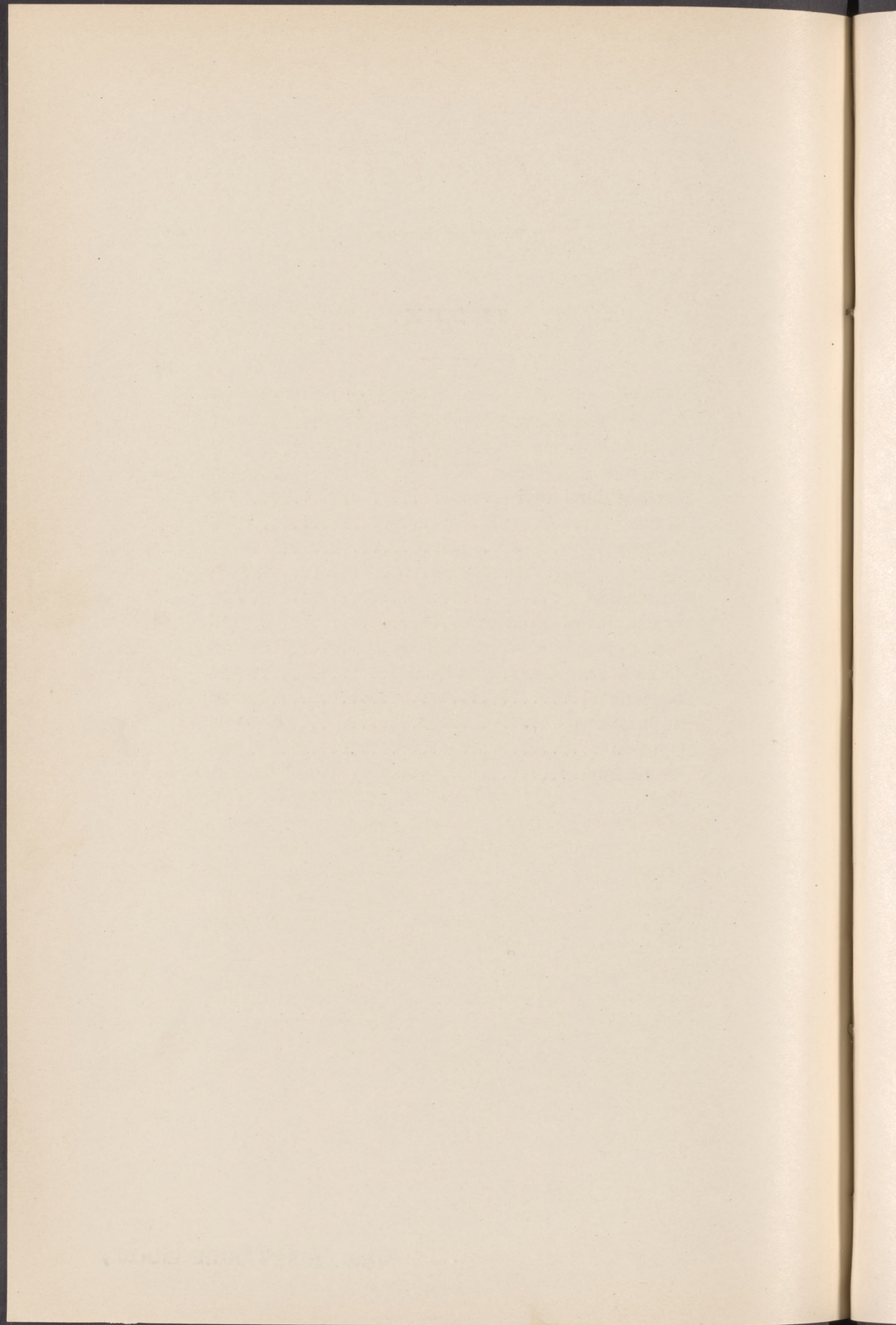


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Writ of Error.

New Jersey, ss.:

To the Honorable, the Justices of the Supreme Court of the State of New Jersey:

10

Because in the entire records and proceedings and the entire records of the proceedings, and also in giving judgment against Max Wasserman and Frank Smith, of the City of New York aforesaid, for violation of Section 6 of "An Act Concerning Disorderly Persons" *pro ut* the said complaints before you and upon which they have been convicted by a certain Police Magistrate of the City of Jersey City, taken between the State of New Jersey and the said Max Wasserman and Frank Smith, as it is said, manifest error hath intervened to the great damage of the said Max Wasserman and Frank Smith as from their complaint we have received information, and we being willing in this behalf to correct the error in due manner if any there shall be, and that speedy justice be done to them, the said Max Wasserman and Frank Smith, command you that if the judgment be thereon given, then that you distinctly and openly send under your seal, the records and proceedings aforesaid, with all things touching the same to the New Jersey Court of Errors and Appeals on January 19th next and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error what of right and according to the law ought to be done.

20

30

40

Joinder in Error.

WITNESS, EDWIN ROBERT WALKER, Chancellor at
Trenton, aforesaid the fifth day of January, A. D.
nineteen hundred and twenty-six.

THOMAS F. MARTIN,
Clerk.

10 EDWARD M. SALLEY,
HYMAN BRODSKY,
Attorneys for Plaintiffs-in-Error.

Joinder in Error.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

20 MAX WASSERMAN and FRANK
SMITH,
Plaintiffs-in-Error,

v.

STATE OF NEW JERSEY and WILLIAM
V. O'DRISCOLL, Judge of the Sec-
ond Criminal Court of Jersey
City,
Defendants-in-Error.

30 And thereupon, afterwards, to wit, on the
twenty-sixth day of March, 1926, the said State of
New Jersey and William V. O'Driscoll, by Thomas
J. Brogan, their attorney, comes into court and
says, that there is no error either in the record and
proceedings aforesaid, or in giving the judgment
aforesaid, and he prays that the Court here may
proceed to examine as well the record and pro-
ceedings aforesaid, as the matters aforesaid as-
signed for error, and that the judgment aforesaid,

40

Assignment of Error.

in manner aforesaid given, may in all things be affirmed, &c.

THOMAS J. BROGAN,
Attorney for Defendants-in-Error.

Assignment of Error.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

MAX WASSERMAN and FRANK
SMITH,
Plaintiffs-in-Error,

v.

STATE OF NEW JERSEY and WILLIAM
V. O'DRISCOLL, Judge of the Sec-
ond Criminal Court of Jersey
City,
Defendants-in-Error.

20

Afterwards, that is to say, on the return day of the Writ of Error, issued in this cause in the New Jersey Court of Errors and Appeals of the State of New Jersey, came the said Max Wasserman and Frank Smith, by Edward M. Salley and Hyman Brodsky, their attorneys and say that in the record and proceedings aforesaid and also in the matters recited and contained in the said bill of exceptions and judgment aforesaid there is manifest error in this, to wit:

30

That the judgment was given against the plaintiffs-in-error whereas under the law of the land the judgment should have been given and rendered in favor of the plaintiffs-in-error.

40

Writ of Certiorari.

WHEREFORE, the said Max Wasserman and Frank Smith pray that the said judgment and sentence may be reversed and altogether held for nothing, and that they may be restored to all things that they lost by occasion thereof.

10

EDWARD M. SALLEY,
HYMAN BRODSKY,
Attorneys for Plaintiffs-in-Error.

Writ of Certiorari.

NEW JERSEY SUPREME COURT. ✓

New Jersey—ss.:

20

The State of New Jersey to William V. O'Driscoll,
Judge of the Second Criminal Court of Jersey
City:

30

We being willing for certain reasons to be certified of a certain complaint made before you, against Max Wasserman and Frank Smith, for violation of Section 6 of "An Act Concerning Disorderly Persons" and his trial, conviction and sentence thereunder, do hereby command you that you send, under your seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the first day of November next, the said complaint, conviction and sentence, together with all things touching and concerning the same, as fully and entirely as they remain before you, together with this writ, that we may further cause to be done, what of right we shall see fit to be done.

WITNESS, WILLIAM S. GUMMERE, Esquire, Chief

40

Writ of Certiorari.

Justice of our Supreme Court, at Trenton, the
31st day of October, nineteen hundred and twenty-
four.

EDWARD M. SALLEY,
HYMAN BRODSKY,
Attorneys for Prosecutors.

10

EDWARD J. KELLEHER,
Clerk.

A true copy.

EDWARD J. KELLEHER,
Clerk.

ENDORSED.

NEW JERSEY SUPREME COURT.

20

MAX WASSERMAN and FRANK
SMITH,
Prosecutors,

v.

STATE OF NEW JERSEY and WILLIAM
V. O'DRISCOLL, Judge of the Sec-
ond Criminal Court of Jersey
City,
Respondents.

On Certiorari.
Writ of
Certiorari.

30

EDWARD M. SALLEY, 76 Montgomery Street,
J. C.

HYMAN BRODSKY, 471 Broadway, Bayonne,
N. J., Attorneys of Prosecutors.

I allow this writ. Let it be sealed. Let the

40

Return.

usual recognizance be dispensed with. Depositions may be taken upon two days notice.

Oct. 25th, 1924.

JAMES F. MINTURN,
Justice Supreme Court.

10 Due and legal service as of time is hereby admitted this 23rd day of December, 1924.

THOMAS J. BROGAN,
Attorney of Respondent.

Return.

NEW JERSEY SUPREME COURT.

20 MAX WASSERMAN and FRANK
SMITH,
Prosecutors,

v.

STATE OF NEW JERSEY and WILLIAM
V. O'DRISCOLL, Judge of the Second
Criminal Court of Jersey
City,

Respondents.

} On Certiorari.

30 To the Chief Justice and the the Associate Justices
of the Supreme Court of the State of New
Jersey:

In pursuance of the command of the annexed writ of certiorari, I, William V. O'Driscoll, Judge of the Second Criminal Court of Jersey City, for return thereto, hereby certify and send the complaint made before me against Max Wasserman and Frank Smith, for violation of Section 6 of
40 "An Act Concerning Disorderly Persons," docket

Complaint.

record, stenographic transcript of the testimony in said writ specified, with all the things touching and concerning the same, as within I am commanded.

WM. O'DRISCOLL,
Judge of the Second Criminal
Court of Jersey City. 10

Complaint.

SECOND CRIMINAL COURT OF
JERSEY CITY.

For Violation of an "Act Concerning Disorderly
Persons" Sec. 6.

THE STATE <i>v.</i> MAX WASSERMAN and FRANK SMITH.	}	20
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City of Jersey City, County of Hudson, State of New Jersey,	}	ss.:
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SERGEANT JAMES JENNINGS of Police Head-
quarters, Jersey City, being duly sworn complains
that on the 11th day of Oct. A. D., one thousand
nine hundred 24, at 8.40 o'clock P. M., Max Was-
serman of 1307 3rd Ave., New York City, N. Y., and
Frank Smith of 538 East 3rd Ave., New York City,
N. Y. did loiter and assemble in a public place
of said city, to wit: Hudson & Manhattan Rail-
road Grove St. Tube Station, Jersey City, Hudson
Co., New Jersey, each being a common thief or

Complaint.

pickpocket and were frequenting or attending
 such place for an unlawful purpose to wit; to
 commit larceny from the person of the public
 contrary to and in violation of the provisions of
 Section 6 of an act entitled, "An Act Concern-
 ing Disorderly Persons" (Revision 1898), and the
 10 supplements thereto, and the acts amendatory
 thereof.

WHEREFORE, this complainant prays that the
 said offenders may be dealt with according to
 the law.

JAMES JENNINGS,
 Complainant.

Subscribed and sworn to before me this }
 14th day of Oct., 1924. }

20

WILLIAM McGOVERN,
 Clerk 2nd Criminal Court of J. C.

Witnesses:

SERGT. JENNINGS, Police Hdqts.
 LIEUT. CHARLES WILSON, Police Hdqts.

30

40

Docket.SECOND CRIMINAL COURT
OF JERSEY CITYWilliam V. O'Driscoll
Judge.William McGovern
Clerk.

Jersey City, N. J., Feb. 4, 1925.

The following is a true and correct copy of a
record in the docket of the Second Criminal
Court:

10

Docket No. 1193—Case No. 1193.

Name—Max Wasserman.

Date—Oct. 14, 1924.

Age—50.

Color—White.

Nativity—Russia.

Charge—Disorderly Person Sec. 6-Chapter 239
Laws 1898.

20

Arraignment and Plea—Oct. 14, 1924.

State Witnesses—Sergeant James Jennings,
Lieutenant Charles Wilson.

Witnesses Defence—None.

Date of Trial—October 16th, 1924.

Disposition—Guilty 90 days County Peniten-
tiary. Committed October 16, 1924.

Magistrate—William V. O'Driscoll.

IN WITNESS WHEREOF, I have hereunto set my
hand and seal of the above Court this 4th day
of February, A. D. 1925.

30

(Seal)

WM. J. MCGOVERN,
Clerk.

40

*Docket.*SECOND CRIMINAL COURT OF
JERSEY CITY.William V. O'Driscoll,
Judge.William McGovern,
Clerk.

Jersey City, N. J., Feb. 4, 1925.

10

The following is a true and correct copy of a record in the docket of the Second Criminal Court:

Docket No. 1194—Case No. 1194.

Name—Frank Smith.

Date—Oct. 14, 1924.

Age—64.

Color—White.

Nativity—U. S.

Charge—Disorderly Person Sec. 6—Chapter 239

20

Laws 1898.

Arraignment and Plea—Oct. 14, 1924.

State Witnesses—Sergeant James Jennings,
Lieutenant Charles Wilson.

Witnesses Defence—None.

Date of Trial—October 16th, 1924.

Disposition—Guilty 90 days County Penitentiary.
Committed October 16, 1924.

Magistrate—William V. O'Driscoll.

30

IN WITNESS WHEREOF, I have hereunto set my hand and seal of the above Court this 4th day of February, A. D. 1925.

(Seal.)

WM. J. MCGOVERN,
Clerk.

40

Conviction.

SECOND CRIMINAL COURT,

CITY OF JERSEY CITY.

**For Violating Provisions of an Act Concerning
Disorderly Persons.**

<p style="text-align: center;">THE STATE</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">FRANK SMITH and MAX WASSER- MAN.</p>	}	10
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City of Jersey City, County of Hudson, State of New Jersey,	}	ss.:
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BE IT REMEMBERED, that Frank Smith and Max Wasserman, defendants, were on October 16th, 1924, charged before the Second Criminal Court of the City of Jersey City, said County and State, on the sworn complaint of Sergeant James Jennings and Lieutenant Charles Wilson, police officers of said City, with violating the provisions of an Act concerning disorderly persons approved June 14, 1898, and the supplements thereto in that the said defendants did on the 11th day of October, 1924, loiter upon and around the Grove Street Tube Station, in the City of Jersey City, a place of public resort for persons for lawful purposes, the said defendants not having any lawful business at said place did conduct themselves in an unbecoming manner, in that they, the said Frank Smith and Max Wasserman, did interfere with persons lawfully then and there being upon

Conviction.

10 said place of public resort, in that the said defendants did push aside, intermingle and closely contact with the said persons and by quickly moving about among them and jostling them, did divert their attention, obstruct and interfere with said persons and that the said defendants were then and there upon said places of public resort for an unlawful purpose, to wit: with the intent to swindle, to pick pockets, to steal and that the said defendants, Frank Smith and Max Wasserman, are swindlers, pickpockets and thieves.

20 AND, the said defendants Frank Smith and Max Wasserman, were apprehended and brought before this Court and put upon trial, upon the charge aforesaid, and by the oath of said police officers who duly swore according to law, in the presence and hearing of the said defendants testified as follows: (Sergeant James Jennings testified as follows:) About 8 o'clock, Saturday, October 4th, Lieutenant Wilson and I were standing on the Grove Street platform, Tube station, when these two men, Smith and Wasserman, got off a train that came in. They immediately tried to board another train, for which there was quite a crowd trying to get in, and they seemed to be acting in an unnecessary hurry—that is, Smith and Wasserman did. There was no hurry needed there because, as a rule, everybody gets into this train without trouble, but they were shoving and pushing in the crowd. They finally got on the train, and Lieutenant Wilson and I got on after them. On the train we separated, as they did too. In the train we rode to Christopher Street, watching them, where they got out, and then they got on a train going to Hoboken, on which train there

Conviction.

was a man who appeared intoxicated. Wasserman sat alongside him, and Smith was alongside him. Well, they got on a Hoboken train and rode to Exchange Place, where they did not attempt to get off, and we drew them off the train due to their queer actions on the train. While on this train, the drunk rode with them as far as Exchange Place. He attempted to get out at the Erie Station, but Wasserman got alongside of him when he started up, and the jerk of the train seemed to throw him back again, and then when he attempted to get up this drunk fell back on the train, so these men sat back too.

10

LIEUTENANT CHARLES WILSON, sworn as a witness, testified as follows:

On Saturday night, October 4, 1924, Sergeant Jennings and I were assigned to the Grove Street Tube Station, and while there we noticed these two men (indicating defendants Smith and Wasserman) get off the train. They loitered about the platform for a while, and then there was quite a lot of people got there. An uptown train came along and they split up—that is, they were separated. As soon as the train came in both of them made for the train and both of them got on the train. They were pushing and jostling, which it was not necessary for them to do, there was ample time for them to get on the train without forcing. They went to Christopher Street on the train, and we went with them, and they came back on a train to Grove Street; they proceeded back on another train there, and when they came back to the Erie there was a man intoxicated there, and there was quite a few people on the train, and he evidently wanted to get off

20

30

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Conviction.

the train, and he got up in the train, and this man, Wasserman and Smith, who had been standing up at the time, also tried to get off, and this man who was intoxicated, he fell back in his seat, and at Exchange Place this fellow (indicating one of defendants) was rolling about in the car and acting as we thought suspicious, and we thought it well to take these people off the train, they acted like pickpockets.

Cross examination by Mr. Salley:

Q. And that is the only reason you arrested them, just suspicion? A. And in fact they were jostling him and giving unnecessary force.

And the said Sergeant James Jennings and Lieutenant Charles Wilson did further testify that the said defendants Frank Smith and Max Wasserman were pickpockets and common thieves.

AND, upon such proof being presented to this Court proof which established to the satisfaction of this Court, the truth of the offense charged, this Court found the said defendants Frank Smith and Max Wasserman, guilty of being pickpockets and common thieves and of voluntarily loitering upon and of obstructing and interfering with persons lawfully being in and upon said Grove Street Tube Station, places of public resort and of frequenting and attending such places for the unlawful purpose of stealing.

WHEREUPON the said defendants Frank Smith and Max Wasserman are by this Court convicted of being pickpockets and common thieves—and of voluntarily loitering upon and of obstructing and interfering with persons who were lawfully upon the said Grove Street Tube Station, places of

Conviction.

public resort, in the City of Jersey City, and of frequenting and attending such places of public resort for the unlawful purpose of stealing.

AND, the said defendants Frank Smith and Max Wasserman are by this Court so convicted, deemed and adjudged guilty within the intent and meaning of Section six (6) of an Act Concerning "disorderly persons" approved June 14, 1898—and the supplements thereto. 10

AND, the said Frank Smith and Max Wasserman are adjudged and sentenced to be committed to the County Penitentiary of the County of Hudson there to be kept for the term of ninety (90) days.

Given under my hand and seal of this Court this 14th day of February, 1925, in the City of Jersey City. 20

(Seal) WM. O'DRISCOLL,
Judge.

30

40

Transcript of Minutes.

SECOND CRIMINAL COURT OF JERSEY CITY,
 COUNTY OF HUDSON,
 State of New Jersey.

10

THE STATE, <i>v.</i> FRANK SMITH, MAX WASSERMAN and JACOB COHEN.

Testimony taken at the Second Criminal Court of Jersey City, County of Hudson, State of New Jersey, on Thursday, October 16, 1924.

20

Before—Hon. WILLIAM V. O'DRISCOLL, Judge Second Criminal Court.

The stenographer, T. F. Daniels, was first sworn to fairly and honestly correctly report the testimony to be given.

Mr. H. Brodsky and Mr. Edward M. Salley appeared on behalf of the defendants.

Mr. Salley: Are you ready to proceed, your Honor?

30

The Court: Yes.

Mr. Salley: May I at this time read into the record the two complaints against Frank Smith and Max Wasserman?

The Court: Yes, and the complaint against Cohen.

The complaints are as follows:

40

Transcript of Minutes.

"SECOND CRIMINAL COURT OF JERSEY CITY.

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

DETECTIVE JOHN J. O'NEILL, of Police Headquarters, Jersey City, being duly sworn complains that on the 11th day of Oct. A. D. one thousand nine hundred 24 at 8.30 o'clock P. M., Jacob Cohen of 365 South 2nd Street, Brooklyn, N. Y., did loiter and assemble in a public place of said city, to wit: Hudson and Manhattan Railroad, Grove St. Tube Station, Jersey City, Hudson Co., New Jersey, being a common thief or pickpocket and was frequenting or attending such place for an unlawful purpose, to wit, to commit larceny from the person of the public, contrary to and in violation of the provisions of section three (6) of an act entitled, "An Act Concerning Disorderly Persons" (Revision 1898), and the supplements thereto, and the acts amendatory thereof.

Wherefore this complainant prays that the said offender may be dealt with according to the law.

JOHN J. O'NEILL,
 Complainant.

Subscribed and sworn to before me }
 this day of 192 . }

WILLIAM J. MCGOVERN,
 Clerk Criminal Court of J. C.

WITNESSES.

Name	Residence
Det. O'Neill	Police Hqts.
Lieut. Walter Ciecuch	Police Hqts."

Transcript of Minutes.

(On application to the Clerk for the complaints against Frank Smith and Max Wasserman, he states that the complaints against them will be identical with that against Jacob Cohen.

T. F. D., Sten)

10 Mr. Salley: I suppose your Honor will try the disorderly cases first?

The Court: Yes.

Mr. Salley: There are two charges of disorderly person, against Max Wasserman and Frank Smith, a separate charge against Jacob Cohen, and there is a joint charge of larceny from the person against the three.

20 The Court: Max Wasserman and Frank Smith are charged with being disorderly persons. Do you want the complaints read to them?

Mr. Salley: No, I do not want that. The complaints look all right to me, on the face of them. I will make a motion later on, if I find they are not.

The Court: The defendants understand the charge?

Mr. Salley: They understand it, generally.

The Court: All right, Sergeant Jennings.

30 SERGEANT JAMES JENNINGS, sworn to as witness, testifies as follows:

The Court: What is the complaint in the cases of Frank Smith and Max Wasserman, as far as disorderly person is concerned, and also against Jacob Cohen, what is the complaint against the three?

The Witness: About 8 o'clock, Saturday, October 4th, Lieutenant Wilson and I were stand on the Grove Street platform,

40

Transcript of Minutes.

Tube station, when these two men, Smith and Wasserman, got off a train that came in. They immediately tried to board another train, for which there was quite a crowd trying to get in, and they seemed to be acting in an unnecessary hurry—that is, Smith and Wasserman did. There was no hurry needed there because, as a rule, everybody gets into this train without trouble, but they were shoving and pushing in the crowd. They finally got on the train, and Lieutenant Wilson and I got on after them. On the train we separated, as they did too. In the train we rode to Christopher Street, watching them, where they got out, and then they got on a train going to Hoboken, on which train there was a man who appeared intoxicated. Wasserman sat alongside him, and Smith was alongside him. 10
20

Mr. Salley: I object to whatever happened in Hoboken. I think we ought to confine ourselves to what happened in Jersey City.

Q. Just confine yourself, Officer, to Jersey City.
A. Well, they got on a Hoboken train and rode to Exchange Place, where they did not attempt to get off, and we drew them off the train due to their queer actions, on the train. While on this train, the drunk rode with them as far as Exchange Place. He attempted to get out at the Erie Station, but Wasserman got alongside of him when he started up, and the jerk of the train seemed to throw him back again, and then when he attempted to get up this drunk fell back on the train, so these men sat back too. 30
40

Transcript of Minutes.

By Mr. Salley:

Q. You have the drunk in Court, have you? A. The drunk we couldn't get off the train.

Q. As the train came into Exchange Place, there was a sort of scrap, was there? A. Yes, sir.

10 Q. There was a stop there? A. Yes.

Q. And the drunk tried to get out? A. Yes, he got up.

Q. And as the drunk got up he was thrown back in his seat by the jerk of the train? A. Yes, sir.

Q. At that time, who was on the train of these three defendants? A. The defendants there were Smith and Wasserman.

Q. Cohen was not on the train? A. No, sir, not that we saw.

20 Q. And at no time, Sergeant, did you see Mr. Smith or Mr. Wasserman ever put their hands on anybody, touch anybody, or put their hands in his pocket? A. I saw Wasserman alongside this man, who was too intoxicated to get off the train.

Q. But you did not see either Wasserman or Smith, either of them put his hand in his pocket or put his hand on him? A. No.

Q. And you first saw them when you saw them getting on the train at Grove Street? A. Yes.

30 Q. And there was a crowd there, you say? A. Yes.

Q. What time was it? A. About 8 o'clock.

Q. And that was the time the theatre crowd was moving very much, wasn't it, from New York to Jersey City and from Jersey City to New York? A. There was a few there, but there was unnecessary jostling by these men in the crowd; it wasn't much of a crowd.

40

Transcript of Minutes.

Q. But there were a few people there? A. Oh, yes there was quite a few people.

Q. And it is a platform that is more or less narrow? A. I don't know that there was any complaint about that.

Q. How many were in the crowd, should you say? A. Oh, I should say fifteen, about. 10

Q. About the middle door congregated mostly, were they? A. I think the end door.

Q. But at no time did you see Mr. Smith or Mr. Wasserman put their hands in anybody's pocket? A. I did not, otherwise the complaint would be different.

The Court: Any other witness in the case?

LIEUTENANT CHARLES WILSON, sworn as a witness, testifies as follows: 20

By the Court:

Q. You are a member of the Jersey City Police force? A. Yes, sir.

Q. Did you know anything about these complaints, Lieutenant? A. Yes, sir.

Q. What do you know; go on and tell us? A. On Saturday night, October 4, 1924, Sergeant Jennings and I were assigned to the Grove Street Tube station, and while there we noticed these two men (indicating defendants Smith and Wasserman) get off the train. They loitered about the platform for a while, and then there was quite a lot of people got there. An uptown train came along and they split up—that is, they were separated. As soon as the train came in both of them made for the train and both of them got on the train. They were pushing and jostling, which it 30 40

Transcript of Minutes.

was not necessary for them to do, there was ample time for them to get on the train without forcing. They went to Christopher Street on the train, and we went with them, and they came back on a train to Grove Street, they proceeded back on another train there, and when they came back to the Erie
10 there was a man intoxicated there, and there was quite a few people on the train, and he evidently wanted to get off the train, and he got up in the train, and this man, Wasserman and Smith, who had been standing up at the time, also tried to get off, and this man who was intoxicated, he fell back in his seat, and at Exchange Place this fellow (indicating one of the defendants) was rolling about in the car and acting as we thought suspicious, and we thought it well to take these
20 people off the train, they acted like pickpockets.

Mr. Salley: I object to "they acted like pickpockets" and move to strike it out.

The Court: Motion denied.

By Mr. Salley:

Q. And that is the only reason you arrested them, just suspicion? A. And in fact they were jostling him and giving unnecessary force.

30 Q. But they did not put their hands on the drunk or try to get his money from him? A. No.

Q. And you simply took them up on suspicion, from the fact that you thought they might be pickpockets? A. Yes; and the records proved afterwards they were pickpockets.

Mr. Salley: I object to what the records proved at this time, and move to strike it out. Furthermore, until these defendants take the stand, which they have done done,
40

Transcript of Minutes.

a criminal record cannot be introduced against them, or any supposed record.

The Court: Motion denied.

Mr. Salley: I ask for the discharge of these two defendants Smith and Wasserman, under the complaints. As far as Cohen is concerned, there is no proof that he was ever over here. 10

Sergeant Jennings: Detective Ciecich arrested Cohen.

Mr. Salley: I ask for the discharge of these defendants because the complaint, on its face, says that they accuse these two men, that they "did loiter and assemble in a public place," and as being a common thief or pickpocket and frequenting or attending such place for an unlawful purpose to wit," 20

Before you can get a conviction in this case, you have to have proof that these men were common thieves or pickpockets, and you have no proof that they were frequenting or attending a public place for an unlawful purpose. They might be the worst people in the world, but they have a perfect right to go anywhere except for an unlawful purpose. In this case there is nothing before this Court to show that they were common thieves or pickpockets, no more proof to show they are than to show I am; and there is no proof that they were attending that place for an unlawful purpose or for the purpose of committing or attempting to commit larceny or anything else; and I ask for the discharge of these two defendants on the testimony produced this morning. 30 40

Transcript of Minutes.

The Court: Motion denied.

Mr. Salley: Exception.

The Court: Do the defendants take the stand?

Mr. Salley: The defendants are not going to take the stand.

10 The Court: I find Frank Smith and Max Wasserman guilty of being disorderly persons and sentence them to ninety days in the County Penitentiary.

20 I, JOHN P. DENGLER, the stenographer designated by the Court and sworn, do certify that the foregoing is a true and accurate transcript of the minutes and proceedings taken in the case of the State against Frank Smith and Max Wasserman, Defendants, at the Second Criminal Court of Jersey City.

JOHN P. DENGLER,
Stenographer.

To the Chief Justice of the Supreme Court of New Jersey:

30 I do certify the foregoing transcript, made by the stenographer, designated by me and sworn, as the minutes and proceedings of the trial of the case of The State against Frank Smith and Max Wasserman, defendants, at the Second Criminal Court of Jersey City, to be used on the appeal herein.

WM. O'DRISCOLL,
Judge.

Reasons.

(Served and Filed Dec. 24, 1924.)

NEW JERSEY SUPREME COURT,

<p style="text-align: center;">MAX WASSERMAN and FRANK SMITH, Prosecutors,</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">STATE OF NEW JERSEY and WILLIAM V. O'DRISCOLL, Judge of the Sec- ond Criminal Court of Jersey City, Respondents.</p>	} On Certiorari.	10
---	------------------	----

The prosecutors present the following reasons for setting aside the complaint, trial, conviction and sentence before Honorable William V. O'Driscoll, Judge of the Second Criminal Court of Jersey City, brought before this Honorable Court by the writ of certiorari granted herein: 20

1. There was no sufficient evidence to warrant the conviction of the prosecutors. ✓

2. The prosecutors were convicted without any evidence upon which they could have been found guilty. ✓ 30

3. The conviction was based wholly or in part upon evidence or a purported record of convictions which was not properly proven and was not even admitted in evidence, and it could not legally be admitted in evidence as the prosecutors did not take the stand.

Reasons.

4. The conviction was based upon matters outside of the record.

10 5. The uncontradictory evidence was to the effect that the prosecutors were not guilty of the charge proven against him, or any violation of Section 6—Chapter 239 of the Laws of 1898 and the acts supplementary thereto and amendatory thereof.

6. There was no proof that the prosecutors were at the time of their arrest common thieves, burglars or pickpockets, and the complainant was in the alternative.

20 7. There was no proof that the prosecutors at the time of their arrest were frequenting or attending at the place or places mentioned in the statute and in the complaint for an unlawful purpose.

8. Section 6, Chapter 239 of the Laws of 1898, and the Acts supplementary thereto and amendatory thereof, and the conviction of the prosecutors thereunder, is unconstitutional and deprives the prosecutors of their constitutional rights.

30 9. Section 6, Chapter 239 of the Laws of 1898, and the Acts supplementary thereto and amendatory thereof, and the conviction of the prosecutors thereunder, is in violation of the Constitution of the United States, in the following particulars:

(a) It violates Article 5 of the Articles in addition to and amendatory to the Constitution and commonly known as the Fifth Amendment.

(b) It violates article 6 of the Articles in addition to and amendatory to the Constitution and commonly known as the Sixth Amendment.

40 (c) It violates article 14 of the Articles in ad-

Reasons.

dition to and amendatory to the Constitution and commonly known as the Fourteenth Amendment.

10. Section 6, Chapter 239 of the Laws of 1898 and the Acts supplementary thereto and amendatory thereof, and the conviction of the prosecutors thereunder, is in violation of the Constitution of the State of New Jersey, in the following particulars:

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(a) It violates article one, section seven.

(b) It violates article one, section nine.

(c) It violates article one, section ten.

11. That the proceedings against and conviction of the prosecutors, were in divers other respects, illegal, irrelevant, unconstitutional, unjust and oppressive to the prosecutors.

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EDWARD M. SALLEY,
Attorney of Prosecutors.

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Stipulation.

(Filed Dec. 24, 1924.)

NEW JERSEY SUPREME COURT.

10

MAX WASSERMAN and FRANK
SMITH,
Prosecutors,

v.

STATE OF NEW JERSEY and WILLIAM
V. O'DRISCOLL, Judge of the Sec-
ond Criminal Court of Jersey
City,
Respondents.

} On Certiorari.

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It is hereby stipulated that the prosecutors have
until Tuesday, December 30th, 1924, to file their
reasons in this case.

Due and timely service of a copy of the reasons
presented by the prosecutors in the above entitled
matter, is hereby acknowledged this 23rd day of
December, 1924, as of within time.

THOS. J. BROGAN,
Attorney for Respondent.

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Stipulation.

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">MAX WASSERMAN and FRANK SMITH, Prosecutors,</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">STATE OF NEW JERSEY and WILLIAM V. O'DRISCOLL, Judge of the Sec- ond Criminal Court of Jersey City, Respondents.</p>	}	<p>On Certiorari.</p>	10
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It is hereby stipulated that the argument on the writ of certiorari granted in the above entitled cause, may be noticed for and argued at the March Term of the Year 1925 of the New Jersey Supreme Court. 20

HYMAN BRODSKY,
EDWARD M. SALLEY,
Attorneys of Prosecutors.

THOS. J. BROGAN,
Attorney for Respondents.

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Opinion.

NEW JERSEY SUPREME COURT.

No. 209, May Term, 1925.

10

MAX WASSERMAN and FRANK
SMITH,
Prosecutors,

v.

STATE OF NEW JERSEY and WILLIAM
V. O'DRISCOLL, Judge of the Sec-
ond Criminal Court of Jersey
City,

Respondents.

20

Submitted May, 15, 1925. Decided November
12, 1925, on certiorari, etc.

Before—J u s t i c e s TRENCHARD, KATZENBACH and
LLOYD.

For the prosecutors, HYMAN BRODSKY and
EDWARD M. SALLEY.

For the respondents, THOMAS J. BROGAN
and CHARLES HERSHENSTEIN.

Per Curiam:

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Upon a complaint, the validity of which is not
questioned, the prosecutors of this writ were con-
victed by the Second Criminal Court of Jersey City
of being common thieves and pickpockets and to
have been frequenting and attending a railroad
depot, a place of public resort, for the unlawful
purpose of stealing, an offense denounced by Sec-
tion 6 of the Act Concerning Disorderly Persons (C.

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Remittitur.

S., p. 1928), and were adjudged to be disorderly persons pursuant to that section of that Act.

The defendants below bring up for review such conviction, and the sentence imposed thereon.

Upon examination we perceive that this case is substantially similar to that of *Rothman v. State* of this term and this day decided. The questions raised are the same. We think that the decision of that case controls this, and therefore the proceedings of the court below will be affirmed, with costs. 10

Remittitur.

NEW JERSEY SUPREME COURT,

MAX WASSERMAN and FRANK
SMITH,
Prosecutors,

v.

STATE OF NEW JERSEY and WILLIAM
V. O'DRISCOLL, Judge of the Sec-
ond Criminal Court of Jersey
City,
Respondents.

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On Certiorari.

Rule on Affirm-
ance of Judg-
ment and Order
of Remittitur.

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This cause having been argued before this Court at the May term, 1925, by Thomas J. Brogan and Charles Hershenstein of Counsel for the Respondents, and Hyman Brodsky and Edward M. Salley of Counsel for the Prosecutors, and the Court having considered the same and having examined the records and proceedings of the Judge of the Second Criminal Court of Jersey City, and finding no error in the proceedings and judgment therein:

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Remittitur.

IT IS HEREBY ORDERED AND ADJUDGED that the judgment of the Second Criminal Court of Jersey City in the above entitled cause be, and the same is hereby affirmed with costs;

10 AND, IT IS FURTHER ORDERED that the record in the said cause be forthwith remitted to the said Second Criminal Court of Jersey City there to be proceeded with according to law.

On Motion of

THOMAS J. BROGAN,
Attorney for the State of New Jersey
and William V. O'Driscoll, Judge
of the Second Criminal Court of
Jersey City, Respondents.

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Stipulation.NEW JERSEY COURT OF ERRORS AND
APPEALS.

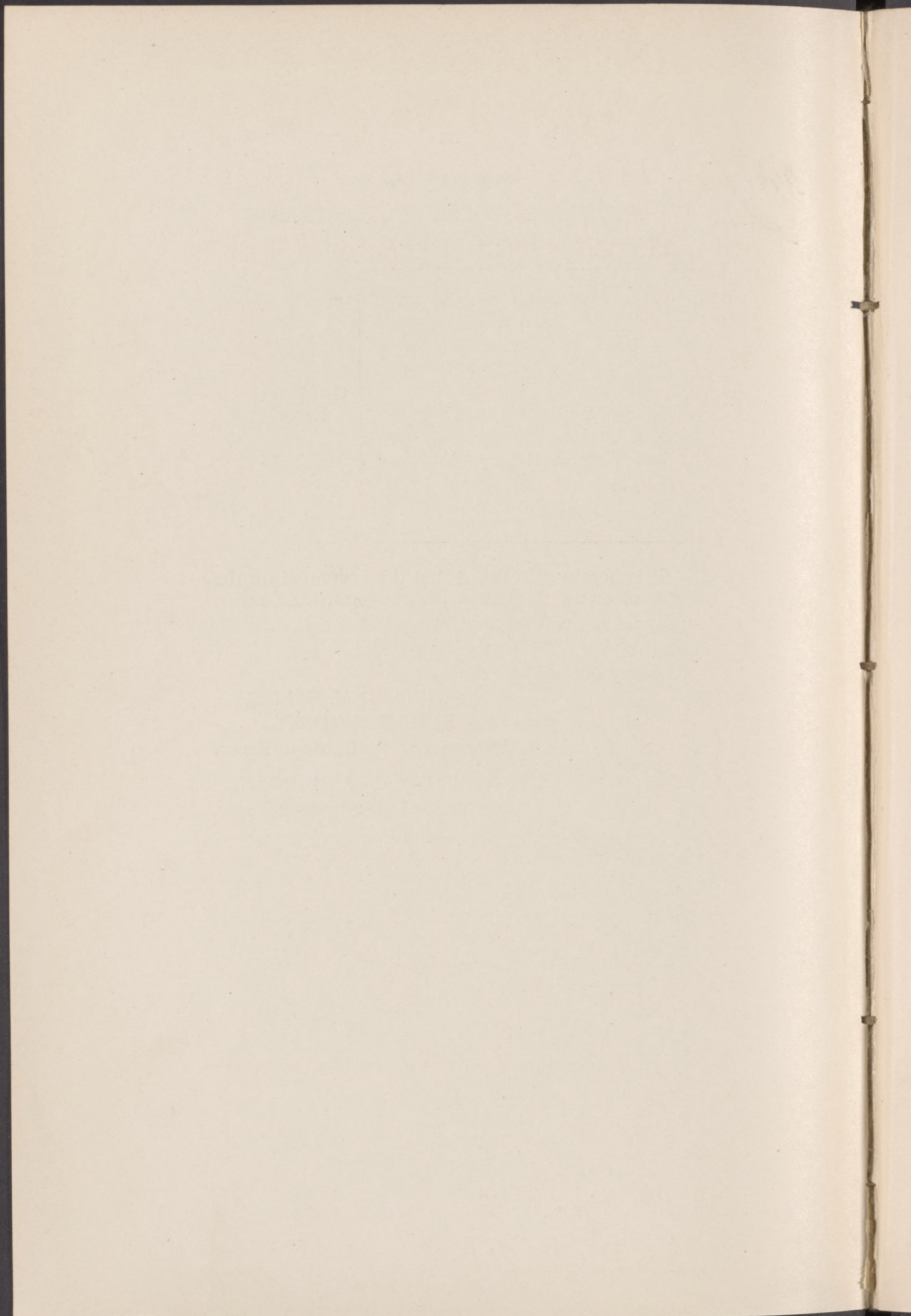
<p style="text-align: center;">MAX WASSERMAN and FRANK SMITH, Plaintiffs-in-Error,</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">STATE OF NEW JERSEY and WILLIAM V. O'DRISCOLL, Judge of the Sec- ond Criminal Court of Jersey City, Defendants-in-Error.</p>	} On Writ of Error.	10
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It is hereby stipulated that the argument on the writ of error granted in the above entitled cause, may be noticed for and argued at the May Term of the year 1926 of the New Jersey Court of Errors and Appeals. 20

EDWARD M. SALLEY,
HYMAN BRODSKY,
Attorneys of Plaintiffs-in-Error.

THOMAS J. BROGAN,
Attorney for Defendants-in-Error.

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New Jersey Court of Errors and Appeals

MAX WASSERMAN and FRANK
SMITH,
Plaintiffs-in-Error,

v.

STATE OF NEW YORK and WIL-
LIAM V. O'DRISCOLL, Judge of
the Second Criminal Court of
Jersey City,
Defendants-in-Error.

BRIEF OF DEFENDANTS-IN-ERROR.

Statement of Facts.

This writ of error brings up for review the summary conviction of the plaintiffs-in-error by the Judge of the Second Criminal Court of Jersey City, under Section 6 of the Disorderly Persons Act, which provides as follows:

"6. Thieves, burglars or pickpockets. Any person who shall be arrested at any steamboat landing, railroad depot, church, banking institution, broker's office, place of public amusement, auction-room, store or crowded thoroughfare, or other place of public resort or assemblage for business, worship, amusement, or other lawful purpose, in any city, town or county in this state, and shall be proven to the satisfaction of the magistrate before whom such person shall be brought to be a common thief, burglar or pickpocket, and to have been frequenting or attending such place or places for an unlawful purpose, shall be deemed and adjudged to be a disorderly person."

The conviction was reviewed by the Supreme Court upon the writ of certiorari, and the Supreme Court sustained the conviction. In the certiorari proceedings no question was raised by the plaintiffs-in-error as to the regularity of the proceedings before the Police Judge and before the Supreme Court and, now, in this Court the plaintiffs-in-error desire to upset the conviction upon the ground there was no evidence before the Police Judge to warrant the conviction and that Section 6, of the Disorderly Persons Act is unconstitutional.

We respectfully contend that:

1. The record of the conviction contains legal evidence upon which the judgment of conviction can be based and, therefore, such conviction should not be reversed by this Court.
2. Section 6 of the Disorderly Persons Act is constitutional.

POINT 1.

The record of conviction contains legal evidence upon which the judgment of conviction can be based, and, therefore, such conviction should not be reversed by this Court.

The argument of the plaintiffs-in-error is based upon an examination of the transcript of the evidence taken at the trial, which is set out in full on pages 18-24 of the case. This evidence was included by the police judge as part of his return. It is not, however, a part of the conviction record signed by the Judge and set out in the case, pages 11-15. Such a transcript of the evidence is not required to be reviewed by an upper court, nor is the evidence before this Court pursuant to any

rule obtained by the plaintiffs-in-error. For that reason the evidence, not properly being a part of the record, cannot be examined by this Court even though it is printed as part of the case of the plaintiffs-in-error. In *Board of Health v. Rosenthal*, 67 N. J. L., page 217, the Supreme Court has laid down the following clear and concise rule:

“We are also asked to look into the evidence returned by the police justice as part of his transcript. This evidence is not embraced in the conviction, and is not required to be under the prescribed form. Nor is it here pursuant to any rule of this court. The evidence not being properly a part of the record, we cannot examine it. *Lloyd v. Richman*, 28 Vr., 385.”

In *Lloyd v. Richman*, 57 N. J. L., 385, cited by the Supreme Court in the *Board of Health* case, an effort was made by the prosecutor to have the Court consider the testimony appended to the return. The Court held that the Judge was not ruled to send it up and therefore it does not form part of the case. The Court disposes of the matter in the following language:

“We are not permitted to look at the notes of the testimony appended to the return. The justice was not ruled to send them up, consequently they form no part of the case. *Moore v. Hamilton*, 4 Zab. 432. We have then a trial at which certain things must be proved to entitle the claimant to have judgment, and we have the rendition of a judgment to support which there must have been legal proof of the claimant's right of possession, and nothing to show that illegal testimony was offered or received by the justice. The prosecutor contends that there was either no proof on this point or that such as there was, was illegal. It may be that one or the other of these contentions would have received support if the justice had been ruled to return what the proof

was on the given point, or whether any proof of a certain kind was offered. This course, however, has not been taken, and we are not at liberty to intend against the judgment anything that is not regularly made part of the record here by the party who seeks to overthrow it. *Demster v. Frech*, 22 Vroom 501.

“The case, therefore, stands simply as one that was within the competency of the justice to determine, provided there was before him legal evidence to support his determination. He has determined it and it is in no way shown that such determination was not upon legal proofs.”

The Supreme Court, in *Rothman v. State of New Jersey*, 130 Atl., 888, held:

“The prosecutor’s argument is that an examination of the transcript of evidence taken at the trial and returned with the state of the case will disclose that the conviction is erroneous. To this it is a sufficient answer to say that such evidence returned by the police justice as part of his transcript, was not embraced in the conviction, and was not returned pursuant to any rule of this court, and is no part of the record, and will not be considered by the court. *Board of Health v. Rosenthal*, 67 N. J. L. 216; *Lloyd v. Richman*, 57 N. J. L. 385; *Preusser v. Case*, 54 N. J. L. 532.”

The opinion of the Supreme Court in this case, to wit, *Wasserman & Smith v. State of New Jersey*, 130 Atl., 889, held: that this case was substantially similar to the case of *Rothman v. State*, and the decision in the *Rothman* case, therefore, controls.

We therefore submit that the law was well settled prior to the decision in the *Rothman* case, that the transcript cannot be considered in determining the regularity of the conviction.

Disregarding, therefore, the evidence which is set out in the transcript, and being limited to an

examination of the conviction itself, we find that the Police Judge embraced in his conviction the testimony adduced before him (Case, pp. 11-15).

From this conviction, it appears that a formal complaint was presented to the Police Judge, charging the plaintiffs-in-error with a violation of Section 6 of the Disorderly Persons Act, that the plaintiffs-in-error, Max Wasserman and Frank Smith, were apprehended and brought to trial, and by the oath of Sergeant James Jennings, a detective, it appears that he was standing on the platform of the Grove Street Tube Station, when Smith and Wasserman got off a train that came in. They immediately tried to board another train for which there was quite a crowd trying to get in, and the plaintiffs-in-error acted as if they were in an unnecessary hurry. They were shoving and pushing in the crowd. They finally got on the train. They got out at Christopher St. and then got on a train going to Hoboken, where they sat alongside of a man who appeared to be intoxicated. The intoxicated man attempted to get out at the Erie Station, but the plaintiff Wasserman, got alongside of him when he started up and the jerk of the train threw him back again. They rode to Exchange Place, where they were arrested (Case, pp. 12-13).

Lieutenant Charles Wilson testified that when an uptown train came along the plaintiffs-in-error separated and when the train came in both plaintiffs-in-error made for the train and boarded the same. They were pushing and jostling, which it was not necessary for them to do. They went to Christopher Street, and then came back on a train to Grove Street. They proceeded back on another train there, and when they came back to the Erie, there was a man intoxicated in the train, who evidently wanted to get off, and he got up and these plaintiffs-in-error also tried to get off, but the in-

toxicated man fell back in his seat, with the plaintiffs-in-error alongside of him (Case, pp. 13-14).

These police officers further testified that the said plaintiffs-in-error, Max Wasserman and Frank Smith, were pickpockets and common thieves (Case, p. 14, lines 18-21). Whereupon the Court found that the plaintiffs-in-error were pickpockets and common thieves who voluntarily loitered upon, obstructed and interfered with persons lawfully upon the Grove Street Tube Station, a public resort, and of frequenting and attending such places for the unlawful purpose of stealing, and accordingly convicted them under Section 6 of the Disorderly Persons Act and sentenced them to ninety days in the County Penitentiary.

The record of conviction, therefore, sets out sufficient legal evidence upon which the Court could rest its decision of guilt, and such legal evidence appearing, an Appellate Court will not disturb the finding. In *Vandegrift v. Meihle*, 66 N. J. L., page 93, the Supreme Court in reviewing a summary conviction, held:

“This court will not review the decision upon questions of fact. If there is legal evidence before the court below upon which the certified judgment can be based, this court will not reverse because the evidence would lead it to a different conclusion. *South Brunswick v. Cranbury*, 23 Vr. 298.”

Counsel for plaintiffs-in-error contends that this Court should follow the decision in *Jacob Cohen v. State of New Jersey*, 130 Atl., 922, which was also decided by the Supreme Court at the same time that the *Wasserman* and *Rothman* cases were decided.

But we respectfully contend that the *Cohen* case was entirely different from the case *sub judice*, for in that case the conviction of the magistrate failed

to show that the magistrate had any evidence before him from which he could have determined that the defendant was a swindler, pickpocket and a common thief and for that reason the Court set aside the conviction upon a writ of certiorari. In this case, however, the conviction of the magistrate distinctly sets out that;

“said Sergeant James Jennings and Lieutenant Charles Wilson did further testify that the said defendants Frank Smith and Max Wasserman were pickpockets and common thieves” (Case, pp. 14, lines 18-21).

The conviction was therefore based upon evidence before the magistrate from which he could and did find that the defendants before him were pickpockets and common thieves.

POINT II.

Section 6 of the Disorderly Persons Act is constitutional.

The only ground upon which the plaintiffs-in-error attack the constitutionality of Section 6 of the Disorderly Persons Act is based upon the theory that the plaintiffs-in-error cannot be tried under Section 6 of the Disorderly Persons Act because in effect it would be retrying them on the charge of being a pickpocket, and thus violates the fundamental principal of law which prohibits the putting of a person twice in jeopardy for the same crimination. The law, however, is well settled that the Constitution of our State which follows the Constitution of the United States, goes no further than to forbid the retrial of a person who has been acquitted or convicted. *Smith and Bennett v. State of New Jersey*, 41 N. J. L., 598, in which well considered opinion, Chief Justice Beasley said:

“The modern English doctrine seems to be that nothing but an existing judgment, either of conviction or acquittal, so that a plea of *autre fois* convict or *autre fois* acquit can be pleaded, will have that effect.”

It has also been the established law in this State that a plea of *autre fois* convict or *autre fois* acquit must be specially interposed in order that it may be considered.

State v. Turco, 122 Atl. Rep., 844.

The reason for this salutary rule is based upon the fact that when such a plea is interposed, the plea is triable by a jury, who alone can determine whether or not a defendant has been previously convicted or acquitted of a certain charge.

The plaintiffs-in-error in this case at no time raised such a plea before the Police Judge in order to try out the question as to whether or not the plaintiffs-in-error were convicted of an offense similar to the one charged by Section 6 of the Disorderly Persons Act. But even irrespective of the fact whether such a plea was interposed, the crime described by Section 6 of the Disorderly Persons Act is entirely different and distinct from the crime of pickpocketing. The elements to be proven under a charge of pickpocketing are entirely different and dissimilar from the elements necessary to prove a violation of Section 6 of the Disorderly Persons Act. No extended argument need be made to prove this dissimilarity. In the one case, an actual abstraction from the pocket of a person is the gist of the offense; in the other the attendance or frequenting of a pickpocket at a public place for an unlawful purpose is the element which constitutes violation of the Disorderly Persons Act. See *Gilpin v. State*, 121 Atl. Rep., 354.

The Supreme Court, in the *Rothman* case, found no merit in this constitutional question which the plaintiffs-in-error raised and held:

“Under that section *the frequenting or attendance of a common thief or pickpocket at a place of public resort for an unlawful purpose* are the essential elements. To the argument that the effect of the Act is to place the accused ‘in a different category from other persons,’ the answer is that it does not deny to the accused the protection that is accorded to others under the same conditions and in like situations. *Graham v. West Virginia*, 224 U. S. 616.”

It is respectfully submitted that the judgment should be affirmed.

THOMAS J. BROGAN,
Attorney for Defendants-in-Error.

THOMAS J. BROGAN,
CHARLES HERSHENSTEIN,
Of Counsel for Defendants-in-Error.

New Jersey Court of Errors and Appeals

MAX WASSERMAN and FRANK
SMITH,
Plaintiffs-in-Error,

v.

STATE OF NEW JERSEY and WIL-
LIAM V. O'DRISCOLL, Judge of
the Second Criminal Court of
Jersey City,
Defendants-in-Error.

BRIEF OF PLAINTIFFS-IN-ERROR.

The writ of error in this cause brings the record of the trial and conviction and also the affirmance of this case by the New Jersey Supreme Court of the plaintiffs-in-error in Second Criminal Court of Jersey City.

Complaint was filed against the prosecutors for violation of Section 6 of "An Act concerning Disorderly Persons" (2 Comp. Stat., 1898). The prosecutors were convicted under said Act and sentenced to the common jail of Hudson County for a term of ninety days.

Reasons.

The reasons are eleven in number (pp. 25 to 27 inclusive) and will be argued under various separate points as indicated.

POINT I.

This point is covered by the first seven reasons.

The only witnesses produced by the State were James Jennings and Charles Wilson. Mr. Jen-

nings testified in brief as follows and his testimony will be found on pages 19, 20-21.

That he saw the defendants Smith and Wasserman on the Grove Street platform of the Hudson Tube, Jersey City, when these two men, Smith and Wasserman, got off a train that came in. They immediately tried to board another train, for which there was quite a crowd trying to get in, and they seemed to be acting in an unnecessary hurry—that is, Smith and Wasserman did. There was no hurry needed there because, as a rule, everybody gets into this train without trouble, but they were shoving and pushing in the crowd. They finally got on after which Lieutenant Wilson and I got on. In the train we rode to Christopher Street where they got out and then they got on a train going to Hoboken, on which train there was a man who appeared intoxicated. Wasserman sat alongside of him and Smith was alongside him.

On cross examination Mr. Jennings testified that he did not see either Smith or Wasserman put their hands in anybody's pockets, but did say he saw unnecessary jostling by Smith and Wasserman in the crowd.

Lieutenant Charles Wilson testified as found on pages 21-22, and he testified almost identically with Police Officer Jennings, except that he said that the drunken man fell back in the seat.

On cross examination he said that "this fellow (indicating one of the defendants) was rolling about in the car and acting as we thought suspicious, and we thought it well to take these people off the train, they acted like pickpockets."

He further testified on cross examination that neither Smith or Wasserman put their hands on the drunken man or did they try to get any money from him.

The defendants did not take the stand as the defendant did in the case of the State v. Morris

Rothman, and there was no evidence by the police officers or was there any record of conviction offered, nor was there any proof in any manner, shape or form produced to the Court to prove that Smith and Wasserman were swindlers, pickpockets or thieves, and there was no proof that they were frequenting or attending the Grove Street Tube Station for an unlawful purpose.

The only thing Jennings and Wilson testified that they saw Smith and Wasserman do was to push and jostle some people and they became suspicious and arrested them as pickpockets.

Section 6 provides that "any person who shall be arrested at any Steamboat landing, Railroad depot—in any City, Town or County of this State and shall be proven to the satisfaction of the Magistrate before whom such person shall be brought to be *a common thief, burglar or pickpocket and to have been frequenting or attending such place or places for an unlawful purpose*, shall be deemed and adjudged to be a disorderly person."

A reading of Section 6 shows that in order to have a conviction in this case it is essential that it be proven that the defendants are pickpockets, thieves, or burglars and to have been frequenting or attending the Grove Street tube station for an unlawful purpose.

Police Officers Jennings and Wilson only testified that they saw Smith and Wasserman push and jostle some people.

POINT II.

The conviction of the prosecutors was based upon matters outside of the record.

This point is covered by the third and fourth reasons (pp. 25-26).

The conviction is found on pages 11, 12, 13, 14, and 15 of the record.

A mere reading of the testimony and the conviction show that there is no basis from the evidence, for the majority of the finding in the conviction.

On page 12 the conviction states that the said defendants were then and there upon said place of public resort with the intent to pick pockets, to steal and that the said defendants, Smith and Wasserman, are swindlers, pickpockets and thieves.

There is no proof before the Court that the said Smith and Wasserman are swindlers or were swindlers, pickpockets or thieves, or that they were there with the intent to pick pockets or to steal.

On page 14 the conviction states that Smith and Wasserman are found guilty of being pickpockets and thieves and of voluntarily loitering upon and of obstructing and interfering with persons who were lawfully upon the said Grove Street tube station places of public resort, in the City of Jersey City, and of frequenting and attending such places of public resort for the unlawful purpose of stealing.

There was no proof produced before the Court *that either Smith or Wasserman were pickpockets or thieves or that either of them was loitering, obstructing or interfering with persons*, and there was no proof produced that they were loitering or frequenting such places for the unlawful purpose of stealing.

This conviction by the Court is without any basis whatever in the evidence.

POINT III.

The uncontradicted evidence was to the effect that the prosecutors were not guilty of any violation of Section 6 of the Disorderly Persons Act.

This point is covered by the fifth reason (p. 26).

We will not under this point restate the evidence which has been referred to under previous points.

It is sufficient to say that there is no evidence to show that the defendants were frequenting the Grove Street tube station for an unlawful purpose, and, therefore, the conviction brought up must be reversed and set aside.

POINT IV.

Section 6, Chapter 239 of the Laws of 1898—and the conviction of prosecutors thereunder is unconstitutional and in violation of prosecutors constitutional rights.

This point is covered by the eighth and ninth and tenth reasons (pp. 26-27).

We have been unable to find any decision in this State as to the constitutionality of this particular section of the Disorderly Persons Act.

The effect of this Act is to place in a different category from other persons, a person who has been convicted of pickpocketing in this State, or another state. A man who has been convicted of pickpocketing in another state and has suffered the sentence that the law of that state prescribes, should not have any further punishment inflicted upon him by the law of this State.

In this case neither of the defendants took the stand as in the *Rothman* case and no record of any previous conviction was offered against either of them.

Conclusion.

It is respectfully submitted that the conviction below be set aside, and it should also be noted that neither of the defendants took the stand in this case as in the case of the *State v. Morris Rothman*, and there was no proof produced by the police officers that either of the defendants had a record, nor was any purported record of conviction offered in this case that either of the defendants was a swindler, pickpocket or thief.

The Supreme Court in its opinion below decided that this case is substantially similar to that of *Rothman v. State* of the May Term and decided November 12, 1925, the same day this case was decided.

It is respectfully pointed out that in the *Rothman* case the defendant took the stand and his criminal record was admitted, but in this case neither of the defendants took the stand and there is no proof produced by the police officers that either of the defendants had a criminal record or was any previous record of conviction offered in this case that either of the defendants was a swindler, pickpocket or thief.

We respectfully submit that this case is directly in point and identical with the case of the *State v. Jacob Cohen*, decided November 12th, 1925, where the Supreme Court said: "In our judgment the evidence set forth in the record of conviction does not show or tend to show that the defendant was a common thief and pickpocket," and is distinguishable from the *State v. Morris Rothman* and we respectfully submit that on these state of facts the conviction should be set aside.

We respectfully submit that this case is identical with the case of the *State v. Cohen* where the conviction of the lower court was reversed. In both the *Cohen* case and in this case the only evidence

against the defendants was the testimony of the police officers that they saw the defendants push against or jostle some people. In the *Rothman* case there was evidence of jostling and also the admission of the defendant on the stand of his long criminal record.

We respectfully submit that this case should be bound by the decision in the case of the *State v. Cohen* as it is distinguishable from the case of the *State v. Rothman*.

EDWARD M. SALLEY,
HYMAN BRODSKY,
Attorneys of Plaintiffs-in-Error.

[1888]

