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Notice and Reasons of Appeal.

(Filed Jan. 30, 1918.)

NEW JERSEY SUPREME COURT.

NED K. FINKELSTEIN,
Plaintiff-Appellee,

vs.

HERMAN GEISMAR,
Defendant-Appellant.

10

Action at Law.

To Ned K. Finkelstein, the above-named plaintiff-appellee, or McDermott & Enright, Esqs., his attorneys.

20

PLEASE TAKE NOTICE, that the appellant, Herman Geismar, appeals to the Court of Errors of Appeals in the last resort in all cases in New Jersey, from the whole of the judgment entered in this cause, on the following grounds:

1. Because the Supreme Court affirmed the judgment of the First District Court of the City of Jersey City, although the verdict of said District Court was contrary to law.

30

2. Because the Supreme Court affirmed the judgment of the First District Court of Jersey City, although it refused to direct a verdict for the defendant, though duly requested so to do, since it appeared from the evidence that the occasion upon which the alleged slanderous remarks were made, if made at all, was a privileged occasion.

40

10 3. Because the Supreme Court affirmed the judgment of the First District Court of the City of Jersey City, although the said District Court erred in not directing a verdict for the defendant, though duly requested so to do, on the ground that said alleged slanderous remarks were made, if at all, in a privileged communication.

4. Because the Supreme Court affirmed the judgment of the First District Court of the City of Jersey City, although it held that the question whether or not the communication was privileged was a question for the jury.

20 5. Because the Supreme Court affirmed the judgment of the First District Court of the City of Jersey City, although it submitted to the jury the question whether or not the occasion upon which the alleged slanderous remarks were made, if made at all, was a privileged occasion.

30 6. Because the Supreme Court affirmed the judgment of the First District Court of the City of Jersey City, although said District Court refused to grant the motion of the defendant for a non-suit, though duly requested so to do, on the ground that said alleged words, if spoken, were spoken on a privileged occasion and the plaintiff had not proved malice on the part of the defendant.

7. Because the Supreme Court affirmed the judgment of the First District Court of the City of Jersey City, although the said Court refused to direct a verdict for the defendant, though duly requested so to do, on the ground that the plaintiff had shown no malice on the part of the defendant, said alleged slanderous remarks having been made in a privileged communication.

40 8. Because the Supreme Court affirmed the judgment of the First District Court of the City of Jer-

Rule of Affirmance.

sey City, although the said District Court erred in entering judgment in favor of the plaintiff.

9. Because the Supreme Court affirmed the judgment of the First District Court of the City of Jersey City, although judgment should have been entered in favor of the defendant and against the plaintiff. 10

10. Because the Supreme Court erred in confirming the judgment of the First District Court of the City of Jersey City.

WELLER & LICHTENSTEIN,
Attorneys for Defendant-Appellant.

Endorsed: Service acknowledged Jan. 29, 1918.

McDERMOTT & ENRIGHT,
Attorneys of Appellee. 20

Rule of Affirmance.

(Filed)

NEW JERSEY SUPREME COURT.

NED K. FINKELSTEIN,
Plaintiff-Appellee,

vs.

HERMAN GEISMAR,
Defendant-Appellant.

Action at Law. 30
On Appeal from
District
Court.

The above entitled cause having been regularly on the list for trial at the June Term of this Court, and the argument on behalf of the respective parties having been heard and considered, 40

Opinion of Supreme Court.

IT IS ORDERED that the judgment of the First District Court of the City of Jersey City in favor of the plaintiff and against the defendant for Two Hundred and Fifty Dollars damages and \$28.55 costs, be and the same is in all respects affirmed, with costs of suit to be taxed.

10

On motion of

McDERMOTT & ENRIGHT,
Attorneys of Appellee.

Opinion of Supreme Court.

(Filed Nov. 13, 1917.)

20

NEW JERSEY SUPREME COURT,

JUNE TERM—1917.

NED K. FINKELSTEIN,
Plaintiff and Appellee,

vs.

HERMAN GEISMER,
Defendant and Appellant.

30

Submitted July 5, 1917; Decided November 13,
1917.

Syllabus.

1. A communication is qualifiedly privileged
40 where circumstances exist, or are reasonably be-
lieved by the defendant to exist, which cast on him

the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or where the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he in good faith proceeds to do.

10

2. A qualifiedly privileged communication is inconsistent with the existence of express malice and requires both an occasion of privilege and the use of that occasion in good faith and is actionable if actuated by express malice.

3. Where there is evidence of express malice to rebut the occasion of qualified privilege, the Judge must submit the case to the jury.

20

4. By express malice in connection with slander is meant some motive actuating the defendant different from that which *prima facie* rendered the communication privileged, and being a motive contrary to good morals. The existence of such a motive may be legitimately gathered from the character of the defamatory communication—as if the terms used be utterly beyond and disproportionate to the facts which the defendant had reason to believe; or from the circumstances under which the communication was made; or from any extraneous facts which, in reason, tend to prove it.

30

5. Where in a suit for slander it is open to the jury to legitimately find that the defendant's motive in making the defamatory statement was to drive the plaintiff out of the neighborhood where both were engaged in business because he thought that the plaintiff, in order to get trade, would sell at cut rate prices articles in which they both dealt,

40

a motion to direct a verdict in favor of the defendant, upon the ground that the communication was one having a qualified privilege, is properly denied.

10 6. The refusal of a Trial Judge to allow a leading question to be put by counsel to a witness called by him is a discretionary matter and will not lead to a reversal on appeal in the absence of a palpable abuse of discretion resulting in prejudice to the complaining party.

7. An objection that a question was overruled will not be considered where substantially the same question was afterwards put to the same witness and was answered.

20 On appeal from the First District Court of the City of Jersey City.

Before Justices GARRISON, TRENCHARD and MIN-
TURN.

For the appellant, WELLER & LICHTENSTEIN.

For the appellee, McDERMOTT & ENRIGHT.

The opinion of the Court was delivered by TREN-
CHARD, J.

30 On May 15, 1916, the plaintiff below opened a clothing store on Washington Street in Hoboken. Three days later he was invited to the Mayor's office in the City Hall. In this suit for slander he avers that then and there the defendant said to the Mayor of and concerning him:

40 "This man, Mr. Finkelstein, is a faker and came to Hoboken to fake the public, and his method of doing business is to show an article in the window and when a man comes inside to purchase that article to give him inferior goods in its place. He is a disgrace to Ho-

boken and Washington Street and a man like him should be driven out of the town."

The jury found for the plaintiff, and the defendant's chief contention here is that the Trial Judge should have directed a verdict for him on the ground that the alleged slander was a privileged communication. 10

We think the Judge rightly refused to direct a verdict.

The question is whether the defendant's statement came within that class of communications which is regarded in law as having a qualified privilege.

A communication is qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or where the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he in good faith proceeds to do. *King vs. Patterson*, 49 N. J. L., 417; *Fahr vs. Hayes*, 50 N. J. L., 275; *Rothholz vs. Dunkle*, 53 N. J. L., 438. 20

It is seen, therefore, that a qualifiedly privileged communication is inconsistent with the existence of express malice and requires both an occasion of privilege and the use of that occasion in good faith and is actionable if actuated by express malice. 30

Where there is evidence of express malice to rebut the occasion of privilege the Judge must submit the case to the jury.

By express malice in this connection is meant some motive actuating the defendant different from 40

that which *prima facie* rendered the communication privileged, and being a motive contrary to good morals. The existence of such a motive may be legitimately gathered from the character of the defamatory communication—as if the terms used be utterly beyond and disproportionate to the facts
10 which the defendant had reason to believe; or from the circumstances under which the communication is made; or from any extraneous facts which in reason tend to prove it.

Fahr vs. Hayes, 50 N. J. L., 275.

In the present case it may be assumed that the occasion upon which the words were spoken was one giving rise to a qualified privilege. But we
20 think that the evidence was such that the jury could legitimately find express malice and a want of good faith, as in fact it did find.

The evidence showed that, at the time of the defendant's statement, the plaintiff and the defendant were competitors in business, the plaintiff having opened his store three days before, and the defendant being an old established merchant. The defendant was a member of a committee appointed by the Merchants Association to investigate the
30 plaintiff's method of doing business. According to his own testimony he made no investigation except to observe that "the plaintiff had his goods on ordinary packing boxes," but nevertheless he went immediately to the Mayor and caused the plaintiff to be sent for and then and there made the statement complained of. His own testimony shows that his sole reason for making the defamatory
40 statement was that a corporation (with which the plaintiff was formerly connected), whilst in business for a short period during the year before at another location, had sold goods at cost, and lower

than elsewhere, and in his "estimation" not as represented.

Apart from the testimony referred to the defendant testified as follows:

"Q. Do I understand that you went to the Mayor and said that Finkelstein was doing a disgraceful business, or a fake business, or something to that effect, when all that you had to complain about was that his goods were still in boxes or on the tops of boxes? A. I hadn't reference at all to his being in business then, because he had only come there two or three days before; I had reference to his previous performance. 10

"Q. Well, weren't you complaining to the Mayor because this man Finkelstein was at the time violating the ordinance? A. No, sir, we were complaining to the Mayor about that. 20

"Q. You didn't go to the Mayor in May, 1916, to complain about what Finkelstein had done some months or years before, did you? A. Yes, sir, there was the appearance of a repetition, from the way he conducted business previous to that, *and we didn't want a second performance of it.*

"Q. And the only thing you know of your own knowledge was that he had sweaters advertised for 69 cents? A. *No, I had reference to the condition of the store. There wasn't anything like it on the entire street.* 30

"Q. Didn't you say in the office of the Mayor that Finkelstein ought to be driven out of town? A. No, sir, that is not what I said.

"Q. Didn't you say something to that effect? A. Something to that effect, yes.

"Q. What did you say? A. I said that a 40

store of that kind ought not to be allowed on the street."

10 We conclude, therefore, that it was open to the jury to legitimately find that the defendant's motive in making the statement was to drive the plaintiff off of the *street* where they both were doing business because he thought that the plaintiff, in order to get trade, would sell at cut rate prices articles in which they both dealt. Accordingly the motion for a direction of a verdict in favor of the defendant was properly denied.

20 The defendant also complains that the trial judge refused to allow the following question to be put to his own witness: "And it was on account of that that you didn't want him to repeat it, isn't that so?" But that was a leading question and the refusal of a trial judge to allow a leading question to be put by counsel to a witness called by him is a discretionary matter and will not lead to a reversal on appeal in the absence of a palpable abuse of discretion resulting in prejudice to the complaining party. *Luckenback vs. Seiple*, 72 N. J. L., 476; *Mershon vs. Hobensack*, 22 N. J. L., 372. In this case there was no such abuse.

30 Lastly, the defendant complains that the trial judge refused to allow the defendant to ask a witness: "What was the method by which they did business?" But this complaint will not be considered for the reason that substantially the same question was afterwards put to the same witness and was answered.

Dayton vs. Boettner, 82 N. J. L., 421.

The judgment below will be affirmed, with costs.

Specification of Determination or Directions of the District Court with Respect to which Appellant is Dissatisfied in Point of Law.

(Filed April 3, 1917.)

NEW JERSEY SUPREME COURT.

10

NED K. FINKELSTEIN,
Plaintiff-Appellee,

vs.

HERMAN GEISMER
Defendant-Appellant.

In Tort.

20

The following is a specification of the determinations of the First District Court of the City of Jersey City with which the appellant is dissatisfied in point of law:

1. Because the verdict of the jury was contrary to the weight of the evidence.

2. Because the verdict of the jury was contrary to law.

3. Because the District Court erred when it refused to direct a verdict for the defendant, though duly requested so to do, since it appeared from the evidence that the occasion upon which the alleged slanderous remarks were made, if made at all, was a privileged occasion.

30

4. Because the District Court erred in not directing a verdict for the defendant, though duly requested so to do, on the ground that said alleged slanderous remarks were made, if made at all, in a privileged communication.

40

*Specification of Determination or Directions of the
District Court with Respect to which Appel-
lant is Dissatisfied in Point of Law.*

5. Because the District Court held that the question whether or not the communication was privileged was a question for the jury.

10 6. Because the District Court submitted to the jury the question whether or not the occasion upon which the alleged slanderous remarks were made, if made at all, was a privileged occasion.

7. Because the District Court refused to grant the motion of the defendant for a non-suit, though duly requested so to do, on the ground that said alleged words, if spoken, were spoken on a privileged occasion and the plaintiff had not proved malice on the part of the defendant.

20 8. Because the Court refused to direct a verdict for the defendant, though duly requested so to do, on the ground that the plaintiff had shown no malice on the part of the defendant, said alleged slanderous remarks having been made in a privileged communication.

30 9. Because the Court refused to permit the defendant to ask the witness Hurwitz the following question: "Whom did he (the plaintiff) rent the store from, did he rent it from you?"

10. Because the Court refused to permit the defendant to ask the witness Hurwitz the following question: "What was the method by which they (the plaintiff on a former occasion) did business?"

11. Because the Court refused to permit the defendant to ask the witness Hurwitz the following question: "Why did the association desire Mr. Fink's business investigated?"

40

*Specification of Determination or Directions of the
District Court with Respect to which Appel-
lant is Dissatisfied in Point of Law.*

12. Because the Court refused to permit the witness Hurwitz to answer the following question: "And it was on account of that that you did not want him to repeat it?"

10

13. Because the Court refused to permit the witness Hurwitz to answer the following question: "Isn't that so?"

14. Because the Court refused to permit the defendant to ask of the witness Mayor Griffin the following question: "As a result of their appearing before you, did you take any action?"

15. Because the Court refused to permit the defendant to ask of the witness Callahan the following question: "On or about May 26th was there a summons issued in your Court to Mr. Ned K. Fink on a complaint in this action?"

20

16. Because the Court refused to permit the defendant to ask of the witness Callahan the following question: "Was a summons issued to Mr. Fink?"

17. Because the said District Court erred in entering judgment in favor of the plaintiff.

30

18. Because judgment should have been entered in favor of the defendant and against the plaintiff.

19. Because the verdict of the jury was excessive.

WELLER & LICHTENSTEIN,
Attorneys for Defendant-Appellant.

Endorsed:

Service acknowledged March 28, 1917.

McDERMOTT & ENRIGHT,
Attorneys for Plaintiff.

40

**Notice of Appeal from District Court
Filed Mar. 6, 1917.**

FIRST DISTRICT COURT OF THE CITY OF
JERSEY CITY.

10	NED K. FINKELSTEIN, Plaintiff-Appellee, vs. HERMAN GEISMAR, Defendant-Appellant.	}	In Tort.
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20 To Ned K. Finkelstein or McDermott & Enright,
his attorneys.

Gentlemen :

Please take notice that the defendant, Herman Geismar, hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court of the City of Jersey City, rendered in the above stated action on the 1st day of March, 1917.

30 WELLER & LICHTENSTEIN,
Attorneys for Defendant.

40

Summons.

10

(Filed July 7th, 1916.)

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

The State of New Jersey, to the Sergeant-at-Arms of the First District Court of the City of Jersey City or to any Constable of said County, summon Herman Geismar to appear before the First District Court of Jersey City to be held at the City Hall, corner Grove and Montgomery Streets, in said city, on the eighteenth day of July, One Thousand Nine Hundred and Sixteen, at ten o'clock in the forenoon to answer unto Ned K. Finkelstein in an action in tort. Demand Five Hundred Dollars.

20

WITNESS, Charles L. Carrick, Esq., Judge of said First District Court of Jersey City aforesaid, the seventh day of July, in the year One Thousand Nine Hundred and Sixteen.

30

JAMES N. BRADEN,
Clerk.

MCDERMOTT & ENRIGHT,
Plaintiff's Attorneys,
75 Montgomery St.

40

State of Demand.

(Filed July 7th, 1916.)

FIRST DISTRICT COURT OF THE CITY
OF JERSEY CITY.

10

 NED K. FINKELSTEIN,
 Plaintiff,

vs.

 HERMAN GEISMAR,
 Defendant.

 In Tort:
 State of
 Demand.

20 (1) Plaintiff is and for a considerable time past has been a merchant engaged in the haberdashery business in the City of Hoboken.

30 (2) Defendant on or about May 18th, 1916, at Hoboken, in the hearing of divers persons said concerning the plaintiff as such a merchant: "Fink is a faker;" "He was written up by Mr. Adams in the New York Tribune as a faker;" "He came to Hoboken to fake the public and advertised articles in his window, and his methods were to give the purchaser who came into the store inferior goods in place of superior goods displayed in the window." Defendant also said that plaintiff was a disgrace to Washington Street, Hoboken; he also said that such persons as Finkelstein are a disgrace to Hoboken.

(3) Said words were false and malicious.

40 (4) Plaintiff because of said words has suffered in his reputation and has lost the good will and

Demand for Jury.

trade of many persons with whom he would have had profitable business.

Plaintiff demands \$500.00 damages.

McDERMOTT & ENRIGHT,
Attorneys of Plaintiff. 10

Endorsed.

Filed July 7, 1916,
JAMES N. BRADEN,
Clerk.

Demand for Jury.

(Filed Dec. 18, 1916.) 20

To the Clerk of the First District Court of Jersey
City:

TAKE NOTICE that the above named plaintiff
demands trial by jury in the above entitled cause.

McDERMOTT & ENRIGHT,
Attorneys of Plaintiff. 30

STATE OF NEW JERSEY.

FIRST DISTRICT COURT OF JERSEY CITY.

10	<hr/> NED K. FINKELSTEIN, Plaintiff, vs. HERMAN GEISMER, Defendant. <hr/>	}	In Tort.
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20 Transcript of the stenographic report of the testimony and proceedings taken in the above entitled action, at the First District Court, in the City of Jersey City, New Jersey, on Thursday, March 1, 1917, at 1 o'clock in the afternoon, before his Honor CHARLES L. CARRICK, District Judge, and a jury.

APPEARANCES:

JAMES D. CARPENTER, JR., Esq. (McDermott & Enright).

JOSEPH RAYMOND TIFFANY, Esq. (Weller & Lichtenstein).

30

NED K. FINKELSTEIN, the plaintiff, sworn in his own behalf, testified as follows:

Direct Examination by Mr. Carpenter:

Q. Where do you live, Mr. Finkelstein? A. 303 Hudson Street, Hoboken.

Q. Are you engaged in business in Hoboken? A. Yes, sir.

40

Ned K. Finkelstein—Direct Examination.

Q. Whereabouts? A. 332 Washington Street.

Q. When did you commence business there? A. Well, on the 15th of May.

Q. I show you a paper and ask you whether or not that is your lease of the store you occupy.

Mr. Tiffany: I object; the lease speaks for itself. 10

Mr. Carpenter: All right, sir; look it over (handing paper to counsel).

Mr. Tiffany: I object to the materiality of the lease.

The Court: It is not evidential, if there is any dispute about it.

A. Yes, sir.

Q. You started in business on what date? A. 20
The 15th of May.

Q. At that place you have given us, on Washington Street? A. Yes, sir.

Q. You are still in business there? A. Yes, sir.

Q. Do you know, or have you met, the defendant Herman Geismer? A. Yes, sir.

Q. Did you meet him in the City of Hoboken on the 18th of May, 1916? A. Yes, sir.

Q. Whereabouts? A. In the Mayor's office.

Q. What did he say at that time? A. He said to the Mayor, "This man, Mr. Finkelstein, is a faker and came to Hoboken to fake the public, and his method of doing business is to show an article in the window and when a man comes inside to purchase that article to give him inferior goods in its place." He said also, that I was a disgrace to Hoboken and Washington Street, and a man like me should be driven out of town. 30

Q. Did he say anything about the New York Tri- 40

bune? A. He also said that Mr. Adams of the New York Tribune has written me up as a faker in the Tribune.

10 Q. Who was present when those words were said?
A. The Mayor, Mr. Hurwitz, Mr. Finkelstein, my brother, Mr. Geismer, Mr. Mountford and a Mr. Greenberg of Hoboken.

Q. Do you remember whether there were any other people there or not, or whether those are all the names you can think of? A. No, that is all that were there.

Q. As a result of that, can you say whether you lost any trade, or any business, in your store? A. Considerable.

20 Q. Are you able to estimate whether you had any loss of profit and, if so, what that amounted to?

Mr. Tiffany: Before that question is answered I ask the privilege of cross examining him.

Examination by Mr. Tiffany:

Q. Do you keep a record, Mr. Finkelstein, of the transactions in your store? A. Yes, sir.

30 Q. Have you any records with you? A. What kind of records?

Q. Records of your business? A. No, sir.

Q. This happened on the 18th of May last? A. Yes.

Q. And you started in business on the 15th of May? A. Yes, sir.

40 Mr. Tiffany: I object, if the Court please, on the ground that he says he keeps records of his business and has none here.

Ned K. Finkelstein—Cross Examination.

The Court: He has stated that he lost business. I think you will have to make objections to specific questions.

Mr. Carpenter: I think that is all. You may cross examine.

Cross Examination by Mr. Tiffany: 10

Q. This was in the Mayor's office, in the City Hall, in Hoboken? A. Yes, sir.

Q. How did you come to be there? A. A special messenger was sent for me.

Q. From where? A. From the Mayor's office, I believe.

Q. By reason of a message sent from the Mayor's office you went there? A. Yes, sir.

Q. And when you got there you found Mr. Geismer, Mr. Mountford, and Mr. Hurwitz there? A. Yes, sir. 20

Q. What did you say? A. I said it was all untrue.

Q. What was all untrue? What was the first thing that was said, the complaint they made to the Mayor? A. Yes, sir.

Q. And you denied the allegation? A. Yes, sir.

Q. And you were notified to appear in the Recorder's Court? A. No. 30

Q. You were summoned afterwards to appear there? A. Yes, sir.

Mr. Carpenter: I object to that as immaterial. It is, what happened on a specific day.

Q. You had been in business before, had you not, in Hoboken? A. Yes, sir. 40

Ned K. Finkelstein—Cross Examination.

Q. How long before the 15th of May, 1916? A. October previous.

Q. The October previous, which would be October, 1915? A. Yes, sir.

10 Q. Mr. Geismer has quite a large gent's furnishing place there in Hoboken? A. I presume it is large.

Q. You know it is, do you not? A. No, sir.

Q. Have you ever been in it? A. No, sir.

Q. You are quite sure of that? A. Yes, sir.

Q. You know where it is, don't you? A. Yes.

Q. And you know what line of business he is in? A. Yes, sir.

Q. And you know he has been there for years, do you not? A. No, sir.

20 Q. He was there when you were there in October, was he not? A. Yes.

Q. Don't you know that he is the leading furnishing goods man in Hoboken? A. No, sir, I didn't know that.

Q. You do know it now? A. No, sir.

Q. Is your name Fink or Finkelstein? A. Finkelstein.

Q. You have done business under the name of Fink? A. Yes.

30 Q. It was on the 16th of May that you filed your certificate? A. About the 16th of May.

Q. When did you first start in business there? A. The 15th.

Q. Are you sure of that? A. The 15th, yes, sir.

Q. That is when you opened your store? A. Yes, I think it was the afternoon of the 15th.

Q. What is it that fixes the date as May 18, 1916, as the time when you were in the Mayor's office?

A. I believe that to be the date.

40

Q. It may have been later than that, may it not? A. No, it was the 18th.

Q. You are sure it was the 18th? A. It might have been a day before or a day after that, but I am pretty sure it was on or about the 18th of May.

Q. It may have been a day or two later or a day or two before? A. No, it couldn't have been a day or two; it may have been a day sooner or later. 10

Q. And it was about a week after that that you appeared in the Recorder's Court in Hoboken? A. Yes.

Q. How did you come to go there?

Mr. Carpenter: I object to that, as immaterial.

Mr. Tiffany: This is material, to show that a personal communication made to a public official was privileged, and that it was of such a nature that this public official acted upon it. 20

The Court: I think I will exclude it.

Mr. Tiffany: Exception.

Q. No, tell us again just what Mr. Geismer said concerning you. A. He said that I was a faker.

Q. Are you giving us the identical language? A. As near as one can remember. 30

Q. Did he use the word "you," or I, or Fink? A. "This man," pointing to me Mr. Finkelstein.

Q. What else did he say? A. He said that I came to fool the public of Hoboken.

Q. Came to fool the public of Hoboken? A. Or words to that effect; and that I should be driven out of the town; that I was a disgrace to Washington Street and Hoboken, and my method was of doing business to show an article in the window 40

Ned K. Finkelstein—Cross Examination.

and when any one came in to buy to go and substitute an inferior article.

Q. Of course, you never did that? A. No, sir.

Q. Never? A. No, sir.

10 Q. Why did you conduct your business under the name of Fink? A. Because I had imagined that there was a prejudice against the name Finkelstein, and also from the fact that "N. K. Fink" was easier to remember.

Q. You did business under the name of the Ward, Fink Company when you were there before, did you not? A. That was a corporation.

Q. How long were you in business at that time? A. About four months, I believe.

20 Q. Was it as long as that? A. About four months, yes, sir.

Q. And where were you in business prior to that, until you came to Hoboken in May? A. 634 Madison Avenue, New York.

Q. That was the head store of Ward & Finkelstein? A. It was.

Q. When did it cease to be? A. We dissolved the corporation.

Q. When was that? A. In the neighborhood of January; I don't quite remember the date.

30 Q. January, 1916? A. Yes, sir.

Q. Where were you in business from January to May? A. I wasn't in business.

Q. You weren't in business at all? A. No, sir.

Q. Nowhere? A. Nowhere.

Q. You had in your windows on Washington Street BVD underwear for 35 cents a garment? A. Yes.

Q. Robert Reis & Company are the makers of BVD underwear? A. Yes.

Ned K. Finkelstein—Cross Examination.

- Q. Did you ever do any business with them?
 A. Yes, I did. Are you referring to last year?
 Q. I am referring to May. A. Of this year?
 Q. May, 1916. A. May, 1916, no; I didn't do any
 business with them since then.
 Q. Did you do any business under the name of
 Ward-Fink Company? A. Yes. 10
 Q. Did you buy BVD's from them? A. Yes.
 Q. Isn't it a fact that you only bought one
 sweater from Robert Reis & Company?

Mr. Carpenter: I object to that.

The Court: It will be excluded.

- Q. You say you keep books of accounts? A.
 Yes, sir. 20
 Q. And you think you lost considerable busi-
 ness? A. Yes.
 Q. How do you know you lost considerable busi-
 ness if you were only in business three days when
 this thing happened? A. I lost business directly
 after that.
 Q. But how do you know you lost business; you
 had only three days to reckon on, didn't you?
 You stated you started on May 15th and this hap-
 pened on the 18th, so how could you tell how much
 business you had lost? A. Because people passed 30
 the store and made ugly remarks as to the store.
 Q. Did you hear them? A. Yes, sir.
 Q. Have you got any of these people here? A.
 No, sir.
 Q. You were in the store, weren't you? A. Yes,
 sir.
 Q. And how did you hear them? A. The door
 was open.

Ned K. Finkelstein—Re-direct Examination.

Q. And you don't know whether they had been in your store to buy before, do you?

Mr. Carpenter: I object.

A. No, sir.

10 Q. It is merely supposition on your part that you lost considerable business? A. I know as a fact.

Q. What do you base that knowledge on, as a fact? A. People coming into the store and having doubts about my merchandise, and going out, and fearing the goods were inferior.

Q. Did they tell you that? A. Yes.

Q. When? A. At the time they attempted to make the purchase.

20 Q. How long was that? A. For a long time afterwards.

Q. How often did that happen a day? A. Very often.

Q. Did you make any records of it? A. No, I did not.

Re-direct Examination by Mr. Carpenter:

30 Q. There was considerable notoriety given to this prosecution over there in Hoboken, so that people in Hoboken knew all about it? A. Yes, sir.

Mr. Carpenter: I offer this certificate of the trade-name in evidence. Something has been brought out by the other side regarding the name which Mr. Finkelstein was operating under, and I have here a certified copy of the trade name.

(The same is marked Exhibit P-1.)

40

Ned K. Finkelstein—Re-direct Examination.

Mr. Carpenter: I also want at this time to offer in evidence the lease, to show that this man was there at that time under a lease that had one year to run.

Mr. Tiffany: I object.

The Court: It will be excluded. He is competent to testify and has testified as to what the lease was. 10

Q. How much rent was provided in your lease of that store at the time you heard these things spoken about you in the Mayor's office?

Mr. Tiffany: I object to that.

The Court: It will be excluded. You are asking for the contents of that lease. There is no reason why you should not ask what rent he paid. 20

Q. What rent did you pay for the store 332 Washington Street, from the 4th day of May, 1916, down to the first of the year?

Mr. Tiffany: I object to that as immaterial.

The Court: I will allow it.

A. \$100. 30

Q. How often? A. A month.

Q. Is that rent paid? A. Yes.

Q. Right up to date? A. Yes, sir.

Q. What kind of a stock of goods did you have in your store? A. Regular line stock of goods.

Q. What do you mean? A. Gent's underwear, pajamas, bath-robos, neckwear, and so forth.

By the Court.

Q. Men's Furnishings? A. Yes. 40

Ned K. Finkelstein—Re-cross Examination.

By Mr. Carpenter:

Q. And did you have your store well stocked?

Mr. Tiffany: That is objected to.

10 Q. How was it stocked; did you have little or much merchandise there at the time these statements were made, about the 18th of May? A. I had quite a good deal of stock there.

Q. Did you own it? A. Yes, sir.

Q. Own it all? A. It wasn't all paid for.

Q. But it was all bought and owned by you?
A. Yes, sir.

Re-cross Examination by Mr. Tiffany:

20 Q. You did business on credit like other merchants? A. Yes.

Q. You say this matter was given a lot of notoriety; is it not a fact that you inserted in the newspapers yourself that you had been accused and vindicated? A. No, sir.

Mr. Carpenter: I object. The advertisements are the best evidence.

30 The Court: Let him answer.

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

Q. Isn't it a fact that you caused to be inserted in the Hudson Observer the facts recited in the state of demand and also a statement to the effect that you had been found not guilty by the Recorder's Court?

40 Mr. Carpenter: I object, unless the time is shown.

Ned K. Finkelstein—Re-cross Examination.

Q. Shortly after this accusation.

Mr. Carpenter: I object to that, on the ground that it is not proper cross-examination, and it is immaterial, irrelevant and incompetent.

The Court: I will allow it.

10

A. No, sir.

Q. Didn't you cause to be inserted in the Hudson Observer a statement that you had been accused of selling goods under cost? A. No, sir.

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

Q. Under the name of Ned K. Fink? A. No, sir.

Q. How about the Hudson Despatch? Did it appear in that paper? A. Not to my knowledge.

Q. Did you cause anything to be printed about your having been accused of these things in any paper? A. No, sir.

20

Q. You never did? A. No, sir.

Mr. Carpenter: Plaintiff rests.

Mr. Tiffany: I now ask for a non-suit, on the ground that it appears by plaintiff's own testimony that these words were spoken by the people mentioned to the Mayor of Hoboken, concerning the ordinance in the City of Hoboken and concerning the methods by which people were to do business in that municipality, and therefore a privileged communication, and—

30

The Court: That may all be so, but it doesn't appear yet by the evidence.

Mr. Tiffany: By this gentleman's own testimony—

40

Edward Sharkey—Direct Examination.

The Court: He said they made a complaint before the Mayor. It doesn't appear as yet in the case why they complained to the Mayor any more than they complained to anybody else. I will refuse to non-suit.

10 Mr. Tiffany: Exception.

The Defense.

EDWARD SHARKEY, sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Tiffany:

20 Q. You are connected with the City Government of Hoboken? A. Yes, I am Deputy City Clerk.

Q. Have you, in your official capacity, brought with you, in answer to subpoena, the ordinance passed December 8, 1915, concerning the sale of goods by merchants? A. Yes, sir (witness producing paper).

Mr. Tiffany: Have you any objection to this?

30 Mr. Carpenter: I certainly have—not as to the fact that it may be a true copy; I don't dispute that.

Q. Is this the original copy as passed? A. Yes.

Q. And written on the books since the 8th of December, 1915? A. Yes, sir.

Mr. Tiffany: I offer the ordinance in evidence.

40 Mr. Carpenter: I object to it as incompetent, irrelevant and immaterial.

Mr. Tiffany: This is an ordinance to regulate the sale of goods, wares and merchandise in the City of Hoboken, which are held forth to the public to be sales of goods belonging to a bankrupt, assignee, receiver, or other person in a representative capacity, or of a person about to retire from business, or of goods damaged by fire or water, and other such sales, passed by the Board of Commissioners of the City of Hoboken, requiring a license to be taken out by by merchants of that kind, and prescribing a penalty if the license is not taken out, and that the license is to be issued at the City Clerk's office. 10

Mr. Carpenter: This ordinance, of course, does not apply to the business Mr. Finkelstein was doing. The title says, "which are held forth to the public to be sales of goods belonging to a bankrupt, assignee, receiver, or other person in a representative capacity, or of a person about to retire from business, or of goods damaged by fire or water, and other such sales." He was doing a legitimate business; and, furthermore, no city has a right to pass an ordinance which forbids a man from entering into business and selling goods from a receiver's sale, or to sell goods when he is about to retire from business, and assignee's sales and bankruptcy sales have to go on in order that courts may exercise their functions and the affairs of courts properly conducted. This ordinance is one that the City Commissioners had no power to pass, and, anyhow, it doesn't apply to a man who is in business for himself. 20 30 40

The Court: Do you claim, Mr. Tiffany, that this business which was being conducted by the plaintiff here came within the terms of that ordinance?

Mr. Tiffany: We are going to show this—

10

Mr. Carpenter: Well, do you claim that?

Mr. Tiffany: We are going to claim it, yes, that Ward-Fink Company, of which Mr. Finkelstein was a member, did such a business, and when he opened up this business in Hoboken they asked him whether he was going to do it again.

20

The Court: It is only a question whether they have the right to claim a privilege; it is not merely a question whether the Commissioners have the power to pass such an ordinance as this, but if certain statements are made they have a right to claim the privilege. I will allow it.

Mr. Tiffany: Will you consent that a copy be used in place of the original? I don't want to call the City Clerk here now.

Mr. Carpenter: I will consent to that.

30

Mr. Tiffany: This ordinance is dated November 4, 1915, was presented, read, and passed its second, third, and final hearing, and finally adopted December 8, 1915. It is signed by D. A. Haggerty, City Clerk.

Q. Mr. Haggerty is the City Clerk? A. Yes.

Q. This ordinance was duly passed after publication? A. After publication, yes.

40

(The ordinance is admitted in evidence, and read in full by counsel.)

Edward Sharkey—Cross Examination.

Cross Examination by Mr. Carpenter:

Q. Do you know who drafted this ordinance?
A. I do not.

Re-direct Examination by Mr. Tiffany:

10

Q. Who is the Director of Public Affairs of the City of Hoboken? A. Patrick R. Griffin.

Q. And is he the one who directs the City Clerk in reference to license? A. Yes, sir.

Q. And licenses are issued by the City Clerk at his direction? A. All licenses are under the direction of the Director of Public Affairs.

By Mr. Carpenter:

20

Q. All licenses are issued by the City Clerk? A. They are issued by the City Clerk, but are granted by the Department of Public Affairs.

Q. Any license under that particular ordinance would be granted by the City Clerk, wouldn't it? A. No, all licenses are granted by the Commissioners, not by the City Clerk—by the whole board, and then referred to the Director of Public Affairs.

By Mr. Tiffany:

30

Q. What is Mr. Patrick R. Griffin's office? A. Mayor.

Q. Is he Chairman of the Board? A. Yes.

(Recess until 2 o'clock.)

40

Roscoe B. White—Direct Examination.

ROSCOE B. WHITE, sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Tiffany:

10 Q. You are Secretary of the Board of Trade of Hoboken? A. I am.

Q. Do you know Mr. Herman Geismer? A. I do.

Q. Is he also a member of the Hoboken Board of Trade? A. He is a member, yes.

Q. Does he hold any office?

Mr. Carpenter: I object to that as immaterial.

20 Mr. Tiffany: I will connect it, to show that Mr. Geismer was acting as a member of the Committee.

The Court: I will allow it.

A. Mr. Geismer is Chairman of the Retail Bureau of the Board of Trade and Chairman of the Executive Committee in charge of that bureau.

Q. What are the duties of that Committee? A. To have general charge of the Retail Bureau.

Mr. Carpenter: I object to that.

30 Q. Do you know what the purpose of that Committee is? A. I know the purpose of the Committee, yes.

Q. Now, I press the question as to what the duties are; do your by-laws show the duties of that Committee? A. Yes, the duties are shown by the by-laws and the minutes.

40 Mr. Carpenter: I want to object to that, on the ground that it is immaterial, because

they cannot by by-laws justify the action of one of their members in slandering a third person.

The Court: The question is, whether he acted in good faith. You are claiming damages for malicious and defamatory statements. It is quite competent for them to show that. 10

Q. Have you the minutes and by-laws here? A. I have the by-laws (witness producing book).

Q. Was Mr. Herman Geismer a member of the Bureau Committee in May, 1916? A. Yes, sir, he was Chairman of that Committee.

The Court: What Committee was that?

A. Executive Committee of the Retail Bureau. 20

Q. The Retail Bureau is a subdivision of the Board of Trade? A. Yes, sir.

Q. And do you know what other persons were members of that Executive Committee in that Bureau? A. Yes, sir.

Q. Will you state them. A. Mr. Tietje and Mr. Wasserberg.

Q. Is Mr. Mountford a member of the Retail Bureau Committee? A. Mr. Mountford is a member of the Board of Trade and a member of the Retail Bureau Committee of that Board. 30

Mr. Tiffany: To save time I will recall Mr. Sharkey.

Mr. Carpenter: I don't know a thing about this; I don't know what you are referring to or anything about it.

Mr. Tiffany: I want him to find the section 40

Max Z. Hurwitz—Direct Examination.

regarding their duties, to show that they were acting as such members.

Mr. Carpenter: He can look for that while you are examining the witnesses.

10 No Cross Examination.

MAX Z. HURWITZ, sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Tiffany:

Q. Mr. Hurwitz, where do you live? A. At 730 Washington Street, Hoboken.

20 Q. Are you in business in Hoboken? A. Yes.

Q. What business? A. Drygoods.

Q. How long have you been in that business? A. About fourteen years.

Q. In Hoboken? A. In Hoboken.

Q. Whereabouts? A. At 316 Washington Street about eight years, at 418 Washington Street about four years, and about two years at my present address, 412.

30 Q. Do you know Mr. Herman Geisner and Mr. Walter Mountford? A. Yes, I do.

Q. Are they in business in Hoboken? A. They are.

Q. Are you a member of the Retail Merchant's Association? A. Yes, sir.

Q. Hold any office? A. I was President last year.

Q. In May, 1916? A. Yes, sir.

40 Q. You remember a meeting of that Committee, about the month of May, at which there were certain conversations regarding the method of busi-

ness of certain people who had come into Hoboken?

A. At the meeting in May—

Q. Do you remember such a meeting? A. I do remember, yes.

Q. At that meeting, did you, as a result of something that was done there, appoint a committee?

A. Yes, sir.

10

Q. What was this committee for?

Mr. Carpenter: I object to that as immaterial.

The Court: I will admit it.

A. For the purpose of investigating Mr. Fink's business methods.

Q. Were Mr. Giesmer and Mr. Mountford present at the meeting at which that action was taken?

20

A. No, sir.

Q. You were the Chairman of that meeting? A. Yes, sir.

Q. And present? A. And present.

Q. Who appointed the committee? A. I did.

Q. When did you appoint it, at the meeting or after? A. After the meeting.

Q. Whom did you appoint upon the committee?

A. Mr. Mountford and Mr. Geismer.

Q. The defendant in this suit? A. Yes, sir.

30

Q. Did you after that go with Mr. Geismer and Mr. Mountford to the Mayor's office? A. Yes, sir.

Q. As a committee? A. Yes.

Q. Did you know Mr. Fink prior to May 15, 1916? A. I did.

Q. What were your relations with him? Did you have any business with him? A. He rented, or rather he occupied a store that I formerly was in—well, two other people. He rented a store that was formerly mine.

40

Max Z. Hurwitz—Direct Examination.

Q. In Hoboken? A. In Hoboken.

Q. Did he carry on a business in it? A. He carried on a business in it.

Q. What kind of business? A. Gent's furnishings.

10 Q. Whom did he rent the store from? Did he rent it from you?

Mr. Carpenter: I object to that. What difference does it make.

Mr. Tiffany: I want to show that this renting was not done by this gentleman at all, but was done by another man and then turned over to him.

Mr. Carpenter: That is immaterial.

The Court: I will overrule that.

20

Mr. Tiffany: Exception.

Q. How long did they remain in that store? A. About four months.

Q. What was the method by which they did business?

Mr. Carpenter: I object to that. I don't think it is material, relevant or competent.

30

Mr. Tiffany: I am going to show, if the Court please, that Mr. Fink acting under a trade name conducted a business there that comes under the very terms of this ordinance and which this ordinance was to prohibit.

The Court: I will exclude it.

Mr. Tiffany: I ask for an exception.

Q. Did you know Mr. Finkelstein prior to May, 1916? A. I did.

40

Q. Do you know whether he was affiliated with the Ward-Fink Company? A. Yes, he was.

Q. And was that the company that was occupying the store of which you have spoken? A. Yes.

Q. Did you know in May, 1916, when you appointed this committee to investigate Mr. Fink's business, that he was the same Fink that was engaged in that business under the name of the Ward-Fink Company? A. I did. 10

Q. And why did the association desire Mr. Fink's business investigated?

Mr. Carpenter: I object to that.

The Court: It will be excluded.

Mr. Tiffany: I ask for an exception.

Q. After you had been in the Mayor's office when Mr. Fink was there, did you go to any other place subsequently at the direction of anyone? A. I don't understand the question. 20

Q. Were you, after the meeting in the Mayor's office with Mr. Fink, Mr. Geismer, and Mr. Mountford in the Hoboken Recorder's Court? A. Yes.

Q. In reference to Mr. Fink? A. I wasn't called there; I went there.

Q. But you were there? A. I was there, yes.

Q. You were a witness? A. I was not a witness.

Cross Examination by Mr. Carpenter: 30

Q. You are friendly with Mr. Fink now, aren't you? A. What do you mean? Yes, I am not unfriendly.

Q. When did you become unfriendly with him? A. I was never unfriendly towards him; I simply wanted to see that the business he conducted was conducted legitimately, as the President of the organization.

Q. By the way, you were in the gent's furnishing business, too, weren't you; you said you were in the drygoods business. A. Drygoods includes gent's furnishings, but as it happens I don't carry gent's furnishings.

10 Q. Didn't you at the time have some goods of that kind? A. Very little.

Q. You had some? A. Yes; I said drygoods includes that, but I carry very little gent's furnishings.

Q. Didn't you know that when Mr. Finkelstein opened his store in Hoboken he wasn't doing a receiver's sale or assignee's sale? You knew that, didn't you? A. Yes, I knew that.

Q. You knew he wasn't carrying on any fire sale? A. Yes.

20 Q. And you knew that he had a neat little store there on Washington Street? A. Nothing of the sort; he had anything but a neat little store.

Q. You are complaining now about dirt or disorder of the goods? A. Well, when he rented that store from me I was very much disappointed; I felt that the store was a menace to the trade, whereas I expected it was going to be a good store. Instead of counters there was, in most cases, boxes used.

30 Q. By the way, you are talking about the Ward-Fink Company? Is that what you are complaining about? A. I am not complaining about anything. I was simply acting as Chairman of the Merchant's Association, and when the complaint was brought, I appointed a committee to investigate.

Q. I show you a letter, dated June 12, 1916, asking Mr. Fink to become a member; did you ever see that before? A. Yes.

40 Q. Sent out by your instructions, wasn't it? A. Yes, dictated by me.

Max Z. Hurwitz—Cross Examination.

Q. Dictated by you and signed by the Secretary of the association? A. Yes, after he was vindicated.

Mr. Carpenter: I offer that letter in evidence.

The same is marked Exhibit P-2.

10

Q. Did you go to Mr. Finkelstein's store between the 15th and 18th of May, 1916? A. No, sir, I don't remember being in his store.

Q. Do you know whether Mr. Mountford went between the 15th and 18th? A. No, sir, I do not.

Q. As a matter of fact, you know he did not? A. No, I cannot say that.

Q. Didn't you hear him testify so before the Recorder in Hoboken? A. You asked me if I knew; I don't know whether he was there or not, personally.

20

Q. Didn't you hear him testify to that? A. I don't even recall that.

Q. You were present in the Mayor's office when these remarks were made about Mr. Finkelstein? A. I came in late to the Mayor's office; I didn't hear all the remarks.

Q. You heard him called a faker, didn't you? A. No, sir.

Q. Didn't you hear him called a disgrace to Hoboken?

30

Mr. Tiffany: I object to this as not proper cross-examination.

The Court: He hasn't given any testimony as to what happened in the Mayor's office.

Q. Do you know whether that committee which you appointed did, as a matter of fact, go into Mr. Finkelstein's store? A. No, sir, I do not.

40

Max Z. Hurwitz—Cross Examination.

Q. Haven't you been going to Mr. Finkelstein a number of times and asking him to settle this case?

A. You mean since?

Q. Since he started this suit.

10 Mr. Tiffany: I object. It wouldn't be binding on us even if he did go.

The Court: I think it is proper to show his relationship to the parties, to find out whether any prejudice existed.

Mr. Tiffany: I ask an exception.

A. I told Mr. Finkelstein I was convinced that there was no malice on my part.

20 Mr. Carpenter: I move to strike out the answer and that the witness be instructed to answer the question.

The Court: It may be stricken out.

A. I did.

Q. Didn't you ask him to take \$200 to settle this case? A. I asked him under what conditions he would settle.

30 Mr. Tiffany: I object, on the same ground, that it in no wise binds us, and it might prejudice us before the jury.

Q. Was any report made to you as President of the Merchant's Association by Mr. Geismer of this so-called Investigating Committee, before you went to the Mayor's office? A. A report made? No, sir.

Q. Do you remember what day you appointed this investigating committee? A. I do not.

40

Max Z. Hurwitz—Cross Examination.

Q. Was it after the store was opened? A. I believe so; I am not sure of that.

Q. Did you instruct the Committee to report to you? A. No, sir, I went down with the Committee. I followed them right up and wanted to know what took place there.

Q. As soon as the Committee was appointed you went to the Mayor's office? A. I don't remember it was the same day or the next day that the Committee was to come down, but they did not meet to go down. The Committee went down and I followed them. I missed a part of the conversation that took place there.

10

Q. Then, if I understand you correctly, as soon as you appointed this Committee they went to the Mayor's office? A. I am not sure whether it was soon or the next day—whether it was the very day or the next day.

20

Q. Do you know what kind of an investigation they made, if any? A. If I recall it right, they wanted to make an investigation as a result of that meeting that took place a day or two before that. At the Merchant's Association several members complained at the meeting about a man because of his previous conduct in business in Hoboken.

Q. I didn't ask you that. A. Excuse me; I will try to answer.

30

Q. (The question is read by the stenographer.) A. I recall to mind the complaint they were to investigate, and they were to investigate it, or ask the Mayor to investigate, to see whether or not it was in accordance with that ordinance.

Q. All your committee was to do, under their instructions, was to go to the Mayor's office and complain about this man? A. All this committee

40

10 was to do was to go to the Mayor and tell him that the Merchant's Association had a meeting and there were several members who complained that this man was conducting business in the form that would include him under that fly-by-night ordinance, and to investigate and see whether or not it was so.

Q. Do you remember whether that committee was formed before he had actually opened his store or afterwards? A. I don't remember that.

Q. So it may have been appointed before the man ever commenced to do business; is that so? A. Well, he was already fixed up, whether he was already open for business or not. You could see from the general appearance of the store the kind of a store it was going to be.

20 Q. Isn't it a fact that your whole complaint against this man arose out of the fact that he was selling, or advertising to sell, BVD underwear for 35 cents a garment? A. No, sir, that was not all.

Q. That was a part of it, then? A. That is one of the items perhaps.

Q. And the merchants of Hoboken sell at 50 cents? A. Yes.

30 Q. And your committee didn't think it was fair that anybody else should come there into Hoboken and make sales for less? A. No, this was only one of the items complained of at that meeting, and we knew he had been there before.

Q. That he undersold other people? A. No, that customers complained that he was not giving the right goods as advertised.

Q. Have you got those customers here? A. No, sir, I have not. That was complained of at the meeting.

40 Q. Do you remember the names of any of those customers? A. There were no names given.

Q. Was your committee aggrieved because you were afraid he was going to sell goods cheaper than the rest of the merchants in Hoboken? A. No, sir, we were not afraid of that, but we didn't want him to advertise one kind of goods in his window and then when people came in to buy give the customers something else, which was a fraud on the public. 10

Q. He hadn't done any of that? A. It was claimed that he had done that under the Ward-Fink Company a few months prior to that.

Q. This man Finkelstein in his store at 332 Washington Street hadn't done any of that, had he? A. No, not yet.

Q. And he himself in his own business wasn't affected at that time, was he? A. Well, I couldn't tell that yet. 20

Q. And he wasn't at that time a disgrace to Hoboken, was he? A. Well, no.

Q. And he wasn't a disgrace himself at that time to Washington Street? A. No, not yet.

Q. And you didn't want him to come in there and sell merchandise cheaper than the rest were selling it? A. No, he has a right to sell what he wants.

Q. I know he has, but you didn't want him to do so? A. No such thing; that was only one of the items. 30

Q. Didn't you tell Mr. Finkelstein that you yourself didn't want him to come in there and sell merchandise cheaper than the rest were selling? A. No, sir, I didn't say anything of the sort.

Q. Didn't tell him anything like that? A. I told him in conversation afterwards—long afterwards—that it was very poor business policy.

Q. That was the reason you say you were com- 40

plaining? A. No, I didn't say that was the reason.

10 Q. Didn't you tell Mr. Finkelstein, before he was invited to join the association in June, that you were going to make him stop selling BVD underwear at 35 cents? A. I didn't say anything of the sort, only he came to me and I told him I was acting absolutely without malice, and I told him I was not acting absolutely without malice, and that he was jeopardizing business by doing that.

Q. That is, selling goods below that? A. No, I don't handle those goods at all.

Re-direct Examination by Mr. Tiffany:

20 Q. The complaint made to the Mayor was by reason of the fact that Mr. Finkelstein had been doing a questionable sort of business prior to that time and they wanted to be sure that he wasn't going to do it in the future? A. Yes.

Q. And the purpose of the complaint to the Mayor was to make sure that he was not going to do business in the manner in which he had already done it? A. Yes.

30 Q. Is there a standard price on BVD underwear? A. Yes.

Q. It is made by what company? A. By the BVD Company, the exclusive agents for which is Robert Reis & Company.

Q. What is the regular retail price at which those goods are sold to the public? A. Fifty cents.

40 Q. And you say complaints had come to various merchants of your committee that this man was advertising in his window one kind of goods at a certain price and when the customers came to purchase they got another kind of goods? A. Yes.

Max Z. Hurwitz—Re-cross Examination.

Q. And it was in reference to that that you asked the Mayor to investigate? A. Yes, sir.

Q. Did you see anything in the Tribune A. No.

Q. When you went to settle this case as you testified, with Mr. Fink, you say you weren't authorized by either Mr. Geismer or Mr. Mountford to do so? A. No sir.

10

Q. You acted entirely unknown to them? A. Yes.

Q. What did you do that for? A. Well, I though inasmuch as I had appointed them on the committee I didn't want any trouble; I wanted to avoid lawsuits.

Re-cross Examination by Mr. Carpenter:

Q. I want you to tell the jury what you know, of your own knowledge, that Mr. Fink of Ward-Fink Company ever did in this other store that was improper, or criminal, or in violation of any law of this State.

20

Mr. Tiffany: I think I shall object to that, if the Court please. As it now appears that they were acting as a committee to ask for an investigation, it makes no difference whether it was of their own knowledge or not.

30

The Court: He has a right to ask that.

A. From my own knowledge I know of nothing criminal, excepting I had a short lease on that store yet, and when it was taken over by the Ward-Fink Company and this was in a prominent block on Washington Street, I was disappointed as to the kind of store they fixed up.

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Max Z. Hurwitz—Re-cross Examination.

Q. Your aesthetic tastes were injured? A. No, except it hurt the standing of other stores in the vicinity. It was in a prominent block with all the others stores.

10 Q. You mean it wasn't in harmony with the Geismer Store? A. No, sir, it was only a general complaint that came to us.

Q. You haven't got any of those complainants here? A. No, I have not.

By Mr. Tiffany:

Q. You say the store wasn't fixed up as the other stores were; did you go into the store of the Ward-Fink Company? A. Yes.

20 Q. How did they display their goods there, and what was the method that this Ward-Fink Company employed in doing business?

Mr. Carpenter: I object to that.

The Court: I will admit it.

A. They displayed their goods in a way you wouldn't expect in a Bowery Store.

30 Mr. Carpenter: I object and move to strike out the answer.

The Court: It may be stricken out.

Q. Tell us how. A. Instead of counters, plain packing cases were used such as sugar cases and grocer's cases, and things of that sort, which certainly would not reflect credit to a store on the principal street.

Q. With planks across the tops of the boxes? A. Yes, and big, glaring headlines.

40 Q. For signs? A. Yes.

Roscoe B. White—Resumed, Direct.

Q. And it was on account of that that you didn't want him to repeat it? A. Not only that—

Mr. Carpenter: I object.

Q. Isn't that so?

10

Mr. Carpenter: I object as hearsay.

The Court: I think the question is objectionable, and I will exclude it.

Mr. Tiffany: Exception.

ROSCOE B. WHITE, resuming the stand, testified as follows:

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Direct Examination by Mr. Tiffany Continued:

Q. Mr. White, have you found the various sections of the by-laws referring to these committees?

A. I have.

Q. Will you just read the sections referred to?

A. Section 11 is the first one of the by-laws of the Board of Trade.

By the Court:

30

Q. Found on what page? A. The pages aren't numbered.

By Mr. Tiffany:

Q. This is the minute-book you are referring to now? A. Yes, sir. The first page of the by-laws has the corner of the page turned down.

Q. That is section 11; now, what other sections?

A. Section 11, and section 13, and section 15, and

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section 16, and section 49, being the duties of the Chairman of the bureaus, among them the Retail bureau.

10 Mr. Tiffany: I offer in evidence these various sections.

Mr. Carpenter: I have no objection.

The Court: Read whatever there is that bears on this subject.

Defendant's counsel thereupon read the various sections referred to.

Q. Now, Mr. White, do you know the duties which the Retail Bureau and Executive Committee were to perform? A. I do.

20 Q. Now, I ask you to tell us what those duties were.

Mr. Carpenter: I object, as immaterial.

The Court: How is it material?

Mr. Tiffany: I want to show, if the Court please, that one of the duties of the Committee was this very thing, to keep an eye on the trade in Hoboken and the manner in which they did business.

30 The Court: You are asking him what their duties were?

Mr. Tiffany: Yes.

The Court: How can he say what the duties were unless they were prescribed by the by-laws or laid down by some resolution of this association?

Mr. Tiffany: I will change the form of the question.

40 Q. What were the duties performed by the Executive Committee of the Retail Bureau of the

Hoboken Board of Trade? A. The duties to be performed by the Retail Bureau were all in furtherance of the mercantile interests of the city of Hoboken.

Mr. Carpenter: I object and move to strike that out. 10

The Court: Yes, I think that ought to be stricken out.

Q. What was the method by which they did it; for instance, what did they do to further the interests of the retail business? A. They did everything they could to attract trade, promote a uniform closing, for example.

Q. Any other examples? A. Anything along that line. 20

Q. Was there any committee of the Board of Trade that had the supervision of the method by which merchants conducted their business in Hoboken? A. The Executive Committee has the management of that.

Cross Examination by Mr. Carpenter:

Q. Is there anything that you can find in those minutes or by-laws which prescribes the number of merchants which shall be allowed to do business in Hoboken? A. Certainly not. 30

Q. Is there anything in those by-laws which prescribes how a store of a merchant shall be dressed up to suit the members? A. Certainly not.

Q. Is there anything that prescribes what the committee that you have referred to shall do in case an outsider comes in and opens a store in Hoboken? A. Certainly not. 40

Patrick R. Griffin—Direct Examination.

Q. There is nothing, then, that limits the number of stores that can be opened in Hoboken for gent's furnishings or anything of that kind? A. Are you asking me if the minutes specify the number of stores in a city?

10 Q. Yes. A. There is nothing of that kind in any minutes of any organization that I ever heard of.

PATRICK R. GRIFFIN, sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Tiffany:

20 Q. You are Mayor of the City of Hoboken? A. Yes, sir.

Q. And director of the Department of Public Affairs? A. Yes.

Q. And member of the Board of Commissioners? A. Yes, sir.

Q. And chairman of various other departments? A. Yes, sir.

Q. Do you know Herman Geismar and Walter Mountford? A. Yes.

30 Q. Do you recall a complaint being made to you by Mr. Geismar and Mr. Mountford and Mr. Hurwitz in May, 1916?

Mr. Carpenter: I object to that as a conclusion of law that it was a complaint.

The Court: The objection is a proper one; the question will be overruled.

Mr. Tiffany: Exception.

40 Q. Did Mr. Geismar, and Mr. Mountford, and Mr. Hurwitz appear before you some time in May,

Patrick R. Griffin—Direct Examination.

1916, in reference to the method of doing business which Mr. Fink had carried on? A. Yes, sir.

Q. And as a result of their appearing before you, did you take any action?

Mr. Carpenter: I object to that as immaterial; furthermore, it is not shown that the Mayor, although I have the greatest respect for his powers, has any judicial powers; he is an executive officer of the city. 10

The Court: The question is, whether a complaint was made in good faith; but how is it material what Mr. Griffin did afterwards?

Mr. Tiffany: I want to show that there was sufficient evidence produced before him to induce him to act in his official capacity to have a complaint drawn by which this man was brought into court. 20

Mr. Carpenter: I object to that.

The Court: I think I ought to exclude that.

Mr. Tiffany: I ask for an exception.

Q. Mayor, who passes upon the licenses granted under the ordinance entitled, "An Ordinance to regulate the sale of goods, wares and merchandise in the City of Hoboken, which are held forth to the public to be sales of goods belonging to a bankrupt, assignee, receiver or other person in a representative capacity, or of a person about to retire from business, or of goods damaged by fire or water and other such sales, passed in December, 1915? 30

Mr. Carpenter: I object to that as immaterial, for the reason that there is no 40

Patrick R. Griffin—Cross Examination.

testimony that Mr. Fink's business came within the terms of that ordinance, and hence he was not obliged to have a license.

The Court: I will allow the question.

10 A. The Board of Commissioners.

Q. Of which you are chairman? A. Yes.

Q. And what would be the process by which licenses would be granted under the ordinance by the Board of Commissioners; would they direct the City Clerk to issue the license?

Mr. Carpenter: Objected to as immaterial.

The Court: The question will be permitted.

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A. The matter would be taken up by the Board and if a license was granted the City Clerk would be notified.

Q. As Director of Public Affairs in the City of Hoboken is it your duty to see that the ordinances of the city are enforced? A. To a certain extent.

Cross Examination by Mr. Carpenter:

30 Q. There wasn't any written complaint made before you as to the business of Mr. Finkelstein?

A. No written complaint; it was taken to the Committee on Magistrate.

Q. You are not the Committee on Magistrate? A. No.

Q. The Recorder's Court in Hoboken is where complaints are made? A. Yes, sir.

Q. Who was the Judge? A. Judge Carsten.

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John F. Callahan—Direct Examination.

JOHN F. CALLAHAN, sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Tiffany:

Q. You are the Clerk of the Hoboken Recorder's Court? A. I am. 10

Q. On or about May 26th was there a summons issued in your court to Mr. Ned K. Fink on a complaint in this action? A. There was.

Mr. Carpenter: I object to that as immaterial.

The Court: How is it material?

Mr. Tiffany: Simply to show that there was sufficient in these complaints to warrant this man being brought into court. 20

The Court: I will exclude it.

Mr. Tiffany: Exception.

Q. Was a summons issued to Mr. Fink?

Mr. Carpenter: I object to that.

The Court: I will exclude it.

Mr. Tiffany: Exception.

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WILLIAM P. CHURCH, sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Tiffany:

Q. You are connected with the Robert Reis Company? A. Yes, sir.

Q. Do they have anything to do with the BVD underwear? A. Yes, we are exclusive agents for 40

Herman Geismer—Direct Examination.

New York and a territory of 50 miles around New York.

Q. Hoboken comes within your area? A. Yes.

Q. And do you know, of your own knowledge, what the price in the trade at which BVD garments are to be sold to customers?

10

Mr. Carpenter: I object to that as immaterial.

The Court: I think it should be excluded.

Mr. Tiffany: Exception.

HERMAN GEISMER, sworn in his own behalf,
20 testified as follows:

Direct Examination by Mr. Tiffany:

Q. Mr. Geismer, you are the defendant in this suit? A. Yes, sir.

Q. And are in business in Hoboken? A. Yes, sir.

Q. And live there? A. Yes.

30 Q. How long have you been in business in Hoboken? A. Twenty-eight years, almost twenty-nine.

Q. What is the nature of the business you conduct? A. Men's outfitting, from head to foot.

Q. Under what name do you conduct it? A. The Geismar shop.

Q. Are you a member of the Board of Trade of Hoboken? A. I am.

40 Q. Do you hold any office there, or did you in 1916? A. I have been Chairman of the Retail

Herman Geismer—Direct Examination.

Bureau of the Board of Trade since it was organized.

Mr. Carpenter: When was that? We don't know.

A. Two years ago—almost two years ago. 10

Q. Do you know Mr. Mountford? A. Yes.

Q. And Mr. Hurwitz? A. Yes, sir.

Q. Are you a member of the Hoboken Merchant's Association? A. Yes, sir.

Q. Do you hold any office in that association? A. No, sir.

Q. Were you present at a meeting in May when action was taken by which the president was to appoint a committee to investigate Ned K. Fink?

A. No, sir. 20

Q. Did you serve on a committee at that time? A. Yes.

Q. At whose request? A. Mr. Hurwitz's request.

Q. Mr. Hurwitz was President of the association? A. Yes, sir.

Q. Did you then go with Mr. Hurwitz and Mr. Mountford to the Mayor's office in Hoboken after that? A. We went together at the Mayor's office, Mr. Mountford and myself and Mr. Hurwitz came later. 30

Q. What was the purpose of going to the Mayor?

Mr. Carpenter: I object to that as immaterial.

The Court: I think the purpose is not material; what they did might have a bearing.

Mr. Tiffany: I will change the question.

Herman Geismer—Direct Examination.

Q. When you went to the Mayor did you go individually or as a committee? A. As a committee.

Q. Representing whom? A. The Merchant's Association of the Hoboken Board of Trade.

10 Q. What did you do there with the Mayor? Was Mr. Fink there? A. Not at the first meeting.

Q. At the second meeting? A. Yes, sir.

Q. Now, at the second meeting what took place before the Mayor? A. At the second meeting?

Q. I will withdraw that at this time. Did you yourself know Mr. Fink prior to your appointment on this committee? A. Yes, but not personally. I was introduced to him and I knew him by sight.

Q. Had he ever been in your store? A. Yes, sir.

20 Q. When? A. The previous Christmas, just before he quit Hoboken.

Q. How was he trading then? A. As the Ward-Fink Company.

Q. In the gent's furnishings business? A. Various men's and ladies' goods.

Q. And did you know the method by which their goods were displayed? A. Yes, sir.

Q. Had you heard rumors as to the method by which he did business? A. I saw it.

Q. What did you see?

30 Mr. Carpenter: I object to that. That was a corporation—proved to be a corporation some months before, and not Mr. Fink as an individual at this time, and I think it is too remote and incompetent, irrelevant and immaterial.

The Court: I will permit it.

40 A. I saw sweaters in the showcase in front of the door, marked "all wool, 69 cents," and any man

Herman Geismer—Direct Examination.

with reason knows that you can't sell all-wool sweaters for 69 cents.

Mr. Carpenter: I object to that and move to strike it out. There is no evidence that they were wool.

The Court: I refuse to strike it out.

10

Q. Do you know all-wool sweaters when you see them? A. Yes.

Q. Did you look at these sweaters? A. Yes.

Q. Were they all-wool sweaters, in your estimation?

Mr. Carpenter: I object to the question; whether they were or not is not material.

The Court: Of course, you haven't shown that he knows.

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Mr. Tiffany: He said he did.

The Court: If Mr. Carpenter wants to examine him as to his knowledge and judgment I think he ought to have an opportunity to do so.

Examination by Mr. Carpenter as to Qualifications:

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Q. Where were you when you saw these sweaters?

A. In front of the showcase—directly in front of it, just the same as I am directly in front of this post.

Q. And were the sweaters inside of the showcase? A. Yes.

Q. Behind glass? A. Yes.

Q. Did you feel of them? A. No, sir.

Q. I thought there were no showcases in that

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Herman Geismer—Direct Examination.

store? A. There was a showcase in front of the store.

Q. Were you in front of the store outside? A. Outside, yes.

Q. How many feet away from these sweaters were you standing? A. Probably ten inches.

10 Q. Looking through the glass? A. Yes, sir.

Q. Can you tell whether a given garment is all wool by looking at it, or must you feel it and carefully examine the texture? A. I can tell if a garment is wool by looking at it, without feeling it.

Q. Can you tell whether it is part wool and part cotton without feeling? A. Well, I hardly think I could if there is just a small amount of wool in it, but if it were half and half I could tell without feeling it.

20 Q. Was the glass showcase clean or dirty? A. I can't remember.

Direct Examination by Mr. Tiffany resumed:

Q. Now, tell me whether, in your estimation, those articles that you saw were all wool. A. They were all cotton.

Q. Do you know of any other instances? A. Yes.

30 Q. Just relate them to the jury. A. One instance I know of in regard to Root's underwear, which is a popular brand, where it was advertised in the showcase; I forget whether it was 69 or 79 cents, and the article costs that price, and a lady going into the store purchased them thinking that she had Root's and when she opened the package—

Mr. Carpenter (interrupting): I object to this. He can't tell what the woman was thinking.

40 A. She showed me.

Q. What did she show you when she opened the package?

Mr. Carpenter: I object as immaterial.

The Court (addressing the witness): How did you identify it as something that she had purchased from the Ward-Fink Company? 10

A. In what way?

Q. Were there any marks on the wrapper? A. I don't remember that.

Q. Do you know of any other instances of the method by which this man did business, which was not in accordance with the way merchants do business in Hoboken? A. The appearance of the store from the outside was almost disgraceful. 20

Mr. Carpenter: I move to strike that out.

The Court: It may be stricken out.

Q. Tell us what the appearance was. A. The appearance was that of taking boxes and using them in the store as a counter and having goods jumbled on them, with red-price-letters on top of the merchandise.

Q. Was there anything on the outside of the store in the way of signs? A. Yes. 30

Q. What was on them? A. I forget the wording, but it was the Ward-Fink Company, on the top, and then it had a lot of reading matter about coming to Hoboken and selling—I forget the wording of it. There was one sign in each window.

Q. What was the purport of it; tell us as near as you can.

Mr. Carpenter: I object to that, unless he knows. He says he can't tell. 40

The Court: He may tell if he can recall.

Herman Geismer—Direct Examination.

Q. Can you tell about what it was? A. It seems to me—(the witness hesitates).

The Court: See if you can tell us substantially what it said.

10 Q. Can you tell us substantially what it said?

A. I don't believe I can remember it.

Q. Did you say on May 18th, 1916, or at any other time, that "Fink is a faker." A. No, sir.

Q. Did you on May 18th or at any other time say "He was written up by Mr. Adams in the New York Tribune as a faker"? A. I said that Mr. Adams of the New York Tribune wrote up the Ward-Fink Company as doing a fake business.

20 Q. Did you say, designating Mr. Fink, "He came to Hoboken to fake the public and advertised articles in his window, and his methods were to give the purchaser who came into the store inferior goods in place of superior goods displayed in the widow"? A. I didn't say it in that way.

Q. What did you say? A. I said Mr. Fink on his previous visit to Hoboken did what I considered a fake business.

Q. And whom were you saying these things to?

A. To the Mayor.

30 Q. As a member of this committee? A. Yes.

Mr. Carpenter: I object to that and ask that it be stricken out.

The Court: I will let it stand.

Mr. Carpenter: Exception.

Q. Were these remarks, or whatever remarks you did make, made to the Mayor as a member of this committee when you went there? A. Yes, sir.

40

Herman Geismer—Direct Examination.

Mr. Carpenter: I object to that as a conclusion.

The Court: He has already stated that he went there as a member of the committee.

Q. Did you go there in any other capacity than as a member of the committee? 10

Mr. Carpenter: I object.

The Court: He may answer it.

A. I never went to the Mayor at any other time in reference to this matter except first to make the complaint, and then I was subpoenaed, at least by word of mouth, by one of his Tax Commissioners who came to me and said there would be a meeting. 20

Mr. Carpenter: I object to that.

Q. Did you say to the Mayor that Ned K. Finkelstein, or indicating him whether you said his name or not, "was a disgrace to Washington Street, Hoboken"? A. No, sir, I did not; I said it was disgraceful to have a store of that kind on Washington Street.

Q. You are quite positive of the words you used? 30

A. As near as I can remember, those were the words that I used.

Q. Did you say to the Mayor, indicating Finkelstein, that "such persons as Finkelstein are a disgrace to Hoboken"? A. No, sir, I did not even know the man's name; I didn't know whether it was Fink or Finkelstein; I said it was disgraceful to have such a store like that on Washington Street.

Cross Examination by Mr. Carpenter:

Q. Have you changed your mind about that since that time? A. What is that?

10 Q. You have just stated that you considered it a disgrace, or disgraceful, to have a store like this man's on Washington Street; have you since that time changed your mind about his store and the character of his business? A. I said—

Q. Just a minute; answer the question. A. If I have since changed my mind?

Q. Yes. A. When I spoke I had reference to the store the gentleman conducted at the time.

20 Q. At the time you spoke? A. At the time I spoke to the Mayor I had reference to Mr. Fink's, or Mr. Finkelstein's conducting a store in Hoboken before; I didn't know what kind of a store he was going to open up the second time.

Q. That was the store you wanted to close our, wasn't it? A. Yes, sir.

Q. You didn't want him to do business there, did you? A. That is not so. I wanted him to conduct a respectable business, the same as we were conducting.

30 Q. Did you know at that time what kind of a business he was conducting,—the time you were in the Mayor's office? A. I did not know, no; I did not know what kind of business he was conducting, because he had only just gone there.

Q. And yet just as soon as you learned he had come there you went to the Mayor and made statements to him, didn't you? A. I did not personally make any statements to the Mayor; it was done by a committee.

40 Q. Those words came out of your mouth, didn't they? A. Yes, part of them, and part of the rest of the committee.

Herman Geismer—Cross Examination.

Q. You were interested in having him driven out of business there, weren't you? A. No, sir; I was not.

Q. Did you go to his store in the month of May, 1916, and before making these statements to the Mayor? A. In the month of May? 10

Q. Yes, in the month of May, 1916, did you go to this man's store—Finkelstein's store? A. Not inside of the store, no, sir.

Q. Didn't you, before going to the Mayor's office in the month of May, 1916, look into this man's store? A. Yes, sir.

Q. Don't you remember testifying before Judge Carsten in the Hoboken Recorder's Court, that in May, 1916, you discovered nothing in Mr. Finkelstein's store that was not proper? A. I didn't say there wasn't anything improper in there; you asked me if I looked into his store and I said yes. 20

Q. I am asking you the question now if you didn't say that you discovered nothing in Mr. Finkelstein's store that was improper? A. What do you mean by "improper"? I don't know what you mean.

Q. Contrary to the terms of this ordinance. A. Yes, sir.

Q. What did you discover? A. I discovered that he had his goods on ordinary packing boxes, and it was only afterwards that the store was fixed up with cases. 30

Q. Do I understand that you went to the Mayor and said that Finkelstein was doing a disgraceful business, or a fake business, or something to that effect, when all that you had to complain about was that his goods were still in boxes or on the tops of boxes? A. I hadn't reference at all to his being in business then, because he had only come there 40

Herman Geismer—Cross Examination.

two or three days before; I had reference to his previous performance.

Q. Did you go to Finkelstein in May and ask him if he had a lease, and if so for how long a time? A. No, sir, I never had spoken to the gentleman in my life.

10 Q. Weren't you appointed on this committee for the purpose of investigating this man who was going to operate in Hoboken? A. I was appointed upon the committee to see that the laws were enforced in the City of Hoboken,—this ordinance that was passed by the council on account of the Ward-Fink Company.

Mr. Carpenter: I move to strike that out as not responsive.

20 The Court: I will let it stand.

Q. In May, 1916, can you testify whether or not Mr. Finkelstein advertised, or set forth to the public, goods as being a sale of goods belonging to a bankrupt? A. I cannot.

Q. Did he advertise any assignee's or receiver's sale? A. Do you mean now, the second time?

Q. May, 1916. A. No, sir, he did not.

30 Q. Did he advertise a sale of goods, as a person about to retire from business? A. No, sir, not to my knowledge.

Q. Did he advertise a sale of goods damaged by fire or water in May, 1916? A. Not to my knowledge.

Q. Well, weren't you complaining to the Mayor because this man Finkelstein was at the time violating the ordinance? A. No, sir, we were complaining to the Mayor about that.

40 Q. You didn't go to the Mayor in May, 1916, to

Herman Geismer—Re-direct Examination.

complain about what Finkelstein had done some months or years before, did you? A. Yes, sir, there was the appearance of a repetition, from the way he conducted business previous to that, and we didn't want a second performance of it.

Q. And the only thing you know of your own knowledge was that he had sweaters advertised for 69 cents? A. No, I had reference to the condition of the store. There wasn't anything like it on the entire street. 10

Q. Do you remember the day that you saw this store? A. I saw it as long as he was there, every day for three or four times a day.

Q. You were down in the Recorder's Court May 26th, weren't you? A. Yes, sir.

Q. And you remember what you testified to that day? A. The same thing that we said upstairs in the Mayor's office, to my knowledge. 20

Q. You don't remember it well, do you? A. I think I remember it fairly well.

Q. Don't you remember that you testified at that time as to what Finkelstein was doing in May, 1916, and not a word spoken as to what he had ever done before? A. No, sir; I do not remember that.

Re-direct Examination by Mr. Tiffany: 30

Q. What did you testify to in the Recorder's Court? A. We went over the same matter again as was rehearsed at the Mayor's office, that Mr. Fink had conducted, or the Ward-Fink Company previous to this time had run a store that was disgraceful to the street, and we didn't want a second performance of it.

40

Herman Geismer—Re-cross Examination.

Mr. Carpenter: I move to strike that out as a conclusion.

The Court: He is telling what he testified to in the Recorder's Court.

10 Q. That was the fact you were complaining about to the Mayor, as to the method of which he had previously done business? A. Yes.

Q. What was the purpose of that complaint, to have him come within the terms of that ordinance?

A. To make him take out a license or otherwise to conduct a respectable business as we were doing.

Q. How did you happen to get in the Recorder's Court, did you go there yourself or were you called there? A. I was called there.

20 Q. By a representative of the Mayor? A. Yes.

Re-cross Examination by Mr. Carpenter:

Q. No subpoena was served on you? A. No, sir, I don't believe so.

Q. You went there voluntarily? A. No, sir, I was called there. There was a meeting at the Mayor's—

30 Q. But when you went down there you went voluntarily? A. Me? Delaney came to my store and asked me to go down.

By Mr. Tiffany:

Q. Who is Mr. Delaney? A. He is Tax Commissioner, or something like that.

By Mr. Carpenter:

40 Q. Didn't you say in the office of the Mayor that Finkelstein ought to be driven out of town? A. No, sir, that is not what I said.

Herman Geismer—Re-cross Examination.

Q. Didn't you say something to that effect? A. Something to that effect, yes.

By Mr. Tiffany:

Q. What did you say? A. I said that the store was the kind that ought not to be allowed on the street. 10

By Mr. Carpenter:

Q. You are selling the same kind of goods he is? A. No, sir, entirely a different line.

Q. Yours is gent's furnishing goods? A. We handle a higher class of merchandise.

Q. But it is gent's furnishings? A. Men's clothing and furnishings.

Defendant rests. 20

Mr. Tiffany: I ask for the direction of a verdict, if the Court please, under the authority in the case of King vs. Patterson, reported in 49 Law, page 423, I think it is; 417 of the Court of Errors and Appeals, where it is said (among other things) that a communication given as the result of a duty, either moral, social, or legal, to an officer who may have the right or who is interested, is a privileged communication (and upon the authority of other cases which I will cite as— 30

The Court: The question here is whether the occasion was a privileged occasion.

Mr. Tiffany: That is a question of law for the Court.

The Court: No, I think not. I refuse to non-suit.

Mr. Tiffany: I ask for an exception. 40

Charge of the Court.

Gentlemen :

This is an action of slander which has been tried before you, that is, an action in which the plaintiff seeks to recover damages for spoken words which were malicious, defamatory, and untrue.

10 The language which he says was used on the occasion spoken of at the Mayor's office about May 18, 1916, was this :

“Fink,” that is, the name by which the defendant was then known, “is a faker.” “He was written up by Mr. Adams in the New York Tribune as a faker.” “He came to Hoboken to fake the public and advertised articles in his window, and his methods were to give the purchaser who came into the store inferior goods in place of superior goods displayed in the window.” “Defendant also said that plaintiff was a disgrace to Washington Street, Hoboken; he also said that such persons as Finkelstein are a disgrace to Hoboken.”

20 There is the language that is charged in the State of Demand, which is the formal statement which he makes to the Court of the substance of his cause of action, and you will remember the testimony which he gave as to what was said there, which resembles very closely the language which is set out in the State of Demand.

30 Now, this plaintiff was at that time engaged in conducting a retail business on Washington Street, in Hoboken, dealing in men's furnishing goods, and this language was spoken of him in regard to that business; so that, if you find from the testimony, and you are satisfied by a preponderance of the evidence, that this language was spoke,

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Charge of the Court.

and that it was untrue, then unless the occasion was a privileged occasion the plaintiff is entitled to a verdict at your hands.

The law is that spoken language that is defamatory, spoken of a man in reference to his business, is actionable even although no special damage is shown. If it is spoken of a man outside of his business or profession, it is necessary to show that he has been damaged by the language that was spoken; but if there is no doubt that the language that was spoken was spoken of the plaintiff as to the character of his dealings in men's furnishings and it was not privileged, then he is entitled to a verdict at your hands. 10

Now, is a case of this kind, a case of slander, you are not limited to giving a man the actual money loss which he has sustained. He is entitled to some verdict at your hands. If you find from the testimony that he is entitled to a verdict at all you are obliged to give him at least nominal damages, six cents; or if you find that to be the case, whether the speaking of the words was actually malicious, without justification, or without excuse, you are entitled, according to the circumstances of the case, to give him what you know as exemplary or punitive damages, that is to say, damages which are not primarily for the purpose of compensating him for loss because he may not have shown any money loss, but as an example to deter others from committing similar acts or as a punishment for the malicious disturbance of the rights of another. 20 30

The first question for you to settle is, whether the language which is charged here was actually said. Of course, if it wasn't said, if it wasn't sub-

Charge of the Court.

stantially said, then of course the plaintiff cannot recover. The plaintiff himself has testified as to what was said on this occasion. There were several other witnesses there. He is not corroborated by the statement of anyone else; and, on the other hand, the defendant who goes upon the stand and denies that he made use of certain language that is charged in the State of Demand and tells us what he actually did say, is not corroborated by anyone who was there. We have, so far as the use of the language that was used on that occasion is concerned, simply the testimony of the plaintiff on the one hand and the defendant on the other.

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Now it is necessary, of course, for any suitor who seeks a verdict at your hands to satisfy you by a preponderance of the evidence that he has established his case. That doesn't always mean that you are to count the number of witnesses. You cannot say, merely because there is one witness on one side and one on the other the plaintiff cannot recover; but unless you find, either from the surrounding circumstances, or from the manner of the witnesses, or from some of the other incidents of the trial that you may use as corroboration, that the plaintiff has satisfied you by a preponderance of the evidence that this language was actually used upon the occasion charged, then of course there can be no recovery.

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Now, if you find that the language charged, or substantially that language, was used, then your next inquiry will be, was it true? If it was true, then there can be no recovery. Truth is always a defense in a civil suit for slander. It matters not how injurious the truth may be to a man, how disagreeable it may be, or how harmful it may be,

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Charge of the Court.

so far as a civil action for damages is concerned the truth of the matter spoken or printed is always a defense. It isn't always so in a criminal action, but in a civil action the damages must be founded upon the fact that the words, spoken or printed, are not only defamatory and malicious, but they must also be untrue. 10

If you find from the evidence that has been put before you by the defendant that this language was true, even though it was spoken, there can be no recovery.

But the defendant does not rest upon a mere denial of the use of the language charged, nor upon which is called justification, that is, showing the truth of the matter; but he says, substantially, even if the language was used and if it was untrue, it was uttered on an occasion "when it was my duty to speak, and before I can be held for any injury which the plaintiff may have sustained he must not only show that the language used was untrue and defamatory but he must show that I was actuated by malice in making the statement." 20

The law is, where a communication is privileged, that it to say, if it is uttered on an occasion when it is the duty of a man to speak, if he is in the performance of some legal, or moral, or social duty, even although he may utter language which is untrue and harmful to the person about whom it is spoken, if he believes it to be true, and if he makes the statement in the performance of a public duty to someone who has a corresponding right or duty, and is not actuated by malice, still he is not liable for damages. 30

Now, it is for you to say whether this was a privileged occasion; whether the circumstances 40

Charge of the Court.

were such that this defendant, in making the statement charged, if he did make it and if it is untrue, was acting in the discharge of a duty. If he was acting in the discharge of a duty then your further inquiry will be, whether he exceeded his privilege. Did he maliciously make any statement on the occasion before the Mayor? If he was mistaken, if he stated things that were not true but acted in good faith not intending to injure the plaintiff in which he regarded as the discharge of a duty, then he is not liable. That is to say, if you find that this was a privileged occasion, then you are also to inquire whether the defendant was actuated by malice, by intent want only to do injury to the plaintiff. And unless you find that the intent was there and that he was actuated by such a motive for making that statement, then there can be no recovery.

Now it appears that this occasion when the talk was had before the Mayor, which has been reported as a complaint or hearing, was made with reference to some purported action under an ordinance which had been passed by the Commissioners of the City of Hoboken some years or so ago. It appears from a reading of this ordinance that it did not have reference—that is, that its terms did not have reference—either to the business which had formerly been conducted by the Ward-Fink Company, with which the plaintiff here was concerned in some way, or with the business which he was conducting in May, 1916. That is to say, the terms of that ordinance do not cover, so far as I recall it, any of the dealings which either the former corporation or the plaintiff here conducted in the City of Hoboken.

Charge of the Court.

But that does not necessarily remove the privilege of the occasion, if you find it to be a privilege. It is a question whether they were acting in good faith,—whether this defendant with his associates were acting in good faith in presenting this matter to the Mayor for the purpose of having an investigation of the circumstances of this business made, in order that it might be determined whether a prosecution should be had under the clause of the ordinance in question. Of course, you have a right, as judges of the facts, to consider whether this was a complaint or statement that was made in good faith with the idea that these gentlemen who represented this committee of the Hoboken Merchant's Association and the Hoboken Board of Trade, were discharging a public duty, a social duty, or whether they were going outside of that for the purpose of injuring a man who may be regarded as a possible competitor in their business, with the intention of putting him out of the business. You are to consider and determine whether this occasion was a privileged occasion, and if it was a privileged occasion, and you find that the defendant was not actuated by malice, then there can be no recovery.

You must first find, before there can be any recovery, that the words were spoken; you must find that they were untrue; you must find that they were not on a privileged occasion when they were spoken, or if they were privileged that the defendant in speaking the words went beyond the necessities of the occasion, and that he was actuated by malice. If you find all those four, you can find the plaintiff, and if you find for the plaintiff the question of damages is very largely in your hands, which may be either nominal dam-

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Defendant's Request of Charge.

ages or substantial damages, if you find that the defendant was actuated by malice and wantonly made this statement for the purpose of defaming the plaintiff.

10 Mr. Tiffany: I ask for exception to your Honor's refusal to charge as requested, except as charged. Then your Honor didn't hear me through on my motion for non-suit.

The Court: It can go on the record now.

Mr. Tiffany: What I had in mind was, that it was a matter for the Court to determine that it was a privileged communication, and if it was a privileged communication there was no proof of malice by the plaintiff.

20

Defendant's Request of Charge.

1. Communications in matters of public interest in which the public generally is concerned, or made in the performance of social, moral or legal duties, are privileged communications.

30 2. Communications made bona fide upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty, although it may contain criminatory matter, is privileged, if made to a person having a corresponding interest or duty.

40

Exhibit P-1.

TO WHOM IT MAY CONCERN:

I, NED K. FINKELSTEIN, hereby make the following statement in pursuance of the provisions of Chapter 240 of the Laws of 1906, entitled, "An Act to regulate the use of business names."

1. The name under which I am transacting business and intended to transact business hereafter is Fred K. Fink. 10

2. The business so conducted and to be conducted by me is that of Men's furnishing & hats.

3. The place where the said business is now being conducted and is intended to be conducted is 332 Washington St Hoboken.

4. The full name and post office address of the only person connected with the said business is Ned K. Finkelstein, 332 Washington St Hoboken. 20

No. 332 Washington Street, City of Hoboken, County of Hudson, State of New Jersey.

NED K. FINKELSTEIN.

Dated, May 16th, 1916.

County, ss.:

Ned K. Finkelstein, being sworn, says that the statements in the foregoing certificate are true. 30

NED K. FINKELSTEIN (Seal)

A true copy:

JOHN J. MCGOVERN, Clerk.

Sworn and subscribed before me the 16th day of May, 1916.

JOHN F. SALMON,

Commissioner of Deeds of New Jersey. 40

Exhibit P-2.

H
Merchant's Ass'n M Hoboken, N. J.

A
New Odd Fellows Hall

10

Hoboken, N. J., June 12/16

Ned. K. Fink,
Hoboken, N. J.

Dear Sir :

20 The objects of our association are primarily, to encourage and further all legitimate business, and having convinced ourselves that you may be classed in that category, would be anxious to have you in our midst.

We enclose membership card and hope for your favorable consideration.

Yours very truly,

(Signed by) ADAM RUCHSTAHL,
Sec.

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**Exhibit D-1 (Introduced Page 21,
Testimony).**

AN ORDINANCE TO REGULATE THE SALE OF GOODS, WARES AND MERCHANDISE IN THE CITY OF HOBOKEN, WHICH ARE HELD FORTH TO THE PUBLIC TO BE SALES OF GOODS BELONGING TO A BANKRUPT, ASSIGNEE, RECEIVER OR OTHER PERSON IN A REPRESENTATIVE CAPACITY, OR OF A PERSON ABOUT TO RETIRE FROM BUSINESS, OR OF GOODS DAMAGED BY FIRE OR WATER AND OTHER SUCH SALES: 10

Be it Ordained by the Board of Commissioners of the City of Hoboken:

Section 1. No person, firm or corporation except persons or corporations acting in a representative capacity under authority issued by a court or judicial authority in this state, or a person, firm or corporation conducting a permanent and well established business in this City for the sale in the regularly and ordinary course of trade of goods, wares and merchandise, either wholesale or retail, shall offer for sale to the public within the City of Hoboken, any goods, wares or merchandise which are held forth to be the goods, wares or merchandise then or formerly of a bankrupt, assignee, receiver, or other person in a representative capacity or of a person about to retire from business, or goods damaged by fire or water, or any goods except those usually sold in the ordinary and regular course of business, without filing with the City Clerk a statement subscribed to under oath or affirmation by the person, firm or an officer of any such corporation holding or realizing such sale, setting forth in detail the kind, quantity, value and condition of such goods, wares and merchandise, so sought to be sold, and obtaining from said City Clerk a license to conduct such sale. 20 30 40

Exhibit D-1.

10 Section 2. That every such person, firm or corporation shall pay to the City Clerk for such license, the sum of One Hundred Dollars (\$100) and shall in addition to such license fee deposit with the City Clerk the sum of Five Hundred Dollars (\$500) to be held by the City Clerk until the expiration of thirty days after such license shall cease, unless claim or claims for damages or compensation for fraud on the part of said licensee in the sale of any of such goods, are within such time entered with the City Clerk against such licensee, in which case the balance of such deposit, after legal settlement or satisfaction of such claim or claims shall have been made, shall be returned as aforesaid.

20 Section 3. Every such license shall be issued for a term of fifteen days from the date thereof unless sooner surrendered by the licensee.

Section 4. Every such licensee shall forthwith report to the City Clerk the kind, quantity, form and condition of any additions to the stock of goods, wares and merchandise sought to be sold thereunder as such additions shall from time to time be made.

30 Section 5. Any person, firm or corporation or officer or director thereof, violating any of the provisions of this ordinance shall be subject to a fine of not less than One Hundred Dollars nor more than Five Hundred Dollars.

Section 6. This ordinance shall take effect immediately.

40

JAMES LONDRIGAN,
P. R. GRIFFIN,
BERNARD N. MCFEELEY,
HARRY L. SCHMULLING,
GUSTAV BACH.

(Passed Dec. 8th, 1915. Ten days after passage becomes effective.)

Exhibit D-2 (Page 43, Testimony).

EXTRACT OF BY-LAWS.

Section 11. The work of this board shall be organized and conducted under bureaus to be known as follows: Civic, Retail, Industrial and Transportation, each member being required to select and to join at least one of such bureaus according to his inclination and interests, and to render such help and assistance in the work as he may be capable of. 10

Section 13. The work of each bureau shall be under the immediate direction of a committee of three, presided over by a Vice-president designated by the trustees, made up of two other members selected among the members by him, in conjunction with the President. 20

Section 15. The first Vice-president shall have charge of the Civic Bureau, and, by virtue of his office, serve as the chairman of the Civic Bureau Committee of three as hereinbefore provided.

Section 49. Each of the four bureaus shall be under the direction of a committee of three, made up of a Vice-president, as hereinbefore provided, who shall be the chairman, and two members to be selected by the Vice-president in charge, in conjunction with the President. This managing committee shall take its name from the bureau it represents. When occasion requires, the President, in conjunction with the chairman of each bureau committee, may appoint special committees to aid in the work of the bureau committee. 30

FIRST DISTRICT COURT OF JERSEY CITY.

Before—CHARLES L. CARRICK, Esquire, Justice.

10

NED K. FINKELSTEIN,
Plaintiff,

vs.

HERMAN GEISMER,
Defendant.

No. 102406, In Tort,
Damages, \$500.

McDermott &
Enright, Plaintiff's
Attorneys.

Weller & Lichten-
stein, Defendant's
Attorneys.

20

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

30

	City	Al.
Costs		
Summons	\$1.50	
Service		\$0.60
Mileage20
Summoning Jury	1.25	
Attending Jury		1.50
Witness Fees		9.00
Trial Fee	1.50	
	4.25	11.30
Appeal Bond.....	1.00	

A summons was issued, tested July 7, A. D. 1916, at 10 o'clock in the forenoon at the Court Room of the said Court in the City of Jersey City. The Constable returned the summons as follows, viz.: I served the within summons July 8, A. D. 1916, on Herman Geismer, the defendant, by reading the same to him and delivering to him a copy thereof. John Solferino, Constable.

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Plaintiff's demand filed July 7, A. D. 1918.

The plaintiff demanded a jury. A venire was issued to John H. Masker, Constable.

September 21, A. D. 1916, the plaintiff appearing and the defendant not appearing.

March 1, A. D. 1917, both parties appearing, the trial was proceeded with as follows: Upon application of defendant, Arthur R. Bailey was appointed and sworn as stenographer. The Constable returned the venire with the following named persons summoned: William Laughlin, John Clos, Sherman De Clarke, Joseph A. Cale, John Fay, Robert McAndrews, John Purcell, Edward Randall, Charles O'Neill, Henry Jackens, Charles Luhne and Charles A. King, who were jointly and severally sworn as jurors. 10

On the part of the plaintiff, Ned K. Finkelstein was sworn and testified. One certificate of trade name and one letter was offered and received in evidence. 20

On part of the defendant, Edward Sharkey, Roscoe D. Wyatt, Max Z. Hurwitz, Patrick R. Griffin, John F. Callahan, William P. Church and Herman Geismer were sworn and testified. One ordinance and one minute book were offered and received in evidence.

The jury retired and after due deliberation returned into court and say they find a verdict in favor of Ned K. Finkelstein, plaintiff, and against Herman Geismer, defendant, for the sum of Two hundred and fifty dollars, and so say they all. 30

WHEREFORE, it is on this first day of March, A. D. 1917, by this Court considered and adjudged that said Ned K. Finkelstein, plaintiff, recover against said Herman Geismer, defendant, the sum 40

of Two hundred and fifty dollars, damages, and
Twenty-eight dollars and five cents, costs of suit.

March 6, 1917, Notice of Appeal and Appeal
Bond filed by defendant.

10

(Court's Seal)

I, James N. Braden, Clerk of the First District
Court of Jersey City, Charles L. Carrick, Esquire,
Judge, do hereby certify that the foregoing is a
true copy of the Summons, State of Demand and
Transcript of a Judgment of the said Court.

20 IN WITNESS WHEREOF I do hereby set my hand as
Clerk of the said Court and affix the seal of the
said Court this eighth day of March, nineteen hun-
dred and seventeen.

JAMES N. BRADEN,
Clerk.

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25514

New Jersey Court of Errors and Appeals 10

NED K. FINKELSTEIN,
Plaintiff-Respondent,

vs.

HERMAN GEISMAR,
Defendant-Appellant.

Action
at Law.
In Tort.

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BRIEF OF DEFENDANT-APPELLANT

Facts.

This was an action tried before a jury in the First District Court of the City of Jersey City wherein Ned K. Finkelstein was the plaintiff and Herman Geismar the defendant, for damages which the plaintiff alleges he sustained by reason of certain slanderous remarks made by Mr. Geismar on or about May 18th, 1916, to the Mayor of the City of Hoboken (5, 25-39). 30

The plaintiff testified that he had commenced his business at 332 Washington Street, in the City of Hoboken, about three days prior to the time of the making the alleged remarks (8, 32-40); that some time prior to the opening of his present business, he had been engaged in business in the City 40

of Hoboken under the name of "Ward-Fink Company," a corporation (10, 14-20) (11, 9-10).

10 On May 18th, 1916, he was summoned by a special messenger from the Mayor of the City of Hoboken to appear before him at his office in the City Hall (7, 10-20); and upon arriving at the Mayor's office, accompanied by his brother, he met the defendant, Mr. Geismar, and Messrs. Mountford, Hurwitz and Greenberg (6, 6-10); that Mr. Geismar made a complaint to the Mayor concerning the method by which the plaintiff did business, and in so doing uttered the remarks of which he complained (5, 30-40).

20 The defendant, Herman Geismar, a reputable business man of 28 years' standing (42, 29-31), admitted going to the Mayor's office, with other members of a committee appointed by the President of the Merchants' Association of the City of Hoboken, on or about May 18th, 1916, and as a member and spokesman of such committee making a complaint to the Mayor about the method by which the plaintiff had previously conducted business in Hoboken under the name of the Ward-Fink Company (43, 15-30) (44, 3-8) (48, 37-40) (53, 32-40) (54, 9-16), so as to prevent his again conducting his business in that manner, which, in the opinion of the Merchants' Association, was not in keeping with the high standard by which merchants in Hoboken did business; was unfair to the public and contrary to the provisions of an ordinance of that City.

30 It appeared from the testimony of Mr. Roscoe B. Wyatt (printed "White" in the case), Secretary of the Hoboken Board of Trade, that Mr. Geismar was the chairman of the Retail Bureau of that Board (20, 22-27) whose duty it was to further the mercantile interests of the City (37, 3-7) and to supervise the method by which mer-

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chants conducted their business in Hoboken (37, 15-25).

Max Z. Hurwitz testified that he was the President of The Merchants' Association of the City of Hoboken in 1916, and was himself engaged in business in that City; that at a meeting of the Association, held several days before the first meeting at the Mayor's office, complaints had been made by members of the Association concerning the manner in which Finkelstein or "Fink" had previously engaged in business, and asking that his present methods be looked into, and as a result of these complaints a resolution was passed calling for the investigation of the plaintiff's present method of doing business, to determine if it came within the provisions of a certain ordinance of the City, whereby it was made a misdemeanor to conduct a business in certain ways (29, 22-37); that *Mr. Geismar was not present at this meeting but was appointed thereafter* (23, 19-21); that *these steps were taken by the Association to protect the public from fraud* (30, 35-38) (31, 1-11). 10 20

Edward Sharkey testified he was the Deputy City Clerk of the City of Hoboken; that Patrick R. Griffin was the Director of Public Affairs and at whose directions licenses were issued (19, 11-40).

Patrick R. Griffin testified that he was the Mayor of the City of Hoboken and Director of Public Affairs in that City (38, 19-22); that Mr. Geismar, Mr. Mountford and Mr. Hurwitz appeared before him in May, 1916, in reference to the method by which Ned K. Finkelstein had conducted his business (38, 39-40) (39, 3-5); that as such Director of Public Affairs it was his duty to see that the ordinances of the City were enforced. 30

The defendant also introduced in evidence the ordinance concerning sales of goods in Hoboken 40

under which The Merchants' Association thought the plaintiff might come (Page 65 [Exhibit D-1]).

The plaintiff does not deny that the defendant acted as a member of a committee appointed to investigate or CAUSE HIS BUSINESS TO BE INVESTIGATED, AND NOT INDIVIDUALLY, in making the complaint; nor does he introduce any evidence either
 10 to disprove the allegations concerning the method by which he did business under the name of the Ward-Fink Company, or that the slanderous remarks, if any, did not relate to the method by which he formerly did business; *not a scintilla of evidence was introduced to show malice on the part of the defendant or that his motives were other than to protect the public.*

The only damage proved, if it can be said any was proved, was the plaintiff's testimony when he
 20 said he lost "considerable" business (6, 18).

Although the plaintiff's brother was present at the Mayor's office, no testimony was offered to support that of the plaintiff (6, 7).

The only dispute as to facts in the entire case was whether the words spoken referred to the way Finkelstein then or had previously done business, and as to just what words were spoken.

At the end of the plaintiff's case the defendant moved for a non-suit on the ground that the words
 30 were spoken on a privileged occasion, and that it was a privileged communication, which motion the Court refused and defendant was allowed an exception (16, 1).

At the close of the whole case defendant moved for a direction of a verdict for the defendant on the ground that the occasion and the communication were privileged. The Court held that the question of privilege was one for the jury and not for the Court and refused to direct a verdict, and an
 40 *exception was allowed the defendant (55, 20).*

POINT I.

The words spoken were uttered on a privileged occasion, and therefore judgment should have been directed in favor of the defendant and against the plaintiff.

There was no dispute as to the facts and it was admitted by the plaintiff that the words were uttered in the making of a complaint by a committee of which the defendant was a member, to Patrick R. Griffin, Commissioner of Public Affairs and Mayor of the City of Hoboken. The plaintiff testified as follows (we set forth all of his testimony on the subject, 5, 25) :

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“Do you know, or have you met, the defendant Herman Geismar? A. Yes, sir.

20

Q. Did you meet him in the City of Hoboken on the 18th day of May, 1916? A. Yes, sir.

Q. Whereabouts? A. In the Mayor's office.

Q. What did he say? A. He said to the Mayor ‘This man Finkelstein is a faker and came to Hoboken to fake the public; and his method of doing business is to show an article in the window, and when a man comes inside to purchase that article, to give him inferior goods in its place.’ He also said I was a disgrace to Hoboken and Washington Street, and a man like me should be driven out of town.”

30

On cross examination he testified (7, 12, etc.) :

“Q. *This was in the Mayor's office in the City Hall, Hoboken?* A. Yes, sir.

Q. *And how did you come to be there?* A. *A special messenger was sent for me.*

40

Q. *From where?* A. *From the Mayor's office, I believe.*

Q. *By reason of a messenger sent by the Mayor's office you went there?* A. *Yes, sir.*

Q. *And when you got there you found Mr. Geismar, Mr. Mountford and Mr. Hurwitz there?* A. *Yes, sir.*

10 Q. *And what did you say?* A. *I said it was all untrue.*

Q. *What was all untrue? What was the first thing that was said, the complaint they made to the Mayor?* A. *Yes, sir.*

Q. *And you denied the allegation?* A. *Yes, sir."*

20 The defendant, Chairman of the Executive Committee of the Retail Bureau of the Board of Trade of the City of Hoboken, who had the supervision of the method by which the merchants conducted their business in the City of Hoboken, was also appointed by Mr. Hurwitz, then President of the Merchants' Association of that City, as a member of a committee to make an investigation, "or ask the Mayor to investigate," to see whether or not the business, as conducted by the plaintiff, was in accordance with an ordinance (29, 30) of the City of Hoboken.

30 Mr. Geismar was not present at the meeting of the association at which these complaints were made, and the resolutions adopted (23, 19), but did have personal knowledge of the plaintiff's method of doing business, and consented, when asked to serve on the committee, and went, with the other members of the committee, several days prior to May 18th, 1916, the date upon which the alleged slanderous remarks were uttered to the Mayor of the City of Hoboken and was instructed

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by the Mayor to return on the 18th of May, at which time the plaintiff would be present.

The committee did accordingly report to the Mayor on May 18, 1916, and in the presence of the plaintiff made a complaint. These facts are not in any wise disputed, and the plaintiff did not at any time prove or attempt to prove malice on the part of the defendant, or of the Merchants' Association of the City of Hoboken, but did introduce a letter in evidence to the effect that after an investigation of the plaintiff's business the association invited him to become a member of that body, which clearly indicates that there was absolutely no malice on their part but merely a desire to be sure of the man's methods of doing business (Exhibit P-2, page 64). 10

Can it be maintained that the defendant, Herman Geismar, individually or as a member of the committee, or as a resident and businessman of the City of Hoboken did not have a vital interest in the subject-matter of the complaint; that he did not perform a commendable public duty when he assented to become a member of the committee and lay the matter of the investigation of the plaintiff before the Mayor for the purpose of finding out whether or not a fraud was being perpetrated against the people of the City of Hoboken? 20

There is no denial by the plaintiff that, when he had previously conducted his business in the City of Hoboken, he did not resort to the business methods of which the merchants complained at that time, and which were detailed by the defendant to the Mayor. 30

Mayor Griffin was the Director of Public Affairs and a member of the Board of Commissioners of the City, and it was unquestionably his duty to see that the ordinance passed by that body were 40

enforced (40, 21-27); he was the official at whose direction the City Clerk issued licenses (19, 1-17), and he certainly had a very great interest in this particular matter to see that the plaintiff secured the necessary license to conduct his business if he did come within the provisions of the ordinance (Exhibit D-1, page 65), to say nothing of the fact that the chief Magistrate of every municipality, by virtue of his very office, is bound to use his utmost endeavors to protect the people of the community from fraudulent and "fly by night" traders.

The fact that the plaintiff's method of doing business was not that covered by the statute would not destroy the privileged occasion, unless it is proved that his acts were prompted by maliciousness; nor would the fact that the defendant used harsh language, if it can be maintained that he did, in describing such dishonest and despicable business methods, which, if true, would create a stench in the nostrils of any legitimate business man.

"A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminatory matter, which, without this privilege, would be slanderous and actionable."

Lord Campbell, C. J., Harrison vs. Bush,
5 E. & B., page 348;
25 L. J., G. B., page 29.

"The true mode of judging upon the question is to put oneself as much as possible in the position of the defendant."

Per Kay, L. J., 1891, 2 Q. B., 359.

"The word 'duty' in this connection cannot be confined to legal duties which must be enforced by indictment, action or mandamus, *but must include moral and social duties of imperfect application.*"

Per Lord Campbell, C. J., *Harrison vs. Bush*, supra.

10

"The underlying principle is common convenience and welfare of society, not the convenience of individuals or of the convenience of a class, but, to use the words of Earle, C. J., in *Whiteley vs. Adams* (15 C. B. N. S., page 14), the general interest of society."

Per Cur. in *MacIntosh vs. Dun*, 1908 A. C., at page 399;

Odgers on Libel & Slander, 5th Edition, page 252.

20

"Where a person is so situated that it becomes right, in the interest of society, that he should tell to a third person certain facts, then if he, bona fide and without malice, does tell them, it is a privileged communication."

Per Blackburn, J., in *Davies vs. Snead*, L. R., 5 Q. B., 611;

39 L. J., Q. B., 202, 23 L. T., 609.

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And in the words of the author of "*Odgers on Libel and Slander*," 5th Edition, page 272, "*again, it is a duty which everyone owes to society and to the State to assist in the investigation of any alleged misconduct, and to promote the detection of crime. All information given bona fide in response to any inquiries made with this object is clearly privileged.* BUT THIS DUTY DOES NOT ARISE

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MERELY WHEN CONFIDENTIAL INQUIRIES ARE MADE. IF FACTS COME TO MY KNOWLEDGE WHICH LEAD ME REASONABLY TO CONCLUDE THAT A CRIME HAS BEEN, OR IS ABOUT TO BE, COMMITTED, IT IS MY DUTY AT ONCE TO GIVE INFORMATION TO THE POLICE OR TO THE PERSONS INTERESTED."

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"When it comes to the knowledge of anyone that a crime has been committed, a duty is laid on that person as a citizen of that country, to state to the authorities what he knows respecting the commission of the crime; and if he states only what he knows and honestly believes, he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is, after all, not guilty of the crime."

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Per Inglis, Lord President, in *Lightbody vs. Gordon*, 9 Scott Sessions Cases, 4th Series, 937-938.

"So, all material statements made by the persons interested in the detection of a crime during their investigations and relevant thereto, are privileged."

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Odgers, *supra*, page 273.

"For the sake of public justice, charges and communications which would otherwise be slanderous, are protected if bona fide made in the prosecution of an inquiry into the suspected crime."

Odgers on Libel & Slander, 273, and cases thereunder cited.

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“Defamatory statements published for the purpose of preventing the grant of a liquor license or of obtaining the revocation of one already granted, are conditionally privileged when made to a body having the power to grant or revoke licenses.”

25 *Cyc.*, 389.

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“The fact that the subject-matter of the communication is one of public interest in the community of which the parties to the communication are members is sufficient as respects interest to confer the privilege, and that in regard to the matters of public interest all that is necessary to render the words spoken to be privileged is that they should be communicated in good faith without malice to those who have an interest in the subject-matter to which they refer, and in a fixed belief that the communications were true, such belief being founded on reasonable and probable grounds.”

20

“This rule has been applied to communications warning the public against fraud.”

25 *Cyc.*, 400 and cases thereunder cited.

In the case of *St. Louis Clothing Co. vs. J. D. Hail Dry Goods Co.*, 156 Mo., 393; 56 S. W., 1112, it was held that where plaintiff published an advertisement calculated to mislead and deceive the public a counter advertisement by defendant, attacking this as being a deception and a fake, was justifiable and privileged.

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POINT II.

The Court erred in submitting to the jury the question of whether or not the occasion upon which the alleged slanderous words were uttered was privileged.

10 The plaintiff did not in any wise prove or attempt to prove malice on the part of the defendant. The defendant, at the end of the whole case asked for a direction of a verdict in favor of the defendant on the ground that the occasion was privileged (55-21).

 “Mr. Tiffany: I ask for the direction of a verdict if the court please, * * * etc.

20 The Court: *The question here is whether the occasion was a privileged occasion.*

 Mr. Tiffany: *That is a question of law for the Court.*

 The Court: *No, I think not. I refuse to non-suit.*

 Mr. Tiffany: *I ask an exception.*

 Charge by the Court: * * *

 Mr. Tiffany: (62-1) * * * Then your Honor didn't hear me through on my motion for a non-suit.

30 The Court: It can go on the record now.

 Mr. Tiffany: What I had in mind was, that it was a matter for the Court to determine that it was a privileged occasion and if it was a privileged occasion there was no proof of malice by the plaintiff.”

 It is obvious that the use of the word “non-suit” is a typographical error and should be “direction of a verdict.”

40

The learned Justice in the Court below agrees that the occasion was, at least, one of qualified privilege and that a communication made on such an occasion is inconsistent with the existence of express malice (g, 30-35; h, 16-20) and goes on to say that "by express malice is meant some motive actuating the defendant different from that which *prima facie* rendered the communication privileged, and being a motive contrary to good morals." 10

Great stress is laid on the fact that the defendant below went directly to the Mayor and that "he made no investigation except to observe that the plaintiff had his goods on ordinary packing boxes" (L-30-37).

The fact that Mr. Geismar was appointed a member of the committee to "investigate, * * * or to ask the Mayor to investigate," to see whether or not it (the plaintiff's method of doing business) was in accordance with the ordinance" seems to have been entirely overlooked by the learned Court below. 20

True, the committee went direct to the Mayor who fixed a day for a hearing, and it is on this second day (44, 8-9) that Mr. Geismar is alleged to have uttered the remarks complained of, but what investigation was necessary on behalf of the committee—they all knew Finkelstein's previous method of doing business (44, 20-40), and did not want it repeated, and hence took the matter up with the Mayor, whose duty it was to see that the ordinance was enforced, and complained to him about the manner in which Finkelstein had previously conducted the business of the Ward-Fink Company. 30

Complaints had been made at the very meeting of the Board of Trade at which the committee was appointed (29, 21-30), and the members of the committee having personal knowledge of the plaintiff's 40

business methods—we repeat—what further investigation was necessary—especially as the purpose of their visit to the Mayor WAS TO HAVE HIM *investigate* Finkelstein's present methods, and to prevent a repetition of his previous way of doing business—a way, which they described in plain language, the truth of which, by the way, was not denied.

10

We respectfully submit that Mr. Geismar did only that which every good citizen should do to protect the interest of the public; that he used language far from being inappropriate to describe the business methods which Finkelstein undeniably used, when formerly engaged a business in Hoboken, and therefore the language used in making the complaint to the Mayor, so as to properly state to him the reason for investigating Finkelstein's business, was not such as this Court should say, would permit a jury, under all the facts in the case, to find as indicating such express or implied malice as to make the defendant liable for slander. To so find, it seems to us, would be to seal, by fear, the mouth of every person desiring to bring to the attention of the authorities, frauds upon the general public.

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“Whether the communication is, or is not, privileged by reason of the occasion, is a question for the judge alone, where there is no dispute as to the circumstances under which it is made.”

Odgers on Libel and Slander, 5 Ed., page 229;

Stace vs. Griffith, L. R., 2 P. C., 420; 6

Moore P. C. C. N. S., 18;

20 L. J., 197.

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“The case therefore is that of a communication presented to the Mayor, upon matters pertinent, for the removal of an officer, whom the Mayor has power to remove; such a communication is unquestionably privileged. * * *”

“In a case of this kind the law requires that there must be shown a bad heart on the part of those who make the communication. This the plaintiff has failed to do. The motion therefore is a proper one and the non-suit is granted.” 10

Frank vs. Dessena, 5 N. J. L. J., 185.

In the case at Bar the communication was to the Mayor whose duty it was to enforce the ordinances of the municipality and at whose direction the City Clerk issued licenses. The subject matter of the complaint was certainly pertinent. 20

“Whether the subject-matter to which the alleged libel relates, and the interest in it of defendants are such as to render the publication privileged and therefore prima facie excusable, is a question for the Court.”

Klinck vs. Colby, 46 N. Y., 427.

Lovell Co. vs. Houghton, 116 N. Y., 520.

“Where the facts upon which the claim of privileged communication is sought to be established are uncontracted, upon the Court rests the duty of determining as a matter of law, whether the communication be privileged or not.” 30

Lovell Co. vs. Houghton, 116 N. Y., 520.

“The case is barren of facts justifying or permitting an inference of express malice. 40

Had it been submitted to the jury, with such a result, it would have been the duty of the Court to have set the verdict aside, as against the weight of evidence. *The rule is that under such conditions the Court should refuse to submit the case to the jury.*"

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Wilds vs. Hudson R. R. Co. (24 N. Y., 433).

"Whether a communication be privileged or not is a question for the Court, not for the jury."

Briggs vs. Garrett, 111 Pa., 404.

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"Whether the occasion is one of privilege is also a question of law for the Court."

Atwater vs. Morning News Co., 67 Conn., 504;

Hassett vs. Carroll, 85 Conn., 23.

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"If, however, the judge decides that the occasion is one of qualified privilege only, the plaintiff must then, if he can, satisfy the judge that there is evidence of malice on the part of the defendant to go to the jury."

"If the plaintiff has given no such evidence, it is the duty of the judge to direct a verdict for the defendant."

"Odgers on Libel and Slandre, supra, page 229.

"The facts upon which the defendants claim that the article was privileged are uncontradicted, and hence the question of privilege became one of law."

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Bowsky vs. Cimiotti Unhairing Co. et al.,
76 N. Y. Supp., 465-6.

“Where there is no evidence of malice, except the mere publication and that is of a privileged character, if the jury should find a verdict for the plaintiff, it would be the duty of the Court to grant a new trial. When the Judge, therefore, upon the mere evidence of publication, non-suits the plaintiff, the non-suit ought not be set aside; there is no legal evidence of malice whatever, and without that the action is not sustained. The jury have nothing to pass upon.” 10

Vanderzee vs. M'Gregor, 12 Wend., 545;
N. Y. Com. Law Rep., Vol. 12, page 224.

“Communications, made in good faith, to public officers, having power to remedy the evils complained of, are privileged and express malice must be shown to destroy the privilege.” 20

Howard vs. Thompson, 21 Wend., 319.

The complaint being made under the belief that it was true, the burden rested on the plaintiff to prove the existence of express malice in the making of it. 30

Butterworth vs. Todd, 70 N. Y., 324.

Nor can it be argued that the fact that Mr. Greenberg was present should alter the situation; for he was at the most a mere bystander; and as to the other members of the Committee, of course, they were vitally interested.

"The presence of a bystander at that meeting was a mere casual incident, not in any sense sought for by the defendant and for which, therefore, he should not be held responsible."

Fahr vs. Hayes, 21 Vr., 220.

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POINT III.

The Court erred in refusing to grant the defendant's motion to direct a verdict for the defendant.

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At the close of the whole case the defendant moved for the direction of a verdict in its favor on the ground that from the undisputed testimony it appeared that the words were spoken in the course of a privileged communication (55, 20, etc.), and on the ground that the question was one of law for the Court and that there was no evidence to warrant submitting the case to the jury inasmuch as there was no evidence produced by the plaintiff of malice on the part of the defendant (62, 11).

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The testimony is absolutely uncontradicted as to the occasion and no malice having been proved by the plaintiff a verdict for the defendant should have been directed.

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Certainly Mr. Geismar and other members of this committee were interested in every sense of the word in protecting their business interests, as well as the interests of the public from unscrupulous methods used by certain persons who from time to time come to cities to ply their so-called "fly-by-night" stores. It cannot be denied that it was the duty of the defendant to advise

the authorities of the commencement of any such enterprise, that the interests of the public might be protected.

It is a matter of common knowledge that business men carry their disputes and trouble in numerous cases where the public interest is concerned, to the Mayor of the particular municipality wherein they are situated and lay the matter before him—just as happened in this instance. It was not an occasion of gossip but one in which the public welfare, in the opinion of the defendant and other members of the committee, was at stake. 10

Certainly, where the law in its wisdom has thrown the cloak of protection about complaints made to governing bodies of religious organizations, unions, etc., it does protect the persons complaining to public officials, charged with the administration of the affairs of city government, concerning the investigation for violations of ordinances of that municipality. 20

The Court of Errors and Appeals said in *King vs. Paterson*, 20 Vr., 419:

“that a communication made bona fide in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which without this privilege would be actionable,” 30

and this exposition of the law was approved in *Rothholtz vs. Dunkle*, 24 Vr., 438, by the same Court who referred, with approval, the following quotation from *Waller vs. Lock*, 45 L. T. (H. S.), 243:

“If an answer is given in the discharge of a social or moral duty, or if the person who gives

it thinks it to be so, that is enough; it might not even be an answer to an inquiry, but the communication may be a voluntary one."

10 There can be no question as to the sincerity of the defendant in making the complaint for he testified as to specific incidents which had come to his personal knowledge during the existence of the Ward-Fink Co. (44, 37, etc.). His evidence was such as would almost inevitably engender in his mind the belief that the plaintiff was defrauding the public; and the Supreme Court of New Hampshire in *White vs. Nicholls* (44 U. S., 3 How.), 266-11, L. Ed., 591, says—such an occasion (privilege occasion) is where a communication is fairly made by a person in the discharge of some public or private duty, legal or moral, or in
20 the conduct of his own affairs, in a matter where his interest is.

POINT IV.

The Court erred in refusing to grant the defendant's motion for a non-suit.

30 At the close of the plaintiff's case the defendant moved for a non-suit (15, 27) on the ground that it appeared by the plaintiff's own testimony that the words in question were spoken by the defendant in the course of making a complaint to the Mayor of Hoboken concerning the methods by which the plaintiff conducted his business in that municipality.

40 We have quoted the entire testimony of the plaintiff on this point under Point I of this brief and for the sake of brevity will refrain from repeating it here.

It appeared that the remarks were made in the course of making a complaint to the Mayor of the City of Hoboken, concerning the method by which the plaintiff carried on his business and for the purpose of protecting the citizens of that city from fraud.

The Court should have taken judicial notice of the fact that the office of the Mayor of the City of Hoboken was a public office; that it was the Mayor's duty as Chief Magistrate of a City to protect the people of Hoboken from the practices of fraudulent and fly-by-night merchants; that he had an interest in such matters to see that they did not continue. 10

It was the defendant's public duty, if he believed Finkelstein was violating the law, to complain to the authorities of the City about it, and he would have been remiss in his obligations as a citizen had he not done so. It is for the very purpose of encouraging the exposures of such wrongs that our courts have clothed complainants with immunity under circumstances and as here exists, by the doctrine of privilege occasion. 20

The law on this point is set forth under Point I.

We respectfully submit, therefore, that the judgment of the Supreme Court and the judgment of the District Court should be reversed, and judgment entered in favor of the defendant Herman Geismar and against the plaintiff Ned K. Finkelstein. 30

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