

# INDEX.

	PAGE.
Notice of Appeal .....	i
Grounds of Appeal .....	ii
Notice of Appeal to Supreme Court.....	1
Summons .....	2
Complaint .....	3
Answer .....	4
Amended Complaint .....	5
Answer to Amended Complaint .....	6
Rule to Show Cause .....	7
Rule reducing Judgment .....	8
Remittitur .....	9
Rule discharging Rule to Show Cause ....	9
Rule extending Time .....	10
Judgment .....	11
Certificate of Clerk .....	12
Motion for Non-suit .....	54
Motion to Direct Verdict .....	78
Charge to Jury .....	78
Requests to Charge .....	87
Exception to Charge .....	88
Grounds of Appeal (Supreme Court) .....	89
Opinion of Supreme Court .....	91
Rule for Judgment .....	97

## TESTIMONY FOR PLAINTIFF.

W. Wallace Bingham,	
direct examination .....	13
cross " .....	20
re-direct " .....	32, 35
re-cross " .....	34
Minnie Bingham,	
direct examination .....	35
cross " .....	37

	PAGE.
Frederick Bristow,	
direct examination .....	39
cross " .....	41
re-direct " .....	47
re-cross " .....	48
John W. Palmer,	
direct examination .....	50
cross " .....	52

TESTIMONY OF DEFENDANT.

George J. Schindel,	
direct examination .....	55
cross " .....	63

*Notice of Appeal.*

**Notice of Appeal.**

Filed April 24, 1918.

**New Jersey Supreme Court.**

10

<p>W. WALLACE BINGHAM, JR.,  <i>Plaintiff-Respondent,</i>  <i>vs.</i>          GEORGE J. SCHINDEL,  <i>Defendant-Appellant.</i></p>	}	<p><i>Action at Law.</i>  <i>On Appeal from Supreme Court.</i>  <i>Notice of Appeal.</i></p>
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20

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in this cause in the Supreme Court of the State of New Jersey.

Dated April 22, 1918.

Yours respectfully,

LEVY & FENSTER,  
*Attorneys of Defendant.*

30

To JOHN W. PALMER, Esq.,  
*Attorney of Plaintiff.*

Service acknowledged April 23, 1918.

JOHN W. PALMER,  
*Attorney of Plaintiff.*

40

*Grounds of Appeal.***Grounds of Appeal.**

Filed May 1, 1918.

**New Jersey Court of Errors and Appeals**

10	W. WALLACE BINGHAM, JR., <i>Plaintiff-Respondent,</i>  <i>vs.</i>  GEORGE J. SCHINDEL, <i>Defendant-Appellant.</i>	}	<i>On Appeal          from          Supreme          Court.            Grounds of          Appeal.</i>
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The appellant states the following grounds of appeals:

- 20 1. The determination of the Supreme Court that the action of the Essex County Circuit Court whereby the following question propounded to the plaintiff on cross examination: "Q Did you ever give any checks for automobile tires?" was excluded, was not erroneous.
2. The determination of the Supreme Court, that the Essex County Circuit Court was not in error in denying the motion to non-suit and the motion to direct a verdict for the defendant.
- 30 3. The determination of the Supreme Court, that there was no error in the charge of the court at the trial, wherein the court said: "In determining whether or not the words were spoken, you have a right to consider in connection therewith the testimony of Mr. and Mrs. Bingham relating to a conversation on Orange Street, to which your attention will presently be called."

LEVY & FENSTER,  
*Attorneys of Appellant.*

40

Service acknowledged by John W. Palmer, attorney of respondent, on April 30, 1918.

*Notice of Appeal.*

**Notice of Appeal.**

Filed May 23, 1917.

**Essex County Circuit Court.**

10

W. WALLACE BINGHAM, JR.,

*Plaintiff,*

*vs.*

GEORGE J. SCHINDEL,

*Defendant.*

*Action at  
Law.*

*Notice of Ap-  
peal.*

TAKE NOTICE that the defendant appeals to the  
Supreme Court of the State of New Jersey from  
the whole of the judgment entered in this cause.

20

Yours respectfully,

LEVY & FENSTER,  
*Attorneys of Appellant.*

Dated May 22, 1917.

To JOHN W. PALMER, ESQ.,  
*Attorney of Plaintiff.*

30

40

*Summons.*

**Summons.**

Filed October 30, 1916.

The State of New Jersey to George J. Schindel:

10

You are summoned to answer the annexed  
complaint of W. Wallace Bingham,  
[L. s.] Jr., in an action at law in the Essex  
County Circuit Court. And take no-  
tice that unless you file your answer to said  
complaint with the Clerk of the Essex County  
Circuit Court, at Newark, within twenty days  
after service upon you of this writ and the  
annexed complaint, the plaintiff may proceed  
in the suit and judgment may be entered against  
you.

20

WITNESS, the Honorable Nelson Y. Dungan,  
Judge of the Essex County Circuit Court, at  
Newark, this twenty-seventh day of October,  
nineteen hundred and sixteen.

JOSEPH McDONOUGH,  
*Clerk.*

JOHN W. PALMER,  
*Attorney.*

30

40

*Complaint.*

**Complaint.**

Filed October 30, 1916.

Plaintiff, W. Wallace Bingham, Jr., residing at No. 230 North Fourth street, in the City of Newark, County of Essex and State of New Jersey, says that: 10

FIRST COUNT.

1. On December 4, 1915, defendant spoke in the presence and hearing of Frederick W. Bristow, the following words concerning the plaintiff: "I know of Bingham's having given a check in payment for automobile tires when he did not have an account, and can prove this."

2. Said words were malicious and false. 20

SECOND COUNT.

1. On December 4, 1915, defendant spoke in the presence and hearing of Frederick W. Bristow, the following words concerning the plaintiff: "Bingham conducted himself improperly with women while his wife was ill in the hospital that he had them at his house. This can be proven by people living in the house at the time."

2. Said words were malicious and false. 30

Plaintiff claims as damages on the two counts \$10,000.

JOHN W. PALMER,  
*Attorney for Plaintiff.*

*Answer.*

Served the within summons and complaint Oct. 30, 1916, personally upon George J. Schindel, the within named defendant at his place of business, Bamberger's Store, Halsey & Market streets, Newark, N. J.

10

RALPH B. SCHMIDT,  
*Sheriff.*

By JOHN L. KANE,  
*Special Deputy.*

**Answer.**

Filed November 13, 1916.

20

George J. Schindel, the defendant in the above entitled action, residing at No. 65 Glenwood avenue, in the City of East Orange, County of Essex and State of New Jersey, answering the plaintiff's complaint says that:

1. This defendant denies each and every of the allegations contained in paragraphs 1 and 2 of the first count of the said complaint.
2. This defendant denies each and every of the allegations contained in paragraphs 1 and 2 of the second count of the said complaint.

30

LEVY & FENSTER,  
*Attorneys for Defendant.*

40

*Amended Complaint.***Amended Complaint.**

Filed December 19, 1916.

Plaintiff, W. Wallace Bingham, Jr., residing at No. 230 North Fourth street, in the City of Newark, County of Essex and State of New Jersey, says that: 10

## FIRST COUNT.

1. On December 4, 1915, defendant spoke in the presence and hearing of Frederick W. Bristow, secretary of Benjamin and Johnes, by whom the plaintiff was employed, the following words concerning the plaintiff:

“I know of Bingham’s having given a check in payment for automobile tires when he did not have an account, and can prove this.” 20

2. Defendant meant thereby that the plaintiff had, by means of said check, secured goods under false pretenses and with intent to defraud the party from whom such tires were purchased.

3. Said words were malicious and false.

Plaintiff demands on the First Count, \$5,000 damages. 30

## SECOND COUNT.

1. On December 4, 1915, defendant spoke in the presence and hearing of Frederick W. Bristow, secretary of Benjamin and Johnes, by whom the plaintiff was employed, the following words concerning the plaintiff: “Bingham conducted himself improperly with women while his wife was ill in the hospital; he had them at his house. This can be proved by people living in the house at the time.” 40

*Answer to Amended Complaint.*

2. Defendant meant thereby that the plaintiff had been guilty of adultery or immoral conduct with said women.

3. Said words were malicious and false.

Plaintiff claims as damages on the Second Count \$5,000.

10

JOHN W. PALMER,  
*Attorney for Plaintiff.*

**Answer to Amended Complaint.**

Filed December 28, 1916.

20

George J. Schindel the defendant in the above entitled cause, residing at No. 65 Glenwood avenue, in the City of East Orange, Essex County, and State of New Jersey, answering the plaintiff's amended complaint says that:

1. This defendant denies each and every of the allegations contained in paragraph 1, 2 and 3 of the first count of the said complaint.

30

2. This defendant denies each and every of the allegations contained in paragraph 1, 2 and 3 of the second count of the said complaint.

LEVY & FENSTER,  
*Attorneys for Defendant.*

40

*Rule to Show Cause.*

**Rule to Show Cause.**

Filed April 4, 1917.

Application having been made to the Court within six days after the verdict in the above stated cause, and the Court having considered the same: **10**

IT IS NOW ORDERED, that the plaintiff do show cause before this Court at the Court House in the City of Newark on Friday, April 27, 1917, at two o'clock in the forenoon why a new trial should not be granted in the above stated cause:

IT IS FURTHER ORDERED, that all objections noted by defendant as grounds of appeal shall be reserved to him and not waived by taking this rule, but no reason shall be assigned for a new trial which shall include any of said objections. **20**

On motion of

LEVY & FENSTER,  
*Attorneys of Defendant.*

Dated April 3rd, 1917.

Let this rule be entered in the minutes of the Court. **30**

NELSON Y. DUNGAN,  
*Circuit Court Judge.*

*Rule reducing Judgment.*

**Rule Reducing Judgment.**

Filed April 30, 1917.

10 A rule to show cause in the above stated case why the verdict rendered therein should not be set aside and a new trial granted, having come on to be heard by the Court and the Court having heard and considered the arguments of counsel, and being of the opinion that the amount of the damages is excessive.

20 It is on this 30th day of April, nineteen hundred and seventeen, ORDERED, that if the plaintiff will remit the sum of eight hundred dollars, (\$800) from the verdict rendered in this case the rule to show cause will be discharged and the motion to set aside the verdict will be denied; otherwise the verdict will be set aside and a new trial granted with costs to abide the event of suit.

On motion of

LEVY & FENSTER,  
*Attorneys of Defendant.*

30 Let this rule be entered in the minutes of the Court.

NELSON Y. DUNGAN,  
*Circuit Court Judge.*

*Rule discharging Rule to Show Cause.*

**Remittitur.**

Filed May 16, 1917.

The plaintiff in the above entitled cause, W. Wallace Bingham, Jr., hereby remits the sum of eight hundred dollars (\$800.00) from the verdict of one thousand, eight hundred dollars (\$1,800.) rendered in this cause. 10

JOHN W. PALMER,  
*Attorney of Plaintiff.*

**Rule Discharging Rule to Show Cause.**

Filed May 15, 1917. 20

The plaintiff having remitted eight hundred dollars (\$800), from the verdict of one thousand eight hundred dollars (\$1,800.00), rendered in this cause, and having filed a Remittitur to that effect.

It is on this 15th day of May, A. D. 1917, ORDERED that the Rule to Show Cause allowed herein on the third day of April, 1917, be and the same is hereby discharged. 30

On motion of

JOHN W. PALMER,  
*Attorney of Plaintiff.*

Rule allowed in open court this day of May, A. D. 1917.

NELSON Y. DUNGAN,  
*Circuit Court Judge.* 40

*Rule extending Time.*

**Rule Extending Time, &c.**

Filed May 23, 1917.

10 It appearing to the Court that the defendant in the above stated action has filed a notice of appeal from the judgment entered therein and application being made for further time to file a recognizance of bail, and the Court being of the opinion that such application should be granted.

20 IT IS ORDERED, that the defendant have until the 24th day of May, instant, to file in the office of the Clerk of this court a recognizance of bail pursuant to the statute in such case made and provided, and that after the filing of such recognizance of bail, all proceedings on said judgment, shall be stayed.

Dated May 23, 1917.

Let this rule be entered in the minutes of the Court.

NELSON Y. DUNGAN,  
*Circuit Court Judge.*

30 On motion of

LEVY & FENSTER,  
*Attorneys of Defendant.*



*Certificate of Clerk.*

## ESSEX COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } *ss.*

10 I, JOSEPH McDONOUGH, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey,

DO HEREBY CERTIFY that the foregoing is a true and correct copy of a certain Notice of Appeal, transcript of entire proceedings and judgment record in the case of W. Wallace Bingham, Jr. v. George J. Schindel and the same is taken from and compared with original papers and record and as the same now remains on the files of said office.

20 IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said court and county at Newark, N. J., this 25th day of May, A. D. 1917.

[L. s.] JOSEPH McDONOUGH,  
*Clerk.*

30

40

*W. Wallace Bingham, direct.*

ESSEX CIRCUIT COURT.

W. WALLACE BINGHAM, JR.,

*vs.*

GEORGE J. SCHINDEL.

10

Transcript of shorthand notes of testimony, and so forth, taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., March 6, 1917.

Before Hon. NELSON Y. DUNGAN, Judge, and a Jury.

John W. Palmer for plaintiff.

Levy & Fenster for defendant.

Jury drawn and sworn.

20

Mr. Palmer opened for plaintiff.

Mr. Fenster opened for defendant.

W. WALLACE BINGHAM, JR., sworn for plaintiff.

*Direct examination* by Mr. Palmer.

Q Mr. Bingham, are you the plaintiff in this cause? A Yes, sir.

Q Where do you reside? A 230 North Fourth street, Newark.

30

Q Previous to that where did you reside? A At 228 North Second street.

Q And previous to that? A 115 North Fourth street.

Q By whom are you employed? A By the Crucible Steel Company.

Q By whom were you employed previous to that? A Benjamin & Johnes.

40

*W. Wallace Bingham, direct.*

Q Are you acquainted with Mr. Schindel, the defendant in this case? A Yes, sir.

Q How did you become acquainted with him?

A Through being a tenant in his house.

Q Where was his house? A 21 Myrtle avenue, Roseville.

10 Q How long did you live there? A One year and two months, as near as I can recall.

Q In what year was that? A I moved there in 1914, and moved out in 1915.

Q At the time you ceased being a tenant of Mr. Schindel's were you indebted to him? A Yes.

Q For what? A The last two months' rent.

Q What was the amount? A \$70.

20 Q How did this debt arise? A I had been out of employment two or three months, which followed a long period of sickness in my family.

Q Has the debt since been paid? A It has not in full.

Q Did Mr. Schindel ever take any step towards collecting the money from you? A A short time ago.

30 Q Just tell the Court and jury just what steps Mr. Schindel took to collect this money from you. A In the fall of 1915, which immediately followed my leaving in the spring Mr. Schindel's house, my wife and I drove up Orange street in the car, and stopped at one of the stores, and met Mr. Schindel, who stopped us. Mr. Schindel—may I use the language that was used?

Q Yes. A Mr. Schindel stopped me, and remarked that "You are a hell of a fellow riding around in automobiles, and you don't"—

40 *Mr. Fenster.* I object. It is not material.

*W. Wallace Bingham, direct.*

*The Court.* Not on the alleged slander itself, but anything which may show malice may be given in evidence.

A (Continued.) "You are a hell of a fine fellow riding around in automobiles and not paying your bills." I tried to explain to Mr. Schindel my having the automobile, which we had bought in more prosperous times, was due to the fact that a party to whom I had rented it had left it in the garage with a bill against it, and I had to take it to save it, and I had only used it for demonstrating purposes, and had only taken my wife up to the store that evening. He said, "I know it is a damn lie, for you and your wife go to the theatre two or three times a week, and the money you spend for that you could pay to me." And I tried to explain that my wife and I had only gone to the theatre three or four times, and visited a few ten-cent movie shows, was the only recreation we had. He knew a damn sight better. Mr. Schindel said, "Are you going to pay me the money you owe me?" I said, "I can't pay it now, I have only a few dollars to my name." He said, "I am going to your employer, and they ought to fix you, they ought to know what kind of a man they have down there. My one ambition from now on is to put you on the bum; I am going to your employers and tell them what kind of a man you are; I have no idea of getting the money, but I will queer you with them." This was on November 6th.

Q At the time of this conversation was anyone else present? A Mrs. Bingham was with me at the time, but when the heated language started I advised her to go in the store and do her shopping, so we would have it out alone.

*W. Wallace Bingham, direct.*

Q Was anything said after she came out of the store? A Mr. Schindel repeated the gist of his remarks to Mrs. Bingham after she came out of the store; he told her what he had told me in regard to threats; he repeated that he was going to my employers and queer me.

10 Q In the presence of Mrs. Bingham he threatened he would go to your employers? A He followed the threat up.

Q Not with the intent of getting the money, but with the intent of putting you on the bum? A He remarked, "I intend to put you on the bum."

Q As a result of his threat did Mr. Schindel ever go to your employer? A Yes, sir; he made two visits there, one visit on a Saturday  
20 noon.

Q Did you see him at the time? A Yes, sir, I met Mr. Schindel in the hall. Mr. Schindel asked me if I intended to pay him, and I told him that I wasn't any more able to pay him at that date than I had been at the last meeting. "Well," he said, "I have but one course, I will go inside and do as I said I would do."

Q Did he subsequently go inside? A Yes,  
30 I showed Mr. Bristow, pointed him out to him and told him the only thing I could do was let him go in, which he did.

Q Did he go in Mr. Bristow's office? A Yes, sir; he did.

Q Did you see him go in? A Yes, sir.

Q Did you hear the conversation that took place? A No, sir; I did not.

Q How long was he there? A On the first visit he was merely there two or three minutes,  
40 Mr. Bristow could not see him.

*W. Wallace Bingham, direct.*

Q Subsequent to this visit which you are now speaking of, did he call again? A Yes, sir, he did.

Q How much later? A About two weeks.

Q Did you see him the second time he called?  
A Yes, sir, I did.

Q Did you have any conversation with him? 10  
A Followed exactly the same as followed the first visit.

Q What did you say to him? A I told Mr. Schindel I could not pay him, it was following his demand that I pay him, and he replied he would go right in and finish up what he had started.

Q Did he go in to see Mr. Bristow? A Yes, sir, he did.

Q Did you see him go in Mr. Bristow's office? A Yes, sir, I did. 20

Q Did you hear what took place in the office? A No, sir; I sat within 15 feet, but I could not hear.

Q Did Mr. Bristow ever call your attention subsequently to this second visit, as to the things Mr. Schindel had told him concerning you? A Yes, sir, he did.

Q As a result of what he told you did you give Mr. Schindel an opportunity to apologize to you concerning it? A Yes, sir, I did, immediately. 30

Q How did you extend such an invitation to him? A I telephoned Mr. Schindel in Mr. Bristow's presence.

Q What did you say to him? A I asked him to come to Mr. Bristow and retract his remarks which were not true.

Q What did he tell you? A "Go to hell."

Q He told you to go to hell? A Yes, sir. 40

*W. Wallace Bingham, direct.*

Q Did he say anything else to you in answer to your invitation to come up and square your reputation with your employer? A His only reply personally was for me to go to hell, and I believe he had told subsequently two representatives.

10 Q Subsequent to this visit at the office of your employer did he ever adopt any other course to collect the money? Did he ever sue you? A Seven or eight months afterward.

Q Did he ever sue you? A Yes, sir.

Q When did he sue you? A I think on August, 1916.

Q And when were these visits which he made to your employer? A November and December, 1915.

20 Q Did he recover judgment against you as a result of that suit? A Yes, sir, he did.

Q As a result of the judgment which he recovered against you did he take any other step? A Yes, sir; he had me up on supplementary proceedings.

30 Q Who was present in Mr. Bristow's office, if you know, in addition to Mr. Bristow and Mr. Schindel, at the time Mr. Schindel was with him? Was anyone present aside from Mr. Schindel and Mr. Bristow? A Not in Mr. Bristow's office. Mr. Bristow's office adjoins by rail with the main office.

Q Whether they talked in Mr. Bristow's office, or not, wherever it was they did talk, was anyone present beside Mr. Bristow and Mr. Schindel? A There were several clerks in the office.

40 Q Were they in the office where this conversation took place? A No, sir; they were not.

*W. Wallace Bingham, direct.*

Q Was anyone else in Mr. Bristow's private office? A The telephone operator.

Q At the time Mr. Schindel called at your office did he speak in English? A Yes, sir.

Q Did he appear sober? A Yes, sir.

Q You are no longer connected with Benjamin & Johnes? A No, sir; I am not. 10

Q How long after these statements did you sever your relations with them? A About one year.

Q Are you married? A Yes, sir.

Q Have you any children? A I have four.

Q What is the age of the children? A Fifteen, twelve, six and nine months.

Q Have you any other income aside from the salary which you derive from the Crucible Steel Company? A No, sir, I have not. 20

Q What is your salary at the Crucible Steel Company? A \$20 a week.

Q Concerning this automobile in which you were riding when Mr. Schindel stopped you on Orange street, do you still own that automobile? A No, sir, I do not.

Q Have you sold it? A No, sir, I had to let it go to the people that had it in storage; the Roseville garage, in Roseville, took it in for a debt, took it in for storage, and the repairs I put on with the object of selling it, and the storage bill and all, I had no way of settling it. 30

Q Did they take the car from you? A They took the car and gave me a receipt.

Q Have they sold it? A I don't know what they did with it.

Q Have you any stocks or bonds? A No, sir; I have not.

Q Do you own any real property? A No, sir; I do not. 40

*W. Wallace Bingham, cross.*

Q Got any money in the bank? A No, sir; I have not.

Q Haven't you any money in bank at all?

A No, sir.

Objected to as irrelevant.

10 *The Court.* How is that important, Mr. Palmer?

*Mr. Palmer.* My understanding is—

*The Court.* You may show the wealth of the defendant, but can you show the property of the plaintiff?

*Mr. Palmer.* I understand I am entitled to show the social standing of both people.

*The Court.* I think perhaps you have gone far enough with that, as far as the plaintiff is concerned.

20

*Cross examination by Mr. Fenster.*

Q Where do you say you live now? A 230 North Fourth street.

Q How long have you lived there? A A year and one month.

Q Where did you live previous to North Fourth street? A 228 North Second street.

Q How long have you lived there? A Four months, I believe.

30

Q Where did you live previous to that? A 115 North Fourth.

Q How long did you live there? A Three months, I believe.

Q So that in one year and three months you lived in three different places, is that correct?

A Apparently.

Q Paid your rent in all those places?

*Mr. Palmer.* Objected to.

40 *The Court.* The objection will be sustained.

*W. Wallace Bingham, cross.*

Q You said, Mr. Bingham, that this note that you gave to Mr. Schindel you could not pay for the reason that you were out of employment, is that correct? A Yes, sir.

*Mr. Palmer.* Objected to on the ground that Mr. Schindel never said he gave Mr. Bingham a note. 10

*The Court.* Perhaps you ought to have shown that first.

Q You said that you did not pay Mr. Schindel for the last two months rent, you occupied premises 21 Myrtle avenue? A Yes.

Q Did you give him any instrument of indebtedness? A Yes.

Q What did you give him? A A note.

Q How much was that note for? A \$70.

Q You said on direct examination that you did not pay that \$70 because you were out of employment at that time? A I told him I could not pay it because I had no money to pay it. 20

Q Just so, and you did not have money because you were out of employment? A One was the direct result of the other; if I have no employment I have no money.

Q But you did say on direct examination that you were out of employment at that time; do you wish to withdraw that statement, or is that correct? A Ask me the question, I could not— 30

Q When did you first enter the employment of Benjamin & Johnes? A On May 24th.

Q What year? A I believe 1915.

Q May 24, 1915? A 1915.

Q Where did you work previous to May 24, 1915? A For two months I had not worked anywheres.

Q Did you have an automobile at that time? A Not in my possession. 40

*W. Wallace Bingham, cross.*

Q Did you ride around in an automobile at that time? A I don't recall that I rode around in a pleasure car of any kind; if I did, it wasn't mine.

10 Q Were you employed after the time that you gave this note to Mr. Schindel? A I think I had just started with Benjamin & Johnes; I think I had been there a week, I am not positive, I won't make a positive statement; I think so.

Q You think you worked with Benjamin & Johnes about a week at the time you gave this note? A I am not sure whether I gave him this note preceding my going there, or just afterwards; it was right around there.

20 Q Well, then, you say you started to work for Benjamin & Johnes on May 24, 1915; that is correct, is it? A I think it is, yes, as I remember it.

Q I show you this note, Mr. Bingham, is that your signature? A Yes, that is my note.

Said note marked D. 1 for identification.

Q That note is made for three months after date, April 29, 1915? A Oh!

30 Q So, according to this note, marked D. 1 for identification, you were employed at the time this note was due? A I have made no statement to the contrary.

Q You said on direct examination that you were not employed at the time that this money was due? A I beg your pardon, I said I was not able to pay on account of non-employment, I didn't say I was out of employment at the time the note came due.

40 Q At the time you could not pay this note, which was the date it was due, you were employed? A I was employed at the time it was due, but the result of my not having the money

*W. Wallace Bingham, cross.*

to pay it was on account of my having been unemployed, and I gave that as the reason; I did not say I was not employed at the time.

Q But you were employed about a month and a half at the time this note was due? A Yes, sir.

Q Now you say Mr. Schindel visited Benjamin & Johnes on two different occasions, one occasion being on a Saturday, do you remember what date? A November 20, 1915. 10

Q How is it that you remember the date, Mr. Bingham? A I had occasion to remember it, because I jotted it down at the time.

Q Did you make a memorandum at the time? A Yes, I did.

Q What was the reason for your making a memorandum that Mr. Schindel visited your employer? 20

*Mr. Palmer.* Objected to.

*The Court.* The objection is overruled.

A My employer brought the facts to me with the request that I prove them, or disprove them; for that reason I had a very good occasion to note the date.

Q Who do you mean by your employer? A My direct employer was Mr. Bristow, secretary of Benjamin & Johnes. 30

Q Didn't you say on direct examination that the first time Mr. Schindel visited your firm he could not see Mr. Bristow, and only stayed a few minutes? A I did say that.

Q How do you make the statement you just made that you saw Mr. Bristow, and for that reason you made a memorandum of the date? A I can retract that, my idea is I put the date down. 40

*W. Wallace Bingham, cross.*

Q I want to know just the truth? A I am telling the truth now, you made me lead up to an entangling question, but I am telling the truth. You asked why I know the date, I know the date Mr. Schindel made the threat.

10 Q I asked you how it is on direct examination you stated that the first time Mr. Schindel visited your firm he only stayed a few minutes, and he could not see Mr. Bristow? A That is perfectly right.

Q Now you say that you remember putting that date down for the reason you saw Mr. Bristow at that time, now which is correct?

Objected to.

Objection overruled.

20 A I say Mr. Bristow did approach me after the first call, Mr. Bristow did approach me endeavoring to find out what the trouble was about, what it was about.

Q Now you say that Mr. Bristow was there at the time Mr. Schindel made the first visit? A I didn't say anything else on my direct testimony, I said Mr. Bristow was there on both occasions, but the first occasion he could not see him.

30 Q You retract the statement made on direct examination, is that right? A I do not retract anything I said; I have never said Mr. Bristow was not there on Mr. Schindel's first visit.

*Mr. Palmer.* May it please your Honor, I would like to ask that reference be made to Mr. Bingham's testimony. Certainly the things accredited to him as having said I am positive he never said. I remember the words distinctly.

40

(Testimony read.)

*W. Wallace Bingham, cross.*

Q Now, Mr. Bingham, when was the other time that Mr. Schindel visited your firm? A As I recall it, it was on December 6th.

Q Of the same year? A Same year.

Q And did you not hear any portion of the conversation between Mr. Bristow and Mr. Schindel? A No, sir, I did not.

10

Q You also say, Mr. Bingham, that you gave Mr. Schindel an opportunity to square himself, is that right? A Yes, sir, I did.

Q When was this? A I have no recollection of that date, I know it was the evening following the second visit.

Q Then it was subsequent to December 6, 1915? A Yes, sir.

Q You don't know how long after that date? A I do not.

20

Q Where did you meet Mr. Schindel in the evening? A I did not meet him; I telephoned to him.

Q What did you say to Mr. Schindel? A I don't recall the conversation, except that I asked him to come back and retract what he had told Mr. Bristow.

Q When did you first find out about these statements that Mr. Schindel made about you? A As near as I can recall, without making positive statement, I think Mr. Bristow called me right over; if he did not, he called me over the next business day following, which, I think, was Monday.

30

Q Do you remember what day it was? A No, I do not.

Q Do you remember the date? A I don't remember the date he told me, no.

Q About when, approximately? A Some time either in November or December, I don't recall the exact date.

40

*W. Wallace Bingham, cross.*

Q When you telephoned Mr. Schindel did you telephone Mr. Schindel from the firm's office? A Yes, sir, I did.

Q Are you in the habit of working in the evening? A Yes, I was, at that time.

10 Q Did you call up Mr. Schindel at Bamberger's? A Yes, I did.

Q Don't you know that L. Bamberger & Company close at six o'clock in the evening? A Did I say at what time I called Mr. Schindel?

Q I presume when you say evening, you mean subsequent to six o'clock? A I called Mr. Schindel in the evening.

20 Q What time in the evening? A I don't recall what time, some time before Bamberger's close, of course. I got Mr. Schindel at Bamberger's.

Q In the evening? A In the evening; what I term in the evening; before I left for home.

Q And you called Mr. Schindel up for the express purpose of asking him to retract these statements he made about you in the presence of Mr. Bristow? A I had no other reason.

Q And you don't know what day Mr. Bristow told you about these statements? A No, I don't recall the exact date, no.

30 Q But you do recall the date that Mr. Schindel called the second time? A I won't try to recall exact dates, I may not be doing justice to myself in trying to do it; I am giving approximate dates to you.

Q You say approximately December 6th? A Well, I think November 16th or November 20th was the first call, I am not sure.

40 Q Did you go to see Mr. Bristow, or did Mr. Bristow approach you in reference to these statements? A Mr. Bristow called me over.

*W. Wallace Bingham, cross.*

Q Was this immediately after Mr. Schindel left? A No, I don't think it was the same day, I don't recall that even.

Q Well, Mr. Bingham, if Mr. Bristow told you on December 6, 1915, about these statements that Mr. Schindel made about you in his presence, will you kindly tell the Court and jury how it is that you first commenced this suit a year subsequent to the time these statements were made? A Yes, I will. Mr. Schindel had two or three opportunities to retract, and he would not do so. At that time I had no desire to push him. 10

Q Oh, I see. So Mr. Schindel has had various opportunities to retract? A Yes, I think he has.

Q Since that time? A I think he has.

Q Since the opportunity you gave him first, and still you have been waiting all this time for Mr. Schindel to retract those statements? A I did not say so. 20

Q You said he has had several opportunities during that year to retract, so you must have waited— A He has been approached during that time.

Q Did you approach him personally? A No, I did not.

Q Who did you have approach for you? A Do I have to say? 30

*The Court.* You had better answer.

A Mr. Herbert L. Thowless.

Q Is Mr. Thowless in court today? A He is not in court today, no.

Q Why didn't you have him in court today as a witness?

Objected to.

Objection sustained. 40

*W. Wallace Bingham, cross.*

Q How is it that you did not commence suit immediately after Mr. Schindel refused to retract this statement, which was a couple of days after he made it? A I do not attempt to go back and recall my mental attitude at that time. I don't know why I did not do it. I gave him an  
10 opportunity to retract it.

Q Yes, you gave him an opportunity to do so a day or so after he made the statement? A These things are not very agreeable.

Q That don't answer my question. A Answers it from my standpoint. The reason I did not bring it was because I did not want to unless I had to.

Q Why did you bring the suit a year subsequent to the time they were made? A Because  
20 the statements were made so broadcast I thought I was losing more than I was getting, or could have gotten.

Q Was not the reason you brought suit against Mr. Schindel because he had commenced suit against you on this note, and that is the reason you brought suit a year after? A You asked me why I waited a year was that I waited until he started suit, is it true I did that?

30 Q (Question read.) A I don't admit it.

Q Mr. Bingham, did you ever pay Mr. Schindel by check for part of the rent of premises, 21 Myrtle avenue? A I object to answering unless I have to.

*Mr. Palmer.* I object to the question.

*The Court.* The question is objected to, and I am inclined to sustain the objection unless you can show some reason why I should not do so; unless you want to show a  
40 malicious reason on the part of Mr. Schindel.

*W. Wallace Bingham, cross.*

Q Mr. Bingham, at the time you were sued by Mr. Schindel on the note, and taken up on supplementary proceeding before the Master in Chancery, did not you request an adjournment of that case for one week? A I believe I did.

Q And was not your reason for the adjournment that you promised that you would settle that matter within a week? A No, sir, it was not; I made no promises. 10

Q What was your reason for the adjournment, do you recollect? A Yes, I made an endeavor to raise the money to pay it with.

Q And did you ever pay it? A No, I have not; I was not successful.

Q Did you send your attorney over to see Mr. Schindel in Bamberger's during that week? A I don't recall that I sent him, or whether my attorney went over; I knew that he went. 20

Q Did you know that he went? A Yes.

Q Do you know why he went over to see Mr. Schindel, when he knew that Mr. Schindel— A Those things were left to my attorney at that time.

Q Isn't it a fact that you sent your attorney over to Mr. Schindel to tell him unless he withdrew this suit you would commence suit on slander against him? A I don't admit it. 30

Q (*By the Court.*) That does not answer the question, Mr. Bingham. The question is what is the fact, not whether you admit a thing, or whether you do not admit it. What is the fact? A I did not send or request Mr. Palmer to go to Mr. Schindel with any threat that I would sue for slander if he did not withdraw the suit.

Q (*By Mr. Fenster.*) Did you ever give Mr. Schindel any check in payment of the rent?

Objected to.

40

*W. Wallace Bingham, cross.*

*The Court.* I think that is the same question the Court sustained the objection to before.

(Question withdrawn.)

10 Q And did you appear before the Master in Chancery and testify in reference to this suit on this note? A Yes, I appeared personally.

Q And did you know that an order was made by the Judge in that matter, the Judge of the Montclair District Court, ordering that your employer pay so much of your salary on account of this judgment.

*Mr. Palmer.* I object to that question on the ground that it is incompetent and immaterial to this issue.

20 *Mr. Fenster.* I desire to show that Mr. Bingham was discharged from his employ with Johnes on this account.

(Objection withdrawn.)

Q Did you ever get that order? A I never saw the order, Mr. Fenster.

30 Q You say you met Mr. Schindel at a time when you were with your wife. Will you kindly state where you met Mr. Schindel? A On Orange street, Roseville, in front of Benedict's dry-goods store.

Q What time was this? A Between eight and nine o'clock at night.

Q And you say that you were with your wife at that time? A Yes.

Q Isn't it a fact that Mr. Schindel met you alone that evening? A No, sir; he did not.

40 Q You are positive that your wife was there? A Positive, my wife and I drove up together; as we stepped out of the car we met Mr. Schindel.

*W. Wallace Bingham, cross.*

Q You say that, assuming that December 6, 1915, is the correct date when these slanderous statements were made, you continued in the employ of Benjamin & Johnes about a year after, didn't you? A Yes.

Q When did you leave, what was the date that you left the employment of Benjamin & Johnes? A Some time in November, 1915. 10

Q For what reason, do you know?

Objected to as immaterial.

*The Court.* If it had reference to this matter you may ask direct questions.

(Question withdrawn.)

Q The reason of your leaving the employment of Benjamin & Johnes was not caused by these slanderous statements, was it?

Objected to as leading. 20

*The Court.* He may ask leading questions on cross examination. The objection will be overruled.

A Indirectly I believe that it was.

Q Can you tell me, Mr. Bingham, how it was that the firm waited for one year before this happened? A I have made no attempt to show the growing feeling from that time on.

Q So, as long as you were not—had no ill feeling against Mr. Schindel, so long they allowed you to remain in their employ? A I have never shown any ill feeling toward Mr. Schindel. 30

Q Then I repeat the question, was it for that reason that you left their employ? A I left Benjamin & Johnes employ because I had to.

Q What was the reason for your leaving? A The reason given me was on account of supplementary proceedings I was brought up under by Mr. Schindel. 40

*W. Wallace Bingham, re-direct.*

Q Were there other attachments against your salary prior to this one in question?

Objected to.

Objection sustained.

10 Q When you owned the automobile did you ever give any checks in payment for automobile repairs?

Objected to.

Objection sustained.

Q Did you ever give any checks for automobile tires?

Objected to.

Objection overruled.

20 *Mr. Palmer.* The reason I object is that it is attempting to show justification for these statements; there has been no justification filed, simply a denial that Mr. Schindel ever said this to Mr. Bristow.

*The Court.* Your objection now will be sustained.

An exception to this ruling is noted by the defendant as ground of appeal.

30 *Re-direct examination.*

Q Mr. Bingham, on your direct testimony you said that Mr. Schindel called twice at the office of Benjamin & Johnes by whom you were employed?

A Yes, sir.

Q On the first visit did you personally see Mr. Schindel? A Yes, sir.

*The Court.* He said he met him in the hall.

40 Q Did Mr. Schindel see Mr. Bristow? A Yes, sir.

*W. Wallace Bingham, re-direct.*

Q For what length of time were they talking?

A Approximately two or three minutes, possibly five.

Q When he returned two weeks later for the second visit how long was he closeted with Mr. Bristow? A I won't attempt to say; I think about ten or fifteen minutes.

10

Q Did he on the first visit have an opportunity to speak with Mr. Bristow? A Yes, sir.

Q You also testified, I believe, that it was in the evening or what you termed evening, when you spoke to Mr. Schindel, calling him up by telephone at Bamberger's; now, approximately what time? A Some time between four-thirty and six o'clock, I don't recall the hour; the lights were on, and for that reason I term it in the evening.

20

Q What time does the office of Benjamin & Johnes ordinarily stop working for the day? A Six o'clock.

Q Previous to your going with Benjamin & Johnes by whom were you employed? A By the Consolidated Button Company.

*The Court.* What does this rebut?

*Mr. Palmer.* The question was asked for the purpose of showing at the time of giving these notes, and not at the time they fell due, but at the time they were given, Mr. Bingham had no employment.

30

*The Court.* Proceed.

Q How much time elapsed between your leaving the Consolidated Button Company, and your going with Benjamin & Johnes? A Two months.

Q During that time were you employed at all?

A No—I think I had two or three weeks tem-

40

*W. Wallace Bingham, re-cross.*

porary employment, at a few dollars a week, to carry me over; I had no permanent position.

*Re-cross examination.*

Q But you were employed since May 15, 1915, you were employed at Benjamin & Johnes? A  
10 I went with Benjamin & Johnes on May 24th.

Q And this note was due three months subsequent to April 29th? A Yes.

Q So you were employed by Benjamin & Johnes at the time this note was due? A Yes, sir.

Q You now say on re-direct examination that you called up Mr. Schindel at Bamberger's between four-thirty and five? A No, four-thirty and six.

20 Q On cross examination you said you did not know what time it was? A I told you it was in the evening, Mr. Fenster.

Q Now you know it was between four-thirty and six? A I know it was when the electric lights were on, it was about the time we turned them on.

Q How do you know Mr. Bristow was closeted with Mr. Schindel on the second visit for ten or  
30 fifteen minutes? Were you outside, waiting for him? A He was not closeted; the office Mr. Bristow used at that time had a railing; Mr. Schindel was within 15 feet of me; my desk was immediately opposite; I sat at my desk all the time he was there.

Q And when he went in you were there? A Yes, sir.

Q One question I forgot to ask you, and that is you say you sent Mr. Thowless to see Mr.  
40 Schindel? A Yes.

*Minnie Bingham, direct.*

Q Several times, to ask him to retract this statement? A I did not say several times, I said Mr. Thowless had gone there for me; I did not know how many times.

Q But you sent him there, is that it? Did Mr. Thowless know Mr. Schindel? A Not until he saw him, no.

10

Q Then a total stranger you sent him on two occasions to Mr. Schindel and asked him to retract? A I haven't numbered the occasions, Mr. Thowless went there as my attorney.

Q Mr. Thowless is an attorney? A An attorney in this city today.

Q How many months elapsed since the last time Mr. Thowless went to see Mr. Schindel before you commenced the suit? A I have no recollection .

20

*Further re-direct examination.*

Q If Mr. Schindel had taken advantage of the opportunity you extended to him to come to your employers and retract the words he had used, would you have sued him for slander?

Objected to.

Objection sustained.

30

MINNIE BINGHAM, sworn for the plaintiff.

*Direct examination by Mr. Palmer.*

Q Mrs. Bingham, are you the wife of W. Wallace Bingham, the plaintiff in this case? A Yes, sir.

Q Have you ever resided at house 21 Myrtle avenue in the City of Newark? A Yes, sir.

Q Who was your landlord while you lived in the house? A Mr. Schindel.

40

*Minnie Bingham, direct.*

Q How long have you known Mr. Schindel, Mrs. Bingham? A Only since I went there to live in the apartment.

Q Were you present at an interview which Mr. Schindel had with Mr. Bingham on Orange street in Newark some time in November, 1915?

10 A I was.

Q Will you kindly tell the Court and jury what took place at that meeting? A Mr. Bingham had taken me to the store in the automobile; when we stopped in front of the store Mr. Schindel came across the sidewalk to us and started at Mr. Bingham about riding in an automobile when he owed him money; and when I saw the conversation was apt to be disagreeable I walked into the store and left them, and waited  
20 in the store some time, and then went out on the walk and asked Mr. Bingham if he would not go and Mr. Schindel called me and said he wanted me to know what he had said to Mr. Bingham; I told him not to bring me into it whatever.

Q What did he say he had told Mr. Bingham?

A He had told Mr. Bingham he was tired waiting for the money, and now he didn't want the money, he simply was after him and would get him, and I asked him what he would do, and he  
30 said he would go to his employers and queer him.

Q Did you say anything to him? A I asked him if he realized what it meant to the children and I, and he said Mr. Bingham didn't care, he didn't see why he should worry.

Q Did you ever have any subsequent conversation or meeting between yourself and Mr. Schindel? A No.

Q Was anybody else present at this meeting besides Mr. Schindel, Mr. Bingham and yourself?  
40 A No.

*Minnie Bingham, cross.*

Q Where did the conversation take place, right on the pavement? A On the sidewalk, in front of the store.

Q What street was this on? A Orange street.

Q About what time in the evening did this conversation take place? A I don't know the exact time, eight o'clock, between eight and nine. 10

Q Do you remember the date? A Around November, the early part of November.

Q What year? A 1915.

Q Have you any children? A I have four.

Q Have you any income aside from what your husband earns?

Objected to.

Objection sustained. 20

*Cross examination by Mr. Fenster.*

Q Do you remember what store you went into at the time you left Mr. Schindel and Mr. Bingham outside? A Yes, I think I went into Benedict's department store, drygoods store, on Orange street.

Q Near what street? A Eleventh street.

Q And how long were you in the store, Mrs. Bingham? A I haven't any idea; I know I was there quite a few minutes, did quite a little purchasing, and waiting afterwards for them to get through talking. 30

Q Ten minutes? A Yes, at least ten minutes.

Q Did you hear any part of the conversation between Mr. Bingham and Mr. Schindel before you went into the store? A Only the first remark Mr. Schindel made to Mr. Bingham about his riding in the car when he owed him money. 40

*Minnie Bingham, cross.*

Q Did you say anything in response to that?

A No, I did not.

Q And as soon as he said that you went into the store, is that right? A Well, he made several other little remarks; I saw it was apt to be a disagreeable conversation and I walked away; I didn't want to hear it.

10

Q Then you considered Mr. Schindel's statement about his riding about in an automobile when he owed him money a very disagreeable statement, is that right? A I didn't say so.

Q What was it that made you think it was apt to be disagreeable conversation? A The language he was using, swearing.

Q Kindly state what the language was? A I don't care to unless it is necessary.

20

*The Court.* No, a woman is not required to do that.

(Question withdrawn.)

Q When you returned from the store Mr. Schindel waited for you to tell you just what he intended to do? A No, Mr. Schindel was still talking to Mr. Bingham when I came from the store.

30

Q How long did Mr. Schindel speak to you after you returned from the store? A Just a minute or two, just a few minutes.

Q Just a minute or two? A Just a few minutes.

Q And in that minute or two he told you what he intended to do, is that right? A Yes.

*Frederick Bristow, direct.*

FREDERICK BRISTOW, sworn for the plaintiff.

*Direct examination by Mr. Palmer.*

Q Mr. Bristow, I will ask you what your business is? A Secretary of Benjamin & Johnes.

Q Are you located in Newark? A Yes, sir, corner of Washington & Warren streets, the office at 42 Warren street. 10

Q Had the company ever in its employ one W. Wallace Bingham? A Yes, sir.

Q About how long was Mr. Bingham in the employ of the company, do you remember? A Early in May, 1915, to November, 1916.

Q Do you remember, Mr. Bristow, ever having received a visit from a Mr. George Schindel? A Yes, sir. 20

Q Will you just in your own way explain to the Court and jury what took place at the time or times that Mr. Schindel called upon you? A Mr. Schindel called in November, I think it was about November 20th, I recall that it was on a Saturday, I think it was a Saturday because I had an engagement that took me at noon, and Mr. Schindel called about that time, I wasn't able to see him because my time was up and I invited Mr.— 30

Q One moment, when you say you were unable to see him, do you mean physically unable to see him, or that you were unable to hear him out? A I was unable to give him time for an interview.

Q You did have some conversation with him, however? A I did, yes, sir, I told him I had an appointment and would not be able to talk with him at that time. I believe he told me what he wanted to talk about. I told him I didn't have 40

*Frederick Bristow, direct.*

10 time that day to talk with him, and invited him to come the following Monday. He did not call on Monday, but some time later, and I believe it was again a Saturday; whether it was the following Saturday or two weeks later, I would not be sure about it; but on a following Saturday he called; it was almost noon, and I also had an engagement, but I did give him time to tell me what he had on his mind.

Q Just repeat the conversation which he had with you, the way he opened it as near as you can recall? A He said that he wanted to tell me about this man who was in our employ, he said that Mr. Bingham was a tenant of his, he had not paid his rent, and I asked him what he wanted me to do about it; there were ways to collect rent if he had not been able to collect his rent. He said he was not so much interested in getting the money for the rent as he was in letting me know what kind of man we had working for us. Well, I asked him what he knew, and he said that he owned this house, that while Mrs. Bingham was away sick in the hospital Mr. Bingham had taken other women to the home there, and he said that this could be proven by other people in the house; and he also said that he knew Mr. Bingham had given checks for some automobile tires, or something of that kind, where he had no account. I had not met Mr. Schindel before, and did not know him at all, and I told him that these were pretty serious charges to make against a man, and asked him what he wanted me to do about it; he said that he wanted me to understand what kind of man he was, because he was afraid that I might give Mr. Bingham some position of trust in which we might become involved.

*Frederick Bristow, cross.*

Q Did he appear sober at the time? A Yes, sir.

Q Did he talk in English? A Yes.

Q Was anybody else present except you— A No one within hearing distance.

Q Were there, however, other people in the room? A In the room, yes, there is a telephone operator and other clerks, but we were separated by a railing and Mr. Schindel sat on one side of the table, and I sat on the other. 10

Q Did you ever hear Mr. Bingham call Mr. Schindel up and ask him to come and square Bingham with you for the remarks he had made? A I did not, no.

Q What were your relations with Mr. Bingham at the time he was employed there? A As employer. 20

Q Were you accustomed to going to lunch with each other? A No, sir.

Q Did you ever visit his house? A No, sir.

Q Had he ever visited yours? A No, sir.

Q Are you acquainted with his family? A No, sir. I have met his wife on one occasion.

Q When did you meet her? A Mrs. Bingham was visiting the office one evening, came there to meet Mr. Bingham, and I was introduced to her. 30

Q That is the extent of your acquaintance with her? A Yes, sir.

*Cross examination by Mr. Fenster.*

Q You say, Mr. Bristow, that Mr. Schindel made these supposed statements in your presence, is that right? A Made them to me.

Q There was no one else present there at the time? A Not within hearing distance. 40

*Frederick Bristow, cross.*

Q So that the only one who heard these supposed statements was yourself? A Yes, so far as I know.

10 Q Now I wish to repeat the exact words of these statements that you say were made in your presence: "I know of Bingham having given a check in payment of automobile tires when he did not have an account, and can prove this"; are those the exact words? A As I recall them, yes.

Q "And Bingham conducted himself improperly with women while his wife was ill in the hospital, he had them in his house, this can be proved by people living in the house at the time," are those the exact words? A Those are the substance of the words, I would not say I can repeat all the words he made use of.

20 Q Did you make a memorandum of these statements as soon as Mr. Schindel left? A Practically as soon, I did, yes, sir.

Q What were your reasons for making a memorandum of these statements? A The occasion and the charge was so unusual that I saw there would be some other occasion, probably, for referring to that interview, and I purposely made a memorandum of the interview.

30 Q Then you, Mr. Bristow, anticipated a suit in this matter? Is that right? A I anticipated nothing. As I have stated, Mr. Schindel came to me an entire stranger and made these statements, and I knew a man could not make statements of that kind without something following, so I assumed something would follow it.

40 Q Although Mr. Schindel came to you as a total stranger and made these statements you presumed that there was something going to follow, and for that reason you made a memorandum, is that correct? A I made a memoran-

*Frederick Bristow, cross.*

dum for safety, so I could refresh my memory in case I should be called upon at any time.

Q Have you that memorandum with you? A I have not.

Q Well, if you knew that these statements were going to be used in the future, how is it that you did not keep the memorandum of the statements that were made? A I made the memorandum and gave it to the attorney in this case, I believe, or gave it to Mr. Bingham, I am not sure which. 10

*Mr. Fenster.* Have you got that?

*Mr. Palmer.* No, I have not.

*Witness.* If I may correct myself, as I recall, I gave it to Mr. Bingham.

Q How soon after the statements were made did you give this memorandum to Mr. Bingham, how many days? A As I recall it this interview with Mr. Schindel was on Saturday, I was busy that afternoon, had another appointment, and on Monday, if my memory is right, I asked Mr. Bingham to explain this situation. 20

Q And did he explain the situation to you? A He denied the statement absolutely. I told Mr. Bingham if these things were true it was a pretty serious matter, and we did not want a man of that kind in our employ; if they were not true then he ought to know about it, because Mr. Schindel was evidently intending to do him harm; and I at that time made out on a memorandum the substance of the statements that had been made to me by Mr. Schindel. 30

Q Then, Mr. Bristow, you did not believe those statements to be true, did you?

*Mr. Fenster.* Objected to. A slanderous statement is a slanderous statement whether 40

*Frederick Bristow, cross.*

the party to whom it is made believes it or not.

*The Court.* The objection will be overruled.

Q (Question read.) A I had no basis for believing or disbelieving it.

10 Q And for that reason, you, as an employer of Mr. Bingham, allowed him to remain in your employment for a year subsequent to the time this statement was made, that is right, isn't it?  
A Yes, sir.

Q Did you ever receive any papers in reference to a suit brought by Mr. Schindel against Mr. Bingham? A I think there was a paper served, an attachment on Mr. Bingham's salary.

20 Q And do you recollect a conversation over the telephone with me in reference to this attachment? A Never having met you before, I don't know.

Q Well, do you remember any conversation over the telephone with some attorney with reference to this attachment? A I recall there was a conversation, yes, sir.

30 Q And do you remember, Mr. Bristow, stating over the telephone to this attorney that there were other attachments ahead of this one, and that we would have to wait our turn? A Other attachments, or an attachment; there was another attachment, and I stated that, yes.

Q Then there was another attachment against Mr. Bingham's salary prior to the time you received this one of Mr. Schindel's? A Yes, sir.

40 Q And for that reason you informed the attorney that he would have to wait until the other attachment was paid? A Yes, that was my understanding of the case, as I recall it; I asked an

*Frederick Bristow, cross.*

attorney whether that was not so, and he told me it was.

Q When did Mr. Bingham leave your employ, Mr. Bristow? A I think it was in November, 1916.

Q And for what reason? A The reason for Mr. Bingham leaving our employ was that there was an accumulation of rumors which in each case I had attributed to this same source, and it was becoming so serious that Mr. Bingham's services had become impaired. 10

Q In other words, there were so many attachments against Mr. Bingham's salary that it was becoming a nuisance to your firm, is that right?

A No, sir, I did not say there were any attachments, I said a moment ago there was one attachment. 20

Q One attachment, and the Schindel attachment; there were two attachments in all? A I did not offer this as a reason for Mr. Bingham being dismissed.

Q But there was this nuisance, that was the reason for it? A The circulation of rumors against Mr. Bingham's character which caused the impairment of his services.

Q Where did you get these rumors from? A I cannot locate, there were various stories among different employees. 30

Q And it was all in addition to this matter that was pending in reference to Mr. Schindel?

A In addition to that attachment, yes.

Q And for that reason you wrote a letter to the attorneys of Mr. Schindel returning this order, and stating that Mr. Bingham was no longer in your employ, that is correct, isn't it? A I returned it because that was the fact, Mr. Bingham being no longer in our employ the order could not be effective. 40

*Frederick Bristow, cross.*

Q Now, isn't it possible, Mr. Bristow, that the wording of the statements that Mr. Schindel made to you were a little different from what you state?

A I don't know what may be possible.

10 Q Isn't it possible that Mr. Schindel may have stated to you that he knew that Mr. Bingham had given him checks that were no good? A The conversation was as I have stated.

Q Was about a check; that Mr. Bingham had given a check? A A check for automobile tires where there was no account.

20 Q But it is possible he may have simply said that Mr. Bingham had given him checks that were no good, instead of without having an account, there being some difference between those two statements? A Anything might be possible; I testified to what actually occurred to the best of my recollection refreshed by the memorandum I made at the time.

Q But it may be that he may have made that statement? A Which statement?

30 Q That he had given checks to him that were no good? A I don't know, I didn't make a memorandum of anything that I could not testify to, and have not testified to anything that I was not fairly sure about.

Q Did you ever hear Mr. Bingham call up Mr. Schindel and ask him to retract these statements that were made in your presence? A No, sir.

Q Were you interested enough, Mr. Bristow, to have Mr. Schindel retract those statements?

A If Mr. Schindel had come to me and retracted them I should have listened to him.

Q But you never asked Mr. Bingham to obtain a retraction of those statements, did you?

40 A I don't recall that I did.

*Frederick Bristow, re-direct.*

*Re-direct examination.*

Q You made reference to various rumors which, subsequent to those brought to you by Mr. Schindel, had arisen around the office, which impaired Mr. Bingham's usefulness to the concern; were you ever able to trace where those rumors had their source? These things among the various employees which you say sprung up after Mr. Schindel had been there? A I remember one case very much in tune, that was Mr. Johnes came to me one day and told me about a statement that had been made to him by a buyer, I believe, in a department with which we are interested, in the corset department, to the effect that we had a man in our employ who ought not to be there, something to that effect; I cannot state, or testify, just what remark was made; and Mr. Johnes was so far impressed that he came to me about it, and I explained to him this attack that had been made on Mr. Bingham by Mr. Schindel, and he seemed to have the same feeling about it that I did, that it was a very unfortunate thing for a man to do if he was not pretty sure that the facts were as he insisted. I am not able to say just what Mr. Schindel said to this buyer.

Q Was this buyer employed also by Bamberger & Company? A I understand he was a buyer in the corset department of Bamberger & Company.

Q When Mr. Schindel came to see you the first time did he mention the fact he also was employed at Bamberger's? A I think he did, in one of the departments.

Q And it was necessary to dispense with Mr. Bingham's services with Benjamin & Johnes; who did that? A I did.

*Frederick Bristow, re-cross.*

Q You made known to him the fact? A Yes, sir.

*Re-cross examination.*

10 Q There were a lot of rumors besides what Mr. Johnes stated to you, there were other stories besides what Mr. Johnes told you? A Yes, by employees about the place.

Q Besides what Mr. Johnes told you? A Yes, sir.

*Mr. Palmer.* I call on Mr. Fenster to admit that Mr. Schindel was the owner of the various properties I shall specify in Newark, with the understanding if it is not admitted the man from the register's office will bring the books to prove it.

20 *Mr. Fenster.* Mr. Schindel is part owner of some of these properties; they are joint owners.

*Mr. Palmer.* In East Orange, on South Park avenue, 918 feet east of Prospect street, a property with 60 feet front on which there are two houses.

*Mr. Fenster.* Yes, sir.

30 *Mr. Palmer.* South Park avenue, 798 feet east of Prospect street a 30-foot front property on which there is one house.

*Mr. Fenster.* If you mean south of Park avenue, Mr. Schindel admits it, but you say South Park avenue.

*Mr. Palmer.* South of Park avenue, I should have said.

*Mr. Fenster.* We admit that.

40 *The Court.* Suppose we go over these properties during recess, perhaps you can agree upon them.

RECESS.

*Mr. Palmer.* Mr. Schindel by his attorney has admitted he is part owner in the following properties: South side of Park avenue, 918 feet east of Prospect street, 60 feet frontage on which there are two houses. Also one on the south side of Park avenue, 798 feet east of Prospect street, 30 feet front, on which there is one house. Also on the south side of Park avenue 588 feet east of Prospect street, a piece of property 30 feet frontage, on which there is one house. On the south side of Park avenue 648 feet east of Prospect street, 30 feet front, one house. Also a piece of property in Newark, one on Montclair street, or avenue, 125 feet west of Mt. Prospect avenue, 35 by 110. Also in Newark a piece of property on the easterly side of Myrtle avenue 226 feet north of Sussex avenue on which there are two houses. Also in Newark on the easterly side of Mt. Prospect avenue, 202 feet north of Elwood avenue, a piece of property having a frontage of 64 feet, on which there is an apartment house, a couple of houses, sixteen families. Also in East Orange at the northwest corner of Grove and William streets, a piece of property 172 feet long on William street and 107 long on Grove street, which, according to my memorandum, but on which I neglected to secure his admission, is a mortgage to the extent of \$46,500. I would like to ask Mr. Schindel if that sum is correct.

*Mr. Fenster.* That is correct.

*Mr. Palmer.* Also in East Orange on the westerly side of North Eighteenth street, 397 feet north of William street, a property 75 by 100 feet. Also in East Orange on the

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*John W. Palmer, direct.*

westerly side of Glenwood avenue, 150 feet front of Park avenue, a property having a frontage of 48½ feet.

*Mr. Fenster.* Mr. Palmer neglected to mention that these properties are all encumbered by mortgages.

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*Mr. Palmer.* We admit that. The reason I did not state it is that I failed to get an admission from Mr. Schindel of the amount to which they were encumbered. The figures I have were taken from the books downstairs this morning.

*Mr. Fenster.* The properties are also jointly held by other parties.

*Mr. Palmer.* That is also admitted.

20 JOHN W. PALMER, sworn for the plaintiff.

*Direct examination.*

Q Did you, as attorney for Mr. Bingham, ever see George J. Schindel? A I did.

Q When and where did that interview take place? A That was at eleven o'clock on the morning of October 16, 1916, in Bamberger's.

30 Q What took place at that interview? A Wait a minute. On the 14th, which was Saturday. On the morning of October 14th I received a letter from Mr. Bingham, who knew I was about to open an office on the 16th, which I did, asking me if I would call upon him in reference to a case, and I did that Saturday afternoon, October 14th. He explained to me just what had occurred between Mr. Schindel and himself.

40 Q Just confine yourself to the interview. A He told me Mr. Schindel had taken him up on supplementary—

*John W. Palmer, direct.*

*The Court.* Oh, no.

A (Continued.) I went to Bamberger's Monday morning, October 16th, inquired for Mr. Schindel, and found that was the day the buyer sees the salesman and had to go up on the sixth or seventh floor, where I saw him in a small office. I told him I represented Mr. Bingham, I understood he had Mr. Bingham up on supplementary proceedings, which were to be heard before a Master the next day, Tuesday, October 17th.

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Q Did you ask him to retract the slanderous words? A I did.

Q What did he say to you? A He told me I should go back and tell Mr. Bingham he could go to hell.

Q What else? A Why, the last thing I remember saying to Mr. Schindel was that if he persisted in going ahead with the suit, and my visit was unavailing, asking him to call off the supplementary proceedings and give Mr. Bingham an opportunity to turn around and pay him, do the best he could, I said "You are going on with the supplementary proceedings now, are you?" He said, "Yes." I said, "Very well, sir, we will be there."

20

Q Did you ask him to retract the words? A I did.

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Q What did he say? A He told me "No." There was a small desk, or table in this little room where he sees buyers, at which I was sitting down and he was standing up, a very small room, he kept swinging his arms—

Objected to as immaterial.

*The Court.* Treating it as an objection I will overrule the objection.

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*John W. Palmer, cross.*

A (Continued.) He kept swinging his arms this way, hitting this desk at which I sat, kept me moving from one side to the other, because the room itself is only about 4 feet wide, and he told me "Yes, I said them," and he said, "What is more, I can"—and then he hit the desk this  
 10 way, and never finished the sentence. I told him, "Then you persist in going ahead with the supplementary proceedings?" He said, "I do." I said, "Very well, sir, we will be there." He said, "I don't give a damn where you are." That is the last I saw of Mr. Schindel.

*Cross examination by Mr. Fenster.*

Q About that time, Mr. Palmer, you were representing Mr. Bingham in the supplementary  
 20 proceedings and hearing? A Yes, I should say I was.

Q And didn't you call at the office of Mr. William Tyack, Master in Chancery, before whom the hearing was to be heard? A I did, on Monday.

Q On the return day, and ask for an adjournment? A Tried to adjourn it on Monday afternoon.

30 Q But you did call for an adjournment? A Oh, yes.

Q And the matter was adjourned for one week? A Either that, or to the end of that week, it was originally to come up on Tuesday and Mr. Bingham was to be given an opportunity that week to raise the money.

Q And during that week you went over to see Mr. Schindel about having him retract those statements? A Yes, it was on Monday I went  
 40 to Mr. Schindel.

*John W. Palmer, cross.*

Q And on that same occasion you went to see him for the purpose of having him retract these slanderous statements? A I went to see him for the purpose of calling off the supplementary proceedings if I could, and give Mr. Bingham an opportunity to pay it off in installments.

Q You knew I was, as a member of the firm of Levy & Fenster, attorney for Mr. Schindel? A At that time I don't think I did; I don't think I had the supplementary papers, I don't think Mr. Bingham had handed them to me; I can't say he did, or did not.

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Q Isn't it a fact that at the time you called at Mr. Tyack's office to have this matter adjourned that I was called in to speak to Mr. Tyack?

Objected to as not cross examination.

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Objection overruled.

A Yes, you were there, Mr. Fenster.

Q Then you mean to say you did not know I was representing Mr. Schindel at the time you visited him? A At the time I visited Mr. Schindel?

Q Yes. A No, I didn't know it.

Q Didn't you tell me in the hall in front of the elevator that you would see that the amount of this note was paid during that week? A No, I said I would use my best influence to help Mr. Bingham get the money.

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Q You told me that, didn't you? A Yes.

Q Why would you tell me that if you did not know I was representing Mr. Schindel? A Because I saw Mr. Schindel on Monday, and saw you on Tuesday, the day the supplementary proceedings were coming up.

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*Motion for non-suit.*

Q And you did not see him between the time the matter was adjourned? A Oh, no.

Q Isn't it a fact that you called at Mr. Schindel's office and told Mr. Schindel that unless he withdrew this suit, or supplementary proceedings against Mr. Bingham, that you would  
 10 commence a suit for slander? A I asked him to call off his supplementary proceedings, which he said he would not do. I told him, I said, "Mr. Schindel, you have made some very damaging remarks to Mr. Bingham's employer which are bound to have some effect on his employers, if you persist the way you do with Mr. Bingham, naturally, unless he brings a suit against you his employers will believe what you said was so, and if you do continue as you do, and do not retract  
 20 the statements which you made, I will certainly sue you in slander." I told him that.

Q Do you think as an attorney it was proper for you to call to see Mr. Schindel and ask him to call off a proper claim he had against your client? A Why, certainly. I didn't ask him to forego his money, I asked him to forego the measure which he had taken to collect it, that is all.

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PLAINTIFF RESTS.

*Mr. Fenster.* I move for a non-suit on the ground the plaintiff has failed to make out a case against the defendant.

*The Court.* In what particulars?

*Mr. Fenster.* Failed to show there was any damage sustained.

*The Court.* Well, he has not shown any special damage, that is true.

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*George J. Schindel, direct.*

*Mr. Fenster.* The burden is upon the plaintiff to show that he has been damaged by reason of the slanderous statements made against him. I think the plaintiff has totally failed to substantiate his case against the defendant.

*The Court.* I will hear you, Mr. Palmer. 10

(Mr. Palmer replied.)

*The Court.* The motion for non-suit will be denied.

An exception to this ruling is noted by the defendant as ground of appeal.

GEORGE J. SCHINDEL, sworn for the defendant.

*Direct examination by Mr. Fenster.* 20

Q What is your business, Mr. Schindel? A I am with L. Bamberger & Co.

Q What is the nature of your— A Buyer and merchandise man.

Q How long have you been employed with L. Bamberger & Co.? A About twenty-four years.

Q Have you a family? A Yes, sir.

Q Children? A Two daughters. 30

Q When did you first meet the plaintiff in this case? A The plaintiff is Mr. Bingham?

Q Yes. A Why, when he rented a flat, or an apartment, on Myrtle avenue from me.

Q And about when was that? A Well, I don't know, I think about 1915, or whatever date he stated, I presume that is about right.

Q How did he pay his rent, in cash or by check? A Why, I think he most always by check. maybe some exceptions. 40

*George J. Schindel, direct.*

Q Did he ever give you any check in part payment of rent? A He gave me a check in full, and in part payment.

Q Were those checks always made good at the bank?

Objected to.

10

Objection sustained.

Q At the time that Mr. Bingham removed from your house how much rent did he owe you?

A He owed me \$70, and one-half month's rent which I gave him throwing off the last half month.

Q Did he ever give you a note for the \$70?

A Yes, sir.

Q Was that note ever paid? A Never.

20 Q I show you a note dated April 29, 1915, made to the order of A. & J. G. Schindel for \$70, is that the note that you received from Mr. Bingham? A Yes, sir.

Same offered and marked Ex. D. 1.

Q Did you ever demand payment of that note when it was due? A Yes, sir, I did.

30 Q How many times did you demand payment from Mr. Bingham of that note? A Well, I don't exactly remember the number of times; it was a few times that I demanded it.

Q And what did Mr. Bingham say to you on the various times that you demanded payment of the note? A Why, he said that he could not pay me and finally said that he would not pay me.

Q Did you ever speak to Mr. Bingham on Orange street in reference to this note? A Yes, sir; I don't know with reference to the note, I met him on Orange street, him alone.

40 Q He was alone; you never met him in the presence of his wife? A I haven't seen his wife

*George J. Schindel, direct.*

with him at any time. I spoke to him, during the time I spoke to him on Grove street.

Q You heard Mrs. Bingham testify on the stand this morning in which she said that you waited until she returned from the department store where she had been doing some shopping, in order to tell her; that you did say to her just what you thought of Mr. Bingham, and that you were going to get him some day? 10

*The Court.* That is not the proper form of question; you cannot ask the witness to characterize the testimony of another witness.

(Question withdrawn.)

Q Did you ever make a statement to Mrs. Bingham up on Orange street with reference to Mr. Bingham? A I have never made any statement to Mrs. Bingham. 20

Q Did you ever tell Mrs. Bingham you did not care about the \$70 Mr. Bingham owed you? A I did not make any such statement to Mrs. Bingham, or anyone else, that I did not care for the \$70.

Q Did you ever tell Mrs. Bingham that you were going to get after Mr. Bingham? A I made no statement to Mrs. Bingham. 30

Q Did you ever say that you were going to get him some day in the presence of Mrs. Bingham? A Not to him, nor to her; I never used such remarks.

Q After Mr. Bingham had made various excuses about the payment of this note what did you do? A I tried to collect it through a lawyer, I forget his name, but somebody mentioned his name, that he was a sort of collector, and when I spoke to him about that he says, "Nothing do- 40

*George J. Schindel, direct.*

ing," he says, "There is about a dozen cases ahead, no use your bothering."

Q Do you know what he had reference to when he said a dozen cases ahead? A That there was different lawsuits, or cases to collect money—

10 *The Court.* That is going too far, isn't it, Mr. Fenster, to ask him what he said to his own lawyer?

*Mr. Fenster.* I just wanted his notion, what he thought he had reference to when he said "cases."

*The Court.* The previous question is improper, it involves conversation with his own lawyer.

20 *Witness.* I don't know what you are referring to, his own lawyer has mentioned it was some—

*The Court.* No, your lawyer.

Q Did you ever go to see Mr. Bristow of Benjamin & Johnes about Mr. Bingham? A Yes, sir.

30 Q What was the gist of the conversation between Mr. Bristow and yourself? A I went to see Mr. Bristow, after I had met Mr. Bingham in his automobile on Orange street. I told him then that he had made me a promise that he was going to give me a payment, which he did not keep, for a week or two, and at the time I had the conversation with Mr. Bingham I told him that I would go down and see his boss.

40 Q And where did you go? A I went in to see Mr.— to Benjamin & Johnes, and went to Mr. Bingham's first, and I told Mr. Bingham "You again have not kept your promises, the same as most of your others," which were a great, great many, and that under the circumstances I am go-

*George J. Schindel, direct.*

ing to talk to his boss. I didn't know who they were, but someone.

Q Well, then, did you see Mr. Bristow? A I saw Mr. Bristow, yes.

Q Who introduced you to him? A No one introduced me to him; he happened to be in the office, sort of, I don't know whether reception office, or what it is, and I went up to him and asked him if I could see someone of the firm, and he told me he was interested. 10

Q How many times did you see Mr. Bristow? A I saw him twice.

Q What was the conversation the first time you met Mr. Bristow? A I told Mr. Bristow that I wanted to see him with reference to Mr. Bingham, that he owed me some money, and that I called to see if he could do anything with regard to collecting, because I had never had any experience with any law cases of any kind, and thought that was the best way to get about it. 20

Q And on the second occasion what was your conversation with Mr. Bristow? A On the second occasion I—

Q Beg pardon, I will withdraw that question. What did Mr. Bristow say to you the first time you met him? A It was then around twelve o'clock, and Mr. Bristow, I think, said he had to catch a train, or something, and I should call in again. 30

Q And when you called again did you see Mr. Bristow? A Yes, sir.

Q And what was the conversation that you had with Mr. Bristow on the second occasion? A I told Mr. Bristow that I came in to see him with reference to Mr. Bingham, he had been a tenant of mine for some time, and during my experience with him I had received at least half 40

*George J. Schindel, direct.*

a dozen bad checks, and he still owed me \$70, and when he moved, after my requesting him to pay, that I had given him half a month's rent free, and wanted to know whether there was any way that I could attach his salary, not being familiar with any law cases in my life.

- 10 Q Did you ever make this statement to Mr. Bristow: "I know of Bingham having given a check in payment of automobile tires when he did not have an account, and can prove it?" A I said nothing regarding automobile tires; I said I had received a check—

*The Court.* No, the question is did you make that statement?

*Witness.* No, sir.

- 20 Q Did you ever make a statement to Mr. Bristow in which you said "Bingham conducted himself improperly with women while his wife was ill in the hospital, he had them in his house, this can be proved by people living in the house at the time?" A No, sir.

Q Did you ever make any statement with reference to Mr. Bingham or his family? A I made no reference to his family, or to his wife, or anyone else.

- 30 Q What did you say, if anything, about his checks? A I told Mr. Bristow that I had received checks that were no good, and I also heard and knew of other people that had received bad checks.

Q I show you a check dated March 20, 1915, made to your order, to the order of J. G. & A. Schindel, signed by W. Wallace Bingham, did you ever receive that check from Mr. Bingham?

- 40 Objected to.

*George J. Schindel, direct.*

*The Court.* I think that is the same line the Court has already decided was improper; really the testimony already given is quite improper.

Q After you had seen Mr. Bristow what did you do with reference to this unpaid note? A I came to see you, I think. 10

Q Did you commence suit against Mr. Bingham on this note? A Yes, sir.

Q And recovered a judgment? A Yes, sir.

Q And after you recovered a judgment did Mr. Palmer, the attorney for Mr. Bingham, visit you in Bamberger's? A Yes, sir, Mr. Palmer came to see me in Bamberger's.

Q What was the conversation you had with Mr. Palmer, what did he say to you? A When Mr. Palmer called I was in the office with a representative from New York, and I stepped out of the office, Mr. Palmer was never inside of my office with my hands striking a desk, and so forth; I stepped outside of my office and Mr. Palmer presented a card which I later turned over to you, and Mr. Palmer says to me, "Are you George Schindel?" I said, "Yes, sir:" He said, "You are suing William Bingham for—" I don't remember whether he said the amount, or anything, but "you are suing Mr. Bingham?" I said, "Yes," he said, "Unless you will withdraw that suit I am going to sue you for slander." There were no further words. There was no word of withdrawing any remark, or anything, except to withdraw the suit, and if I did not do that he would sue me for slander; no particular word was mentioned. 20 30

Q Do you remember the date when Mr. Palmer called to see you? A I can't remember the date, but it was on a Monday. 40

*George J. Schindel, direct.*

Q Do you know what Monday? A I don't think that I know, but I can say this, that I think the following Saturday is when I was served with a certain paper regarding a suit which I did not understand, and went over to see you in reference to it.

10 Q You mean that a week after Mr. Palmer called to see you you received summons in this case, is that right? A Yes, sir; I received the summons, if that is what it is called, and came over to inquire of you.

Q Did you ever speak to Mr. Bingham over the telephone? You heard Mr. Bingham state on his examination that he called you on the telephone, and asked you to retract these supposed slanderous statements? A Mr. Bingham nor  
20 any other person ever came to me to ask me to retract any remarks, and some lawyer's name that he mentioned that may have been to see me, I never heard of him, and I doubt whether he ever heard of me, some lawyer that he mentioned, afterwards stated that he was a lawyer.

Q Then you never met this lawyer, Mr. Thowless? A I have never met—that is the name that was mentioned in the testimony, I believe—I never met him, or he has never met me.

30 Q Did you ever make any statement to any buyer in Bamberger's in reference to Mr. Bingham? A No, sir, I never made a statement to any buyer in Bamberger's in reference to Mr. Bingham.

Q Have you ever met Mr. Bristow previous to these visits you made to him? A I never met him before, nor do I know anyone in his factory.

40 Q Do you know either one of the firm, Mr. Benjamin or Mr. Johnes? A I don't know

*George J. Schindel, cross.*

them, never met them, I don't think any of them ever met me; that is, I know they have not.

Q Have you ever been sued before? A I have never been in a court house until—except for a few days as a juror, for a few days.

*Mr. Palmer.* I object to the answer.

*The Court.* The answer will be stricken out. 10

Q Do you know whether Mr. Bingham was working at the time that he owed you this money for the rent, the time the note was due? A I think that he was.

Q Do you know where he was employed? A May I ask the date of the note?

Q Well, the date was April 29, 1915; I just want to know whether you know, that is all. A No, I can't say positively; I think he was employed. 20

Q Well, Mr. Schindel, how is it that you did not sue Mr. Bingham long before the time that you did, the note was due on June 29, 1915; why didn't you sue Mr. Bingham at that time?

*Mr. Palmer.* I object to the question.

*The Court.* The objection will be sustained. 30

*Cross examination by Mr. Palmer.*

Q This note for \$70 which Mr. Fenster has shown you was given to you by Mr. Bingham for the \$70 rent; was that note indorsed? A Yes, sir.

Q By whom was it indorsed? A Indorsed by his father.

Q Now, when the note fell due you said you demanded payment. Of whom did you demand payment? A Of Mr. Bingham, and I went to 40

*George J. Schindel, cross.*

see his father, who stated that he would do nothing in the matter. He had had enough trouble on that line.

Q Did you protest the note?

Objected to.

10 A I don't know whether I did, I don't know much about protesting, whether it has been protested, or not, I have not had any such matters before. I don't think the note was protested, probably, because I didn't know, I really don't know whether it has been protested or not.

Q How long did you say you were employed by Bamberger's? A About twenty-four years.

Q And did you say you were a buyer for them? A Yes, sir; I was a buyer.

20 Q How long did you occupy the position as buyer? A Well, I should say about fourteen years, probably fifteen years.

Q Is that a responsible position? A Yes, sir.

Q How much salary did you receive? A Was I getting?

Q Are you getting? A I don't know whether I can answer. Must I answer such a question?

30 *Mr. Fenster.* The question is objected to as immaterial.

*The Court.* The objection will be overruled.

*Witness.* The firm, I think, probably desires me to keep such things confidential; I don't think it is something I should mention? I will do so if the Judge says so.

40 Q You answer my question, will you, please, what is your salary per year? A I am on a

*George J. Schindel, cross.*

commission basis, and cannot tell what my salary is.

Q Well, take the year 1916, how much was your salary and commission? A The year 1916, I don't know exactly just what they were.

Q Well, tell us approximately. A Why, I don't know, I was receiving part of that year a drawing account of \$60. 10

Q \$60 what? A A week. Then I received \$100 a week during that year, and a drawing account, and I received a check from them.

Q That is outside of your commission? A The entire thing is on a commission basis.

*Mr. Fenster.* Objected to as not cross examination.

*The Court.* The jury are entitled to assess exemplary damages, if the plaintiff is entitled to recover at all, somewhat upon the financial ability of the defendant; that is, the property he has, and his income. That makes this proper, notwithstanding it may be disagreeable to the defendant to answer these questions. 20

*Mr. Fenster.* I think it is immaterial what salary he is earning, the question is what damage was sustained. 30

*The Court.* That is not the theory upon which exemplary damages are assessed.

Q Well, did you make \$40,000 last year? A No, sir.

Q How much did you make? A Well, I think it was about \$7,000, either a little less, or a little more, I think just about \$7,000.

Q About \$7,000; what was that, salary or commission? A Salary and commission. 40

*George J. Schindel, cross.*

Q You testified, I believe, on your direct, that when Mr. Bingham left your house he owed you two months and ten days, or half a month's rent? A Yes.

Q And you had knocked off half a month's rent, and just charged him the \$70? A Yes.

10 Q You also testified, I believe, that you met Mr. Bingham in November, 1914, as testified to by him on the direct, with the only exception his wife was not present at that time, is that right? A I don't know the date.

Q You met him on Orange street? A Yes.

Q Was he in an automobile at that time? A Yes, he was in an automobile—he was outside of the automobile.

Q Anybody with him? A No one was with him.

20 Q And how is it you remember so well everything that took place in November, 1914, particularly little items like you knocked off ten or fifteen days' rent, but you cannot remember how much your salary was that year? A Because my salary was in different receipts; I was working on one basis, then it was changed to another and then in addition to that I received a check for a bonus, and I could not state just exactly what those amounts were.

30 Q You received them eventually, didn't you? A I received it, yes.

Q Did you see Mrs. Bingham at all that night on Orange street? A I have not seen Mrs. Bingham that night; saw only Mr. Bingham and his car was in front of the theatre.

Q Where was the theatre? A Right on Orange street.

40 Q Whereabouts on Orange street? A I am not so familiar with the streets, but it was some-

*George J. Schindel, cross.*

wheres between Eleventh street there and the junction, I think between Eleventh and Thirteenth, if that is the way the streets run there.

Q A drygoods store anywheres near there?

A Somewheres near there.

Q You heard Mrs. Bingham testify that she was present at this conversation that took place between you and her husband, didn't you? A Yes, sir. 10

Q You still deny that what she said is so? A Yes, I deny that I saw her near that machine, or anywhere, before or after, as she stated she left and came back.

Q Oh, you saw her that night, then, did you?

A I did not see her that night, I did not see her that evening.

Q You said a little while ago on your direct that you don't use such words as "I'll get you?" A I didn't use such words. 20

Q Why don't you use such words? A Why should I?

Q Do you mean you do not believe in talking that way? A No, sir; my habit and language is not on the style that you and Mr. Bingham have mentioned here on the stand.

Q You never would walk up to a man on the street and say, "You are a hell of a nice man riding around in an automobile?" A I would not use such language. 30

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

Q Never told a man that called you on the telephone to "Go to hell?" A No, sir.

Q And you did not do that, did you? A No, sir, I did not.

Q You would not tell me to go to hell, either, would you? A No, sir, nor did I. 40

*George J. Schindel, cross.*

Q You would not use such language to me like, "I don't give a damn where you would be," you didn't use that to me, either, did you? A Where you would be?

Q Yes, where I would be tomorrow.

Objected to.

10

Objection overruled.

Q You would not use such language, would you? A I did not, and I would not use such language to a man that I met the first time, nor any other time.

Q Did you ever use that to me? A No, sir, I did not.

Q You heard me testify that you did, didn't you? A Yes, sir, and I believe you told an untruth; nor did you ask me to apologize, or whatever the term was that you asked me, or to discontinue the suit, or you will sue me for slander unless I discontinued that suit, nothing else was said.

20

Q Have you in your office on the sixth or seventh, whatever the floor may be, in Bamberg-er's—is your office there where you entertain buyers a very small office? A Yes, sir, and you were not in it.

30

Q No matter about that, I am asking you is your office on that floor a very small office? A Yes, sir.

Q Have you in the office—has your office a glass front that is part of the way up wood, and part ground glass? A It has a partition that—it is glass that you cannot look through; all the offices are that way.

40

Q Got a small desk in there? A Yes, sir; I have got a large desk there.

*George J. Schindel, cross.*

Q Got a table in there? A There is no table in there.

Q But there is a desk? A There is a desk.

Q Got a telephone in the room? A No, sir; I have not.

Q Now, at the time you saw me out in the hall, as you say? A Yes, sir. 10

Q Why didn't you take me in your office? A I regret very much that I didn't have you in my office so a party present could have heard what you said.

Q Isn't it an actual fact that party whom you are referring to kept me standing around for an hour, and eventually when you got through talking to him, and he did go, you called me in, looked at my card, and closed the door? A No, sir.

Q You did not do that? A Your card was in my hand one minute when I excused myself from the gentleman and stepped out of the office to talk to you, and I talked to you just about a minute, and then went back to the office to resume my business with the gentleman that was present. 20

Q If I told you that you did take me in and shut the door and talked to me would you still deny it? A How?

*The Court.* The question is objectionable, Mr. Palmer. 30

Q As a matter of fact, when you first received my card this gentleman was in this little office of yours, didn't you come out into the hallway and tell me you would see me in a minute, and go back and finish talking to that gentleman, talked to him for at least half an hour, then when he excused himself you saw me and called me inside and closed the door and had the conversation as I repeated it? A No, sir. 40

*George J. Schindel, cross.*

Q What did take place? A I was in my office with the gentleman.

*Mr. Fenster.* Objected to.

*The Court.* The witness has answered the question on direct examination, and may be asked on cross examination.

10 Q What took place? A I was in the office talking to a representative of an umbrella concern.

Q Stout gentleman, or thin? A He was kind of a stout gentleman.

Q Knows you pretty well, doesn't he? A Yes, sir.

Q Called you "George?" A Why, I don't know whether he calls me George.

20 Q You have known him for a long time, you know what he calls you, what does he call you? A Calls me Mr. Schindel.

Q Does he ever call you George? A I don't think he does.

Q Did you ever hear him say, "Well, goodbye George, good luck to you?" A He never said such words to me as "Good luck," that is not a business way of talking.

30 Q I am asking you whether he said that? A No.

Q Does he know you well enough to call you George? A I don't think so.

Q Did he ever say "Goodby George" to you, did he ever use that expression when leaving you? A He may have said "Goodby."

Q Does he ever say "Goodby George?" A Never "George."

Objected to as immaterial.

40 *The Court.* The objection will be overruled.

*George J. Schindel, cross.*

Q Now what took place? A I was sitting by my desk and the gentleman was standing, and when a little girl, or someone, either a girl or boy, who is usually outside, presented this card, I excused myself and went out to see you, and then you told me that—that is after I had your card—you said to me, “Are you suing Mr. Bingham?” I said, “Yes,” and you said, “Well, now, here, unless you are going to withdraw that suit I am going to sue you for damages,” and I said, “You can’t bluff me,” I said, and you just went away immediately, no other conversation or anything. I said I was not going to discontinue the suit, and that you could not bluff me, and then I took the card that same afternoon, or noontime, and went over to Levy’s office and told him what had occurred.

10

Q I did not tell you that you had placed Mr. Bingham in bad position, did I? A No, sir, you did not.

20

Q I didn’t ask you to put Mr. Bingham right with his employer? A You never said such a word, or anywhere else.

Q You did not tell me “Yes,” you said— A What?

Q You did not say to me “Yes, I said those things, and I can”—and then stop there? A You know I never said that.

30

Q I am asking you what you know? A I am telling you what you know.

*The Court.* Oh, no.

A Pardon me, no, sir, I never said such words, because you didn’t ask me.

Q How much did you make in 1915 as buyer for Bamberger? A I couldn’t tell for the same reason that I stated before.

40

*George J. Schindel, cross.*

*The Court.* I think you have covered that fully

*Witness.* I know I made a good deal less money the year before, each year I have made less, I have been progressive with the firm—

10 *The Court.* You need not answer that further.

Q Do you own any stock in any company? A Never owned any stock.

Q Own any bonds? A No, sir.

Q Got any money in bank? A I think I have some account.

Q How many accounts have you? A One account.

20 Q How much is in the bank? A I would judge probably between \$200 and \$300.

Q Got any building and loan stock? A Yes, I have.

Q How many shares in all? A Why, I have different shares.

Q I am asking how many? A I could not tell off and on how many I have.

Q Well, about 150? A No, sir; I don't think I have that many.

30 Q Got over 100? A I have got over 100.

Q Hold any mortgages? A No, I do not.

Q Any concern or corporation in which you are interested hold any mortgages? A No, we have no mortgages, we owe mortgages.

Q Sir? A I say we owe some mortgages, I don't hold any.

40 Q Who lived in this house 21 Myrtle avenue at the time Mr. Bingham lived there, beside Mr. Bingham? A My mother lived upstairs on the top floor.

*George J. Schindel, cross.*

Q Who lived on the second floor? A I don't think I could recall who lived on the second floor.

Q Was it the people who lived on the third floor, or the people who lived on the second floor that could prove this about Mr. Bingham having women in the house? A There were no people going to prove it on either floor.

10

Q Who were you going to prove this statement about Mr. Bingham having women in the house? A There was nothing to prove.

Objected to.

Objection sustained.

Q How long have you owned the house? A About five years.

Q At the time you went to Benjamin & Johnes' factory to see Mr. Bingham's employers what conversation did you have with Mr. Bingham, if you had any? A I met Mr. Bingham at the office, or in the office, and told him that "You haven't kept your word, as usual."

20

Q Which word were you referring to? A That he was going to make me a payment.

Q When did he make that promise?

*The Court.* You have asked a question as to what he said, why don't you let him finish that and then if you want to discredit it afterwards, all right.

30

Q All right. A The question was what?

Q What your conversation was with Mr. Bingham? A I told Mr. Bingham "You have not kept your word, as usual," and that I was going to see somebody up higher, or one of the firm, I don't know just who I said, because I didn't know anyone in there.

Q What promise were you referring to? A I was referring to a promise he was going to

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*George J. Schindel, cross.*

give me a payment of \$5, which was about the twentieth promise, I think, if not more.

Q Do you deny saying to Mr. Bingham at that time, "I am going in there without any idea of getting any money from them, my idea is to fix you, and I am going to do it?" A I deny such  
10 a statement, I never said such a statement.

Q Then, when Mr. Bingham testifies on the stand that such conversation took place he is telling an untruth?

*The Court.* It is just as improper to ask the witness such a question as it is to ask a witness on the other side to characterize your witnesses.

Q You eventually got in to see Mr. Bristow, what did you say to Mr. Bristow? A I told Mr.  
20 Bristow that I came to see him in reference to an employee by the name of Mr. Bingham who owed me money that I had been trying to collect and that probably he could help me out or use his influence.

Q You just spoke nice like that? A Yes, sir, because I had never before met Mr. Bristow, and there was no reason why I should speak in any other way but a nice way.

Q You did not say "I know of a case where  
30 Bingham gave a check for automobile tires where he had no bank account, and I can prove that?" did you? A No, sir, I did not say anything about automobile tires, I said he had given checks that were no good.

Q You heard Mr. Bristow say, "I know a case where Bingham gave a check for automobile tires where he had no bank account, and I can prove it," did you? A Repeat that again.

Q You heard Mr. Bristow say that you told  
40 him "I know of a case where Bingham gave a

*George J. Schindel, cross.*

check in payment for some automobile tires when he had no bank account and I can prove it?" A If those were the words that Mr. Bristow said here on the stand, then I heard what he said.

Q That is what he said? A I heard what he said.

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Q Did you hear Mr. Bristow say you said to him "Bingham conducted himself improperly with women while his wife was ill at the hospital, had them at his house, this can be proved by people who lived in the house at the time?" A I heard Mr. Bristow say those were not the exact—those were about the words, but I heard him deny that those were the words exactly that I said, that they were something on that line.

Q Did you hear Mr. Bristow this morning say that you said to him on that visit that "As Bingham's employer I want to guard you against advancing him any position of trust as I thought your business might be prejudiced by so doing, and I thought you ought to know what sort of man you had in your employment?" A I heard Mr. Bristow make some similar remark.

20

Q Is that true, that you said it? A I did not say that.

30

Q Did you ever say to Mr. Bristow that Bingham conducted himself improperly with women while his wife was ill in the hospital and that you could prove it by people living in the house? A I didn't use any remarks of that kind to Mr. Bristow.

Q Now while you were in there, and you testified Mr. Bristow told you he had to catch a train, or some other purpose would prevent him listening to what you had to say that day; how long

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*George J. Schindel, cross.*

were you with him? A I would say about two minutes, probably.

Q So it really took you two minutes to tell him, "Your Mr. Bingham owes me \$70, and I wish you would kindly try to get it for me," is that all you said in two minutes? A Whatever  
10 I did say I spoke to him about two minutes, I don't think it was over that, and I don't remember that I mentioned any \$70, or anything else like that to Mr. Bristow the first time I was there.

Q How long were you there the second time? A I would judge somewhere between three and five minutes at the utmost.

Q You heard Mr. Bristow testify this morning the second visit you were with him from ten to  
20 fifteen minutes? A I think you are in error on that testimony.

Q Did you hear Mr. Bristow say that this morning?

*The Court.* Every one of these questions is improper. You asked him whether he heard certain witnesses testify, without following it up at all; none of the questions you have asked him along that line have been  
30 followed up by any suggestion of refreshing his recollection at all. You may ask him about the fact, but I cannot see the point of asking a witness whether or not he heard certain witnesses testified to certain facts.

Q I have forgotten the length of time you said you were there the second time. A I said I thought it was about from three to five minutes.

Q Now what did you do the second time you were there? A When I was there the second  
40 time I told him that I came to see him in refer-

*George J. Schindel, cross.*

ence to Mr. Bingham who was in his employ there, and that he had lived in my house for a year or over, and that during the time that he lived there that I received a number of bad checks from him, and that I was now holding a note of \$70, and was wondering whether he could not do something so I could collect on that note, because someone said the salary should be attached, and I was really unaware that you had to go—I thought probably going down direct to the concern would be better without going to a lawyer with reference to attaching the salary, and I just wanted to get an idea from Mr. Bristow, or his employer, on that line, because I didn't want to go to any lawyer if it wasn't necessary. 10

Q Is that all you said the second time you went to see him? What did Mr. Bristow say to you as to that? A He couldn't do it unless he would investigate the matter, and then I think he did say I would have to go to a lawyer, that he could not do anything with regard to attaching the salary at all. 20

Q Was that all the conversation? A Something about suing him, something like that.

Q Was that all the conversation that took place? A Yes, sir. 30

Q It took you between three to five minutes to say that, did it? A I think I was there three to five minutes in the office; I told Mr. Bristow my name.

Q Aside from the real property that you this morning admitted owning, or having an interest in, do you own any other property? A No, I don't own any other property than what you mentioned on the list. 40

*Charge to Jury.*

Q That is all the real estate that you own?

A That is all, and it is all owned jointly.

DEFENDANT RESTS.

TESTIMONY CLOSED.

10 *Mr. Fenster.* At this time I request the Court to direct the jury to bring in a verdict for the defendant for the reasons stated before, and for the further reason that the plaintiff has failed by the preponderance of the evidence to establish a case of slander.

*The Court.* The motion will be denied.

An exception to this ruling is noted by the defendant as ground of appeal.

Counsel summed up.

20 Adjourned to March 7, 1917, at ten o'clock, A. M.

### **Court's Charge to the Jury.**

SECOND DAY.

Newark, N. J., March 7, 1917.

30 Continued pursuant to adjournment.  
Appearances as before.

The Court charged the jury as follows:

DUNGAN, *J.*

40 GENTLEMEN: This case which you are called upon to decide is an action of slander; an action for words alleged to have been spoken by the defendant, Mr. Schindel, against the plaintiff, Mr. Bingham. At the outset I should say to you that you, of course, cannot find a verdict against the

*Charge to Jury.*

defendant because he gets a large salary or because he is interested in a large amount of real estate. That is merely incidental, and testimony upon that point was admitted upon another branch of the case to which your attention will be called. Nor should Mr. Schindel be made to answer damages in this suit simply because he has pursued remedies against the plaintiff on the plaintiff's indebtedness to him. It is an admitted fact in the case that the plaintiff owed Mr. Schindel \$70 for rent; that he gave him a note for it; that Mr. Schindel brought suit against him in the District Court upon that note, and that he obtained judgment. The note was not paid, and Mr. Schindel commenced to prosecute what is known as supplementary proceedings. That is a proceeding which is quite recent in New Jersey. It requires a man who fails to pay a judgment debt to pay a certain portion from his salary each week, or requiring his employer to pay a certain portion from his salary. These supplementary proceedings were prosecuted, and an order was obtained upon the Benjamin & Johnes Co., for which he was working, requiring the payment of a certain amount per week; how much, is not stated; that is not important. All these things are regular, and are the remedies ordinarily pursued against a debtor, and should not be permitted to prejudice Mr. Schindel in this case. Of course, if this suit is brought, as was suggested in the argument for the defendant, as retaliation for the suit brought by Mr. Schindel against Mr. Bingham, and without foundation in fact, the plaintiff cannot recover. But if the slander has been proven, then the fact that this suit is brought after the suit of the defendant against the plaintiff, or even in conse-

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*Charge to Jury.*

quence thereof, makes no difference. The failure of the plaintiff to pay his debt to the defendant did not give Mr. Schindel the right to slander him.

10 The words alleged in the complaint are that on the 4th day of December, 1915—the plaintiff says the 6th day, but that makes no difference, because if it were necessary an amendment to that effect would be made—on the 4th day of December Mr. Schindel spoke in the presence and hearing of Frederick W. Bristow these words:  
 20 “I know of Bingham having given a check in payment for automobile tires when he did not have an account, and can prove that; also that Bingham conducted himself improperly with women while his wife was ill at the hospital; that he had them at his house; this can be proven by people living in the house at the time.”

These are the exact words which Mr. Bristow testified were said to him by Mr. Schindel. I say the exact words, because, while his testimony upon direct examination differed slightly from this, upon cross examination these precise words were read to him, and as to the first count he said  
 30 “Yes, as near as I can remember they were the exact words,” and to the second count he said they were substantially the words. Substantial exactness is all that is required, but the words charged must be substantially those proved.

It is denied by the defendant that these words were spoken. He admits having a conversation with Mr. Bristow; there is no question about that; but he denies that he charged the plaintiff with having given checks in payment for automobile tires when he had no account. He admits that he stated that he gave checks which were  
 40 no good. He denies absolutely that he said any-

*Charge to Jury.*

thing about the plaintiff's attitude toward women other than his wife; and, of course, the burden of proof is upon the plaintiff to establish his case by the preponderance of the evidence. That is, not by a superior number of witnesses, but by evidence which is the more convincing, the more credible in your view.

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The first thing, then, for you to decide in this case is whether or not the plaintiff has established, by the greater weight of the evidence in the case, that these precise words, or substantially these words, were spoken by Mr. Schindel of Mr. Bingham. If you find that the plaintiff has failed to establish by the greater weight of the evidence in the case that these words were spoken, then the plaintiff fails in his suit, and your verdict must be in favor of the defendant.

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In determining whether or not the words were spoken you have a right to consider, in connection therewith the testimony of Mr. and Mrs. Bingham relating to a conversation on Orange street, to which your attention will presently be called.

If you decide that the burden of proof has not been sustained by the plaintiff then, of course, your verdict, as I have said, must be for the defendant. But if you decide that it does appear by the greater weight of the evidence in the case that those words were spoken, then the next question for you to determine is whether or not the words were slanderous. Because, even though the words were spoken, there can be no recovery in this case unless the words were slanderous *per se*; that is, in themselves; because there is no allegation of special damage; only general damages, which are those which the law presumes must actually, proximately and neces-

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*Charge to Jury.*

sarily result from the publication of defamatory matter. Such damages arise by inference of law, and are not required to be proved by evidence, and are allowable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss has in fact resulted, the words from which the law presumes injury in such case being deemed actionable *per se*.

To be slanderous *per se* the words must be such as to charge the plaintiff with a criminal offense, or such that they will tend to disgrace and discredit the plaintiff, and hold him up to hatred, contempt, ridicule, or cause him to be shunned and avoided. Have the words that tendency?

Referring again to the first count, in which the words are: "I know of Bingham having given a check in payment for automobile tires when he did not have an account." These words may be susceptible of two meanings; and it is for the jury, and not the Court, to determine from the evidence in what sense they were used. For instance, it is not a criminal offense, nor would the charge be actionable *per se*, if what is meant by this charge is that the plaintiff owing somebody an account gave a check when he had no account, because that is not a criminal offense. It is not a criminal offense for a man to give you a check, when he has not an account, for a debt which he already owes you. But it is a criminal offense for a person to induce you to sell him goods by giving you a check when he has not any account. That is, if, as an inducement to some person to sell him automobile tires he gave a check when he had no account, that is a criminal offense for which he can be indicted and convicted. You see the words themselves do not ex-

*Charge to Jury.*

plain this, and the question is would the ordinary person understand that this was a charge that the plaintiff ordinarily did not meet his checks, or, rather, that he did not meet a check, had no account to meet a check which he had given for a precedent debt; or that he was guilty of fraud in inducing a person to sell him automobile tires by giving him a check when he had no account to meet it. In the one instance, if those words mean he was guilty of fraud in inducing somebody to sell him automobile tires when he had no account, those words are then actionable *per se*. If, on the other hand, it meant he gave a check for automobile tires which he had purchased some time before that, then the words are not actionable *per se* and the plaintiff cannot recover on account of them.

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The second count is "Bingham conducted himself improperly with women while his wife was ill at the hospital, he had them at his house." Would the ordinary man understand from this, that is, conducting himself improperly with women, and having them in his house, that the defendant intended Mr. Bristow to understand that Bingham had been guilty of sexual relations with other women than his wife? If it meant he had been simply a little too free with other women, had been indiscreet in having the women in his house when his wife was not there, that would not be a criminal offense, the words would not be actionable *per se*, and the plaintiff could not recover on account of them.

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But it is not necessary in order to constitute actionable slander that the words should directly charge the plaintiff with fornication or adultery, it is sufficient if they were calculated to induce the hearer, that is, Mr. Bristow, to suppose and

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*Charge to Jury.*

understand that the plaintiff was guilty of fornication or adultery; and it is for you to say in what sense these words were used, if you find them to have been used. Would the ordinary hearer understand these words to mean that the plaintiff had simply been indiscreet with other  
 10 women, not amounting to a crime, or would the ordinary hearer understand that he had been guilty of the crime of fornication or adultery with other women while his wife was away from the house? If so, then the words would be actionable *per se*, for which the plaintiff would be entitled to recover.

If you decide that the plaintiff has not sustained the burden of proof imposed upon him, then your verdict must be for the defendant.  
 20 But if you decide that he has, and that the words were spoken, but that they were not spoken in a slanderous sense, even then the plaintiff cannot recover. But if you decide that these words were spoken, and that they were spoken in a slanderous sense, as defined by the Court, then the plaintiff is entitled to your verdict.

There have been no actual special damages alleged or claimed in this case, but if you find the words to have been spoken, and to have been  
 30 slanderous *per se*, you may award compensatory damages, that is, such damages as will be a money return to the plaintiff for the injury to his reputation, and for any mental suffering in consequence thereof. Damage to reputation is all that can be recovered by way of general damage.

There are two other classes of damages that I shall mention in connection with this case, and the next is exemplary, or punitive damages,  
 40 "punitive" meaning punishment, damages which

*Charge to Jury.*

are awarded as a punishment for a person who does a wilful, malicious act; such an amount as will punish him, and deter others from committing like offenses. Such damages are allowed where the words are spoken with actual malice; that is, with spite, with ill will. As I have already suggested, simply because the plaintiff owed him, the defendant had no right to slander, and to act maliciously. He had a right to pursue his remedy upon his debt, as I have already indicated, and no presumptions are to be taken against him on that account. But he has no right to go about maliciously slandering the plaintiff through spite and ill will. 10

The plaintiff says that before these words were spoken the defendant met him and his wife on Orange street, and twitted him about riding around in an automobile when he owed him for his rent, and then said that he didn't care now anything about the money, but that his ambition was to put him on the bum, to queer him. His wife says that when she heard this conversation start she avoided it by going into the store, and when she came out the defendant insisted upon talking to her about it, although she said she did not want to hear about it; and he then said that he wanted to repeat to her what he said to Mr. Bingham, and he said it was not money he was after, that he was after him, and that he would get him, and would go to his employers and queer him; and you will recollect what Mr. Bingham said the defendant said to him. On the other hand the defendant denies this. He says that he did have a conversation on Orange street with Mr. Bingham in which he demanded his money, and in which he stated that he was going to his employer for the purpose of seeing if he could not 20 30 40

*Charge to Jury.*

get the money, and that he did go to his employer, but that he never did see the wife upon the street, and that he never made these statements which Mr. Bingham says he made, and another statement which Mr. Bingham said he made in the hallway before going in to see Mr. Bristow.

10 But what he testified he said to Mr. Bristow was that, not knowing much about the legal situation, he came to him, that he understood there was a law by which he could hold back some of the salary, and he came to him to see if he would not take care of his debt, and see what he could do about holding back some of Mr. Bingham's salary.

If you find these words were spoken, and spoken slanderously, then it will be for you to say on the question of damages whether or not they were spoken with express malice, with ill will and spite. If they were, then you have a right to award exemplary damages. In awarding exemplary damages you have a right to take into consideration the income of the defendant, and his position and wealth; because what would be a punishment to a man of small means, would be no punishment at all, perhaps, to a man of large income and large means. It is upon this theory

20 that the law requires the Court to admit such testimony, if it is offered, and it is upon that ground that the testimony was received as to the income, wealth and position of the defendant.

But there is another class of damages to which I think I ought to call your attention, and that is what is known as nominal damages; because, even if the words were actionable *per se*, and the words were spoken, but you do not find that there has been any mental suffering, or any injury to the plaintiff's reputation, and no express malice,

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*Charge to Jury.*

then your verdict may be for nominal damages, which is usually six cents, or some other small sum.

I am requested by the plaintiff to charge several requests.

The first request I decline to charge except as I have charged. 10

2. "Where words actionable *per se* are used, it is not necessary for the plaintiff to show any financial loss, injury to the reputation being the gist of the action."

I have already charged you that.

3. "If the jury find from the evidence that the defendant did slander the plaintiff as alleged by the plaintiff, then your verdict should be for the plaintiff." 20

I have already charged that in several different forms.

4. "If from the evidence the jury finds that the defendant spoke the words maliciously and wilfully, and from a desire to injure the plaintiff's reputation, then the plaintiff is entitled to exemplary damages."

I decline to charge that except as I have charged. I think I have fully covered that. 30

5. "In arriving at the amount of damages to be awarded the jury should consider the defendant's rank and influence in the community as increased by his wealth and position."

Just as it is stated that is not a correct request. In arriving at the amount of exemplary damages, if you find there is malice, that is a correct statement.

*Exception to Charge.*

6. "In arriving at the amount of damages the jury will not, where malice in fact is shown, base their finding on the theory of compensation, but are to remember that exemplary damages are inflicted as a punishment of the offender, and a warning to others."

10 I charge you that.

7. "It is a presumption of law that every man is presumed to have a good character until, by a preponderance of evidence, the contrary is shown."

That applies to both plaintiff and defendant, and I charge you that they are both presumed to have good character until the contrary is shown.

20 You may retire.

Defendant prays an exception to the charge—that the jury could consider the testimony of Mr. and Mrs. Bingham relating to a conversation on Orange street in determining whether the alleged slanderous words were spoken.

Exception allowed and noted as ground of appeal.

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*Grounds of Appeal.*

**Grounds of Appeal.**

Filed June 21, 1917.

**New Jersey Supreme Court.** 10

<p>W. WALLACE BINGHAM, JR.,  <i>Plaintiff-Respondent,</i>  <i>vs.</i>          GEORGE J. SCHINDEL,  <i>Defendant-Appellant.</i></p>	}	<p><i>Action at          Law.          On Appeal          from Essex          Circuit Court.          Grounds of          Appeal.</i></p>
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The appellant states the following grounds of appeal: 20

1. The exclusion by the Court of the following question propounded to the plaintiff on cross examination:

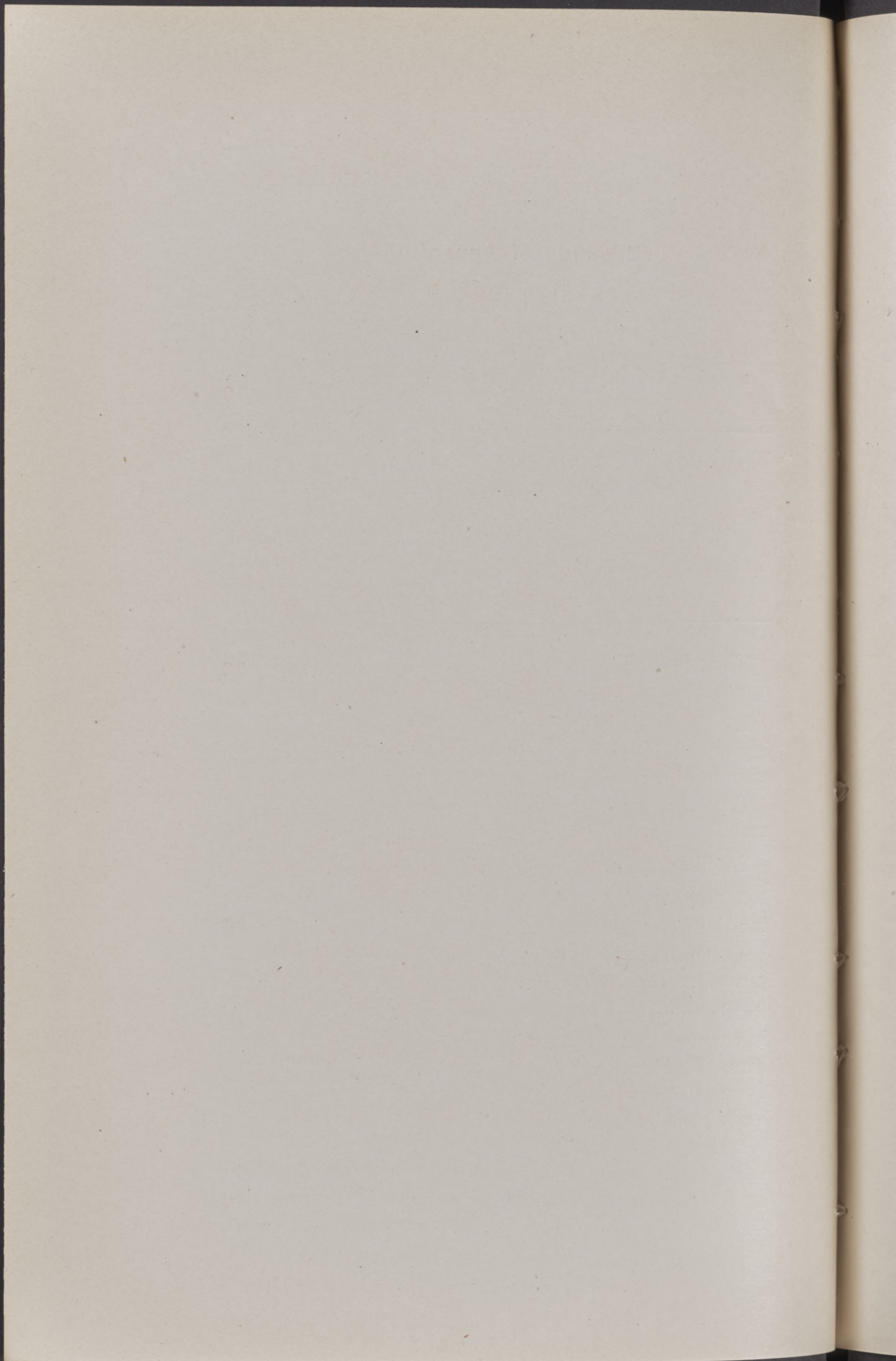
Q "Did you ever give any checks for automobile tires?"

2. The denial of the motion to non-suit.

3. The denial of the motion to direct a verdict for the defendant. 30

4. The charge of the Court to the jury, as follows: "In determining whether or not the words were spoken, you have a right to consider in connection therewith the testimony of Mr. and Mrs. Bingham relating to a conversation on Orange street, to which your attention will presently be called."

LEVY & FENSTER,  
*Attorneys of Appellant.* 40



*Opinion of Supreme Court.*

**Opinion of Supreme Court.**

NEW JERSEY SUPREME COURT.

November Term, 1917.

W. WALLACE BINGHAM, JR.,  
*Plaintiff-Respondent,*

*vs.*

GEORGE J. SCHINDEL,  
*Defendant-Appellant.*

10

On appeal from the Essex Circuit.

Before Gummere, Chief Justice, and Justices  
Parker and Kalisch.

20

For the appellant, Levy & Fenster, Frank  
E. Bradner of counsel.

For the respondent, John W. Palmer, Child  
& Gilmour of counsel.

*Per Curiam.*

This is an appeal from a judgment entered  
on a verdict in favor of the plaintiff against  
the defendant in the Essex Circuit for eigh-  
teen hundred dollars.

30

The defendant obtained a rule to show cause,  
reserving exceptions taken at the trial, with the  
result that the verdict was reduced to one  
thousand dollars and judgment entered for that  
amount from which judgment the defendant  
appeals to this court.

The plaintiff's complaint contained two counts  
for slander.

The first count charges the alleged slander-  
ous words spoken to be as follows: "I know 40

*Opinion of Supreme Court.*

of Bingham's having given a check in payment of automobile tires when he did not have an account, and can prove this." The innuendo is: "Defendant meant thereby that the plaintiff had, by means of said check, secured goods under false pretenses, and with intent to defraud the party from which the tires were purchased."

10

The second count charges the following alleged slanderous words to have been spoken: "Bingham conducted himself improperly with women while his wife was ill in the hospital; he had them at his house. This can be proved by people living in the house at the time." The innuendo is: "Defendant meant thereby that the plaintiff had been guilty of adultery or immoral conduct with said women."

20

Under section 106 of the Practice Act, 3 Comp. Stats., p. 408, the pleader may aver that the words set forth were used in any defamatory sense he may see fit to attribute to them. *Curley v. Fenney*, 62 N. J. L. 70.

The first ground of appeal is rested upon the exclusion by the court of the following question put by defendant's counsel to the plaintiff, on cross examination: "Did you ever give any checks for automobile tires?" The contention is that the question was erroneously excluded. It appears that the question was objected to by counsel for plaintiff upon the ground that it was an attempt to establish justification and because justification had not been pleaded, hence, it was not admissible.

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The legal rule is settled in this state that under the plea of general issue the truth of the alleged slanderous words spoken may be proved,

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*Opinion of Supreme Court.*

but only to the extent of rebutting the presumption of malice. *Merry v. Guardian Pub. Co.*, 79 N. J. L. 177; affirmed 81 *Id.* 632.

It is obvious that the question put to the plaintiff bore no material pertinency to the controversy as to whether or not the plaintiff had given a check in payment for automobile tires when he did not have an account. 10

If the question put to the plaintiff had been answered in the affirmative it would not have tended to establish the truth of the alleged slanderous words. It may very well be that the plaintiff gave checks for automobile tires which were paid.

A different situation would have been presented if the question asked the witness was whether he ever gave any checks for automobile tires when he had no account in the bank to meet them. The question asked was properly excluded. It was immaterial and irrelevant. The fact that it was excluded on an erroneous ground cannot properly be made a basis of appeal. 20

The second ground of appeal is based on the refusal of the court to grant a non-suit at the close of the plaintiff's case. It is obvious from the record that the motion was properly refused. 30

It appears that at the close of the plaintiff's case counsel for defendant moved for a non-suit on the ground that the plaintiff had failed to show any damages sustained.

In appellant's brief it is argued that the defendant was entitled to a non-suit as to the first count of the complaint. The motion for a non-suit was a general one and was placed squarely on the ground that the plaintiff failed to make 40

*Opinion of Supreme Court.*

out a case under the complaint; and even though it appeared that the first count was insufficient in law or not supported by the testimony, nevertheless, if the second count was good, and there was evidence to support it, the motion to non-suit could not be properly entertained. In re-  
10 spect to the last mentioned count, counsel for appellant argues that it does not impute the commission of the crime of adultery, in that the immoral conduct charged does not include within its meaning, intercourse with married women which is essential in order to charge adultery.

As the statute permits the pleader to aver the use of the words in any defamatory sense he sees fit to attribute to them, it was for the  
20 jury to decide from the proof of the words spoken whether they were spoken of the plaintiff in the defamatory sense averred in the complaint.

We think from the words used it was permissible for the jury to find that they were spoken in the defamatory sense set out in the innuendo.

The third ground of appeal is based on the refusal of the court to direct a verdict for the  
30 defendant for the reason stated on the motion for a non-suit, and for the further reason that the plaintiff has failed by the preponderance of the evidence to establish a case of slander.

These grounds are not argued in the appellant's brief. Suffice it to say that so far as they relate to the basis of the motion for a non-suit that question needs no further discussion here, and as to the ground relating to the preponderance of the evidence, that is a matter which  
40 cannot be properly considered on appeal.

*Opinion of Supreme Court.*

The fourth and last ground of appeal is founded on an exception taken to the judge's charge wherein he said: "In determining whether or not the words were spoken, you have a right to consider in connection therewith the testimony of Mr. and Mrs. Bingham relating to a conversation on Orange Street to which your attention will presently be called." 10

The conversation to which the trial judge referred, is stated by him, in his charge, as follows: "The plaintiff says that before these words were spoken the defendant met him and his wife on Orange Street, and twitted him about riding around in an automobile when he owed for his rent, and then said that he didn't care now anything about the money, but that his ambition was to put him on the bum, to queer him. His wife says that when she heard this conversation start she avoided it by going into the store, and when she came out the defendant insisted upon talking to her about it, although she said she did not want to hear about it; and he then said that he wanted to repeat to her what he said to Mr. Bingham, and he said it was not money he was after, that he was after him, and that he would get him, and would go to his employers and queer him—" \* \* \* 20 30

Counsel for appellant argues that the evidence of this conversation was only admissible upon the question of malice, and could only be used as evidence bearing upon the original motive of the defendant in speaking the alleged slanderous words to Mr. Bristow afterwards, but that the trial court regarded the conversation as tending to show an intent to slander 40

*Opinion of Supreme Court.*

the plaintiff and practically instructed the jury that it might infer that the intent was followed out by the speaking of the words, and therefore, harmful error was committed.

We are unable to perceive any error in the instruction excepted to.

10

What the trial judge told the jury was that it could take into consideration the Orange Street conversation, which took place several days prior to the utterance of the alleged slanderous words, the attitude of the defendant's mind towards the plaintiff, when it came to consider the question whether or not it was likely that the defendant made use of the alleged slanderous words attributed to him.

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The judgment is affirmed, with costs.

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*Rule for Judgment.***Rule for Judgment.**

Entered April 16, 1918.

## SUPREME COURT OF NEW JERSEY.

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 W. WALLACE BINGHAM, JR.,  
*Plaintiff-Respondent,*
*vs.*
 GEORGE J. SCHINDEL,  
*Defendant-Appellant.*


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*Rule for  
Judgment.*

10

*On Appel  
from Essex  
County  
Circuit Court.*

This appeal coming on to be heard before the court in the presence of John W. Palmer, attorney for, and Child & Gilmour, of counsel with plaintiff, and Levy & Fenster, attorneys for, and Frank E. Bradner, of counsel with defendant, and the court having inspected the record brought up on appeal and heard the arguments of counsel thereon, and having considered such record and arguments and being of the opinion that the judgment of the Essex County Circuit Court in this cause should be affirmed, with costs,

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IT IS ORDERED that the judgment brought up by the appeal in this cause be and the same is hereby affirmed, with costs to the plaintiff.

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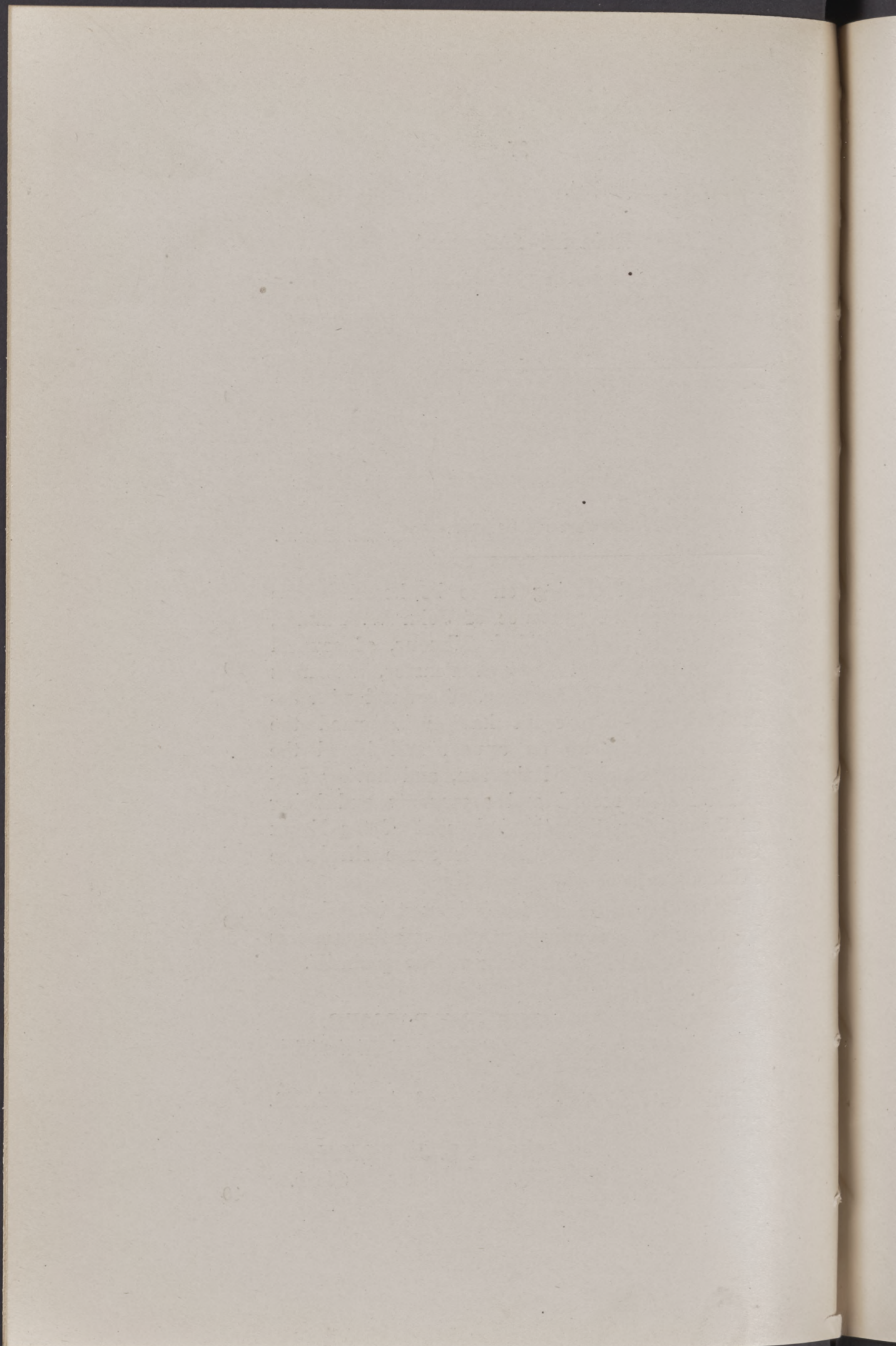
On motion of

JOHN W. PALMER,  
*Attorney of Plaintiff.*

Rule entered this 16th day of April, A. D. 1918.

ENOCH L. JOHNSON,  
*Clerk.*

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## New Jersey Court of Errors and Appeals

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W. WALLACE BINGHAM, JR., <i>Plaintiff-Respondent,</i>	}	<i>On Appeal from Supreme Court.</i>
<i>vs.</i>		
GEORGE J. SCHINDEL, <i>Defendant-Appellant.</i>	}	

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### **Brief for Appellant.**

#### **Abstract of the Case.**

This is an appeal from a judgment affirming the judgment of Essex County Circuit Court in an action for slander. The complaint contains two counts (p. 5).

The first count alleges that the defendant spoke the following words concerning plaintiff:—"I know of Bingham's having given a check in payment for automobile tires when he did not have an account, and can prove this;" and that defendant meant thereby that the plaintiff had by means of said check secured goods under false pretences and with intent to defraud the party from whom such tires were purchased.

The second count alleges that the defendant spoke the following words:—"Bingham conducted himself improperly with women while his wife was ill in the hospital; he had them at his house. This can be proved by people living in the house at the time," and that defendant meant thereby that the plaintiff had been guilty of adultery or immoral conduct with said women.

At the trial, the plaintiff testified to statements made by the defendant, which tended to show

actual malice; and on cross examination, at p. 32, this question was asked:

Q "Did you ever give any checks for automobile tires?"

Objected to. Objection overruled.

*Mr. Palmer.* "The reason I object is, that it is attempting to show justification for these statements; there has been no justification filed, simply a denial that Mr. Schindel ever said this to Mr. Bristow."

*The Court.* "Your objection now will be sustained."

An exception to this ruling was allowed. There was a motion to non-suit, and at the close of the case, a motion to direct a verdict for the defendant. Both motions were made upon the ground, that the plaintiff had not made out a case. Both motions were denied and exceptions allowed (pp. 54 and 78).

In charging the jury, at p. 81, l. 20, the court says:

"In determining whether or not the words were spoken, you have a right to consider in connection therewith the testimony of Mr. and Mrs. Bingham relating to a conversation on Orange street, to which your attention will presently be called."

An exception to this charge was taken and allowed (p. 88).

### **Specification of Errors.**

1. The determination of the Supreme Court, that the question propounded to the plaintiff on cross examination, was properly excluded, and that the error, if any, was not harmful.
2. The determination of the Supreme Court, that there was no error in the denial of the

motions to non-suit and to direct a verdict for the defendant.

3. The determination of the Supreme Court, that there was no error in the charge of the court, as hereinabove set forth.

## Brief of Argument.

### POINT I.

**The exclusion of evidence tending to show the truth of the alleged slanderous words, was erroneous.**

The plaintiff had testified to statements made to him by the defendant on Orange street some time in November, 1915, which statements tended to prove malice. The defendant had the legal right to prove the truth of the alleged slanderous words for the purpose of rebutting the presumption of malice.

*Merrey v. Guardian Pub. Co.*, 79 Law 177; affirmed 81 Law 632.

The Supreme Court concedes the legal rule, as stated; but argues that the question put to the plaintiff bore no material pertinency to the controversy, and therefore, was immaterial and irrelevant, and could have been excluded for that reason. It seems to be conceded that the question was excluded for an erroneous reason. A reference to the preceding questions and objections will show what the court and counsel for the defendant had in mind.

At the top of p. 32, is the question:

Q "Were there other attachments against your salary prior to this one?"

Question objected to. Objection sustained.

The ground of the objection, immateriality and irrelevancy, was clear. The next question is:

Q "When you owned the automobile, did you ever give any checks in payment for automobile repairs?"

Objected to. Objection sustained.

This was clearly immaterial and irrelevant. The court sustained both of these objections, although no statement of the ground of the objection was made. Then comes the question under discussion:

Q "Did you ever give any checks for automobile tires?"

Objected to. Objection overruled.

*It is manifest that the court did not overrule the objection because no ground was stated, but because the court considered that the question called for evidence which would be material and relevant. Consequently, the objection suggested by the Supreme Court had been acted upon and overruled by the trial court. Plaintiff's counsel thereupon stated that he objected, because the defendant was attempting to show justification, and the court sustained his objection. What the court had in mind was, that the truth could not be shown, and not that the question was immaterial and irrelevant. Certainly, if defendant's counsel had changed the question to include the words "in payment for automobile tires when he did not have an account," the court would have excluded it for the same reason, that it would be attempting to show the truth.*

It must be presumed that defendant was attempting to prove what he had the legal right to prove, and not that he was attempting to show justification, and it is quite clear I think, that the defendant was misled by the court's

ruling, and that the court intended to rule that the truth could not be shown, and had already ruled that the question was in the proper form. Any doubt as to the effect of the ruling should be resolved in favor of the defendant.

*Ruckman v. Bergholz*, 37 Law 437; *Bell v. Samuels*, 60 Law 370.

It is contended that the ruling was harmful error.

## POINT II.

**The plaintiff failed to make out a case, and judgment should have been entered for the defendant.**

It is conceded, that when the words are susceptible of either of two meanings, one of which renders them injurious to the person concerning whom they were spoken, and the other makes them harmless, it becomes a question for the jury to determine whether the one meaning or the other, was in fact conveyed to the persons who heard the words spoken.

*Kilpatrick v. Edge*, 85 Law 7.

The rule is stated in *Freisinger v. Moore*, 65 Law 286, Court of Errors, as follows:

“Spoken words are to be understood in their plain and natural import, according to the ideas they are calculated to convey to those to whom they are addressed.”

Pollock, *C. B.*, said in *Hankinson v. Bilby*, 16 M. & W. 442, 445:

“Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to, might form a different judgment on the subject.”

In *Johnson v. Shields*, 25 Law 116-119, the court says:

“The question is, what the defendant meant to make other people believe,” citing *Read v. Ambridge*, 6 Carr. & Pay. 308. The plaintiff has alleged that the words have a special defamatory sense, that is—those in the first count impute the criminal offense of obtaining goods by false pretences, and those in the second count, the crime of adultery.

In *McCuen ads. Ludlum*, 17 Law 12, the court cites with approval the rule laid down by Chief Justice Spencer in *Van Ness v. Hamilton*, 19 Johns. 367, as follows:

“The words must either have produced a temporal loss to the plaintiff by reason of special damage sustained by their having been spoken, or they must convey a charge of some act, criminal in itself, and indictable as such, and subjecting the party to an infamous punishment; or they must impute some indictable offense involving moral turpitude.”

*Newell Slander & Libel*, 3d Ed. par. 100, p. 1029, says: “All words which amount only to an accusation of fraud, dishonesty, immorality, or any vicious or dishonorable conduct not in itself criminal—are not actionable unless they have produced as a natural and necessary consequence some pecuniary loss or damage.” “The question is, what the hearers were reasonably caused to understand, and not what was the speaker’s intent. And the private understanding of an individual hearer as distinguished from the ordinary sense of the words, cannot in theory be offered until it is first shown that

some circumstance was known to him, which reasonably gave the words a special meaning."

*Wigmore on Evidence*, par. 1971, Vol. 3, p. 2615.

Citing *Daines v. Hartley*, 3 Exchequer 200, in which case, the court excluded a question asked of the witness: "What did you understand by those words?"

The motions were put upon the ground that the plaintiff had not made out any case, and the questions presented to the court were:

1. *Whether the words could possibly bear the meaning alleged by the plaintiff.*

2. *Whether there was any evidence from which the jury could infer that the meaning alleged, was conveyed to Bristow, the only person who heard the words spoken.*

The words in the first count in their ordinary sense, signify that the plaintiff had paid a debt with a check drawn on a bank in which he had no account, the word "payment" signifying a pre-existing debt. And even the counsel for the plaintiff in stating the meaning of the words must have had in mind the idea that the check was given for goods which had been purchased. *The pretence must precede the incurring of the obligation.*

The following words:—"He has defrauded a mealman of a roan horse" have been held not to imply a criminal act of fraud, as it is not stated the mealman was induced to part with his property by means of any false pretence.

*Odger's Libel & Slander*, # p. 124, citing *Richardson v. Allen*, 2 Ch. 657.

*Needham v. Dowling*, 15 L. J. C. P. 9.

I contend that the words that were spoken, are utterly incapable of conveying the meaning, that the plaintiff had committed the crime of obtaining goods by false pretences. And also the words in the second count are not capable of conveying the meaning that the plaintiff had committed adultery. They charge possibly immorality and dishonorable conduct, but they do not convey the meaning that the plaintiff, although he was dishonorable enough to have women at the house while his wife was in the hospital, did anything more than conduct himself in an unbecoming manner. The words are not capable of the meaning assigned to them. There was no evidence from which the jury could infer that the words spoken did convey the meaning alleged.

Bristow testifies, at p. 40, that the defendant said that he wanted to tell him about Bingham, who was a tenant of his, and had not paid his rent, and that he was not as much interested in getting the money for the rent, as he was in letting Bristow know what kind of a man he had working for him. At the foot of the page, he testifies: "I told him that these were pretty serious charges to make against a man, and asked him what he wanted me to do about it, and he said he wanted me to understand what kind of a man he was, because he was afraid I might give Mr. Bingham some position of trust in which we might become involved."

It does not appear that Bristow, who was the secretary of Benjamin & Johnes, ever reported to the company the statements that had been made to him. He testifies that he did not believe them. And at p. 44, he admitted that Bingham was retained as an employee for a year subsequent to the time the statements were made.

The only reasonable inference from the facts proved is, that Bristow did not undersand the words to signify the criminal offences charged by the plaintiff. He may have understood that there was a charge that the plaintiff was dishonorable and dishonest and immoral, but if he had understood that the plaintiff was charged with actual criminal, indictable offences, he certainly would have reported the facts to the officers of the company.

I contend, therefore, that there was no evidence to go to the jury. The defendant was entitled to direction of a verdict, and is now entitled to judgment in his favor.

### POINT III.

**The Court erred in the instruction to the jury, that they could take the testimony of Mr. and Mrs. Bingham relating to a conversation on Orange street, into consideration in determining whether the alleged slanderous words were spoken.**

It is possible that the brief submitted to the Supreme Court did not make the objection to the charge clear. The conversation was relevant to show the plan or design to tell the plaintiff's employer what kind of a man he was. And only to that extent.

It was relevant also, on the question of malice, as showing the motive.

*The objectionable feature of the instruction is, that the jury was permitted to consider the conversation in determining whether the alleged slanderous words were spoken, that is, the precise words, or substantially the same words alleged and calculated to convey the meaning alleged. Bristow was the only witness who testi-*

fied that the words were spoken, *and he did not know about the threat*, and the scales were turned in favor of the plaintiff by use of the conversation on Orange street, because the jury inferred that the threat proved the intent to speak the words, *and that they conveyed the meaning alleged*.

It is respectfully submitted that the judgment should be reversed and a new trial allowed.

LEVY & FENSTER,  
*Attorneys of Appellant.*

FRANK E. BRADNER,  
*Of Counsel.*

# New Jersey Court of Errors and Appeals

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W. WALLACE BINGHAM, JR., <i>Plaintiff-Respondent,</i>	}	<i>Action at</i>
<i>vs.</i>		<i>Law.</i>
GEORGE J. SCHINDEL, <i>Defendant-Appellant.</i>	}	<i>On Appeal</i>
		<i>from</i>
		<i>Supreme</i>
		<i>Court.</i>

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## **Brief for Respondent.**

### **Statement.**

This case arose over statements which it is alleged the defendant made concerning the plaintiff to plaintiff's employers. Plaintiff had at one time been a tenant of the defendant, and fell behind in the payment of his rent for a period of two months, amounting to \$70.00, for which sum defendant sued the plaintiff in the Montclair District Court, and recovered judgment. Being unable to realize on the judgment, defendant met the plaintiff and his wife one evening on Orange street, in the City of Newark, and began to upbraid him on the street. Plaintiff's wife, not wishing to be present at the quarrel, went into a dry goods store and made some purchases, which she had intended making that evening. Upon her return to where her husband and defendant were standing, the defendant told her he wanted her to know what he had just told her husband, which was to the effect that he no longer cared for the \$70.00, but that his ambition from that time on would be to put the plaintiff "on the bum"; to "queer

him'' with his employers; and that he intended to go to the plaintiff's employers and tell them just what kind of a man the plaintiff was. Two weeks later he went to the office where plaintiff was employed, and stated to the plaintiff, who met him in the hall, that if the plaintiff did not pay him, he, the defendant, was going inside and do what he had threatened to do. Upon being advised by the plaintiff that he was in no better position to pay him then than he had been for some time past, the defendant went inside the office and saw Mr. Bristow, the plaintiff's employer. Mr. Bristow had an engagement at that time which prevented him hearing the defendant's entire story, and he asked the defendant to call on the following Monday. Two weeks later, namely, Saturday, December 4th, 1915, the defendant returned, made practically the same remark to the plaintiff, and received the same reply, whereupon he again saw Mr. Bristow, and at that time stated that he wanted plaintiff's employers to know just what kind of a man he was, so that they would not advance him to a position of trust, and then stated that he knew of the plaintiff's having given a check for automobile tires when he did not have an account, and that this could be proven; also, that plaintiff had conducted himself improperly with women, having had them at his house when the wife of the plaintiff was ill in the hospital, and that this could be proven by people who lived in the house at the time. As a result of such statements, the plaintiff was interrogated by his employers as to their truth, and furnished by Mr. Bristow with a written memorandum of what the defendant had said on his visit of December 4th.

Subsequently plaintiff retained John W. Palmer, Esq., of the city of Newark, to represent him in the matter of these statements, and also in supplementary proceedings which the defendant had instituted and which were to come up for hearing on October 17th, 1916. On October 16th, Mr. Palmer called at the office of Mr. Schindel in regard to these matters, and upon learning that the defendant refused to adjourn or discontinue the supplementary proceedings, and also refused to withdraw the charges he had made against the plaintiff to the plaintiff's employers, stated that nothing remained for the plaintiff to do but sue the defendant for slander, the plaintiff feeling that if he stood idly by and permitted the defendant to proceed in any manner the defendant saw fit, that it would be a tacit admission on the part of the plaintiff that the statements in question were true, and that he was afraid to seek vindication. Upon being charged with the making of damaging statements to plaintiff's employers, the defendant at that time said "Yes, I said them, and what is more I can"—but did not complete the sentence. Within one week this suit was instituted by the plaintiff.

#### I.

#### **Trial Court Not in Error.**

The first ground assigned by appellant for the reversal of the judgment under review is that the trial court erred in excluding a question propounded to the plaintiff on his cross examination as follows: "Did you ever give any checks for automobile tires?" (Case, p. 32.)

This is an action for slanderous words spoken by the defendant of the plaintiff, based on two counts, the first of which alleged that the de-

defendant had stated in the presence of a third person that he knew of the plaintiff's having given a check for automobile tires when he did not have an account at the bank. The answer is a general denial, as to both the first and second counts. The issue, therefore, is simply whether or not the defendant made the statements charged in the complaint.

This question could have been asked for only one of two purposes; first, either to prove the truth of the statement made by the defendant, as a bar to the action; or, second, to prove the truth of such statement for the purpose of mitigating the damages. Respondent claims that under a general denial this question, when asked of the plaintiff, was improper for either purpose, and no error was committed in its exclusion.

If the defendant made the statements because they were true, he should have admitted their making in his answer and justified on the ground of their truth. His answer, however, was a general denial that he had ever made the statements, and under such answer the truth, so far as it is sought to be used as a *bar to the action*, is irrelevant.

If, on the other hand, the question was asked for the purpose of mitigating the damages, it was also improper for the reason that the plaintiff was not the proper party by whom to prove the truth. For purposes of mitigation the defendant is, under a general denial, permitted to prove that when making statements he was simply repeating what was current gossip, rumor, or reputation, on the theory that a man having a poor reputation is less likely to be injured than one concerning whom nothing derogatory can be said. The way to prove such reputation is the same in slander as in any other

case, namely: by the testimony of neighbors of the party whose reputation is sought to be shown. Certainly a plaintiff's reputation for the giving of checks on banks where he has no accounts cannot be shown by asking him if he had ever given such checks. Such a question does not disclose his reputation; neither does it disclose what rumors, if any, exist in the community of his having given checks of that character. In reality it was nothing more than an attempt to prove the truth under a form of pleading which made the truth inadmissible. If that assumption is incorrect, then it was an attempt to prove a man's reputation by questions propounded to the man himself; to prove reputation by proof of particular facts.

The authorities are clear, both in New Jersey, throughout the United States, and in England, that under a general denial the truth cannot be introduced in bar of the action. They are likewise clear, at least in New Jersey, that while, under a general denial, the truth is admissible in *mitigation of damages*, and to rebut malice, the way to show the basis for defendant's statements is by introducing evidence as to the reputation which the plaintiff bears in the community as having in fact been guilty of the acts with which the defendant charged him in the slanderous statements.

While the following are authorities on both of these points, and show clearly that the question was improper, it is to be noted that at the time plaintiff objected to this question he did so on the ground that it was an attempt to prove the truth of the statement under an answer in which the truth had not been set up as a defense (Case, p. 32), and it was upon *this* contention of the plaintiff that the trial court

excluded the question; furthermore, that it was to his excluding the question for the reason given by the plaintiff as to why it should be excluded that the defendant excepted. Therefore, while authorities on both points are cited, the exception in question is based on the judge's refusal to permit this defendant to prove the truth as a bar to the action under a general denial.

In *McNaughton v. Quay*, 102 Mich. 142, the slanderous charge imputed both larceny and perjury to the plaintiff and the defendant justified as to the charge of perjury and entered a general denial as to the charge of larceny. Under these pleadings he was allowed to prove the truth of the charge imputing perjury, but evidence to show the truth of the charge imputing larceny was held inadmissible in bar of the action.

The common law rule is stated by Newell on *Slander and Libel* (3rd Ed.), p. 790, as follows:

“The defendant cannot prove, under the plea of general issue at common law, the truth of the defamatory words either in bar of the action or in mitigation of damages. The truth must be specially pleaded. If he desires to confess the publication of the defamatory words and avoid the consequences by asserting the truth of the same, he can do so under the plea of justification.”

That such evidence is inadmissible for the purpose of proving justification, see the case of *Shepard v. Merrill*, 13 Johns. (N. Y.) 475, where it is said:

“The truth of slanderous words cannot be given in evidence, under the general issue, without notice, either in justification or mitigation of damages.”

To the same effect are *Bodwell v. Swan*, 3 Pick. (Mass.) 376; *Taylor v. Robinson*, 29 Me. 323; *Knight v. Foster*, 39 N. H. 576; *Else v. Ferris*, Anth. N. P. (N. Y.) 23 (2nd Ed.) 36; *Uddegrove v. Zimmerman*, 13 Pa. 619; *Eagan v. Gantt*, 1 McMull. (S. C.) 468; *McCampbell v. Thornburgh*, 3 Head (Tenn.) 109; *Shirley v. Keathy*, 4 Coldw. (Tenn.) 29; *Barns v. Webb*, 1 Tyler (Vt.) 17; *Douge v. Pearce*, 13 Ala. 127; *Waggstaff v. Ashton*, 1 Harr. (Del.) 503; *Burke v. Miller*, 6 Blackf. (Ind.) 155; *Ashire v. Cline*, 3 Ind. 115.

“In an action for charging the plaintiff with fornication, the defendant offered to prove, under the general issue, without notice, evidence which amounted to a justification of the charge; but it was held to be inadmissible.” *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156.

“Under a plea of ‘not guilty,’ evidence to prove a justification is inadmissible either in chief, in mitigation of damages, or by the way of repelling illegal evidence introduced by the plaintiff.” *Samuel v. Bond*, Litt. Sel. Cas. (Ky.) 158.

“In a civil action, the truth of the charge is a justification, but it cannot be given in evidence unless it is pleaded or notice thereof is given with the general issue. Under the general issue any matter may be given in evidence in mitigation which does not tend to a justification and which falls short of it.” *Snyder v. Andrews*, 6 Barb. (N. Y.) 43.

“The defendant cannot give in evidence under this plea matter which might be pleaded in bar; nor can he give evidence of any other crime than the one charged, either in bar or in mitigation of damages.” *Andrews v. Van Duzer*, 11 Johns.

(N. Y.) 38; *Randall v. Holsenhake*, 3 Hill (S. C.) 175.

Newell on Slander and Libel (3rd edition), p. 966, says:

“In civil actions, and against a party coming into a court of justice on a claim for damages, it has long been held, as a rule of the common law, that the truth of the facts imputed constituting the slanderous or libelous charge may be pleaded by way of justification, and if proved constitute a good bar to the action. In such case, of course, the motive and purpose are immaterial, and cannot be the subject of inquiry. The rule proceeds upon the principle that whatever is the motive, if the charge against the individual suing is true, if he is in fact guilty of the crime or disgraceful conduct imputed to him, he has sustained no damage for which he can claim redress in a court of justice. *But in such case it is a fixed rule that the defendant must plead the truth in bar, and must detail the facts in his special plea with legal formality and precision, and sustain it by strict proof of the facts thus charged.*”

“If defendant relies on the truth of the words spoken or published, as a defense to the action, it must be pleaded. Evidence of the truth of the charge is not competent under the general issue.” 13 Enc. of Pl. & Pr., p. 78, and cases there cited.

“The truth of the charge cannot be proved where justification is not pleaded.” *Haws v. Stanford*, 3 Sneed, 520; *Rumsey v. Webb*, 1 Car. & M. 104; *Watkin v. Hall*, L. R. 3 Q. B. 396; *Padgett v. Sweeting*, 21 L. R. A., 65 Md. 404; *Sheahan v. Collins*, 20 Ill. 325, 71 Am. Dec. 271;

*Abshire v. Cline*, 3 Ind. 115; *Manitoba Free Press Co. v. Martin*, 21 Can. Sup. Ct. Rep. 518.

“Evidence tending to prove the truth of the words charged as slanderous was properly rejected where there was no plea of justification.” *Kay v. Fredrigal*, 3 Pa. 221.

“The defenses of truth, and privileged communication must be separately pleaded.” *Fink v. Justh*, 14 Abb. Pr. N. S. 107.

In New Jersey, in the case of *Cook v. Barkley*, 2 N. J. L., p. 163, Rossell, *J.*, says:

“I take it to be indisputable law, ever since the decision of the court in the case of *Underwood v. Parks*, as laid down by Chief Justice Lee, in 2 Strange, 1200, that the truth of the words in actions of slander, shall not be given in evidence on a plea of not guilty.”

In *Merrey v. Guardian Printing & Publishing Co.*, 79 N. J. L. 177, affirmed in 81 N. J. L. 632, it is said:

“The truthfulness of a libel is a complete defense in a civil action; but it must be pleaded fully and as to every particular, and be strictly proved, to be availed of.”

In *Sayre v. Sayre*, 25 N. J. L. 235, at page 240, it is said, in the opinion of the Chief Justice:

“The defendant cannot, under the general issue, give in evidence the truth of the words spoken, because this is matter of justification, and constitutes a complete defense to the action. It is excluded, therefore, from being offered in evidence under the general issue by virtue of a technical rule of pleading, which requires matters of justification to be pleaded in bar of the action.”

In the opinion of Elmer, *J.*, in the same case, p. 250, it is said, referring to three classes of cases in which the character of individuals is admitted, that:

“\* \* \* evidence of character can occur in an action of slander only when it has been justified, and the question is, whether the plaintiff was or was not guilty of the crime charged.”

In that case the defendant had stated that the plaintiff had broken open a store and stolen shoes and boots. On this point the court says, bottom of page 250:

“In the case before us, the defendant could not have been permitted to prove the plaintiff’s character, to affect the question of his being guilty of the charge made against him, that he had broken open a store and stolen shoes and boots, and he made no such offer. That he was innocent of the crime alleged to have been imputed to him, was admitted by the plea of not guilty, and was not a subject of inquiry.”

From the above, therefore, it will be seen that it has uniformly been held that unless a justification has been filed the defendant has never been permitted to introduce evidence as to the truth of the slanderous statements *in bar* of the action.

New Jersey differs from many of the states, in that here the truth of the statement may be introduced under a general denial for the purpose of *mitigating the damages*, but for that purpose only. The following cases show that such is the law here, although respondent contends that this is a point not involved in the exception taken, which, as before claimed, was taken

solely to the refusal of the trial judge to permit the defendant to show the truth *in bar* of the action under a general denial.

A case in point is that of *Merrey v. Guardian Printing & Publishing Co., supra*. In that case the defendants justified as to some of the charges and filed a plea of general issue as to others. As to those to which a justification had been filed, the defendants were permitted to prove the truth as *a bar* to the action. As to those to which a general denial had been filed, they were permitted to prove the truth for the purpose of *mitigating the damages*, and for that purpose only. If this were not so, it would be impossible to reconcile the first and fourth *syllabii*, the first of which reads:

“The truthfulness of a libel is a complete defense in a civil action; but it must be pleaded fully and as to every particular, and be strictly proved, to be availed of.”

This refers to the truth as a defense in *bar* of the action.

The fourth *syllabus* states:

“Under the plea of general issue, the truth of the libelous matter may be proved; but to the extent only of rebutting the presumption of malice.”

This refers to the truth when it is sought to introduce it for purposes of *mitigation*. This case is illustrative of the New Jersey doctrine, that under a general denial the defendant may show circumstances tending to prove the truth, for the sole purpose of showing that the reputation of the plaintiff is such that it could sustain but little further injury, even if the defendant did make the statements which by his answer are denied. It is contrary to the com-

mon law rule as stated by Newell on Slander and Libel at page 790, *supra*, and likewise to the cases referred to on page 7 of this brief, which hold that evidence of the truth is inadmissible for *any* purpose where the truth has not been specially pleaded. This split in authority is occasioned by the fact that many of the states follow *Underwood v. Parks*, 2 Str. 1200, while others follow what was the common law doctrine previous to the decision in that case. At common law, previous to *Underwood v. Parks*, and because of the danger of relying upon a plea of justification, a defendant usually rested his defense upon the general issue, under which he was allowed to prove any circumstances repelling the inference of malice to mitigate the damages. That case, however, laid down the rule that under the general issue defendant cannot prove the truth *either* in bar or in mitigation, which rule is today law in the states of Alabama, Delaware, Indiana, Maine Massachusetts, Missouri, New Hampshire, New York, North Carolina, Pennsylvania, South Carolina, Tennessee and Vermont; also in England and Canada. New Jersey, however, does not follow *Underwood v. Parks* in its entirety, for in this state the defendant is permitted, under the general issue, to disprove malice by introducing evidence tending to prove the truth of the statement by showing plaintiff's general reputation for the purpose of mitigating the damages. Indeed, the only question that has ever been raised in this matter of proving the truth of the charge under a general denial, has been whether or not it was proper to be introduced for the purposes of *mitigation*, and no cases can be found where it has ever seriously been contended that the truth is admissible in bar where

no justification has been filed. The authorities are uniform that for the latter purpose the truth is never admissible.

Had the defendant sought to prove the truth of the statements he had made, for the purpose of mitigating the damages, it is clear that in New Jersey he would have had that right. He did not, however, seek to introduce the truth for purposes of *mitigation*, but for the sole purpose of *justification*, and the exception which he took was solely to the refusal of the trial court to permit him to prove the truth in bar of the action. Nothing was said by him at that time about seeking to introduce it for purposes of mitigation; in fact, plaintiff's objection was that he was endeavoring to prove the truth in bar, and it was to the judge's ruling that this could not be done that defendant's exception was taken.

Furthermore, as already pointed out, the question was an improper one when asked of the plaintiff, even had the defendant expressly stated at the time that it was asked for purposes of mitigation, for it could by no means disclose anything as to plaintiff's reputation, nor if answered in the affirmative, could it have shown that the defendant knew that the plaintiff had given such checks when the statements in question were made.

As to what is competent in mitigation of damages where a defendant does not justify, Newell, in his work on Slander and Libel, at p. 1060, says:

“Where a defendant does not justify he may mitigate the damages in two ways:

First: By showing the general bad character of the plaintiff.

Second: By showing any circumstances which tend to disprove malice, but do not

tend to prove the truth of the charge, or which tend to prove the truth but fall short of such proof.”

As illustrations of this he cites the following:

“The defendant may show, in mitigation of damages, that, before the words were spoken, some statements which another had made in reference to the same offense had been communicated to him.” *Galloway v. Courtney*, 10 Rich. Law (S. C.) 414.

“The alleged slander consisted in calling the plaintiff a thief and scoundrel. At the trial the defendant testified that, at the time he used the language, he believed that his property had been stolen. The evidence was proper as tending to show good faith and in mitigation of damages.” *Morris v. Lachman*, 68 Cal. 109.

“For the purpose of reducing the damages the defendant may introduce evidence to show that the plaintiff’s general moral character is bad, but evidence of particular facts is inadmissible.” *Lamos v. Snell*, 6 N. H. 413, 25 Am. Dec. 468, and cases there cited.

“The defendant may prove a general report of the truth of the words spoken in mitigation of damages, but not in justification.” *Nelson v. Evans*, 12 N. C. 9; *Callo-way v. Middleton*, 2 A. K. Marsh. (Ky.), 372, 12 Am. Dec. 406; *Wetherbee v. Marsh*, 20 N. H. 561, 51 Am. Dec. 244.

“In mitigation of damages evidence that the party uttering the words offered an explanation of the same, the explanation being part of the same conversation and in the hearing of the same persons, and in refer-

ence to the same subject, is admissible." *Winchell v. Strong*, 17 Ill. 597.

"Under a plea of justification, evidence of a rumor of the truth of the alleged libel may be given in mitigation of damages, and evidence of the defendant's motive in publishing the alleged libel is admissible for the same purpose." *Heilman v. Shanklin*, 60 Ind. 424.

"Where a slanderous charge of larceny is made the foundation of a suit, evidence of the plaintiff's general reputation for honesty and integrity is admissible in mitigation of damages." *Werner v. Lockerby*, 31 Minn. 421.

## II.

### The Motion to Non-Suit.

It is likewise contended that the court erred in refusing to non-suit the plaintiff. At the time plaintiff closed his case the evidence indicated (1) that in the latter part of October or early in November, 1915, plaintiff and his wife met the defendant on Orange Street, in the City of Newark, and in the presence of the plaintiff alone defendant made the threats testified to on pp. 15-16 of the state of the case; (2) that when Mrs. Bingham, having completed her purchases in the store, returned to the automobile, Mr. Schindel repeated to her (Case, p. 36) the threats he had just made to her husband; (3) Mr. Bingham further testified that in pursuance of those threats, Mr. Schindel had twice called at his place of employment, and told him that he would "go inside and do as I said I would do" (Case, p. 16); (4) Mr. Bristow corroborated Mr. Bing-

ham to the extent of saying that Mr. Schindel did twice call upon him; (5) the same witness testified that on the second visit the defendant stated to him, "I know of Bingham having given a check in payment of automobile tires when he did not have an account, and can prove this," and furthermore that he had subsequently told the witness that "Bingham conducted himself improperly with women while his wife was ill in the hospital, he had them in his house, this can be proved by people living in the house at the time" (Case, p. 42), and that he had made a memorandum of these statements within one or two days after the defendant's second visit; (6) Mr. Palmer testified that on October 16th, 1916, he visited the defendant at his office in Bamberger's store in Newark, and at that time asked him to retract the statements made to Mr. Bingham's employers (Case, p. 51); that the defendant refused to do so, and upon being charged with the making of statements damaging to Mr. Bingham, said (p. 52), "Yes, I said them. What is more, I can"—

Therefore when the plaintiff closed, his case stood as follows: One month prior to the making of the statements the defendant had threatened to "queer" the plaintiff, to put him "on the bum" with his employers. We have corroboration of these threats in the testimony of plaintiff's wife, to whom the defendant repeated them. We have the defendant thereafter twice calling at the office of plaintiff, each time remarking that he was about to do what he had threatened to do; likewise testimony from the plaintiff's employer, that when the defendant succeeded in seeing him he did make statements which would have the effect of "queering" a man with his employers; and last-

ly, evidence that ten months later, when charged with the making of damaging statements to the plaintiff's employers, the defendant admitted that he had made them, and half completed a further statement that he could prove them.

Under these circumstances no error was committed by the trial court refusing to non-suit the plaintiff. Defendant, at the time of making his motion for non-suit, based it on the fact that the plaintiff had not shown he had been damaged by reason of the slanderous statements made against him. It, however, is clear that where words actionable *per se* are used, the law will presume damage to the reputation, and it is only where a plaintiff claims special damages that he need prove the damages those words occasioned. If reasonable men might infer that the statements in question intended to charge Mr. Bingham with fraud, and with sexual relations with women other than his wife, they are clearly actionable *per se*, and as such do not require evidence that, in addition to the injury which the law presumes such charges occasion to the reputation, the plaintiff should go on and show an injury to his pocket-book. Had special damages been claimed, there would have been some merit to the contention of the defendant that damages had not been proven, but such a contention has no place in a case based on words actionable in themselves.

## III.

**Questions of Fact Properly Left to Jury.**

The defense in this case was a general denial, the defendant admitting but three of the points brought out by the plaintiff, and denying absolutely everything else in the case. Defendant admitted meeting Mr. Bingham in an automobile on Orange Street, but denied that Mrs. Bingham was present; he admitted seeing Mr. Bristow twice, but denied that on either visit he did anything more than ask that Mr. Bristow to help him secure his \$70.00 from Mr. Bingham; he admitted that Mr. Palmer had seen him in Bamberger's, but denied that he had made any admission that he had made damaging statements against Mr. Bingham. The trial court had an opportunity to observe all the witnesses in this case, and note their manner on the stand. To have directed a verdict for the defendant would in effect have been to hold that Mr. and Mrs. Bingham, against whom nothing derogatory had been shown at the trial; Mr. Bristow, secretary of Benjamin & Johnes, and a gentleman of high standing in the business life of Newark; and Mr. Palmer, an attorney of Newark, were unworthy of belief, and there was nothing throughout the trial on which the court could have arrived at such a conclusion.

The trial court, therefore, properly left to the jury the questions as to who was testifying to the truth in this case, and whether or not, if the statements were made, they were the result of an unfortunate choice of words, or were, in fact, charges of offenses for which the plaintiff could be indicted, and were such as a man would be apt to make who had stated that he no longer cared for the money that was due him, and

whose "one ambition from now on is to put you on the bum; I am going to your employers and tell them what kind of a man you are; I have no idea of getting the money, but I will 'queer' you with them." (Case, p. 15.)

#### IV.

##### **Court Did Not Err in Instructing Jury.**

It is claimed by appellant that the court below erred in instructing the jury that in determining whether or not the slanderous words were spoken, they had a right to consider in connection therewith the testimony of Mr. and Mrs. Bingham which related to a conversation they had with Mr. Schindel on Orange Street. To properly determine whether or not this was error, it is necessary to ascertain just what Mr. and Mrs. Bingham claimed took place during their conversation with Mr. Schindel. Mr. Bingham testified (Case, pp. 15-16) that Mr. Schindel, in the course of the conversation, threatened to go to Bingham's employers, not with any idea of getting the money due him, but to "queer" him, to "put him on the bum." Mrs. Bingham testified (Case, p. 36) that she did not hear these threats at the time they were made to Mr. Bingham, but that upon her coming out of the store, Mr. Schindel volunteered to repeat what he had told Mr. Bingham while Mrs. Bingham was in the store, and her testimony is to the effect that he told her he had just finished telling her husband that he would go to Bingham's employers and "queer him"; that he did not want the money, but that he would "put him on the bum." The exception, therefore, presents the single question: In de-

termining whether or not an act was done, have the jury a right to consider in connection therewith threats to commit that act made by the defendant prior to its commission? A review of the authorities shows that nothing is more firmly settled than that such threats are admissible, and, if admissible, of course are proper to be considered by the jury in determining whether or not the act concerning which the threat was made had actually been carried out.

On this point Wigmore, in his treatise on Evidence, sec. 102, says:

“The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or was not done. A plan is not always carried out, but it is more or less likely to be carried out. The existence of the plan is always used in daily life as the basis of an inference to the act planned. There is no question about the relevancy in general of such evidence.”

“The existence in the mind of a deliberate design to do a certain act, when once proved, may properly lead to the inference that the intent once harbored continued and was carried into effect by acts long subsequent to the origin of the motive by which they were prompted.” *Cook v. Moore*, 11 Cush. 213.

The probative value of such a design or plan, for the purpose of admissibility, will depend chiefly on two elements, either of which may be very weak in a given instance, the fixedness or absolute quality of the design, *i. e.*, its subjection to no contingencies or conditions; and the specific direction of it to the act in question, *i. e.*, its application, not merely to a class of acts

indefinitely foreseen, but to the exact deed in question. The only question of relevancy that have arisen are due to the probative importance of these elements. Wigmore on Evidence, sec. 102.

Swift, in his work on Evidence, p. 136, says:

“When one threatens to do an injury to another, and that or a similar injury afterwards happens, this furnishes ground to presume that he who threatened the fact was the perpetrator or instigator.”

In *Stokes v. People*, 53 New York, 175, it was held:

“Threats to commit the crime for which a person is upon trial are constantly received as evidence against him, as circumstances proper to be considered in determining the question whether he has in fact committed the crime; for the reason that the threats indicate an intention to do it, and the existence of this intention creates a probability that he has in fact committed it.”

In *Worth v. R. R. Co.*, 51 Fed. Rep. 173, the court said:

“It is also said by counsel that a threat to do an act in the future is not proof that the person will in fact do the act threatened. It may not be proof conclusive, but it may be evidence competent to be considered with other facts in determining the question. Thus if the two persons who made the threats in question had been charged, either civilly or criminally, with the tort of having wrecked the train, can it be questioned that on the trial of the case evidence of the threats made by them would have been competent as tending to show their complicity in the wrong done.”

The same doctrine is enunciated in *Wilson v. State*, 110 Ala. 1, 20 So. 415; *Casat v. State*, 40 Ark. 715; *Babcock v. People*, 13 Colo. 521, 29 Pac. 817; *Fulton v. State*, 58 Ga. 224; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; *Cluck v. State*, 40 Ind. 263, 270; *State v. Windahl*, 95 Ia. 470, 64 N. W. 420; *New Gloucester v. Bridgham*, 28 Me. 68; *Commonwealth v. Madan*, 102 Mass. 165; *People v. Holmes*, 111 Mich. 364, 69 N. W. 501; *State v. Hayward*, 62 Minn. 474, 65 N. W. 63; *State v. Harlan*, 130 Mo. 381, 32 S. W. 997. See further, cases cited in Note 1, sec. 106, p. 178, of Wigmore on Evidence, showing the uniformity with which such threats have been admitted, not only in this country, but also in England.

In New Jersey, threats by a defendant to commit a certain act have always been receivable upon his trial for the commission of such act.

“It is first objected that the State was permitted to prove by two witnesses that the defendant, about three weeks before the homicide, exhibited a revolver to them, stating at the same time that there were a couple of his countrymen that he had a grudge in for, and that, if they bothered him, he was going to shoot them. The ground of objection is that the time of the making of the statement was ‘too remote’ from the date of the homicide, and, further, that the defendant did not state that either of the two men against whom the threat was made was Denofrio. Why the time of making the statement was so remote as to render it incompetent we are not informed by counsel, nor are we able to perceive for ourselves. Nor do we consider that the failure of the defendant to disclose the identity of the two

men against whom he had the grudge rendered the testimony incompetent. If, in fact, one of them was Denofrio, it is not denied that the evidence was competent. Whether or not such was the case was a matter of inference, to be drawn from the other facts proved; and the drawing of that inference was for the jury, not for the court." *State v. Rosa*, 72 N. J. L. 462, decided by the Court of Errors and Appeals.

In a subsequent case, *State v. Overton*, 88 Atl. 689, decided by the same court, it was said:

"Counsel maintained that evidence of statements indicating bad feelings, especially when made sometime previous to the commission of the crime, was incompetent. The rule is just the other way"; affirming *State v. Rosa, supra*.

See also cases cited in 17 L. R. A. 654.

"Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions are." *Sugden v. St. Leonards*, L. R. 1 P. D. 154.

"The evidence is admitted on the presumption, arising from experience, that when a man does an act his contemporary declaration accords with his real intention, unless there be some reason for misrepresenting such intention." *Hadley v. Carter*, 8 N. H. 42.

"It is almost the only kind of evidence by which the condition of body or mind can be ascertained." *Biles v. Holmes*, 11 Ired. 20.

"The declarations of the defendant as to his intent or object in killing the cow do not depend

in the slightest degree upon the credit that might be awarded to him as a man, but solely and exclusively upon the presumption arising from experience that his contemporary declarations accord with his real intentions." *Cornelius v. State*, 12 Ark. 805.

"The present state of health or feeling is always allowed to be proved in this way, since it is the only mode in which it can be shown." *State v. Howard*, 32 Vt. 380, 404.

"Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. These expressions are the natural reflexes of what it might be impossible to show by other testimony. \* \* \* As independent explanatory or corroborative evidence, it is often indispensable to the due administration of justice. \* \* \* Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, not to the past. Anything in the nature of narration must be excluded." *Insurance Company v. Mosley*, 8 Wall, 397.

"Such declarations, made with no apparent motive for misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same person." *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208.

"A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written." *Mutual Life Insurance Company v. Hillmon*, 145 U. S. 285.

"The fundamental proposition is that an intention in the mind of a person can only be

shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these for the purpose of showing the state of mind or intention of the person is proof of a fact from which the state of mind or intention may be inferred." *Commonwealth v. Trefethen*, 157 Mass. 185, 31 N. E. 961.

"Declarations of defendants, tending to show their having formed determinations to commit crimes, are always admissible against them when accused of committing the same." *New Gloucester v. Bridgeham*, 28 Me. 68.

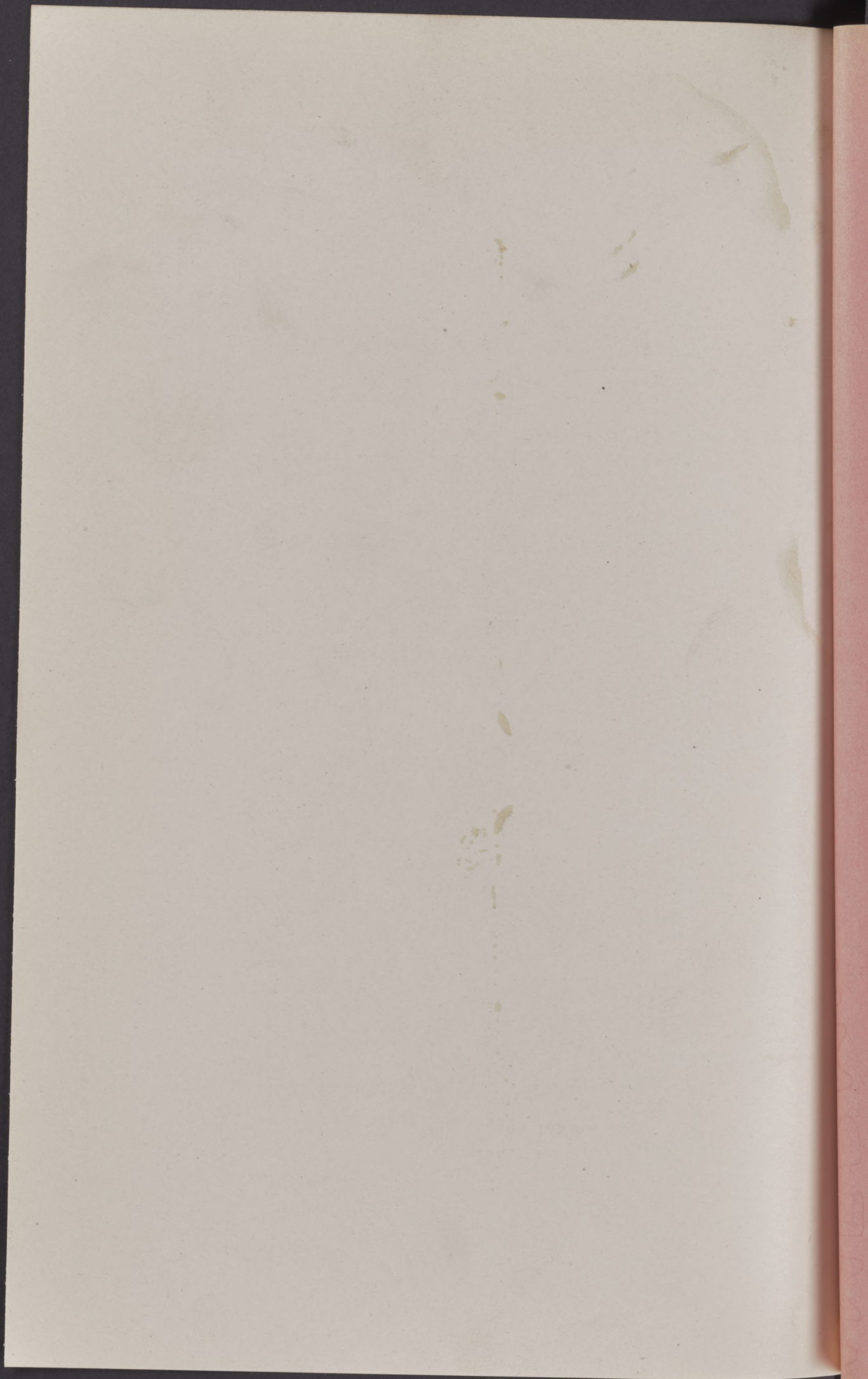
If then, threats to murder are admissible against the defendant in murder cases; if threats to commit arson are admissible against the defendant in arson cases; if threats to do bodily injury are admissible in cases of assault and battery; if threats to place railroad ties on train tracks are admissible against defendants where ties have been placed upon tracks; if threats to kill animals are admissible in cases arising out of the death of such animals—why are not threats to slander admissible in cases arising out of such slander? And that such threats as are here cited have been admitted is conclusively shown by the cases cited in the paragraph beginning "The same doctrine is enunciated in *Wilson v. State*," on page 22, *supra*.

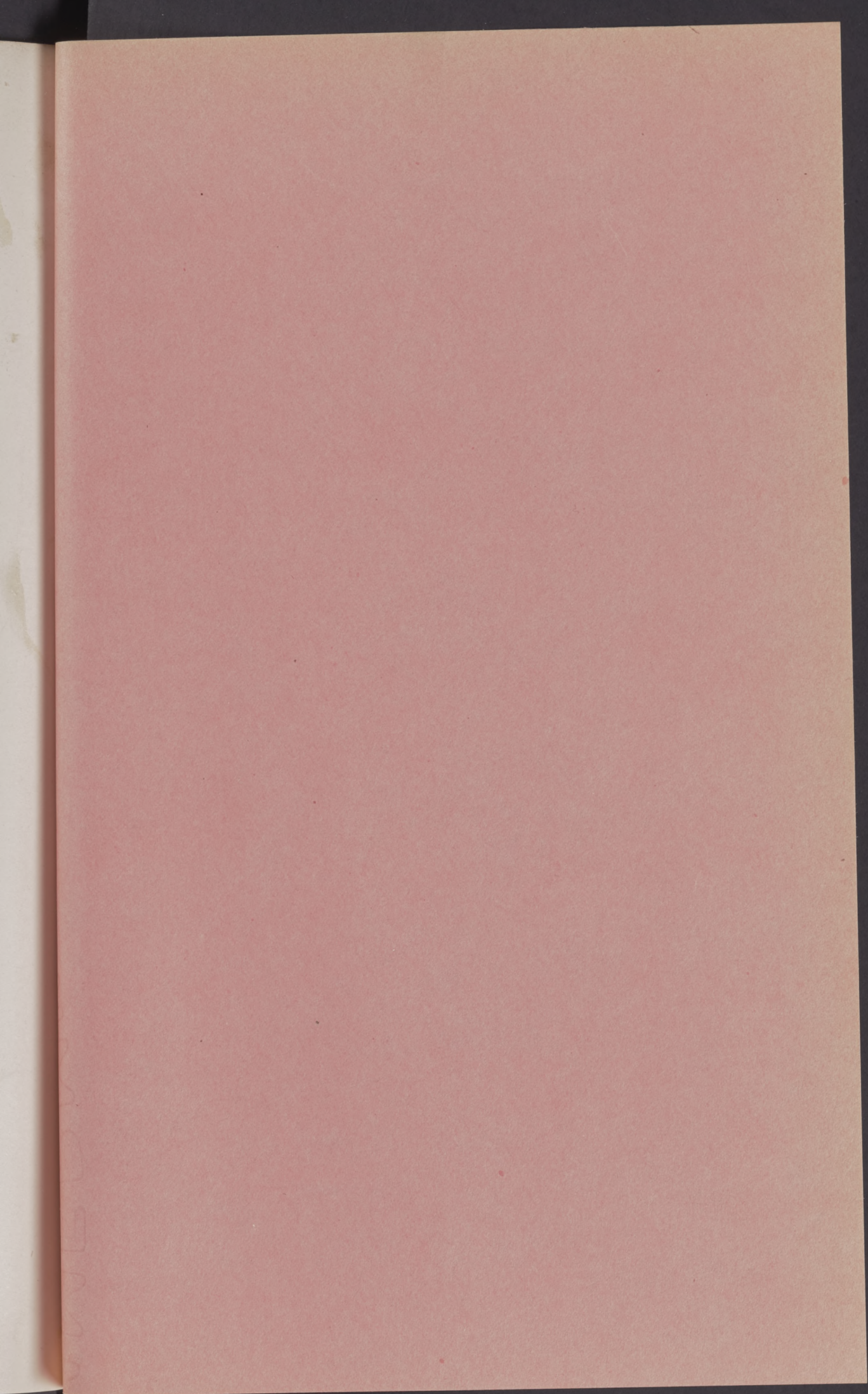
It is respectfully submitted that the judgment under review should be affirmed.

June term, 1918.

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CHILD & GILMOUR,  
*Of Counsel for Respondent.*





AMERICAN