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Notice of Appeal.

(Filed Nov. 23, 1922.)

10

Hudson County Circuit Court

MAXWELL GREENBERG,
Plaintiff-Respondent,

vs.

IRVING ROSE,
Defendant-Appellant.

20

To Alex. Simpson, Esq., Attorney for Plaintiff-Respondent :

Sir :

PLEASE TAKE NOTICE that the defendant-appellant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this case on the following grounds, viz. :

30

1. The Court refused to decide the question of reasonable and probable cause and to direct a verdict for the defendant-appellant at the close of the whole case, when requested so to do by the defendant-appellant and left the question of reasonable and probable cause to the jury.

40

2. The following questions were overruled, viz.:

To the defendant Irving Rose:

“Q. You did make inquiries about this man before you made the arrest, didn’t you? A. Very thorough.

10

Q. You had a detective up there with you? A. I had Lieutenant-Detective Jolling, of the Union Hill Police Department.

Q. Were the help in the theatre examined?

Mr. Simpson: I object to that as not cross-examination. That is part of his defense.

Mr. Schneider: Senator Simpson asked this witness, then you didn’t make any inquiries of anybody about this man as to having a key and you made the arrest. I think that opens the door to permit me to cross-examine.

20

The Court: As to the key, that is all.

Mr. Schneider: Your Honor allow me an exception.

The Court: Take your exception.”

3. The following questions were allowed:

To the defendant Irving Rose:

30

“Q. Now you say that you tried to get this man to come over, and he wouldn’t come over, this Sader. Isn’t it a fact that when you had your interview with him he told you he would not come over because he was present when you were coaching these two women cleaners to swear against this man? Isn’t that the reason he gave for not coming over?

Mr. Schneider: I object to it as containing an unwarranted assumption of fact.

40

Mr. Simpson: This is cross-examination. He

is trying to explain an interview with an absent witness, and I am trying to show what the absent witness told him.

The Court: You may answer that.

Mr. Schneider: Exception."

4. The following question was overruled: 10

To witness, Mrs. Kate Smith:

"Q. Were you ever examined by any one relative to what you saw there and what you have just testified? A. Yes.

Mr. Simpson: I object, unless it is confined to the defendant.

Mr. Schneider: As the evidence stands an officer may have examined her. There is testimony in the case there was a detective sent up there to examine people. 20

The Court: Well, I don't think that will help you in this case. I do not see that what she told the detective will help you; the detective is dead and you cannot show that.

Mr. Schneider: Your Honor, allow me an exception.

The Court: You would have to show, you see, that the defendant did not have probable cause; that is the whole issue. The defendant had this man arrested. Now the question is what he knew when he made his complaint, and what he should have known." 30

5. The following question was allowed:

To witness Dr. Anna Greenberg:

"Q. How did you recognize his voice? A. Because he said he was Mr. Rose. 40

Notice of Appeal.

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

Mr. Simpson: He did not object to it before, and he did not ask any qualification of it.

The Court: It may stand.

10 Mr. Schneider: Allow me an exception.

The Court: I cannot strike it out now.

Mr. Schneider: I ask that it be stricken out and the jury instructed to disregard it.

Mr. Simpson: He is taking a chance on it, and when he doesn't want it in he wants to strike it out."

Respectfully,

20 J. EMIL WALSCHEID,
Attorney for Defendant-Appellant.

**Acknowledgment of Service of Notice
of Appeal.**

30 Due, timely and legal service of the within Notice of Appeal is hereby acknowledged, this day of November, 1922.

Copy received, Nov. 21, 1922.

ALEX. SIMPSON,
Attorney for Plaintiff.

Summons.

The State of New Jersey to Irving Rose :

(Seal.)

You are summoned to answer the annexed complaint of Maxwell Greenberg, in an action at law in the Circuit Court of the County of Hudson. And take notice, that unless you file your answer to said complaint with the Clerk of said Court, within 20 days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 10

Witness, Luther A. Campbell, Judge of the Circuit Court of the County of Hudson, at Jersey City, this 30th day of March, 1921. 20

JOHN J. McGOVERN,
Clerk.

ALEX. SIMPSON,
Attorney.

30

40

Complaint.

(Filed, Apr. 5, 1921.)

HUDSON CIRCUIT COURT.

10

MAXWELL GREENBERG,
Plaintiff,

vs.

IRVING ROSE,
Defendant.

Action at Law.

Complaint.

The plaintiff, who resides at No. 1134 Manhattan Avenue, in the Borough of Brooklyn, and State of New York, says that:

20

1. The defendant on or about the 26th day of May, 1919, at Weehawken, in the County of Hudson, of his malice and without reasonable or probable cause, accused the plaintiff of breaking and opening a certain locker and taking therefrom a quantity of sheet music and a violin alleged to have belonged to one Samuel Sater, and also a certain amount of money to the value of \$5.00 which defendant claimed plaintiff had converted to his own use, and caused the arrest of the plaintiff on the charge of larceny.

30

2. That thereafter the plaintiff was held in bail in the sum of \$1,000 for the Grand Jury and thereafter was acquitted.

3. That by reason of said false charges and said false arrest, the plaintiff was injured in his reputation and good name and was caused to expend money in and about his defense.

Plaintiff demands \$10,000 damages.

40

ALEX. SIMPSON,
Attorney for Plaintiff.

Answer.

(Filed, May 2, 1921.)

HUDSON COUNTY CIRCUIT COURT.

<p style="text-align: center;">MAXWELL GREENBERG, Plaintiff,</p> <p style="text-align: center;">against</p> <p style="text-align: center;">IRVING ROSE, Defendant.</p>	}	<p>Action at Law.</p> <p>Answer.</p>	10
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The defendant, Irving Rose, residing at No. 31 McKinley Place, in the Town of West New York, County of Hudson and State of New Jersey, answering said complaint, says that: 20

FIRST DEFENSE.

1. He denies paragraph 1 of the complaint.
2. He admits paragraph 2 of the complaint, but says that the Grand Jury found a true bill of indictment against the plaintiff.
3. He denies paragraph 3 of the complaint. 30

SECOND DEFENSE.

1. The defendant on or about May 27, 1919, caused a complaint of larceny to be made against the plaintiff before the Justice of the Peace and Recorder of the Town of Union, Hudson County, New Jersey, wherein the defendant alleged that he had good cause to suspect that the plaintiff did unlawfully enter a certain theatre building known 40

as the Pastime Theatre, in the Town of Union, aforesaid, and did then and there steal, take and carry away, one violin of the value of \$200.00, and one lot of music of the value of \$100.00.

10 2. The defendant made the complaint as set forth in paragraph 1, but denies that he requested that a warrant be issued for the arrest of the plaintiff on said complaint.

20 3. That the defendant was at the times herein mentioned, manager of the Pastime Theatre, in the Town of Union aforesaid, and that on or about May 26, 1919, the said theatre was unlawfully entered into and broken open, and a violin, the property of one Samuel Sater, an employee of said theatre, together with a large amount of sheet music, was stolen therefrom; that shortly thereafter, the defendant was informed by good and reliable persons, of certain conduct and facts and circumstances, which led him to believe, and he did believe, that the plaintiff was connected with the commission of the said unlawful entry and the larceny aforesaid, and that he thereupon, having a reasonable cause to suspect the plaintiff of having been connected with the commission of the said
30 unlawful entry and larceny, consulted the police authorities of the Town of Union, in the County of Hudson aforesaid, and fully and fairly stated to them all the facts and circumstances and conduct of the plaintiff, of which the defendant had been informed, and of his reasons for so suspecting the plaintiff of being connected with the said unlawful entry and larceny, and for believing him guilty thereof. That thereupon the plaintiff was apprehended by the police authorities of the Town
40 of Union, aforesaid.

4. The plaintiff was brought before the Justice of the Peace and Recorder of the Town of Union aforesaid, upon the complaint aforesaid, and was held by the said Justice and Recorder, in \$1,000.00 bail, to await the action of the Grand Jury.

5. That thereafter, the Grand Jury of the County of Hudson found a true bill of indictment against the plaintiff for having committed the unlawful entry and larceny aforesaid. 10

6. That in causing the arrest of the plaintiff, the defendant acted upon the advice of the police authorities and the said arrest was caused to be made in good faith, without malice, and in the honest belief that the plaintiff committed the said unlawful entry and larceny, or was connected therewith. 20

THIRD DEFENSE.

1. For a further answer, this defendant as a partial defense, and in mitigation of any damages to which plaintiff may be or may appear to be entitled, by reason of any of the acts of the defendant set forth in the complaint, repeats and realleges all and singular the matters stated and alleged in the foregoing answer; that all of said acts in reference to said information and arrest, were done by defendant in good faith, and without malice, and in the honest belief that the plaintiff was guilty of the acts alleged. 30

SAMUEL SCHNEIDER,
Attorney for Defendant.

Reply.

(Filed May 12th, 1921.)

HUDSON COUNTY CIRCUIT COURT.

10

MAXWELL GREENBERG,
Plaintiff,

vs.

IRVING ROSE,
Defendant.

Action at Law.
Reply.

- 20 1. Plaintiff admits the allegations set up in paragraph 2 of Second Defense in answer of the defendant, but alleges that the warrant was issued for the arrest of plaintiff at the request of the defendant.
2. Plaintiff denies the allegations set up in paragraph 3 of Second Defense in answer of the defendant, except that plaintiff admits he was apprehended by the police authorities of the Town of Union.
- 30 3. Plaintiff admits paragraph 4 of Second Defense in answer of the defendant.
4. Plaintiff denies the allegations set up in paragraph 6 of Second Defense.
5. Plaintiff denies the allegations set up in Third Defense in answer of the defendants.

40

ALEX. SIMPSON,
Attorney for Plaintiff.

HUDSON COUNTY CIRCUIT COURT.

MAXWELL GREENBERG

vs.

IRVING ROSE.

10

The above entitled case was tried at the Hudson Circuit, September 25, 1922, before Judge Cutler and a jury.

ALEXANDER SIMPSON, Esq., for plaintiff.

SAMUEL SCHNEIDER, Esq., I. Haber, for defendant.

20

A jury was called and sworn, in the above entitled action, and counsel for the respective parties opened to the jury.

MAXWELL GREENBERG, sworn.

Direct Examination by Mr. Simpson:

30 Q. Where do you live, Mr. Greenberg? A. 1134 Manhattan Avenue, Brooklyn.

Q. What is your business? A. Wholesale clothing.

Q. Do you know the defendant? A. Yes sir.

Q. How long have you know him? A. Well, employed there for about two years.

Q. When did you cease to work for him? A. On the 26th of May, 1919.

40 Q. What did you do while you worked for him?
A. I was leader of the orchestra.

Q. Where? A. Pastime Theatre.

Q. Where is that, Union Hill? A. Yes.

Q. How long had you been leader of the orchestra when you quit that employment? A. I imagine about a year.

Q. Were you arrested at any time when you were working for him? A. No, sir.

10

Q. When was it? A. Why, after I had quit.

Q. How long after? A. Day after.

Q. Where were you when you were arrested? A. At the theatre.

Q. Who was present? A. The whole orchestra.

Q. Who arrested you? A. Detective Garvin, I think his name was.

Q. Was the defendant present at the time you were arrested? A. No, sir.

Q. When did you next see him after you were arrested? A. At the police court.

20

Q. Where? A. I don't remember the town.

Q. In Union Hill, was it? A. In Union Hill, I guess.

Q. How long was that after you were arrested that you saw the defendant there? A. How long—beg pardon?

Q. How long after you were arrested did you encounter the defendant in the police court? A. Well, it was a couple of days after.

30

Q. What occurred? What did the defendant do or say at the Union Hill police court? A. He complained that I broke into the theatre and stole the music and violin.

Q. Who did he tell that to? A. The judge, the magistrate there.

Q. That you had broken into the theatre and stolen what? A. Stolen music and a violin.

Q. How much music did he say you had stolen? A. He didn't specify.

40

Maxwell Greenberg—Direct Examination.

Q. As a result of that hearing you were held for the grand jury? A. Yes, sir.

Q. Were you indicted? A. Yes, sir.

Q. For grand larceny? A. Yes.

Q. And brought to trial where? A. The court downstairs.

10 Q. Before Judge Doherty? A. Yes.

Q. In special sessions? A. Yes.

Q. What happened at that trial?

Mr. Schneider: I object.

A. Acquitted.

Mr. Schneider: I object. I think the record is the best evidence.

20 Mr. Simpson: They denied in their answer that he was acquitted.

Mr. Schneider: I don't see where I do.

The Court: Well, if you don't you have to prove it by the record.

Mr. Simpson: Yes; I have sent for the record. Sent downstairs.

Mr. Schneider: We do deny it in the answer.

The Court: All right.

30 Q. You were tried downstairs? A. Yes, sir.

Q. Were you detained any length of time? Were you locked up any length of time at all? A. At the time of the arrest?

Q. Yes. A. Until I could procure—well, I was there about five hours until I procured bail from New York.

Q. Where were you detained? A. At the Union Hill station.

Q. At the station or in a cell? A. In a cell.

40 Q. Locked in a cell for how long? A. About five or six hours.

Q. Then after that you gave bail, you say? A. I got bail from New York, yes.

Q. How much bail? A. I don't remember.

Q. Did you give bail again up at the court house here? A. No, sir.

Q. What was the date of your trial before Judge Doherty? A. I don't remember. 10

Q. Well, how long ago was it? A. It was in 1919, in May or June, if I am not mistaken.

Q. Were you compelled to expend any money in your defence? A. Yes, sir.

Q. How much did you spend? A. A thousand dollars.

Q. Now, did you have anything to do with stealing any violin? A. No, sir.

Q. Did you know anything about it? A. Why, it wasn't necessary for me to break into the place, because as leader of the orchestra I had keys to the theatre and to the lockers. 20

Q. Did the defendant know that you had keys to the lockers? A. Yes.

Q. He claimed you broke it open and this violin was taken? A. Yes.

Q. Did you have any conversation with the defendant at any time about this charge after you were arrested? A. No, sir.

Q. He didn't speak to you about it or you to him? A. No, sir. 30

Q. You say you had nothing to do with stealing the violin? A. No, sir.

Q. Now has your arrest had any effect at all upon your business? A. Yes, sir.

Q. What effect? A. Why, I was ashamed to go out and try to get anything to do on account of my musicians knowing about it, you know, and I didn't work for about a year until I went into the clothing business. 40

Q. You are a musician? A. Yes.

Q. You are now in the clothing business? A. Yes, sir.

Q. How much did you earn as a musician? A. Ten thousand a year.

Q. How much? A. Ten thousand a year.

10 Q. You were out of work, you say, as a result of this for a year? A. About a year, yes.

Cross Examination by Mr. Schneider:

Q. Mr. Greenberg, you obtained employment with the Pastime Theatre in Union Hill, about the fall of 19—about March, 1917, didn't you? A. I don't remember the date.

20 Q. Well, it was after you had lost your position in New York City, wasn't it? A. I never lost any position.

Q. Isn't it a fact that you lost your position with the National Theatre Roof in New York? A. I never lost any position.

Q. Did you play there with Mr. Sader? A. No, sir; he played there with me.

Q. You both played there together? A. No, sir; he played for me.

30 Q. You both played there together, didn't you? A. Well, naturally.

Q. Then it was that summer that you went and played in the mountains? A. I never played in the mountains.

Q. You played in the country, didn't you? A. I never played in the country.

Q. Where did you play in the summer of 1916? A. I never played in the summer. This happened to be the first summer I had played for the National Theatre.

40 Q. At what theatre? A. At the National Theatre.

Q. Did you play during the summer time? A. Yes; that was the first summer I ever played.

Q. Did you play throughout the summer? A. Yes.

Q. When did you quit the National Theatre of New York? A. That I don't remember.

Q. Well, about when? A. I don't remember. 10

Q. Well, try to think about when? A. Well, I don't remember, I don't remember dates.

Q. Don't remember dates? A. No, sir. It was after the summer, I know.

Q. How did you come to quit that employment? A. Because the job was beneath me.

Q. How much were you earning then? A. About seventy-five dollars.

Q. Seventy-five dollars a week? A. Yes.

Q. Was it beneath you on account of salary? A. Yes, sir. 20

Q. And after that was it that you sought employment and obtained employment at the National Theatre in Union Hill? A. Yes.

Q. The Pastime Theatre in Union Hill? A. Yes.

Q. That was about in March, 1917? A. About.

Q. Do you remember that date? A. I don't remember the date, no.

Q. Who employed you? A. Mr. Rose.

Q. Mr. Rose, that is the defendant in this case? A. Yes. 30

Q. In between the time that you gave up employment with the National Theatre in New York and the employment by Mr. Rose in March, 1917, did you work any other place? A. No.

Q. At what salary were you employed by Mr. Rose? A. I don't remember.

Q. Now just—I wasn't employed at any salary.

Q. Eh? I wasn't employed at any salary.

Q. Did you get a monthly payment for services? 40

A. No, sir. I got so much for the orchestra; whatever I made was mine.

Q. How much did you get for the orchestra? A. That I don't remember now.

Q. Have you any records to show what you got?

A. No, sir; I don't keep any books. It is not necessary in this business.

Q. Have you any idea within fifty dollars of what you got? A. Yes; seventy-five dollars I made there.

Q. For yourself? A. For myself, yes.

Q. How many men did you have working for you? A. Well, six men on the average.

Q. Didn't you have the six men all the week long? A. All the week long.

Q. How many did you have on Saturdays and Sundays? A. About the same, except sometimes we would add another man or two.

Q. For the week how much did Mr. Rose give you? A. That I don't remember.

Q. For all of the men including yourself? A. I don't remember that; I don't remember.

Q. Didn't you get about two hundred dollars? A. I don't remember.

Q. Was it three hundred dollars? A. I don't remember.

Q. Do you recall when you drew your last salary from Mr. Rose? A. Yes.

Q. When was it? A. The day before I was arrested.

Q. What did you draw then? A. I didn't draw it then.

Q. Who drew it? A. The violinist.

Q. Well, did you draw it the week before that? A. Yes.

Q. What did you draw then? A. I don't remember how much.

Q. You don't remember the last salary you received? A. No. I didn't receive any salary; I told you I got payment for the whole orchestra.

Q. Do you recall the last week when you say you did not obtain the money from Mr. Rose? A. Yes.

Q. But the violinist obtained the money? A. Yes.

10

Q. That week he obtained the money from Mr. Rose to pay all of you? A. Yes; he obtained the money to give to me so that I would pay all.

Q. Well, how much did he give to you? A. That I don't remember; it is so long ago I don't remember.

Q. How much did you pay to your men in the orchestra? A. How much? Well, I had some people working for eighteen, and I had some for about twenty-five, I don't remember now; I told you it is about three years ago.

20

Q. You had some men for eighteen dollars a week? A. Yes, sir.

Q. Who did you pay the eighteen dollars a week to? A. Who?

Q. Yes. A. I can't tell you.

Q. Well, was it the cellist, violinist, or pianist? A. It happened to be a flute player.

Q. What was his name? A. Rosenthal.

Q. What is the Union rate for a flute player? A. Union rate for that job is thirty-three dollars.

30

Q. You paid him eighteen? A. I paid him eighteen, right.

Q. Did he belong to the Union? A. Yes.

Q. You knew he belonged to the Union? A. Sure.

Q. Now, outside of paying this flute player eighteen dollars, what was the next highest salary you paid to any member of your company there? A. My violinist.

40

Q. Was that Mr. Sader? A. Yes.

Q. And how much did Mr. Sader obtain from you? A. About forty dollars.

Q. Was it forty? A. About forty.

Q. When you say about, what do you mean? A. I mean sometimes he got a little more and sometimes a little less, all depended how much I had to pay him, because all the men were not working there all the time.

Q. But you always managed to see there was seventy dollars a week left for you? A. Yes.

Q. That was beneath your dignity? A. Absolutely not, in Jersey.

Mr. Simpson: I object to it as not proper cross-examination. He is not being tried.

The Court: No; I think that question is hardly proper. You may proceed as to what he was receiving. Of course that is proper.

Q. Do you recall what the cornet player received in that orchestra from you? A. About twenty-four dollars.

Q. Twenty-four. What were the Union rates?

Mr. Simpson: I object to it as not proper cross-examination. What difference does it make what the Union rates were?

The Court: I do not see that it makes any difference at all.

Mr. Schneider: It has a bearing as to his veracity. If the man was a Union man, I am asking what the Union rate was to find out what this man said he paid a violin man—

The Court: I do not think that is cross-examination.

Mr. Schneider: I will withdraw the question.

The Court: You may find out what he paid them. That is proper, but what the Union wages were would not affect this case.

Q. You paid the flute player eighteen dollars a week? A. Yes, sir.

Q. You paid the violinist about forty-five? A. 10
About forty.

Q. About forty? A. About forty, I said.

Q. Didn't you say about forty-five? A. I said about forty.

Q. About forty; and the cornetist about twenty-four? A. Yes.

Q. Who else did you have playing? A. I don't recall now.

Q. What other kind of instruments were played in your orchestra? A. Well, I had a cellist. 20

Q. How much was he getting? A. About twenty-two.

Q. What else did you have? A. We had a drummer.

Q. How much did the drummer obtain? A. Twenty-eight.

Q. Anybody else? A. Well, there were men on and off; I don't remember.

Q. Didn't you pay the organist? A. No; we had no organist. 30

Q. In addition to those five that you speak of was yourself? A. Yes, myself.

Q. Now how much did you receive from Mr. Rose; do you recall? A. I don't remember.

Q. Well, was it two hundred or three hundred or thereabouts? A. I don't remember. Between two and three hundred.

Q. Between two and three hundred dollars? A. Yes.

Q. Did you get a different amount every week? A. Yes; depending on how many men we had there. 40

Q. Did you ever have more than seven men? A. Yes, we did.

Q. How many men did you have at the most?

A. I think we had eight at the most.

Q. When you had eight how much was the salary that was paid to you? A. I can't tell you.

10 Q. Now, Mr. Sader was your violinist, wasn't he? A. Yes.

Q. You expressed to him a desire of getting out of the violinist business, didn't you? A. Expressed to him a desire of getting out of the violin business?

Q. Yes. A. I don't recall that I did.

Q. Did you ever express to any member of the company a desire that you wanted to get into the cloak and suit business? A. No, sir; not in the
20 cloak and suit business.

Q. Did you ever tell him that you were disgusted with the piano playing? A. How is that?

Q. That you were disgusted with piano playing?

A. I was never disgusted with piano playing.

Q. Did you ever express to anybody dissatisfaction with it? A. No, sir.

Q. Did you ever tell any one that you didn't intend to pursue it? A. No, sir.

Q. But you didn't intend to pursue it, did you?
30 A. Certainly did.

Q. Why, didn't you tell us before that you gave up in New York and you intended to go with your father? A. I did not.

Q. You had no idea at all that you would go in with your father, that you would give up the music business? A. Well, everybody has ideas.

Q. Did you have an idea of giving it up? A. Well, everybody tries to better themselves. I had no idea at the present, no.

40 Q. Did you have an idea then? A. At that time, no.

Q. Now you recall having a little argument with Mr. Sader, don't you? A. Argument with Sader; no, sir.

Q. Did you ever have any argument with him? A. No, sir.

Q. You say that the last time that you were there Mr. Rose paid the money to Mr. Sader? A. The last week I was there, yes, sir. 10

Q. Not to you? A. Not to me, because I was too busy to go out.

Q. Do you recall Mr. Sader coming in and paying you off? A. He didn't pay me off. He handed me all the money.

Q. That was underneath the theatre floor, after you were through playing, and between vaudeville acts? A. I don't recall that.

Q. He didn't hand you the money in the orchestra pit, did he? A. He might have; he was sitting right next to me. 20

Q. This happened on Sunday, did it not? A. Yes, sir.

Q. And on Sunday they have moving pictures and vaudeville, do they not? A. Yes, sir.

Q. And the orchestra plays during the vaudeville? A. Yes.

Q. And when the picture was on an organ plays without the orchestra? A. We never had any organ. 30

Q. You had a piano player? A. Yes.

Q. And there was merely a piano player playing without the rest of the orchestra? A. That is right.

Q. And you usually had a relief man playing the piano? A. Yes.

Q. Isn't it a fact that on Sunday night you would go up for the money after the vaudeville was over and while the relief man was playing the piano for the moving picture? A. No, sir. 40

Q. When did you go out for the money? A. Whenever I got a chance.

Q. When did you get a chance, if you were playing? A. When I had somebody playing a piano for me. I didn't happen to have a relief man that day, I don't think; or else he went out or something.

10 Q. But Mr. Sader got the money? A. Yes.

Q. How could he go out and get the money if he was playing in the orchestra? A. I don't think—I was sitting in the orchestra or playing the piano when he got the money.

Q. Nobody else playing then at that time besides yourself? A. No, sir.

Q. And he came back and gave it to you while you were playing? A. While I was playing, I think; I don't remember.

20 Q. Oh, you think? A. I think, I don't remember.

Q. It was after you got through that you went underneath the stage floor and paid off your men? A. Yes.

Q. Did you express any dissatisfaction at that time with Mr. Rose? A. No.

Q. Did you express any dissatisfaction at that time with Mr. Sader, the violinist? A. At what time?

30 Q. At the time you paid off your men? A. No, sir; not at the time I paid off my men.

Q. When did you?

40 Mr. Simpson: I object to it as not proper cross-examination. It seems to me it makes no difference if he expressed dissatisfaction with his employment to any one. He is the plaintiff, and he has simply testified to being locked up for stealing a violin. He didn't

steal it. Now it doesn't seem to me to be cross-examination to ask him whether at some time previous to his arrest he expressed a dissatisfaction to somebody about his employment.

Mr. Schneider: I want to show the facts that led up to our suspicion and the probable cause. 10

The Court: I will allow the question.

A. About a half hour before we finished for the night.

Q. What did you say to him then? A. I said to him, "We ought to quit this job here." I said, "I am going to quit."

Q. You said to him you were going to quit? A. Yes. 20

Q. You said to him that you ought to quit? A. I said you ought to quit along with me.

Q. And did you tell him why? A. Yes.

Q. Why did you tell him he ought to quit? A. Because, if I recall right, Mr. Rose, or somebody came back and told me that the cashier had—

Q. I object—go ahead. A. The cashier had overpaid me five dollars, and I didn't come and give it to her back, and I said, because he had accused me of doing that, whereas the week preceding she had overpaid me five dollars, and I returned it to her voluntarily, because a woman can abuse me for not returning that five dollars, I am going to go, and I said, "You have to quit along with me." 30

Q. You said, "You have to quit"? A. Yes, as leader of the orchestra.

Q. What did Sader say?

Mr. Simpson: I object to it as not proper cross-examination, what some third party said. 40

The Court: I do not think what Mr. Sader said to him can throw any light on this subject.

10 Mr. Schneider: If the Court please, this arrest arises out of an alleged theft of a violin belonging to Mr. Sader, who is this man's violinist. Now, if we can show what happened there that night, Mr. Sader's refusal to quit and this man's remarks at that time, and his desire as expressed by him at that time to get even—

The Court: What this man said at that conversation I am allowing, but what the replies were, and what Mr. Sader said would be a matter of defense, and not cross-examination of this witness.

20 Mr. Schneider: Your Honor allow me an exception?

The Court: Yes.

Q. Mr. Sader did refuse to quit work, didn't he?

Mr. Simpson: I object on the same ground. What Sader said does not bind us.

The Court: No; but he may answer the question whether he did or not.

30 A. Yes.

Q. What did you say to him then? A. Why, I said, "If you people don't quit with me I am going to report you to the Union, that you are working under the scale.

Q. You threatened then that you would report him to the Union for accepting wages from you less than the Union provided? A. No, sir.

40 Mr. Simpson: I object to it as not proper cross-examination. If we are going to try

a lot of Union disputes we will never finish this case.

The Court: Oh, yes.

Q. Will you tell us what you did say then? A. I told him that if he did not quit along with me I would report them to the Union, that they are working under the Union scale. 10

Q. Is that all that took place then? A. That is all.

Q. You already had in your possession the two weeks' notice to quit? A. I never got any notice.

Q. You never received a two-weeks notice to quit? A. No, sir. I voluntarily quit.

Q. Were you through that Sunday night with your employment? A. I was through. I told him I was finished. 20

Q. Is that the first time you told him you were finished? A. Yes.

Q. You had not given him any private notice that you were finished? A. I had not given him any notice, no, sir.

Q. The union rules provide for notice, do they not? A. That is my business.

The Court: We cannot go into what the union rules are. 30

Q. You walked out of the place? A. That is all.

Q. Never returned there again? A. Returned the next day.

Q. When did you return the next day? A. At five o'clock.

Q. In the afternoon? A. In the afternoon.

Q. For what purpose? A. To get my music and one automobile tire that I had in that locker that was supposed to have been broken open by me. 40

Q. Did you see anybody there at five P. M.? A. Yes.

Q. Who did you see? A. I saw the orchestra.

Q. You mean the musicians? A. Yes; that I had working for me.

10 Q. Had you been in the theatre prior to five o'clock? A. No, sir.

Q. Did you see Mr. Rose there at five o'clock? A. No.

Q. Did you see Mr. Rose there at any time afterwards?

Q. What did you do when you returned at 5 P. M.? A. Why, the boys told me I was going to be arrested. I said, "All right, I will wait here until I am arrested. I don't know for what purpose that I did, but I will wait here.

20 Q. Who did you say that to? A. To the orchestra.

Q. Who? A. The orchestra.

Q. What part of the orchestra? A. Well, Mr. Sader and all the rest of the men that were working then.

Q. Was Mr. Frank there? A. I don't remember.

30 Q. Who was there besides Mr. Sader? A. Well, there happened to be another piano player there that I know, Mr. Rich, and this Rosenthal, the flute player, that I remember was there.

Q. Anybody else? A. That is all I remember.

Q. Did you know where Mr. Sader kept his violin? A. Certainly.

Q. He had a locker, didn't he? A. Yes.

Q. The violin was in the locker? A. Yes.

Q. Did you see that locker broken open? A. Did I see it broken open? I saw it open, yes.

Q. You didn't see a violin in there, did you? A. All I looked for was my tire; my tire was there.

40 Q. How big was the locker? A. How big? Well, I can't tell you exactly.

Q. Well, about? A. Well, I should say about four feet high, right along a staircase, built under a staircase.

Q. Did you notice whether the lock was broken off the door? A. No; I didn't notice that.

Q. Were you told that the locker had been broken open?

10

Mr. Simpson: I object to it as not proper cross examination, what somebody told him.

The Court: Well, that was before the arrest, or after the arrest?

Mr. Schneider: Before the arrest.

The Court: I think that will be competent; might explain some of his actions.

You may answer.

20

Q. When you came into the theatre at five o'clock you say that the orchestra told you or somebody there told you that you were going to be arrested?

A. Yes.

Q. And you said to them, "What for?" A. Yes.

Q. And did they tell you why? A. No, sir.

Q. They didn't tell you why? A. I don't recall, really.

Q. Didn't you ask them what for? A. No; I simply said I would wait and see.

30

Q. You were not interested in finding out why you were to be arrested? A. Well, certainly not.

Q. You were not. Were you told that Sader's violin had been stolen? A. No, sir; Sader didn't tell me anything.

Q. Did any one tell you? A. No; I don't remember.

Q. Were you told anything about a robbery? A. I can't recall.

Q. You can't recall that? A. I can't recall now. 40

I simply know that I was told I would be arrested, so I simply said I would wait there until I was.

Q. Did you go to see Rose and ask him why you were to be arrested? A. No, sir.

Q. Did you know who was going to arrest you? A. No.

10 Q. Did you ask who was going to arrest you? A. No.

Q. You simply said you would wait there? A. That is all.

Q. And you stayed there? A. I stayed.

Q. What happened next? A. I was arrested.

Q. An officer came in and arrested you? A. A detective came in and arrested me.

Q. Detective Garvin, wasn't it? A. I think that was the man, yes.

20 Q. He died since, didn't he? A. How do I know.

Q. And you were taken to the police station? A. Yes.

Q. Mr. Rose was not in the theatre or did not accompany you to the police station? A. I don't remember; not with me. I had my car then.

Q. He wasn't with you? A. He wasn't with me, no.

30 Q. What happened when you got to the police station? A. Why, I simply called up New York and got my bail, that is all.

Q. How long were you detained there? A. About six hours.

Q. About six hours? A. Yes, sir.

Q. What time did your bail man come, do you know? A. About eleven or twelve o'clock at night.

Q. Who took the bail? A. Who took the bail?

Q. Yes. A. The man at the desk.

40 Q. That was about midnight? A. That was about midnight, yes.

Q. In the meantime you say you were in the cell?

A. Yes.

Q. Now before five o'clock that afternoon you say you were not in that building? A. Not in that building, no.

Q. Where were you that morning? A. That morning? Home in bed.

10

Q. Now you were driving an automobile at that time, weren't you? A. Yes.

Q. Did you come over from New York in your car? A. No; my car was being repaired then in Union Hill.

Q. Your car was being repaired in Union Hill? A. Yes.

Q. And that Sunday night when you went home your car remained in Union Hill? A. Yes; that is right.

20

Q. Where was your car at that time? A. At the garage where it was being repaired.

Q. What garage was it? A. I don't remember the name—Lincoln Garage, if I am not mistaken.

Q. What street was that on? A. I don't know the street; a couple of blocks away from there.

Q. When you came back the next day you went to get your car? A. At the garage, yes, sir.

Q. What time did you get your car? A. What time?

30

Q. Yes. A. At about half past four or five o'clock.

Q. Didn't you make a statement at the Recorder's court in Union Hill when your case came up that you could not bring your car over from New York because your car had been burned in the New York garage?

Mr. Simpson: I object to it as not proper cross examination.

40

The Court: That is not proper cross examination. I will sustain the objection.

Mr. Schneider: Your Honor allow me an exception.

10 Q. Now, you say that you had a key for the theatre? A. Yes, sir.

Q. Did you have a key for the locker? A. Yes, sir.

Q. Have you got that key with you? A. No, sir.

Q. Do you still have the key? A. No, sir.

Q. Did you return it? A. Key for what, for the locker?

Q. Either the locker or the theatre? A. I returned the key for the theatre, yes.

20 Q. Whom did you return that to? A. The electrician was there, Tony.

Q. You gave it to the electrician? A. Yes.

Q. And the key to the locker; you still had that? A. I had that, yes.

Q. Did you return the key to the theatre before you returned at five o'clock the next day? A. I had returned the key to the theatre a week previously because my key stopped working, to have the electrician fix it up.

30 Q. Now, when the case came up in the police court you said you were held for the grand jury? A. Yes.

Q. Then did you say you paid one thousand dollars for your defense? A. Yes.

Q. Who did you pay that to? A. Mr. Honecker.

Q. Who? A. Mr. Honecker.

Q. Is he an attorney? A. He is an attorney, a New York attorney.

Q. You paid him in cash or by check? A. I paid him by check.

40 Q. By check? A. Yes.

- Q. Have you that check? A. No, sir.
- Q. Do you think you could get that check? A. No; I don't think so.
- Q. You don't think so. What did you do with that check? A. What I do with all cancelled checks after three years, threw them away.
- Q. Didn't you think it important to keep that check? A. Why was it important? 10
- Q. I am asking you? A. I don't think so, no; I never thought so.
- Q. Did you pay him a thousand dollars in one lump sum? A. No, sir.
- Q. How many payments did you give him the thousand dollars? A. I gave him six hundred in one lump sum.
- Q. When was that? A. Well, about June, I guess, June or July. 20
- Q. Was that after the case was over? A. After the case was over.
- Q. How long had Mr. Honecker been your attorney before you retained him in this case? A. About a year before that.
- Q. Did you give him six hundred dollars in the form of a check? A. In the form of a check.
- Q. Did he ever give you a bill? A. Didn't have to.
- Q. Please answer my question? A. No, sir. 30
- Q. How did you know his fee was to be a thousand dollars? A. He called me up and told me.
- Q. What? A. He told me.
- Q. When did he call you up and tell you that? A. After the case was over.
- Q. Didn't you ask him when you retained him how much his fee would be? A. No; it is not necessary.
- Q. After the case was over he told you it would 40

be a thousand dollars? A. Told me it would be a thousand dollars.

Q. Did he tell you that over here in Jersey, or when you got back to New York after the case?

A. He told me in New York.

10 Q. When did you pay him the other four hundred dollars? A. Why, a few months later; I don't remember now.

Q. Did you pay him that in the form of a check?

A. Yes.

Q. Ever get any receipted bills? A. No, sir.

Q. Did you ever get any letters from him asking for the payment? A. No, sir; wasn't necessary.

Q. You haven't either of those checks? A. No, sir.

20 Q. What did Mr. Honecker do for you? A. Why, he retained a Jersey lawyer, and they both came over here and fought the case.

Q. Where did they fight the case? A. At the Recorder's court and down in special sessions.

Q. Were both lawyers present in the Union Hill Court? A. Both lawyers were present.

Q. How long did that Union Hill case take before the Recorder? A. I don't remember.

Q. Well, don't you know it was a short time? A. It wasn't all day.

30 Q. You were not put on the witness stand? A. Yes.

Q. You know you were not put on the witness stand in the police court? A. I don't remember that, no.

Q. You do remember that you were not on the witness stand, don't you? A. I don't remember. I have got the minutes here; they will show that.

Q. Will you show me those minutes?

Mr. Simpson: I think they are the minutes of his trial. I will let him have these papers, but I am going to object to any use of them as incompetent.

Q. I show you this testimony you just spoke about, and ask you to glance through it and refresh your memory— 10

Mr. Simpson: I object.

Q. —and then I ask you after reading it over, don't you know that you were not called on that case?

Mr. Simpson: I object on the ground that the witness has not said he wanted to refresh his memory, and in the second place, there is no proof that this is an accurate transcript of what occurred. 20

The Court: What difference does it make whether he was sworn as a witness or not?

Mr. Schneider: He says he was called and they took up so much time.

The Court: He doesn't recall now whether he was or whether he was not.

Mr. Schneider: I know, but it is cross examination testing this man's veracity. He said he paid a thousand dollars as counsel fee, and I surely have a right to question him along those lines. 30

The Court: Yes, but whether he was sworn as a witness cannot throw any light on the question of counsel fees.

Mr. Schneider: But it throws a light on the length of the examination, what was done there, to see whether this man is telling the truth. 40

The Court: If you want to prove that you will have to produce your records.

Mr. Schneider: Your Honor allow an exception?

The Court: Take your exception.

- 10 Q. This case was over in the morning, wasn't it?
 A. I can't recall.
 Q. Was your New York attorney there? A. Yes.
 Q. And your Jersey attorney also? A. And my Jersey attorney.
 Q. Eh? A. And my Jersey attorney, yes, sir.
 Q. Now you say that you were ashamed to go out after that arrest.
 Q. You were living in New York, weren't you?
 A. Surely.
- 20 Q. Still living in New York? A. No, sir; living in Brooklyn.
 Q. You did not live in New York? A. No, sir.
 Q. Haven't moved to New Jersey since? A. No, sir.
 Q. You were ashamed to go out? A. Yes.
 Q. You say you were out of employment for a year? A. About.
 Q. Did you try to get employment? A. Did I try to get employment?
- 30 Q. Yes. A. No.
 Q. You know that there was no New Jersey attorney representing you in the Recorder's Court, don't you? A. There was a Jersey lawyer representing me.
 Q. In the Union Hill court? A. At the Union Hill court. I know he was retained at that time.
 Q. Now, you say you were earning ten thousand dollars a year as a musician? A. Yes.
 Q. Well, you were only getting about fifty, sev-
- 40

enty-five dollars from Mr. Rose, weren't you? A. Yes.

Q. A week? A. Yes, sir.

Q. And you are only getting about seventy-five dollars a week in the theatre in New York, weren't you? A. Yes, sir.

Q. Is that ten thousand dollars a year? A. Why, 10
I had a lot of extra work.

Q. When did you have your extra work when you were working for Mr. Rose? A. Where did I?

Q. Where? A. What do you mean, when?

Q. Where did you have your extra work when you were employed by Mr. Rose? A. I had society work.

Q. Society work? A. Yes.

Q. When? A. What do you mean when?

Q. You were employed by Mr. Rose, weren't you? 20
A. At the same time I think I could have three or four orchestras working for me.

Q. You had orchestras working for you? A. Yes.

Q. This did not interfere with it? A. What didn't?

Q. This arrest? A. Why, certainly did. I dropped everything.

Q. Oh, you dropped everything? A. Yes.

Q. Of your own accord? A. Of my own accord, 30
yes.

Q. That is all.

Re-direct Examination by Mr. Simpson:

Q. You say you lived in New York and Brooklyn, and the societies you associated with were musicians, weren't they? A. Yes.

Q. They would take in this whole Metropolitan territory? A. Yes.

Q. And you being ashamed to go out, would be 40

ashamed to mix with the people in the same occupation as you? A. Yes.

Q. Who was the New Jersey lawyer who represented you? Mr. Storey, wasn't it? A. Yes.

Q. Douglass Storey? A. Yes.

10 Q. You say he was in Union Hill and also downstairs? A. Downstairs, yes.

Q. That is all.

IRVING ROSE, sworn.

Direct Examination by Mr. Simpson:

20 Q. What is your business, Mr. Rose? A. Theatre manager.

Q. Where is your theatre? A. The Pastime Theatre in Union Hill.

Q. Were you such manager on the 26th of May, 1919? A. Yes.

Q. Was this man employed by you? A. Yes.

Q. How long had he been employed by you on the 26th of May, 1919? A. A year and a half, I believe, or two.

Q. See him every day? A. Mostly.

30 Q. Had a chance to make up your opinion about him. Now look at this paper. Is that your signature on that paper? A. Yes.

Mr. Simpson: I offer that in evidence. That is the complaint in the Union Hill police court.

Mr. Schneider: I object unless all the records are put in at the same time.

40 Mr. Simpson: There is no record in the Union Hill court, excepting the complaint.

Mr. Schneider: There is a record there of the disposition that was made of the case.

Mr. Simpson: I simply have to prove that he set this in motion, by making a complaint.

The Court: You may offer that in evidence.

Paper marked Exhibit P-1.

10

Mr. Schneider: I object on the ground that—

The Court: Note your objection. Proceed.

Q. After you made that complaint, then you appeared before the Grand Jury, didn't you? A. Yes.

Q. And testified against him and procured an indictment, didn't you? A. Yes, sir.

Q. After procuring the indictment, you still followed it up and testified before Judge Doherty in the Court of Special Sessions, didn't you? A. Yes, sir.

20

Q. And you were present at that trial? A. Yes, sir.

Q. That is all.

LOUIS DE FORGE, sworn.

30

Direct Examination by Mr. Simpson:

Q. You are employed in the office of the County Clerk of Hudson County? A. I am, sir.

Q. Has your office at my request produced an indictment found against Greenberg? A. Yes, sir.

Q. And is that the indictment? A. Yes.

Q. Is that produced from the files of the Clerk's office? A. It is.

40

Mr. Simpson: I offer that in evidence.

Mr. Schneider: No objection.

Record considered in evidence as Exhibit P-2.

10 Q. Have you also produced the minutes of the Court of Special Sessions, held by his Honor Judge Richard Doherty, when this indictment was tried?
A. Yes.

Q. Are these the minutes? A. Yes.

20 Q. Just read them, will you? A. "State vs. Maxwell Greenberg, breaking, etc., 33 Q. S., April, 1919. July 17, 1919, the defendant being charged plead not guilty, he and his bail, Maxwell Greenberg, enter into a recognizance in the sum of one thousand dollars, cash bail in lieu of real estate, conditioned that the defendant appear from time to time to Judge for trial. Judge Blair. July 31, 1919, defendant waived trial by jury, and being tried in Special Sessions is found not guilty, and is acquitted. Judge Blair."

Q. That is the record of this indictment? A. Yes.

Q. That is all.

30 The Court: The record may be noted as offered, but not marked, of course, being an original record.

Mr. Schneider: No cross examination.

IRVING ROSE, recalled.

Direct Examination by Mr. Simpson:

40 Q. At the time you made this complaint in the Union Hill Police Court against this man, you knew that he had a key of the locker that was

broken open, didn't you? A. Why, I can't say that I did.

Q. Why, you mean to say that this man had been employed by you for a year and a half and you didn't know what keys he had? A. I knew he had a key to the theatre.

Q. Didn't you know the keys he had to the locker? A. You see, there were six musicians and each one had a key to the locker. How many of them had one really would not be under my jurisdiction. 10

Q. You did not inquire before you made the complaint against him whether he had a key to this locker, did you? A. That I don't know.

Q. You mean you don't remember. You made a complaint against this man who had been employed for a year and a half, accusing him of larceny, and you don't now remember whether or not before you made the complaint you inquired as to whether he had a key to the locker? A. I made all the inquiries that anybody could possibly make. I do not just remember what developed as far as that key went. 20

Cross Examination by Mr. Schneider:

Q. You did make inquiries about this man before you made the arrest, didn't you? A. Very thorough. 30

Q. You had a detective up there with you? A. I had Lieutenant Detective Jolling, of the Union Hill Police Department.

Q. Were the help in the theatre examined?

Mr. Simpson: I object to that as not cross examination. That is part of his defense. 40

Mr. Schneider: Senator Simpson asked this witness, then you didn't make any inquiries of anybody about this man as to having a key and you made the arrest. I think that opens the door to permit me to cross examine.

10

The Court: As to the key, that is all.

Mr. Schneider: Your Honor allow me an exception?

The Court: Take your exception.

Q. Did you make any inquiries as to whether this man had a key to the locker? A. That I really don't remember.

20

Q. Did you make any inquiries as to whether this man had a key to the building? A. I knew he had a key to the building, because I gave it to him.

Q. Did you talk to him about that key? A. Yes, I asked him for the key on the Sunday night that he was getting through.

Q. How did you come to ask him for the key? A. He knew that he was getting through that night, and I asked him naturally for the key to the building, and he told me—

30

Q. How did you know he was getting through? A. Well, I had given him his notice two weeks prior to that.

Q. Was that a written notice? A. Oh, yes; that is required of us. You see, that is a union rule.

Q. After you had given that written notice the two weeks were up that Sunday night, and you asked him for the key? A. Naturally.

Q. Well, did you? A. I did, most decidedly.

40

Q. What did he say? A. He said he had lost the key, and with that, of course, I let it go at that.

Plaintiff rests.

DEFENDANT'S TESTIMONY.

IRVING ROSE, recalled for the defendant.

Direct Examination by Mr. Schneider:

Q. Mr. Rose, you were the manager of the Pas- 10
time Theatre in Union Hill? A. Yes.

Q. How long had you been managing that
theatre? A. About five years, six years.

Q. You do not own the theatre, do you? A. No;
just an employee.

Q. An employee. You are there on salary, are
you? A. Yes, sir.

Q. Do you recall having hired Mr. Greenberg,
the plaintiff in this suit? A. Yes, sir.

Q. In what capacity? A. As an orchestra 20
leader.

Q. Do you recall when you hired him? A. Well,
about 1917, some time; I couldn't really give you
the date.

Q. Can you tell us at what salary he was hired?
A. He was hired at sixty dollars a week.

Q. Did you pay him sixty dollars a week? A.
I did.

Q. Do you recall a man by the name of Sader?
A. Yes, sir. 30

Q. What occupation did he have at the time?
A. He was a violinist.

Q. Was he employed at or about the same time?
A. Yes; he was employed at the same time.

Q. Did they both come to you together? A.
They both came together.

Q. At what salary was Sader employed? A.
Sader got forty-five dollars a week.

Q. He was a violinist? A. He was a violinist.

Q. Had you been paying out salaries from 1917, 40

when you employed Mr. Greenberg, up to the time of this arrest? A. Yes, sir; I had been paying salaries.

Q. And throughout that period of time, what salary was Mr. Greenberg obtaining from you? A. Sixty dollars a week.

10 Q. Now did you at any time give him a notice to quit? A. Gave him notice—I gave him a notice that he was through two weeks prior to May 25th, that would be about May 14th, I suppose.

Q. 1917? A. 1919.

Q. That was about two weeks prior to this happening that caused the arrest? A. Just two weeks prior.

Q. When was the two weeks up? A. It was up on May 25th, on the Sunday night, or the 24th, 20 whatever day—it was Sunday night.

Q. Do you recall who paid out the cash for the salaries that night? A. Well, I paid the orchestra.

Q. You paid the orchestra salaries? A. Yes, sir; I paid Greenberg.

Q. You paid the money to Greenberg? A. Yes.

Q. Sure about that? A. Positive of it.

Q. Where did you give the money to Greenberg? A. In my office.

Q. Where was your office with reference to the 30 theatre pit, the orchestra pit? A. Well, I am on the side of the building upstairs in the back, and the theatre pit is downstairs in the back; it is a matter of thirty feet, I suppose.

Q. Did he come in to see you? A. He came upstairs to see me.

Q. About what time in the evening was it? A. I would say it was about eight o'clock.

Q. Do you recall how much money you gave him that night? A. I gave him two hundred and 40 twenty-five dollars, for the entire orchestra.

Q. How many men were employed, working with him at that time? A. Six.

Q. There were seven including himself? A. No; six including himself.

Q. And you gave him two hundred and twenty-five dollars? A. Yes.

Q. How did you come to give him all the cash? 10
A. Well, I made the salaries up; it is custom in the office to make up your salaries in an envelope and then give it to your leader. You make up these various salaries and you hand it to the man in charge of your orchestra.

Q. When you gave him this salary of two hundred and twenty-five dollars, did you give it to him all in cash in one envelope? A. No, in six envelopes, in cash.

Q. And the salary of each individual player was 20
marked on the individual envelopes? A. Yes.

Q. What happened when you gave him the money? A. Well, he wanted to know—he asked me whether the notice was final, and I said I hadn't changed my mind, and he said "All right, to-morrow you won't have an orchestra." I said, "Suit yourself," and with that he went out.

Q. Was there any discussion about a key? A. 30
Yes; I asked him for the key then and he said he didn't have it, he had lost it.

Q. How many keys are there to enter that 30
theatre—I will withdraw the question. How many entrances are there to that theatre? A. Entrances?

Q. Yes. A. Well, with keys, you mean for keys?

Q. Yes. A. There is two, four, about five 30
entrances for keys.

Q. Now there is one entrance which is called the main entrance? A. In the front of the theatre.

Q. On the front of the theatre? A. And there 40
is one on each side of the theatre in the back.

Q. One on each side of the theatre in the rear?

A. In the rear. That is what you call the stage entrance.

Q. So there are two such entrances in the rear?

A. Yes.

10 Q. Are there any other entrances? A. Outside of the four doors from the front, there are exits, yes.

Q. Those are ordinary fire exits? A. Ordinary fire exits.

Q. How many doors were there equipped with keys? A. Well, that is all for keys.

Q. Well, how many for the orchestra to use? A. There was two keys used by the orchestra.

Q. Who were they given to? A. One to Sader and one to Greenberg.

20 Q. Had you given them the keys? A. Yes.

Q. When? A. When they first started to work for me.

Q. Did you have anything to do with their key to their individual locker? A. No, nothing, because that was theirs.

Q. So you asked him for the key that night as you paid him off his final two hundred and twenty-five dollars and he said he had lost it? A. Yes.

30 Q. Why did you give him that two weeks' notice? A. It was coming to the time in the year there—prior to my giving him his notice he had been sending in a substitute four and five days a week, and I told him I could not conduct my business with a substitute, and told him unless he could stay steady there, come fourteen performances a week, I would have to give him his notice, and he said he didn't care about working steady, and it was agreed then that I write out the notice he is entitled to and give it to him.

40 Q. Was that all that was said there that day when he said "You won't have any music there to-

morrow," and you said, "Do as you like?" A. Yes, sir.

Q. Is that all that was said? A. That is all that was said.

Q. What next happened? A. Well, the next thing I knew was Monday morning—well, no, that night I sent for Sader along towards ten o'clock. 10

Q. He was the violinist? A. That is the violinist, and I offered him the leadership of the orchestra, and he agreed to take this leadership, and he notified me at that time that none of the other men in the orchestra would quit. Well, I said they could all stay.

Mr. Simpson: I object to the conversation.

The Court: No, that is incompetent. 20

Q. After you found out the rest of the orchestra refused to quit you made Sader the leader? A. Yes.

Q. What happened after that? A. The next I knew was Monday morning; they called up my house and told me that Sader got there early that Monday morning, eleven o'clock, and he called me up at my home, and told me most of his music was missing, and his violin. I came to the theatre and looked around the music pit and saw the cabinet open, and the locker room broken open, and I immediately telephoned to Detective Jolling, or, rather, telephoned to the police station, and they sent Detective Jolling up. 30

Q. You telephoned to the Weehawken Police? A. Union Hill police.

Q. Union Hill police, and they sent a detective known as Jolling down to your place? A. Yes.

Q. Did you subpoena Jolling or not? A. He is dead. 40

Q. He has died since? A. I went down to the police station, but—

10 Q. Now what did Officer Jolling do in your presence? A. He looked at the cabinet and the doors, and we then went around and interviewed the help, the cleaners, and everybody connected with the orchestra, and he suggested that we get Greenberg over here, because he lived in New York, and I telephoned to him to come over, that I wanted to see him, and Greenberg came over to the theatre.

Q. Why did you telephone for Greenberg? A. Detective Jolling told me that this Mr. Greenberg undoubtedly was the man that took it, and to get him over here, that he wanted to talk to him.

20 Mr. Simpson: I object to that on the ground that under the cases in this state the advice of unofficial persons is no defence, therefore whatever this man told him is incompetent.

The Court: But you let the witness answer the question without objecting, and I won't strike it out now. If there are any other questions asked as to that conversation I shall rule them out. I think your objection is well made, but it was too late.

30 Q. Before you telephoned for Greenberg what did you do? A. Well, Detective Jolling and myself—

Mr. Simpson: I object to any conversations with Jolling.

The Court: No; what did he do?

40 Q. Tell us what you did? A. Detective Jolling and myself went up to the cleaners who were there the first thing in the morning, and we went up to their homes.

Q. What cleaners have you reference to? A. The cleaning women. The women that clean the theatre in the mornings.

Q. How many women clean the theatre? A. Two women.

Q. They clean it every morning? A. Every morning. And we found one of the women up on 4th Street, in Mrs. Knox's home. 10

Q. Mrs. Knox? A. She was working there for her; she was working in Mrs. Knox's, and Detective Jolling questioned this woman, and myself, and we asked her—

Mr. Simpson: I object.

The Court: No.

Q. You and Detective Jolling questioned this woman? A. Yes. 20

Q. Did you interview the other cleaning woman? A. Yes.

Q. And you questioned her about it? A. Yes.

Q. Who first did you question? A. I questioned all the orchestra men.

Q. The musicians of the orchestra? A. The musicians of the orchestra.

Q. You and Detective Jolling? A. Detective Jolling and myself. 30

Q. You say you examined the cabinet that had been broken into? A. Yes.

Q. You found the violin gone and the music? A. So the violin player told me.

Q. You didn't see it there? A. I didn't see it there.

Q. Now, as a result of what Detective Jolling had told you you called up Mr. Greenberg and asked him to come over? A. Yes.

Q. Did he come over? A. Yes.

Q. What happened when he came over? A. 40

When he came over I had an officer waiting there for him, and he was taken down to the station house, where he was questioned.

Q. Was he questioned in your presence? A. Yes, sir; and they held him for the Recorder, or held him on bail.

10 Q. What time was it when he was taken to the Union Hill police station? A. About four o'clock.

Q. He was held for bail, wasn't he, for the grand jury? A. Yes, sir.

Q. Were you there when his bail bond was fixed up? A. No.

Q. Did you talk with Mr. Greenberg at any time since his arrest? A. No, sir.

Q. This man Sader, your violinist, whose violin was stolen, is he the man that told you his violin was stolen? A. Yes, sir.

Q. Did you try to subpoena him? A. I did.

Q. Where does he live? A. He lives in New York.

Q. When did you last see him? A. I was up to his house Saturday night.

Q. And did you ask him to come over to court? A. I very thoroughly did.

Q. What did he say?

30 Mr. Simpson: I object to what he said.

Q. Well, he refused to come, did he? A. He refused to come.

Mr. Simpson: I object to what he said. He is not here.

The Court: I think you can strike out the answer.

Q. Did you have him in this court in this case
40 before?

Mr. Simpson: I object.

A. Yes.

Mr. Simpson: I object to it as incompetent, whether he had a man here before. He could have taken this man's testimony on ten days' notice. 10

The Court: Proceed.

Q. When did you first find out he would not come over here?

Mr. Simpson: I object to it as incompetent.

A. Friday. 20

Mr. Schneider: I think it is competent. Although it is true that we could take depositions of the witness out of the state, where it appears that the witness has come over and never refused to come over, and suddenly decides not to come over, I think it is a matter which the jury ought to be cognizant of and apprised of.

Mr. Simpson: I object on the ground that he knows he could have taken his testimony on ten days' notice, and if he claims he didn't know it until Saturday, he could have made an application on this ground to your Honor, and it would undoubtedly have been granted, showing surprise that he could not get a witness he wanted, and have had this case put over for two weeks. So this is an attempt to confuse the jury. that they cannot get this man here. 30

Mr. Schneider: The court knows that 40

10 last week it was set down for to-day, and had to be tried to-day. We made the application on account of not getting this man. I think we have a right to show that he is a non-resident, that we tried to get him, that he was here before, and that we only learned lately that we could not get him.
(Question and answer repeated by stenographer.)

Q. You appeared in the Union Hill Police Court and testified against Mr. Greenberg, didn't you?
A. Yes, sir.

Q. Did Mr. Sader appear at the Union Hill Police Court and testify against Mr. Greenberg?
A. Yes.

20 Mr. Simpson: I object. How are we bound by the appearance of some witness in the Union Hill Police Court? That is no defence.

The Court: I think he may show what took place. It is no defence to the action, of course.

30 Q. You appeared in the court after the indictment, didn't you, before Judge Doherty or Judge Blair? A. Yes, sir.

Q. Did Mr. Sader appear and testify? A. Yes.

Cross Examination by Mr. Simpson:

Q. Now you had some trouble, with this man, as I understand you, which caused you to give him two weeks' notice? A. Not trouble.

40 Q. Why did you give him the two weeks' notice?
A. Just disagreement of the methods of doing business.

Q. Well, did that make any feeling between you,

or were your relations just as pleasant after you had given him the notice as before? A. No feeling at all.

Q. Just as pleasant after you had discharged him as before? A. Just the same.

Q. What was the reason you gave him this two weeks' notice? A. The reason was that he wouldn't come steady himself; he seemed to want time off for himself, and sent somebody else to play for him, which was not satisfactory. 10

Q. Did you talk to him about that before you gave him the notice? A. I most certainly did.

Q. Over what period of time were you talking to him about his unsatisfactory service? A. At least four or five or six weeks.

Q. Then you gave him this notice? A. Yes.

Q. And the violin that was stolen was not your violin? A. No, sir. 20

Q. But you made a complaint in the police court? A. I made a complaint.

Q. You made this complaint you have identified, did you? Did you make a complaint? A. I made a complaint.

Q. This one you have identified here and has been offered in evidence in which you charge him with the theft of this violin; you made that complaint? A. I did not charge him with the theft of a violin. I charged him with entering the theatre. 30

Q. You charged him with breaking and entering and stealing a violin, didn't you? A. I don't know anything about the stealing part; I said entering the theatre.

Q. It was not your violin, was it? A. No, sir.

Q. Nothing was stolen that was your property? A. Not a thing.

Q. Now you say that you tried to get this man to come over, and he wouldn't come over, this Sader. 40

Isn't it a fact that when you had your interview with him he told you he would not come over because he was present when you were coaching these two women cleaners to swear against this man? Isn't that the reason he gave for not coming over?

10

Mr. Schneider: I object to it as containing an unwarranted assumption of fact.

Mr. Simpson: This is cross-examination. He is trying to explain an interview with an absent witness, and I am trying to show what the absent witness told him.

The Court: You may answer that.

Mr. Schneider: Exception.

20

Q. Wasn't that the reason that this man gave you, that he would not come over, because he didn't want to get in a jam himself, or that he was present when you were coaching these two women cleaners?

A. No, that is not the reason.

Q. What reason did he give you? A. He gave me the reason that Mr. Greenberg and he had had a conference two days previous to that, and he thought it to his interest not to come over in my behalf.

30

Q. Why didn't you have this case held until his testimony could be taken in New York? A. Because my attorney told me Saturday night he had all he could do putting it over until this morning, and it was to be called on Friday, and I didn't know anything about my case coming up until Friday morning at ten o'clock.

Q. You left it all to your attorney? A. Most decidedly did.

Q. You wanted this violinist's testimony? A.
40 Yes, sir.

Q. You didn't want to go to trial without it?
A. Not if I could help it.

Q. You left it all to your attorney? A. I certainly did.

Q. Now can you tell me why you made the complaint against this man and said this is the man who took the violin? A. Well, I don't know why; I simply went down to the police court—I had no malice against this man; I simply made the complaint that he did break into the theatre, and acting as a theatre manager there for the Pastime Theatre Company, I was acting in behalf of the company and not myself, because I have nothing with this man. 10

Q. At any rate the fact remains you made the complaint? A. Yes; that would be the fact.

Q. You not only made the complaint, but you followed him to the Grand Jury, didn't you, and you had him indicted? A. I had to. 20

Q. You did? A. I was summoned.

Q. You went down to the Grand Jury? A. I did; I certainly did.

Q. He was indicted. Now then, after he was indicted you followed him into court downstairs and had these two women come in and had this man Sader come in and tried your best to have him convicted of an offense which would send him to State's prison, didn't you? A. If he done it, which I think he did, he was entitled to it. 30

Q. You did that? A. I did.

Q. Now this man Greenberg's relations had always been pleasant with you? A. Yes, sir.

Q. Even after you gave him two weeks' notice? A. That is true.

Q. Under those circumstances, you, not knowing who stole the violin, not knowing whether there was any fiddle in the locker or not, you went out and had him arrested and tried to send him to 40

State's prison, didn't you? A. On the evidence that I found out.

Q. And all the time you had no bad feeling against him at all? A. Other than the fact that I found out after he had left my employ.

10 Q. When did you find out? A. The following day.

Q. Before this breaking or after? A. Well, at that time.

Q. When you say you found out something, do you refer to something you found out before you knew of the breaking of the locker, or after? A. Oh, no; after.

Q. After? A. Yes.

Q. When you telephoned this man you had a policeman waiting for him, didn't you? A. Yes.

20 Q. You were perfectly friendly with him, you knew him for a year and a half, didn't you? A. Yes.

Q. Believed the man was an honest man? A. At that time.

Q. Knew he had a good reputation in his profession as a musician? You knew that, didn't you? A. That I don't know.

30 Q. Whether you knew that or not you telephoned him and told him you wanted to see him; is that right? A. Yes.

Q. Didn't tell him what you wanted to see him for? A. No.

Q. You had a policeman waiting for him? Although you didn't own the fiddle you had a policeman waiting for him? A. Yes!

Q. And had him picked up without a chance and locked up and put in a cell for six hours, didn't you? A. Yes.

40 Q. Although your relations were perfectly pleasant and you were simply trying to vindicate

the ends of justice? A. I didn't grab him and put him in a cell for six hours.

Q. You had him locked up? A. I had him locked up.

Q. Might have been kept in there for a year for all you know? A. Might have been.

Q. I didn't suppose you turned the key in the cell lock and sat outside the cell? A. I had him locked up. 10

Q. You didn't think you were going to dinner and give him some chianti? A. I can't tell a thing about it.

Q. These two women that you speak about having interviewed, they are employees of yours, aren't they? A. Not any more, no.

Q. They were then? A. They were then.

Q. You say you are just an employee of this theatre? As a matter of fact you own the majority of shares in the company? A. I don't own a share. I am just a manager. 20

Q. Did you ever own a share? A. Never owned a share.

Q. What is the company that owns it? A. Pas-time Theatre Company.

Q. You hold any office in that company? A. None at all; just a manager of the theatre.

Q. Who is the president of the company? A. C. William Jones. 30

Q. Where is he, New York? A. In New York.

Q. Is it New York capital? A. He owns the whole thing.

Q. What kind of a theatre is it? A. Vaudeville and picture theatre.

Q. Located where? A. Union Hill.

FRANK DE BLASSY, sworn.

Direct Examination by Mr. Schneider:

Q. Mr. De Blassy, where do you live? A. Philmore Place—644 Philmore Place.

10 Q. You were employed at the Pastime Theatre in Union Hill in the early part of 1919? A. Yes, sir.

Q. As what? A. As cornet player.

Q. Mr. Greenberg was employed there at that time? A. Yes, sir.

Q. As what? A. Leader.

Q. He also played what instrument? A. Piano.

Q. Do you remember Mr. Sader, the violinist? A. Yes, sir.

20 Q. Now do you recall the night when Mr. Greenberg came into the orchestra pit which was just before he left the employment? A. Yes, sir.

Q. Where were you all, the musicians, at that time? A. Around there, see. This was after the vaudeville. I went outside there for a little air, and then I came in and I saw Mr. Greenberg, you know, speaking to Sader.

Q. Where did you go inside? A. Down the pit.

Q. You mean underneath the stage? A. Yes, sir.

30 Q. That is when the piano was playing for the moving pictures? A. Yes, sir.

Q. The rest of the musicians were out of the stage? A. Yes, sir.

Q. You came in out of the air and went underneath the stage and saw Mr. Greenberg talking to Mr. Sader? A. Yes, sir.

Q. What did he say? A. And he said "The idea, Mr. Greenberg wanted us to quit."

Q. Who said? A. Mr. Greenberg to this Sader.

40 Q. What did he say? A. We all should quit tonight.

Q. Said you all should quit tonight?

Mr. Simpson: I object. He said all should quit.

The Court: Just tell us what he said.

A. The piano player, Mr. Greenberg, told Sader, he says, "We all should quit now," and then we all said we all should quit, but then Sader fixed it so we would remain, and Mr. Greenberg said "All right; I am going to fix you for this, and when I do fix you I will fix you right." 10

Q. Who did he say that to? A. Mr. Greenberg to Mr. Sader.

Q. "I will fix you and I will fix you right." A. That is all I know about the case.

Q. Did he go out? A. When? 20

Q. Did Mr. Greenberg leave the place then? A. Well, after the show was through, yes. Then the next morning I came there about ten o'clock and Sader told me the music was stolen, and the violin wasn't there, and the thing was broken, forced out.

Mr. Simpson: I object to what Sader told him.

The Court: Strike that out.

Q. Did you receive your money that Sunday night? A. Oh, sure, yes. 30

Q. You did receive your money? A. In full.

Q. Well, was it given to you in cash? A. Yes, yes.

Q. Was it in an envelope? A. No, no, loose.

Q. Who gave it to you? A. Greenberg.

Q. How much did he pay you? A. Well, I don't know; I know that he told me, he says, "It is up to you, Frank, if you want the price without send- 40

ing in substitutes, but if you want to send substitutes I will give you two dollars less the price. So I took it at a figure that was two dollars less than the price.

Q. How much was it? A. I don't know; it was two dollars less than the price.

10 Q. How much was the price? A. I think it was twenty-eight or thirty-one; I am not sure.

Q. Did you ever receive from Greenberg twenty-four dollars a week? A. Oh, no; never paid me twenty-four, no, sir.

Q. Are you employed by the Pastime Theatre now? A. No.

Q. You are not working at the Pastime Theatre now? A. No, sir.

20 Q. Haven't been working for the Pastime Theatre for how long? A. Oh, it is over—it is over about two years, I guess.

Q. You were subpoenaed to come here? A. Yes, sir.

Q. Where are you employed now? A. Lincoln Theatre.

Q. You are working there now? A. Yes.

Cross Examination by Mr. Simpson:

30 Q. You worked for Greenberg how long? A. About a year and a half.

Q. He always paid you? A. Yes; always paid me.

Q. Paid you loose; he didn't pay you in the envelope? This man says every week the salaries are made up and put in an envelope, but you say Greenberg paid you for that year and a half, and always paid you with loose money? A. Everybody was getting different salary.

Q. Did Greenberg pay you the loose money? A. I think so; I am not quite sure.

Q. Now, two questions; he had some row with you, he wanted you all to quit when he quit? A. Yes.

Q. You wouldn't do it; that is, you didn't want to do it? A. When Sader said to me, "Do you want to remain?" I said, "Sure, why not?" 10

Q. He got mad at Sader and said, "I will fix you for this, and I will fix you good?" A. Yes.

Q. He seemed to be in a temper? A. Yes.

Q. So that he was going to report you to the union; that is the way he was going to fix you? A. No.

Q. All he said was—he got mad and said, "I will fix you for this because you are keeping these boys here?" A. Yes, and "I will fix you right," that is all I know. 20

EUGENE D. KNOX, sworn.

Direct Examination by Mr. Schneider:

Q. Mr. Knox, where do you live? A. 151 Fourth Street, Union Hill.

Q. Were you employed by the Pastime Theatre in 1919? A. No, sir. 30

Q. 1917? A. No, sir.

Q. Were you employed there in 1919? A. No, sir; I was never employed by the Pastime Theatre; I am in the express business.

Q. In business for yourself? A. Yes, sir.

Q. In 1919, did you have any business that brought you to the Pastime Theatre? A. Yes, sir.

Q. What kind of business? A. I was getting a trunk out of there to make a train, a special train, 40

and I got there and I went into the basement and the trunk was not ready, and I was waiting until the party got the trunk ready to go out.

Q. Do you always take out the trunks from the Pastime Theatre? A. From all the theatres; I am in the theatrical transfer business, and I make a specialty of this.

Q. Now, do you recall this occasion when you were waiting for this trunk to come down? A. Yes.

Q. Where were you waiting? A. In the basement of the theatre.

Q. Is that underneath the stage floor? A. Underneath the stage.

Q. Will you tell the court and jury what transpired while you were waiting there? A. Why, while I was waiting there Mr. Greenberg came downstairs as I thought from the office—

Mr. Simpson: I object. Fix the date.

Q. Do you recall when this was? A. Why, it was the 25th of May, the day before that the trouble was. It was on a Sunday night at about 9.30. I left the Hudson Theatre at 9.30 to meet my man at the Pastime, as a party had to get the train, and when I got there the trunk wasn't quite ready, and Mr. Greenberg came down the stairs and very excitedly he commenced to talking to the musicians, and he passed the remark that we all stay or we all quit, and they had an argument amongst themselves, mostly with Mr. Sader, and he says to Mr. Sader, "I am going to get you," and he pointed his finger at him, "and when I get you I am going to get you right, and you will feel sorry for it."

Q. Do you know how he came to say that to Sader?

Mr. Simpson: I object to that, what he knew.

The Court: What he heard is competent, and that is all.

Q. What did Sader say to him just prior to that?

A. He said he wasn't going to quit; I heard him say that. 10

Q. Wasn't going to quit. Is that all you know about what happened that night? A. That is all I know.

Q. Were you there the next day? A. No, sir.

Q. Were you questioned by any one relative to this breaking and entering and theft of this violin?

A. Yes.

Q. Who questioned you? 20

The Court: Find out when.

Q. When were you questioned? A. It was the next night.

Q. Who questioned you? A. It was the next night I heard he was arrested, then I told what I had heard.

Q. Who did you tell that to? A. To my daughter.

Q. Where does your daughter work? A. At the Pastime Theatre. 30

Q. In what capacity? A. Cashier.

Q. Your daughter is a cashier under Mr. Rose at the Pastime Theatre? A. Yes.

Q. When you found out that this man Greenberg was arrested you told what you knew to your daughter? A. I told her what I had heard, yes, sir, down there.

Q. You say you were examined the next night? A. Not immediately afterwards, no. I just told my daughter and I gave all the information I had 40

to Mr. Rose. I told him what I had heard while I was in the basement of the theatre.

Q. You told that to Mr. Rose? A. Yes, sir.

Q. How soon after the occurrence there between Mr. Greenberg and Sader? A. I think it was a Tuesday I told Mr. Rose what I had heard, but
10 my daughter I told Monday night after I heard Mr. Greenberg had been arrested.

Q. You told Mr. Rose what you told the court and jury here? A. Yes, exactly.

Cross Examination by Mr. Simpson:

Q. Did you go to the police court in Union Hill?

A. No, sir.

Q. You were not examined as a witness there, were you? A. No, sir.
20

Q. Did you testify before the grand jury? A. No, sir.

Q. Testify in this trial of this indictment? A. Yes, sir.

Q. Who requested you to come to this trial? A. Subpoenaed.

Q. Who? A. I was subpoenaed.

Q. Yes, but before you were subpoenaed what conversation did you have with Rose about coming to the trial? A. Why, I had no conversation with
30 Mr. Rose at all, only what I had explained to him, what I had heard in the basement of the theatre that night.

Q. Rose was the only one you talked to outside of your daughter, and you didn't go to the police court and you didn't go before the grand jury, but you did appear at the trial downstairs? A. Yes; I was subpoenaed, yes.

Q. All you know is that you were present at
40 some row between Greenberg and the musicians

about quitting; that is all you know? A. That is all I know.

Q. You heard him say in anger to one of them, "I will get you, and I will get you good. I will get even with you." A. Yes.

Q. He didn't say what he would do, whether he would report it to the union or what he would do? 10
A. No; he said, "I am going to get you, and when I get you I will get you right," and he pointed his finger in his face.

By Mr. Schneider:

Q. In whose face? A. In Sader's face.

Mrs. KATE SMITH, sworn.

20

Direct Examination by Mr. Schneider:

Q. Mrs. Smith, are you married? A. Yes, sir.

Q. Live with your husband? A. Yes, sir.

Q. Where are you living? A. 530 26th Street, Guttenberg.

Q. Were you employed by the Pastime Theatre in 1919? A. Yes.

Q. As what? A. Cleaner. 30

Q. Were you the only one cleaning there? A. No, sir; there was another cleaner.

Q. Who was the other cleaner? A. Mrs. Holmes.

Q. Is she here in court? A. Yes, sir.

Q. In 1919 how long had you been working there as a cleaning woman? A. Over two years at that time.

Q. Did you know at that time Mr. Greenberg? A. Yes, from seeing him there Saturday mornings at rehearsal. 40

Q. You would see him there at rehearsals Saturday mornings? A. Yes, sir.

Q. At what time did you work in the theatre every day? A. Seven o'clock in the morning.

Q. Seven o'clock every morning. Was it your duty to clean up the theatre? A. Clean it all out.

10 Q. Did you see Mr. Greenberg on other mornings other than Saturday? A. No, sir; never saw him in the theatre—saw nobody in that pit any time only on Saturday mornings.

Q. What were they doing there Saturday mornings?

Mr. Simpson: I object.

A. Preparing for rehearsals.

20

Mr. Simpson: I object to that. Saturday mornings—I understand this larceny was on a Sunday.

The Court: I cannot see that it throws any light on the subject.

Mr. Schneider: I will withdraw the question.

30

The Court: You see, as I understand the evidence, this man, the plaintiff, left on Saturday night. When they came back Monday morning the allegation is that the locker had been broken open and the goods stolen, so that whatever took place must have taken place between Sunday night and Monday morning.

Q. How long would you stay in the theatre from seven o'clock in the morning? A. Well, sometimes a little longer, but we were through there at
40 half past eleven at the latest.

Q. In the morning? A. In the morning.

Q. Now did you ever see Mr. Greenberg at any morning other than this—any other morning than a Saturday morning? A. That Monday morning.

Q. That Monday morning? What Monday morning was that? A. That was in May.

Q. 1919? A. 1919, yes.

10

Q. How do you remember now that you saw Mr. Greenberg in the theatre that Monday morning? A. Because I happened to notice him. I never saw anybody down there before, that is how I came to notice the man was down there by the pit.

Q. Where were you? A. We were about, I should judge the distance of this room from the pit, when I called Mrs. Holmes' attention to it, and I said, "Who is the man?" And he was bent down over a music cabinet, and she raised up quick, looked at him, and said, "Oh, that is the piano player." So we paid no more attention to him.

20

Q. Where were you in the theatre when you noticed Mr. Greenberg in the orchestra pit? A. We were in the body of the theatre.

Q. Of the orchestra floor? A. Yes.

Q. Were any of the doors, exits, open? A. Everything was wide open.

Q. You could see? A. You could see plain.

Q. Did you see Mr. Greenberg come into the theatre? A. No, sir.

30

Q. Do you recall what hour of the morning it was that Monday morning? A. It was about half past nine.

Q. You say he was stooping down? A. Bent low over—there was a music cabinet; he was bent low over this cabinet.

Q. Did you know where this cabinet was? A. Yes.

Q. You had seen it there before? A. Yes.

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Q. Did it have a lock on it? A. That I don't know. It was covered; it was a curtain over that. I don't know whether it was locked. That I don't know anything about.

Q. You saw him bending over? A. Yes.

10 Q. And you called this other woman's attention to it? A. Yes.

Q. Did you pay any other attention to it at that time? A. No, sir.

Q. Kept busy about your work? A. Went right on when she said it was the piano player. I didn't see the man's face; it was bent down. His back was turned toward me, but as he had to go down, he had to turn towards her, because the piano was between him and the stairs; he had to turn that way.

20 Q. Where was this other woman? A. On the other side of the theatre; I was on the left side as I am sitting now.

Q. This other woman was on the right hand side? A. Yes.

Q. Facing the theatre? A. Yes.

Q. Did you see Mr. Greenberg leave the orchestra? A. As soon as I spoke, he went right down as quick as he could.

30 Q. Well, do you know whether he heard you speaking? A. He couldn't help it; must have heard it.

Mr. Simpson: I object.

Q. Could he have heard you speaking?

Mr. Simpson: I object to it as calling for a conclusion.

40 A. I guess I spoke loud enough, because I was surprised.

Kate Smith—Direct Examination.

Mr. Simpson: I object.

The Court: Yes, she may tell how they were located.

Q. Well, how far from you was Mr. Greenberg, taking this room into consideration? A. I should judge the distance of this room or a little more, away from him. 10

Q. The distance from the rear of this room to you? A. About that.

Q. How far from you was this other cleaning woman? A. Well, she was a couple of seats ahead of me.

Q. But on the opposite side of the house? A. On the opposite side of the house.

Q. How far away? A. Well, I should judge that desk over there; she was that far ahead of me. 20

Q. How far on the side of you? A. She was on the side aisle, away over on the side aisle, and I was on the other side aisle.

Q. About how far is that? Take this room for example? A. It is wider than this room.

Q. Eh? A. The theatre is wider than this room.

Q. Is it wider than from you to the rear of this court room? A. No; I should not think it was that wide.

Q. Less than that? A. Yes. 30

Q. You called over to her? A. Yes.

Mr. Simpson: I object to the conversation between these women.

Q. I say you called over to her?

Mr. Simpson: I object to that. She was brought here to identify the plaintiff, not to give a conversation with some other woman. 40

Kate Smith—Direct Examination.

The Court: I do not think it is competent as it stands now. This lady is not identifying him.

Mr. Simpson: The woman says she saw a man stooping down and never saw his face.

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Q. After you called over to this woman, you say he left the theatre? A. Left the theatre; went right down the stage, then steps.

Q. In leaving the theatre, did he pass nearer to this other lady or nearer to you? A. He passed nearer to her, because he had to turn that way to go down the stairs.

Q. You paid no more attention to him? A. No, sir.

20

Q. Were you ever examined by any one relative to what you saw there and what you have just testified? A. Yes.

Mr. Simpson: I object, unless it is confined to the defendant.

Mr. Schneider: As the evidence stands an officer may have examined her. There is testimony in the case there was a detective sent up there to examine people.

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The Court: Well, I don't think that will help you in this case. I do not see that what she told the detective will help you; the detective is dead and you cannot show that.

Mr. Schneider: Your Honor allow me an exception?

The Court: You would have to show, you see, that the defendant did not have probable cause; that is the whole issue. The defendant had this man arrested. Now the

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question is what he knew when he made his complaint, and what he should have known.

Q. Did you speak to Mr. Rose about what you had seen? A. No; never spoke to Mr. Rose.

Q. Did you speak to a police officer? A. No, sir.

Q. Did you talk to a detective as to what you had seen there? A. No, sir. 10

Q. Who did you talk to? A. Didn't talk to anybody. When I came in Tuesday morning to work Mrs. Holmes told me that Mr. Sader's violin was taken, and that is all I knew about it, and then we had to go down to the Union Hill Court.

Q. Who asked you to go down to the Union Hill Court? A. I don't know. I don't remember who it was that asked me. I know we all had to go down. 20

Q. Did Mr. Rose ask you to go down to court? A. I never had any conversation whatever—Mrs. Holmes told me we had to go down. I never had any conversation with Mr. Rose.

Q. You did go down to the court? A. Yes.

Q. You testified to what you testified here? A. Yes, sir.

Cross Examination by Mr. Simpson:

Q. You were examined in the Union Hill Police Court? A. Yes, sir. 30

Q. Did you say, "I could not positively say that that was the man (pointing to plaintiff), all I saw was his back." Did you swear to that? A. I said it was his back.

Q. Did you swear to that? A. Yes, sir.

Mr. Schneider: I object to it as not proper cross examination. There is no foundation laid for it. Mr. Simpson is reading 40

from something that is not in evidence.

Mr. Simpson: I am asking whether she did testify to such a thing in the police court. I have a perfect right to do that.

Mr. Schneider: I object.

10 The Court: I think that is perfectly competent. If the story she told on another occasion differed from the story on the witness stand, it may go to the jury as to the credibility of the story she is now telling.

Q. Didn't you say in the police court, "Well, I couldn't positively say that was the man. All I saw was his back"? Did you say that? A. Yes.

Q. That is the truth? A. Yes. All I saw was the man's back.

20 Q. So you don't say this is the man. All you say is that you saw the man the distance of this room with his back to you. That is all you know, isn't it? A. Yes.

Q. Tell these twelve men whether it is a fact, when you say you could not positively say who that man was or not from your own observation. Is that a fact or not? A. No, he was bent low over this cabinet.

30 Q. Yes, but can you identify the man that you saw, or, as you swore in the police court right after this thing, is it a fact that you could not positively identify who you saw? A. I couldn't tell if it was Mr. Greenberg positively, because I did not see his face.

Q. You just saw a man in the pit leaning over, with his back to you? A. Yes, sir.

Q. The distance of this room, and you cannot say whether it was this plaintiff or not, of your own observation? A. I did not see his face.

40 Q. I don't care whether you saw his face or his

mustache; what I want to know is what you tell these twelve men. Did you see a man with his back to you, and that is all you know, and you can't say whether it was this man or not; is that a fact?

A. Yes, sir.

Q. That is all.

10

Re-direct Examination by Mr. Schneider:

Q. Did you notice the back of his head or the top of his head? A. Yes; he was slightly bald.

Q. Will you turn around, Mr. Greenberg?

Mr. Simpson: We will admit he was slightly bald. Why, there are some on the jury that are slightly bald, too.

Q. Will you stand up and turn around, Mr. Greenberg?

20

Mr. Simpson: Sure.

Q. Does he look like that? A. From the back, yes. It is the same kind of a back that that man had that was bending over this cabinet.

Q. Same thing. That is all.

Re-cross Examination by Mr. Simpson:

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Q. What was the measurement of the bald space you saw? How big was the bald space? A. I don't know.

Q. Three inches square, or what was it? A. That I don't know.

Q. As a matter of fact, all you know is that on this morning you saw a man bending over a case, and you don't know who it was. Is that right? That is all you know, isn't it? You can't identify

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Maggie Holmes—Direct Examination.

the man? A. Yes, there was a man bending over that music cabinet that morning.

By Mr. Schneider:

10 Q. Are you here under subpoena? A. Yes, sir.

Mrs. MAGGIE HOLMES, sworn.

Direct Examination by Mr. Schneider:

Q. Mrs. Holmes, are you married? A. Yes, sir.
 Q. Living home with your husband? A. Yes, sir.
 Q. Where do you live? A. 317 Bergenline Avenue, Union Hill.

20 Q. Were you employed at the Pastime Theatre in Union Hill in 1919? A. Yes, sir.

Q. What were your duties? A. Cleaning.

Q. Do you know Mrs. Smith that was on the witness stand before? A. Yes, sir.

Q. She was cleaning there with you? A. Yes, sir.

Q. What were your hours at that time? A. Seven in the morning until eleven, half past, depends how much work we had to do.

30 Q. You clean everything about the theatre? A. Everything, yes, sir.

Q. Did you ever see any one in that theatre in the morning? A. No, sir.

Q. In the morning? A. No, sir, only the morning that this case happened.

Q. Do you recall seeing somebody there that morning? A. Yes.

Q. Do you recall who? A. Yes, sir.

40 Q. Where were you in the theatre at that time?
 A. In the orchestra.

Q. Whereabouts in the orchestra? A. Well, not quite from the back of the orchestra—right—little back from the back of the theatre.

Q. Where was Mrs. Smith then? A. She was on the left hand side, same place.

Q. On the opposite side of the orchestra floor?
A. Yes. 10

Q. You say you observed somebody in the orchestra? A. Yes, sir.

Q. Where did you observe this person to be? A. At the music cabinet down in the pit.

Q. How was your attention called to this person at the music cabinet in the pit? A. Mrs. Smith drew my attention; she said, "Who is the man?" and he bowed down to the music cabinet, and he went to the right side to go down into the cellar. I said, "Oh, that is the piano player." 20

Mr. Simpson: I object to what he said.

Q. Did you see it was the piano player? A. Yes.

Q. Did you see this man Greenberg there at that time? A. Yes; I did.

Q. How did you know it was this man Greenberg at that time? A. Well, I knew it was him; I worked a year and a half, pretty near two years, with him. 30

Q. Where had you ever seen him before? A. At rehearsals, Saturday mornings, and during the performances—I attend the morning and afternoons.

Q. You saw him there Saturday morning rehearsals? A. Yes.

Q. What did you see Mr. Greenberg doing at that cabinet, anything? A. No; I couldn't tell. There was a curtain drawn across, I couldn't see what he was doing. 40

Q. Did you speak to him then? A. No, sir.

Q. Did you say he walked out? A. He went down to the cellar—down through the pit, there is a stair there.

Q. In walking out did he face you? A. Yes, he came over to the right side.

10 Q. Did he speak to you? A. No, sir.

Q. Did you speak to Mr. Greenberg—to Mr. Rose, as to what you had seen? A. Mr. Rose came to where I was working Monday afternoon.

Q. Where were you working then? A. Up at Mrs. Knox's house; I was doing some ironing.

Q. And Mr. Rose came there? A. And Detective Jolling came up there.

Q. Mr. Rose and Detective Jolling came to that place? A. Yes, where I was working.

20 Q. They interviewed you? A. They asked me did I see any one in the theatre, and I said, "yes, the piano player." He said, "What was he doing?", and I said—

Mr. Simpson: I object, unless it was by the defendant.

Mr. Schneider: She testifies it was by the defendant.

The Court: I think she may testify to what information she gave the defendant.

30 Q. What did he say? A. He asked me who did I see; did I see anyone in the theatre, and I said, "Yes, the piano player." He said, "What was he doing"? I said I didn't know, he was at the music cabinet. That was all I said.

Q. Did you appear in the Union Hill Police Court? A. I did.

Q. And the other court in this case after the indictment? A. Yes.

40 Q. You appeared before the Grand Jury? A. Yes.

Maggie Holmes—Cross Examination.

Q. Told the same story? A. The same story.

Q. You are here under subpoena now, aren't you?

A. I am.

Cross Examination by Mr. Simpson:

Q. You were a witness against the plaintiff here at the trial before Judge Doherty in which he was acquitted, weren't you? A. I believe I was. 10

Q. Then you swore there that you had seen him in the music pit, didn't you, at that trial? A. Yes.

Q. Where were you standing when you say you saw this plaintiff in the music pit; how far away from the man who you say was the plaintiff? A. Well, I guess from about to that table there from the back of the theatre. 20

Q. Well, that does not tell us anything. How far were you from the music pit? A. We don't know anything about your theatre. Oh! Well, it is as far as this room, I believe.

Q. From the music pit to the man that you say was standing how? A. Stooping down at the music cabinet.

Q. With his back or face to you? A. His face.

Q. Toward you? A. Yes.

Q. Then the music cabinet was between you and him, is that right? A. The music cabinet on the left-hand side. 30

Q. Well, was the music cabinet between him and you when he was stooping down? A. Yes; I was on the right-hand side.

Q. You were on the right-hand side of what? A. Of the theatre.

Q. Of the theatre? A. Yes, cleaning.

Q. How far back from the pit were you? A. I guess about the length of this room. 40

- Q. What time of day was it? A. I guess about half-past nine in the morning.
- Q. What was the light there? A. Very bright.
- Q. Well, what was it? A. Daylight.
- Q. Daylight in this theatre? A. Yes.
- Q. Moving picture theatre? A. Yes.
- 10 Q. And the daylight was very bright in it? A. Yes; we had all the exits open.
- Q. How many exits have you? A. There is ten.
- Q. Where were they, all on the same floor? A. No, six downstairs and four upstairs in the balcony.
- Q. How near to this music pit is the nearest exit? A. I don't know; I never measured, but it is not far.
- Q. Give us an idea? A. Well, I guess from here
- 20 to there.
- Q. The first gentleman in the jury? A. No; right to that last gentleman there.
- Q. The last gentleman there? A. Yes, sir.
- Q. What is the exit, is it one door or two doors? A. Two doors.
- Q. Those two doors are open? A. Double doors.
- Q. How was this man's back, was it towards those two doors or away from it? A. Stooping down this way towards the doors.
- 30 Q. When was it you say you recognized him as the piano player? A. Going over to the right side to get down to the cellar stairs.
- Q. On his going over to the right side and going down the cellar stairs? A. Yes.
- Q. He was always the distance of this room from you; is that right? A. Yes, sir.
- Q. When you saw him and you say identified him, did he have the side of his face to you or full face? A. Side. He had to face me to go down the
- 40 cellar stairs.

Q. He had the side of his face toward you. Did he have to walk the entire width of the music pit?

A. Yes.

Q. He was always the length of this room away from you? A. Yes.

Q. You knew him very well? A. Yes.

Q. It was a very unusual thing to see a man in the theatre in that place, in the morning, wasn't it? 10

A. It was.

Q. Why didn't you speak to him? A. Because I knew that if he had any business down there—

Q. He had no business? A. If he had business down there I didn't bother, but—

Q. Yes; but if this man worked there a year and a half, and you had been working at it a long time, and you were astonished to see somebody at this place at this time because it was so unusual, you didn't say a word to him, did you? A. Why, no. 20

Q. You didn't speak to him? A. Why, no.

Q. Simply let this man pass on? A. Yes; because we knew he played the piano.

Q. Now you say you saw this man going down the cellar stairs? A. Yes.

Q. How was he dressed? A. In a dark suit.

Q. What kind of a hat did he have on? A. No hat.

Q. No hat? A. No. 30

Q. Anything peculiar about him? A. No.

Q. Was he carrying an automobile tire? A. I couldn't tell you.

Q. Carrying nothing, was he? A. I just happened to see him.

Q. Went down the stairs carrying nothing without his hat on? A. I couldn't see what he had.

Q. Was he carrying anything or not? A. I don't know.

Q. You don't know, and yet you observed him so 40

closely that you can identify this man as the man?

A. Yes.

Q. You can't say whether he was carrying anything? A. Yes.

Q. Is that right? A. I couldn't say what he had.

10 Q. Did he have anything? A. I don't know.

Q. Did you see him carrying anything? A. No, sir.

Q. Although you closely identified him so that you could identify him and swear to it, you cannot tell whether the man was carrying anything. Who was it you first told about seeing this man in the pit? A. Mr. Rose and Officer Jolling.

Q. When? A. When he came up to my place where I was working.

20 Q. When was that? A. That is the same afternoon, same day.

Q. Did he tell you who told him to come up to see you? A. No, sir.

Q. He came as far as you know without anybody telling him? A. I don't know.

Q. You hadn't told anybody you had seen the piano player? A. Only Mr. Rose and the detective.

30 Q. Well, before you told Mr. Rose and the detective you hadn't told anybody? A. No.

Q. This man ever have a hat on that you saw? A. No, sir.

Q. When you went down the cellar stairs where would that lead you to? A. The cellar.

Q. The what? A. In the cellar, under the stage.

Q. Could he go out of the cellar into the street? A. Yes, sir.

Q. How? A. Why, there is a cellar door there, there is two side doors.

40 Q. What street would it lead him to? A. Fifth Street.

Q. What is the entrance to the theatre, what street is that on? A. The entrance?

Q. Bergenline Avenue, is it? A. I don't understand you.

Q. Where is the entrance of the Pastime Theatre? A. On 4th Street, main entrance.

Q. What time of the morning is it you say you saw this man stooping down over the music cabinet? A. About half-past nine. 10

Q. Half-past nine in the morning? A. Yes.

Q. You never were any nearer to him than the length of this room? A. No, sir.

Q. That is all.

Re-direct Examination by Mr. Schneider:

Q. Mrs. Holmes, this building of the Pastime Theatre is on the corner, isn't it? A. Yes, sir. 20

Q. And the three sides of it face the street? A. Yes, sir.

Q. And the exits on three sides open directly on to the street? A. Yes, sir.

Q. What is there which separates the orchestra pit from the orchestra—where the musicians play, from where the people sit in the orchestra? A. There is a rail there and has a curtain on.

Q. That rail has a curtain on? A. Yes. 30

Q. What color was the curtain, do you know? A. Red.

Q. Could you see through that curtain? A. No, sir.

Q. But if a person was standing behind that curtain could you see them? A. Yes, sir.

Q. Above the curtain? A. Yes.

Q. You couldn't see him below the railing, could you? A. No, sir.

Q. Does that account for the reason that you 40

Maggie Holmes—Re-cross Examination.

didn't see whether he was carrying anything? A. Yes.

Mr. Simpson: I object. That is for the jury, not for this witness, whether that man had anything.

10 Mr. Schneider: That is all.

Re-cross Examination by Mr. Simpson:

Q. As I understand, you say there was a curtain between you and this man all the time? There was a curtain between you and this man all the time? A. Yes.

Q. How high did that curtain go up; I mean, was it above his head? A. No, sir.

20 Q. How much below his head? A. Well, about a yard.

Q. Then it only came up to his waist, about? A. He was stooping over, yes.

Q. When he stood up to walk he didn't walk in a stooping position, did he? A. Yes.

Q. When he walked out he stood up straight? A. He certainly did; he was stooping over going along.

30 Q. When he stood up to go out, did he walk stooping or walk straight? A. He walked stooping.

Q. All the time? A. Yes, sir.

Q. Stooped down below the curtain? A. Not low enough that I couldn't see him.

Q. But he stooped below the curtain when he walked all the way across the stage? A. No, sir; wasn't stooping that much.

Q. Did he walk stooping? A. Yes.

40 Q. All the time until you lost sight of him? A. Yes; all the time until he went down the cellar.

Tony Williams—Direct Examination.

By Mr. Schneider:

Q. Could he stand up there if he wanted to?

A. Yes, sir.

Q. Straight? A. Yes, sir.

Q. How far distant did he have to walk from the cabinet to the exit under the stage? A. Why, I should judge about from there to the center of the judge's desk; not far. 10

Q. What day do you say this was? A. 26th of May.

Q. What day of the week? A. Monday.

TONY WILLIAMS, sworn.

Direct Examination by Mr. Schneider:

Q. Mr. Williams, where do you live? A. 480 Bergenline Avenue. 20

Q. In 1919 were you employed by the Pastime Theatre in Union Hill? A. Yes, sir.

Q. As what? A. Operator.

Q. Were you electrician there, too? A. Yes, sir.

Q. You just came into the court room now? A. Yes.

Q. You were not here all the morning? A. No, sir.

Q. Did Mr. Greenberg at any time give you a key to the Pastime Theatre? A. He did not. 30

Q. That is all.

Cross Examination by Mr. Simpson:

Q. You worked for the Pastime Theatre? A. Yes, sir.

Q. Still work for them? A. Yes.

Q. And Mr. Rose is your boss? A. Yes.

Q. That is all.

Defendant rests.

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PLAINTIFF'S TESTIMONY IN REBUTTAL.

JOHN BROWN, sworn.

Direct Examination by Mr. Simpson :

10 Q. Mr. Brown, you work for the New York Telephone Company? A. Yes, sir.

Q. On the 26th of May, 1919, were you putting a telephone in the house of the plaintiff? A. Yes.

Q. Where? A. On the first floor upstairs of Dr. Greenberg's office, that is his wife.

Q. That is the wife? A. Yes, sir.

Q. You were putting a telephone in? A. Yes, sir.

Q. Did you see him there that morning? A. Yes; I did.

20 Q. What time? A. Well, it was between nine and twenty after nine.

Q. How long were you working there? A. Well, I stayed there until one o'clock that day.

Q. Do you know what time he went out? A. What time he went out in the morning?

30 Q. Yes, what time he left the place? A. Well, when I seen him in the morning he was coming out of his bedroom, I happened—we had—going to have another telephone there delivered, for change of an equipment, so I just happened to think that the package was delivered, and just naturally enough happened to look at the clock and I seen it was about twenty after nine.

Q. Where was he then? A. He was coming out of his room. He was in his undershirt and trousers.

Q. Did you see him there after that that day? A. I seen him there down on the street, around the door, around ten o'clock or quarter after ten.

40 Q. Where is that address in Brooklyn? A. Ten hundred and something Manhattan Avenue.

John Brown—Cross Examination.

Q. 1134 Manhattan Avenue. Do you know where that is located, how far it is from the bridge? A. From which bridge?

Q. How long does it take you to go from your place of business to 1134 Manhattan Avenue, Brooklyn? A. Why, it takes us forty minutes at the lowest.

10

Q. How long were you working there that day? A. I stayed there until one o'clock that day.

Q. You are sure of your date? A. Yes, sir.

Q. What makes you so sure? A. Well, we make a memorandum of every job that we go on.

Q. Have to do that for the company, haven't you? A. You have to do that for reference later on.

Q. Have you got that date there? A. I have the time I started and the time I finished the job. Started on the 23rd at 3 P. M., and I finished up on the 27th at 9.35 A. M.

20

Cross Examination by Mr. Schneider:

Q. What is your name? A. John Brown.

Q. Where were you employed at this time? A. Where was I employed?

Q. Yes. A. If you mean what part of the house?

Q. No; by whom were you employed? A. New York Telephone Company.

30

Q. How long had you been working for the New York Telephone Company? A. Five years.

Q. You recall that in May, 1919, you visited Mr. Greenberg's apartment? A. Went there to put in telephones.

Q. At whose request? A. Dr. Greenberg; that is, the order is—

Q. Your employer requested you to put in a telephone there? A. Yes.

Q. You got there about nine o'clock in the morn-

40

ing? A. Why, I got there about 3 P. M. on Friday.

Q. How long did you work there? A. Well, I worked from 3 P. M. Friday until one o'clock Monday, that was the 26th, and then I went away and came back the following morning, and I finished it up at 9.35 on Tuesday morning.

10 Q. Did you put in the telephone? A. Yes.

Q. Did you work there Saturday? A. Yes, Saturday morning.

Q. What took you so long to put in a telephone? A. Why, there was two going in there.

Q. Took you that long to put in two telephones? A. Yes.

Q. Did you ever talk to Mr. Greenberg about this case? A. Why, Mr. Greenberg's wife, when I came back, said she wanted me a witness for it, just that I had seen him there in the morning.

20 Q. When did she ask you that? A. Oh, that was when he was acquitted in July. That is when I came back from lunch that day she asked me that.

Q. What day was that? A. That was the 26th of May, about ten minutes of one.

Q. About ten minutes of one on the 26th? A. Yes.

30 Q. She asked you? A. She said her husband had been arrested and she wanted me to go as a witness.

Q. That was ten minutes to one on the 26th? A. Yes.

Q. Sure of that? A. Yes.

Q. What makes you so sure it was ten minutes to one on the 26th? A. I made a note of it in my book.

Q. Where is your note? Where is your memorandum? A. Here.

40 Q. You show me a page of your little book that you refer to. The handwriting on the top, Mon-

day, May 26th, is in a different pencil than the rest of the memorandum, isn't it? A. Not that I know of.

Q. Just look at it a minute? A. It is the same day, only I made a mistake on Tuesday, May 27th, when I finished up, and she asked me on Monday, that is all. 10

Q. When did you change Tuesday to Monday?
A. When did I change Tuesday to Monday?

Q. Yes. A. I wrote this out on Tuesday night.

Q. You wrote out this memorandum on Tuesday night? A. Yes.

Q. You had it here on Tuesday, May 27th, and you struck out Tuesday, May 27th, and made it Monday, May 26th? A. Well, that is all right.

Q. When did you make that change? A. Tuesday night. 20

Q. So you made the change the same night that you wrote out this memorandum? A. Right.

Q. How do you know it was ten minutes to one?
A. Well, that is the time I came back from lunch.

Q. You are sure that is the time she asked you?
A. Positive.

Q. What time did you quit there that day? A. I left there around one o'clock to go on another job, and came back next morning to finish up.

Q. If you came there at one o'clock how could she have asked you at ten minutes to one? A. I said I came there at 12.50. 30

Q. And you stayed there ten minutes? A. Yes.

Q. For what purpose did you stay there ten minutes? A. Because I wouldn't call our office before one o'clock.

Q. You stayed there to call your office? A. Yes.

Q. It was at ten minutes to one on May 26th that she asked you to make a memorandum that her husband— A. She didn't ask me to make any memorandum. 40

John Brown—Cross Examination.

Q. What did she say? A. She asked me would I come as a witness to try and get her husband out of trouble, as he had been arrested in Jersey for stealing.

Q. What year was that in? A. 1919.

10 Q. How do you know it was 1919? A. Well, there is the date there when I done the job on the book.

Q. Where is a date on the book? A. That is when I started and when I finished.

Q. You are positive about these dates, aren't you? A. Pretty positive, yes.

Q. If I were to tell you that he was not arrested until late that afternoon would you change your opinion or your testimony? A. I don't know. I have only what Dr. Greenberg told me.

20 Q. You only know it was ten minutes to one? A. Ten minutes to one when she asked me.

Q. Are you here under subpoena? A. No, sir.

Q. Were you in the Union Hill Police Court? A. No, sir.

Q. Were you asked to appear in the Union Hill Police Court?

Mr. Simpson: I object to it as not cross examination.

30 The Court: He may answer.

A. Not in the police court I wasn't asked to appear, no, sir.

Q. Were you asked to appear in any court? A. Yes, I believe the court that is downstairs.

Q. You did appear there? A. Yes.

Q. And you gave the same testimony that you are giving here? A. No, sir; I didn't give any testimony.

40 Q. You didn't give any testimony at all? A. No, sir.

John Brown—Re-direct Examination.

Q. This is the first time you are on the witness stand in this case? A. Yes.

Q. That is all.

Re-direct Examination by Mr. Simpson:

Q. The reason you did not testify in the criminal proceeding was that the Judge threw the case out on the testimony of the State, and no witnesses were called for the defendant; that is the reason, isn't it? A. I was never called, no, sir. 10

Mr. Schneider: I object to what the Judge did.

Mr. Simpson: This man is trying to make an inference that he didn't have a witness, and the fact is that the Judge threw out the case on their own testimony. 20

Mr. Schneider: This witness cannot testify to that.

The Court: I think it is proper to ask him whether the defendant called any witnesses.

Mr. Schneider: That would be a proper question.

By the Court:

Q. Did the defendant put in any witnesses? A. I know that I was not called. 30

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

By Mr. Simpson:

Q. But you were in court? A. I was in court, yes.

Q. You were in court but not called? A. I was in court but not called. 40

Dr. Anna Greenberg—Direct Examination.

Re-cross Examination by Mr. Schneider:

Q. Do you remember Mr. Greenberg's wife taking the stand? A. I believe I do.

By Mr. Simpson:

10

Q. The fact is that you left the Greenberg place on the 27th; that is the last day you were there?

A. Yes.

Q. That is right, isn't it? A. Yes.

Q. That is all.

Dr. ANNA GREENBERG, sworn.

20 Direct Examination by Mr. Simpson:

Q. You are the wife of the defendant? A. Yes, sir.

Q. Live where? A. 1134 Manhattan Avenue, Brooklyn.

Q. Where did you live on the 26th of May, 1919? A. Same address.

Q. Was he living with you on that day? A. Yes, sir.

30 Q. How long was he in the house on the morning of May 26th, 1919? A. Until half past ten.

Q. Was this telephone man putting in a telephone that day? A. Yes, sir.

Q. He left the house at half past ten that day, sure of that? A. Yes, sir.

Cross Examination by Mr. Schneider:

40 Q. How do you know that it was May 26th? A. How do I know?

Q. Yes. A. Well, the telephone man was there, and at the same time, at half past eleven Mr. Rose called me up saying that my husband stole a violin at half past nine, and I told him that it was impossible that my husband should steal a thing when he was home at half past ten.

Q. How do you know it was May 26th? A. Well, 10
we had all that trouble May 26th.

Q. Couldn't it have been May 27th? A. No, sir.

Q. Why not? A. Because it was May 26th, and we had to get bail and everything else.

Q. Did you make a memorandum on that day?
A. Well, I can well remember that day.

Q. What? A. I can well remember that day.

Q. You can well remember that day. What day of the week was it? A. On Monday.

Q. Do you recall the electrician being there? 20
A. The telephone man, not electrician.

Q. Yes; the telephone man. Did you speak to him about it? A. I spoke to him about ten minutes to one or one o'clock.

Q. That same day? A. Yes.

Q. Did you ask him to make a memorandum? A.
I didn't ask him to make anything.

Q. Did he make a memorandum? A. I don't
know.

Q. Did you ever speak to him since then? A. 30
Why, surely, I have seen him in court and we have been together.

Q. Did you tell him to change it from Tuesday, May 27th, to Monday, May 26th? A. How could I ask him to change it when I didn't know he made any notation.

Q. You never knew he made a notation of it? A.
No, sir.

Q. That is all.

Re-direct Examination by Mr. Simpson:

Q. Isn't it a fact that Rose called you up on the 26th of May, at half past eleven and told you that your husband had stolen a violin and was going to be arrested, and that is why you asked the man
10 on the same day? A. That is why I asked him; he called me up at half past eleven or twelve o'clock, and told me he was coming over with a detective to arrest my husband.

Q. That is on the 26th of May? A. Yes.

Q. Although your husband, as a matter of fact, was not locked up until five o'clock on the afternoon of the 26th, yet at half past eleven in the morning of the 26th, Rose called you up and told you he was coming over with a detective to lock
20 him up? A. Yes, sir.

Q. Then you told the boy to remember it? A. Yes.

Re-cross Examination by Mr. Schneider:

Q. Did you ever speak to Mr. Rose on the phone before? A. For what?

Q. At any time before that? A. No, sir.

Q. How did you recognize his voice? A. Because
30 he said he was Mr. Rose.

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

Mr. Simpson: He did not object to it before, and he did not ask any qualification of it.

The Court: It may stand.

Mr. Schneider: Allow me an exception.

The Court: I cannot strike it out now.

Mr. Schneider: I ask that it be stricken
40 out and the jury instructed to disregard it.

Maxwell Greenberg—Recalled, direct.

Mr. Simpson: He is taking a chance on it, and when he doesn't want it in he wants to strike it out.

Q. When were you married to Mr. Greenberg?
A. January 22, 1919.

Q. That is the same year this happened? A. Yes, 10
sir.

MAXWELL GREENBERG, recalled.

Direct Examination by Mr. Simpson:

Q. Were you in the Pastime Theatre between nine and ten, or any time in the morning of May 20
26th, 1919? A. No, sir.

Cross Examination by Mr. Schneider:

Q. Where were you at that time? A. In bed.

Q. Where were you living at that time? A. 1134
Manhattan Ave.

Q. How long had you been living there? A.
About—right after I got married.

Q. Prior to that you were living with your folks, 30
weren't you? A. Yes.

Q. When you sought employment from Mr. Rose
you gave him your folks' address? A. Surely, be-
cause I was living there.

Q. They have a telephone, haven't they? A.
Sure.

Plaintiff rests.

DEFENDANT'S TESTIMONY IN REBUTTAL.

IRVING ROSE, recalled.

Direct Examination by Mr. Schneider :

10 Q. Mr. Rose, did you telephone to Mr. Greenberg at 1134 Manhattan Avenue, Brooklyn? A. No, sir; I did not.

Q. Did you ever know he lived there? A. No, sir.

Q. Where did you know him to live? A. He lived down Canal Street somewhere, with his folks. The telephone number was Orchard something.

Q. Who gave you that information? A. He did.

Q. When you employed him? A. Yes.

20 Q. Tell you that he was living with his folks in Canal Street? A. Yes.

Q. Called up an Orchard number? A. I did.

Q. Who did you speak to there? A. Spoke to some one who said they were his mother.

Mr. Simpson: I object unless he knows her voice over the telephone.

30 Q. You spoke to some one on the other end? A. Yes, sir.

Q. As the result of speaking to them Mr. Greenberg came over? A. Yes, sir.

Q. Did you ever call up any number at 1134 Manhattan Avenue, Brooklyn? A. No, sir.

Q. Did you know Mr. Greenberg ever lived there? A. Never knew that.

Q. Did you know he was married? A. No; I knew he was going to be married that June; I didn't know he had been married prior to that.

40

Cross Examination by Mr. Simpson :

Q. You have already sworn that the way you got Greenberg over here was by telephoning to him to come over, you wanted to see him on that day, and you did do it, isn't that the fact? A. Will you repeat that? 10

Q. (Question repeated by stenographer.) A. That is right.

Q. And he was arrested? A. That is right.

Q. So you must have telephoned to him. According to you, wherever you telephoned you did get into telephonic communication with him? A. I did get in communication with his mother, and she said she would send him over.

Q. Keep his mother out. You got in telephone communication with him, you said. You have already sworn that you called him up and talked to him and said you wanted to see him; is that a fact? A. I do not think it is. 20

Q. Now, do you say now you talked to him or talked to somebody else? A. I spoke to his mother. I called up his house.

Q. Why did you testify a little while ago, that you telephoned to this man and told him to come over, you wanted him, when as a matter of fact you didn't? A. I don't think I testified to that. 30

Q. All right. The testimony will show. That is all.

Both sides rest.

Recess to 1.50 P. M.

Afternoon Session.

Motion to Direct a Verdict.

10 Mr. Schneider: If the Court please I ask that the Court direct a verdict for the defendant, on the ground that at the end of the case there is no evidence to warrant the Court in finding that the prosecution of the plaintiff by the defendant was without reasonable or probable cause, and if the Court find that there is sufficient evidence in the case to warrant it in going to the jury on that ground, then on the further ground that there is no evidence that the defendant in making the charge was actuated by a malicious motive, as both of these elements must appear.

The Court: Your motion is refused.

20 Mr. Schneider: Exception.

(Counsel for the respective parties summed up to the jury.)

Court's Charge to the Jury.

Members of the Jury:

30 The plaintiff brings this suit against the defendant to recover damages for being maliciously prosecuted for breaking and entering and larceny. It is not disputed that some time in May, 1919, the present defendant made a criminal complaint against the present plaintiff before a Recorder, and that complaint reads, among other things, as follows:

40 "That one Maxwell Greenberg did break and enter the Pastime Theatre and then and there did steal a violin of the value of two hundred dollars and a lot of music of the value of five hundred dollars in the care of said deponent."

Court's Charge to the Jury.

On that complaint a warrant was issued and the plaintiff was arrested, kept in custody for about five hours, then gave bail, was indicted by the grand jury of this county, was tried and acquitted. But the effect of that acquittal has nothing whatever to do with this case.

In order to recover in this case the plaintiff must do more than show that the defendant had him arrested. He must establish by the evidence malice on the part of the defendant, or want of probable cause. It is not sufficient to show merely that the action was maliciously prosecuted, but that it was commenced or continued without probable cause. Want of probable cause cannot be inferred from malice, but malice may be implied as a fact from want of probable cause. 10

What is probable cause is a question of law for the Court when the facts are not in dispute, but where the facts are in dispute as in this case, the jury has to determine what the facts are and then apply the law that the Court lays down as to what probable cause is. In this case, you have nothing to do with the trial of the criminal charge, as I said before, and your verdict does not determine the guilt or the innocence of this particular plaintiff. The sole question for you to determine in this case is whether or not the plaintiff was maliciously prosecuted by this defendant. The essential ground of this action is that a legal prosecution was carried on without a probable cause, and that by reason of such action, the plaintiff suffered injury by being taken into custody and deprived of his liberty. The guilt or innocence of the plaintiff is not the question to be decided, but whether the defendant had probable cause for instituting these proceedings. The lack of probable cause must be substantially and expressly proved by the plaintiff, and it cannot be implied. 20 30 40

Probable cause is a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent man in believing the party to be guilty of the offense. It involves the consideration of what the facts are and what are the reasonable deductions from these facts. This, therefore, makes it a question of law and a question of fact. The plaintiff must show that the criminal prosecution is ended—and that is not disputed in this case—or the plaintiff was discharged, acquitted on the trial of the criminal case; that the prosecution was instituted without reasonable or probable cause; and, that the defendant was actuated by malice. Those facts the plaintiff must prove before he can ask a verdict at your hands.

The plaintiff to succeed in this action must establish that the prosecution of the defendant was without reasonable or probable cause, and that the defendant in making the charge was actuated by a malicious motive. The evidence in this case must establish the existence of both these grounds, otherwise the plaintiff must fail in this suit. But when a party makes a criminal charge against another without having reasonable grounds for believing it to be true, the presumption is that in doing so, he is actuated by a malicious motive. When the charge is unfounded and is purposely made without the existence of probable cause, malice sufficient to sustain the action for criminal prosecution is inferable.

Now you see, members of the jury, that it is immaterial what information may have come to this defendant after the charge was made. The question for you to determine is what he knew about this when he made the charge. Did he have reasonable or probable cause to suspect that this plaintiff committed the crime which he charged him with

committing. You are to determine from all the evidence that you have had whether the facts stated by the defendant are substantially true in reference to this charge. Does the evidence show that the theatre was broken and entered into some time in May, 1919; that the plaintiff was at the theatre about that time and in position where he could have stolen the property which he is charged to have stolen; did he make threats against the owner of the violin or against the manager of the theatre which could be construed by a reasonably prudent man that he would commit a crime of this character? In fact, does the evidence satisfy you that this defendant, when he made the charge and had this man arrested, had reasonable or probable grounds to suspect, to believe that he was guilty of what he charged him with? If he had that reasonable or probable ground, then he was justified in making the complaint, and the plaintiff cannot recover. If, on the contrary, you find from all of this evidence that the testimony that he gave as to why he had this man arrested was untrue and he did not have probable and reasonable grounds to cause the arrest, then in that case the plaintiff is entitled to recover at your hands; and if he can recover, he is entitled to recover the damages which resulted to him by reason of his arrest.

The plaintiff says that he was arrested and kept in custody for five hours; that he did not carry on his employment for something like a year. Is there anything in the evidence, gentlemen, that warrants you in saying that this man could not have carried on his employment for the year? He is entitled, if entitled to anything, to recover for the injury to his character, and any injury which he suffered by reason of this malicious prosecution, if you find there was a malicious prosecution, and that in-

Defendant's Requests to Charge.

10 cludes the money which he expended in the effort to defend himself. In other words, he is to be compensated, if compensated at all, for the injury which he suffered as the result of this malicious prosecution. But, if, on the other hand, you find that it was not a malicious prosecution, that the defendant had reasonable and probable cause to make the complaint, or that he was not actuated by malice, then the defendant is entitled to your verdict, and not the plaintiff. That, members of the jury, is a question you have to decide in this case.

(The jury retired.)

The Court: I refuse to charge otherwise than as I have charged.

20 Mr. Schneider: I take an exception to the refusal of the Court charge as requested.

Defendant's Requests to Charge.

30 1. The plaintiff to succeed in this action must establish that the prosecution by the defendant was without reasonable or probable cause and that the defendant in making the charge was actuated by a malicious motive.

The evidence in this case must establish the existence of *both* these grounds, otherwise the plaintiff must fail in this suit.

40 2. If you find in favor of the plaintiff when you come to the question of damages, you cannot consider the plaintiff's testimony that he lost \$10,000 a year as salary, for he stated he made no effort to obtain employment.

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EXHIBIT P-1

COMPLAINT

STATE OF NEW JERSEY)
: SS.
COUNTY OF HUDSON)

Before me, Recorder of the Town of Union, personally appeared Irving Rose, #336- 4th Street, of the Town of Union, in said County, who being duly sworn according to law, upon his oath complains that on the 26th day of May, 1919, at the Town of Union in said County, one Maxwell Greenberg did break and enter the Pastime Theatre and did then and there steal a violin of the value of two hundred dollars and a lot of music of the value of five hundred dollars in the care of said deponent.

He therefore prays that said Maxwell Greenberg may be apprehended and held to answer said complaint, and be further dealt with as law and justice may require.

Sworn and subscribed to
at Town of Union in said
County, this 27th day of
May, 1919.

Irving Rose

Louis C. Hauenstein,
Recorder

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J. J. [illegible]
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New Jersey Court of Errors and Appeals

MAXWELL GREENBERG,
Plaintiff-Respondent,

v.

IRVING ROSE,
Defendant-Appellant.

Action at Law.
Appeal from
Hudson Circuit
Court.

BRIEF FOR PLAINTIFF-RESPONDENT.

Facts.

This is an appeal from a judgment of \$4,000 entered on a verdict in a malicious prosecution case. The jury might have found the following facts:

The plaintiff was the leader of an orchestra in the theatre of the defendant, that is, in which the defendant was the manager and in control. The defendant and the plaintiff quarreled because the defendant accused the plaintiff of having attempted to lead out his orchestra and thereby break up the performance, and the defendant, according to his story, gave the plaintiff notice to quit. Thereafter, a closet in the place where the orchestra worked was broken open and it is alleged an automobile tire, a violin and music were stolen. The defendant, without any reasonable grounds made a complaint against the plaintiff of larceny and the plaintiff was arrested; afterwards, upon evidence of the defendant he was indicted and

was put on trial in the Sessions and forced to employ counsel to whom he paid \$1,000, and after the trial was acquitted. The defendant knew that if the plaintiff was the thief there was no necessity for him to break open the door because he had a key to the closet. The defendant was so persistent that he by false telephone calls inveigled the plaintiff into the State of New Jersey for the purpose of having him arrested, the plaintiff living in the State of New York.

Grounds of Appeal.

The grounds of appeal are:

1. That probable cause was a question of law for the Court.
2. That a question asked of the defendant, who had been called as a witness by the plaintiff, which question was asked on cross examination by defendant's counsel, was improperly excluded.

POINT I.

Probable cause was not a question of law for the Court.

The facts in the case were greatly controverted. It is not one of those cases where it is undisputed that the defendant had information given to him or knowledge of his own upon which any reasonable man would have acted, as in the case of *Vladar v. Klopman*, 89 N. J. L., 575; 99 Atl., 330, and the cases therein cited, which case exhaustively goes into the law and cites the earlier cases; but in the case at bar the evidence was greatly controverted, and the only fact relied upon by the defendant to support probable cause was that one of the scrub women had told him that the plaintiff, previ-

ous to the alleged larceny was in the orchestra of the theatre. Even if this woman had told the defendant this, and her credibility was for the jury and the fact that she was employed by the defendant and it was charged had been schooled by the defendant how to testify against the plaintiff, were all questions affecting the credibleness of the facts as to whether or not she had told him any such thing. This was his sole justification and his only foundation for the alleged probable cause. This was disputed and it was for the jury to say whether she had told him any such thing or whether this was simply a concocted defense. But, admitting for the sake of argument she had told him that she had seen the plaintiff in the vicinity of the place of the larceny, where he had a right to be; also considering the fact that the defendant knew that the plaintiff had a key and need not break open the door; also the failure to trace any of the property at any time; also the malice existing in the mind of the defendant against the plaintiff because plaintiff had attempted, as defendant believed, to break up the orchestra and the business; also the failure of the defendant to examine any of the other musicians or to make an investigation, all left it for the jury to say what were the facts, and upon certain facts, upon proper instructions from the Court, it was for the jury to say whether the defendant was guilty of malice and want of probable cause. This is in line with the case of *Spencer v. Anness*, 3 Vr., 100, where Chief Justice Beasley, speaking for the Supreme Court, said:

“The fact that the plaintiff’s wife was near by at the time of the larceny and that certain bystanders asserted there were grounds of suspicion, would not constitute probable cause, for no prudent man on such groundwork, would impute crime to another. The accident

of the presence of the plaintiff's wife at the time the money was missed, if unattended with words or conduct of a suspicious cast, was not an incident from which to draw probable cause."

So, in the case of *Vladar v. Klopman* where the Court said probable cause was a question for the Court. There the plaintiff was found standing before a drawer in the room in which she had no business to be; the articles were missed. Afterwards, the plaintiff told a witness that she had certain articles of the description of those stolen. This, the Court said, was sufficient for probable cause, and it might well be. If the plaintiff in this case was found in a place where he had no business to be and afterwards told a third person that he had articles of the description of those stolen, it might be that the doctrine of that case could apply, but that is not the situation here. Here the defendant, to satisfy a private grudge, on a hairbreadth suspicion rushes out and makes a complaint and does it so carelessly that it will be found in his testimony that he denies at any time having made a complaint of breaking. It is, therefore, submitted that under the case of *Potter v. Casterline*, 12 Vr., 23, and the cases cited in *Vladar v. Klopman*, the evidence being controverted in this case and the credibility of witnesses being for the jury, and if the jury believed certain facts, the defendant acted rashly and without any grounds such as would move a reasonably prudent man, the question of probable cause was for the jury.

POINT II.

The second point argued in the brief of the appellant is that the defendant, upon being asked the question, "You did make inquiries about this

man?" (page 16 of the Brief, page 41 of the Record) this question was excluded and that the exclusion of this question was error; but if the Court turns to the defendant's testimony, the defendant having been called by both the plaintiff and the defendant, it will be seen from page 43 onwards, that the defendant was examined by his own counsel at great length on the very subject excluded in this examination by the excision of the question asked of the defendant on cross examination, and if it was error to exclude this question, it was harmless because all the testimony sought to be given in the case entered into the case.

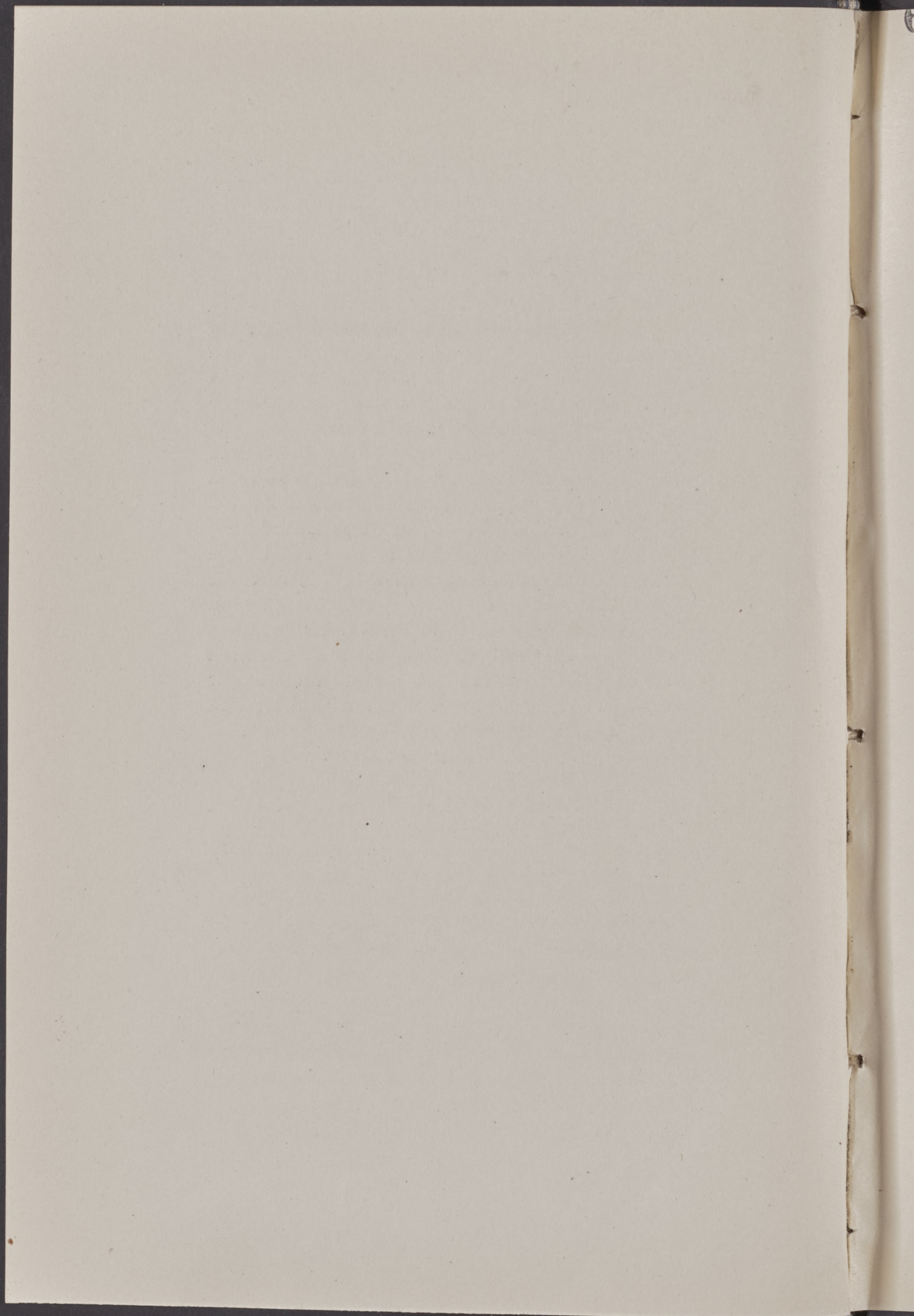
The question excluded was: "Were the help in the theatre examined?" (p. 41). It was objected to as not proper upon cross examination. The examination in chief was as to the knowledge by the defendant of the possession of a key by the plaintiff. Thereupon he was asked, "Were the help in the theatre examined?" and that question was excluded as not proper cross examination, but if the Court will turn to page 43 this evidence, so excluded, came into the case in most ample form in a description by the defendant when called by his own counsel as to what he had done. This was, therefore, harmless error, if error.

The appellee, therefore, respectfully urges upon the Court that the testimony being controverted, and if certain facts were believed, there was no probable cause, and that question was for the jury.

3. That the excision of the question objected to as cross examination was not error and that the judgment below should be affirmed.

Respectfully submitted,

ALEX. SIMPSON,
Attorney for Plaintiff-Respondent.



New Jersey Court of Errors and Appeals

<p style="text-align: center;">MAXWELL GREENBERG, Plaintiff-Respondent,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">IRVING ROSE, Defendant-Appellant.</p>	}	<p>10</p> <p>Action at Law.</p>
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BRIEF FOR DEFENDANT- APPELLANT.	20
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Statement of Facts.

This appeal brings up a judgment for malicious prosecution in favor of the plaintiff. The charge was that defendant had, of his malice and without reasonable or probable cause, accused the plaintiff of breaking and opening a certain locker and taking therefrom a quantity of sheet music and the violin alleged to have belonged to one Sader and also a certain amount of money to the value of \$5.00 which defendant claimed plaintiff had converted to his own use and caused the arrest of the plaintiff on the charge of larceny (page 6, fol. 20). The jury assessed the damages in favor of the plaintiff at \$4,500.00 and a judgment was entered accordingly. 30

Defendant on May 26th, 1919, was the manager of the Pastime Theatre in Union Hill (page 38, 40

fol. 20). He had been manager for five to six years. He was merely an employee working for a salary (page 42, fol. 10). Sometime in 1917 he, as manager, hired the plaintiff as leader of the theatre orchestra (page 43, fol. 20). At the same time he hired one Sader as violinist. They both came to the theatre at the same time (page 43, fol. 30).

10 According to the defendant, the latter about May 14th, 1919, gave to plaintiff two weeks' notice to quit. The two weeks were up on *Sunday*, May 25th, 1919 (page 44, fol. 10).

20 According to the plaintiff, the latter never received a two weeks' notice to quit, but he quit voluntarily, he was through with his employment that Sunday night. He told defendant he was finished (page 27, fol. 15), this was the first time (Sunday) that he told defendant he was finished, he did not give defendant notice, he just walked out of the place (page 27, fol. 30), and did not return again until five o'clock in the afternoon of the next day to get his music and an automobile tire that he had left in the locker (page 27, fol. 35).

According to the plaintiff, he himself made the weekly payments of salary to the members of his orchestra with money given to him by defendant.

30 From the testimony of the plaintiff, it appears that in the orchestra there was a flute player named Rosenthal, that he was a Union man and that the rate of pay for that job was \$33.00 per week, that plaintiff handled the pay-roll, that instead of paying this flute player \$33.00 he paid him \$18.00 per week, although he knew that Rosenthal belonged to the Union (page 19, fol. 30). There is further evidence in the record of other Union players paid less than the Union rate of pay.

40 According to plaintiff, Greenberg, about half an hour before the orchestra finished that Sunday night he, plaintiff, said to Sader, "We ought to

quit this job here. I am going to quit," (page 25, fol. 10) and at the same time also told Sader, "You have to quit along with me" (page 25, fol. 30), but that Sader refused to quit work with him (page 26, fol. 25); whereupon plaintiff said to Sader, "If you people don't quit with me, I am going to report you to the Union that you are working under the scale."

10

The uncontradicted testimony shows that on the Sunday night in question plaintiff came into defendant's office, that defendant then paid off the plaintiff.

Defendant knew that plaintiff had a key to the building (page 46, fol. 20) but had nothing to do with and knew nothing of the keys to individual lockers (page 46, fol. 20) of the members of the orchestra.

The uncontradicted proof for defendant also shows that plaintiff said to defendant, when he received the pay on this Sunday, "You won't have any music there tomorrow" to which defendant replied "Do as you like" (page 47, fol. 1).

20

Defendant thereupon offered the leadership of the orchestra to Sader, the violinist; Sader at that time notified the defendant that none of the other men in the orchestra would quit and defendant thereupon made Sader leader (page 47, fol. 10).

The uncontradicted proof for defendant also shows that the next day, Monday morning, defendant was called upon the telephone at his house, at about eleven o'clock. The call was from Sader who was at the theatre. He told defendant that *most of his music was missing, and his violin*. Defendant thereupon came to the theatre and looked around the music pit and *found the cabinet open and the music room locker broken open* and immediately telephoned to the Union Hill Police Station, whereupon Detective Jolling was sent to the theatre

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by the department (page 47, fol. 20). Detective Jolling was dead at the time of the trial (page 47, fol. 40). In the presence of defendant, Jolling looked at the cabinet and the doors *and Jolling and defendant then went around and interviewed the help, the cleaners and everybody connected with the orchestra* and Jolling suggested that Greenberg, the plaintiff, be brought from New York where he lived, whereupon defendant telephoned to Greenberg to come over. Defendant thus called Greenberg because Jolling told him that Greenberg undoubtedly was the man who took it (meaning the music and the violin) and to get him over that he, Jolling, wanted to talk to him (page 48, fol. 10).

Two women clean the theatre every morning (page 49, fol. 10). Detective Jolling and defendant interviewed both of these women and all the orchestra men. Defendant also examined the cabinet that had been broken into and the violin and music were not there. He was then told that the violin and music were gone (page 49, fol. 30).

Greenberg came over about four o'clock in the afternoon, was taken to the Station House where he was questioned (page 50, fol. 1), and was held for the Recorder or held in bail.

Sader, the violinist, was the man who told defendant that it was his violin which was stolen (page 50, fol. 20). He lives in New York and defendant tried to get him to the trial but unsuccessfully (page 50, fol. 20). There was therefore no direct evidence at the trial by the alleged owner of the violin and music concerning the theft.

Defendant says he had no malice against the plaintiff, he simply made the complaint acting as a theatre manager in behalf of the company and not in his own behalf, because he had nothing with the man (page 55, fol. 10). He made the complaint *on the evidence* that he found out the day after plaintiff was out of the employ (page 56, fol. 1).

Kate Smith, one of the cleaners sworn, testified she was at the theatre with another cleaner, Mrs. Holmes, and that she saw Mr. Greenberg, the plaintiff, that Monday morning down in the pit. She says, "I happened to notice him. I never saw anybody down there before, that is how I came to notice the man was down there by the pit." She called Mrs. Holmes' attention to it and said, "Who is the man." *He bent down over a music cabinet* and when she called Mrs. Holmes' attention to the man, Mrs. Holmes raised up from her work and said, "Oh, that is the piano player," whereupon no further attention was paid to him (page 67, fol. 20). When she saw him he *was bending low over this cabinet*. She did not see this man's face because his back was turned towards her. She was on one side of the theatre (page 68, fol. 20) and *as soon as she spoke the man went right down as quick as he could* (page 68, fol. 20). She thinks he must have heard her speak. He could not have helped it, must have heard it. She spoke loud enough because she was surprised (page 68, fol. 30). After she called to the other woman, the man left the theatre, went right down the stage, then steps (page 70, fol. 10). In leaving the theatre he passed nearer to the other woman because he had to turn that way to go down the stairs (page 70, fol. 20). She could not positively tell that it was Greenberg the plaintiff, because she did not see his face but she did notice the back of the man's head and that he was slightly bald (page 73, fol. 20) and Mr. Greenberg is bald, and from the back the man who was bending over the cabinet *looked like Greenberg* (page 73, fol. 25).

Mrs. Holmes, the other woman cleaner, remembers seeing somebody in the orchestra at the theatre that Monday morning (page 74, fol. 30). She observed this person at the music cabinet down in the

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pit. Her attention was called to him by Mrs. Smith who said, "Who is the man?" and *he bowed down to the music cabinet*, and he went to the right side to go down into the cellar and she, at that time, said to Mrs. Smith, "Oh, that is the piano player," and Mrs. Holmes *positively identified Greenberg as the individual*.

10 Thus she says:

"Q. Did you see it was the piano player? A. Yes.

Q. Did you see this man Greenberg there at that time? A. Yes; I did.

Q. How did you know it was this man Greenberg at that time? A. Well, I knew it was him; I worked a year and a half, pretty near two years, with him.

20 Q. Where had you ever seen him before? A. At rehearsals, Saturday mornings, and during the performances—I attend the morning and afternoons" (page 75, fol. 20).

She did not, however, see what Greenberg was doing at the cabinet, there was a curtain drawn across (page 77, fol. 40). This was about nine o'clock in the morning; it was very bright and the women had all the exits open. *She recognized Greenberg as he was going over to the side to go*
 30 *down the cellar stairs* (meaning the stairs which lead under the stage). He had to face the woman to go down the stairs (page 78, fol. 30) and had to go the entire width of the music pit (page 79, fol. 1). It was a very unusual thing to see a man in the theatre *in that place* in the morning. She did not speak to him. She let him pass because she knew he played the piano (page 79, fol. 20). She first told Mr. Rose, the defendant, and Officer Jolling about the matter *when they came up to her*
 40 *place where she was working that same afternoon*,

that same day (page 80, fol. 20). Before she had told Mr. Rose and the detective, she had not told anybody (page 80, fol. 30). The cellar stairs lead to the cellar *in under the stage* and you can go from this cellar out into the street (pages 80, fol. 35). This would lead to Fifth Street (page 80, fol. 40) while the main entrance to the theatre is on Fourth Street (page 81, fol. 10). When Greenberg left the theatre that morning he was *stooping while going along*. He walked *stooping, all the time stooping*, below a curtain, *but not low enough to prevent the woman from seeing him*. He went that way all the time until he went down the cellar (page 82, fol. 30). He could have stood up and walked straight if he desired to do so (page 83, fol. 10).

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POINT I.

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The trial Court erroneously refused to decide the question of reasonable and probable cause and to direct a verdict for defendant-appellant at the close of the case, when requested so to do by defendant-appellant and left the question of reasonable and probable cause to the jury.

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At the conclusion of the case, counsel for defendant moved for the direction of a verdict on the ground that there was no evidence to warrant a finding that the prosecution was without reasonable or probable cause (page 96, fol. 1).

The fundamental grounds upon which an action for malicious prosecution rests are that it was instituted without reasonable or probable cause and that defendant was actuated by a malicious motive

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in making the charge. Unless the evidence establishes the existence of *both* these grounds the plaintiff's suit must fail.

Vladar vs. Klopman, 89 N. J. L., 575.

10 It is the contention of the defendant that the uncontroverted proofs demonstrate that the defendant had reasonable and probable cause for *charging* the alleged larceny against the defendant and that therefor the trial Court should have directed a verdict in the defendant's favor.

Vladar vs. Klopman, 89 N. J. L., 575.

20 Probable cause has been defined as "a reasonable ground *for suspicion*, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the *belief* that the party is guilty of the offense with which he is charged," as, "the existence of such facts and circumstances as would excite *belief* in a reasonable mind acting on the facts *within the knowledge of the prosecutor*, that the person charged was guilty of the offense for which he was prosecuted," and as "such facts and circumstances as when communicated to the generality of men of ordinary and impartial minds are sufficient to raise in them a *belief* or *real grave suspicion* of the person."

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18 R. C. L., 35, par. 20.

The first of the foregoing has been adopted in this State.

Lane vs. Penn. R. R. Co., 78 N. J. L., 672.

40 The question of the presence or absence of probable cause does not depend upon the guilt or in-

nocence of the accused, or upon the fact whether or not a crime has been committed. If a person acts upon *appearances* in making a criminal charge and the *apparent facts* are such as to lead a discreet and prudent person *to believe* that a crime has been committed by the party charged, although it turns out that he was deceived and the party accused was innocent, he will be justified.

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Lane vs. Penn. R. R. Co., 78 N. J. L., 672.
18 R. C. L., 36, par. 21.

While mere conjecture and suspicion will not warrant a reasonable man instituting prosecution, *creditable information* received from others might well be enough to induce action on the part of the prosecutor.

18 R. C. L., 36, par. 21.

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In the present case the uncontroverted facts, which defendant claims showed absence of a want of probable cause and the actual presence of a probable cause for the arrest, are these:

The defendant was merely an employee in the theatre in which plaintiff was employed. There was no reason why he should bear plaintiff any malice.

On Sunday, May 25th, 1919, plaintiff was either discharged—as defendant contends—or as plaintiff contends, left his job as leader of the orchestra without notice to the defendant, who was his superior, of his intention so to do. Plaintiff at that time, according to his *own* testimony, *attempted to induce* the orchestra *to leave with him* and *threatened* the members of the orchestra, that if they would not quit with him, he was going to report to the Union the fact that they were working under

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the Union scale (page 26, fol. 30). He then said to Sader, the violinist of the orchestra, "You have to quit along with me" (page 25, fol. 35), but Sader refused to quit the work (page 26, fol. 25). And according to defendant, plaintiff at the time when he was being discharged, or the time when he was throwing up his job, said to defendant, "All right, tomorrow you won't have any orchestra" (page 45, fol. 20) and this statement, charged by defendant to have been made by plaintiff, *stands uncontradicted in this record.*

There is no direct evidence that the statements and threats which plaintiff admits having made to Sader and members of the orchestra were communicated verbatim to the defendant, but the uncontradicted proof does show that defendant *found out* that the rest of the orchestra *refused to quit if Sader were made the leader* and that defendant made Sader the leader of the orchestra *after* he had found out that the orchestra had refused to quit if Sader were made leader.

On Sunday night, May 25th, 1919, Sader was thus made leader of the orchestra in the face of plaintiff's threat that he, defendant, would not have an orchestra the next day, and the next day at eleven o'clock in the morning defendant was called upon the telephone from the theatre by Sader, his new leader of the orchestra, and informed by him that *most of Sader's music and his violin were missing* (page 47, fol. 30).

Truly the defendant had the right, upon receiving this information, to remember the threat which plaintiff had made the night before that he, defendant, would have no orchestra the next day, and certainly this threat was in itself sufficient to cast suspicion upon the plaintiff. The music in itself and the violin in itself could be of no value to an ordinary thief and only to one *who had some*

grudge to serve would the thought of taking this music and this violin appeal. That man was Greenberg, the plaintiff.

Defendant, upon receiving the telephone call, immediately came to the theatre and looked around the music cabinet and *saw* the cabinet open, and the *locker room broken open*, and thereupon immediately telephoned for a detective to the Union Hill Police Station in response to which call, detective Jolling was sent to the theatre. When Jolling arrived, he looked at the cabinet and the doors and defendant and Jolling then went around and interviewed the help, the cleaners, and *everybody connected with the orchestra* (page 48, fol. 10). Defendant, under the guide of a man *experienced in the kind of investigation in hand*, therefore undertook to *ascertain* who the perpetrator of the crime was. He did not act hastily but sought to satisfy himself. In doing so, he interrogated, among others, the two women employed in the theatre for the purpose of cleaning the same (page 49, fol. 20), and according to his own uncontroverted story and the uncontroverted story of Maggie Holmes, *that morning learned from Maggie Holmes what she claims and swears to have seen in the theatre, at about nine o'clock on the Monday morning in question*. The defendant says, he, together with the detective examined the woman employed to clean. Maggie Holmes says that Mr. Rose, the defendant, and Detective Jolling called upon her on the Monday afternoon in question, where she was at that time working and made inquiries of her as to whether she had seen anyone in the theatre that morning, to which she replied, "Yes, the piano player" (page 76, fol. 20) and upon being asked by them what he was doing in the theatre at that time, she said she did not know but that he was at the music cabinet (page 76,

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- fol. 30). Maggie Holmes swears that she saw the piano player in the theatre that morning, that she saw his face and that he was at the music cabinet on the left hand side of the theatre while she was on the right hand side cleaning (page 77, fol. 30). This was about 9:30 in the morning, it was very bright and when she saw him he was
- 10 stooping down "this way" towards the doors, going over along to the right side to get down to the cellar stairs (page 78, fol. 30). In order to get to these cellar stairs he had to face Maggie Holmes (page 78, fol. 40), and had to walk the entire width of the music pit (page 79, fol. 1). She knew plaintiff very well and it was a very unusual thing to see a man in the theatre in that place in the morning (page 79, fol. 10), but she did not speak to plaintiff because she knew he played the
- 20 piano (page 79, fol. 20). She first told about seeing this man in the pit to Mr. Rose, the defendant, and Officer Jolling when they came to her place where she was working, that same afternoon (page 80, fol. 20). The cellar stairs to which she refers lead to the cellar in under the stage (page 80, fol. 35), and from this cellar a door leads to Fifth Street (page 80, fol. 40). The main entrance to the theatre is on Fourth Street (page 81, fol. 10).
- 30 The orchestra pit is separated from the orchestra where the musicians play and from where the people sit by a rail upon which there was a curtain (page 81, fol. 30). This curtain was red. Maggie Holmes could not see through the curtain but could see above the curtain (page 81, fol. 30), and when plaintiff walked from the music cabinet, he walked in a stooping position. He walked stooping but not so low, that she could not see him. He walked that way all the time until he went down
- 40 the cellar (page 82, fol. 40). This was on the

twenty-sixth day of May, Monday (page 82, fol. 10).

The defendant submits that in the fact of the uncontradicted proof that plaintiff threatened him, defendant, that he, defendant, would have no orchestra on Monday, May 26th, that the music cabinet was actually broken open, that there was neither music nor violin in the cabinet when he, defendant, arrived at the theatre, that Sader then and there told him that his music and violin were missing and had been stolen, and that a disinterested person, Maggie Holmes, whose business it was to be in the theatre at 9:30 in the morning, told him, defendant, in the presence of the detective, a representative of the State, that Greenberg, the plaintiff, had been at the cabinet at half past nine,—only an hour and a half before the missing music and violin were reported to him, defendant, and that he had left the cabinet, walked across the music pit to the stairs leading in under the stage in a stooping, crouching position and had disappeared in under the stage, these facts,—taken together with the fact that Greenberg had no business in the theatre at that hour, that no ordinary thief,—no thief stealing for value,—would ordinarily steal sheet music and a violin,—whereas a musician with a grudge to serve might do so,—and the further fact that as a result of the whole examination made by the defendant and the detective, the detective advised the defendant to send for the plaintiff as he undoubtedly was the man who took the property (page 48, fol. 15),—justified the defendant in reaching the *belief* that the plaintiff was guilty of the offense which was thereupon charged against him and justified a *belief* in the defendant,—or at least a *real grave suspicion* in the defendant,—that plaintiff was guilty.

Lane vs. Penn. R. R. Co., 78 N. J. L., 672.

I therefore submit that the uncontroverted testimony in this case establishes the presence of probable cause for the arrest and prosecution of the plaintiff.

POINT II.

10 **The trial Court erred in overruling the question "were the help in the theatre examined?"**

The question and ruling are found at page 41 of the record. The situation when the question was asked was this. Plaintiff was bound to establish as part of his affirmative case absence of reasonable or probable cause for the arrest and of malicious motive in making the arrest.

20 Vladar vs. Klopman, 89 N. J. L., 575.

There was proof presented by plaintiff that the charge made against plaintiff was false and this was sufficient to raise an inference of probable cause and of malice. It was *sufficient* to take the case to the jury.

Navarrino vs. Dudrap, 66 N. J. L., 620;
Weismer vs. Hanson, 81 N. J. L., 601.

30 Plaintiff's attorney, however, *was not satisfied* to rest his case on this inference, but attempted to prove *actual* want of probable cause and *actual* malice. He called the defendant as his witness and asked him these questions concerning the plaintiff:

"Q. Was this man employed by you? A. Yes.

40 Q. *How long had he been employed by you on the 26th day of May, 1919?* A. A year and a half, I believe, or two.

Q. See him every day? A. Mostly.

Q. *Had a chance to make up your opinion about him.* Now look at this paper. Is that your signature on that paper? A. Yes" (page 38, fols. 25-40).

Q. At the time you made this complaint in the Union Hill Police Court against this man, you *knew* that he had a *key* of the locker that was broken open, didn't you? A. Why, I can't say that I did. 10

Q. Why, you mean to say that this man had been employed by you for a year and a half and you didn't know what keys he had? A. I knew he had a key to the theatre.

Q. Didn't you know the keys he had to the locker? A. You see, there were six musicians and each one had a key to the locker. How many of them had one really would not be under my jurisdiction." 20

The foregoing is an outline of the testimony introduced by the plaintiff *as part of his affirmative case*. It was introduced *solely* for the purpose of showing *actual* malice and *actual* want of probable cause. Thus the testimony drawn from the defendant that he had known the plaintiff for a year and a half or two, that he had seen him almost daily and that he therefore had had opportunity to make up his opinion concerning the plaintiff, was material and was introduced *solely* for the purpose of showing that, because of defendant's long continued and intimate acquaintance with the plaintiff and his almost daily association with him, he knew or ought to have known that plaintiff could not be guilty of stealing the music or the violin and that since defendant, *with this knowledge of plaintiff*, made the charge against him, it *must* of necessity have been malicious in its origin. 30 40

So also, was the testimony about the key introduced merely as one of the items of evidence to show how unreasonable it was, with the knowledge which defendant then had, to charge plaintiff with crime.

10 Defendant had the right to meet this situation by cross examination of the witness and for that purpose had the right to show that he did not act hastily, that he acted as any other reasonable, prudent man would act and that he made a *thorough examination before making his charge and just what the examination had consisted of*. In other words, the defendant, at the time when the question was asked, had the right to controvert the issue of malice and want of probable cause presented by the pleadings and established as a fact by the calling of the defendant as a witness for the plaintiff.

20 It will be noted that counsel for the defendant realized the import of the inquiry which had been conducted by counsel for the plaintiff and that his first question upon cross examination of the witness was:

“Q. You did make inquiries about this man before you made the arrest, didn't you? A. Very thorough.

30 Q. You had a detective up there with you? A. I had Lieutenant Detective Jolling of the Union Hill Police Department” (page 41, fol. 30).

40 Defendant's counsel had therefore undertaken by his examination to break down, as I contend he had the right at that time to do, the fact which counsel for plaintiff had then apparently established, that defendant, because of his intimate acquaintance with plaintiff, and because he knew that plaintiff had a key, knew or ought to have known

that plaintiff could not be guilty of the act charged and that therefore the bringing of the complaint against plaintiff must of necessity have been malicious.

It was in this posture of affairs that the question was asked "Were the help in the theatre examined?"

I contend that when this question was asked, plaintiff had, by his examination of the defendant, opened up the *whole* field of the presence or absence of malice and the presence or absence of want of probable cause. 10

Counsel for plaintiff objected to the question as not being *cross examination* and that it was part of the defense. If counsel for plaintiff had been satisfied to rest his case upon the natural inferences arising out of the proof that the charge against plaintiff was false, his position would have been proper and the question then undoubtedly would have been objectionable as part of the defense. But if counsel for plaintiff had thus rested his case, defendant would not have been called to the stand by plaintiff and the situation now presented would never have arisen. The Court refused to allow this question and in that committed an error. The Court seems to have been of the opinion that the only thing that counsel for defendant might inquire about was the key. 20

The key, in itself, was merely an incident of the proof produced and again the object of plaintiff in attempting to prove that defendant knew the plaintiff to have a key to the locker, which was broken open, was material only to furnish to the jury evidence from which they could draw the inference that, since defendant had known and had been associated with the plaintiff daily for almost two years and since he knew that plaintiff had a key to the locker, therefore it would be unreasonable for the defendant, because of the existence of those 30 40

facts, to charge the plaintiff with the crime charged. The question as to the key was but one of the questions tending to prove the issue involved and the issue tendered, namely that of actual malice and actual want of probable cause, and I submit that any testimony which might be elicited from the defendant upon cross examination tending to show the absence of actual malice and tending to show the existence of reasonable and probable cause for the arrest was competent, material and relevant to the case as it stood when the question was asked. I therefore submit that it was error and error prejudicial to the interest of the defendant to overrule the question asked.

As to whether or not the question was prejudicial, I think the answer must undoubtedly be in the affirmative, because when defendant left the stand the plaintiff rested his case. He had *then* succeeded in making a much stronger case on malice and want of probable cause than he would have done if he had rested upon the mere inference of a denial of the guilt of the crime charged. He had done this by proving actual malice and actual want of probable cause *from the mouth of the defendant* and the defendant had been unable to controvert this actual malice and actual want of probable cause. He had been prevented from showing that he acted without malice and that he had reasonable and probable cause for his action. He had been denied the right of rebutting the inferences to be drawn from his testimony as it then stood. He had been denied the right of cross examination. He had been denied the right of showing why this action was not malicious and why it was based on cause. Undoubtedly the impression which counsel for plaintiff intended to make upon the jury by the examination of defendant was that he had acted recklessly and wantonly and that undoubtedly was the impression

which the testimony as it stood at the close of plaintiff's case made upon the jury and that impression thus made, to my mind, could not be effaced, or could not be so well effaced, by any subsequent examination of the defendant on his own behalf, as it could have been if defendant had been permitted *then and there* to meet the issue presented.

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CONCLUSION.

I respectfully submit that the judgment should be reversed.

March Term, 1923.

Respectfully submitted,

J. EMIL WALSCHEID,
Of Counsel with Defendant-Appellant.

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