statement that the train dispatcher gave him the information—

Mr. Stokes: The train dispatcher of the company. 40

Thomas Smith—For Plaintiff—Direct.

10 Mr. Tomlinson: No, sir, that is not the fact. That was not the testimony. The testimony was that the train dispatcher reported to him that the whistle had been blown and the bell rung, and that he made an investigation, and as a result of this conversation with the train crew, he, Robinson, made the complaint.

Mr. Stokes: The rear brakeman and the front brakeman.

The Court: I will allow the question; but is that material at all? What was the purpose of serving the warrant at Freneau, do you know?

20 Witness: I don't know how to explain that; how he came to go to Freneau to do it—I could tell you that, if you want to know.

The Court: He did go to Freneau?

Witness: Yes.

By Mr. Stokes:

Q. Do you know where Robinson was? A. Yes.

Q. Where was he at? A. He was at the Matawan station.

30 Q. Were these men brought before you (indicating plaintiffs)? A. Yes.

Q. These three men? A. Yes.

Q. These are the three? A. Yes, these are the men.

Q. They were placed in jail at the Matawan jail? A. No, Keyport jail.

40 Q. Do you know how long they were confined in the jail at Keyport? A. I don't just remember.

Thomas Smith—For Plaintiff—Direct.

Q. I want "about"; I don't want exact. A. Two or three hours.

Q. They came before you and gave bail? A. Yes.

Q. And the hearing was held before you on what date? A. I think the 6th day of August.

Q. 1924? A. Yes. 10

Q. Who appeared there as respective attorneys?

Mr. Tomlinson: Objected to as immaterial.

The Court: I will allow it and grant you an exception.

A. Attorney Brown—I don't know—I think it is Robert Brown, from the Railroad Company, and Harold McDermott for the defendants.

Mr. Tomlinson: I move to strike out so much of the testimony as that Robert Brown appeared for the Railroad Company. 20

The Court: Strike it out.

By the Court:

Q. For whom did Robert Brown appear? A. For the Railroad Company, I understand.

By Mr. Stokes: 30

Q. How do you know that? A. Mr. Brown said at the time that he came to the office—

The Court: Strike it out as hearsay.

Mr. Tomlinson: I move to strike out what he said about Brown appearing for the railroad.

The Court: Strike it out.

Q. Do you know Mr. Brown? A. I had never met him before that time. 40

Thomas Smith—For Plaintiff—Cross.

Q. Did you see him confer with Mr. Robinson then? A. No, they conferred before they came to the office.

10 Mr. Tomlinson: I move to strike it out; if he didn't see them confer, how does he know they did? What does he know about it?

The Court: Strike it out.

Q. A man named Brown did appear at the hearing and cross examine the witnesses, and called the witnesses? Didn't he? A. Yes.

Q. And examined them? A. Yes; right.

20 Q. After hearing the evidence, Mr. Smith, on the part of the Railroad Company, what did you do with this complaint? A. Dismissed it.

Q. Finally disposed of it? A. Yes.

Cross examination by Mr. Tomlinson.

Q. Mr. Smith, you are a Justice of the Peace? A. Yes, sir.

Q. At Keyport, New Jersey? A. Yes, sir.

Q. Robinson came to you and laid certain information before you? A. Yes, sir.

30 Q. As a result of that, you issued a warrant for these three men? A. After he signed the complaint.

Q. After he signed the complaint? A. Yes.

Q. You gave that warrant to a constable for execution? A. I did.

Q. Then these men were brought to Keyport and arraigned before you? A. Yes.

40 Q. And as soon as they furnished bail, you released them? A. Yes, sir.

Thomas Smith—For Plaintiff—Cross.

Q. What was the bail? A. I don't remember now, the bail there; the recognizance and other papers were sent to the Prosecutor's office; I believe it was \$500.00.

Q. As soon as they furnished bail, you released them? A. Yes. 10

Q. And later on, they were brought before you for a hearing? A. Yes.

Q. The witnesses produced before you were all railroad men, weren't they? A. Yes.

Q. They were the only witnesses?

The Court: The train crew?

A. I think that is so.

Q. Three members of the train crew? A. Yes; I know the conductor and the two brakemen. 20

Q. And they were the men you say Brown examined? A. I couldn't say that was all of them; I don't remember the men produced, but they were witnesses.

Q. Aren't you sure they were the only ones? A. I am not so certain.

Q. Does your record show? A. I haven't the names of the witnesses here on the record; the names of the witnesses appear on the back of the complaint. There is a space there for them—the witnesses they produce; they are always placed on the back of the complaint. 30

Q. These three witnesses were—— A. Joseph Creby the conductor; Pierce and John Iverson.

Q. John Iverson? A. Yes.

Q. After the hearing you dismissed these men? A. I dismissed them, yes.

Thomas Smith—For Plaintiff—Cross.

By Mr. Stokes:

Q. Did you issue subpoenas for the appearance of these witnesses before you? A. I don't remember, Mr. Stokes.

10 Q. Did Mr. Robinson come there and get subpoenas for them, or did he produce the witnesses? A. I think he produced the witnesses.

Q. Without a subpoena? A. Yes.

Q. Why didn't you give these warrants to Robinson—he was an officer—a policeman? Why didn't you give these warrants to him at the time?

Mr. Tomlinson: Objected to as irrelevant, incompetent and immaterial.

20 Mr. Stokes: He had power to make arrests; he didn't take the warrant, but directed somebody else to take it, it has been brought out here.

Mr. Tomlinson: What difference does it make?

30 Mr. Stokes: The man gets on the train at Freneau; he waits at Matawan. That seems to me a very significant circumstance in this case. I think what he said to the Justice at the time he made the complaint is quite important. Robinson is the agent of the Railroad Company——

The Court: It is not like the relation of master and servant.

Mr. Stokes: He is a policeman for the Central Railroad, and nobody else.

40 The Court: We must take the ruling of the Supreme Court, the law is here. Undoubtedly he is a policeman appointed by the Governor, in the employ of the railroad; he says so himself. The statute says that

George H. Crawford—For Plaintiff—Direct.

Governor may appoint such person as the company may choose to act as policeman for such company, and then it goes on about the warning, and so on. I don't think it is material, however. If you want to, I will allow you to recall the officer at the proper time, and ask him what he did after the complaint was made and the warrant issued—what he did to identify this man for the benefit of Crawford. 10

GEORGE H. CRAWFORD, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Stokes. 20

Q. Mr. Crawford, you are an officer and constable? A. I am an officer and constable.

Q. At Keyport? A. Yes, sir.

Q. And did you receive a warrant in this case against these three young men? A. Yes, sir.

Q. From Mr. Smith? A. Yes, sir.

Q. When did you receive that—do you recall what time How long before you executed it? A. I think the night before I served it; that would be the 28th, I think. 30

Q. Who did you receive it from? A. Justice Smith.

Q. Was anybody else present when you received it? A. No, sir.

Q. And did you know Robert Sturla and Mr. Reiff and Mr. Miller? A. No, sir.

Q. Did you know that they were men who commuted daily on the train from New York to Freehold? A. No, sir. 40

George H. Crawford—For Plaintiff—Direct.

10 Q. Did you know—why did you, as a matter of fact, get on the train at Freneau? A. Well, I will tell you; I couldn't get on the train and search these fellows out—fellows you had never seen before; I left my car at the Matawan Station, and got the train at Freneau, and on my way down to the Matawan Station I asked the conductor which were the three fellows, and so one of the conductors pointed them out.

The Court: Strike it out.

Q. How did you come to get on the train, not knowing these three men, at Freneau? A. I learned that these fellows was coming down every morning on that early train.

20 Q. Who did you learn that from? A. I believe the conductor told Justice Smith that they were on that train.

Mr. Tomlinson: I ask to have that stricken out.

The Court: Strike it out.

By the Court:

30 Q. You got your information from the Justice, did you? A. Yes.

Q. Whatever you did in connection with it, came from the Justice? A. Yes.

Q. When you got on the train, you didn't know these men? A. No.

By Mr. Stokes:

Q. When you got to Matawan, who did you meet there? A. Mr. Robinson.

40 Q. He stepped right up to you first, there? A. Very shortly. I walked up to these three

George H. Crawford—For Plaintiff—Direct.

fellows on the train and asked them their names; they told me their names.

Q. Did they give you their names—Sturla, Reiff, Miller? A. Yes. I told them I had a warrant for their arrest—that they were under arrest; I took them to Matawan Station; we got off there and we got in my car and went to Keyport in it; I had to wait a while for the Justice of the Peace—the Justice was not in, and I locked them in jail, for not more than two or two and a half hours—or three hours.

10

Q. Where did you meet Robinson? A. Matawan Station.

Q. Did he go with you from Matawan to Keyport? A. Yes, sir.

Q. Go in the same car? A. Yes.

20

Q. Was he present when these men were locked up at Keyport? A. Yes, sir.

Q. What did he say about the matter at that time?

Mr. Tomlinson: I object to what Robinson said.

Objection sustained.

Q. And they were actually confined in jail for how long, about? A. I should judge about two and a half to three hours.

30

Q. All three in one cell or separate cells? A. Separate cells. We have got four cells down there.

No Cross Examination.

The Court: One moment, Mr. Stokes. I am going to allow you to repeat that question to this witness as to how he came to identify these men on the train.

40

George H. Crawford—For Plaintiff—Direct.

By Mr. Stokes:

Q. How did you come to identify Mr. Sturla, Mr. Reiff and Mr. Miller on the train? A. I asked the conductor what these fellows look like, and he said, "You will find the three of them——"

10

Mr. Tomlinson: I object.

Objection overruled and exception allowed.

Mr. Tomlinson: You are allowing what the conductor said?

The Court: Yes.

Witness: He said, "You will find them sitting three together." I found these three fellows sitting together, and I asked them—

20

Q. Did he take you to that car and point them out? A. No, he said I would find the three of them sitting together.

Q. Did he go over with you? A. Only as far as the door; he was on the one train, they were on another.

Q. He said you would find them sitting together? A. Yes.

Q. You went in and inquired—and asked them their names? A. Yes.

30

By the Court:

Q. Were they the only three men sitting together? A. Yes.

Q. Seat turned over? A. Yes.

By Mr. Stokes:

Q. At that time when you went on the train, that was the only seat that was turned over that way? A. Yes.

40

George H. Crawford—For Plaintiff—Direct.

By Mr. Tomlinson:

Q. You asked the conductor if he knew three men by the name of Sturla, Miller and Reiff, didn't you, Mr. Crawford? A. Yes.

By the Court:

10

Q. What did you ask him? A. I asked him if he knew these fellows. He said, "You will find them in the next train, the three of them sitting together."

Q. Did you tell him what you wanted the information for? A. Yes, sir.

By Mr. Tomlinson:

Q. You had a warrant with you? A. Yes, sir. 20

Q. And you asked the conductor if he knew these three men, and he pointed them out; is that right? A. Yes, sir; he said, "You will find them sitting there, three together," yes, sir.

Q. He didn't go in the car with you? A. No.

By Mr. Stokes:

Q. Did you tell him the name of Sturla? A. I used all the three of them.

30

Q. Didn't you use the name "Sterling,"—the complaint was against Sterling, wasn't it? A. Sturla, I think it was.

Mr. Stokes: There it is, right there (indicating).

Q. Yes; Sterling. A. Robert Sterling, John Miller and Charles Reiff.

Q. Where is your warrant? A. I returned the warrant to the Judge.

40

George H. Crawford—For Plaintiff—Direct.

Q. Then what have you there? A. This is my subpoena; it has got all the names on it.

Q. That's the one used by you today? A. Yes.

By the Court:

10 Q. For this trial? A. Yes, sir.

By Mr. Stokes:

Q. You said that warrant named "Sterla" at the time you had it? A. I wouldn't say exactly; that is quite a while ago I served the warrant.

20 Q. Did Mr. Sturla tell you afterwards that his name was Sturla, and not Sterling? A. I don't recollect it.

Q. And you corrected it after it was served on him? A. I don't recollect that at all.

Mr. Tomlinson: I object to that as leading.

Q. Didn't he ask you to let him see the complaint?

Mr. Tomlinson: Objected to as leading.

A. I read the complaint.

30 Q. Did you hand the complaint to Mr. Sturla after you read it? A. I forget whether I did or not.

By the Court:

Q. Did you see Sturla read the complaint?

A. I read the warrant to him.

Q. You didn't have the complaint? A. No.

*George Robinson—For Plaintiff—Recalled—
Direct.*

By Mr. Stokes:

Q. Didn't he ask you to let him see the warrant that you had in your hand, and you handed it to him?

Mr. Tomlinson: Objected to as leading. 10

Q. What did you do? A. I forget whether I let him read it; I know I read it to him, the three of them.

Q. Was any demand made on you for the warrant? A. That I don't remember.

Q. Did you use any first names when you talked to the conductor? A. I think I did.

Q. What first name did you use for Miller? A. What I had on the warrant. 20

Q. What was that, sir? A. I forget that.

Q. What first name did you have for Mr. Reiff? A. Charles; Charles Reiff.

GEORGE ROBINSON, recalled.

By Mr. Stokes:

Q. Mr. Robinson, did you know at the time you swore out this complaint before Mr. Smith and left his office without taking the warrant with you, that the arrest was to be made at Freneau? 30

A. I suggested that plan, that he could find the men on the train, and I suggested that he do that to avoid confusion.

Q. And that was carried out, as he suggested? A. Yes.

Q. And then you—when you saw Mr. Crawford get off the train at Matawan with these 40

*George Robinson—For Plaintiff—Recalled—
Direct.*

three gentlemen, then you walked up to them?

A. Yes.

Q. You were waiting to receive the party at Matawan? A. Yes, sir.

10 By the Court:

Q. I would like to ask you one or two questions, Mr. Robinson. How many complaints in which the railroad company is not interested have you made since you were appointed?

Mr. Tomlinson: I object.

Objection overruled and exception allowed.

20 A. Well, I don't know as I could answer you that, Judge, your Honor.

Q. Well, in what general work have you been engaged since you were appointed? A. I work for the County Detective, for instance, with the city police and in different places wherever I would be; in the Highlands, I would help the police over there.

Q. You have your daily itinerary— A. Traveling around through the State.

30 Q. —from the Central Railroad? A. Yes.

Q. And where do you work? A. I have the Atlantic Highlands and Seashore Branch, Freehold Branch, and New Jersey Southern down as far as Lakehurst, taking in Toms River and Barnegat.

Q. Every day, you devote your time to that sort of work? A. Yes.

Q. What percentage of general work do you engage in? A. I don't know that I could state
40 that.

*George Robinson—For Plaintiff—Recalled—
Direct.*

Q. Is there any appreciable percentage of it?

A. No, sir; if anything came along, I would attend to it.

Q. That would be occasionally? A. Yes.

Q. In the main, looking out for the railroad property? A. Yes. 10

By Mr. Stokes:

Q. What are your specific hours on duty for the railroad company? A. I have no hours.

Q. You have some time off duty—some time you are supposed to be free? A. We have.

Q. I mean in your regular line of duty. A. I have no set, no regular time off. I have no regular time. 20

By the Court:

Q. You are at the call of the railroad company at all times? A. Yes.

By Mr. Stokes:

Q. What are your regular hours? What time do you go to work in the morning? A. Generally around seven o'clock. 30

Q. Until what time at night? A. Sometimes seven or eight o'clock at night—sometimes nine or ten.

Q. I mean generally—what time do you leave? A. About five or six o'clock.

Q. You have said that as a result of certain information you received from the train dispatcher, you investigated this particular occurrence? A. Yes.

Q. Who was the train dispatcher? A. I just 40

*George Robinson—For Plaintiff—Recalled—
Direct.*

don't recall what his name is; there are three men, eight hours apart.

Q. How did you get the information from him?

A. Over the telephone.

10 Q. Who called you at that time? A. He called me.

Q. Who called, you or him? A. He called me.

Q. Where? A. At Red Bank—the office I have in Red Bank. He called me and said someone had interfered with the train line on a particular train, and when I got in there—

Q. What did you do? A. I went to Matawan.

Q. Why? A. To investigate it.

20 Q. Why did you do that? A. That's my duty; I went to Matawan to investigate it.

By the Court:

Q. Well, your duty to whom? A. To the company for whom I work.

By Mr. Stokes:

Q. Central Railroad Company of New Jersey?

30 A. Yes, sir, and as a State officer. I went to Matawan. The dispatcher called to a policeman from Freneau and somewhere else—

Q. Why did he call them?

Mr. Tomlinson: I object.

Objection overruled and exception allowed.

A. He tried to get me; when he can't get me, he often does call on the local police to look these things up, because I am a State Policeman—

40 Q. He tells you that? A. Yes.

*George Robinson—For Plaintiff—Recalled—
Direct.*

Q. Because you are what is known as a Railroad Detective? A. Yes.

Mr. Tomlinson: I object

Objection overruled and exception allowed. 10

The Court: That is in conformity with the statute.

Q. And after that, you went to Matawan with these men— A. To Keyport.

Q. To Keyport with these men and Mr. Crawford, and went and saw them locked up in jail—after that, what did you do next? A. I went about my business.

Q. Did you ever go to Jersey City? A. No, 20
sir.

By the Court:

Q. Why did you pay any attention to the train dispatcher when he called you up? A. That's where I got my information from—the train dispatcher; I got all my information if anything occurred, of car robbery or train interference, or anything like that—he informs me. He advises me, and he called me to investigate it. 30

Q. Suppose you ignored the information? A. I suppose if I did that, I probably would lose out.

Q. What do you mean by "lose out"? A. I would lose my position.

Q. As a policeman? A. Yes.

Q. For whom? A. The railroad company.

By Mr. Stokes:

Q. The Central Railroad of New Jersey, you 40
mean? A. Yes.

*George Robinson—For Plaintiff—Recalled—
Direct.*

By Mr. Tomlinson:

Q. Then you would lose your position as a State Railroad Policeman? A. Yes.

10 By Mr. Stokes:

Q. With the Central Railroad? A. Yes.

The Court: This man is merely appointed by the railroad for the purpose of looking after the road—

Mr. Tomlinson: He is not appointed by the railroad.

20 The Court: And commissioned by the Governor. His duties are indicated by statute. I don't see why there should be any question about it at all.

Mr. Tomlinson: I would like to ask him one or two questions.

By Mr. Tomlinson:

Q. When you got this message from the train dispatcher, did he give you any names? A. No, sir.

30 Q. Of these three persons or anyone else? A. No, sir.

Q. Did he order you to do anything? A. He; he gave me the information; that was all. He told me to investigate it.

By the Court:

Q. Are you sure he told you to investigate it? A. Yes, sir, he told me to investigate.

40

J. Mabel Brown—For Plaintiff—Direct.

By Mr. Tomlinson:

Q. All the information that you got indicated that the State law had been violated? A. Yes, sir.

Q. In the blowing of the whistle and the ringing of the bell? A. Yes, sir. 10

Q. And thereupon you made your investigation? A. Yes, sir.

By Mr. Stokes:

Q. If he had told you that somebody had blown a whistle on the Freehold Rug Mill, you wouldn't have come up to investigate that, would you? A. I don't suppose I would unless I—no, I don't suppose I would. 20

By the Court:

Q. And this thing didn't occur in your presence, did it? A. No, sir.

Mr. Stokes: He was at Atlantic Highlands, he has already testified.

J. MABEL BROWN, being duly sworn, according to law, on her oath, testifies as follows: 30

Direct examination by Mr. Stokes.

Q. Where do you live? A. Matawan.

Q. And what have you in your hand there?

A. Keyport Weekly.

Q. What connection have you with the Keyport Weekly, if any? A. I am President of the Borough Publishing and Printing Company, which publishes the Keyport Weekly. 40

J. Mabel Brown—For Plaintiff—Direct.

Q. Have you any active employment in the business—in that company? A. Daily.

Q. And what edition have you got there? A. Edition of August 8, 1924.

10 Q. Was an article published in that paper you have there— A. Among the Court notices, there is an article which covers it.

Q. Covering this matter? A. Yes.

Q. That was circulated through the county? A. Yes, sir.

The Court: How is this material, Mr. Stokes?

Mr. Stokes: I want to show this matter was circulated, and went all around—

20 The Court: You mean as an element of damage?

Mr. Stokes: Yes.

Mr. Tomlinson: I object on the ground it is not competent; there is no authority for the introduction of any articles—

The Court: I am afraid that is so, Mr. Stokes.

Mr. Stokes: I think it shows a measure of damages, if your Honor please.

30 Mr. Tomlinson: If your Honor please, in 26 Cyc, page 63, there is a note reading as follows: "Injuries caused by information given to commercial agencies that the property had been attached, or publication of such fact in newspapers are not elements of damage, where it is not shown that plaintiff in attachment was connected with such publication or furnished the information to the commercial agencies."

40 (After argument.)

J. Mabel Brown—For Plaintiff—Direct.

The Court: There is the old case in this county—King vs. Patterson, 20 Vroom, 417; involves the same question.

Mr. Tomlinson: Not a malicious prosecution case?

The Court: No, I think it is a libel case. 10
What do you charge as damages for your clients? You don't specify—

Mr. Stokes: Great mental suffering—

The Court: You don't say that.

Mr. Stokes: No, if your Honor please, but great mental suffering such as this might be an element. This article read in that Weekly would certainly cause these men great mental anguish.

The Court: I will allow this witness to answer the question, with the understanding that unless you connect it up with the right to recover damages, it will be stricken out. 20

Mr. Tomlinson: I ask for an exception.

Exception allowed Mr. Tomlinson.

Q. You said this article was published in this paper; what is the circulation of your paper?
A. 1400.

Q. Fourten hundred? A. About. 30

Q. And mostly in Monmouth County? A. Yes, largely.

The Court: You have not specified damages. You don't state that these complainants saw the paper, and that people refused to deal with these men because of the publication. It seems to me that is an element of specific injury.

Mr. Stokes: Suppose these men saw the article in the paper themselves. 40

William S. Best—For Plaintiff—Direct.

The Court (after argument): I will decide that after recess and allow this testimony to stand; it may be stricken later; for the present, I will allow it to stand.

Mr. Stokes: I offer the paper in evidence.

10 (Paper is received in evidence and marked Exhibit P-6)

The Court: It will be marked for identification. Newspaper is marked P-6 for identification.

By Mr. Tomlinson:

Q. Were you present at the hearing? A. No, sir.

20 Q. Did you write this article yourself? A. No, sir.

RECESS.

AFTER RECESS.

WILLIAM S. BEST, being duly sworn, according to law, on his oath testifies as follows:

Direct examination By Mr. Stokes.

30 Q. William S. Best? A. Yes.

Q. What is your business, sir? A. Claim agent, Central Railroad.

Q. Do you know Theodore J. B. Brown? A. Yes, sir.

Q. In your employment as claim agent of the Central Railroad have you ever consulted with Mr. Brown? A. What?

40 Q. In your capacity as claim agent of the Central Railroad, have you ever consulted with Mr. Brown?

William S. Best—For Plaintiff—Direct.

Mr. Tomlinson: Objected to as immaterial, irrelevant and incompetent.

The Court: I didn't get the question.

Mr. Stokes: I asked if, in his employment did he ever consult with Mr. Theodore J. R. Brown.

Mr. Tomlinson: I object.

The Court: The best evidence is Theodore Brown himself. You have a right to subpoena him. 10

Mr. Stokes: I will prove it, if your Honor please; I will take the stand myself.

The Court: You may answer this particular question.

A. What is the question?

Q. Did you ever consult with Mr. Theodore Brown as claim agent? A. Yes. 20

Q. Whereabouts was he when you consulted with him?

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

Objection overruled and exception allowed.

A. Are you referring to this particular case?

Q. No, sir; any case. 30

The Court: I will allow you to ask him whether Mr. Brown is in the employ of the Central Railroad, if he knows of his own knowledge.

Mr. Tomlinson: May I have an exception?

The Court: Yes.

A. Yes.

Q. Was he in such employment on July 29, 1924? 40

William S. Best—For Plaintiff—Cross.

Mr. Tomlinson: I object.

Objection overruled and exception allowed.

A. I presume he was.

10 Q. And he is still in the employ of the Central Railroad? A. I presume so.

By the Court:

Q. What is the nature of his employment? A. Mr. Brown is Safety Officer of the Central Railroad.

By Mr. Stokes:

20 Q. What do you mean by "safety officer"?
A. He has charge of the safety conditions of the railroad.

Q. Legal matters pertaining to— A. No, general safety matters are under his jurisdiction; general safety rules and regulations.

Q. He is connected with the law department of the Central Railroad, isn't it? A. Yes.

Q. He is a lawyer? A. Yes.

Q. He is from Brielle, New Jersey? A. Yes.

30 Q. He is former prosecutor of Monmouth County.

Mr. Tomlinson: We admit he is a lawyer, practicing in the State of New Jersey.

Mr. Stokes: And also attorney of the Central Railroad?

Mr. Tomlinson: No.

Cross examination by Mr. Tomlinson.

40 Q. You said Mr. Brown is connected with some safety committee? A. Yes.

William S. Best—For Plaintiff—Cross.

Q. You said he is employed by the Central Railroad. Do you know anything about the terms and conditions of his employment? A. Positively not.

Q. Do you know anything about the compensation, if any, he receives from the company? 10
A. No, sir.

Q. Do you know whether or not he is employed exclusively by the railroad company? A. I do not.

Q. Do you know whether or not he is employed exclusively by any other business? A. I don't.

Q. He is supervisor of safety? A. He is supervisor of safety, yes.

Q. And that has to do with the investigation 20
of methods to lower the number of accidents?
A. Yes, correct.

Q. Station, platforms, and everything of that sort? A. Yes.

Q. That is correct? A. Yes.

Q. Does Mr. Brown ever try any cases for the railroad company? A. Not to my knowledge.

By Mr. Stokes:

Q. Ever attend any hearing for the railroad 30
company? A. No, sir.

Q. Never did? A. Not to my knowledge.

Q. Where is Mr. Brown's office? A. Jersey City.

Q. What building? A. Terminal Building.

Q. Whose building? A. Central Railroad's.

Q. Is his name on the door? A. I don't believe so.

Q. You have been in his office? A. Yes. 40

William S. Best—For Plaintiff—Cross.

Q. Did you ever go in any other office to see him except the Central Railroad in New York?

A. Yes.

Q. In New York, that is, isn't it? A. No, sir, Jersey City.

10 Q. Jersey City side? A. Yes, sir.

Q. Were you consulted about this matter, about this occurrence that is alleged to have happened on July 22, 1924?

Objected to.

Objection overruled. Exception allowed.

A. Was I consulted?

Q. Yes. A. You mean by Mr. Brown?

Q. By anybody.

20

The Court: No, anybody in the employ of the company.

A. I was ordered to make an investigation.

Q. When—what date? A. I can't tell you exactly. It was some time along in August or September.

By the Court:

30 Q. By whom were you ordered? A. Central Railroad—

Mr. Tomlinson: I object on the ground that this was subsequent, according to his own testimony, to the complaint in a criminal matter.

The Court: That is so.

Mr. Stokes: I don't know; I am asking him the date.

40

William S. Best—For Plaintiff—Cross.

By the Court:

Q. When was your investigation, after the arrest? A. After the arrest, yes.

By Mr. Stokes:

Q. You knew nothing about it before the arrest? A. No. 10

The Court: The objection is proper. It will be stricken.

Q. Why was the investigation after the arrest, if you know?

Mr. Tomlinson: I object—oh, let him answer.

A. Why was what? 20

Q. Why was the investigation after the arrest?

A. Someone put in a claim to the railroad company.

Q. You mean a suit had been instituted? A. I don't know whether a suit had been instituted at that time or not; I know a claim had been received.

Q. What you did was after the hearing held at Keyport? A. Yes. 30

By Mr. Tomlinson:

Q. As I understand it, Mr. Best, Mr. Stokes and his partner, Mr. McDermott presented a claim in behalf of these three plaintiffs? A. Correct.

Q. And it was after that that you made the investigation? A. Yes, sir.

Q. In connection with this civil suit, is that so? A. Yes, sir. 40

DeVoe Tomlinson—For Plaintiff—Direct.

DEVÖE TOMLINSON, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Stokes.

10 Q. Mr. Tomlinson, you are connected with the Central Railroad of New Jersey? A. Yes, sir.

Q. And are their trial attorney? A. I am Assistant General Counsel of the Central Railroad.

Q. And who is their General Counsel? A. Mr. George Holmes.

Q. You know Theodore J. R. Brown? A. I do.

Q. How long have you known Mr. Brown? A. I have known Mr. Brown approximately nine years.

20 Q. And during that nine years, who has he been employed by, if you know, outside the Central Railroad of New Jersey? A. Mr. Brown has clients outside the Central Railroad.

By the Court:

Q. Is he employed by the Central Railroad? A. Yes, sir.

30 Q. In what capacity? A. Mr. Brown has the title of Supervisor of Safety and also the title of Assistant Claims Attorney. His principal work is now the safety work, and also in addition to that, his principal work is, and has been ever since I have known him, in connection with legislative matters in Trenton and Harrisburg.

By Mr. Stokes:

40 Q. He does attend hearings occasionally for the railroad? A. I have known—I don't know of any other hearing except this, Mr. Stokes.

DeVoe Tomlinson—For Plaintiff—Direct.

Q. That's the only one you know of that he has attended for the railroad? A. I beg pardon?

Q. This is the only one that you know of that he has attended for the railroad? A. I know of one or two compensation hearings in which he appeared as attorney. I don't know of any other occasion. 10

Q. Do you know why he should have appeared at this hearing, to which reference has been made—in this case? A. Do I know?

Q. Do you know why he did appear? A. No, sir. I will qualify that; only by hearsay; I cannot swear to it.

Q. Under whose general direction is he—or who is his superior? A. Mr. Brown comes—I would like to stipulate on the record if I may—that I object to these questions, and ask for a general exception. 20

The Court: You may have them.

A. Mr. Brown comes generally under the jurisdiction or rule—he comes under the jurisdiction of Mr. Besler and Mr. Stein, the General Manager. His work is generally special work, his main work is his safety work, and in connection with that, he has legislative matters, and other special matters that occasionally come up. 30

By the Court:

Q. What do you mean by "safety work"? A. The railroad has in the past several years—for the past several years back, noticed with alarm the increased accidents on their roads; as a result of that, the various railroads in the East, the Trunk Line roads have formed a sort of 40

DeVoe Tomlinson—For Plaintiff—Direct.

10 association, and that association has formed what is generally called a safety committee. The purpose of that committee and its functions are to determine in what respect they can decrease these accidents. One way in which they have done it has been to require all machinists of their organization to wear goggles to prevent eye injuries; there have been cases where platforms have not been perfectly level, and these platforms have been made level. Other instances have been to put up signs all around where the men work, to watch out for themselves in yards and in shops, and in general—that is the general purpose of it; of course, there are others—

20 Q. Does the conduct of passengers on trains come within the jurisdiction of the Safety Committee? A. No, sir. Safety conditions—has to do with existing conditions, your Honor. Another instance has been to adopt the grab iron on the freight cars.

By Mr. Stokes:

30 Q. You said this is the only time you know of Mr. Brown representing the Central Railroad, here at the hearing before Mr. Smith in this matter? A. That's the only one I can recollect. I won't swear that that is the only one, but that's the only one I can recollect.

Q. Had you been consulted about this matter after the warrant had been sworn out, and before the hearing? A. No, sir, I didn't know anything about it until after the hearing was over.

Charles Reiff—For Plaintiff—Direct.

CHARLES REIFF, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Stokes.

Q. Mr. Reiff, where do you live? A. I live in Adelphia, New Jersey. 10

Q. How long have you lived in Adelphia? A. Approximately about two years.

Q. And where is your employment, sir? A. 97 Bowery, New York City, by J. P. Jube and Company.

Q. What is your line of employment? A. Hardware salesman.

Q. How long had you been employed by them on July 22, 1924? A. About eleven years. 20

Q. You are still employed by them, are you? A. Yes, sir.

Q. Do you recall the 22nd day of July, 1924? A. Well, I do, yes.

Q. And you recall the 29th of July, 1924? A. I recall that day; that was my birthday.

Q. And you recall what else happened on your birthday, that day? A. Yes, sir.

Q. What? A. What was that question?

Q. What happened on your birthday, the 29th of July, 1924? A. That was the day I was taken off the train—arrested. 30

Q. Going back first to the 22nd of July, 1924—you were a passenger on the train coming from New York City? A. I was.

Q. How long have you been a commuter on this train? A. Up to that time, about a year.

Q. Daily except Sundays, I suppose? A. Daily except Sundays, yes.

Q. Did you always travel on practically the 40

Charles Reiff—For Plaintiff—Direct.

same train—the early train out? A. We did; I always got the 5.42 out of Jersey City.

Q. Was that this train on this day? A. That was the 5.42, yes.

10 Q. Who did you come across the Ferry with when you left New York? A. I came over with Mr. Hughes and Mr. Hanley and Mr. Sturla.

Q. Where did you meet Sturla and Hughes? A. I was introduced to them at the ferry.

Q. When you got to the ferry, who was with you? A. Well, I had been on the boat, and I met Mr. Sturla, and Mr. Hanley, and Mr. Hughes came on the boat and I met them there.

Q. Did anybody else get on with you from New York side? A. I got on alone.

20 Q. You and Miller and Sturla were not together at that time? A. No.

Q. What did you have, if anything, on that day, in your hand? A. I had a roll of screens for windows.

Q. You mean a wire netting? A. I mean mosquito screens; comes in a roll.

Q. How many screen did you have? A. One roll.

30 Q. How long was that—how big in diameter? A. Twenty-four inches wide.

Q. How much in that roll did you have? A. It is a hundred feet long, making it two hundred square feet on the roll.

Q. You had an armful right there? A. Yes, I did.

Q. Did you have anything else? A. No, sir, I did not; I had a newspaper.

40 Q. You got on the ferry boat and there you met Sturla and one other gentleman? A. Yes; two others.

Charles Reiff—For Plaintiff—Direct.

Q. Where did you meet Mr. Miller? A. On the train; he had been seated on the train. He is usually there ahead of us. He gets off earlier.

Q. Did you get the train to Matawan? A. Yes.

Q. And you changed cars? A. Yes.

Q. Tell us what happened then. A. I sat about the middle of the car, at the right hand side with Mr. Sturla alongside of me; Mr. Hughes and Mr. Hanley opposite to me. 10

Q. What way? A. With the seats turned over—seats facing each other.

Q. How were you riding? A. Forward, with my face toward the engine.

Q. How was Mr. Sturla riding? A. Alongside of me—the same way.

Q. And Mr. Hughes and the other man were opposite you? A. Mr. Hughes and Mr. Hanley were opposite us in the car. 20

Q. Your faces were together? A. Just facing each other, in four seats.

Q. Where was Mr. Miller? A. On the opposite side of me—on my left, talking with another gentleman.

Q. And how many people were in that car as the train came from East Freehold to Freehold? A. I should judge about twenty people. 30

Q. And which way did you leave the train, Mr. Reiff? A. I left by the back end.

Q. Who else left by the back end? A. Mr. Hanley was behind me, and Mr. Hughes; that's all I could see who came after me. I didn't keep turning around to see if the men were following me.

Q. You were the first person off that train by the back end? A. I was.

Q. How many people came out after you? You 40

Charles Reiff—For Plaintiff—Direct.

did testify to these men that you noticed—
 A. I really couldn't say. I know I had walked over to the car and there were still passengers coming off.

10 Q. There were still passengers coming off the rear of that train? A. There were still passengers coming off the rear of that train.

Q. Did you hear any whistle blown or bell rope pulled, or anything of that kind? A. No, sir, I did not.

Q. Did you do anything that day in the way of pulling any whistle or ringing any bell? A. No, sir, I did not.

Q. Did you pull the brakeman's cap over his forehead? A. No, sir.

20 Q. Or anything of that kind? A. No, sir.

Q. Did you do anything different from what usually is— A. I only walked off that train with my bundle.

Q. Did anybody say anything to you, that you were ringing the bell or blowing the whistle? A. I never heard anything more about it until the following week.

Q. Did you get on the train the next morning? A. Yes.

30 Q. You and Sturla and Miller? A. Yes.

Q. You were together? A. Yes.

Q. Was anything said to you about the pulling of the cord or the blowing of the whistle? A. Never heard anything about it.

A. The morning Mr. Crawford approached us and handed us this warrant. I didn't know anything about it before that. We were stunned.

40 Q. Where was that? A. The train was just leaving Freneau Station, at the time he approached us.

Charles Reiff—For Plaintiff—Direct.

Q. And he accosted you? A. Yes.

Q. Did he ask you if you were Mr. Reiff, and Mr. Miller and Mr. Sturla? A. He asked me personally, to my face: "Is your name Mr. Reiff?" I said, "It is."

Q. What else was said, if you can remember? 10

Mr. Tomlinson: Objected to as immaterial, irrelevant and incompetent, what the constable said.

The Court: It is not material.

Q. When you got to Matawan, what happened?

A. After he had asked me my name, he didn't say anything until he asked Mr Sturla his name, and he replied, and he asked Mr Miller his name, and he replied, and he said, "You are under arrest." 20

Mr. Tomlinson: I object to what he said.

The Court: Strike it out.

By the Court:

Q. As a result of that, what then happened?

A. I was taken off at Matawan Station.

Q. What happened then? A. I was put in a Ford car and taken to Keyport and put in jail. 30

Q. Who were in the Ford car? A. Mr. Sturla was taken with me, and Mr. Miller and Mr. Crawford, and when we got off the train, Mr. Robinson was standing there waiting for us and we all got in the car and they drove us to Keyport.

By Mr. Stokes:

Q. Who drove the car? A. I cannot remember. 40

Charles Reiff—For Plaintiff—Direct.

Q. Did Robinson accompany you? A. Robinson accompanied us.

Q. You five composed the party that went from Matawan to Keyport—you three gentlemen, and Crawford and Robinson? A. That's right.

10 Q. When you got to Keyport, what took place?
A. I had asked to telephone to try and get some word down to my folks, to my father-in-law to go my bail, and I was denied permission.

Mr. Tomlinson: I ask to have that stricken.

The Court: You cannot tell that.

Q. After you got to Keyport, where were you taken? A. I was put in jail.

20 Q. In the Borough Hall? A. I just don't know what the name of the building was.

Q. How long were you there? A. Approximately four hours; four hours and fifteen minutes by my watch that I had taken out.

Q. Then what happened? A. We stayed there until Justice Smith came and took us out and brought us down in his car to the Port; my father-in-law in the meantime happened to get word that I was there—

30

Mr. Tomlinson: Objected to.

The Court: Strike it out.

Q. You gave bail for a hearing? A. Yes.

Q. That hearing was held on the—

Mr. Tomlinson: We don't deny that they gave bail and the hearing was held and they were discharged, I admitted that in the opening.

40

Charles Reiff—For Plaintiff—Direct.

By the Court:

Q. When was the hearing? A. Within a week afterwards.

By Mr. Stokes:

Q. Of course you returned to the hearing? A. 10
We returned for the hearing.

Q. What happened at the hearing—who appeared? A. Mr. Brown, and I had word he was prosecutor for the railroad.

Mr. Tomlinson: I ask to have that stricken out.

The Court: I will allow you to state what Brown did.

Exception allowed Mr. Tomlinson. 20

Q. What did Mr. Brown do in your presence, Mr. Reiff?

Mr. Tomlinson: I object.

Objection overruled and exception allowed.

A. He asked Mr. Pierce questions, and Conductor Creby questions, in regard to this—and John Iverson, in regard to this. 30

Q. And at the close of the examination, what did he do?

Mr. Tomlinson: I object.

Objection overruled and exception allowed.

A. What?

Q. What did Mr. Brown do, if anything, at the close of the taking of the testimony? A. 40

Charles Reiff—For Plaintiff—Direct.

He got up and he wanted to have us put away for——

Mr. Tomlinson: I object.

10 The Court: I will tell you what I have in mind, gentlemen, so you will know the trend of the Court's mind. I have before me the case of Taylor vs. New York and Long Branch Railroad, 80 N. J. page 245, and I am going to allow the plaintiffs to show, if they can, if they have available evidence, the presence of any employe other than Robinson, of the railroad company at that hearing, of having appeared and taking an active part in it. The Court will allow that much testimony.

20

Q. Was Joseph Creby present at that hearing?

Mr. Tomlinson: I object.

Objection overruled and exception allowed.

Q. He was the train conductor? A. He was there, yes, sir.

Q. He was examined and questioned by Mr. Brown?

30

Mr. Tomlinson: I make a general objection to all this testimony.

The Court: I will allow you to do that.

Q. Was Mr. Creby the conductor of the train that you were on on July 22, 1924? A. As I recall it.

Mr. Tomlinson: Objected to.

40 Objection overruled and exception allowed.

Charles Reiff—For Plaintiff—Direct.

Q. Was Wesley Price a witness there?

Mr. Tomlinson: I object.

Objection overruled and exception allowed.

A. He was.

Q. Mr. Pierce is who? A. I believe he is a 10
brakeman.

Q. And was he on the train on July 22, 1924?

A. He was.

Q. And John Iverson—was he also a witness?

Mr. Tomlinson: I object.

Objection overruled and exception allowed.

A. Yes.

Q. And examined by Mr. Brown? A. He was. 20

Q. Was he on the train on July 22, 1924? A.
He was.

Q. Was anybody else produced by Mr. Brown
and sworn as a witness except these men?

Mr. Tomlinson: I object on the ground
it is not relevant, and also on the ground
there is no evidence whatsoever of Brown
producing any of the witnesses.

Question withdrawn. 30

Q. Was anybody else produced at this hearing
except Joseph Creby, the engineer, Wesley
Peirce, a brakeman, and John Iverson, a brake-
man of the Central Railroad at that hearing, to
testify, and gave any testimony against these
three men?

Mr. Tomlinson: I object.

A. This Mr. Crawford was there— 40

Charles Reiff—For Plaintiff—Cross.

Q. And testified, I said. A. Nobody besides these three.

By the Court:

10 Q. Was Robinson there? A. I didn't see Robinson at the hearing, no. I don't remember.

Q. You didn't see him there? A. I don't recall. I don't remember.

Q. You don't recall? A. No.

Cross examination by Mr. Tomlinson.

Q. There were only three men who were called, were there not? A. Was there anybody more there?

20 Q. You are testifying, Mr. Reiff, as to who were there. Are you sure about that, or are you not? A. I am sure that Mr. Creby was there, Mr. Iverson was there and Wesley Pierce was there.

Q. Did anybody else appear as a witness, or not? A. Well, others appeared, but were not questioned.

Q. As a witness; you know what a witness is? A. Yes.

30 Q. What is your line of business? A. Hardware salesman.

Q. For Jube? A. John P. Jube.

Q. And the only three men who testified at this hearing, then, were Creby, Iverson and Pierce; that's correct, isn't it? A. As I remember Those three of which I remember.

Q. Do you think there was somebody else? A. Well, no; I only saw this man Crawford come in, but I don't remember him testifying.

40 Q. And these three men were the only men

Charles Reiff—For Plaintiff—Cross.

that testified at all at that hearing; weren't they the only men that went up on the witness stand and gave testimony? A. As I recall, yes.

Q. And you were discharged after the hearing? A. We were discharged after the hearing.

Q. How long have you known Mr. Sturla? A. 10
Well, about three and a half or four years now; I will say four years.

Q. How long have you known Mr. Miller? A. About three years—three and a half years.

Q. And you have been commuting with them quite regularly, haven't you? A. Yes, sir.

Q. Now, on this day, you came on to the ferry boat alone, didn't you? A. I approached the ferry boat alone.

Q. And when you got on the ferry boat, you 20
met Mr. Miller and Mr. Hanley, didn't you? A. I did not meet—not Mr. Miller on the boat.

Q. Did you meet Mr. Sturla? A. Mr. Hanley and Mr. Sturla.

Q. You met Mr. Miller on the train? A. I met Mr. Miller on the train.

Q. After you changed at Matawan, who were the three men you sat with? A. Mr. Sturla on my left, Mr. Hanley facing me, and Mr. Hughes on my left facing me. 30

Q. Hughes was the same gentlemen who testified this morning? A. I believe so.

Q. Was Hughes riding backward or forward? A. He was riding backward.

Q. You are certain about that? A. Yes.

Q. When was it you first started to get up out of your seat to get off the train? A. The train had pretty nearly come to a standstill—just simply moving along.

Q. Other people got out of the train ahead of 40

Charles Reiff—For Plaintiff—Cross.

you? A. There was people got out ahead of me, and after me.

10 Q. How did you happen to notice these people that came out after you? A. Our car is parked at that station, and we always keep it at the back end of that station, and I made a run with my bundle to the car, put it inside the seat, and I still saw passengers coming off.

Q. You turned around to look? A. Yes; the reason I turned around to look was because Mr. Sturla and the rest of these men were coming off after me.

Q. You didn't look to see whether anyone came off after Sturla, did you? A. I did.

20 Q. How did you happen to do that after you were off the train? A. I just turned around.

Q. Just turned around after you got out the door, to see whether anyone else got off? A. Yes; a lot of these gentlemen know my car, and I was waiting for them.

Q. You said they got off the train—you saw them get off the train? A. Yes.

Q. You saw Sturla get off the train? A. I did.

30 Q. You saw Hanley get off the train? A. I did.

Q. You saw Hughes get off the train? A. I did.

Q. Which one was the last one to get off? A. Mr. Hanley followed me—Mr. Hughes and Mr. Sturla, and Mr. Miller accompanied by Mr. Kinney, and there were still gentlemen getting off after that.

40 Q. What I mean is, how did you happen to account for these other people after your own crowd got off? A. I didn't say I accounted for

Charles Reiff—For Plaintiff—Cross.

other people. I seen people coming off; I don't know who they were.

Q. You saw about twenty people in that car?

A. Approximately.

Q. Who else was there that you knew in that car besides Miller and Sturla and Hughes and Hanley? A. I knew Mr. Kinney. 10

Q. Is he here today? A. No.

Q. Who else did you know in the car? A. Other gentlemen—Mr. Barkalow here in town and some others; they came off that end.

Q. You knew quite a few in that car? A. Yes, I did.

Q. You didn't pull the whistle cord, you say?

A. No, sir, I did not; I wouldn't do a thing like that. 20

Q. When you went out the end of the car, you didn't turn the back-up hose? A. No, sir; I don't know where that is.

Q. You don't know where that is? A. No.

Q. How long have you been riding on that train? A. I had been riding on that train at that time very nearly a year.

Q. And you usually get off the rear end of the train? A. Not always.

Q. You had—— A. I had, and I get off the front also. 30

Q. You don't know where the back-up hose is? A. Never paid any attention to it.

By Mr. Stokes:

Q. You ride home in Mr. Sturla's car every night? A. Yes, sir.

John R. Miller—For Plaintiff—Direct.

JOHN R. MILLER, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Stokes.

10 Q. Mr. Miller, where do you live? A. Roselle Park, New Jersey.

Q. Where did you live on July 22, 1924? A. Farmingdale, New Jersey.

Q. Were you a commuter on the Central Railroad during the month of July, 1924? A. I was.

Q. How long had you been commuting at that time, Mr. Miller? A. Beginning the first of April, up until the first of January, of this year.

20 Q. What was your employment at that time? A. Employed by the Barret Transportation Company, 40 Rector Street.

Q. How long had you been employed there at that time? A. Two years, at that time.

Q. Still employed by them? A. Yes, sir.

Q. Now, do you recall the 29th of July? A. Yes, sir.

Q. And that morning, were you a commuter on the train from Freehold to Matawan? A. I was.

30 Q. Had you been commuting daily at that time, with the exception of Sundays? A. Yes.

Q. Even went in Saturdays? A. Yes.

Q. What happened on the 29th of July, if you recall, that morning? A. Why, as we were leaving Freneau Station, we were approached by a man, telling us we were under arrest. He asked us our names—

Mr. Tomlinson: I object.

40 Witness (continuing): And we answered to our names, and he said, "You are under arrest."

John R. Miller—For Plaintiff—Direct.

Q. After that time, where did you go? Did you go to Matawan? A. From that time on, we went to Matawan.

Q. Who did you find when you got to Matawan? A. Why,—who do you mean that we found? 10

Q. Who else besides the men with you? Who went with you from Matawan to Keyport, if anybody?

Mr. Tomlinson: I object.

The Court: Strike it out.

By the Court:

Q. What happened to you after you got to Matawan? A. We were put in a Ford touring car and taken to Keyport. 20

By Mr. Stokes:

Q. Who assisted you in the Ford touring car? A. Nobody assisted me; we got in and, I believe, Mr. Crawford, the constable, and Mr. Robinson.

Q. Did Mr Robinson go with you from Matawan to Keyport? A. Yes, sir.

Q. With you all the way over? A. Yes. 30

Q. When you got out of the car at Keyport, did he come with you, too? A. Yes.

Q. What happened after that, at Keyport? A. We were put in jail.

Q. How long were you kept in jail? A. Approximately four to four and a half hours.

Q. You mean inside a cell? A. You can call it a cell, yes.

Q. Locked up, I mean? A. Locked up, yes, sir. 40

John R. Miller—For Plaintiff—Direct.

Q. Were there iron bars in front of the door?

A. Certainly.

Q. You remained there for four hours? A. Approximately.

10 Q. And gave bail for a hearing at some time later? A. Yes.

Q. You attended the hearing? A. Yes, sir.

Q. And who else attended that hearing? Was Mr. Robinson there, or who else was there? A. Yes, sir, Mr. Robinson was there; Mr. Creby, Mr. Pierce, Mr. Iverson and Mr. Brown and another gentleman—I don't know his name.

Q. What did you see Mr. Robinson do, if anything, while he was there?

Mr. Tomlinson: I object.

20 Objection overruled and exception allowed.

Q. Nothing but converse with Mr. Brown the other side of the room. Mr. Brown examined the railroad crew first.

Q. And when you speak of the railroad crew, do you refer to Crawford, Pierce and Iverson?

A. The three of them.

30 Q. Was anyone else sworn except those three? A. No, sir.

Mr. Tomlinson: Objected to as immaterial, irrelevant and incompetent

Objection overruled and exception allowed.

40 Q. And after these three men had been sworn and examined by Mr. Brown and the hearing closed, what happened, if anything? A. After the hearing was dismissed?

John R. Miller—For Plaintiff—Cross.

Q. No, right before it was dismissed.

Mr. Tomlinson: Objected to as immaterial, incompetent and irrelevant.

A. Before it was actually dismissed, and after the evidence was all in, Mr. Brown got up and summed up the case.

Mr. Tomlinson: I ask that that be stricken out as incompetent and hearsay. 10

The Court: It cannot be hearsay. Did you see Mr. Brown during that hearing?

Mr. Tomlinson: I think that is hearsay.

Witness: I did.

Q. Now, Mr. Miller, what happened to you finally after the Justice's decision? A. What happened to me?

Q. Yes; the case against you? A. Dismissed. 20

Q. And you were set free? A. Yes, sir.

Cross examination by Mr Tomlinson.

Q. The only witnesses you say who were examined were Creby the conductor, Iverson and Pierce, who were the balance of the train crew; is that right? A. Yes, sir.

Q. And after their testimony was taken, you were discharged? A. Yes, sir. 30

Q. Just what do you do with the Barrett Company, Mr. Miller? A. What is my line of work?

Q. Yes, sir. A. What I do there?

Q. Yes. A. We have about eleven hundred tank cars I take care of, traveling all through Canada and New York.

By the Court:

Q. Are you a clerk in charge of the records?

A. I am the car record clerk. 40

John R. Miller—For Plaintiff—Cross.

By Mr. Tomlinson:

Q. How many car record clerks are there in your department? A. How many?

Q. Yes. A. Three.

10 Q. Coming down from Matawan, with whom were you riding? A. I was riding with Mr. Fisher—a gentleman named Fisher, who is a commuter also on the Freehold train.

Q. Were you between the front of the car and Mr. Sturla and his companions, or not? A. I was sitting opposite them.

Q. Right opposite them? A. As I recall, right opposite, yes, sir.

Q. Now, you said you did not pull any cord? A. No, sir.

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

Q. You didn't see anybody pull the cord? A. No, sir.

Q. You know what the back-up whistle is, on the back of a train? A. Yes, sir.

Q. Did you hear the whistle blown? A. No, sir.

Q. You went out that way, toward the back of the car? A. Yes.

Q. Is that right? A. Yes.

30 Q. Now, as you passed Pierce, the brakeman, did you have any conversation with him? A. I didn't pass Pierce.

Q. You did not? A. No, sir.

Q. You saw Pierce the next night, didn't you? A. Yes, sir.

Q. And we said to him, "If you can't bring the train in right, we will handle it and show you how"? A. No, sir.

40 Q. You didn't say that? A. No.

John R. Miller—For Plaintiff—Redirect.

Robert Sturla—For Plaintiff—Direct.

Redirect examination by Mr. Stokes.

Q. Did you hear any whistles blown or did you blow any whistle or ring any bell? A. No.

Q. Was anything said to you that night when you got off the train by any member of that crew about the blowing of a bell or pulling a whistle? A. Not that I recall. 10

Q. Was anything said the next morning when you got on the train? A. No, sir.

Q. Had you heard anything about that at all? A. Recently.

Q. What had you heard, if anything, from the 22nd until the time you were arrested at Freehold, if anything? A. Nothing. 20

By Mr. Tomlinson:

Q. You said nobody said anything to you when you got off the train that night at Freehold. Didn't Pierce say to you, "If you want something to play with, I will get you something instead of the back-up hose"? A. No, sir.

Q. He didn't say that to you? A. No, sir, not to me.

Q. You heard him say it to your crowd, didn't you? A. No, sir, I did not. 30

ROBERT STURLA, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Stokes.

Q. Where do you live? A. Farmingdale, New Jersey.

Q. Whereabouts do you live, on what road? A. Between Farmingdale and Freehold. 40

Robert Sturla—For Plaintiff—Direct.

Q. Between Rogers Drum and Banjo Head Factory and Farmingdale? A. Yes.

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

10 Q. On July 22, 1924, who were you working for? A. Ocean Accident and Guaranty Company.

Q. In what capacity? A. I was an adjuster of claims, personal injury and subrogation, and preparing cases for trial.

Q. How long had you been working for them at that time? A. Seven years.

Q. Do you recall, Mr. Sturla, the 29th of July? A. I do.

Q. The morning of that day? A. I do.

20 Q. Where were you that morning? A. I was on my way to New York.

Q. How long have you been commuting back and forth between your place and New York? A. About four years.

Q. In what manner did you commute? A. I took the 7.03 train from Freehold and connected with the train at Matawan.

Q. You left your automobile here at Freehold? A. I left my automobile here at the Freehold Station, yes, sir.

30 Q. At what part of the platform of the station did you leave your automobile? A. Right next to the platform, facing the rug mill.

Q. That's the end furthest away from the engine? A. The end furthest away, yes.

Q. As this rear car of this two car train stopped, where would it stop, about, with reference to what portion of your car? A. About where my car was.

40

Robert Sturla—For Plaintiff—Direct.

Q. Now, do you recall the 22nd day of July, Mr. Sturla? A. I do.

Q. And you were a passenger on that train that night? A. I was.

Q. Who else was with you? A. Attorney Hughes and Mr. Hanley who is the Chief Adjuster of the Ocean Accident Guaranty Company. 10.

Q. Where were they coming to? A. To my home.

Q. And do you recall how you were sitting in the train—on which side of the train? A. I do.

Q. Where? Tell us. A. Mr. Hanley was facing toward Freehold, with Mr. Hughes; I was facing Mr. Hughes and Mr. Reiff was facing Mr. Hanley—with the seats turned over.

Q. Where was Mr. Miller? A. Right across the aisle in the next seat. 20

Q. What did you have with you that night, if anything? A. I had my brief case, department discontinuing and release statement paper, and a package containing some meat I purchased at the Washington Market.

Q. Did you use two hands to hold these things, or one hand? A. Two hands.

Q. Was your brief case quite a heavy one? A. Quite heavy. 30

Q. You had it full of papers? A. Yes; quite heavy.

Q. And you held it by the handle in the center? A. Yes.

Q. How did you handle your meat? A. I had a handle on the meat, yes, sir.

Q. Now, can you tell us, Mr. Sturla, the way in which different ones got off of that train, if you recall it? A. Yes; Mr. Reiff got up and he 40

Robert Sturla—For Plaintiff—Direct.

went out; Mr. Hanley followed him; he was sitting opposite to him; Mr. Hughes got off, and I got up and I followed Mr. Hughes.

10 Q. Go ahead. A. Then there was Mr. Miller following me, and there were some other people in the rear of Mr. Miller.

Q. About how many people, Mr. Sturla, were there in that train when it arrived at Freehold? A. I would say about fifteen or twenty.

Q. And did anybody except the five you have mentioned—or any others except those comprising your party get off the rear end? A. There were other people got off.

20 Q. As you got off that train that night, did anybody say anything to you? A. Nobody said anything.

Q. Did anybody ask you why you had pulled the bell cord or turned on this whistle in the rear? A. No, sir.

Q. Was anything said to you when you came back and got on the train the next morning? A. No, sir.

Q. Did you get on the train the next morning? A. I did.

30 Q. Did you commute every day since then until the 29th, excepting Sundays? A. I did.

Q. Did anybody say anything to you about blowing the bell, or ringing the whistle—ringing the bell and blowing the whistle or anything else? A. No.

Q. When was the first you knew about any charge being made against you? A. When a man got on at Freneau, and he approached Mr. Miller and Mr. Reiff and myself and he said—

40 Mr. Tomlinson: I object.

Robert Sturla—For Plaintiff—Direct.

Q. What did he do? A. He placed Mr. Reiff and Mr. Miller and myself under arrest.

Q. Then from the time you were placed under arrest on the train, where did you go? A. Matawan.

Q. When you got to Matawan, who did you see? A. Robinson. 10

Q. Had you seen him before? A. No.

Q. What did Robinson do from that time on, if anything? A. He walked over to the automobile with Constable Crawford, and we got in this car; he ordered us to get in.

Q. Who ordered you to get in? A. Robinson.

Q. What did he say?

Mr. Tomlinson: I object.

A. Told us to get into the automobile. 20

Mr. Tomlinson: I move to strike that out, and I ask that this witness be instructed not to answer while I am making my objection.

The Court: The last answer will be stricken out.

Mr. Stokes: I think that is competent, what Robinson said to him when he got off the train at Matawan.

Mr. Tomlinson: Robinson is not on trial. 30

Mr. Stokes: Robinson is the man that put this whole thing on the way. Robinson started it.

(After argument.)

Mr. Tomlinson: Now he is asking him what Robinson said, and as I understand it, in the case of Blackman vs. West Jersey and Seashore Railroad Company, 68 Law, page 1, a servant cannot bind the principal by declaration. 40

Robert Sturla—For Plaintiff—Direct.

The Court: I will allow the witness to testify as to what directions, if any, Robinson gave him.

Exception allowed Mr. Tomlinson.

10 Q. Answer, Mr. Sturla, please. A. He told us to get in the automobile, and he was going to Keyport, and he said to the Judge—

The Court: The Court might observe it is also evidential as to whether or not these men were actually under arrest. It is admissible for that purpose.

Q. You said what? A. Said to the Judge—

20 Mr. Tomlinson: I object to what he said. I object to what he is going to say now.

Q. What did they do after you got there? A. Put us in a car and placed us under arrest, and told me he was the complainant in this case—

Mr. Tomlinson: I object.

Q. Take you to Keyport? A. Took us to Keyport.

30 Q. And what happened? A. Placed us in the jail.

Q. You mean a jail where you were locked in—iron bars? A. Regular jail.

Q. How long were you left there? A. Four and a half hours.

Q. Bail was given? A. Yes.

Q. Hearing held? A. Yes.

Mr. Tomlinson: Don't lead.

40 Q. At that hearing, who appeared?

Robert Sturla—For Plaintiff—Direct.

Mr. Tomlinson: I object.

Objection overruled and exception allowed.

A. Conductor Creby, Brakeman Pierce and Baggage Master Iverson. 10

Q. Anybody else? A. There was Mr. Robinson there, their railroad detective, and also Constable Crawford.

Q. Anybody else? A. I didn't see anybody else outside of Mr. Brown—he was the attorney representing the railroad company.

Mr. Tomlinson: I ask to have that stricken out.

The Court: Strike it out. 20

Q. What did Mr. Brown do? A. He tried—

Mr. Tomlinson: I object.

Witness: He tried the case.

Q. Just tell us what he did? A. He placed Mr. Creby—Conductor Creby on the stand, trainman Pierce and trainman Iverson.

Q. Questioned them? A. Questioned them as to this particular case, yes, sir. 30

Q. You are speaking of Mr. Brown? A. Mr. Brown, the attorney, yes.

Q. And after the hearing of witness was closed, what did he do?

Mr. Tomlinson: Objected to as immaterial, irrelevant and incompetent.

Objection overruled and exception allowed.

Robert Sturla—For Plaintiff—Cross.

Q. What happened to you after the hearing?

A. He made a summation, and so forth——

Q. You mean Mr Brown addressed the Court?

A. Yes.

10 Q. And after that, what happened? A. It was dismissed by Judge Smith.

Q. Did you read anywhere an account of this in any newspaper?

Mr. Tomlinson: I object.

The Court: I will allow it Exception allowed.

A. I did.

Q. And in what paper did you read that?

20 Mr. Tomlinson: Objected to.

Objection overruled and exception allowed.

A. The Record, I believe; the Keyport Record, and there is another paper there, I have just forgotten the name of it.

Q. Did anyone call it to your attention, or say anything to you about the article in the newspaper?

30 Mr. Tomlinson: I object.

Objection sustained.

Cross examination by Mr. Tomlinson.

Q. Your recollection, Mr. Sturla, about this occurrence is very vivid? A. What?

Q. (Question repeated). A. Yes.

Q. You have no doubt about anything that you have testified to here today? A. I do.

40 Q. Have you? A. I do.

Robert Sturla—For Plaintiff—Cross.

Q. Have you any doubt—— A. I remember, yes.

Q. You say you have no doubt whatsoever about anything you have testified to as being the truth? A. Everything is correct that I have any knowledge of, yes, sir.

10

Q. Now, as I understand you, you and Mr. Hughes sat together, did you? A. We sat opposite one another.

Q. You sat opposite one another? A. Yes.

Q. And who sat in the same seat with you? A. Mr. Reiff.

Q. And who sat with Mr. Hughes? A. Mr. Hanley.

Q. Which way were Mr. Hanley and Mr. Hughes facing? A. Toward the locomotive; toward Freehold.

20

Q. In the direction the train was going? A. Yes, sir.

Q. Sure about that? A. Yes, sir.

Q. You are sure that Mr. Reiff was riding backwards? A. Yes, sir, he was riding backwards.

Q. Did you hear Mr. Reiff while he was on the witness stand? A. Yes, I did.

Q. Didn't you hear him say he was riding forward? A. No; the opposite way.

30

Q. Didn't he—— A. I understood him to say the opposite way he was riding—the opposite way, with his back toward the engine.

Q. You say he was riding the opposite way from what he said he was? A. That's right.

Q. You think your recollection better than Mr. Reiff's, don't you? A. I don't know.

Q. There were fifteen or twenty people in the car? A. About that.

40

Robert Sturla—For Plaintiff—Cross.

Q. Did you know many of them? A. I know a few.

Q. You knew quite a few, didn't you? A. Why, Mr. Jones, is one, and Mr. Fisher is another, Mr. Kinney is another, and a number of other people; I don't remember them by name.

10 Q. Any of them here? A. No.

Q. When you got to Freehold, you went out through the baggage compartment, didn't you? A. Yes.

Q. And your crowd was practically toward the tail end, to get out? A. About the center of the car.

Q. You think that you were about in the middle of the people who were leaving the car? A. About the center; we were sitting about the center of the car.

20 Q. I don't think you understand me. When you started to get off the train at Freehold— A. Yes.

Q. —you and Mr. Reiff and Mr. Hanley and Mr. Hughes and Mr. Miller were among the last to leave the car? A. About the last?

Q. About the last? A. A few men got off afterwards.

30 Q. And Reiff got off first? A. I believe he did.

Q. And then Hanley? A. Yes.

Q. And then Hughes? A. Yes.

Q. That's right? A. Yes.

Q. And then you? A. Yes.

Q. And then Miller? A. Yes.

Q. Now, you said you had not pulled any rope? A. No, sir.

Q. You didn't notice anybody pull any rope? A. No, sir.

40 Q. As you went out, didn't you jam down

Robert Sturla—For Plaintiff—Cross.

Iverson's cap over his head while Miller pulled the lever on the back-up whistle? A. I did not.

Q. You did not? A. No.

Q. Positive about that? A. Positive.

Q. You know Iverson quite a while? A. Knew him on the train, riding on the train.

Q. Knew him for some time? A. I don't know; probably about a couple of years, I guess.

Q. Didn't you hear somebody pull that whistle? A. No, sir.

Q. Do you know what a back-up whistle is? A. I have seen it there; I know what it is, yes.

Q. You live at Farmingdale? A. I do.

Q. How long have you lived there? A. Over five years.

Q. You have lived there steadily for the past five years? A. Yes.

Q. This is not your first law suit against the railroad, is it? A. The first one.

Q. What? A. I never had any.

Q. You say this is the first suit you have brought against the Central Railroad Company?

A. That is for myself, yes. I had one suit—a property damage case.

Q. You did? A. A property damage case.

Q. This is not your first case? A. No.

Q. You brought suit in New York, in another State? A. I did, yes.

Q. You were living in Farmingdale? A. I was living in Farmingdale; my residence was here.

By Mr. Stokes:

Q. When was that suit brought? A. About two years ago.

Motion for Direction of Verdict.

Q. In that case—— A. My attorney was Mr. Stricker at Perth Amboy.

Q. Your attorney? A. Yes.

Q. You brought suit against the company? A. Yes.

10 By Mr. Tomlinson:

Q. And the jury brought in a verdict, returned against you? A. Yes.

By Mr. Stokes:

Q. That was because it was brought in New York, I suppose.

The Court: No, don't let's do that.

Mr. Stokes: We rest, if the Court please.

20

Mr. Tomlinson: We rest our case.

The Court: Proceed.

Mr. Tomlinson: I ask for a direction of a verdict in this case in favor of the defendant upon the ground that it appears affirmatively from the testimony adduced upon the part of the plaintiffs that this prosecution was instituted by George Robinson. That it appears affirmatively from such evidence——

30

The Court: Before the motion is argued, I think, Mr. Stokes, I would like to hear some more evidence in the case, for while you have rested, and I have no notion to volunteer anything, at the same time, I think that Mr. Brown should have been examined in this case, and you have not produced him.

40

Mr. Stokes: It has been admitted here that he is a lawyer employed by the Central Railroad; he has his office in the same building——

Motion for Direction of Verdict.

Mr. Tomlinson: I don't think that is fair. I didn't ask for a non suit. I put in my entire case and rested my case, and I think I have the right to stand or fall now.

The Court: I am inclined to think that is so. 10

Mr. Tomlinson: If I had asked for a non suit, it would have been a different proposition, but I did not.

The Court: I am going to examine this case very carefully, and will give you ample opportunity to be heard. There are many cases here; whether this is one of the exceptions to the rulings of the Court in these cases is a matter of argument. We will take a recess until three o'clock. (To the Jury.) Don't let anyone talk to you about this case. 20

(A recess is taken to afford a conference and argument of counsel before the Court, not in the presence of the Jury.)

The Court: There was a motion for a direction in this case, and the Court has concluded to deny the motion for the reason that it feels the case should go to the Jury to ascertain as a fact under the evidence offered whether the defendant company through its agents and employees, other than the so-called state policeman, instigated the prosecution in question, or whether the defendant company, through its agents and employees, were active in forwarding the prosecution, the Court having in mind the testimony as to Mr. Robinson and with respect to the train dispatcher and the other 30 40

Judge's Charge.

evidence in the case—especially as to the appearance at the hearing of Mr Brown, who appears to have been an employee of the company and who participated in the prosecution of the defendant at the hearing.

10 Mr. Tomlinson: Your Honor will, of course, allow me an exception to your refusal to direct a verdict in favor of the defendant.

The Court: You may have your exception.

Judge's Charge.

THE COURT:

20 Gentlemen of the Jury, you are sufficiently informed from the evidence in this case to know that the plaintiffs here seek damages for what they term an act of malicious prosecution on the part of the defendant railroad company, and it is my duty to state to you that the "company cannot be held unless you find as a fact under the greater weight of evidence, the burden of which is on plaintiffs, that the company, through its employes or agents, instigated this prosecution, or through such agents and employes, 30 was active in forwarding the same."

It appears that these men had been arrested on a charge of tampering with the signal apparatus on one of the trains, and if they had done so, it was a misdemeanor under our statute. You have heard the section referred to, which defines such offense under the statute, in this case; and in the proceedings in this Court, it is necessary

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Judge's Charge.

also that you should be satisfied under the greater weight of the evidence,—and the plaintiffs carry again the burden, in showing that the proceeding was malicious and without probable cause.

It does appear that as a result of such occurrence, said to have been contrary to the statute, 10
 a train dispatcher of the defendant company notified a Mr. Robinson, who was a railroad policeman,—and it is important that you bear in mind the nature of Robinson's employment. He occupied a post created by a statute of the State; on the recommendation of a railway company, the Governor has authority to appoint such person so designated by the company to act as a policeman for the company, and to issue 20
 to such person so appointed a commission, and when so appointed and commissioned, such person "shall, in the counties through which such railroad may run, possess all the powers of policemen and of constables in criminal cases in the several cities or municipalities of the county and shall receive from the company by which employed such compensation as shall be agreed upon between the company and the person." And then follows a provision as to the 30
 use of insignia when on duty—which doesn't appear to be material in this case.

Now, it has been held by the Supreme Court of the State and affirmed by the Court of Appeals, that when an arrest is made by a State Railway Policeman, the officer represents the State and not the company, and therefore if he should maliciously and without probable cause make an arrest, there would be no liability on the part of the company. In other words, if he 40

Judge's Charge.

were the sole person instigating the prosecution, what he might do would be as a policeman representing the State.

10 So the cases hold, and therefore in this case, the only way that the defendant company could be held liable at all would be in the event that the Jury found as a fact that the company, through its employees or officers, aside from the State Railway Policeman, instigated the prosecution, or was active in forwarding the same.

20 Now, while the Court has ruled upon a motion here, you will understand that that in no way expresses the opinion of the Court. You are the judges of the facts, and it is your duty to ascertain the facts in the case, guided by the direction of the Court as to the law, and therefore it is necessary for you to find as a fact, gentlemen, that the employees or agents of the company instigated this prosecution or actively participated in such a way that under the greater weight of the evidence you are able to say as a fact that, through such agents and employees, the company instigated this act.

30 Now, the question arises whether the request for an investigation by the train dispatcher, and the appearance of Mr. Brown at the hearing would justify the Jury in finding as a fact that agents and employees of the company instigated and forwarded this prosecution. If your answer is in the affirmative, then I charge you, you would have a right to consider the question of damages, but not otherwise.

40 It is said that Mr. Brown was in the employment of the railroad company in some capacity; as legislative agent, for example, or as a repre-

Judge's Charge.

sentative of the company on what is known as a Committee of safety, which you have heard designated and described to you by counsel of the defendant company as a witness. That at the hearing the crew of the train upon which the occurrence in question is said to have been appeared, and Mr. Brown also appeared. Now, you can find from the evidence in what capacity he appeared. Did he appear to prosecute the plaintiffs? That would be the natural inquiry that would arise from the admission of the fact that he did appear. Did he appear for the company in an unsuccessful prosecution of the proceeding, maliciously instituted and without probable cause? 10

Malice in the law is said to be the intentional doing of a wrongful act, without just cause or excuse, and it is claimed here by the plaintiffs that the complaint and warrant and hearing were made and issued and carried on without just cause and excuse, and therefore was maliciously done, within the meaning of the law, and that the making of the complaint and the arrest of the plaintiffs were without probable cause. 20

So, gentlemen, it is for you to say as a fact whether these essential elements have been established under the greater weight of the evidence by the plaintiffs. If you find, for example, that there was no malice of the description defined, but there was probable cause, then there could be no recovery. The test is that it must have been maliciously, and without probable cause, and if that be so, then you would have the right to consider the question of assessing damages. 30

Judge's Charge.

10 It appears that these men were arrested, deprived of their liberty in such a way as to be physically restrained for some hours, until bail was procured, conditioned for their appearance at a subsequent hearing of the complaint, and in fact they did subsequently appear and the hearing was held, at which the persons were present as indicated to you heretofore. These persons referred to were either employed by the railroad company as trainmen or as agents, as in the case of Mr. Brown.

20 Now, gentlemen, should you decide that this prosecution was malicious and without probable cause, bearing in mind that the act of Robinson in view of the law, cannot be charged to the defendant company, so far as his participation is concerned, and that the railroad company can only be held in the event that you find its agents or employees instigated the prosecution, and that their appearance at the hearing was in evidence, it is only with such evidence that you can pass on the question of damages.

30 What sum shall be returned, if any, rests in the sound discretion of you gentlemen. An element would be deprivation of their liberty and humiliation suffered. I do not recall any evidence in the case of special damage claimed; therefore it is not for you to say. Whatever sum you return, if any, the Court expresses no opinion one way or the other, except that it shall be what in your sound judgment you think will compensate them for the arrest, deprivation of their liberty and the humiliation suffered.

Mr. Stokes: There are three separate suits here. I ask for a verdict for each one.

40 The Court: The complaint filed here is made

Exceptions to Charge.

by three persons. Under our statute, it is brought as a single suit. In assessing damages, if any, they should be separately returned in assessing for the three of them, but with that remark, the Court gives you no opinion whatever; you will bear in mind the law as the Court has endeavored to give to you. 10

JURY RETIRES.

Mr. Tomlinson: The defendant prays an exception to that part of the Court's charge where your Honor in substance says the defendant cannot be held unless it is shown to have instigated the prosecution. 20

Exception allowed.

Mr. Tomlinson: The defendant also prays for an exception to that part of your Honor's charge where you said in substance the only event in which the defendant can be held liable is that if the Jury should find as a fact that the defendant, through its employees and officers, instigated the prosecution, and was active in forwarding the same.

Exception allowed. 30

Mr. Tomlinson: The defendant also prays an exception to that part of your Honor's charge where you, in substance, say: "The question then arises whether action of the train dispatcher and of Brown constitutes a participation." That is not the exact language, but in substance and also an exception to that part of your Honor's charge where you say, in substance, "at the hearing, the train crew appeared, and Brown also appeared, you must find in what capacity 40

Exceptions to Charge.

he appeared; did he appear in an unsuccessful prosecution, maliciously and without cause, instituted?"

Exception allowed.

10 Mr. Tomlinson: Defendant also prays an exception to that part of your Honor's charge wherein you say, in substance, if the prosecution you find was instigated by the company, or that it was active in forwarding the same,—that it is necessary for the plaintiff to show that they were acting as agents of the company for this purpose, and were not acting solely of their own volition,—it must be shown the prosecution was instigated by the company, or its agents, or that it was active in forwarding the same. My
20 complaint is that your Honor should have stated that the Jury must find that these were agents of the company in that cause, and were not acting of their own volition.

In addition, your Honor spoke about the presence at the hearing of certain persons; you said that at the hearing there were persons either employed by the railroad as members of the crew, or, as in the case of Brown, as an agent. I would like an exception to that also.

30 Exception allowed.

Notice of Appeal to Supreme Court.

Filed July 10, 1925.

MONMOUTH COUNTY COURT OF COMMON
PLEAS.

10

ROBERT STURLA, JOHN MILLER
and CHARLES REIFF,
Plaintiffs,

vs.

THE CENTRAL RAILROAD COM-
PANY OF NEW JERSEY,
Defendant.

Action
at Law.

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To: STOKES & McDERMOTT, Esqs.,
Attorneys for Plaintiffs:

Sirs:

30

PLEASE TAKE NOTICE that the defendant, The
Central Railroad Company of New Jersey, here-
by appeals to the New Jersey Supreme Court
from the whole and every part of the judgment
rendered in the above stated cause.

Dated, June 13th, 1925.

WM. A. BARKALOW,
Attorney for Defendant.

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Grounds of Appeal.

Filed July 20, 1925.

NEW JERSEY SUPREME COURT,

ROBERT STURLA, JOHN MILLER and CHARLES REIFF, Plaintiffs, <i>vs.</i> THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, Defendant.	}	On Appeal from Mon- mouth County Court of Common Pleas.	10
			20

To: STOKES & McDERMOTT, Esqs.,
 Attorneys for Plaintiffs-Respondent:

Sirs:

PLEASE TAKE NOTICE that the following are the grounds upon which the defendant, The Central Railroad Company of New Jersey, appeals from the judgment heretofore entered in this cause against it: 30

1. The said judgment was given for the plaintiffs, Robert Sturla, John Miller and Charles Reiff, against the defendant, The Central Railroad Company of New Jersey, whereas by the law of the land judgment should have been given for the said The Central Railroad Company of New Jersey and against the said Robert Sturla, John Miller and Charles Reiff.

2. The judge before whom the trial of the issued joined between the parties was had, erro- 40

Grounds of Appeal.

neously denied defendant's motion for the direction of a verdict in its favor at the close of the entire case.

- 10 3. The said judge erroneously propounded to the witness George W. Robinson, and required said witness to answer over the objection of the defendant, the following question:

“Q. I would like to ask you one or two questions, Mr. Robinson. How many complaints in which the Railroad Company is not interested have you made since you were appointed?”

- 20 4. The said judge erroneously permitted the plaintiff Charles Reiff, produced as a witness, to answer over the defendant's objection the following question:

“Q. What did Mr. Brown do in your presence, Mr. Reiff?”

5. The said judge erroneously permitted the plaintiff Charles Reiff, produced as a witness, to answer over the defendant's objection the following question:

- 30 “Q. And at the close of the examination, what did he do?”

6. The said judge erroneously permitted the plaintiff Charles Reiff, produced as a witness, to answer over the defendant's objection the following question:

“Q. What did Mr. Brown do, if anything, at the close of the taking of the testimony?”

- 40 7. The said judge erroneously permitted the plaintiff Charles Reiff, produced as a witness,

Grounds of Appeal.

to answer over the defendant's objection the following question:

“Q. Was Joseph Creby present at that hearing?”

8. The said judge erroneously permitted the plaintiff Charles Reiff, produced as a witness, to answer over the defendant's objection the following question: 10

“Q. He was examined and questioned by Mr. Brown?”

9. The said judge erroneously permitted the plaintiff Charles Reiff, produced as a witness, to answer over the defendant's objection the following question: 20

“Q. Was Mr. Creby the conductor of the train that you were on on July 22, 1924?”

10. The said judge erroneously permitted the plaintiff Charles Reiff, produced as a witness, to answer over the defendant's objection the following question:

“Q. Was Wesley Price a witness there?” 30

11. The said judge erroneously permitted the plaintiff Charles Reiff, produced as a witness, to answer over the defendant's objection the following question:

“Q. And John Iverson—was he also a witness?”

12. The said judge erroneously permitted the plaintiff John R. Miller, produced as a witness, 40

Grounds of Appeal.

to answer over the defendant's objection the following question:

“Q. What did you see Mr. Robinson do, if anything, while he was there?”

10 13. The said judge erroneously permitted the plaintiff John R. Miller, produced as a witness, to answer over the defendant's objection the following question:

“Q. Was anyone else sworn except those three?”

20 14. The said judge erroneously permitted the plaintiff John R. Miller, produced as a witness, to answer over the defendant's objection, the following question, and erroneously refused on defendant's motion to strike out the following answer thereto:

“Q. No, right before it was dismissed.
A. Before it was actually dismissed, and after the evidence was all in, Mr. Brown got up and summed up the case.”

30 15. The said judge erroneously permitted the plaintiff Robert Sturla, produced as a witness, to answer over the defendant's objection the following question:

“Q. At that hearing, who appeared?”

16. The said judge erroneously permitted the plaintiff Robert Sturla, produced as a witness, to answer over the defendant's objection the following question:

40 “Q. And after the hearing of witness was closed, what did he do?”

Grounds of Appeal.

17. The said judge erroneously permitted the plaintiff Robert Sturla, produced as a witness, to answer over the defendant's objection the following question:

“Q. Did you read anywhere an account of this in any newspaper?” 10

18. The said judge erroneously permitted the plaintiff Robert Sturla, produced as a witness, to answer over the defendant's objection the following question:

“Q. And in what paper did you read that?”

19. The said judge erroneously charged the jury as follows: 20

“the Company cannot be held unless you find as a fact under the greater weight of the evidence, the burden of which is on plaintiffs, that the Company, through its employees or agents, instigated this prosecution, or through such agents and employees, was active in forwarding the same.”

20. The said judge erroneously charged the jury as follows: 30

“the only way that the defendant company could be held liable at all would be in the event that the jury found as a fact that the company, through its employees or officers, aside from the State Railway Policeman, instigated the prosecution, or was active in forwarding the same.”

Grounds of Appeal.

21. The said judge erroneously charged the jury as follows:

10 “the question arises whether the request for an investigation by the train dispatcher, and the appearance of Mr. Brown at the hearing would justify the jury in finding as a fact that agents and employees of the company instigated and forwarded this prosecution. If your answer is in the affirmative, then I charge you, you would have a right to consider the question of damages, but not otherwise.”

22. The said judge erroneously charged the jury as follows:

20 “It is said that Mr. Brown was in the employment of the Railroad Company in some capacity; as legislative agent, for example, or as a representative of the company on what is known as a Committee of Safety, which you have heard designated and described to you by counsel of the defendant company as a witness. That at the hearing the crew of the train upon which the occurrence in question is said to have been appeared, and Mr. Brown also appeared. Now, you can find from the evidence in what capacity he appeared. Did he appear to prosecute the plaintiffs? That would be the natural inquiry that would arise from the admission of the fact that he did appear. Did he appear for the company in an unsuccessful prosecution of the proceeding, maliciously instituted and without probable cause?”

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Grounds of Appeal.

23. The said judge erroneously charged the jury as follows:

“It appears that these men were arrested, deprived of their liberty in such a way as to be physically restrained for some hours, until bail was procured, conditioned for their appearance at a subsequent hearing of the complaint, and in fact, they did subsequently appear and the hearing was held, at which the persons were present as indicated to you heretofore. These persons referred to were either employed by the railroad company as trainmen or as agents, as in the case of Mr. Brown.” 10

24. The said judge erroneously charged the jury as follows: 20

“should you decide that this prosecution was malicious and without probable cause, bearing in mind that the act of Robinson in view of the law, cannot be charged to the defendant company, so far as his participation is concerned, and that the railroad company can only be held in the event that you find its agents or employees instigated the prosecution, and that their appearance at the hearing was in evidence, it is only with such evidence that you can pass on the question of damages.” 30

Yours respectfully,

WM. A. BARKALOW,
Attorney for Defendant-Appellant.

Dated, July 16th, 1925.

Opinion of Supreme Court.

NEW JERSEY SUPREME COURT.

No. 61. OCTOBER TERM, 1925.

10

ROBERT STURLA, JOHN MILLER
and CHARLES REIFF,
Plaintiffs-Respondents,

vs.

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,
Defendant-Appellant.

20

On Appeal from the Monmouth County Common
Pleas.

Submitted November 5, 1925; decided February
18, 1926.

Before GUMMERE, Chief Justice, and Justices
KALISCH and CAMPBELL.

30

For appellant, DeVoe TOMLINSON and GEORGE
HOLMES.

For respondents, WILLIAM HARTSHORNE.

PER CURIAM:

The action is for malicious prosecution and
each of the three plaintiffs recovered verdicts of
\$300. From the judgment entered upon such ver-
dict this appeal is taken. They were arrested by
a railway policeman in the employ of the appel-

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Opinion of Supreme Court.

lant on a charge of unlawfully pulling the emergency stop cord on a train on which they were riding from Freehold to Matawan. They were locked up for some hours, then taken to the Mayor's court in Keyport where a hearing was had upon the charge which hearing resulted in a discharge of the plaintiffs-respondents. The proofs show that Robinson, the member of the railway police who made the charge against respondents, had been notified by the train dispatcher of the appellant at Long Branch that this whistle cord on a particular train had been interfered with and was directed to make an investigation: that Robinson proceeded to make an investigation and as a result made the complaint against the respondents. The proofs further show that at the hearing certain employees of the appellant appeared as witnesses and an attorney of appellant also was present apparently for the purpose of conducting the prosecution.

The first ground urged for reversal is that the trial court erred in refusing to direct a verdict in favor of appellant. This motion was based upon the ground that Robinson, who made the complaint, had his commission as a police officer from the State under Section 4, Comp. Stats., p. 369, and was responsible for his acts to the State and that no liability for his acts was imputable to appellant.

We find the proofs such, however, that a jury question was raised as to whether Robinson's acts were instigated by the appellant Company or by some of its officers and employees, likewise as to the acts of those employees who attended the trial as witnesses and that of the attorney of

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Opinion of Supreme Court.

appellant who attended the hearing and prosecuted the complaint.

Tucker vs. Erie Railway Co., 69 N. J. L. 19.

10 Goldberg vs. Central R. R. Co., 97 N. J. L. 374.

Rockwell vs. Erie R. R. Co., 128 Atl. 482.

The remaining ground urged for reversal is alleged error in the charge of the trial court as contained in the following excerpts:

20 (a) "The question arises whether the request for an investigation by the train dispatcher, and the appearance of Mr. Brown at the hearing would justify the jury in finding as a fact that agents and employees of the company instigated and forwarded this prosecution. If your answer is in the affirmative, then I charge you, you would have a right to consider the question of damages, but not otherwise."

30 (b) "It is said that Mr. Brown was in the employment of the railroad company in some capacity; as legislative agent, for example, or as a representative of the company on what is known as a Committee of Safety which you have heard designated and described to you by counsel of the defendant company as a witness. That at the hearing the crew of the train upon which the occurrence in question is said to have been, appeared. Now you can find from the evidence in what capacity he appeared. Did he appear to prosecute the plaintiffs? That would be the natural inquiry that would arise from the admission of the fact that he did appear. Did he appear
40 for the company in an unsuccessful prosecution

Opinion of Supreme Court.

of the proceeding, maliciously instituted and without probable cause?"

(c) "It appears that these men were arrested, deprived of their liberty in such a way as to be physically restrained for some hours, until bail was procured, conditioned for their appearance at a subsequent hearing of the complaint, and in fact, they did subsequently appear and the hearing was held, at which the persons were present as indicated to you before. These persons referred to were either employed by the railroad company as trainmen or as agents as in the case of Mr. Brown." 10

(d) "Should you decide that this prosecution was malicious and without probable cause, bearing in mind that the act of Robinson, in view of the law cannot be charged to the defendant company, so far as his participation is concerned, and that the railroad company can only be held in the event that you find its agents or employes instigated the prosecution, and that their appearance at the hearing was in evidence, it is only with such evidence that you can pass upon the question of damages." 20

We find no error therein, particularly when the charge as a whole is read and considered. 30

The instructions contained therein are in line with the law as expressed in the cases referred to under the first ground of appeal.

The judgment below is affirmed, with costs.

Exhibit P-1.

PAY CHECK

Accounting Department D

No. 16851 JOD

10

New York, N. Y., July 15th, 1924

PAY TO THE ORDER OF George W. Robinson

Eighty-seven & 10/100 Dollars \$87.10

For services rendered as shown on pay roll for
first half of month of July, 1924

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY

20

Not Negotiable unless Countersigned

F. T. DICKERSON

Treasurer

Countersigned

C W KINSMAN

To the
COAL AND IRON NATIONAL BANK
of New York

30

40

Exhibit P-1.

(Endorsements)

The endorsement on this check must correspond with the name as written in the body thereof. If the endorsement be made by mark (X) the signature must be witnessed.

Sign Here.

George W. Robinson. 10

Pay to the Order of
Second National Bank
and Trust Company
of Red Bank, N. J.

The New York & Long Branch R. R. Co.

By C. W. Elliott
Agent.

Pay National Park Bank
New York, N. Y. 20
or Order

Endorsements Guaranteed
The Second Nat'l Bank & Trust Co.
(55-268)

Red Bank, N. J.
Philip S. Walton, Cashier

Received Payment
Through New York Clearing House
Endorsement Guaranteed 30
Jul 29 1924

The National Park Bank of N.Y.
1-54

Treasurer
The
Central Railroad
Company
of New Jersey

PAID
Jul 30 1924 40

Exhibit P-2.

PAY CHECK

Accounting Department D
No. 16831-GFH

10

New York, N. Y., July 31st, 1924

PAY TO THE ORDER OF George W. Robinson
Ninety two and 90/100 Dollars \$92.90
For services rendered as shown on pay roll for
last half of month of July, 1924

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY

20

Not Negotiable unless Countersigned

F. T. DICKERSON
Treasurer

Countersigned
C. W. KINSMAN

To the
COAL AND IRON NATIONAL BANK
of New York

30

40

Exhibit P-2.

(Endorsements)

The endorsement on this check must correspond with the name as written in the body thereof. If the endorsement be made by mark (X) the signature must be witnessed. 10

Sign Here.

George W. Robinson.

Pay to the Order of
Second National Bank
and Trust Company
of Red Bank, N. J.

The New York & Long Branch R. R. Co.

By W. W. Van Note

Agent 20

Pay National Park Bank
New York, N. Y.
or Order

Endorsements Guaranteed

The Second Nat'l Bank & Trust Co.

(55-268)

Red Bank, N. J.

Philip S. Walton, Cashier 30

Received Payment

Through New York Clearing House

Endorsement Guaranteed

Aug 13 1924

The National Park Bank of N.Y.

1-54

40

Exhibit P-3.

A 579

STATE OF NEW JERSEY

(Seal)

TO GEORGE W. ROBINSON, GREETING:

10 WHEREAS, *the CENTRAL RAILROAD COMPANY OF NEW JERSEY have in pursuance of an act entitled "An Act concerning Carriers" (Revision of 1904,) approved March twenty-ninth, one thousand nine hundred and four, designated you to act as Railroad Policeman for said corporation.*

20 THEREFORE *you the said GEORGE W. ROBINSON, are by these presents commissioned to be RAILROAD POLICEMAN for said Corporation and to possess "In the Counties (in this State) through which such Railroad may run all the powers of policemen and constables in criminal cases of the several townships and municipalities in such counties," to have and to hold the said commission until the same shall be revoked in the manner prescribed in the fourth section of the above recited act.*

IN TESTIMONY WHEREOF, *the GREAT SEAL of the State is hereunto affixed.*

30 WITNESS, *the GOVERNOR of the State of New Jersey, at Trenton, this Twenty-sixth day of September in the year of our Lord, one thousand nine hundred and 16 and of the Independence of the United States the one hundred and forty first.*

[The Great
Seal of the
State of
New
Jersey]

JAMES F. FIELDER
Governor.

By the Governor:

40 THOMAS F. MARTIN
Secretary of State.

Exhibit P-4.

A 579

STATE OF NEW JERSEY

DEPARTMENT OF STATE

10

I, THOMAS F. MARTIN, Secretary of State of
the State of New Jersey,

DO HEREBY CERTIFY

That GEORGE W. ROBINSON has this day been
commissioned by the Governor to be a Railroad
Policeman, for the Central R. R. Co. in pursu-
ance of an act entitled "An Act concerning car-
riers" (Revision of 1904), approved March
twenty-ninth, one thousand nine hundred and
four. 20

In Witness Whereof, I have hereunto set my
hand and official seal this Twenty-sixth day of
September, A. D. 1916.

THOMAS F. MARTIN,
Secretary of State.

(Reverse side)

Signature of Appointee: 30
GEORGE W. ROBINSON.

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Exhibit P-5.

STATE OF NEW JERSEY }
County of Monmouth } ss.:

10 GEORGE W. ROBINSON, C. R. R. Detective of the Boro of Keyport in the County of Monmouth and State of New Jersey, upon his oath complains and says that on the 22nd day of July A. D. 1924 at the Boro. of Freehold in the County aforesaid:

20 One Charles Reiff of Adelphia, county and state above written, as he is informed and believes, did on the above named date pull the emergency cord on train No. 4297 going into Freehold station, and after train stopped at station, he again pulled cord and blew whistle causing engineer to start train, and an accident was avoided when Conductor Creby who was in charge of said train signalled for engineer to stop, thereby the said Charles Reiff becomes a disorderly person.

30 WHEREFORE, he prays that the said Charles Reiff may be apprehended and held to answer to said Complaint, and dealt with as law and justice may require.

GEORGE W. ROBINSON.

Subscribed and sworn to at Keyport,
N. J. the 28th day of July, A. D.
1924, before me

.....
Justice of the Peace.

New Jersey Court of Errors and Appeals

ROBERT STURLA, JOHN MILLER and CHARLES REIFF, Plaintiffs-Respondent, <i>vs.</i> THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	} On Appeal from Supreme Court.
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BRIEF FOR DEFENDANT-APPELLANT.

This action was instituted in the Court of Common Pleas of Monmouth County by Robert Sturla, John Miller and Charles Reiff, against The Central Railroad Company of New Jersey, to recover damages for an alleged malicious prosecution claimed to have been instituted and instigated by the said defendant corporation.

The action was tried in the said Monmouth Pleas and there was a verdict in favor of all three plaintiffs.

An appeal was then taken by the said defendant to the Supreme Court, which affirmed the judgment of the Monmouth Pleas.

It is to review such judgment of the Supreme Court that the present appeal is taken.

Statement of the Facts.

The case presented by the plaintiffs was in substance that they were commuters on the trains

of the defendant railroad between Freehold and New York City; that both the trip from Freehold to New York in the morning and the trip from New York to Freehold in the evening required a change of cars at Matawan; that on July 29th, 1924, while on the morning trip from Freehold to New York, a constable named Crawford boarded the train at Freneau, which is a station between Freehold and Matawan, with a warrant for the arrest of all three plaintiffs, which he then proceeded to execute by taking the plaintiffs into custody; that the warrant was issued by Thomas Smith, a justice of the peace at Keyport, New Jersey; that upon the arrival of the train at Matawan the three plaintiffs were taken from the train to an automobile and by said automobile conveyed to Keyport, where they were confined in the Borough Hall until the arrival of Justice Smith, at which time they were arraigned and gave bail for a hearing; that the hearing was heard on August 6, 1924, and at the termination thereof the three plaintiffs were discharged.

The complaints upon which the warrant was issued were signed by George W. Robinson, and charged the defendant with pulling the emergency cord and blowing the whistle on one of the defendant's trains on July 22nd, 1924 (Rec. 122, Exhibit P-5). Such an act, if in fact committed, would, of course, constitute a misdemeanor under Section 79 of the Crimes Act (2 N. J. Compiled Statutes, p. 1771, P. L. 1898, p. 816).

It was undisputed that said Robinson was at the time a railway policeman, duly appointed and commissioned as such by the Governor of the State of New Jersey under and pursuant to Section 4 of the Carriers' Act of New Jersey (P. L. 1904, p. 323, as amended by P. L. 1911, p. 689) (Rec. 14, 15, 23, 24, 25).

Robinson was produced as a witness by the plaintiff, and testified that on the night of July 22nd, 1924, he received word from the train dispatcher of the defendant at East Long Branch that the whistle cord on this train had been interfered with; that as a result of that information he, Robinson, proceeded to make an investigation and that as a result of such investigation he signed the complaints; that his actions in signing the complaints were solely of his own volition and not by virtue of any orders or instructions from the defendant railroad company (Rec. 17, 18, 49, 50, 51); that when he received the aforesaid message from the train dispatcher, such dispatcher did not furnish Robinson with the names of any persons alleged to have caused or been implicated in the affair in question, but simply told him of the occurrence and asked him to investigate it (Rec. 52). At the hearing which was held, as aforesaid, on August 6th, 1924, there appeared as witnesses some members of the train crew of the train on which the whistle and bell cord were alleged to have been interfered with. There also appeared as attorney for the prosecution T. J. R. Brown, who is and was an attorney of the State of New Jersey, and who, it was testified, was in the employ of the defendant company (Rec. 38, 39, 62, 63).

There was no testimony nor evidence, however, even in the slightest degree, that Mr. Brown attended such hearing by virtue of any request, order or instruction from the defendant corporation.

The Questions Involved on This Appeal.

It is submitted that the Trial Court erred (and that consequently the Supreme Court erred, in affirming instead of reversing the judgment below) in the following respects:

I.

Because said Trial Court denied defendant's motion for a direction of a verdict.

II.

Because said Trial Court committed error in its charge to the jury.

A R G U M E N T .

POINT I.

The Trial Court erroneously refused to direct a verdict in favor of the defendant.

At the close of the plaintiffs' case the defendant rested and moved for a direction of a verdict (Rec. 94). This motion was denied, and we think that such denial constituted error.

An examination of the record will disclose that the plaintiffs sought to establish a connection between the defendant and the instigation or institution of the prosecution in question in the following particulars: First, by reason of the action of Robinson in signing the complaints; Second, because of the fact that the train dispatcher requested Robinson to make an investigation; Third, in that the train crew appeared as witnesses at the hearing, and Fourth, in that Mr. Brown appeared at the hearing as counsel for the prosecution.

As to the first ground, i.e. the acts of Robinson with reference to the prosecution, the Trial Court eliminated this from the consideration of the jury, holding that since Robinson was a State Railway Policeman he was responsible for the proper performance of his duties to the State of New Jersey alone, and that consequently his actions in connection with the prosecution in the case at bar could not impose any liability or responsibility upon the railroad company. The Court's action in this regard was based upon and in line with the well settled rule enunciated in *Tucker v. Erie Railroad Co.*, 69 N. J. Law 19, and followed in *Kraft v. Erie R. R. Co.* (decided by the Supreme Court. Opinion unreported); *Paknis v. Pennsylvania R. R. Co.* (decided by the Supreme Court. Opinion unreported); *Goldberg v. The Central Railroad Company of New Jersey*, 99 N. J. Law 374; *Rockwell v. Erie R. R. Co.*, 128 Atl. Rep. 482; *Murray v. Payne, Director General of Railroads*, 273 Fed. Rep. 820.

The Court then submitted to the jury the question of whether or not the defendant company in any or all of the remaining three respects instigated or participated in the prosecution. The jury, as aforesaid, rendered a verdict for all three plaintiffs.

In affirming the judgment entered on said verdict, the Supreme Court held that there was evidence that "Robinson's acts were instigated by the appellant company or by some of its officers and employees, likewise as to the acts of those employees who attended the trial as witnesses and that of the attorney of appellant who attended the hearing and prosecuted the complaint" (Rec. 113, 114). In support of its decision the Supreme Court cited the cases of *Tucker v. Erie*

Railway Co., supra; Goldberg v. Central R. R. Co., 97 N. J. Law 374; Rockwell v. Erie R. R. Co., supra.

It is, of course, conceded that if there was evidence that the defendant corporation had *instigated* this prosecution, the Trial Court was justified in submitting the case to the jury, but we insist that there was absolutely no evidence which proved or tended to prove any such instigation by the defendant with respect to: (A) any act upon the part of Robinson, the railway policeman, (B) any act upon the part of the members of part of the train crew in attending the hearing and there testifying as witnesses, or (C) any act upon the part of Mr. Brown in attending the hearing and acting as counsel for the prosecution.

The opinion of the Supreme Court, as has been shown, was based upon the premise that there was such evidence, and if, as we insist, there was no such evidence, then clearly the judgment of the Supreme Court is without foundation and must be reversed.

This renders necessary a discussion of the evidence and the proofs adduced at the trial.

(A) The case was absolutely barren of any evidence whatsoever proving or tending to prove any instigation of the prosecution by the defendant regarding or with respect to any act or acts upon the part of Robinson, the railway State policeman.

The first question that presents itself is whether there was any evidence tending to show an instigation by the defendant corporation of the acts of Robinson, the railway State police-

man, who signed the complaint and who undeniably instituted the prosecution. For it is clear, of course, that unless the defendant corporation *instigated* Robinson's actions it cannot be held responsible therefor. Any authority upon his part to act on behalf of and bind the defendant corporation in doing any act which he performed in connection with this prosecution must be affirmatively shown and may not be *presumed*. *Tucker v. Erie Railway Co., supra; Kraft v. Erie R. R. Co., supra; Paknis v. Pennsylvania R. R. Co., supra; Goldberg v. Central R. R. Co., supra; Rockwell v. Erie R. R. Co., supra; Murray v. Payne, Director General of Railroads, supra.*

The evidence clearly showed and it was contradicted that Robinson received word from a train despatcher of the defendant that the whistle cord on the train in question had been interfered with, and that such train despatcher requested Robinson simply *to make an investigation*; that as a *result*, and *not as a part* of such investigation, Robinson signed the complaints against the plaintiffs and instituted the prosecution; that he signed such complaints and instituted such prosecution solely of his own volition and not because or by virtue of any order, request or instruction from the defendant company; and that he received no such order, request or instruction from the defendant company.

In view of the above, it is clear beyond argument that there was not in the entire case a single scintilla of evidence of any instigation by the defendant company of Robinson's actions, unless it be considered that the request by the train despatcher for an investigation of the tampering and interference with the train cord and whistle constituted such an instigation. We feel

that the answer to any such proposition as this must so obviously be in the negative as to hardly require discussion.

The despatcher simply mentioned to Robinson that he had received information that the whistle cord and whistle had been tampered with, and simply requested that Robinson make an investigation. It is to be noted particularly that the despatcher mentioned no names and accused no one, either by direct accusation or insinuation, of being the guilty party; neither did he request, instruct or order Robinson to make any arrest or arrests whatever. His sole and only request was for an investigation. Moreover, there was not a scrap of evidence to indicate that the despatcher was authorized by his employer, the defendant, to order or to cause an arrest or criminal prosecution to be made or instituted, and it is, of course, elemental that in the absence of a showing of such authority, either expressed or as within the scope of the servant's employment, the master is not responsible for the servant's acts. Certainly the ordering of an arrest or of a criminal prosecution cannot be said to be within the scope of the employment of a train despatcher. Even assuming, however, that the despatcher did in fact have authority, yet it is manifest that his message to Robinson was not a causation of or in any wise connected with the institution of the criminal prosecution.

It is consequently urged that there was no evidence which would have legally warranted the jury in finding that the defendant corporation instigated Robinson's acts, and that the Supreme Court accordingly fell into error in holding that there was such evidence.

(B) The case was absolutely barren of any evidence whatsoever proving or tending to prove any instigation of the prosecution by the defendant regarding or with respect to any act or acts upon the part of those members of the train crew who attended the hearing and there testified as witnesses.

The second question which it is necessary to consider and determine is whether the appearance at the hearing of the individuals comprising a portion of the train crew, and the fact that they testified at such hearing, constituted a participation in or instigation of the prosecution by the defendant company.

This proposition likewise seems hardly worthy of discussion. At the time that these members of the crew appeared, the complaints had already been signed and the plaintiffs had already been taken into custody. Therefore, their appearance at the hearing could in no way constitute an *institution* or *instigation* of the prosecution. Their sole acts consisted in taking the witness stand and giving their sworn testimony. There is not the slightest suggestion that their testimony was perjured or biased, and indeed the best proof of this fact is that they were the only witnesses sworn and that after their testimony was given the plaintiffs were discharged. It would indeed be going to such extreme lengths as to constitute an absurdity if it were to be said that a person simply by testifying as a witness at the hearing of a criminal complaint so participates in the institution and carrying on of such prosecution as to render his master a like participant.

Furthermore, there was no evidence whatever that the defendant company ordered, sent or re-

requested these men to attend the hearing, or was responsible for their appearance there. In addition, although any acts performed by such members of the train crew while actually on duty and operating their train would probably be deemed to be within the scope of their employment, yet it can certainly not be contended for a moment that their actions in appearing and testifying at the hearing of a criminal prosecution can be held to be within the scope of their employment, which was simply that of operating a railroad train.

It is accordingly most earnestly submitted that the Supreme Court erred in its holding that there was any evidence of instigation by the defendant company in the aforementioned respect.

(C) The case was absolutely barren of any evidence whatsoever proving or tending to prove any instigation of the prosecution by the defendant regarding or with respect to any act or acts upon the part of Mr. Brown in attending the hearing and acting as counsel for the complainant or prosecution.

The third and remaining question is whether the fact that Mr. Brown appeared at the hearing as counsel for the prosecution, examined the witnesses and summed up for the prosecution, can be legally said to have constituted a participation by the defendant railroad company in the prosecution in question. Mr. Brown is an attorney at law of New Jersey and is and was employed by the defendant railroad company. His title was that of Assistant Claims Attorney and in addition to that he held the title of Supervisor of Safety. His principal work in connection with

the railroad company was two-fold—first, in the handling of legislative matters, and second, in connection with “safety work” on the railroads. This work was performed by a committee commonly called a safety committee, and had for its purpose the reduction of accidents on the railroad. Examples of this work have been the requirement that machinists wear goggles to prevent eye injuries, the levelling of station platforms, the posting of signs in yards and shops cautioning workmen to watch out for engines. The conduct of passengers on trains does not come within the jurisdiction of the safety committee (Rec. 56, 57, 58, 59, 62, 63, 64).

At the time of Mr. Brown’s appearance in this case, i.e., at the hearing before the Justice of the Peace, the complaints had already been made and signed by Robinson and executed by the constable. The plaintiffs had been duly taken into custody and released on bail for the hearing. Mr. Brown’s sole connection with the case consisted in his examination of the witnesses and his summation to the Court.

A client is not responsible for the malicious acts of his counsel, unless it appears that he aided, abetted, advised, consented to, adopted or ratified such act, and such adoption or ratification must have been with full knowledge of all the facts, *26 Cyc. 20*. In the instant case there is not the slightest bit of evidence to show that Mr. Brown was instructed or authorized by the railroad company to appear at this hearing on its behalf, or that his appearance at such hearing was with its knowledge, acquiescence or approval. We think it clear that in the absence of such a showing, he could not by his actions at the hearing bind the defendant.

Of course, the fact that Mr. Brown conferred at such hearing with Robinson, the railroad State policeman, is absolutely without any legal significance and would not in any wise bind or impose liability upon the defendant company, for the reason that there was an entire absence of any evidence to show that Robinson, in so conferring, was acting under authority conferred upon him for that purpose by the defendant company, *Rockwell v. Erie R. R. Co.*, *supra*.

Conceding, however, that Mr. Brown was in the employ of the defendant railroad company, and that he was either instructed or expressly authorized by such company to appear at this hearing, we still insist that his actions did not constitute such a participation in the prosecution as to render the defendant liable for such prosecution, assuming that it was malicious.

To support an action for malicious prosecution the plaintiff must show by a preponderance of evidence—first, that the prosecution is ended, and that he is duly discharged; second, that the defendant *instituted* the proceedings against him without reasonable or probable cause; third, that the defendant was actuated by a malicious motive in making the charge, *McGowan v. Rickey*, 64 N. J. Law 402.

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 of these grounds, the plaintiff's suit must fail, *Vladar v. Klopman*, 89 N. J. Law 575.

In the case at bar, the proceeding was *instituted* by the signing of the complaints. The complaints were signed by Robinson, who, as has already been shown, did so solely of his own volition and without any orders or instructions to such effect from the defendant company.

Mr. Brown had absolutely nothing to do with the institution of this prosecution, and at the time of his appearance such prosecution had been fully put into motion.

This situation is then presented. A criminal prosecution is instituted by some person other than the defendant, or by some person for whom the defendant is not responsible. The arrest is made by some person for whom the defendant is not responsible. The persons arrested are arraigned before and held for hearing by a justice of the peace for whose actions the defendant is of course not responsible. They appear for hearing at a time fixed by said Justice of the Peace and then at such hearing the defendant makes its first contact with the case by having its attorney appear and participate in the examination of witnesses. Can it be said that because of the appearance of the attorney at almost the end of the entire prosecution, the attorney's employer or client has *instituted* such proceeding? We submit that this is not and cannot be the rule.

In conclusion, therefore, we urge and insist most earnestly, and we feel that a careful examination of the record will support this contention, that the case was barren of evidence to establish any institution or instigation of the prosecution by the defendant, either through the acts

of Robinson, the railroad policeman; or through the acts of those members of the train crew who appeared at the hearing; or through the acts of Mr. Brown, the attorney, and that this being so the Trial Court clearly erred in refusing to direct a verdict for the defendant, and the Supreme Court likewise clearly erred in affirming instead of reversing the judgment below.

POINT II.

There was error in the charge.

A.

The Court erroneously charged the jury as follows:

“the question arises whether the request for
“an investigation by the train despatcher,
“and the appearance of Mr. Brown at the
“hearing would justify the jury in finding
“as a fact that agents and employees of the
“company instigated and forwarded this
“prosecution. If your answer is in the af-
“firmative, then I charge you, you would
“have a right to consider the question of
“damages, but not otherwise.” (Ground of
Appeal 21.)

The effect of the foregoing portion of the charge was to permit the jury to find that the action of the train despatcher in requesting an investigation, and the action of Mr. Brown in appearing at the hearing constituted an instigation or institution by the defendant company of the prosecution so as to render said defendant liable therefor.

As we have endeavored to demonstrate under Point I, there could be no legal justification for such a finding by the jury.

It is submitted, therefore, that the above portion of the charge constituted prejudicial error.

B.

The Court erroneously charged the jury as follows:

“It is said that Mr. Brown was in the
 “employment of the Railroad Company in
 “some capacity; as legislative agent, for ex-
 “ample, or as a representative of the com-
 “pany on what is known as a Committee of
 “Safety, which you have heard designated
 “and described to you by counsel of the de-
 “fendant company as a witness. That at the
 “hearing the crew of the train upon which
 “the occurrence in question is said to have
 “been appeared, and Mr. Brown also ap-
 “peared. Now, you can find from the evi-
 “dence in what capacity he appeared. Did he
 “appear to prosecute the plaintiffs? That
 “would be the natural inquiry that would
 “arise from the admission of the fact that
 “he did appear. Did he appear for the com-
 “pany in an unsuccessful prosecution of the
 “proceeding, maliciously instituted and with-
 “out probable cause?” (Ground of Appeal
 22.)

The plain import of the above portion of the charge was that the jury was permitted to find that the fact that the train crew appeared and testified at the hearing, and the additional fact of Mr. Brown's appearance at such hearing, were sufficient in law to constitute an instigation or institution by the defendant company of the prosecution in question.

We think that we have shown under Point I of this brief that this proposition is legally unsound.

This being so, it is urged that the above portion of the charge was clearly erroneous. If it was erroneous, it cannot be denied that it was harmful to the defendant.

C.

The Court erroneously charged the jury as follows:

“It appears that these men were arrested, “deprived of their liberty in such a way as “to be physically restrained for some hours, “until bail was procured, conditioned for “their appearance at a subsequent hearing “of the complaint, and in fact, they did subsequently appear and the hearing was held, “at which the persons were present as indicated to you heretofore. These persons referred to were either employed by the railroad company as trainmen *or as agents*, “as in the case of *Mr. Brown.*” (Ground of Appeal 23.)

We have italicized that portion of the above charge to which exception is taken.

The vice of the instruction is that the jury was permitted to find that the trainmen who appeared at the hearing, or Mr. Brown, who likewise appeared as attorney at the hearing, or all of them, in making such appearance acted as *agents* of the defendant company in such a manner as to bind the defendant.

We think the unsoundness of such an instruction has already been demonstrated in our discussion under Point I of this brief.

We therefore contend that the above instruction was clear error.

D.

The Court erroneously charged the jury as follows:

“should you decide that this prosecution was
“malicious and without probable cause, bear-
“ing in mind that act of Robinson in view
“of the law, cannot be charged to the de-
“fendant company, so far as his participa-
“tion is concerned, and that the railroad
“company can only be held in the event that
“you find its agents or employees instigated
“the prosecution, and that their appearance
“at the hearing was in evidence, it is only
“with such evidence that you can pass on
“the question of damages.” (Ground of
Appeal 24.)

While the above portion of the charge is quite vaguely worded, it was apparently the Court's intention to thereby instruct the jury that there were in evidence in the case certain facts or circumstances which would justify the jury in finding that the defendant, through its duly authorized agents or employees, had instigated or instituted this prosecution, and that one of such facts or circumstances was the appearance at the hearing of such “agents or employees.” Of course, the only “agents or employees” who appeared at the hearing were the train crew and Mr. Brown.

We think that we have shown in our discussion under Point I of this brief that the fact that the said train crew appeared and gave testimony at the hearing, and the additional fact that Mr. Brown appeared, examined the witnesses and made a summation at such hearing, were wholly insufficient to constitute an instigation or institution by the defendant of the prosecution.

This being so, it is contended that the above instruction is clearly and harmfully erroneous.

POINT III.

The judgment of the Supreme Court should be reversed, with directions that it order a reversal of the judgment of the Monmouth County Court of Common Pleas.

Respectfully submitted,

WM. A. BARKALOW,
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DEVŌE TOMLINSON,
Of Counsel.

New Jersey Court of Errors and Appeals

ROBERT STURLA, JOHN MILLER
AND CHARLES REIFF,
Plaintiffs-Respondent,

vs.

THE CENTRAL RAILROAD COM-
PANY OF NEW JERSEY,
Defendant-Appellant.

On Appeal
From Supreme
Court.

10

BRIEF FOR PLAINTIFFS-RESPONDENT

Nature of Case

This action was instituted by the plaintiffs-respondent to recover damages for a malicious prosecution by the defendant-appellant, resulting from an alleged unwarranted arrest, imprisonment and prosecution by agents of the defendant-appellant. 20

Statement of Facts

On July 29, 1924, the plaintiffs-respondent, all commuters from Freehold to New York on the Central Railroad of New Jersey, after leaving Freneau, a station on that line, were arrested by a constable who held a warrant for their arrest, and who by virtue thereof took them from the train at Matawan where they were joined by George W. Robinson, a railroad policeman, appointed by the Governor on application of the Central Railroad Company of New Jersey, who had made the complaint on which the warrant was issued, and who with the constable placed the three plaintiffs-respondent in an automobile and conducted them to Keyport, a distance of approximately two miles, to the jail in that town where the two policemen above named locked the 30 40

plaintiffs-respondent in one cell, and there kept them confined for a period of about three hours; at the expiration of which time the same police officers conducted the plaintiffs-respondent to the office of the magistrate who had issued the warrants, a Justice of the Peace of Monmouth County, New Jersey, by the name of Thomas L. Smith. The said justice thereupon released the defendants under bail to appear before him on August 4, 1924, for a hearing.

- 10 The complaint was made on information and belief by George W. Robinson, C. R. R. Detective, against each of the plaintiffs-respondent, respectively, that each of them did on the 22nd day of July, 1924, at the Borough of Freehold, Monmouth County, pull the emergency cord on train No. 4297, going into Freehold station, and after train stopped at station again pulled the cord and blew the whistle causing the engineer to start the train, and that an accident
- 20 was avoided when the conductor of said train signalled for the engineer to stop. At the hearing of the complaint before the magistrate on August 4, 1924, it appeared that George W. Robinson was a policeman usually called a railroad policeman who was appointed by the Governor, and by him commissioned, on the application of the defendant-appellant. The witnesses in support of the complaint were all employees of the railroad company. The Justice of the Peace dismissed the complaint and discharged
- 30 the prisoners.

Thereafter, this suit was instituted and therein it appeared that the complainant George W. Robinson did not know and had never seen the plaintiffs-respondent prior to the day of their arrest; that the acts complained of were not committed in his presence; that he was informed of the happenings at Freehold by the railroad dispatcher; that he investigated the case and secured the information on which

40 he based his complaint from railroad employees; that

at the hearing before the magistrate he conferred with one of the railroad attorneys; that said railroad attorney conducted the prosecution; that no representative of the prosecutor's office had been called in or did attend the hearing as a representative of the state; that at the conclusion of his investigation he made a report to the defendant-appellant and mailed the same to its office in Jersey City.

Upon the termination of the suit in the trial court, favorable to the plaintiffs-respondent, appeal was taken to the Supreme Court where judgment of affirmance was entered March 26, 1926. From this judgment appeal is taken to this court. ^{In} the Supreme Court the defendant-appellant abandoned all its exceptions, taken at the trial, to the admission of evidence and rested its appeal entirely on two points:

1. That the trial court erred in denying defendant's motion for a direction of a verdict in its favor (ground of appeal No. 2, S. C. 105).

2. Because of error in the charge of the trial judge (grounds of appeal Nos. 21, 22, 23 and 24, S. C. 110-111).

The case now comes before the Court of Errors and Appeals on the defendant-appellant's insistence that the Supreme Court erred in giving judgment for the plaintiffs-respondent instead of for the defendant-appellant, and that the Supreme Court erred in affirming the judgment of the Monmouth County Court of Common Pleas.

POINT I.

The Supreme Court correctly held that the trial court properly refused to direct a verdict in favor of the Defendant.

The defendant-appellant assumes and counsel argues that a railroad policeman, because of the fact

that he has all the powers of a policeman within the counties traversed by the railroad in the State and is appointed to such office and commissioned by the Governor, always acts on his own responsibility when he commences a proceeding for any transgression of the law, notwithstanding that his appointment is made on the application of the railroad company and that he is regularly in the railroad company's employ and receives all of his remuneration from the railroad company; and it is asserted by the defendant-appellant that the doctrine of respondeat superior is not applicable.

The view thus held by the defendant-appellant does not seem to accord with the law as it has heretofore been proclaimed in the Supreme Court and in the Court of Errors and Appeals.

The cases cited by the defendant-appellant under point one of their brief in the Supreme Court and again in this Court are *Tucker vs. Erie Railroad Company*, 69 N. J. L. 19; *Goldberg vs. The Central Railroad Company of New Jersey*, 99 N. J. L. 374, and *Rockwell vs. Erie Railroad Company*, 128 Atl. Rep. 482. It is also on these three cases that the Supreme Court rests its decision and judgment on this point.

It is appropriate therefore to discuss the case at bar in the light of the facts before the court in these cases and to apply the principles of law involved to our state of facts as they appear in the State of the Case.

In the *Tucker* case the plaintiffs who had been arrested by a railroad policeman, had been taken into custody without a warrant and charged with violations of the law alleged to have been committed in the presence of the said policeman. The policeman had not been directed to make the arrest by any of the officers or employees of the railroad company.

After discussing the statute under which railroad

policemen are created and stating that for the proper discharge of their official duties, as well as for the proper exercise of their official powers, they are responsible not to the railroad company but to the state. Mr. Chief Justice Gummere writing the opinion for this court said:

“In order, therefore, to render the defendant company legally responsible for the unwarranted arrest made by them, and the subsequent criminal prosecution, maliciously instituted by Dwyer, it was necessary to show that their action was instigated by the company or by some of its officers or employees; that what they did was done by them as agents of the company, and not solely of their own volition as peace officers.” 10

In the case sub-judice, Robinson, the police officer, did no single act of his own volition as a peace officer. He did not know any of the plaintiffs-respondent. 20

He was the first witness sworn on behalf of the plaintiffs and upon examination by Mr. Stokes he was asked.

Q. How did you come to make this complaint? Did you know Robert Sturla? Did you know Charles Reiff and did you know John R. Miller?

A. No, sir.

Q. You knew none of these men? A. No, sir.

Q. Had never seen them, as far you knew? A. No, sir. 30

Q. And never talked to any of them? A. No, sir.

Q. From the 22nd day of July until the time you made this complaint? A. No, sir.

Q. Mr. Robinson, did you make the complaint or a complaint in that wording, before Mr. Smith, the original of which that is a copy? A. Yes, sir.

Q. And did you make a complaint like that against 40

each of the other men?? A. Yes, sir. (S. C. 15-36, 16-1 to 11 and 16-36 to 38).

Q. Were you called into this matter? A. I received word that the whistle cord had been interfered with on this particular train; I received word on the night of the 22nd of July, and on the afternoon of the 23rd, I went to Matawan.

Q. Who did you receive word from? A. From the dispatcher at East Long Branch.

10 Q. Dispatcher for whom? A. Railroad Dispatcher; train dispatcher.

Q. Central Railroad? A. Central Railroad.

Q. Did you go to Jersey City in this matter? A. No.

Q. Did you file a report in Jersey City? A. Not until after I was through with my work.

Q. And on what day did you file your report? A. Probably the 24th or 25th.

20 Q. July 24th or 25th? A. Yes.

Q. Where did you file that report? A. Jersey City.

Q. Did you file it personally or mail it? A. Mailed it. (S. C. 17-28, 18-1 to 12).

On being recalled for the plaintiff and on examination by the court the same witness testified:

Q. You have your daily itinerary——. A. Traveling around through the state.

Q. ——from the Central Railroad? A. Yes.

30 Q. And where do you work? A. I have the Atlantic Highlands and Sea Shore branch, Freehold branch and New Jersey Southern down as far as Lakehurst, taking in Toms River and Barnegat.

Q. Every day, you devote your time to that sort of work? A. Yes. (S. C. 48-28 to 37).

BY MR. STOKES:

40 Q. What are your regular hours? What time do you go to work in the morning? A. Generally around 7 o'clock.

Q. Until what time at night? A. Sometimes 7 or 8 o'clock at night—sometimes 9 or 10.

Q. I mean generally what time do you leave? A. About 5 or 6 o'clock.

Q. You have said that as a result of certain information you received from the train dispatcher, you investigated this particular occurrence? A. Yes.

Q. Who was the train dispatcher? A. I just don't recall what his name is; there are three men eight hours apart. 10

Q. How did you get the information from him? A. Over the telephone.

Q. Who called you at that time? A. He called me.

Q. Who called you or him? A. He called me.

Q. Where? A. At Red Bank,—the office I have in Red Bank. He called me and said someone had interfered with the train line on that particular train, and when I got there——. 20

Q. What did you do? A. I went to Matawan.

Q. Why? A. To investigate it.

Q. Why did you do that? A. That's my duty; I went to Matawan to investigate it.

BY THE COURT:

Q. Your duty to whom? A. To the company for whom I work. (S. C. 49-28, 50-1 to 25).

It seems quite clear that up to this point at least the said Robinson had done no act or thing in behalf of the State of New Jersey. He had no knowledge of the event until he was advised by the dispatcher of the defendant company, and he took no action except as directed by the dispatcher, namely to investigate, and as a part of his investigation he made this complaint before the magistrate which was within his province as an employee of the railroad company, but it contemplated no act requiring the authority of a policeman. The same work might 30 40

have been done by any person authorized by the railroad company to undertake it.

As the complainant in this matter, although the offense charged is a crime by statute, he did not call upon the properly constituted authorities to prosecute the case, nor did he ask the magistrate to subpoena witnesses in behalf of the state. (See testimony of Thomas Smith S. C. 40-1 to 12). On the contrary he filed his report with the railroad company and thereafter assisted on the execution of the warrant by directing the constable in whose hands it was to board the train at Freneau and make the arrest while he remained at Matawan station to meet the train and help convey the prisoners to the jail at Keyport, where he actually took part in locking up these plaintiffs and guarding them until they were released on bail by the magistrate. (Testimony of George W. Robinson S. C. 19-12 to 33, and testimony of George H. Crawford S. C. 43-15 to 23).

The next step in this proceeding was the hearing before the magistrate on August 4, 1924. The same man Robinson was present at the hearing and apparently directed the prosecution, although he did not testify, and he produced there as witnesses railroad employees, and while there, and before the hearing, he discussed the case with Mr. Theodore J. R. Brown, a lawyer, who it is admitted is in the employ of the Central Railroad Company of New Jersey. (S. C. 21-11 to 40). And the said Mr. Brown actually did appear and prosecute the case before the justice. (S. C. 20-17 to 37).

That the witnesses on this occasion were produced by and in behalf of the defendant-appellant at the hearing before the magistrate and that they did not appear by command of the State of New Jersey seems very clear from the testimony of George W. Robinson:

40 Q. Now you said you made an investigation and

you received certain information: Who from? A. From the train crew.

Q. Which ones of the train crew? A. John Iverson. Q. Who? A. John Iverson. Q. "Iverson?" A. Yes.

Q. He was a brakeman on the rear car? A. Yes.

Q. Who else did you get it from? A. Wesley Fierce.

Q. Who is he? A. Brakeman also.

Q. And on the front car? A. Yes, sir. 10

Q. Are they here? A. I don't know whether they are or not.

Q. They were at Keyport at the hearing? A. Yes, sir.

Q. How did they come to be there? A. I asked for them to be there.

Q. And who did you ask that they be there? A. I told the train dispatcher that I wanted them at Keyport that morning.

Q. That was the train dispatcher of the Central Railroad? A. Yes. 20

Q. They were there as you requested? A. Yes. (S. C. 22-10 to 33).

The uncontroverted legal principal applicable to this case is:

"A police officer, by responding to the invitations of the regular agents of the company, to aid in enforcing its regulations, becomes for that purpose a special agent of the company, and for the conduct of such special agent within the scope of his employment the company is responsible." *Jardine vs. Cornell* 50 N. J. L. 485-487. 30

The facts in the case of *Goldberg vs. The Central Railroad Company of New Jersey*, 97 N. J. L. P. 374, next relied on by the defendant-appellant, are distinctly dissimilar to the case under review. There 40

Goldberg was a passenger and was on the premises of the railroad company and was disorderly in his conduct and came in direct contact with the railroad policeman then protecting the railroad property. He was arrested by the policeman acting as a police officer of the state and not after an investigation directed by the employees of the railroad company, and the Supreme Court there says that it is settled in this court by the case of Tucker vs. Erie Railroad Company, that railway policemen commissioned by the Governor are State officers charged with the performance of public duties, and are responsible not to the railway company but to the state, unless the action of the officer is instigated by the company or some of its officers or employees.

And in the case of Rockwell vs. Erie R. R. Co. 128 Atl. Reporter 482, also cited by defendant-appellant the plaintiff Rockwell was a disorderly person as alleged and arrested by one of the railroad policemen. This officer received his instructions to make the arrest from another member of the railroad police force and not from the officers or employees of the railroad company and this court in a per curiam decision held that

“In order to hold a railroad company responsible for a malicious prosecution such as was shown to exist in the present case, the burden rested upon the plaintiff to show that the state policeman, in making the arrest and lodging the complaint against the plaintiff, was acting under the instructions of the corporation, either expressed or implied.”

The investigation of the policeman Robinson was by the expressed direction of an employee of the railroad company, viz, the train dispatcher, and as a part of such investigation the complaint against these plaintiffs was lodged with the magistrate, and the re-

sults of the investigation were, within a day or two and before the hearing, reported to the Jersey City office of the company. At the hearing witnesses were produced and sworn by the authority of the same train dispatcher following the report of the policeman and at his request, and at that hearing there appeared an attorney who is employed by the defendant railroad company and who bears the title "Supervisor of Safety." (See testimony of Devoe Tomlinson S. C. 62-29). And this attorney's work is generally special work and his main work is safety work. (S. C. 63-28 & 29). 10

We deem it safe to conclude that even without positive evidence of his authority the said Theodore J. R. Brown by all reasonable implication represented the defendant Central Railroad Company of New Jersey at the hearing before the Justice of the Peace.

The Court of Errors and Appeals recognizes that a State railway policeman owes two separate duties, one to the State alone when he, in the exercise of his duty as a policeman, makes an arrest for the transgression of a law committed in his presence or where he is called in to aid the state authorities; the other obligation is to his employer, the railroad company on whose application he is appointed and from whom he receives a compensation, when he makes his investigation at the request of an officer or employee of such company and acts throughout as its agent and representative. 20 30

In the case of Taylor vs. New York and Long Branch Railroad Company, 80 N. J. L. 282, the defendant in error, Taylor, had been arrested, handcuffed and taken to jail after a judgment in tort in the small cause court. The officer was a railroad policeman and he made the arrest in cooperation with another officer. In this case the evidence of the policeman's relation to the railroad company was to the same effect as that in the case at bar, and the fol- 40

lowing extract from Chancellor Pitney's opinion at page 285, is applicable:

10 "The case of *Tucker vs. Erie Railroad Company*, 40 Vroom 19, cited by plaintiff in error, was quite different from the present. There the plaintiffs were arrested upon a criminal charge, although without warrant, and all that was done by the railway policemen about the arrest and subsequent prosecution was done in the line of their duty under the Governor's commission. The decision was that for their misconduct in arresting and prosecuting the plaintiffs the railroad company was not responsible, on the ground that, although the policemen were appointed upon the application of the company, they were responsible for the proper discharge of their official duties not to the company but

20 to the state. But the opinion of the Chief Justice, who spoke for the Supreme Court, distinctly recognizes that if the prosecution of the plaintiffs had been instigated by the company, or its officers or employees, or if what the railway policemen did had been done by them as agents of the company, and not solely as police officers, the company would have been legally responsible.

30 "In our opinion, if railway policemen, appointed and commissioned under the act of 1904, are employed by the railroad company, or any other corporation or person, in matters aside from their duties under the statute, the principal may be held answerable for what they do, the same as in other cases of agency. Their commissions as railway policemen cannot be made a cloak to shield the company from responsibility for what may be done by such agents under the

40 employment of the company, aside from the

strict and proper performance of their duties as officers under the act.

“There being evidence justifying the inference that in what Lankinau did about the plaintiff’s arrest he was acting within the scope of his authority as agent for the defendant company, and the evidence justifying the further inference that he participated in the act of the constable in taking the plaintiff to Long Branch, in excess of the warrant of the writ of execution, it was proper to submit to the jury the question of defendant’s liability to the plaintiff, and the motion for the direction of a verdict in defendant’s favor was properly refused.”

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The case of Dellabello vs. Central Railroad Company of New Jersey, 124 Atlantic Reporter page 59 follows the theory of the foregoing case of Taylor against the Long Branch Railroad and quotes the same extract from the opinion. In that case Mr. Justice Kalisch writing for the court on page 60 also held:

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“If there was any testimony, no matter how meager adduced on the part of the plaintiffs tending to show liability of defendants, and no incontrovertible fact was established by the defendants which fact, as established, would constitute an absolute bar to the plaintiffs right of recovery, the defendants were not entitled to succeed on either motion.”

30

The motions referred to were first to non-suit the plaintiff, second for the direction of a verdict in favor of the railroad company.

We submit that there was ample testimony in this case tending to establish the agency of the policeman Robinson and the attorney Brown; that they each acted for the railroad company; that neither of them would have acted except under instructions received from some officer or employee of the company. In

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fact the witness Robinson testified when asked by the court:

Q. Why did you pay any attention to the train dispatcher when he called you up? A. That's where I got my information from—the train dispatcher. I got all my information when anything occurred, of car robbery or train interference, or anything like that—he informs me. He advises me, and he called me to investigate.

10 Q. Suppose you ignored the information? A. I suppose if I did that I would probably lose out.

Q. What do you mean by "lose out?" A. I would lose my position.

Q. As a policeman? A. Yes.

Q. For whom? A. The railroad company.

BY MR. STOKES:

20 Q. The Central Railroad of New Jersey you mean? A. Yes. (S. C. 51-4 to 41).

The defendant-appellant cites the cases of McGowan vs. Rickey, 64 N. J. L. 402, and Vladar vs. Klopman, 89 N. J. L. 575, and contends that the plaintiffs-respondent did not fulfill the requirements of those cases. In the McGowan case this court held that to support an action of this character the burden is on the plaintiff to show by a preponderance of evidence first that the prosecution was ended, and that
30 he was duly discharged; second that the defendant instituted proceedings against him without reasonable or probable cause; third that the defendant was actuated by a malicious motive in making the charge. As to the first condition the testimony of Thomas Smith the justice sufficiently disposed of it when he said in answer to the question:

Q. After hearing the evidence, Mr. Smith, on the part of the railroad company, what did you do with
40 this complaint? A. Dismissed it.

Q. Finally disposed of it? A. Yes. (S. C. 38-19 to 22).

As to the second requirement, viz., the want of probable cause, we respectfully refer to the testimony of the three plaintiffs, Charles Reiff, John R. Miller and Robert Sturla. (S. C. pages 65-93).

As against which the defendant-appellant put in no defense, and did not deny or weaken in any way the plaintiffs' case on cross-examination. As to the third condition viz.; malice, the Court of Errors and Appeals in the Vladar case, *Supra*, on page 576 said: 10

“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. (Navarino vs. Dudrap, 66 N. J. L. 620; Weisner vs. Hanson, 81 Id. 601.)” 20

The Navarino case in the Court of Errors and Appeals held that from the falsity of an affidavit upon which an arrest was procured, the malice and want of probable cause may be inferred, and in the Weisner case, also in the Court of Errors and Appeals, it was held, Syl. 1, In an action for malicious prosecution uncontroverted evidence that the charge upon which the plaintiff was prosecuted was false, so far as the plaintiff's responsibility for the matters alleged against him was concerned, is sufficient to justify an inference, against the defendant of malice and want of probable cause. 2. When the question of 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. 30 40

The defendant-appellant argues on page 10 of his brief that,

10 “Although any acts performed by such members of the train crew while actually on duty and operating their trains would probably be deemed to be within the scope of their employment, yet it can certainly not be contended for a moment that their actions in appearing and testifying at the hearing of a criminal prosecution can be held to be within the scope of their employment, which was simply that of operating a railroad train.”

20 Our answer to this is that these trainmen did not appear voluntarily as witnesses before the Justice of the Peace, but came in response to orders received from their employer, the railroad company, through the train dispatcher and in response to that command these trainmen actually did appear before the magistrate. (See testimony of witness, George W. Robinson, S. C. 22-25 to 36). It is respectfully contended that the responsive action of the trainmen to the orders of their superior, which order was founded on a supposed happening on their train, is an act within the scope of the employment of the said trainmen and might easily have been contemplated as a probability at the time the employment was undertaken.

30 Upon consideration of the case as above set forth, we respectfully submit that there was no error in the refusal of the trial judge to direct a verdict for the defendant, and that the judgment under review should be affirmed.

POINT II.**A.**

The Supreme Court correctly held that there is no error in the Judge's charge so far as it is made Ground of Appeal No. 21.

The trial judge had no discretion in the matter complained of in the appellant's brief on this ground of appeal, because, as we have set forth in our argument under point 1, and as seems to be the settled law, the question of the railroad's liability depended upon whether or not the doctrine of respondeat superior should apply. This raised a question of fact as to whether or not the policeman and employees of the railroad were acting in their capacity as agents of the defendant company or whether the policeman was acting strictly as a peace officer on his own initiative in pressing the complaint and subsequent proceedings. These were jury questions which the trial judge would not have been justified in determining without the aid of the jury. *Weisner vs. Hansen*, 81 N. J. L. 601-604.

B.

The Supreme Court correctly held that there was no error in the Judge's charge as set forth in Ground of Appeal No. 22.

Here again the appellant's contention is that the judge at the trial should have withdrawn from the jury consideration of the question: Were the trainmen, when witnesses before the Justice of the Peace, acting in their capacity as employees and representatives of the railroad or were they acting as citizens and performing only their duty towards the state? Clearly this also was a jury question and it was so submitted to the jury by the trial Judge that there could have been no prejudice created in the jurors' minds against the defendant.

C. & D.

The Supreme Court correctly held that there was no error in those portions of the charge of the Trial Judge which are included within the Grounds of Appal Nos. 23 and 24.

10 On these grounds of appeal the same argument is submitted that we have urged in the grounds of appeal 21 and 22 and under our point 1 in this brief. Further discussion of the judge's charge would be but a repetition of our point 1.

POINT III.

The judgment of the Supreme Court affirming the judgment in favor of the Plaintiffs in the trial Court should be affirmed for the reasons set forth in the opinion of the Supreme Court.

20 See State of the Case pages 112-115.

All of which is respectfully submitted this eighteenth day of October, A. D. nineteen hundred and twenty-six.

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30 WILLIAM HARTSHORNE,
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