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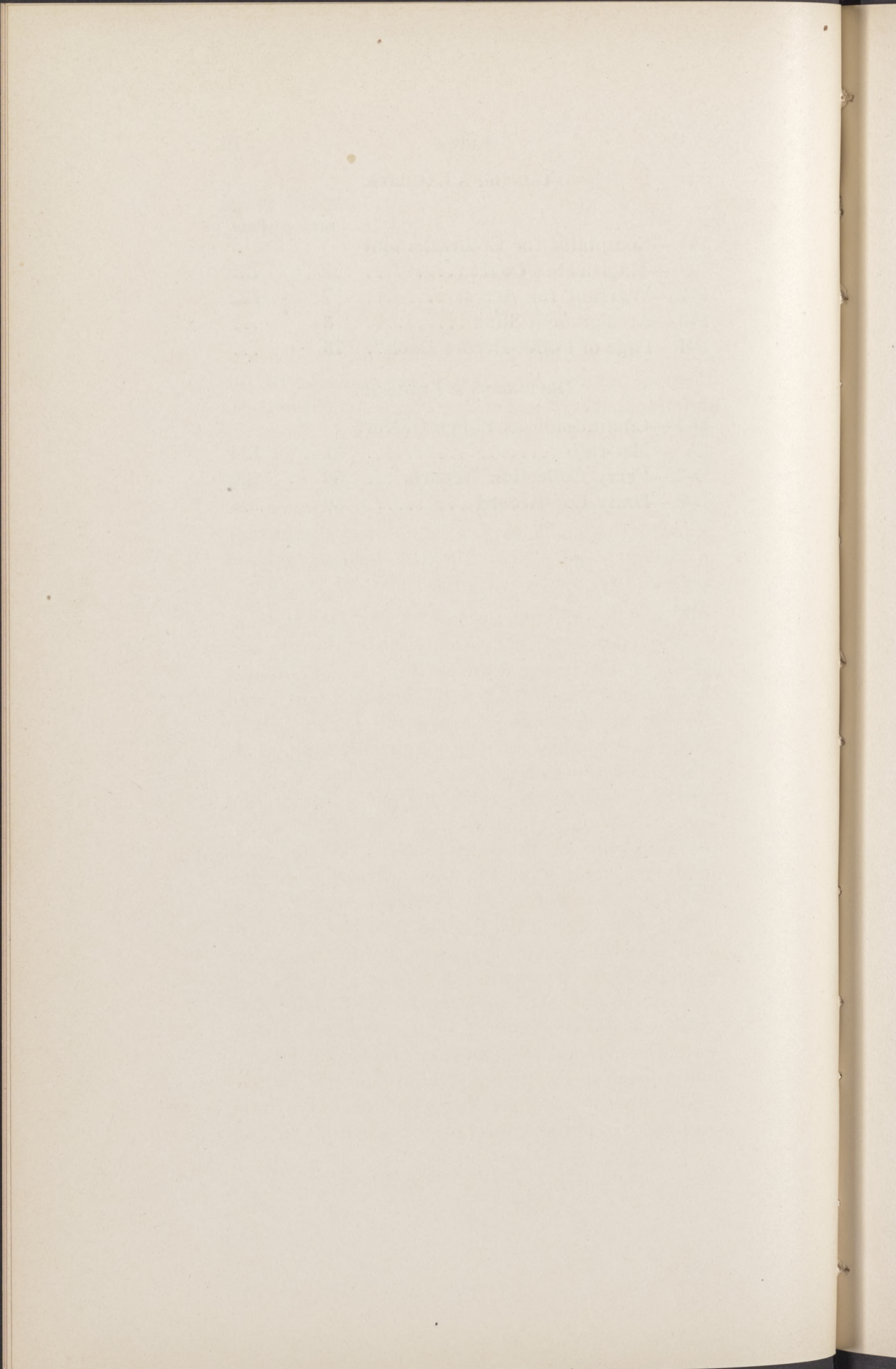
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Complaint.

(Filed December 3, 1928.)

Plaintiff Michael Evanyke, residing at Clifton, Passaic County, New Jersey, complaining of the defendant, Electric Ferries Company, a corporation of the State of New Jersey, says: 10

FIRST COUNT.

1. At all the times hereinafter mentioned the plaintiff was and now is a resident of the County of Passaic, New Jersey, and was held in high esteem and repute by his fellow citizens.

2. On or about November 12, 1927, the defendant, Electric Ferries Company, by its agents and servants, falsely and maliciously, and without just or probable cause, and with intent to harm and defame the plaintiff, charged the plaintiff, who was then employed by it in a fiduciary capacity as a ticket seller and cashier at its office in Weehawken, New Jersey, with feloniously embezzling and converting to his own use, without the assent or knowledge of the said Electric Ferries Company, the sum of \$1,000, then alleged to be the property of the Electric Ferries Company, and which was alleged had come into possession of said plaintiff as such employee, before the police officials in the Township of Weehawken, Hudson County, New Jersey, and caused said plaintiff to be arrested and confined in the common jail in said Township of Weehawken upon said charge, and otherwise greatly humiliated plaintiff, and deprived him of his liberty for a long period of time, and he was obliged to appear from time to time 20 30 40

Complaint.

10 before the Recorder's court of said Township of Weehawken after being permitted his liberty upon bail, to answer said charge, but said charge has not been prosecuted nor has plaintiff been indicted by the Grand Jury of the County of Hudson, or elsewhere, but, in fact, the complaint so made before the Recorder of the Township of Weehawken, has been dismissed and plaintiff discharged from his said bail and the same has been cancelled.

20 3. Said complaint so made by the defendant, through its agents and servants, while acting within the scope of their employment, was founded in malice and without justification or probable cause therefor, but wholly with intent to injure and harm the plaintiff herein.

30 4. As a result of said acts of the defendant, through its agents and servants, the plaintiff was greatly humiliated and injured in his reputation, lost the respect of many of his friends and acquaintances, and has been prohibited from obtaining employment in a fiduciary capacity because of the damage to his reputation by reason of the making of said false and malicious charge by the defendant, and was damaged in divers and other manners.

Plaintiff will demand damages on this count in the sum of \$10,000.

SECOND COUNT.

1. Paragraphs 1, 2, 3 and 4 of the First Count are reiterated and made a part of this count.

40 2. On or about November 12, 1927, at the Township of Weehawken, New Jersey, defendant was, through its agents and servants operating an electric ferry system across the Hudson River, and did

Complaint.

employ the plaintiff as a ticket seller and cashier at said Township of Weehawken.

3. At the time and place first aforesaid, the said plaintiff, by its agents and servants, and while actually engaged in the performance of their duty, and acting within the scope of their authority, with force and arms, assaulted the plaintiff, and then seized and lay hold of him, and with great force and violence, pulled and dragged him about, and then, without justifiable cause, did cause him to be imprisoned in the common jail in the Township of Weehawken, New Jersey, and kept and detained him in such prison for a long time, and forced and compelled the plaintiff to go to court and forcibly conveyed him in custody in and along divers public streets and highways to said police station where plaintiff was imprisoned and kept and detained for a long space of time, without any reasonable or probable cause whatsoever, and contrary to law, and under a false and unreasonable assertion, without justification, declared and charged plaintiff had committed an offense in that the defendant alleged that the plaintiff feloniously embezzled and converted to his own use, without the knowledge or consent of the Electric Ferries Company, a certain sum of money, United States currency, of the value of One Thousand (\$1,000) Dollars, claimed to be the property of the Electric Ferries Company, and which it alleged had come to the possession of the plaintiff as such employee.

4. Whereby and by reason thereof, plaintiff was greatly hurt, and suffered great anguish and pain of mind and body, and was prevented from attending his lawful affairs, and was also thereby greatly exposed and injured in his credit, reputation and circumstances, and was subjected and

Answer.

put to diver's expense in order to obtain, and in obtaining his liberation from said imprisonment, and was obliged from time to time to appear in said court, and thereby also sustained other wrongs, all at the instigation of the defendant, and all without reasonable justification or probable cause.

10

Plaintiff will demand damages on this count in the sum of \$10,000.

Plaintiff will demand damages on the First Count in the sum of \$10,000; plaintiff will demand damages on the Second Count in the sum of \$10,000, together with costs of suit.

J. RAYMOND TIFFANY,
Attorney for Plaintiff.

20

Answer.

(Filed March 20th, 1929.)

Defendant answering plaintiff's complaint, says that:

FIRST DEFENSE TO FIRST COUNT.

1. It denies each and every allegation of paragraph 1.
2. It denies each and every allegation of paragraph 2.
3. It denies each and every allegation of paragraph 3.
4. It denies each and every allegation of paragraph 4.

30

FIRST DEFENSE TO SECOND COUNT.

1. Paragraphs 1, 2, 3 and 4 of the first defense to first count are repeated and made part of this defense.

40

Reply.

2. It denies each and every allegation of paragraph 2.

3. It denies each and every allegation of paragraph 3.

4. It denies each and every allegation of paragraph 4. 10

SECOND DEFENSE TO EACH COUNT.

The arrest of the plaintiff as alleged in the complaint was made not by, through or at the instigation of this defendant, but by one Joseph McGrath, State Railway Police Officer, who is responsible not to the plaintiff, but to the sovereign State of New Jersey.

COLLINS & CORBIN, 20
Attorneys of Defendant.

Consent to filing within Answer as of time hereby acknowledged this 19th day of March, 1929.

J. RAYMOND TIFFANY,
Attorney of Plaintiff.

Reply.

30

(Filed March 18th, 1929.)

Plaintiff, Michael Evanyke, replying to the answer filed herein says:

He denies the allegations of the Second Defense to each count and says that the arrest of the plaintiff was made by, through and at the instigation of the defendant.

J. RAYMOND TIFFANY, 40
Attorney for Plaintiff.

Andrew L. Nunan, direct.

NEW JERSEY SUPREME COURT,
PASSAIC CIRCUIT.

10

MICHAEL EVANYKE,
Plaintiff,

v.

ELECTRIC FERRIES COMPANY,
Defendant.

At Law.

Paterson, N. J., April 24, 1929.

Before—Hon. WILLIAM B. MACKAY, J., and a Jury.

20

APPEARANCES:

For Plaintiff: J. RAYMOND TIFFANY, Esq.

For Defendant: COLLINS AND CORBIN,
Esqs., by HOWARD F. McINTYRE.

(A jury was called and sworn and counsel for the respective parties opened the case to the jury.)

(A brief recess was taken.)

ANDREW L. NUNAN, sworn.

30

Direct examination by Mr. Tiffany:

Q. Mr. Nunan, you are connected with the department for the administration of justice in Weehawken? A. Yes, sir.

Q. In what capacity? A. I am magistrate.

Q. And were you the magistrate in December, 1927? A. Yes, sir.

40

Q. I show you a paper and ask you if that paper was signed in your presence (handing a paper to the witness). A. Yes, sir.

Andrew L. Nunan, direct.

Mr. Tiffany: I offer in evidence a paper marked "Complaint for embezzlement, State *versus* Michael Evanyke,"—the original.

(Paper marked Exhibit P-1.)

(Mr. Tiffany read Exhibit P-1 to the jury.)

Q. Who wrote that complaint, Judge? A. I wrote it. 10

Q. And it is signed by McGrath? A. And signed by McGrath.

Q. I ask you if you issued a warrant upon that complaint? A. Yes, sir.

Q. I show you a paper and ask you if that is the warrant that you issued as a magistrate? A. That is my signature.

Q. Well, is that the warrant? A. That is the warrant. 20

Mr. Tiffany: I offer it in evidence.

(Paper marked Exhibit P-2.)

(Mr. Tiffany read Exhibit P-2 to the jury.)

Q. Now, was that warrant executed?

Mr. McIntyre: If the Court please, I think the return is on the warrant. It speaks for itself.

Mr. Tiffany: All right. 30

Q. On the return of the warrant, December 15, 1927, as surrendered, I show you certain slips and ask you what those slips represent (handing papers to the witness). A. They represent the arraignment.

Q. Are they—

By the Court:

Q. What slips? A. These slips. 40

Andrew L. Nunan, direct.

By Mr. Tiffany:

Q. Are they of the official records? A. They are the official records.

10 Mr. Tiffany: I offer them in evidence.

(Four papers marked Exhibit P-3.)

(Mr. Tiffany read Exhibit P-3 to the jury.)

Mr. McIntyre: May I interrupt you and ask that that part of the exhibit which says "Mr. McIntyre, lawyer for the Electric Company," be stricken out as being immaterial?

Mr. Tiffany: It is the record.

Mr. McIntyre: It is a conclusion. It has no materiality whatsoever.

20 The Court: I think they are in the case without objection.

Mr. McIntyre: It didn't develop, your Honor.

Mr. Tiffany: May I ask you this: Do you deny that you represented at that time the Electric Ferries?

Mr. McIntyre: I don't think we are called upon to do it.

30 Mr. Tiffany: Subject to his objection I will prove that he represented the Electric Ferries.

The Court: I can't strike out anything in the exhibit admitted without objection.

Mr. McIntyre: It has not been admitted without objection.

The Court: It was admitted without objection.

Mr. McIntyre: The first part was, not the rest.

40 The Court: I will deny your request.

Mr. McIntyre: May I have an exception?

Andrew L. Nunan, cross.

Cross examination by Mr. McIntyre:

Q. Judge, was Evanyke ever arrested?

Mr. Tiffany: Objected to as calling for a conclusion on the part of the Judge as to whether he was ever arrested. What does he know about it? 10

Mr. McIntyre: It is to the judge's court. I think it is proper to ask.

Mr. Tiffany: He may have been arrested outside of his presence, something he knows nothing about.

The Court: What do you mean by an arrest?

Mr. McIntyre: Was he taken into custody as directed by the warrant and was he incarcerated or put in jail? What was the return to the warrant? 20

The Court: Suppose a policeman is on the street and says to a man, "I arrest you," and the man says, "You can't arrest me," and he started to run away and runs away. Is that an escape?

Mr. McIntyre: I don't think I am called upon to pass upon that.

The Court: Suppose he says, "Well, I will go with you." Is that an arrest? 30

Mr. McIntyre: I think it is.

The Court: What do you mean by an arrest?

Mr. McIntyre: I want to distinguish between the plaintiff's surrender and his apprehension and arrest, and I want to get it clear before the Court and jury what the real fact is, whether he was taken to jail and booked and bail put on him and then 40

Andrew L. Nunan, cross.

returned to Weehawken, or whether he merely came in and surrendered himself.

Mr. Tiffany: That will develop in the proof.

10

The Court: Why don't you ask him what the facts were?

Mr. McIntyre: May I ask that?

The Court: Yes.

Q. What were the facts surrounding the execution of the warrant? A. Well, the warrant was— at the time of the man's arraignment before me, why, the police department surrendered the warrant, turned the warrant over to me with the proper notation that the defendant had surrendered.

20

Q. That is, the Weehawken Police Department turned that over to you? A. Yes.

Q. Evanyke was not brought there, was he, by the Clifton Police Department? A. That I am not able to say.

Q. Shouldn't that appear on the return of the warrant? A. Well, he surrendered, so naturally it wasn't necessary to have any bodyguard or anything, if a man surrendered.

30

Q. And he was brought to you by his own attorney, wasn't he, Judge?

Mr. Tiffany: There is no question about that.

A. The man was brought to me—

Mr. McIntyre: All right, there is no question about that. That is all.

40

Joseph McGrath, direct.

JOSEPH McGRATH, sworn.

Direct examination by Mr. Tiffany:

Q. Mr. McGrath, I show you a paper, P-1, and ask you if that is your signature (handing exhibit to the witness). A. Yes, sir.

10

Q. You were employed in November, 1927, by whom? A. By the Electric Ferries Company.

Q. At Weehawken? A. At Weehawken.

Q. And in what capacity? A. Police officer.

Q. Do you know Michael Evanyke, the plaintiff here? A. Yes.

Q. At whose direction if anyone's did you make the complaint which I have exhibited to you as P-1?

Mr. McIntyre: I object, if the Court please, first to the form of the question. The complaint speaks for itself, signed by the witness, and I don't think there are any circumstances or facts surrounding the signing of it that are admissible.

20

Mr. Tiffany: I think I have a right to show, in a suit for malicious prosecution, as I will show, that this witness, who was directed to sign a complaint—

Mr. McIntyre: Now, I object to the statement on the record, because it amounts to testimony.

30

Mr. Tiffany: I am going to prove it out of the mouth of this witness, that he was directed to sign this complaint and that he knew nothing about these facts and knew nothing about it, and yet he was directed to sign. I will prove it by this witness, and who told him to do it.

The Court: I will permit it.

40

Joseph McGrath, direct.

Mr. McIntyre: I will ask an exception, your Honor please.

(The question was read by the stenographer as follows:)

10 "Q. At whose direction if anyone's did you make the complaint which I have exhibited to you as P-1"? A. Mr. Price, superintendent.

Q. Superintendent of whom? A. Of the Electric Ferries.

Q. Now, will you tell the Court and jury, was it upon the same day that you signed the complaint that he told you to make it? A. The following afternoon.

20 Q. Well, now, he told you the following afternoon to make it or was it the following afternoon that he told you that you made it? A. The following morning he told me to go to the station house to meet counsel, which I did.

Q. He told you to go the following morning? A. The following morning.

Q. Did you go the following morning? A. Yes, I went there and met counsel.

30 Q. Will you refer to the conversation that you had with Mr. Price on the day before you made that complaint in which he directed you to go and meet counsel as you have indicated, Mr. McIntyre? At the office or at the Town Hall?

Mr. McIntyre: I object to that question first upon the ground that whatever Mr. Price said cannot be made binding upon this defendant; secondly, it doesn't appear who Mr. Price is or—

40 Mr. Tiffany: I will withdraw the question.

Mr. McIntyre: All right.

Carol Winslow, direct.

Mr. Tiffany: May I withdraw the witness for a moment?

Mr. McIntyre: Yes.

CAROL WINSLOW, sworn.

10

Direct examination by Mr. Tiffany:

Q. Mr. Winslow, you are connected with the Electric Ferries Company? A. Yes, sir.

Q. In what capacity? A. President.

Q. And as president—withdraw it. Did you occupy that position in November, 1927? A. I did.

Q. And who was the—withdraw it. Did you have a man in your employ by the name of Price? A. I did.

20

Q. What was his full name? A. I don't know his full name. Jim Price.

Q. And where was his place of employment?

A. He was superintendent of maintenance and operation in Weehawken.

Q. In Weehawken? Was he in charge of the Weehawken end of the ferries, the operation and maintenance? A. In charge of the boats and the operation, both ends.

Q. Maintenance at both ends? A. The maintenance is in Weehawken.

30

Mr. Tiffany: That is all.

JOSEPH McGRATH, recalled.

Direct examination by Mr. Tiffany:

Q. Mr. McGrath, what was Mr. Price's first name?

A. We used to call him Jimmy Price.

40

Q. Was he superintendent at Weehawken of the Electric Ferries, I-n-c.? A. I believe he was.

Carol Winslow, cross.

Q. Will you tell us the conversation that you had with him on the day prior to the making of the complaint, P-1?

10 Mr. McIntyre: I object to that, if the Court please, upon the ground, first, that it does not appear that Price had any authority other than that concerned with the operation of the boats and maintenance, and whatever Price may have said to him cannot be made binding upon the defendant in this action.

The Court: I will permit the question.

20 Mr. McIntyre: May I have an exception, but before may I be allowed to ask Mr. Winslow one question?

The Court: Yes.

CAROL WINSLOW, recalled.

Cross examination by Mr. McIntyre:

Q. Mr. Winslow, did Mr. Price have anything whatsoever to do with the manner of the sale of tickets?

30 Mr. Tiffany: I object to the question as leading. He can tell us his duties, it seems to me.

The Court: Is this cross examination?

40 Mr. McIntyre: Yes, of Mr. Tiffany's witness. He called Mr. Winslow to prove the duties of Price. Now, we urge here that if what McGrath says Price told him to do—we say that that cannot be binding upon this defendant, because Price's authority for doing so does not appear. The only evidence before the Court was Price was the

Carol Winslow, cross.

superintendent of operation and also of maintenance. Now, the issue is something separate and distinct and entirely apart from the question of operation and maintenance of boats. This involves ticket selling, and as McGrath would have it, instruction from Price whose authority does not appear, to have Evanyke arrested or a complaint signed, and we respectfully urge to the Court that the question propounded by Mr. Tiffany is immaterial and improper and further that it should not be allowed unless it appears what Price's authority in this particular issue is. 10

Mr. Tiffany: May I just answer? It would seem to me from counsel's opening, where he stated that they had investigated and they had come to counsel for advice, I have a right to show the conversation in which they put it before Price and what Price said to him. 20

Mr. McIntyre: The first time that Price's name appeared was when Mr. McGrath said it. It wasn't stated in my opening.

The Court: What is the question? 30

Mr. Tiffany: The conversation that took place between Price, the superintendent, and McGrath.

The Court: No, the question is to Mr. Winslow.

Mr. Tiffany: I overlooked that. I will withdraw my objection to that.

Q. Had Price, Mr. Winslow, any authority—

Mr. Tiffany: I object to the use of the word authority. 40

Mr. McIntyre: All right. May I say this:

Joseph McGrath, direct.

10 Q. What was Price's function or duty with respect to the sale of tickets by Evanyke? A. None at all. The tickets directly turned into the head office. And I am also treasurer of the company and head of it. Money and tickets and every-
 10 thing is turned into a box and sent directly to the head office, and nobody on the dock or on the boats is allowed to touch any money or any tickets.

Q. All right.

20 Mr. McIntyre: With that before the Court we respectfully urge that the question propounded is improper, irrelevant, immaterial, and without foundation, and whatever Price said to McGrath cannot be made binding upon the defendant because it does not appear that Price had any right or authority to bind this defendant.

The Court: Let us have the question.

JOSEPH McGRATH, recalled.

(Question repeated by the stenographer as follows:)

30 "Q. Will you tell us the conversation that you had with him on the day prior to the making of the complaint, P-1?"

Mr. McIntyre: I object to the question.

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

Mr. McIntyre: An exception, your Honor.

Direct examination (continued) by Mr. Tiffany:

40 Q. Will you state that conversation, now, that

Joseph McGrath, direct.

you had with Mr. Price before you made that complaint? A. Mr. Price called up on the telephone at the ticket office and said he wanted to see me, and I went down on the end of the bridge—

By Mr. McIntyre:

10

Q. The end of the what? A. At the end of the bridge, down where the boats come in, and we walked to the—by the newsstand, and he says, "Mac," he says, "you are chief of the police." I says, "What? I got raised quick. How did that happen?" He says, "You are chief of the Electric Ferries police."

By Mr. Tiffany:

20

Q. Were you chief of police prior to that?
A. No.

Q. All right. A. So I says, "What happened?" "Well," he says, "Mr. Winslow told me to tell you to go to the station house"—

Mr. McIntyre: I object on the ground it is hearsay.

Mr. Tiffany: This is conversation between Price which does bind Mr. Winslow.

30

Mr. McIntyre: This is a telephone conversation.

Mr. Tiffany: No, it is not.

The Court: I don't think you can tell what Price told McGrath, Winslow told him.
(Discussion.)

The Court: I don't think Price's statement of what somebody else said—

Q. Never mind what he said Winslow said. What did he tell you himself. Leave out Mr.

40

Joseph McGrath, direct.

Winslow's name. A. He told me to go to the station house and meet counsel, which I did.

Q. What counsel did you meet? A. This gentleman (indicating).

10 Q. Mr. McIntyre? A. Yes. And then I says, "What for?" He says, "They want you to make a complaint against Mike Evanyke." I said, "I don't know anything about it, and why should they pass the buck to me?" I says, "Burns Brothers is the people handles this case. I don't know what he did or didn't do or anything else. I never worked with Mike; I never was told to watch him; I never was told anything; I was never working with him." "Well," he says, "you got to do it." "Well," I says, "I don't like to do it." "Well,"
20 he says, "you go up there and see the man, anyway. He will instruct you what to do." He says, "Mr. Winslow wants it done."

Mr. McIntyre: I ask to have it stricken out.

Mr. Tiffany: I will consent, under your Honor's ruling.

Q. Now, after that did you go to see Mr. McIntyre? A. Yes, I did that after.

30 Q. Did you talk to Mr. McIntyre? A. Yes, he took me and I told him I didn't know much about the case or anything of that sort. He says, "Somebody has got to be the complainant in the case." I says, "Why should I be in this case?"

Q. Did you find out any of the facts concerning Michael Evanyke or the embezzlement or taking of property belonging to the ferry company? A. No.

40 Q. Did you know anything that he ever did? A. No.

Joseph McGrath, cross.

Q. Did you tell Mr. McIntyre that? A. I said I didn't know nothing about it.

Q. Well, why did you sign the complaint finally if you knew nothing about the facts? A. I was told by—I was told to sign it or my job was at stake.

10

Q. That is all. Just a moment. You didn't appear at the police court, did you, on the return of the warrant? A. No, sir.

Q. Were you subpoenaed by the Electric Ferry Company to come there? A. No, sir.

Q. Were you ever requested to come by the Electric Ferries Company? A. No.

Q. Did you know anything about the case anyway? A. No, if I went there I wouldn't know anything about the case, anyhow.

20

Mr. Tiffany: That is all.

Cross examination by Mr. McIntyre:

Q. When did you first speak to Mr. Price?

Mr. Tiffany: About this.

A. That morning.

Q. What morning was that, Mr. McGrath? A. In September, was it, or—

30

Q. I mean, you said first—I think you testified that Mr. Price called you up. A. Yes.

Q. Do you remember when that was? A. Well, it was on the morning after he had been arrested.

Q. After he had been arrested? A. He had been arrested that evening, and the following morning, I believe, I met you in the station house around one o'clock, between one o'clock—

Q. What day was that? Do you remember? A. I couldn't recall the date.

40

Q. Well, when Price spoke to you on the tele-

Joseph McGrath, cross.

phone did he discuss Evanyke with you? A. He said he wanted to see me and discuss it.

Q. And then pursuant to that call he came over to see you, didn't he? A. No, I went down to see him.

10 Q. This was at the terminal in Weehawken?

A. Yes, sir.

Q. Price told you that you had to sign a complaint against Evanyke; is that what you want us to believe? A. Yes.

Q. Didn't he tell you what it was for? A. Yes.

Q. He did, didn't he? A. Yes.

Q. He told you that—what? A. Well, he didn't exactly tell me what it was for. He didn't tell me what it was for.

20 Q. Well, when you spoke to Price did he tell you anything about why you were to sign a complaint?

A. Why I should sign a complaint?

Q. Yes, what the complaint was about? A. Yes, he told me I should sign the complaint because I was chief of the entire ferry police; that is what he told me, and that somebody in the company had to do it.

30 Q. Did he tell you what the complaint was for? Did he say it was for a disorderly person or that he had deserted his wife or something? A. No, he said the Burns people had evidence that Mike Evanyke was stealing from the ferry company.

Q. And that was before you signed a complaint? A. That was before I signed a complaint.

Q. Yes. Did you ask Price anything further about the stealing business? A. Yes.

40 Q. What was said? A. Well, Price says he didn't know only what they did. I says, "I don't know anything about it, either. Why should Burns Brothers pass it to me?"

Joseph McGrath, cross.

Q. Now, you have been commissioned, Mr. McGrath, as a police officer by the State of New Jersey? A. By the Erie Railroad.

Q. By the Erie Railroad? A. Yes, Erie Railroad commission and State, division of the electric ferry. 10

Q. The Erie Railroad commissioned you? A. Yes, it was their commission I was working under for the Electric Ferries.

Q. I show you a paper—were you commissioned by or through the Erie Railroad or through the Electric Ferries, do you know? A. Well, I really don't know who commissioned me, but I believe the Electric Ferries got my commission.

Q. How does the Erie Railroad come in this picture? A. They are on Erie Railroad property; they are operating through Erie Railroad property, to my knowledge and belief. 20

Q. Of course, you don't know as a matter of fact? A. No.

Q. It is only what you heard? A. Yes.

Q. But you are commissioned by the Governor of the State of New Jersey as a police officer? A. Absolutely, yes.

Q. I show you a paper and ask you if you know what that is (handing a paper to the witness). A. Yes. 30

Q. This is your commission? A. That is my commission.

Q. Or a certified copy of it.

Mr. McIntyre: Is there any objection to it? Any objection?

Mr. Tiffany: No objection. Put it in evidence now if you want to. 40

(Paper marked Exhibit D-1.)

Joseph McGrath, cross.

(Mr. McIntyre read Exhibit D-1 to the jury.)

Q. Now, then, by virtue of this commission you had a badge, I suppose, didn't you, and you wore a uniform? A. Yes.

10

Q. Now, when Price related to you the facts as you have stated, that Evanyke was suspected of stealing money, you say that he then told you to see me; is that right? A. Yes.

Q. And you did see me, didn't you? A. Yes.

Q. And this was before the complaint was signed? A. Yes.

Q. Will you kindly answer so the stenographer can get it? A. Yes.

20

Q. All right, Mr. McGrath. And then I told you—in fact, you knew beforehand that the Burns Detective Agency had been watching Evanyke? A. No, sir.

Q. Well, didn't you tell us that you told Price that this was a case for the Burns Brothers? A. That evening was the first time.

Q. All right. Now, who do you mean by the Burns Brothers? A. Not the Burns Brothers, the Burns Detective Agency was supposed to be watching Mr. Evanyke.

30

Q. And you knew that? A. I knowed it after he was arrested, after he was taken to the station house that night by Chief Klassen.

Q. That was before you signed the complaint, wasn't it? A. Yes, before I signed the complaint, yes.

40

Q. Now, then, thus far before the complaint was signed Price told you that Evanyke was being suspected, and you further found out before the complaint was signed that the Burns detective agency was watching Evanyke; isn't that so? A. No, sir.

Joseph McGrath, cross.

Q. Well, didn't you say you knew that that night? A. That night after Mike came back and told everybody what he was over to the station house for.

Q. You didn't sign the complaint that night, did you? A. No, the following morning. 10

Q. It was the following morning. Now, that night, which is the night before the complaint was signed, you at least knew from Price, as you told us, that Evanyke was being suspected of stealing money; isn't that so? A. Very true, yes, sir.

Q. And you also knew that the Burns Detective Agency was on him, didn't you? A. Yes, sir.

Q. All right. Then, the following morning you conferred with me; is that right? A. Yes. 20

Q. And you were further told what Price had told you with respect to Evanyke's being suspected? A. Yes.

Q. And with respect to the Burns detective agent? A. Yes.

Q. —having clocked Evanyke. You knew that, didn't you? A. Yes.

Q. All right. After that the complaint was signed; isn't that so? A. Yes, sir.

Q. All right. Now, then, when the hearing on the complaint was had, were you in the employ of the Electric Ferries then? A. No, sir. 30

Q. You were not. You had been discharged, hadn't you? A. Not discharged.

Q. Well, did you resign? A. Well, we were laid off.

Q. I see. Now, then—

By the Court:

Q. What date was this? A. About five days after the complaint was signed. 40

Joseph McGrath, cross.

By Mr. McIntyre:

Q. And before—you were laid off before Evanyke appeared for a hearing on the complaint; isn't that so? A. Yes, sir.

10 Q. All right. Now, then, you knew, didn't you, the date that the hearing was to come up the first time? A. Yes, I did.

Q. All right. And weren't you subpoenaed by Captain Dillon? A. No.

Q. Were you subpoenaed by Judge Nunan to appear at all? A. No.

Q. You were directed by no one to attend court? A. No one.

20 Q. You knew of the hearing the first time it came on, didn't you? A. I heard it was on.

Q. Yes, and you attended the Weehawken Police Headquarters very frequently, didn't you? A. Occasionally, not frequently.

Q. You live quite near there, don't you? A. Yes.

Q. You knew all the members of the Department quite well? A. Yes.

Q. The Chief and the Captain and everybody? A. Yes, sir.

30 Q. And you discussed Evanyke's case, didn't you, with Evanyke? A. With Evanyke?

Q. Yes. A. Why should I discuss his case? No, sir, I didn't discuss the case.

Q. I see. All right. Before the complaint was signed—that is, the night before—when Evanyke had talked to Captain Lyons and Chief Klassen, he came back to where you were, didn't he? A. Well, I was gone when he came back.

40 Q. I thought you said before he came back again and told everybody what had happened. Did he? A. Yes, he came back. I was just going off; that is right.

Joseph McGrath, cross.

Q. So that is right, he told you, too, didn't he?
A. No, he didn't tell me.

Q. You knew all about it and you were in pretty close touch with the situation, too, weren't you, Mr. McGrath? A. What do you mean by close touch?

10

Q. As to when the hearings were going to be had? A. No, sir.

Q. Well, didn't you tell us before you knew the first time that the hearing was going to be had before the Judge? You knew that, didn't you? You told us before you did. A. I knew there was going to be a hearing, but I didn't know when.

Q. And you heard it was adjourned because you were not present; isn't that so? A. No, sir, I didn't hear that.

20

Q. Do you want this Court and jury to believe that you didn't know that you, as a complaining witness on that complaint, were required to be in court to testify? Is that what you want us to believe? A. I want you to believe that I didn't know the case was coming up.

Q. You didn't know the case was coming up at all? A. I didn't know at any time.

Q. What do you mean by that? A. I never was subpoenaed to appear.

30

Q. You knew you had signed a complaint? A. Yes, by advice of you.

Mr. McIntyre: I ask to have it stricken out, if the Court please, that qualification as to advice by me.

The Court: Yes, strike it out.

Q. You knew you had signed a complaint? A. Yes.

Q. You knew you had to be in court to testify

40

Joseph McGrath, cross.

against the defendant, Evanyke, didn't you? A. When I was subpoenaed and the proper time came, yes.

Q. You own a house, don't you? A. No, sir.

Q. Did you at that time own a house? A. Yes.

10 Q. Did you say anything about—after you were discharged—that you didn't like to testify because you were afraid you might lose your house? A. No, sir.

Q. You didn't say that at all? A. No, sir.

Q. Isn't that the reason why you didn't want to attend court at all? A. No, sir.

Q. It is not? A. No, sir. No, sir.

Q. You have since— A. I said—

20 Q. Wait a minute. You have since sold that house?

Mr. Tiffany: I object to that; highly improper and unfair.

A. I will tell him what I said.

Q. All right, I will take it back. Withdraw it. How close to the Weehawken Police Headquarters do you live? A. About a half mile.

Q. How long have you lived in Weehawken? A. All my life.

30 Q. Do you want this Court and jury now to believe that you didn't know when Evanyke's case was coming up for hearing on the complaint that you had signed? A. Absolutely true; I didn't know when.

Q. You did know, didn't you? A. I did not know.

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

Q. Didn't you tell us before— A. Counsel, I don't think it is fair. That is five times I said that.

40 Q. That is for the Court and your attorney to do.

Joseph McGrath, cross.

You are not trying this case, Mr. McGrath. You knew the first time it was coming off, didn't you?

A. No, sir.

Q. Well, you told us before you knew the first time.

Mr. Tiffany: I submit that is not the testimony. He said he knew it would come up. 10

Q. Do you want to change what you said before?

A. No.

Mr. Tiffany: I object to it as unfair. It is not the testimony. I don't know why counsel pursues that.

The Court: He can say it is not so if it is not so. It is proper cross examination.

Q. Didn't you inquire and find out when the case was adjourned after the first time it was on? 20

A. No, sir.

Q. Didn't do that, either? A. No.

Q. Didn't you inquire and understand and go to see Chief Lyons or Captain—Chief Klassen or Captain Lyons—about this case being adjourned because you were not there? A. Never asked a word about it.

Q. Never heard the case discussed at all? A. No, sir. 30

Q. Did you talk to Chief Klassen or Captain Lyons about this case at any time after the complaint was signed as to when the hearing was to be had? A. No, I don't think I did. Before the complaint was signed I believe I spoke to Captain Lyons.

Q. Did you speak to them after the complaint was signed about when this hearing was going to come on? A. I can't recall. 40

Joseph McGrath, cross.

Q. Is that your best answer? A. I don't believe I did.

Q. You don't believe you did. After you were discharged did you discuss the proposition as to whether or not you would appear on the complaint against Evanyke? I mean when you were discharged from the Electric Ferries? A. With whom?

Q. Did you discuss it with Captain Lyons or Chief Klassen or anyone? A. No.

Q. About whether or not you would testify? A. No, sir.

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

Q. Do you know what finally happened in the case on the hearing of the complaint?

20

Mr. Tiffany: I object to it as immaterial, irrelevant and incompetent, whether he knows.

Mr. McIntyre: I think it is proper cross, your Honor.

The Court: If he knows of his own knowledge.

A. No, sir.

Q. You don't know what happened? A. No, sir.

Q. Still living in Weehawken? A. Yes.

Q. Lived there all your life? A. Yes.

Q. And this was the only complaint that you had signed while you were in the employ of the Electric Ferries; isn't that so? A. Yes, sir.

Q. And you want the Court and jury to understand that you simply signed the complaint and then forgot all about it? A. Yes, sir.

Q. And you weren't interested once you had signed the complaint; is that right? A. No, sir.

40

Q. You didn't discuss the case with anybody as to when there was going to be a hearing? A. No.

Joseph McGrath, redirect-recross.

Q. And you didn't even trouble yourself to find out what finally happened? A. No.

Redirect examination by Mr. Tiffany:

Q. You had no facts or knowledge of anything in support of the foundation of the complaint in evidence, is that so? A. No. 10

Q. That is all. Except what had been told you?
A. That is all.

Mr. McIntyre: May I ask to have that last question?

(Testimony repeated by the stenographer.)

Recross examination by Mr. McIntyre:

Q. You signed this complaint on the knowledge you had, or did you not? A. No, on your knowledge I signed it. 20

Mr. McIntyre: Now I ask to have it stricken out, if the Court please, on the ground it is not responsive.

The Court: You said did he or not?

Mr. McIntyre: "Sign this complaint upon what knowledge you had?"

The Court: You gave an opening for two answers. 30

Mr. McIntyre: Well, may I ask that the question be read again?

(Question repeated by the stenographer as follows:)

"Q. You signed this complaint on the knowledge you had, or did you not?"

Q. Did you or did you not, Mr. McGrath, sign this complaint upon the knowledge that you had? I think that clearly calls for a yes or no answer. 40

Joseph McGrath, redirect.

Mr. Tiffany: That wasn't the question.
(Question repeated by the stenographer
as quoted above.)

Mr. McIntyre: That calls for yes or no.
The motion is to have the answer stricken
out as irresponsible.

Mr. Tiffany: I won't object to it.

Q. Now, did you or did you not sign this complaint upon the knowledge that you had, as given to you by Mr. Price and the facts laid before you? That is the reason why you signed the complaint, isn't it, you as a police officer? A. Yes.

Q. Were told certain things and you signed that complaint; isn't that right? A. Yes.

Mr. McIntyre: That is all.

By the Court:

Q. Did you yourself know anything about it other than what you had been told? A. No, your Honor.

Redirect examination by Mr. Tiffany:

Q. And if it had not been for the instruction of Price to go up there, you would not have gone, would you?

Mr. McIntyre: I object to that, if the Court please.

Q. Yes or no. A. No, sir.

The Court: How is that material?

Mr. Tiffany: His very shrewd question to argue later to the jury here when he got his question answered, he wanted to show that this was the complaint of a police officer.

Andrew L. Nunan, cross.

Mr. McIntyre: Exactly.

Mr. Tiffany: And our purpose is to show that he as a police officer knew nothing about it and had no right to make the complaint.

(Discussion.)

10

The Court: What is the objection now?

Mr. McIntyre: Last question of Mr. Tiffany.

(Question repeated by the stenographer as follows:)

“Q. And if it had not been for the instruction of Price to go up there, you would not have gone, would you?”

Mr. McIntyre: I object to the word instruction.

20

The Court: I won't strike the answer out. It has been answered. It wasn't objected to before it was answered.

Mr. McIntyre: May I have an exception, your Honor?

Q. Mr. McGrath, you came here this morning under subpoena? A. Yes.

30

WILLIAM COUGHLIN, sworn.

Mr. McIntyre: On Mr. McGrath's testimony may I ask one question of Judge Nunan?

ANDREW L. NUNAN, recalled.

Further cross examination by Mr. McIntyre:

Q. Judge Nunan, do you recall at the final hearing in which the complaint here was dismissed by

40

Andrew L. Nunan, cross.

reason of default and McGrath not appearing, do you recall having stated to counsel that McGrath was under subpoena?

10 Mr. Tiffany: I object to that—I will withdraw the objection.

Q. Do you recall it? A. Well, summons was sent for McGrath, stating the date, time, place, and date, and it was returned unserved.

Q. Unserved? A. Unable to locate.

Q. Judge, do you recall whether or not a subpoena server, or, rather, a messenger came to you for subpoenas to be served upon McGrath and the police officers, and you instructed them that the police department would attend to the subpoenaing of McGrath; isn't that so? A. No, I have no recollection of that, Counsellor. Who, someone of your office?

Q. Yes, went to you for subpoenas, I believe, or it may have been to the chief or to Captain Lyons.

Mr. Tiffany: How can he talk for the chief?

30 Mr. McIntyre: May I know if it was to him?

Q. And asked you for a subpoena to be executed to McGrath or the other witnesses to appear, and did you not tell them it was the custom of the Weehawken Police Department in cases of this nature, that the Police Department itself brings the witnesses in by subpoena; isn't that so? A. Well, where the case has a witness, but in this case it was only a complaining witness.

40 Q. And you have summoned him to appear? A. Yes.

William Coughlin, direct.

WILLIAM COUGHLIN, recalled.

Direct examination by Mr. Tiffany:

Q. Well, Chief, you are Chief of Police of Clifton, New Jersey? A. Yes.

Q. Did you have a warrant sent to your office from Weehawken? A. Yes, sir. 10

Q. For the apprehension of Michael Evanyke? A. It was delivered to us.

Q. Was he apprehended? A. Yes, sir.

Q. And taken into custody? A. Yes, sir.

Q. And what was done with him after he was taken into custody? A. He was in on a Sunday morning, if I recall.

Q. Do you recall what time you got him? A. No. It was quite early. 20

Q. Around seven-thirty? A. Yes, and he was detained there until about ten or eleven o'clock and then he was paroled in the care of Mr. Stoddard.

Q. He was connected with the Electric Ferries? A. Yes, sir, whom he worked formerly for.

Q. And who he was employed by formerly? A. Yes.

Mr. Tiffany: Cross examine. 30

Cross examination by Mr. McIntyre:

Q. There was no bond fixed, was there? I say, Chief, there was no bond fixed for his appearance, was there? A. He was there and he was paroled there to Mr. Stoddard on Sunday, and he was to take him before Weehawken police and there give bond.

Q. But he gave no bond to you at all, did he? A. No, sir.

Q. And it was a very informal thing all around, 40

William Coughlin, cross.

wasn't it? A. What do you mean by informal? He was arrested by warrant.

Q. Yes? A. And knowing Mr. Stoddard so well as I do, and on his responsibility, why, we permitted to parole him in his care until he went to answer the complaint in Weehawken.

Q. You said that Mr. Stoddard was connected with the electric ferries? A. I believe he was, yes.

Q. Of course, you don't know, do you? A. No, I believe he was connected with them.

Q. But you wouldn't swear positively that he was, would you? A. No.

Mr. Tiffany: Is there any question about it, Mr. McIntyre?

Mr. McIntyre: I beg your pardon?

Mr. Tiffany: Is there any question about it?

Mr. McIntyre: Yes.

Q. You merely advised Evanyke that he was wanted by the Weehawken police and he was paroled? A. No, no, no. No, he was arrested by warrant by the chief.

Q. Have you the return of the warrant? A. Oh, no, that—we send it back to them, to the Weehawken police. We forwarded the warrant back.

Q. This is the warrant that you returned, is it, Chief? A. I can't say. I will look at it.

Q. That is the warrant that has been offered by the plaintiff? A. I don't know. I wouldn't say that was the warrant.

Q. You say that is not the warrant? A. No, I would not.

Q. Is it or is it not, Chief, do you know? A. I can't answer you.

Q. You can't answer that? A. No.

William Coughlin, cross.

Q. Now, when you make an arrest, or let us say as you say, when you arrested Michael Evanyke, you make a return on the warrant, don't you, Chief? A. It should be, yes.

Q. May I ask you to read your return on that warrant? A. There is no return on it. 10

Q. There is no return on the warrant? A. No, it says surrendered here to that.

Q. Surrendered? A. And it is in lead pencil, which is unusual for any police officer in my department, except in ink.

Q. I see. A. I couldn't say that.

Q. May I ask you this, Chief: Is that the warrant that was sent to you by the Weehawken police for execution and return? A. I can't answer that. The warrant wasn't sent; it was delivered by the chief and another gentleman to me. It was not sent. 20

Q. Was that Chief Klassen down there (indicating)? A. Yes.

Q. And Captain Lyons? A. I think it was Captain Lyons, or whatever you call him, yes.

Q. And this is the warrant that they delivered to you for execution? A. I say it may be; I won't say that is the warrant. I don't recall the paper. 30

Q. If it were the warrant, Chief, you would make a return on there, wouldn't you, yourself? A. No, the arresting officer.

Q. Well, who was the arresting officer? A. If I recall, it was Sergeant Prall.

Q. Is he in court this morning? A. I don't know. I don't see him.

Q. What is the return of the Clifton Police Department's activity on this matter on that warrant, endorsed on there? Is there anything? A. No, I see nothing on it. 40

William Coughlin, cross.

Q. Can you explain that to the Court and jury—
why there was no return made on the warrant?

A. No.

Q. And he was arrested,—Evanyke? A. He was
arrested.

10 Q. Where is the return on the warrant to show
that? A. It is not there, but he was arrested.

Mr. McIntyre: Now, if the Court please—

Q. Let me ask you this before I make my motion:
Did you make the arrest yourself, Chief?

A. No, sir.

20 Mr. McIntyre: Now, if the Court please,
I respectfully move that the testimony of
this witness, the Chief, as to the arrest be
stricken out and that the jury be instructed
to disregard his testimony on the question
of arrest, because he himself did not make
the arrest; secondly, there is no return, or,
rather, if an arrest were made, the return
on the warrant would be the best evidence
of it. Upon those grounds I respectfully
move, as I have said before, that his testi-
mony be stricken out and the jury in-
30 structed to disregard it entirely.

The Court: I will deny the motion.

Mr. McIntyre: May I have an exception,
your Honor.

The Court: An exception, yes.

Q. This is the warrant that was delivered to you?

Mr. Tiffany: He said he didn't know.

A. I can't say, sir.

40 Mr. Tiffany: That is all, Chief.

Michael Evanyke, direct.

MICHAEL EVANYKE, sworn.

Direct examination by Mr. Tiffany:

Q. You are the plaintiff in this case? A. Yes.

Q. How old are you? A. Twenty-seven.

Q. Are you married or single? A. Single. 10

Q. Where do you live? A. 5 Madison Avenue, Clifton.

Q. In November, 1927, where did you live? A. 9 Van Cleve Avenue, Clifton.

Q. Before you went to work for the Electric Ferries Company by whom were you employed?

A. By the Arrow Bus Company, Paterson line that runs to New York.

Q. In what capacity? A. Ticket collector.

Q. Did you handle funds for them? A. Yes. 20

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

Q. What connection did he have with the Arrow Bus Company? A. President of the Arrow Bus.

Mr. McIntyre: I object to that.

The Court: If he knows.

Q. Do you know what position he had? Was he an officer of the Arrow Bus Line? A. Yes.

Q. Now, do you know whether or not he was afterwards connected with the Electric Ferries Company? Yes or no. A. Yes. 30

Mr. McIntyre: I object, if the Court please. It is immaterial, and besides, too, how can this witness testify as to whether or not somebody who is a total stranger in this case was an officer or what his capacity was? I think the best evidence of Mr. Stoddard's connection, if any at all, would be his own testimony. And further, too, even 40

Michael Evanyke, direct.

though he was connected we urge it is absolutely immaterial.

10 Mr. Tiffany: The only materiality, possible materiality, would be of the facts that Mr. McIntyre brought out on his cross examination of the Chief of Clifton, to belittle the arrest of Evanyke on that Sunday morning; my thought being to show that the reason he was not incarcerated and kept there, the reason he was not obliged to put up a bail bond, was because Mr. Stoddard, who was known to the Chief and who was at that time known to the Chief to have been connected with the Electric Ferries, paroled him in his custody.

20 Mr. McIntyre: The Chief said he didn't know.

Mr. Tiffany: He thought he was; for that reason he did not. If he doesn't urge it I will withdraw it.

Mr. McIntyre: We urge that.

Mr. Tiffany: I will ask my opponents to produce the records of the Electric Ferries Company showing the officers and directors of the company.

30 Mr. McIntyre: I respectfully say this, and I ask your Honor to hear me on that: Judge Tiffany well knows that if he wanted those records he is required under the evidence act to serve me with a two-day notice to produce. He knows further that they are not competent evidence in this case.

(Discussion.)

40 Mr. McIntyre: Because to say whether Mr. Stoddard is connected or not is a lot of smoke directed to the jury, and I think they

Carol Winslow, direct.

are improper questions. I will ask Mr. Winslow right here and now if I am endeavoring to get smoke.

(Witness temporarily withdrawn.)

10

CAROL WINSLOW, recalled.

By Mr. McIntyre:

Q. At the time in November and December of 1927, I believe it was, was this Mr. Stoddard whom we are speaking about here, an officer of the Electric Ferries, to the best of your recollection? A. Up to—

Mr. Tiffany: I object to the "best of his recollection."

20

Q. If you can remember? A. I am going to try to give as nearly as I can. Up to March of this year, for about a year or fourteen months previously he was a director of the company, but he resigned around March. I do not think he was a director at the time of this arrest.

Mr. Tiffany: I object to what he thinks about the time he was a director.

30

(Discussion.)

MICHAEL EVANYKE, recalled.

Direct examination (continued) by Mr. Tiffany:

Q. Prior to this difficulty that you had with the Electric Ferries Company were you ever charged with crime? A. Never.

Mr. McIntyre: It is immaterial.

40

Michael Evanyke, direct.

Q. Or arrested or convicted of any crime? A. No, sir, never.

Q. Or been involved in any charge affecting your integrity? A. Never.

10 Q. When were you first employed by the Electric Ferries Company? A. Some time in November, 1927; I don't recall exactly.

Q. When you say you are single and live at home, what does your family consist of?

20 Mr. McIntyre: I object to this, if the Court please. The only issue here is, is this defendant guilty or not guilty, or, rather, I say, responsible or chargeable with malicious prosecution? Mr. Tiffany's question has to do with the witness' previous history. We urge that is totally immaterial.

The Court: What is the purpose of it?

30 Mr. Tiffany: The purpose? In all false imprisonment and malicious prosecution cases we have a right to show the standing of a man in his community, to show how great has been his damage or how little. Now, if he had a reputation that was blasted by other proceedings there would be nothing to it, but if he was a reputable citizen in a responsible position on previous occasions, we have a right to show it.

The Court: Yes, if that is your purpose.

Mr. Tiffany: It is the only purpose.

Mr. McIntyre: I say it is collateral to the issue and without the scope of the pleadings, and therefore immaterial.

Mr. Tiffany: It is not without the scope of the pleadings.

40 The Court: A man can show his good character, can't he?

Michael Evanyke, direct.

Mr. McIntyre: Yes, but not by himself. If he has good character let him bring in character witnesses on reputation.

The Court: Why can't he admit it himself if he wants to?

Mr. McIntyre: I suppose if he says he is respectable and a man of character it goes to the weight as coming from himself. On that ground, all right. Withdraw the objection. 10

Mr. Tiffany: It is absolutely pleaded in the complaint, I might say, if the Court please. May I hear the question.

(Question repeated by the stenographer as follows:)

"Q. When you say you are single and live at home, what does your family consist of?" A. My father, my mother, and my sister and brother. 20

Q. They all lived at your address at that time? A. Yes.

Q. Now, when you went into the company's employ did you have any difficulties with the company prior to the date, prior to November, 1927?

A. No, sir.

Q. Now, do you recall the day that you met Mr. McIntyre at the police station in Weehawken? Do you recall that day? A. The witness nodded.) 30

Q. What time of day was it that you went to work on that day? A. I was supposed to go on work four o'clock.

Q. What was your trick? A. Four to twelve.

Q. During those hours from four to twelve were you relieved by anybody? A. No, sir.

Q. What were your duties, by the way, Evanyke?

A. Well, I have a box there, and every car that 40

Michael Evanyke, direct.

passed there, my duties were to take its money, give them the ticket so he can go down on the boat.

Q. What do you mean by a box? A. A little shanty there.

10 Q. What was in that shanty? A. Cash register and a safe.

Q. And was there anybody else in the shanty besides you? A. There was an officer there.

Q. Was it McGrath? A. No, sir.

Q. On your tour? A. No, sir.

Q. Was there an officer with each collector? A. Yes, sir.

Q. And what was the purpose of the officer being there? A. Well, he was there to see that no car passed down there without a ticket.

20 Q. I see. And was that officer always present? A. Always, yes, sir.

Q. Now, that the jury may see the picture, the Electric Ferries run from New York to Weehawken and Weehawken to New York? A. Yes, sir.

Q. How many boats did they run at that time?

A. If I can recall, they ran three boats that time.

Q. Three boats? A. Yes, sir.

30 Q. And this entrance-way to the ferries, is it large enough for more than one vehicle to pass your box at a time? A. Yes, sir.

Q. And do the boats—the cars come off the boat and pass by your box on the same side that the cars going on? A. Yes, sir.

Q. Now, if you drove an automobile up to get on the ferry—what does the driver do? Can he get past your box without getting a ticket? A. No, sir.

40 Q. What does he do, pay the money to you? A. Yes, sir, he stops the car and pays the money.

Q. He stops the car and pays the money to you

Michael Evanyke, direct.

at the box. What do you do with the money?

A. I ring it up on the cash register.

Q. And when you ring it up on the cash register, does that register the amount you ring up? A. Yes, and amount of passengers, the price, and the date.

10

Q. The amount of passengers, the price— A. Yes, and it has the number on it.

Q. Does anything come out of the box? A. A ticket comes out.

Q. Is there any way of getting those tickets out without ringing the machine? A. No.

Q. Does the machine register the amount of money that you ring up? A. Yes.

Q. And is that amount stamped through a mechanical contrivance on the ticket you give to the passenger? A. Yes.

20

Q. Can a vehicle get on the boat without having a ticket or a pass? A. No, sir.

Q. Now, after you have rung up the money that you have collected from the driver of the vehicle and received from this register the ticket, what do you do with the ticket? Give it to the passenger? A. Give it to the passenger.

Q. What does he do with it? A. Takes it down and gets on the boat with it.

30

Q. Is it taken away from him? A. It is, yes.

Q. Where is it collected? A. Oh, the time I was there they used to collect it on the boats, the crews collect it on the boat.

Q. The crews collect them on the boats? A. Yes.

Q. Was there ever any charge made—withdraw that. Do you balance the cash in your machine, your register, with the registered total before you go off duty? A. Yes, sir.

40

Michael Evanyke, direct.

Q. Had any complaint been made to you that your money did not correspond with the figures in the machine? A. Well, I think I got one slip from the office that I was fifty cents over one day.

Q. You were fifty cents over on one occasion?
10 A. Yes.

Q. Were there any other complaints made? A. No, sir.

Q. Is it possible for you to manipulate or adjust the total figures of the cash register? A. No, sir.

Mr. McIntyre: I object to that. Wait a minute. If the Court please, my objection was perhaps made simultaneous with the answer, but I object to it on the ground it calls for a conclusion.
20

Mr. Tiffany: Well, I will put it this way: I will admit his objection came with the answer.

Q. Do you know of any method by which you can adjust the numerical totals of your machine—withdraw that, first. Can you see on this cash register the total of the day's sales? A. Yes, sir.

Q. Is there any way that you can adjust the figures that show that themselves? A. No, sir.
30

Q. Now, are automobiles permitted to go past and go onto the boat without actually buying a ticket from you? A. Yes.

Q. What type of vehicle is that? A. Vehicles that have passes.

Q. Did you have any vehicles that had passes on and from the boats? A. Yes.

Q. Occasionally or many times or how? A. Occasionally.

Q. Occasionally. What would those persons do who had the pass to go on the boat with their au-
40

Michael Evanyke, direct.

tomobile? A. Well, they usually went by the box without stopping. They would wave their arm that they had a pass or give me some signal that had to show his pass.

Q. Now, what happened when the car got on the boat without a ticket from your booth? A. He had to show his pass. 10

Q. On this afternoon in question, before the afternoon you went up to the police station, what time did you go to work? A. Four o'clock.

Q. And up to the time until you arrived at your place of business from the time that you had left your home did you have any notice of any charge being made against you? A. No, sir.

Q. For embezzlement or anything else? A. No.

Q. Did you know that you were being watched? A. No, sir. 20

Q. Or that there was an agent there from the Burns Detective Agency or any other detective agency? A. No, sir.

Q. When you got to your booth on that afternoon who was there? A. Mr. Winslow.

Q. This gentleman (indicating)? A. Yes, sir. Chief of Police of Weehawken.

Q. Yes. A. Mr. McIntyre.

Q. Yes. A. A lady there and one of the Burns Detective agents. 30

Q. I see. By the way, do you know a man in the employ of the company by the name of Price? A. Yes.

Q. Was he there, if you remember? A. No, sir, I don't remember.

Q. You don't remember? Up to that time what was Price's job there, if you know? A. Well, what I understood—

Q. Not what you understood. A. He was marine superintendent. 40

Michael Evanyke, direct.

Q. Did you come in contact with him? A. Yes.

Q. When was the first you met him? A. I met him about two weeks before I got the job.

Q. Who hired you when you got the job? A. Price hired me.

10 Q. Now, did he ever come to your booth? A. Yes, sir.

Q. Have anything to do with your—speak to you about your tickets or money? A. Yes.

Q. Did he do that frequently or not? A. Yes, frequently.

Q. Now, on this afternoon when you arrived at your booth, who spoke to you first, do you recall? A. Well—

20 The Court: What date was this that you are speaking of now?

Q. I am fixing the date by the time that you went to the police station, the afternoon you went to the police station. A. I can't recall the date.

Q. Well, it was in November? A. November, yes.

Q. And what was said to you? A. Mr. Winslow came up to me and he said he wanted to speak to me.

30 Q. Yes. A. And I says, "What about, Mr. Winslow?"

Q. Did you know Mr. Winslow at that time? A. Yes.

Q. Did you know what his job was with the company? A. Yes.

Q. You knew he was an officer? A. Yes.

40 Q. All right. Now tell us the conversation that Mr. Winslow and yourself had. A. Mr. Winslow told me that he would like to speak to me, and he said he wanted me to walk over towards the

Michael Evanyke, direct.

men that were standing there, the Chief of Police of Weehawken or Captain of Detective and Mr. McIntyre. And he says—he introduced me to those gentlemen. He says, “That is the Chief of Police right there.” Of course, I got scared. I didn’t know what was up, see? And he says, “There has been some trouble here,” and he says, “You are the one bright fellow around here that could help us out.” I says, “I would be glad to help you out, Mr. Winslow.” And he says, “There is some shortage; we don’t know where it is from.” So he says, “Will you come up with us to the police station?” So right then and there I kind of got—I says, “Why the police station? Isn’t the ferry company property good enough to talk on?” So Mr. McIntyre said, “Yes, but it will be quieter up there; come on up. You will get a chance to talk better up there.”

I says to Mr. McIntyre, “If I am going up off the Electric Ferries property I am going up against my will. If you want to talk any matters like this, the Electric Ferries office is good enough.” So, of course, when I told him I was going up against my will I went right up with these gentlemen, and saw police officers there.

Q. You went where? A. To the Police Department in Weehawken. 30

Q. That is about how far from the Electric Ferries? A. About a half a mile.

Q. How did you get up there? A. Walked up.

Q. Did you go all around the boulevard loop or go right straight across? A. I think we cut across.

Q. I see. A little farther that way, is it? A. Yes.

Q. Now, when you got up to the police station, whereabouts in the police station did you go? A. 40

Michael Evanyke, direct.

Why, they took me right upstairs to the third floor, a little room up there.

Q. Who all was there? A. Why, Mr. Winslow, Mr. McIntyre, and a lady.

10 Q. Do you know who the lady was? A. No, sir, I do not.

Q. Yes? A. Chief of Police of Weehawken and Captain Lyons of Detectives in Weehawken.

Q. Who else? A. And one of the Burns Detective Agents there.

Q. Was McGrath there? A. No, sir.

Q. Had you had anything to do with McGrath up to that time? A. No, sir, never.

20 The Court: We will adjourn now until two o'clock.

(A recess was taken until two o'clock P. M.)

AFTERNOON SESSION.

MICHAEL EVANYKE, resumed.

Direct examination (continued) by Mr. Tiffany:

30 Q. Mr. Evanyke, this morning you told us who was present at the time you went to your ticket booth on the afternoon that you were summoned to the police court or that you went to the police court, and you mentioned Captain Lyons. Did you mean Captain Lyons was at your booth or was he at the police station? A. Police station.

Q. Was he down on the runway near your booth? A. No.

Q. He called your attention to that when he went out this noon? A. Yes.

40 Q. You were in error if you did say it, that he was down there? A. Yes.

Michael Evanyke, direct.

Q. Now, when you got up to the police station was Mr. McIntyre there? A. Yes, sir.

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

Q. Mr. McGrath? A. No, sir, he wasn't there.

Q. Mr. Price? A. No, sir.

Q. How long were you at the police station, in this upper floor? A. About three hours. 10

Q. During that three hours what were you doing there? A. Mr. McIntyre was questioning me.

Q. And what was he questioning you about? A. Well, he said there is a shortage of 100 cars "on your shift yesterday."

Q. 100 cars on your shift the day before? A. Yes.

Q. Was Mr. Winslow present at this questioning? A. Yes. 20

Q. What did you say to him? A. I says, "I don't know how that is possible." I says, "I wasn't any money over or anything; that was all straight. It couldn't be."

Q. Did they accuse you of being responsible for it? A. Yes, sir.

Q. And did they tell you how they thought you did it? A. They told me they had a Burns Detective Agent clocking me with a clock, and—

Q. And was anything said about how many cars passed without—according to this Burns Agent? A. He says I was a hundred cars short, that is all. 30

Q. A hundred cars short? A. Yes.

Q. And was anything said about passes? A. No, sir.

Q. Well, now, after you were there during this length of time did you at any time admit that you knew or had anything to do with any such shortage? A. No, sir.

Q. Or that there was any shortage? A. I denied it. 40

Michael Evanyke, direct.

Q. You denied it. And was the Burns man there? A. Yes, sir.

Q. Did he talk? A. No, he didn't talk.

10 Q. Now, what was the next thing? After you were there where did you go? Did you go back on the job? A. Well, I went down, and went down near the ticket box and there was another man in my place.

Q. Did you go to work? A. No, sir.

Q. Did you work after that at all for the Electric Ferries Company? A. No, sir, I did not.

Q. Where did you go? Home? A. I got on the bus and went to New York. My brother was the starter in New York at the time, on the buses.

Q. Well, you went over? A. Yes, sir.

20 Q. What was the next that you heard about this matter yourself? A. Well, about two or three days later, on a Sunday, a police sergeant of the Clifton police came to our house, about seven o'clock in the morning.

Q. Stop there just a minute. From the time you were in the police station until this Sunday morning had you been around the house and lived home all the time? A. Yes.

Q. Did you go away anywhere? A. No, sir.

30 Q. Did your family know where you were at all times? A. Yes, sir.

Q. And this Sunday morning, now, you say, about seven o'clock this police officer came to your house? A. Yes, sir, came over to the house.

Q. Do you know who he was? A. Well, he was a sergeant from the Clifton police station; that is all I know.

40 Q. All right. What happened? A. He came there and he said he has got a warrant for my arrest.

Michael Evanyke, direct.

Q. Well? A. And I was very much surprised.

Q. Never mind your surprise. What did you do? A. Well, he says I am—he says I am wanted at the police station. “I got a warrant for your arrest and I want you to go there with me.”

Q. Did you go? A. I dressed up and my brother did, too, and we both went together. 10

Q. When you were in the police station, how long did you stay there? A. Well, I stayed there about three hours.

Q. Uh, huh. And what happened there? A. My brother called up for Mr. Stoddard.

Q. You can't say what your brother did. Did someone come there? A. Yes.

Q. Who was that person? A. Mr. Stoddard.

Q. Who is Mr. Stoddard? A. He was an officer of the Arrow Bus Line or— 20

Q. For whom you had worked? A. Yes.

Q. Had you known him for any length of time? A. Yes, sir.

Q. What did he come there for? A. He came out to bail me out.

Q. And were you released? A. Yes, sir.

Q. Was any bail put up there? A. Well, I don't know.

Q. Was anything said about Stoddard? A. Yes. 30

Q. What? A. The Chief of Police told me that “You are in Mr. Stoddard's custody,” and he says, “I will hold Mr. Stoddard responsible for you.”

Q. Then you went out of the Police Department? A. Yes.

Q. What was the next you heard about this matter from official sources? A. I didn't hear nothing about it until about two weeks later. I was down in Weehawken. 40

Q. Let me interrupt you right there. From the

Michael Evanyke, direct.

Sunday morning that you were locked up or taken in custody by this police officer, until you were in Weehawken about two weeks later, or whatever time it was, were you home every night? A. Yes, sir.

10 Q. Did you go away at all? A. No, sir.

Q. And when you were at Weehawken what happened? A. I was there with a friend of mine, and I was told that—by this friend—that I could be picked up by the police at any time.

Q. What did you do then? A. Of course, I consulted counsel right away.

Q. And as a result of that did you go to the Weehawken Police Court? A. Yes.

20 Q. What was done there? A. Well, the case came up for trial once and was postponed.

Q. All right. The first time you went there what did you go there for? A. To Weehawken?

Q. Yes, to the police station—withdraw the question. After you had been released from Clifton—A. Yes.

Q. (Continuing.) —and you heard in Weehawken that you could be picked up at any time, you went to the police station at Weehawken with counsel? A. Yes.

30 Q. What did you go there for? A. To surrender myself.

Q. All right. And was bail fixed? A. Yes.

Q. How much? A. \$2,000.

Q. Who went your bail? A. My father.

Q. Now, after bail was fixed did you appear at the police station again? A. Yes, sir.

Q. On more than one occasion? A. Yes.

Q. For what purpose was it? For a hearing? A. Yes.

40 Q. Did you have a hearing? A. Well, the first

Michael Evanyke, direct.

time it was postponed; the second time it was postponed.

Q. And did you ever have any witnesses there testifying against you? A. No, sir.

Q. Do you know whether or not your bail was afterwards cancelled? Was your bail given back to your father? A. Yes. 10

Q. Yes. Have you been arrested since on that charge? A. No, sir.

Q. Have you ever been tried on that charge? A. No, sir.

Q. Or convicted? A. No, sir.

Q. Is there to your knowledge now any proceeding pending against you as a result of this alleged embezzlement? A. No, sir.

Q. Did you at any time have anything to do with embezzling or taking any funds? A. No, sir. 20

Q. Or property whatsoever from the Electric Ferries Company or anybody else? A. Never did.

Q. Do you know whether or not the stories of your arrest got into the newspaper? A. Yes, sir.

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

Q. After this matter—after you were arrested, when did you go back to work? Did you ever go back for the Electric Ferries Company? A. No, sir, I did not. 30

Q. Did you get a job? A. Well, I tried several places and couldn't seem to get a job.

Q. Did you finally get a job? A. Finally got a job.

Q. Where? A. Up New York State, Irvington-on-the-Hudson.

Q. How long did you work up there? A. About a month.

Q. Then what happened? A. I was discharged. 40

Michael Evanyke, direct.

Q. Do you know why? A. Well, they didn't give me no reason.

Q. Just discharged you? A. Yes, sir.

Q. Then what did you do? Pardon me. What kind of a job did you have up in New York? A.
10 I was working in the Photo Color Corporation, makers of colored moving pictures. I was chauffeur for the president and did small odds and ends around the shop.

Q. Any complaint made about your work? A. No, sir.

Q. Were you given any notice of being discharged? A. No, sir.

Q. Just let go? A. Yes, sir.

Q. Did you get a job after that? A. Well, I
20 tried several places, but couldn't seem to get no job.

Q. Did they tell you why they wouldn't employ you? A. No, sir.

Q. Did you finally get work? A. Well, I started in business in Upper Montclair.

Q. After that did you get out of that business? A. Yes.

Q. What business was it? A. A drug store business.
30

Q. That was a drug store corporation that you had an interest in? A. Yes.

Q. A regular retail drug company? A. Yes.

Q. Then you sold your interest out of that? A. Yes.

Q. Who are you working for now? A. The Arrow Bus Line.

Q. Mr. Stoddard's company? A. Yes.

Q. Is he in it now? A. Yes, sir.

Q. How long were you out of work? A. Oh, between
40 seven and eight months.

Michael Evanyke, cross.

Q. What was your salary with the Electric Ferries Company? A. Around \$35 a week.

Q. What do you mean, around \$35 a week? A. It came to about \$70 every two weeks. They pay every two weeks.

Q. It was on the basis of \$70 every two weeks? 10
A. Yes.

Q. You had a regular salary? A. Yes.

Q. How much a month? A. \$140 a month.

Q. What's that? A. \$140, something like that. I never got the full salary, anyway.

Q. Why didn't you get full salary? A. I didn't work there long enough.

Mr. Tiffany: That is all.

Cross examination by Mr. McIntyre: 20

Q. You were a chauffeur, you say, for the Photo Color Company in Irvington-on-the-Hudson, weren't you? A. Chauffeur for the president.

Q. Used to drive the president around? A. Yes.

Q. And do odd jobs? A. Yes.

Q. You had nothing to do whatsoever with the handling of moneys, did you? A. Yes, sir.

Q. As a chauffeur? A. When I did odd jobs I handled money. 30

Q. Little odd jobs. And did they refuse you employment? A. I was discharged.

Q. And no reason given you at all? A. No.

Q. You don't know why you were discharged,—simply discharged? A. That is all.

Q. And when you applied for a job there they didn't refuse you at all, did they? A. No, sir.

Q. And did the Arrow Bus Line ever refuse you a job when you applied? When you applied to the Arrow Bus Line for work, after this whole affair which we are now in court about had ter- 40

Michael Evanyke, cross.

minated and ended, did you go to the Arrow Bus Line looking for work? A. No, sir.

Q. They never turned you down at all, did they? A. Never went there for a job.

10 Q. Never went there for a job, but you are now employed by them, aren't you? A. Yes, sir.

Q. The Arrow Bus Line. Mr. Stoddard is an officer, isn't he? A. Yes.

Q. What is your job there now? A. Collector on the Montclair line.

Q. As collector you handle moneys for the company, don't you? A. Yes.

Q. And Mr. Stoddard got you your employment? A. Yes.

20 Q. And Mr. Stoddard knew about this charge of embezzlement, didn't he? In fact, he bailed you out, didn't he? A. Yes.

Q. That is right. Now, I direct your attention—this is in the interrogatories, Judge—this is your signature, isn't it (indicating)? A. Yes.

Q. "Michael Evanyke"? A. Yes.

Q. You signed that, didn't you? A. Yes, sir.

30 Mr. McIntyre: If your Honor please, may I read to the jury and into the record answers to interrogatories propounded and which it is admitted he signed?

Mr. Tiffany: That should be done on the defendant's case, and it is the practice to identify them and read them on the defendant's case. I have no objection, but I want the record right.

40 The Court: It is understood that counsel for the defendant is going to read the interrogatories and answers, and they will be considered as part of the defendant's case.

Mr. McIntyre: That is, from the stand-

Michael Evanyke, cross.

point of cross examination, and we are not to waive our right to move for a non-suit. I want to be protected on that.

Mr. Tiffany: Oh, no.

Mr. McIntyre: I will withdraw the question. 10

Mr. Tiffany: I say, you won't waive your rights as far as I am concerned.

Mr. McIntyre: In other words, if I cross examine now and bring the interrogatories before the attention of the jury and into the record, I will not be precluded from moving for a non-suit at the proper time. In other words, I will not be considered as having waived my right to move for a non-suit. 20

Mr. Tiffany: I will agree. 20

Mr. McIntyre: And put in a defense.

The Court: Well, no, you won't waive your right to a nonsuit, but will anything that you say perhaps preclude you from getting one? I mean, if there is a possibility of getting one.

Mr. McIntyre: I suppose that will be for your Honor to pass upon. This is directed towards the witness's credibility, not considered as a part of the defendant's direct case. 30

The Court: I can't consider it for any specific purposes. It may be admissible for several purposes, I don't know.

Mr. McIntyre: It is overruled?

The Court: What you are putting in, if you are putting it in, don't ask me to say that I can do something that I may not be able legally to do.

Mr. McIntyre: Oh, just simply raising the point that this is part of our defense, and 40

Michael Evanyke, cross.

inferentially saying that we might be precluded from moving for a nonsuit.

Mr. Tiffany: I have no such thought at all.

10 Q. Now, the third interrogatory that was put to you to be answered under oath. This is the question, Mr. Evanyke: "State the name and address of each and every prospective employer of the plaintiff who refused the plaintiff"—that is you—"employment because of damage to plaintiff's reputation as alleged in paragraph 4 of the first and second counts of the complaint." Without reciting the paragraphs I might recite briefly that they say he was refused employment because of
20 damage to his reputation. Now, the witness's answer to that question was—

The Court: Are you arguing with me or asking the witness a question.

Mr. McIntyre: I am stating it on the record.

30 Q. (Continuing)—The witness's answer was this: "He was refused employment on account of damage to his reputation first by the Arrow Bus Interstate Company, Montclair, New Jersey, and by the Photo Color Corporation, Irvington-on-the-Hudson." Now, your answer there, Mr. Evanyke, was sworn to under oath; isn't that so?

Mr. Tiffany: It speaks for itself.

The Court: If it is, why ask him?

Mr. McIntyre: All right. All right.

40 Q. Now, then, may I ask you: You have told us two different stories with respect—

Mr. Tiffany: I object to that.

The Court: Strike that out.

Michael Evanyke, cross.

Mr. Tiffany: He has not told two different stories at all.

Q. Which do you want us to believe, Mr. Evanyke, that you were refused employment by the Photo Color Corporation of Irvington and by the Arrow Bus Interstate Company because of damage to your reputation, or you were not refused employment by the so-called damage to reputation? 10

A. I was employed by the Photo Color and discharged by them when they found out about this.

Q. I didn't ask you about finding out.

Mr. McIntyre: I ask to have it stricken out, because it is highly improper. He can't testify for the Photo Color.

The Court: You are getting so many *ors* that you are—you can't expect much else. You are making speeches here as if you were summing up for the jury. 20

Mr. McIntyre: I wanted it clear, your Honor. I may be—

The Court: Ask the witness the questions. Question the witness. That is all you have to do. Everything is clear. Ask him what you want to ask him. 30

Q. Were you refused employment by the Photo Color Corporation? A. I was not. I was employed by them and I was discharged.

Q. Yet you swore under oath that you were refused employment by them, didn't you? A. I was discharged by them.

Mr. Tiffany: I submit—

Mr. McIntyre: All right.

Q. And you also swore that the Arrow Bus In- 40

Michael Evanyke, cross.

terstate Company refused you employment; isn't that so? Yes or no? A. The Arrow Bus?

10 Q. Yes, the Arrow Bus Interstate Company of Montclair, New Jersey, refused you employment because of the damage to your reputation? You have sworn to that. Now, is that so or not? A. The Arrow Bus was supposed to give me a job before I took the job in the Electric Ferries, but when I got out of the Electric Ferries the Arrow Bus didn't take me no more; that was the end of it.

Q. They didn't take you any more? A. They were supposed to take me before I got on the Electric Ferries.

Q. After this trouble did they take you or did they not take you? A. They took me.

20 Q. I direct your attention to your answer here where you swore that they did not take you (indicating). A. That is about a year later they took me.

Q. When did you go to work for the Arrow Bus Interstate? A. About November of 1927.

Q. November of 1927? When had you applied for work there after this occasion? A. I was always ready to go to work for them; they always knew where I was. I didn't apply the last year.

30 Q. They sent for you, didn't they? A. Yes.

Q. As a matter of fact, you were never refused employment by them at all; isn't that so? A. They didn't take me on, but I was always ready to go to work, and I expected to go to work for them any day.

40 Q. All right, Mr. Evanyke. I didn't ask you that. I asked you if after this occurrence in Weehawken about which we are in court here today, did the Arrow Bus Line ever refuse you employment?

Michael Evanyke, cross.

Did they or did they not? A. I don't know if it was on account of that, but—

Q. Listen. I am asking you, if you will, please, for about the third time. Tell us whether or not the Arrow Bus Line ever refused you employment after November of 1927. A. Just what do you mean by refusing employment? 10

Q. Did you ever apply for a job there and have them tell you, "No, we have no work for you"? A. How could I go there when this thing happened in Weehawken?

Q. I am asking you after November, after this Weehawken affair about which we are talking here today, after that all happened did you ever apply to the Arrow Bus Interstate Company of Montclair, New Jersey, for a job? A. I never applied personally, but my brother was always there to let me know in case they wanted me, and they never sent for me. 20

Q. You never applied and they never sent for you? A. No.

Q. That is the reason you have sworn here under oath that they refused you employment because of your reputation; is that right? A. I think so, yes.

Q. As a matter of fact, you are now employed by them, aren't you? A. Yes. 30

Q. In a trusted relationship? A. Yes, sir. I didn't apply for the job.

Q. They sent for you? A. Yes. That is what I waited for all that while.

Q. Now, you went in the druggist business, you say? A. Yes.

Q. With whom did you go into business? A. A man by the name of Fipps.

Q. It was a corporation? A. Yes. 40

Michael Evanyke, cross.

Q. What was the capital stock; do you remember? A. I don't remember just what it was.

Q. When did you go into business? A. I went sometimes—I just can't recall the date. Around June or—

10 Q. 1928? A. Yes, sir.

Q. That was about six months after this Weehawken affair? A. Oh, it was later than that.

Q. Well, seven months? A. About that, seven or eight months.

Q. And you had worked up at the Photo Color Corporation in Irvington, had you, in the meantime? A. Yes.

Q. Did you work anywhere else? A. Well, I applied for it at different places.

20 Q. Where did you get the money to go into business? A. Where? My father.

Q. What was the name of the drug business? A. Upper Montclair Pharmacy.

Q. Was your father an officer of this corporation? A. No, sir.

Q. You were, weren't you? A. Yes.

Q. You were one of the incorporators, weren't you? A. Yes.

30 Q. How much did you pay in? A. About, between twelve and fifteen hundred dollars.

Q. And your father gave you that money? A. My father gave me \$800.

Q. And you had \$700 of your own, I suppose? A. Not my own.

Q. Where did you get that from? A. My brother.

Q. But neither your father nor your brother were members of this corporation at all? A. Well, my brother was a member; he had about twenty shares of stock.

40 Q. Going back to the night that you first met me.

Michael Evanyke, cross.

You told us before, I think, that you were going away from the premises against your will; is that right? A. Yes.

Q. And what about the time you were in the room at the Weehawken Police Headquarters? Were you also there against your will? A. Yes, sir. 10

Q. Did I say to you at any time, either before going up or while you were at the room in the police headquarters, that you could leave any minute, that you were here on your own free volition, and you were there voluntarily and that you didn't have to answer questions? A. After you got done grilling me, yes.

Q. Before we left there I said what to you? A. Before we left there? 20

Q. Yes. A. That is what you told me.

Q. Before you went to the room, and while we were at the booth about four o'clock on that afternoon, what did I say to you? A. I can't recall what you said. I was in a state of excitement at that time.

Q. When you said if you did go away from there it was against your will, who did you say that to? A. I said it to you.

Q. To me? A. Yes. 30

Q. Who first spoke to you when the band of men came there? Who spoke to you first? Do you remember? A. I just can't recall. I think it was Mr. Winslow first spoke to me.

Q. I see. And you told me—at least, you want us to understand that you told me—if you did leave there it was against your will? A. Yes.

Q. Were you placed under arrest by anybody? A. When I saw the police officers there and I was introduced to them, I thought I was under arrest, yes. 40

Michael Evanyke, cross.

Q. Did any of the officers tell you that you were arrested? A. No.

Q. Did any of the officers take hold of you and bring you there to the headquarters? A. I said to the Chief of Police of Weehawken, I says, "What
10 does this mean, Chief?" He says, "I don't know."

Q. He didn't know? A. No.

Q. You still thought you were under arrest? A. Yes.

Q. Now, when you got there, in the beginning or while you were there, did I tell you that you could have gone of your own free will, that you didn't have to stay there, and didn't have to answer questions? A. You told me, yes, after we got done.

Q. Not before? A. Not that I can recall.

Q. And that only after three hours; is that it?
20 A. Yes, sir.

Q. Now, you say that some buses passed through there on passes? A. Buses?

Mr. Tiffany: He didn't say buses; he said automobiles.

A. Not buses.

Q. Automobiles, vehicles. A. Yes.

Q. What was the average would go through on
30 your tour of duty, in eight hours? A. Five or ten or twenty. Sometimes five, sometimes more. On Sundays there were more than on regular days.

Q. Well, what was the most that ever passed through at any one time on your tour of duty, eight hours? A. I never counted them.

Q. To your best recollection. A. I couldn't say. I don't know. I know there was—

Q. Would you say twenty or thirty? A. I
40 couldn't say. I don't know.

Michael Evanyke, cross.

Q. In eight hours? You have no idea at all, you want us to understand. A. No.

Q. Huh? A. No, there is more business on Sundays than they did on regular days.

Q. On a weekday there weren't so many? A. No.

10

Q. What was the most that passed through in any day that you were there? A. Well, I don't know. I can't recall that, just how many passed.

Q. Can't you give us any approximation, even? A. No, sir.

Q. It would not be within ten or twenty or thirty or forty? A. No. I couldn't say.

Q. Couldn't say at all. Now, going back again to the talk we had, myself and you and Captain Lyons: Were you asked about what happened to a ticket after it was bought from you? A. Yes, sir.

20

Q. What did you tell us? A. The passenger got it that paid for it, and they took it down to the boat; that is all I knew about it.

Q. That is all you knew about it? A. Yes.

Q. You don't know what happened to it after that, did you? A. No, sir. I know it was collected, that is all I knew.

Q. Now, at the end of the day and at the end of a tour of duty, I suppose you would turn the money and tickets over to whom? A. To the man that relieved me.

30

Q. To the man that relieved you? Did you have to report to Mr. Price, either when coming to work or going from work, or did you ever turn any receipts over to him at all? A. No, sir.

Q. All right. What happened to the proceeds, that is, moneys you would collect, and the tickets? Where would they go? A. At the end of the tour

40

Michael Evanyke, cross.

they were taken in at the Erie Station by a man there.

Q. They were collected? A. On the New York side.

Q. Was that Mr. Price? A. No, sir.

10 Q. He never collected, did he? A. No.

Q. Where is the Electric Ferries' office of Weehawken, the booth? A. I don't know.

Q. Huh? A. I don't know.

Q. You don't know where that is, do you? A. The Electric Ferries' office?

Q. Office, yes. A. I don't know what office you mean.

Q. Well, isn't there a booth there where you sold the tickets? A. That is the ticket box.

20 Q. A little office, isn't it? A. Yes.

Q. Was there any down by the booth at all, any office, rooms, or space? A. No more ticket offices, no.

Q. Are there any kind of offices? A. Well, there is some kind of offices there.

Q. How big are they? Did you notice? A. There is only one there at the time I was there.

Q. As big a room as this, was it? A. No.

30 Q. About as big as the ticket office? A. Yes, about that.

Q. How big is the ticket office, about? A. Well, about twelve by eighteen.

Q. Twelve by eighteen. Filled with furniture and so on, I suppose? A. Stools.

40 Q. Now, you told us that when you were asked to take a walk and tell us about this thing that you said that if you did leave there it would be against your will, that you wanted to stay on the Electric Ferries property and talk in their offices? A. Yes.

Michael Evanyke, redirect.

Q. Is that right? A. Yes.

Q. And the only office was the one down at the boat and the ticket office; is that right? A. Yes.

Q. And you wanted to talk there? A. Yes.

Q. Otherwise to go away would be against your will; is that right? A. Yes.

10

Q. Now, did anybody force you to go with them?

A. Well, I went against my will; I wasn't forced, but I went against my will.

Q. Nobody forced you? A. I was told to come along, and I went.

Q. By whom? A. You told me, for one. When I saw the police officers there, naturally I was—

Q. You thought I was a police officer, I suppose? A. No, I didn't know who you were.

Q. And when I said to you to come along you went with me? A. Certainly, you acted with authority there. Of course, Mr. Winslow was there and listened to you, too.

20

Mr. McIntyre: That is all.

Redirect examination by Mr. Tiffany:

Q. Were the Hudson Vehicular Tunnels in operation about the time and shortly before you went to work for this company? A. Just about that time, yes.

30

Q. About that time. And you testified on direct examination that at the end of your tour you turned the money and tickets over to a man who relieved you. What tickets do you mean you turned over to him? The new tickets that had not been issued? A. Why, you turn the register over to him with about \$20 worth of change.

Q. Did you have anything to do with any tickets that were not contained in the register? A. No.

40

Q. So when you said you turned the tickets to

Michael Evanyke, recross.

the—the tickets and the money over you meant you turned over the registering machine with the balance that was there, did you check that balance? A. Yes.

Q. And check the number of the ticket? A. Yes.

10 Q. Was each ticket numbered that came out of the machine? A. Yes.

Q. So that it would be possible, by looking at the numbers of the tickets, to know about what date they were sold? A. Yes.

Mr. Tiffany: That is all.

Recross examination by Mr. McIntyre:

20 Q. Just a minute. Is this your signature (handing a paper to the witness)? A. Yes, sir.

Q. That is yours. Is this? A. No, sir.

Q. Is that yours? A. Yes.

Q. Is this your signature? A. No, sir.

Q. Is this your signature? A. Yes, sir.

Q. Is that your signature? A. Yes, sir.

Q. Is that your signature? A. Yes, sir.

Mr. McIntyre: These have been offered for identification. He has identified all these papers here.

30 (Five papers marked as one exhibit, D-2, for identification.)

Q. Now may I ask you to tell us what they are, please?

Mr. Tiffany: I object to that, if the Court please, unless he makes the witness his own witness. It is not proper cross examination.

Mr. McIntyre: It goes to the matter of reports.

40 Mr. Tiffany: I object to his statement of

Michael Evanyke, recross.

what they are. They are not proper at this time in the case.

Mr. McIntyre: They have been identified.

Mr. Tiffany: All right, that is proper.

Q. You don't know the date—or do you know the date that the Vehicular Tunnels were opened?

10

A. I do not, no, sir.

Q. You don't know. Were they opened before this charge of embezzlement was made against you? A. About that time, sometime.

Q. It was afterwards, as a matter of fact, wasn't it? A. About that time.

Q. Well, do you mean the date you say you were charged with embezzlement or a week later or a week before or what? A. I don't know just what date it was. I can't recall the date.

20

Q. You can't recall as to whether or not it was before or after, can you? A. I can't recall, no. I know there was talk—

Mr. McIntyre: That is all.

Mr. Tiffany: It is admitted, I believe, by counsel that at the time he appeared as counsel, Mr. McIntyre, on this afternoon in question at the Electric Ferries Office, and at the time he appeared in the Weehawken Police Court on these various occasions, he was associated with Collins and Corbin, members of the bar of this State; likewise admitted that Collins and Corbin were counsel for the Electric Ferries, Incorporated.

30

Mr. McIntyre: That is right.

Mr. Tiffany: It is also admitted that no indictment has been found against Mr. Evanyke and that there had been no further or other proceedings had in this matter other

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Motion for Nonsuit.

than this one Police Court proceeding in which the complaint was dismissed. That is the case.

PLAINTIFF RESTED.

10

MOTION FOR NONSUIT.

Mr. McIntyre: May it please the Court, I respectfully move for nonsuit on behalf of the defendant on the following grounds:

First, there is no proof that the defendant was guilty of malice;

Second, there is conclusive evidence that there was reasonable and probable cause for the signing of the criminal complaint;

20

Third, there is no proof, as the plaintiff is required to adduce, that there was want or absence of reasonable and probable cause for the criminal complaint;

Fourth, it does not appear that the criminal complaint was signed by any officer or agent of the defendant company, nor is this defendant directly connected in any manner whatsoever with the signing of the complaint charging embezzlement;

30

Fifth, that complaint was signed by a State Railway Police Officer, duly commissioned, the commission being in evidence, and he is responsible not to the defendant but rather to the State of New Jersey alone;

Sixth, this defendant, even assuming that it did instigate the signing of the criminal complaint, acted upon the advice of counsel.

40

On these grounds I respectfully urge that the plaintiff's complaint be dismissed and a judgment of nonsuit entered.

The Court: Your second and third rea-

August Klassen, direct.

sons are somewhat the same, only different language.

Mr. McIntyre: Probably, yes, I can elaborate on them, of course.

The Court: I will deny the motion and allow you an exception. 10

Mr. McIntyre: May I have an exception, your Honor?

DEFENDANT'S TESTIMONY.

AUGUST KLASSEN, sworn.

Direct examination by Mr. McIntyre:

Q. Mr. Klassen, where do you live? A. 534 Palisade Avenue, Weehawken. 20

Q. What is your position? What is your business? A. Chief of Police.

Q. Of what city? A. Weehawken.

Q. And do you know Mr. Evanyke, the plaintiff here? A. Yes, sir.

Q. Do you recall about the first time it was that you saw him? A. On November 11, 1928.

Q. 1928? A. Nineteen twenty—

Q. Or was it 1927, Chief? A. 1927. Excuse me. 30

Q. What were the circumstances under which you saw the gentleman? Will you kindly state it briefly? A. Mr. Winslow, yourself, stenographer, and some agent or detective, Burns detective, came to my office about three P. M. on November 11, stating that he would like to interview one of your employees down at the Electric Ferry.

Mr. Tiffany: I object, if the Court please, to the conversation. It is wholly outside of the presence of the plaintiff. 40

August Klassen, direct.

The Court: Yes, how is that admissible?

Mr. McIntyre: I will withdraw it. I wanted to get the full picture before us, that is all.

10 Mr. Tiffany: I submit, your Honor, that is not quite right. The full picture of legal evidence, he means.

Q. Well, you saw Evanyke down at the Electric Ferries accompanied by myself and Mr. Winslow?

A. Yes.

Q. Did you speak to him down there? A. After I was introduced to him.

Q. Do you recall who introduced you to him?

A. Mr. Winslow and yourself. Mr. Winslow—

20 Q. Was Evanyke placed under arrest? A. No, sir.

Q. And you were present in the room at headquarters when he was questioned, weren't you?

A. Yes, sir, I was.

Q. Before he went there— A. Yes, sir.

Q. (Continuing)—do you know whether he was told before leaving the premises of the Electric Ferries that he was coming along voluntarily? A. Yes, sir, he was told.

30 Q. He was told that before he left the premises of the Electric Ferries at all, wasn't he? A. Yes, sir.

Q. When he went to the Weehawken Police Headquarters and before he was questioned was anything said to him by anyone as to whether or not he had to stay there or whether he could leave voluntarily? A. He asked me what it was about.

40 I said I didn't know, some question about his booth, but I says, "If you go it is up to yourself; if you go you must go of your own free will."

Q. Was he told that he had to stay there? A. No, sir.

August Klassen, direct.

Q. Did you tell him he could leave any moment?

A. I told him it was up to himself to stay or leave.

Q. And that was before he was questioned at all, was it? A. Yes.

Q. Now, he was then questioned for a period, wasn't he? A. Yes, sir.

10

Q. Do you remember whether or not I told him he was there of his own free will and to go leave any time he wanted to? A. Yes.

Q. Well, did I tell him that? A. Yes, before, upstairs.

Q. That was before we went upstairs? A. Yes, when we were upstairs before you questioned him.

Q. How long had we been up there when he was told that by me? A. To my best memory it was before you questioned him.

20

Q. Did I say it to him again at any time? A. During the questioning, yes.

Q. About how many times, to your recollection? A. Well, that I couldn't say. I didn't take any part in that. I was called on the 'phone and so forth. I don't know the conversation.

Q. Well, you heard it before we went up and when we were up there before there was any questioning. Can you give us any idea whether there was any other time that you heard he was told that he could leave any moment, that it was not against his will? A. Yes.

30

Mr. Tiffany: Please don't lead him too much.

Q. All right. How many times was he told that, to your knowledge? A. Well, twice to my knowledge, anyhow.

Q. Twice, anyhow. I show you a paper, Chief,

40

August Klassen, direct.

and ask you what it is. I believe it is P-1 or 2.
A. It is the warrant, yes.

Q. Was there a return on that warrant from the Clifton Police Department?

10 Mr. Tiffany: It speaks for itself that there is not.

A. There is not, no, sir.

Q. That is the warrant that you brought— A. Yes, sir.

Q. (Continuing)—to the Clifton Police Department? A. Clifton Headquarters.

Q. You brought that there yourself? A. Yes.

20 Q. And there is no return as to what happened in Clifton on it, is there? A. No, that is marked on by myself, "Returned From Clifton; sent back to us."

Q. I see. And as far as the official records in this case show, this man was never arrested? A. Not that I know of.

Q. And as far as the official record shows there is no record of his arrest at all? A. He surrendered in Weehawken.

30 Q. If he were arrested would you have a record of it?

Mr. Tiffany: I object to that.

Mr. McIntyre: Withdraw it.

Q. Do you, as the Chief of Police of Weehawken, know whether or not there was any return to this warrant? A. There was no return on this warrant until the man came in on the 15th of December.

40 Q. Now, have you the blotter record, the record of your department to show whether or not he was arrested? A. Yes, sir, I have it with me.

August Klassen, cross.

Q. Is this it (handing a book to the witness)? A. Yes.

Q. I ask you to turn to your record of that day. A. Yes, sir, here it is (indicating).

Q. Now, you haven't any record there of the arrest of Michael Evanyke, pursuant to this complaint in question? A. No, sir. He surrendered. 10

Q. It was a surrender; no arrest? A. No arrest.

Q. And if he was arrested it would show on that record, wouldn't it? A. Yes.

Mr. McIntyre: That is all.

Cross examination by Mr. Tiffany:

Q. Now, then, you had a warrant for this man, didn't you? A. Yes. 20

Q. And you were looking for him? A. Yes.

Q. Did you ever go to his house for him? A. Once.

Q. When? A. November 12.

Q. So that at that visit you didn't find him home? A. I didn't find him home.

Q. And you were constantly watching for him to show up? A. Yes.

Q. Because you had a warrant that was issued for this man's arrest? A. Yes. 30

Q. And you received a communication from me? A. Yes.

Q. Yes. A. I went there in person; we went to Clifton again after.

Q. Yes. And didn't you know that he was paroled in Mr. Stoddard's custody? A. No, sir.

Q. That was never communicated to you? A. No.

Q. But I communicated with you in December? A. Well, you might, Mr. Judge. 40

August Klassen, redirect.

Q. Don't you know that I did? A. That he was going to surrender himself.

Q. No, didn't I tell you—didn't I call you up and talk to you and ask you if you were still looking for Evanyke? A. Yes, sir.

10 Q. And didn't you tell me that they would want him? A. Yes.

Q. Didn't I tell you that we would produce him any time you wanted him? A. Yes, he came in. Yes.

Q. Correct. And bail was fixed at \$2,000, and he was to await the action of the committing magistrate? A. Yes.

20 Q. Just turn to the record, Chief. Now, this is your blotter of the Police Department? A. That is the Police Department's.

Mr. Tiffany: Are you offering this?

Mr. McIntyre: Well, on the question of arrest it has been testified to.

Mr. Tiffany: If the Court please, we have the whole record. May I offer it at this time?

(Page of book marked Exhibit P-4.)

(Mr. Tiffany read Exhibit P-4 to the jury.)

30 Q. Is that your full record on it? A. Yes.

Q. So that at all times from the date of the issuance of the warrant until he surrendered himself there was a process out for this man's arrest, and he was liable to be picked up by anybody? A. Yes.

Mr. Tiffany: That is all.

Redirect examination by Mr. McIntyre:

40 Q. But he was never picked up, was he? A. I don't know. Not to my knowledge.

Michael Lyons, direct.

Q. Never arrested? A. Never arrested; came in.

Mr. Tiffany: I submit, if the Court please, that is hardly fair. Never arrested to his knowledge.

The Court: I think the jury understands it. It is proper cross examination. 10

Mr. Tiffany: That is all.

MICHAEL LYONS, sworn.

Direct examination by Mr. McIntyre:

Q. Where do you live, Mr. Lyons? A. 510 Park Avenue, Weehawken.

Q. What is your business? A. Captain of Police. 20

Q. Of Weehawken? A. Yes, sir.

Q. Do you remember November 10, 1927? A. The 10th or 11th?

Q. The 11th; I beg your pardon. A. Yes.

Q. Did you see Mr. Evanyke on that day? A. Yes, sir.

Q. Tell us about what time of day it was? A. About half past four in the afternoon.

Q. And where was it at? A. In my office in the police station. 30

Q. Had you seen him at the Electric Ferries ticket booth? A. No, sir.

Q. You did see him at your office? A. Yes.

Q. In headquarters. And you saw me there that day? A. Yes.

Q. And also Mr. Winslow? A. Yes, sir.

Q. And anybody else? A. Chief Klassen, the man who was supposed to be a Burns detective agent, and a young lady.

Q. What did all these people do, if anything. 40

Michael Lyons, cross.

Can you tell us? A. Well, there wasn't anybody done much. The girl took some notes; you asked some questions, and Mr. Winslow asked some; Mr. Evanyke answered quite a good many.

10 Q. Now, did you hear me have any conversation with Mr. Evanyke? A. Yes, sir.

Q. With respect to whether or not he was under arrest? A. Yes.

Q. What was said? A. You said to him, "You are under no duress. You are at liberty to go if you please, any time."

Q. When was that? Before he was questioned or after? A. You were just seated.

Q. I see. On that point was there anything further said while you were in the discussion there?

20 A. I think Mr. Evanyke says, "I am here to help you if I can, if there is anything I can do I am willing to help you." He made that answer to you.

Q. I see. With reference to whether he was there voluntarily or not, do you remember how many conversations on that point there was between myself and Evanyke? A. How many?

Q. Yes. How many times was it repeated to him, do you remember? A. Well, I think three or four times, during the time he was there.

30 Q. You didn't arrest him, did you? A. No, sir.

Q. And you were merely present at this conversation? A. That is all. That is all.

Cross examination by Mr. Tiffany:

Q. You went down to lend your moral support to Mr. Winslow when they went down to the Electric Ferries Company,—or you didn't go, did you? A. No.

James F. Healy, direct.

Q. Do you know why the chief went down there?

A. I think he was invited.

Q. By whom? A. By Mr. Winslow himself.

Q. I suppose to go down and act as a reception committee to bring him up to police headquarters?

A. I don't know just that.

10

Q. Drag him from the Electric Ferries Company. Now, when they brought him up to your office at police headquarters— A. Yes.

Q. And they put him through an examination, didn't they, Captain, and they had a stenographer there taking down everything he said? A. There was a lady there taking notes.

Q. And the Burns detective was there? A. Yes.

Q. And Mr. Winslow and Mr. McIntyre would say, "You can go, of course, any time you want to," but they kept on asking him questions just the same? A. Yes.

20

Q. You and the chief and others sat around there in police headquarters? A. Yes.

Q. He didn't attempt to go, did he? A. No, it was very fine.

Mr. Tiffany: I think it was.

30

JAMES F. HEALY, sworn.

Direct examination by Mr. McIntyre:

Q. Where do you live, Mr. Healy? A. 1905 Avenue, Weehawken.

Q. What is your business? A. At the present time I am a representative of the Electric Ferries.

Q. I see. Were you ever a ticket collector? A. I was, yes.

Q. Can you tell the Court and jury, briefly, the

40

James F. Healy, direct.

process by which passengers are admitted to a ride for fare? A. Well, as the car approaches the ticket office I see what kind of a vehicle it is and how many—if it is a pleasure car you see how many passengers are in it, and then you charge accordingly.

10

Q. And the money received by way of fares is deposited in a cash register; is that it? A. Yes.

Q. Now, tell the Court and jury, will you? I can't testify. What happens with the fare and the tickets and how are they collected and so on? A. Well, as we see the car approaches, as I said before, we punched the ticket accordingly, and then that is recorded on the register, the kind of vehicle, and everything else, and they are given a ticket which they give over to the bridgeman or the man on the boat, whatever process was in effect at that time.

20

Q. Now, how long were you a ticket cashier? A. Well, about two years.

Q. And was Mr. Price ever your superior? A. Why, I never spoke to him as long as he was there, never received any orders from him.

Q. And did you make your returns to him? A. Never.

30

Q. Or report to him when you came to work? A. Never.

Q. Have anything whatsoever to do with Mr. Price? A. Why—

Mr. Tiffany: I object to what he had to do with Price.

A. I happened to be the relief man and I only worked two days, like, eight to four and twelve to four; very seldom I saw anyone.

40

James F. Healy, cross.

Cross examination by Mr. Tiffany:

Q. You are now in what capacity with the Electric Ferries Company? A. The representative on the complaints and the sale of advance sale tickets.

Q. I see. And these tickets that you talk about being given to the automobile owner, they came out of the cash register, didn't they? A. Yes.

Q. Automatically? A. Yes.

Q. And they had marked upon them a perforated line so that the passenger could keep a part as a receipt; is that right? A. Yes, but they never did keep them.

Q. How do you know they didn't? Did you go with each automobile driver? A. No, but I used to go up to the office quite often, and the whole ticket would come in.

Q. Did you ever see one of the receipts torn off? A. Very, very seldom.

Q. You have. And it was meant for that purpose, wasn't it? A. Yes.

Q. I show you a receipt and ask you if that isn't the top of the receipt that the passenger could tear off and keep (handing a paper to the witness)? A. Yes.

Mr. Tiffany: I offer it in evidence.

(Paper marked P-5 for Identification.)

Mr. Tiffany: I offer this.

(Paper marked P-6 for Identification.)

Q. And these stubs that the passenger would keep were identically numbered with the part that he turned over to the collector, the ticket? A. Yes.

Q. And as the ticket seller, when you went on duty the number of the next ticket was taken, and

John Carroll, direct.

that was the way they could tell just what tickets you sold? A. Just what tickets I sold, yes.

Q. So that they could place the sale of every ticket in a certain man's tour of duty? A. Yes.

10 Q. And these also show the number of passengers and the time collected and the number of the ticket? A. Yes.

Q. And there is no question but they could check each one of these tickets into the tour of the man who sold them? A. Right.

Mr. Tiffany: That is all.

JOHN CARROLL, sworn.

20 *Direct examination by Mr. McIntyre:*

Q. Where do you live, Mr. Carroll? A. At 15 West 19th Street, Weehawken.

Q. What is your business? A. At the present time I am idle. At the present time I am idle, not working.

Q. Had you ever worked for the Electric Ferries? A. Yes.

Q. In what capacity? A. Ticket seller.

30 Q. Did Mr. Price ever have anything to do with—

Mr. Tiffany: I object to that. It is immaterial, what Price did with other men.

The Court: What is the question?

A. Whether Mr. Price had anything to do with me.

Mr. McIntyre: It has a two-fold purpose.

The Court: That may be. I will permit it.

40 Mr. McIntyre: There is an objection to it.

John Carroll, direct.

Mr. Tiffany: Go ahead. Go ahead. Go ahead.

A. He was my superior. He was the marine superintendent. That is, if the machine went out of order or something of that sort he attended and sent a man up there. I would have to call him up to have it fixed or something like that. 10

Q. To fix the machine? A. Yes.

Q. Well, now, about when you reported for work, what tours, and so on. Where did you get those orders? A. Well, when I went to work I automatically got a shift, then—there was three shifts. I automatically got the eight to four shift, which was the day trick, and from then on, why, understood I would be on the shift until further notice. 20

Q. Now, if you wanted to take a day off, being sick, would you get it from Mr. Price or the office of Mr. Winslow? A. I would call up Mr. Price.

Q. And when you wanted to make returns of the receipts and tickets and so on, where would you make those returns? A. In New York, in the Erie Depot.

Q. Did Mr. Price ever inspect your records to see whether the money was correct or incorrect or whether they agreed with the traffic that had passed over? A. No. 30

Q. If there was anything wrong about that where would you go? A. We—I don't know just what you mean.

Q. Well, if there was anything wrong or any question arising with respect to your accounts or tickets collected or sold, who would settle those questions? Mr. Price? A. No, Mr. Sullivan. We usually got a list from him of a shortage or overage. 40

John Carroll, cross.

Q. How long had you been employed as a ticket taker? A. About two years and three months.

Mr. McIntyre: That is all.

Cross examination by Mr. Tiffany:

10 Q. And you are not working for the company now? A. No.

Q. How long have you been away from them, about? A. The first of the year.

Q. Did Mr. Winslow offer you a job the other day? A. No, sir.

Q. Weren't you down there and didn't he offer you work? A. He didn't offer me work.

20 Q. Did you have a conversation about a job down there? A. Yes.

Q. Did you ask him for it? A. No, sir.

Q. Did he talk to you about a job? A. Well, I had a friend of mine, see, who told me he would probably be able to get me back there again.

Q. Did you see Mr. Winslow? A. My friend told me to go down to see Mr. Winslow.

Q. Did you? A. I went down to see Mr. Winslow.

Q. Did you ask him for a job? A. No.

30 Q. Did he ask you? A. He said, "What's on your mind?" I says, "Nothing." And he said to me, he says, "Your friend told me that you wanted to come back again."

Q. Yes? A. So he said, "I got nothing here now."

Mr. Tiffany: All right. That is all.

Carol Winslow, direct.

CAROL WINSLOW, recalled.

Direct examination by Mr. McIntyre:

Q. Mr. Winslow, has the Erie Railroad anything whatsoever to do with your company? A. Nothing whatsoever. We are just tenants.

10

Q. Tenants? A. No connection of any kind.

Q. Can you tell the Court and jury the method of selling tickets and collecting them that was in operation at the time that—or, let me say explicitly, in 1927? A. At the time of this case?

Q. Yes, sir. A. Well, when we first started we would ring up the—a ticket seller would ring up the ticket on the cash register, and when the car would get down to the end of the bridge a bridge-man would collect the ticket, and at the end, when the boat went out, put them in an envelope and leave them in the office, and we found that—

20

Mr. Tiffany: I object to what they found, if the Court please. What happened before has nothing to do with this plaintiff.

A. This is at this time.

The Court: Well, you mean for a fact that it is not—

30

Mr. Tiffany: I mean as a matter of evidence it is not proper evidence, what was found. If he knows himself, of his own personal knowledge, all right.

Mr. McIntyre: Oh, yes.

Mr. Tiffany: But not what somebody else may have found out.

The Court: I assumed that—

A. I am treasurer of the company.

40

Carol Winslow, direct.

Mr. Tiffany: That doesn't make any difference.

A. It was found that—

Mr. Tiffany: I object to that.

10

By the Court:

Q. What do you know about it yourself? A. Well, I found that the tickets collected that way, especially the evening shifts—it is impossible to break the series on a cash register—but during the evening, when there was nobody around, that the bridgeman, instead of putting all those tickets away the way he should, would hold some of them out and send them back to the ticket office, and when a car would come through, instead of ringing it up on the cash register, that same ticket would be sold, and a ticket could be sold four or five times over.

20

Mr. Tiffany: I object to this theory going in unless he proves that it did happen and names who it was.

Mr. McIntyre: I think it is proper for this reason: The judge says to his own plaintiff here, "Do you know of any way"—if your Honor recalls the testimony—"Do you know of any way possible by which tickets could be duplicated and resold on that register?"

30

(Discussion.)

The Court: If he knows himself and knows that this is actually what occurred and it is in connection with this case, that may be a different matter, but if he is speculating as to what might possibly happen or what he thinks could happen, I think that is too remote.

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Carol Winslow, direct.

Mr. McIntyre: I think it is quite proper, especially in view of what Judge Tiffany had testified to by the plaintiff, that he himself knew of no way. Now, if we can show in answer to that that there is a way, plus the fact that coupled with other evidence—

10

Mr. Tiffany: I will withdraw the objection. Let the jury have it. I will withdraw the objection.

A. (Continuing.) When the ticket is collected at the bridge that man, if he wished to be dishonest, and had a confederate, could have his confederate at the ferry bridge hold out some of these tickets and send them back or take them back during the evening. When a car came through, instead of ringing that on the cash register—and keep doing that over and over again—would run up into a big amount. I myself stayed down there all night watching things. We stopped that system and had the boat's tickets collected on the boat and dropped in a locked box, taken off by the captain at the end of his eight-hour tour, and all these irregularities ceased. That is how you can beat a cash register.

20

By Mr. Tiffany:

30

Q. Is that system still in effect, Mr. Winslow, with the company? A. No, it was discontinued right after this case.

Q. Now, can you tell us something, as the president and treasurer of the company, of the duties of Mr. Price and what his limits were and what his jobs were? A. Why, he was to supervise the employes, see that the boats were kept in proper condition, that the engines were running right; and his duty was the same as any operating superintendent on a railroad; had absolutely nothing to

40

Carol Winslow, direct.

do with the ticket selling or the treasury department. It is the same as the ticket seller here in the Paterson Station. The man sells the tickets has nothing to do with the man that repairs the tracks. That is just as different as that.

10 Q. Was he regarded by you as an officer or just an employe? A. Oh, employe, no contract, no voice.

Mr. Tiffany: I object to what he was regarded as. It doesn't make any difference.

Q. I show you exhibits marked for identification and will ask you what they are (handing papers to the witness). A. Those—at the end of each tour the ticket seller makes a record there on the cash register at which he starts and the number at which he stops and the amount received, and it is returned to the office. These are sent—he makes out two. The money is put in a bag and sealed by the ticket seller and put in a safe, taken over and put in a—there are three ticket sellers on each side. He adds in one report with the money and that goes direct to the bank every morning at 9:30, and the other is sent up to the office, and the bank checks his money, then we check his report against the bank. That is two checks against him, so there can't be any mistake.

30 Q. Whose reports are these? A. They are signed by Michael Evanyke.

Mr. McIntyre: I offer them in evidence. (Paper marked Exhibit D-2 in evidence.)

Mr. Tiffany: What is the purpose of it?

Mr. McIntyre: To show the reports handed in by Mr. Evanyke as compared with others we will adduce later.

40

Carol Winslow, direct.

Q. I show you a book and ask you if you can tell us what that is. A. That is the official record of the cars starting November, 1926, day by day, through to December, 1927, day by day totals.

Mr. McIntyre: I offer it in evidence.

Mr. Tiffany: I don't care.

(Book marked Exhibit D-3.)

10

Q. May I ask you to read, if you will, the record of the cars on the tour of duty from four to twelve on November 11?

Mr. Tiffany: Why don't you read them and save time?

A. Well, this gives the daily total, for the whole day.

20

Q. Not the different tours? A. The tours are there, just that one tour in question; that is, six tours, three on each side, twenty-four hours.

Q. I see. All right, then, I don't believe that would be of much—

Mr. Tiffany: May I see it?

Mr. McIntyre: Yes.

Q. Now, about automobiles with passes. What is the average per working day that go through there, the number of vehicles with passes? A. Sometimes ten, sometimes twenty; never more than twenty in twenty-four hours. The care of the different companies go with their trucks; that is generally what they are used for.

30

Q. On a pass? A. The silk companies out here, they will send trucks and then the man will go riding in the car behind him with a shotgun to keep the bandits off; he has a pass.

Q. Well, now, did your company retain anyone

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Carol Winslow, direct.

to clock or make a check of the number of vehicles that passed on the tour from four to twelve there, Thursday, November 11, 1927? A. Is that the date in question?

10 Q. On November 10. A. Yes, we retained the Burns Detective Agency.

Q. Do you remember his name? A. I don't remember his name, but he is sitting right there (indicating).

Q. This is the gentleman right here? A. Yes.

Q. He can testify for himself. Now, then, did you yourself have a report and a check-up made of the records from October the 13th to November the— A. November the 8th.

Q. 8th or 9th? A. Yes.

20 Q. And 10th? A. May I have these for notes?

Q. This is the original? (Discussion.)

Mr. Tiffany: Did this gentleman make it?

Mr. McIntyre: Yes.

By Mr. Tiffany:

Q. Where are your original notes from which this was compiled? A. That book and these reports—slips.

30 Mr. Tiffany: I submit that it is data he compiled from these, and they are sufficient evidence themselves. I submit that the report is in evidence, and this book and the slips are in evidence. There is no need to use his compilation.

Mr. McIntyre: I want to simplify it.

A. I would be a lightning calculator if I could add it in my mind.

40 Mr. Tiffany: I can't consent to the use

Carol Winslow, direct.

of all this. Without the stuff on the bottom I suppose it is all right.

A. You can just jot the dates down. It is the same on every date.

By Mr. McIntyre:

10

Q. Take the Thursday, October 13. Can you tell us what cash was received on that tour from four to twelve?

Mr. Tiffany: Wait just a moment. There is nothing here that shows the cash received.

A. On the slips signed by Evanyke.

By Mr. Tiffany:

Q. What date? October 13? A. Yes.

20

Mr. Tiffany: There is no slip.

By Mr. McIntyre:

Q. Well, take the date we have here, then. A. Take those.

Mr. Tiffany: November, it is.

Q. November the 6th, 1927. A. \$558.95.

Mr. Tiffany: What is the cash?

30

Q. That was cash received? And what was the number of vehicles that passed through on that tour? A. 1,464.

Mr. Tiffany: Where do you find that?

Mr. McIntyre: Right alongside of it.

Mr. Tiffany: Fourteen hundred?

The Witness: Sixty-four.

Mr. Tiffany: His report shows 1,475.

The Witness: Yes, but he has voids on

40

Carol Winslow, direct.

there, Judge, deducted, Judge; a ticket printed wrong and destroyed.

Mr. Tiffany: I don't see it, do you? Where are the voids? Maybe you can show us it.

10 (The witness replied inaudibly.)

Q. Now, then, November 7, 1927, on the tour from four to twelve.

Mr. Tiffany: November what? November 5, I have.

A. Evanyke didn't work on November 7.

Q. Didn't work on the 7th? A. He didn't work on the 8th, either.

20 Q. Now, can you say the number of vehicles that passed through on the tours four to twelve on the 7th and 8th of November, 1927?

Mr. Tiffany: Not unless you have got something better than a compilation. I want to see the original slips of that date, and I want them proved.

A. I think you have those, Mr. McIntyre.

30 Q. All I have I have here. Have we the—could you tell that? A. No, no, this is just the total.

Q. For the day? A. Yes.

Q. On November 9, tour four to twelve, November 9, 1927? A. The number of vehicles?

Q. The number of vehicles. A. 464.

Mr. Tiffany: That is right. And November 10?

40 Q. November 10? A. November the 10th we have it; that is the day in question here. Evanyke turned in 557 and Burns turned in 658.

Carol Winslow, direct.

Mr. Tiffany: I object to what Burns did.
I ask that that be stricken out.

A. Evanyke turned in 557.

Q. November the 1st, 1927, the tour four to twelve? A. 515.

10

Mr. Tiffany: That is right.

Q. And November the 4th, tour four to twelve, how many cars did he turn in? A. 485.

Q. Now, did you compare the receipts as turned in by Evanyke with receipts turned in by his reliefs for the same tour between the time he was employed and discharged? A. I did for several days before I put the check on him.

Q. What did it show?

20

Mr. Tiffany: I object to that. The record is the best evidence.

A. I did.

Mr. Tiffany: I object to the question on the ground he says he has some records. I say they are the best evidence of what it was.

A. There were reports.

30

Mr. Tiffany: I object to what the record shows. It is the best evidence of what it shows.

Mr. McIntyre: We have the record here.

The Court: That is your best evidence, isn't it?

Mr. McIntyre: But it may be difficult.

Mr. Tiffany: Mr. McIntyre, you know that record doesn't show what he is going to testify to. He is going to subdivide it as

40

Carol Winslow, direct.

it pleases him from certain other information. I want to see that other information.

A. Well, there it is, Judge.

Mr. Tiffany: Those statements are in.

10 A. Will you let Mr. McIntyre ask me another question?

Q. Was there any—let me say this: How do returns of Evanyke compare with the returns of other men?

20 Mr. Tiffany: I submit, if the Court please, the record shows. I don't care how the returns of other men compare. That has got nothing to do with this case. What difference does it make whether they compare with other men?

The Court: How is that material, Mr. McIntyre?

Mr. McIntyre: Why, to show the reasonable and probable cause for any action taken by the defendant, if there were shortages on Evanyke's tours of duty as compared with other men, the same tours of duty for similar periods.

30 Mr. Tiffany: The fallacy of that is very apparent when I say to you this: He has testified as to his theory of this scheme to defraud his company. It involves someone on the boat, who is charged with the collection of these tickets, taking them back to the ticket seller who resells them without ringing them up. That is his theory. Now, these tickets may have been collected on someone else's tour of duty and held over
40 and then on Evanyke's tour be turned—

Carol Winslow, direct.

The Witness: It can't, your Honor, on account of the sequence of the numbers on them.

Mr. Tiffany: That is the point; it can't be done.

The Witness: It has got to be in that tour, Judge. 10

Mr. Tiffany: That is the point. They leave out the essential elements. They don't produce the man or give any proof against him, who the man was that took the tickets.

Mr. McIntyre: We will bring it in now.

Q. It is possible, or can you tell the jury, the Court and jury, whether or not it would be possible for a ticket to be collected on Evanyke's tour and resold on somebody else's tour? A. Impossible. 20

Q. Can you tell us why, Mr. Winslow? A. Because on the report is the first number on the cash register of the tour, and the last number, and it has got to come between those numbers. When it is returned to the office it has got to come between the first number of the tour and the last number of the tour.

Q. Now, then, what prompted you to retain or engage this Burns detective? 30

Mr. Tiffany: I object to that.

(After discussion the objection was withdrawn.)

The Court: He says, "Well, now, perhaps this is what caused it."

Mr. Tiffany: I will withdraw the objection.

Q. May I ask you, Mr. Winslow, to explain to us 40

Carol Winslow, direct.

why it is that what Judge Tiffany said couldn't happen or could have happened, about these Arrow buses?

10 Mr. Tiffany: Let's get down to the question.

The Court: Just a minute. Make your question more explicit. The jury probably may not remember exactly what Mr. Tiffany said, what Judge Tiffany said.

Q. Would it be possible to obtain a ticket and use it on some other tour of duty from the same tour that Evanyke was on? A. No.

20 Q. So as to defraud the company? A. No, at the end of that tour all the tickets are sent up to the head office at Forty-second Street and destroyed the next morning; can't be used except during that one tour.

Q. So that when a tour is over, from four to twelve, for example, when Evanyke worked, all those tickets would be taken where? A. Put in a box on the dock at that time and collected the next morning and brought up to the office and destroyed after they were counted to see that they were all in the right tour.

30 Q. Now, how long had you been watching Evanyke? A. A week or ten days.

Q. And what prompted you to retain the Burns detective? A. Well, the fluctuation from day to day in the traffic. His tour was out of line with the fluctuation. You could tell by the time of day, when we became experienced and watched every day, that if the traffic goes up or down a certain amount, but looking at the report you could tell in the office a certain tour should fluctuate a certain part of the movement, and Evanyke, when the

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Carol Winslow, cross.

traffic went down one day he would go down with it, and when it would be up he would be a hundred vehicles out of line in round numbers from day to day and week—

Q. Was that the normal fluctuation before Evanyke got there? A. No. His fluctuation should have been about one-sixth, and it was over one-twenty-fifth. 10

Q. Now, after having got the report of the Burns detective did you consult your attorneys about this situation? A. I did.

Q. Who did you see? A. I called up Collins and Corbin and talked to Mr. Markley, and he turned me over to you.

Q. And after laying the whole story before me what did I tell you? A. Well, you advised me to cross question him; that is the way I remember it. It is so long ago. 20

Q. And before anything was done at all you consulted your attorney during the entire proceeding? A. Yes.

Mr. McIntyre: Cross examine.

Cross examination by Mr. Tiffany:

Q. Now, Mr. Winslow, your check of the vehicles passing the ticket booth— A. Yes. 30

Q. And these—under your theory of the case, tickets were turned over to someone on the boat and collected by him? A. No, they were collected on the dock at that time.

Q. Who was the man on the dock that collected them? A. I have forgotten now. He was discharged at the same time.

Q. I ask to have it stricken off the record. 40

The Court: Strike it out.

Q. Did you make a charge against him? A. I

Carol Winslow, cross.

never made any charge against him.

Q. No. This man on the dock, whoever he was—what was his name? A. I have forgotten.

Q. You have forgotten that, too. And was his job just to collect tickets? A. Run the bridge and hook up the boat.

Q. When was he discharged? A. I don't remember.

Q. Do you know where he lived? A. No. How could I know where he lived if I didn't know his name?

Q. Well, sometimes we may forget a man's name and still remember what his address is. A. They come and go, those bridgemen. You can't keep track of them.

Q. Under your theory he would turn the ticket back to Evanyke? A. He might. He did.

Q. Is that what you are charging? A. I am not charging anything. This is not a police court.

Q. We know just what kind of court it is. Is that what you lay the foundation of your police action against this man on?

Mr. McIntyre: I object to that, if the Court please, first because it is an unwarranted assumption of fact. It assumes that he did.

Mr. Tiffany: I asked him—

Mr. McIntyre: Wait a minute. The question assumes that he did take police action, where, as a matter of fact, we did not. And secondly, we say it is immaterial and irrelevant and not within the issues.

The Court: Why do you say you didn't take police action? You mean Winslow didn't?

Carol Winslow, cross.

Mr. McIntyre: Nor the company. What we did was lay the situation before the police officer. He on his own hook signed the complaint.

(Discussion.)

Mr. McIntyre: We urge that this question is improper, if your Honor please. 10

(Last question read by the stenographer.)

Mr. McIntyre: I object to that. It assumes that he took the police action, whereas, as a matter of proof, we say it was—

Mr. Tiffany: Leave out the word "police."

Q. Took action against this man. A. May I have question leading up? I have forgotten the sequence. 20

(Testimony read by the stenographer as follows:)

"Q. Is that what you are charging? A. I am not charging anything. This is not a police court.

"Q. We know just what kind of court it is. Is that what you lay the foundation of your action against this man on?"

A. I don't know what the question means now. It has gone so far back. Could you ask me again more fully? 30

Q. You charge your theory to be that a man acting in cahoots with Evanyke would collect the tickets at the bridge or on the boat, and instead of putting them all in the envelope keep a few out and turn them back to Evanyke to sell over? A. Yes.

Q. Did you make any charge against the bridge-man for his part in that action? A. As I remem- 40

Carol Winslow, cross.

ber, the next day was his day off and he never showed up for work again, as I remember now.

Q. I thought you said you discharged him? A. Either discharged or quit.

10 Q. Which was it? It is quite important. A. It was two years ago.

Q. Why did you say that you discharged him, if he quit? A. I don't know whether he quit or was discharged. I can't keep track of that. That is your Mr. Price's job, not mine.

Q. That was Mr. Price's job, to discharge them? A. Yes.

Q. And to hire them? A. Yes.

Q. He was an officer to that extent, was he? A. Not an officer, superintendent.

20 Q. By the way, you said he was a superintendent like any railroad superintendent? A. Yes.

Q. You know, do you not, that the average railroad superintendent has the power of discharging, hiring, and making complaints against employees? A. Yes.

Q. Yes. Now, if this bridgeman had handed these tickets back to Evanyke he would have to collect money from the driver, wouldn't he? A. No.

30 Q. Well, what is your theory about that? A. Evanyke would collect the money.

Q. Evanyke would collect the money? A. Yes.

Q. Now, you keep in and about the box a police officer on tour, do you not? A. Not that late in the evening.

Q. Didn't you hear Evanyke testify he was never there without an officer on duty? A. His testimony was wrong.

40 Q. He was wrong about that, was he? A. Yes.

Q. During what tour of duty do you keep police

Carol Winslow, cross.

officers? A. The police officer has no jurisdiction over the cash register, anyway.

Q. I am not talking about that. I am asking you— A. We don't keep any there now.

Q. Well, did you during Evanyke's period? A. Eight to four, four to twelve, and on the four to twelve when the traffic lightened up the police officer went down to the dock. 10

Q. When did the traffic lighten up? A. Around four or five o'clock in the afternoon.

Q. Isn't that when it became rather heavy? A. No, not from New Jersey.

Q. Not from New Jersey. How about Sundays? Is it light in the afternoon Sundays, too? A. Light in the evening.

Q. From New Jersey? A. What? 20

Q. From New Jersey? A. I can't say this summer, because the tunnel was opened last summer. We have had—

Q. Don't you know, as a matter of fact, on holidays and Saturdays and Sundays and a great many afternoons there were blocks at the ferries? A. That never worried us. That is our advertisement.

Q. Now, you say that this—did you put in a new system right after Evanyke quit? When did you put that system in? A. A few days afterwards. 30

Q. How long afterwards? A. Maybe a week, maybe ten days, maybe five days.

Q. You don't know exactly, do you? A. (Witness shook head in the negative.)

Q. What was the Burns man doing? Merely checking the vehicles passed Evanyke's booth? A. That stopped, yes.

Q. That stopped? And have you his report? A. Yes. 40

Irving Weinberg, direct.

Q. And he is here? A. He is here.

Q. You didn't have him in the police court, did you? A. No.

Q. Why didn't you? A. In the police court? I never went to police court.

10 Q. You never went to police court. Why weren't you there to press this complaint? A. My attorney was there.

Q. But you made a personal investigation, didn't you? A. Of these irregularities?

Q. Yes. A. Yes.

Q. And you had personal knowledge about these alleged irregularities, but you didn't come to the police court to substantiate these, did you, at any time? A. It is not my place to do it.

20 Q. You didn't do it, did you? A. No.

Q. What record did you keep in New York—withdraw that.

Mr. Tiffany: I think that is all.

Redirect examination by Mr. McIntyre:

Q. May I ask one question? When did the Vehicular Tunnel open? A. November 13, 1927. I remember it very well.

30 Q. And that was after this charge of embezzlement. A. (No answer.)

IRVING WEINBERG, sworn.

Direct examination by Mr. McIntyre:

Q. By whom are you employed, Mr. Weinberg?
A. William J. Burns International Detective Agency.

40 Q. Were you retained to do any work by the Electric Ferries in November, 1927? A. Yes.

Q. Will you tell us the date that you did this

Irving Weinberg, direct.

work, and what the work was and what the result of your work was? A. On November 10 at 1:30 P. M. I was assigned by our manager, Mr. Miller, to proceed to the Electric Ferries' office at the Graybar Building, Lexington Avenue and 44th Street to report there for a case that they wanted us to handle. I went up there and reported to Mr. Broderick, who then in turn had me meet Mr. Price. Then together with Mr. Price I left the office of the Graybar Building and proceeded to the Weehawken Ferries and secretly we got out of the ferries and went upon the side of a big hill overlooking the toll booth there and I took position on top of this hill, quite out of sight from any person, yet in full view of the toll booth, and upon a prearranged signal from Mr. Price, who at that time was then at the booth, outside of the booth, I began to count, exactly three minutes of four. 10

Q. I see. What was that signal Mr. Price gave you? A. He was to go away in an automobile, and when he left towards the ferry from the toll booth I was to count all vehicles that stopped in front of that booth and then went on to the ferry, every one that came through from then on up to twelve midnight. 20 30

Q. From three minutes to four until twelve o'clock midnight on November 10, 1927. How did you count them, by what means? A. I used a stop clock, stop watch, this here thing here (indicating).

Q. The only cars counted were those that stopped outside of the toll booth? A. Yes.

Q. How many cars did you count? A. I counted exactly 658, right up to the minute of twelve o'clock midnight. 40

Mr. McIntyre: Cross examine.

Irving Weinberg, cross.

Cross examination by Mr. Tiffany:

- Q. And what day was that? A. November 10, 1927.
- Q. Was that the only day you clocked? A. That is all.
- 10 Q. You just clocked one day? A. Yes.
- Q. And you counted 658? A. That is right.
- Q. And you made a report of it? A. Yes.
- Q. You were up on the top of the hill known as Kings Bluffs? A. I don't know what it is known by.
- Q. A big hill up there overlooking things? A. Yes.
- Q. That is about how far away from the ferry drive? A. Well, it is right across the road from the ferry and the height, I would say, about 75 or 20 80 feet.
- Q. Well, it is right across—where did you clock these cars? A. Why, I was on the top of this hill.
- Q. Yes? A. Say where you are standing is the toll booth.
- Q. Yes? A. I am almost parallel.
- Q. How far away? A. About 75 feet airline.
- Q. Were you across the boulevard? A. On, on 30 the same side that goes down to the ferry.
- Q. Were you in front or in back of this house? A. In front of the booth; there is no hill in back of it.
- Q. Did the cars pass between you and the house? A. That is right.
- Q. Going to the boat? A. Right.
- Q. And there is a hill there? A. A hill where I was standing.
- Q. You are quite sure it is in front of the booth? 40 A. Absolutely. I got a beautiful cold up there.

Irving Weinberg, cross.

Q. And about 75 feet away? A. About 75 air-line.

Q. And you clocked them just one day? A. That is all, for eight hours.

Q. Yes, and you had that mechanical contrivance? A. Right. 10

Q. What did you clock? A. I clocked all the vehicles that stopped in front of the booth.

Q. Yes? A. And then went on through the ferry.

Q. And did you do anything else in connection with this case? A. No, sir.

Q. You don't know whether the type of ticket that was given or taken or passed or anything—all you did was clock some vehicles that stopped in that entrance way? A. That is right. 20

Q. Did you clock any that didn't stop? A. They all stopped.

Q. They all stopped? You are sure about that? A. Very sure.

Q. Don't you know those with a pass didn't have to stop? A. They stopped for a minute and then went on.

Q. They came along and stopped? A. Came along right in front of the booth and stopped.

Q. And stood there for approximately a minute? A. A minute or two, a half a minute. 30

Q. You didn't make a complaint or any complaint in this matter, did you? A. No.

Q. Were you asked to sign a complaint? A. No, sir.

Q. Now, passing between you and the cars going on the bridge would be the cars coming off, wouldn't there? A. No, sir, they would be going towards the boat. Well, say the ferry is there in that direction; I am on the hill here. 40

Irving Weinberg, redirect-recross.

Q. The ferry is down here? A. The entrance of the booth is facing me.

Q. That is not the question. Where did they pass? A. Passed in front of the booth and then stood there for about a half a minute, and sometimes less and sometimes more, and then continued on to the ferry, and as they passed I clocked it.

Q. And the cars that came off the boat, where did they pass? A. Well, they pass the side of the booth, then they wouldn't come alongside of the booth.

Q. They passed on the near side to you, not the booth? A. That is right.

Q. And that would have obstructed your view of the booth? A. No. If I was on the road they would, but I was overhead looking down.

Mr. Tiffany: I think that is all, Mr. Detective.

Redirect examination by Mr. McIntyre:

Q. You were up on the hill? A. Oh, I was fully 75 feet high.

Q. Up on the hill, looking down. A. Positively.

Q. And was there any light there at the time? A. Yes, there was a light at the time, I think, inside the booth.

Q. And the only cars you clocked were the ones stopped going toward the ferry? A. That is right.

Q. What was your tally? A. 658.

Mr. McIntyre: That is all.

Recross examination by Mr. Tiffany:

Q. You had a plain view of this ferry entrance? A. Of the ferry entrance?

Demetrio Evanyke, direct.

Q. Yes, where the booth was. A. Oh, yes.

Q. What were you in up there? A. I was in nothing, out in the plain open.

Q. Plain open, 75 feet from the road. A. 75 feet from the roadbed.

Q. Yes, and you were there from four in the afternoon until a late hour, weren't you? A. Twelve midnight. 10

Q. In plain view of the ferry? A. Where you couldn't see me; it was pretty dark.

Q. I think that is all. Dark at four in the afternoon? A. Well, not quite at four, no, but shortly after. November 10, you know, it was getting dark pretty early.

Q. It was very light around that place? A. Yes. 20

Q. And at night it is very light because the electric flood lights shine on it? A. They shone down on the road and the light would be reflected.

Mr. Tiffany: All right.

Mr. McIntyre: We rest.

DEFENDANT RESTED.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

DEMETRIO EVANYKE, sworn. 30

Direct examination by Mr. Tiffany:

Q. You are the father of this young man (indicating)? A. Yes.

Q. And did you or did you not loan him any money to go into the business of drug store? A. Drug store.

Q. Do you understand me? Did you lend him any money to go in the drug store business? A. Yes. 40

Michael Evanyke, direct.

Q. How much? A. \$800.

Q. \$800. And on the Sunday morning were you home when some police officers came to the house?

A. Yes, ma'am.

10 Q. About what time was it the police officers came? A. About seven o'clock in the morning.

Mr. Tiffany: That is all.

Mr. McIntyre: No questions.

By Mr. Tiffany:

Q. One more question, sir. During the months of November and December, 1927, was your son always living at your home? A. Yes, sir.

Mr. Tiffany: That is all.

20

MICHAEL EVANYKE, recalled.

Direct examination by Mr. Tiffany:

30 Q. Mr. Evanyke, Mr. Winslow has testified that his theory embraces the taking of tickets from the man who collected them on the bridge or on the boat and handing them back to you in the box to sell them over without ringing them up. Did you have any such system or anything of that kind? A. Never. No, sir.

Q. Did you ever receive any tickets back from the bridgeman or anyone who collected them? A. Never.

Q. And resell them? A. Never.

Q. Did you, on this 10th day of November, check in every vehicle that passed your box? A. Yes, sir.

40 Q. By ringing it up on the machine? A. Yes, sir.

Mr. Tiffany: Cross examine.

Mr. McIntyre: No questions.

BOTH SIDES RESTED.

Motion for Directed Verdict.

MOTION FOR DIRECTED VERDICT.

Mr. McIntyre: We desire to renew our motion—rather for a directed verdict for the defendant, upon the grounds already stated on motion for nonsuit. At this time I would like to call your Honor's particular attention to the one circumstance that the plaintiff has not proven, the element absolutely necessary to sustain this suit, and that is, want of probable cause. That is the one element that must be shown, and I think the contrary is quite apparent, and it is for the Court, and not the jury to decide. And we urge that the Court direct a verdict for defendant upon the grounds already stated. The grounds of the motion for nonsuit are renewed and made the grounds for a motion for a directed verdict for the defendant.

(Discussion.)

The Court: I will deny the motion and allow you an exception.

(A recess was taken until April 25, 1929, at ten o'clock in the forenoon.)

30

Paterson, N. J., April 25, 1929.

(TRIAL OF THE CAUSE RESUMED.)

(Mr. McIntyre summed up to the jury on behalf of the defendant.)

(Mr. Tiffany summed up to the jury on behalf of the plaintiff.)

(The Court charged the jury as follows:)

40

Court's Charge to the Jury.

MACKAY, J.:

Members of the Jury:

10 This is an action brought by the plaintiff Michael Evanyke against the defendant The Electric Ferries, Incorporated, to recover damages for what is known in the law as malicious prosecution. The plaintiff claims that on November 12, 1927, the defendant by its agents and servants caused the arrest of the plaintiff without probable cause and with malice, that the prosecution has terminated, and that by reason of the wrongful acts of the defendant the plaintiff has suffered damages as alleged in his complaint. The defendant denies the contentions of the plaintiff and says further that
20 the arrest of the plaintiff was not made through or at the instigation of the defendant, but by one Joseph McGrath, a State Railway Police Officer, who is not responsible to the defendant, but to the sovereign State of New Jersey.

It is not my intention to state to you my opinion of the facts or evidence in this case, because it is not for me to say but for you to say what the evidence is and where the truth lies.

30 The burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the testimony that the material allegations in the complaint have been proven. That is to say, that to support an action for malicious prosecution the plaintiff must show by a fair preponderance of the evidence, first, that the prosecution is ended and he is duly discharged; second, that the defendant instituted the proceedings against him without reasonable or probable cause; and, third, that the defendant was actuated by a malicious motive in
40 making the charge.

Court's Charge to the Jury.

Probable cause is such a state of facts and circumstances present in the mind of the one making the complaint at the time of swearing it out or at the time of issuing the warrant or at the time of causing the arrest, if without warrant, as to lead a man of ordinary intelligence, precaution, and prudence, acting conscientiously, fairly, and without prejudice upon the facts as he believes them to be at the time or as he believes he knows them, to believe the person accused to be guilty. The question of probable cause turns upon a consideration of the facts as they appear to or were known by the defendant or as the defendant believed them to be. Probable cause, therefore, is something more than mere grounds for suspicion, or even reasonable grounds for suspicion. In addition to that there must be such an appearance of facts and circumstances that would warrant and justify a man of ordinary intelligence, caution, and prudence in believing that the person accused were guilty of the offense or crime charged.

The plaintiff must also show by a fair preponderance of the testimony that the defendant was actuated by a malicious motive in making the charge. Malice, in law, signifies nothing more than a wrongful act, done intentionally, without just cause or excuse. Malice, as I have defined it, must be proved to your satisfaction by the greater weight of the evidence. Malice may be implied; it may be inferred from circumstances. If you are satisfied from all the evidence that the prosecution was wholly without cause or without probable cause, you may infer that it was prompted by malice. But that may be rebutted by sufficient competent evidence showing that even without proper cause there was no evil intention, no delib-

Court's Charge to the Jury.

erate purpose to do wrong, no malice. The absence of probable cause infers the existence of malice in the defendant's conduct.

10 The plaintiff must also prove by a fair preponderance of the testimony that the prosecution is ended.

If you find that the plaintiff has sustained the burden of proof by a fair preponderance of the testimony on these points that I have mentioned, then you have the right to consider the question of damages. In an action of this kind you have a right to allow what is known as compensatory damages. I cannot give you very much aid in fixing the amount if you find for the plaintiff; that has to be left to your sound judgment under all
20 of the evidence in the case. But if you find that the plaintiff has sustained the burden, then on the question of damages you could allow, first, for loss of time; second, for the loss of liberty; third, for injury to his name, fame, and reputation; fourth, for mental suffering, if any; fifth, the indignity, the shame, and the humiliation, if you believe there is any; and, sixth, such loss as he may have sustained which was the proximate result of the action of the defendant, its agents or servants, in
30 causing the arrest.

The defendant has asked me to charge certain requests:

“If you decide, from all the evidence in this case, that the facts were fully and fairly stated to competent counsel and competent counsel advised this complaint, and that the defendant here acted upon that advice, that is a complete, justification; then the plaintiff in this suit cannot recover and your
40 verdict, therefore, must be in favor of the defendant.”

Court's Charge to the Jury.

I so charge you, but with this addition: except that counsel's advice will protect the defendant only if none of the material statements were false to defendant's knowledge.

The second request: "To support this action the burden is on the plaintiff to show by a preponderance of the evidence, first, that the prosecution was ended and that he was duly discharged; second, that the defendant instituted the proceedings against him without reasonable or probable cause; third, that the defendant was actuated by a malicious motive in making the charge. To maintain the second proposition, the want of probable cause, it is not sufficient to show merely the dismissal of the complaint by the recorder. There must, in addition, be some evidence from which it may be inferred that the prosecution was without probable cause."

I think I have said something on that score to you, but I will also charge that in addition, as it gives you the law on the subject.

"3. Malice in the law is the intentional doing of a wrongful act without just cause or excuse."

I have charged you that before, and I so charge you again.

"4. Accusation of embezzlement is justified if the party accused be found guilty. It is excused if probable cause be found for the making of the accusation, although the prosecution resulted in acquittal."

I so charge you.

"5. The fundamental grounds upon which an action for malicious prosecution rests are that it was instituted against the plaintiff without reasonable or probable cause, and that the defendant

Court's Charge to the Jury.

was actuated by a malicious motive in making the charge. Unless the evidence in the case establishes the existence of both these grounds, the plaintiff's suit must fail and your verdict should, therefore, be for the defendant."

10 I so charge you.

"6. You are not called upon here to say whether or not Evanyke is guilty of the charge of larceny (embezzlement), and if you decide to dismiss his cause of action and render a verdict in favor of the defendant, that decision can in no wise affect the charge of larceny (embezzlement)."

I so charge you.

20 "7. It is not consistent with public policy unreasonably to discourage criminal prosecution at the instance of private individuals."

I so charge you that part of the seventh request. The other part I refuse to charge.

30 "8. It is in evidence that Joseph McGrath, complaining witness, was a State Railway Police Officer, commissioned by the Governor under the laws of the State of New Jersey, and although he was appointed on the application of the defendant, received his compensation from it, and was subject to be divested of this power by its act, he was nevertheless a State officer, charged with the performance of public duties. He was in law a police officer, authorized to arrest persons guilty of criminal offenses or breaches of the peace, not only in cases where the property of the company was involved, but in every case where a crime was committed or the peace broken within the boundaries of any of the counties on which the company's property was located. For the proper discharge

40 of his official duties, as well as for the proper exer-

Court's Charge to the Jury.

cise of his official powers, he is responsible, not to the defendant, but to the State of New Jersey."

I so charge you, but I add, however, that the defendant could, under certain circumstances, be held responsible for the acts of the policeman, McGrath, and in order to render the defendant liable for an unwarranted arrest made by one of such policemen and subsequent malicious criminal prosecution by him, it is necessary to show that his action was instigated by the defendant or some of its officers or employes. I so charge you in that manner. 10

"9. If you find that the defendant had reasonable or probable cause for making the complaint and was not actuated by malice, and if it appears that the defendant acted cautiously after due investigation and deliberation, and not rashly, and that there is an entire absence of evidence upon which the charge of malice can be rested, then your verdict must be against the plaintiff and in favor of the defendant." 20

I so charge you.

"10. You are not to be influenced by the Court's refusal to grant motion for a non-suit, or the Court's refusal to grant motion for a directed verdict in favor of the defendant. The effect of the Court's refusal of these motions is that the issues involved are submitted to the jury for its decision, because the issues as the Court conceives them are for determination by the jury and not by the Court." 30

I so charge you.

In other words, the questions involved in this case I, as the Court, have decided are questions of fact which you must decide, and not questions of 40

Court's Charge to the Jury.

10 law. If they had been questions of law I would have dismissed the case or directed a verdict for the defendant, but believing them to be questions of fact, disputed questions, that is within your province and for you to say where the truth lies and what you believe the truth to be. You are to render a verdict based upon such evidence in the case as you believe to be the true evidence. You have a right to disregard the testimony of a witness in whole or in part. You are the judges of truthfulness and veracity. You have a right to say which particular one or more you believe, and which particular one or more you disbelieve.

20 The entire matter is wholly within your hands, and you are to give it careful consideration and render a verdict that will square with the evidence in the case.

30 Counsel thinks I may have given you some wrong impression about the questions of non-suit and direction of verdict. Whatever I did say, what I intended to say was that there was a motion made for a non-suit, which I denied. I denied it because I believed it was a question of fact for you to decide, and not a question of law for me to decide. And so on the question of the direction of a verdict. I denied that because it is for you to decide.

Counsel requests me to state to you that on a motion for a non-suit or a motion for a directed verdict the testimony of the plaintiff on the motion for non-suit is admitted to be true. That is the law. But that is only for the purposes of the motion.

40 The questions of fact are still, as I said before, for you to determine, and you are to find out where the truth lies in this case and render a verdict in accordance with the evidence.

Exceptions.

PLAINTIFF'S EXCEPTIONS.

Mr. Tiffany: I except to that part of your Honor's charge where, dealing with probable cause, you said words to the effect that probable cause could not be inferred from the discontinuance or termination of the proceedings unless there was other evidence in the case of lack of probable cause, my thought being that the jury have a right to consider the establishment of a proceeding or not going through with it, and that the testimony would justify—without any other evidence in the case.

10

I ask an exception to that.

DEFENDANT'S EXCEPTIONS.

Mr. McIntyre: May I respectfully except to that part of the Court's charge where the Court in effect charged the jury that the absence of probable cause, malice may be inferred?

20

I further except to that part of the Court's charge wherein the Court, in charging the defendant's request to charge number 1, which is in part as follows:

"If you decide that the facts were fully and fairly stated to competent counsel and competent counsel advised this complaint, and that the defendant here acted upon that advice, that is a complete justification, then the plaintiff in this suit cannot recover, and your verdict therefore, must be in favor of the defendant."

30

The exception being to the exception added by the Court with respect to the truth of the material facts, to defendant's knowledge.

I also respectfully ask an exception to that part

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Defendant's Requests to Charge.

of your Honor's charge wherein the Court, after instructing the jury on the defendant's eighth request, which the Court does not require me to repeat verbatim here, but to which the Court added that the defendant could be held liable for the acts of McGrath, the special police officer, if his acts were instigated by the defendant's officers or employees.

DEFENDANT'S REQUESTS TO CHARGE.

(1) If you decide that the facts were fully and fairly stated to competent counsel and competent counsel advised this complaint, and that the defendant here acted upon that advice, that is a complete justification, then the plaintiff in this suit cannot recover, and your verdict therefore, must be in favor of the defendant. *Helstoski v. Greenberg.*

(2) To support this action the burden is on the plaintiff to show by a preponderance of the evidence, first, that the prosecution was ended and that he was duly discharged; second, that the defendant instituted the proceedings against him without reasonable or probable cause; third, that the defendant was actuated by a malicious motive in making the charge. To maintain the second proposition, the want of probable cause, it is not sufficient to show merely the dismissal of the complaint by the recorder; there must in addition be some evidence from which it may be inferred that the prosecution was without probable cause.

(3) Malice in the law is the intentional doing of a wrongful act without just cause or excuse.

(4) Accusation of larceny is justified if the party accused be found guilty. It is excused if probable

Defendant's Requests to Charge.

cause be found for the making of the accusation, although the prosecution resulted in acquittal.

(5) The fundamental grounds upon which an action for malicious prosecution rests, are that it was instituted against the plaintiff without reasonable or probable cause, and that the defendant was actuated by a malicious motive in making the charge. Unless the evidence in the case establishes the existence of both these grounds, the plaintiff's suit must fail and your verdict should, therefore, be for the defendant.

10

(6) You are not called upon here to say whether or not Evanyke is guilty of the charge of larceny (embezzlement) and if you decide to dismiss his cause of action and render a verdict in favor of the defendant, that decision can in nowise affect the charge of larceny (embezzlement).

20

(7) It is not consistent with public policy unreasonably to discourage criminal prosecution at the instance of private individuals. If in a case like this a verdict for damages can be maintained, no citizen can safely intervene to bring to justice offenders against the criminal law.

(8) It is in evidence that Thomas McGrath, complaining witness, was a State Railway Police Officer commissioned by the Governor under the laws of the State of New Jersey and although he was appointed on the application of the defendant, received his compensation from it, and was subject to be divested of this power by this act, he was nevertheless, a State officer charged with the performance of public duties. He was in law, a police officer, authorized to arrest persons guilty of criminal offenses or breaches of the peace, not only in cases where the property of the company

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Defendant's Requests to Charge.

was involved, but in every case where a crime was committed or the peace broken within the boundaries of any of the counties on which the company's property was located. For the proper discharge of his official duties, as well as for the
10 proper exercise of his official powers, he is responsible not to the defendant company, but to the State of New Jersey.

(9) If you find, that the defendant had reasonable or probable cause for making the complaint and was not actuated by malice, and if it appears that the defendant acted cautiously after due investigation and deliberation and not rashly, and that there is an entire absence of evidence upon
20 which the charge of malice can be rested, then your verdict must be against the plaintiff and in favor of the defendant.

(10) You are not to be influenced by the Court's refusal to grant motion for a nonsuit, or the Court's refusal to grant motion for a directed verdict in favor of the defendant; the effect of the Court's denial of these motions is, that the issues involved are submitted to the jury for its decision,
30 because the issues as the Court conceives them, are for determination by the jury and not by the Court.

*Exhibits.***Exhibit P-1.**

WEEHAWKEN POLICE COURT.

THE STATE <i>v.</i> MICHAEL EVANDYKE.	}	Complaint—for Embezzlement.	10
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Township of Weehawken, County of Hudson, State
of New Jersey, ss.:

JOSEPH McGRATH State Railway Police Officer of
Electric Ferries Inc. Weehawken N. J., being duly
sworn, complains, on information and belief that
between the First day of November & Eleventh
day of November both inclusive A. D. One Thou-
sand Nine Hundred and twenty seven at Electric
Ferries Inc. Terminal in the Township of Wee-
hawken, aforesaid, one Michael Evandyke 25 yrs.
of age of 9 Van Cleve Ave. Clifton N. J. being a
ticket seller and cashier of the said Electric Fer-
ries, Inc. at Weehawken N. J. did feloniously em-
bezzle and convert to his own use without the
assent or knowledge of the said Electric Ferries
Inc. a certain sum of money United States Cur-
rency of the value of One thousand (\$1000) dollars
the property of the said Electric Ferries Inc which
had come into the possession of the said Michael
Evandyke as such employee.

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Exhibits.

WHEREFORE, this Complainant prays that the said offender may be dealt with according to law.

JOSEPH McGRATH
State Railway Police Officer of
Electric Ferries Inc.
Complainant.

10 (SEAL)

ANDREW L. NUNAN
Justice of the Peace
Weehawken N. J.

Subscribed and sworn to before me this }
Twelfth day of November 1927 }

A true copy

20

Certified by

ANDREW L. NUNAN
Justice of the Peace
Weehawken N. J.

WITNESSES:

Name

Residence

Exhibit P-2.

30

POLICE COURT,

TOWNSHIP OF WEEHAWKEN.

THE STATE

v.

MICHAEL EVANDYKE.

Warrant for
Embezzlement.

40

Township of Weehawken, County of Hudson, State
of New Jersey, ss.:

To the Officers and Members of the Police De-
partment of the Township of Weehawken.

Exhibits.

WHEREAS, Joseph McGrath of Electric Ferries Inc. has this day made complaint upon oath before me, Andrew L. Nunan a Justice of the Peace of the Township of Weehawken, that between November 1st & 11th day of November 1927 at Electric Ferries Inc., in the Township of Weehawken, aforesaid, one Michael Evandyke of 9 Van Cleve Clifton N. J. being a ticket seller & cashier of the said Electric Ferries Inc. at Weehawken N. J. did feloniously embezzle and convert to his own use, without the assent or knowledge of the said Electric Ferries Inc. a certain sum of money, United States Currency of the value One Thousand (\$1000.) dollars the property of the said Electric Ferries Inc. which had come into the possession of the said Michael Evandyke as such employee.

THESE ARE, THEREFORE, in the name of the State of New Jersey, to authorize and command you forthwith to apprehend the said Michael Evandyke if he may be found in your bailiwick, and him forthwith bring or cause to come before the Police Court of the Township of Weehawken, to answer said complaint and be further dealt with as the law directs.

Given under my hand and seal of the aforesaid Court at the Township of Weehawken, in the County aforesaid, this Twelfth day of November 1927

ANDREW L. NUNAN
Justice of the Peace
Weehawken
New Jersey

A true copy
Certified by

ANDREW L. NUNAN
Justice of the Peace
Weehawken N. J.

Exhibits.

State of New Jersey }
 County of Passaic } ss.:

To any Constable of said County (SEAL)

10 Proof being made to me, one of the Justice of the Peace of the County of Hudson, that the name of Andrew L. Nunan within signed, is the handwriting of the Justice of the Peace within mentioned, I do hereby authorize you and all other persons to whom the said warrant is directed to execute the same within the County of Passaic

Given under my hand & seal this 12th day of Nov. 1927.

JOHN MCKORSKY L. S.
 Justice of the Peace.

20

Exhibit D-1.

STATE OF NEW JERSEY

To JOSEPH McGRATH Greeting:

30 WHEREAS, the Electric Ferries, Inc. have, in pursuance of an act entitled "An act concerning Carriers (Revision of 1904), approved March twenty-ninth, one thousand nine hundred and four, designated you to act as Railroad Policeman for said corporation.

40 THEREFORE you the said Joseph McGrath are by these presents commissioned to be RAILROAD POLICEMAN for said corporation, and to possess "In the Counties (in this State) through which such Railroad may run, all the powers of policemen and constables in criminal cases of the several townships and municipalities in such counties," to have and to hold the said commission until the same

Exhibits.

shall be revoked in the manner prescribed in the fourth section of the above recited act.

IN TESTIMONY WHEREOF, the GREAT SEAL of the State is hereunto affixed.

WITNESS, the GOVERNOR of the State of
New Jersey, at Trenton, this eighteenth
day of January in the year of our Lord
[SEAL] one thousand nine hundred and twenty-
seven and of the Independence of the
United States the one hundred and fifty-
first.

A. HARRY MOORE
Governor.

By the Governor:

JOSEPH F. S. FITZPATRICK
Secretary of State. 20

STATE OF NEW JERSEY

DEPARTMENT OF STATE.

I, JOSEPH F. S. FITZPATRICK, Secretary of State of the State of New Jersey, DO HEREBY CERTIFY that the foregoing is a true copy of the record of Joseph McGrath appointed a Railroad Policeman for Electric Ferries, Inc. January 18, 1927; and the same was cancelled December 2, 1927, as the same is taken from and compared with the original now remaining on file and of record in my office. 30

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official
[SEAL] at Trenton, this nineteen day of March
A. D. 1929.

JOSEPH F. S. FITZPATRICK
Secretary of State. 40

*Exhibits.***Exhibit D-2.**

[COPY]

CC1121

10

ELECTRIC FERRIES, INC.
23RD STREET, WEEHAWKEN LINE

Report of Ferry Collections at Weehawken, N. J.
 Tour 4 p m To 12 m Nov 1 1927
 Register Com. No. 22615 Clos No. 23130

Tickets Issued 516

REGISTER READING—CASH

20	1 Bus Ticket enclosed for subticket	B-61—76.25 A-12—11.15	
	At end of tour		\$1154.20
	At beginning of tour		894.65
			894.65
	Amount Registered		259.55
	Less value of Tickets Collected	\$87.40	
	Less value of Cash Register Tickets Spoiled	\$ 0.30	87.70
			87.70
	Total Cash Collections		171.85
	Corrections (Add or Deduct)		
	Cash Remittance	\$171.85	

30

MICHAEL EVANYKE

[COPY]

CC1082

ELECTRIC FERRIES, INC.
23RD STREET, WEEHAWKEN LINE

Report of Ferry Collections at Weehawken, N. J.
 Tour 4 p m To 12 m Nov 4 1927
 Register Com. No. 27802 Clos. No. 28286

40

Tickets Issued 485

Exhibits.

REGISTER READING—CASH

	B-63—\$78.75	
	A- 7— 4.70	
At end of tour		\$3792.70
At beginning of tour		3545.50
		<hr/>
Amount Registered		247.20
Less value of Tickets Collected	\$83.45	
Less value of Cash Register Tickets Spoiled	\$	83.45
		<hr/>
Total Cash Collections		163.75
Corrections (Add or Deduct)		
Cash Remittance	\$163.75	

10

MICHAEL EVANYKE

[COPY]

CC1028

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ELECTRIC FERRIES, INC.
23RD STREET, WEEHAWKEN LINE

Report of Ferry Collections at Weehawken, N. J.
Tour 4 p m To 12 m Nov 6 1927
Register Com. No. 31529 Clos. No. 33003

Tickets Issued 1475

REGISTER READING—CASH

	B-85—106.25	
	A- 1— .30	
At end of tour		\$5957.00
At beginning of tour		5286.25
		<hr/>
Amount Registered		670.75
Less value of Tickets Collected	\$106.55	
Less value of Cash Register Tickets Spoiled (11)	\$ 5.25	111.80
		<hr/>
Total Cash Collections		558.95
Corrections (Add or Deduct)		
Cash Remittance	\$558.95	

30

MICHAEL EVANYKE

40

Exhibits.

[COPY]

ELECTRIC FERRIES, INC.
23RD STREET, WEEHAWKEN LINE

10 Report of Ferry Collections at Weehawken
Tour 4 m To 12 m Nov 8 1927
Register Com. No. 36128 Closing No. 36854

Tickets Issued 727

REGISTER READING—CASH

	1 Memo—Nevens attached	Bus 74—92.50	
	1 “ Westwood Bus	Adv 5 3.55	
	At end of tour		\$7820.55
	At beginning of tour		7470.55
	Amount Registered		<u>350.00</u>
20	Less value of Tickets Collected	\$96.05	
	Less value of Cash Register Tickets Spoiled (1) \$ 1.45		<u>97.50</u>
	Total Cash Collections		252.50
	Corrections (Add or Deduct)		
	Cash Remittance	\$252.50	

J STILES

[COPY]

CC1035

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ELECTRIC FERRIES, INC.
23RD STREET, WEEHAWKEN LINE

Report of Ferry Collections at Weehawken, N. J.
Tour 4 p m To 12 m Nov 9 1927
Register Com. No. 38118 Closing No. 38581

Tickets Issued 464

40

Exhibits.

REGISTER READING—CASH

	B-67—83.75	
	A-14—10.75	
At end of tour	\$8700.05	
At beginning of tour	8459.80	
	<hr/>	
Amount Registered	240.25	10
Less value of Tickets Collected	\$94.50	
Less value of Cash Register Tickets Spoiled...	\$ 94.50	
	<hr/>	
Total Cash Collections	145.75	
Corrections (Add or Deduct)		
Cash Remittance	\$145.75	

MICHAEL EVANYKE

[COPY]

CC1059

ELECTRIC FERRIES, INC.
23RD STREET, WEEHAWKEN LINE

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Report of Ferry Collections at Weehawken, N. J.
Tour 4 p m To 12 m Nov 10 1927
Register Com. No. 39836 Closing No. 40394

Tickets Issued 559

REGISTER READING—CASH

	B-72—90.00	30
	A-11— 9.30	
At end of tour	\$9612.75	
At beginning of tour	9335.25	
	<hr/>	
Amount Registered	277.50	
Less value of Tickets Collected	\$99.30	
Less value of Cash Register Tickets Spoiled...	\$ 1.60 100.90	
	<hr/>	
Total Cash Collections	176.60	
Corrections (Add or Deduct)		
Cash Remittance	\$176.60	

MICHAEL EVANYKE

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Postea.

(Filed May 1, 1929.)

10 This cause was tried at the Essex County Circuit of the Supreme Court of the State of New Jersey, before the Honorable William B. Mackay, judge of said court and a jury, on April 23rd and 24th, 1929, and the jury rendered a general verdict in favor of the plaintiff and against the defendant in the sum of Fifteen Hundred Dollars (\$1,500.).

WILLIAM B. MACKAY,
Judge.

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Notice of Appeal.

(Filed August 5th, 1929.)

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">MICHAEL EVANYKE, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">ELECTRIC FERRIES COMPANY, a corporation of the State of New Jersey, <i>Defendant.</i></p>	} Action at Law.	10
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To

J. RAYMOND TIFFANY, Esq.,
Attorney of Plaintiff.

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SIR:

TAKE NOTICE, that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Dated July 5, 1929.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant.

30

Service of copy of within notice hereby acknowledged this 24th day of July, 1929.

J. RAYMOND TIFFANY,
Attorney of Plaintiff.

40

Grounds of Appeal.

(Filed Sept. 23, 1929.)

[SAME TITLE]

The appellant states the following grounds of appeal:

10

1. The trial court denied motion for nonsuit when thereunto moved, whereas said motion should have been granted upon one or more of the following grounds:

(a) There was no proof that the defendant was guilty of malice;

20

(b) There is conclusive evidence that there was reasonable and probable cause for the signing of the criminal complaint;

(c) There is no proof as the plaintiff is required to adduce, that there was want or absence of reasonable and probable cause for the criminal complaint;

30

(d) It does not appear that the criminal complaint was signed by any officer or agent of the defendant company, nor is this defendant directly connected in any manner whatsoever, with the signing of the complaint charging embezzlement;

(e) Complaint was signed by a State Railway Police Officer, duly commissioned, the commission being in evidence, and he is responsible not to the defendant, but rather to the State of New Jersey alone;

40

(f) This defendant, even assuming that he instigated the signing of the criminal complaint, acted upon the advice of counsel.

Grounds of Appeal.

2. The trial court refused to direct a verdict in favor of the defendant-appellant, when thereunto moved, whereas said motion should have been granted upon one or more of the following grounds:

(a) There was no proof that the defendant was guilty of malice; 10

(b) There is conclusive evidence that there was reasonable and probable cause for the signing of the criminal complaint;

(c) There is no proof as the plaintiff is require to adduce, that there was want or absence of reasonable and probable cause for the criminal complaint;

(d) It does not appear that the criminal complaint was signed by any officer or agent of the defendant company, nor is this defendant directly connected in any manner whatsoever, with the signing of the complaint charging embezzlement; 20

(e) Complaint was signed by a State Railway Police Officer, duly commissioned, the commission being in evidence, and he is responsible not to the defendant, but rather to the State of New Jersey alone; 30

(f) This defendant, even assuming that he instigated the signing of the criminal complaint, acted upon the advice of counsel.

3. The court allowed the following question:

“Will you tell us the conversation that you (Joseph McGrath), had with him (James Price), on the day prior to the making of the complaint, P1?” 40

Grounds of Appeal.

4. The court refused to strike out the testimony of witness William Coughlin, with respect to the arrest, when thereunto moved.

5. The court erroneously charged the jury:

10 “The absence of probable cause infers the existence of malice in the defendant’s conduct.”

6. The defendant requested the court to charge the following:

20 “If you decide from all the evidence in this case, that the facts were fully and fairly stated to competent counsel, and competent counsel advised this complaint, and that the defendant here acted upon that advice, that is a complete justification; then the plaintiff in this suit cannot recover and your verdict, therefore, must be in favor of the defendant.”

With respect thereto, the court said:

30 “I so charge you, but with this addition,—except that counsel’s advice will protect the defendant only if none of the material statements were false to the defendant’s knowledge.”

7. The court erroneously charged the jury:

40 “The defendant could under certain circumstances, be held responsible for the acts of the policeman McGrath, and in order to render the defendant liable for an unwarranted arrest made by one of such policemen, and subsequent malicious criminal prosecution by him, it is necessary to show

Grounds of Appeal.

that his action was instigated by the defendant or some of its officers or employees."

8. The court refused to charge part of defendant's request to charge as follows:

"If in a case like this a verdict for damages can be maintained, no citizen can safely intervene to bring to justice offenders against the criminal law." 10

Dated September 20, 1929.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Consent to filing within grounds as of time, hereby acknowledged. 20

J. RAYMOND TIFFANY,
Attorney of Plaintiff-Respondent.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

MICHAEL EVANYKE, :
Plaintiff-Respondent, :
Action at Law.
-vs- :
On Appeal from Supreme
Court.
ELECTRIC FERRIES COMPANY, a :
corporation of the State of :
New Jersey, : MEMORANDUM.
Defendant-Appellant. :
:

On page 97, lines 9 to 12, the following
appears:

"Q. Was that the normal fluctuation
before Evanyke got there? A. No. His
fluctuation should have been about one-sixth
and it was over one twenty-fifth."

The foregoing is a typographical error. It should read:

"Q. Was that the normal fluctuation
before Evanyke got there? A. No. His
fluctuation should have been about one-sixth
and it was over one-fifth."

Similarly in appellant's brief the error occurs in quoting
testimony at page 2, lines 1 to 5; page 5, lines 16 to 23;
page 7, lines 17 to 20.

Respectfully submitted,

EDWARD A. MARKLEY,

Of Counsel with Defendant-
Appellant.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

MICHAEL EVANYKE,

Plaintiff-Respondent.

-vs-

ELECTRIC FERRIES COMPANY, a
corporation of the State of
New Jersey,

Defendant-Appellant.

Action at Law.
On Appeal from Supreme Court.
MEMORANDUM.

COLLINS & CORBIN,
Attorneys of Defendant-
Appellant,
1 Exchange Place,
Jersey City, N.J.

New Jersey Court of Errors and Appeals

MICHAEL EVANYKE,
Plaintiff-Respondent,

v.

ELECTRIC FERRIES COMPANY, a corporation,
Defendant-Appellant.

Action at Law.

On Appeal from
Supreme Court.

BRIEF OF COLLINS & CORBIN IN BEHALF OF DEFENDANT-APPELLANT.

(1)

Statement of the Case.

This appeal brings before this Court for review a judgment in favor of the plaintiff for \$1,500 (p. 130, lines 1-12), in an action wherein he sued the defendant for malicious prosecution. Plaintiff was employed by defendant as a ticket seller in Weehawken and his hours of duty were from 4:00 P. M. to 12 M. (p. 41, lines 24-40; p. 42, lines 1-2). Defendant operated ferry boats carrying vehicular traffic between New York and Weehawken (p. 42, lines 22-25). There was a considerable falling off in the receipts during plaintiff's hours of employment and he was watched for a period of ten days prior to November 11, 1927. There is a normal fluctuation in traffic from day to day. From the

company's experience this fluctuation on the plaintiff's tour of duty should have been about one-sixth, but on the contrary, the fluctuation was over one-twenty-fifth (p. 96, lines 30-40; p. 97, lines 1-12).

Defendant retained William J. Burns' Detective Agency to watch the plaintiff and on November 10, 1927, at 3:57 P. M., a representative of the Burns Detective Agency concealed himself at or near where the plaintiff was working and used a stop clock or watch, to count the vehicles that passed the booth where plaintiff was working. The operative of the Detective Bureau clocked exactly 658 vehicles from 3:57 P. M. until 12 M., November 10, 1927 (p. 102, lines 35-40; p. 103, lines 1-40). Plaintiff in report signed by him covering tour of duty, 4:00 P. M. to 12 M., November 10, 1927, reported 559 tickets issued.

The foregoing facts were laid before Joseph McGrath, who by reason thereof (p. 30, lines 11-20), and on information and belief (p. 121, Exhibit P-1), signed a complaint charging Evanyke with embezzlement. Joseph McGrath was a State Railway Police Officer commissioned under the "Act Concerning Carriers, Revision of 1904, approved March 29, 1904" (p. 12, lines 21-40; p. 125, lines 1-40). Upon this complaint a warrant for the arrest of Evanyke was issued (Exhibit P-2, p. 122, lines 30-40; p. 123, lines 1-40), to which warrant there is no record of return endorsed. However, Evanyke testified that a police officer of the Clifton Police Department came to his house and arrested him and he was detained at the Clifton Police Headquarters for about three hours and paroled in the custody of one John Stoddard (p. 50, lines 32-40; p. 51, lines 8-35), and about two weeks later he was surrendered by his counsel and released on \$2,000 bail (p. 51, lines 35-40; p. 52, lines 21-35).

Complaining witness Joseph McGrath had been in the employ of the defendant company at Weehawken as a police officer (p. 11, lines 11-15), and was laid off from his employment about five days after the complaint was signed, and before plaintiff Evanyke appeared for hearing on the complaint (p. 23, lines 29-40; p. 24, lines 1-11). McGrath knew the date that the hearing was to come up (p. 24, lines 9-12), but never appeared to testify. For this reason hearing on the complaint was postponed and finally dismissed by default, bail returned, and Evanyke was never tried on the charge of embezzlement (p. 52, lines 36-40; p. 53, lines 1-19).

The foregoing in short, represents the fact situation. At the close of the plaintiff's case and at the close of the entire case, motion for a nonsuit and direction of a verdict was made by counsel for the defendant on various grounds, and both motions were denied and exceptions duly noted (p. 70, lines 10-40; p. 71, lines 1-12; p. 109, lines 1-25). The case was submitted to the jury, which brought in a verdict in favor of the plaintiff and against the defendant in the sum of \$1,500. It is from that judgment that the present appeal is taken. We shall hereinafter refer to the plaintiff-respondent as plaintiff, and to the defendant-appellant as defendant.

(2)

Grounds of Appeal.

The grounds of appeal will be considered under the following heads:

1. The Trial Court denied motion for nonsuit and refused to direct a verdict for defendant, when thereunto moved, whereas said motions, or one of them, should have been granted.

2. The Trial Court erroneously refused to charge certain instructions which were duly requested, and also erred in his charge.

3. The Trial Court erred in allowing certain questions over objection.

4. The Trial Court erred in refusing to strike out certain testimony, when thereunto moved.

(3)

BRIEF OF THE ARGUMENT.

I.

The Trial Court denied motion for nonsuit and refused to direct a verdict for defendant, when thereunto moved, whereas said motions, or one of them, should have been granted.

These motions were based on the following grounds (p. 70, lines 13-36; p. 109, lines 1-26):

“First, there is no proof that the defendant was guilty of malice;

“Second, there is conclusive evidence that there was reasonable and probable cause for the signing of the criminal complaint;

“Third, there is no proof, as the plaintiff is required to adduce, that there was want or absence of reasonable and probable cause for the criminal complaint;

“Fourth, it does not appear that the criminal complaint was signed by any officer or agent of the defendant company, nor is this defendant directly connected in any manner whatsoever with the signing of the complaint charging embezzlement;

“Fifth, that complaint was signed by a State Railway Police Officer, duly commissioned, the

commission being in evidence, and he is responsible not to the defendant but rather to the State of New Jersey alone;

“Sixth, this defendant, even assuming that it did instigate the signing of the criminal complaint, acted upon the advice of counsel.”

The Court denied the motions and allowed* exceptions (p. 71, lines 9-11; p. 109, lines 20-22).

Defendant owned and operated a ferry carrying vehicular traffic between Weehawken and New York (p. 42, lines 22-25), and employed plaintiff as ticket seller at the Weehawken Terminal (p. 41, lines 24-40; p. 42, lines 1-2). Plaintiff was hired about November 1, 1927 and was watched for about a week or ten days (complaint was signed November 12, 1927). There is a normal fluctuation from day to day in traffic, but on plaintiff's tour of duty the reports showed that he would be 100 vehicles short from day to day. That was not the normal fluctuation before Evanyke was employed; his fluctuation should have been about one-sixth, and reports showed it was over one-twenty-fifth (p. 96, lines 30-40; p. 97, lines 1-12; Exhibit D-2, pp. 126, 127, 128, 129; Exhibit D-3).

On November 10, 1927, defendant retained William J. Burns' International Detective Agency, and a representative of that detective bureau, at 3:57 P. M. on November 10, 1927, concealed himself at or near the booth at which the plaintiff was working, from which point he could observe all the vehicles that passed through the ferry. For the purpose of counting the number of vehicles that passed plaintiff's booth, a stop watch was used and from 3:57 P. M. to 12 M., 658 vehicles were registered on the stop watch (p. 102, lines 35-40; p. 103, lines 1-40). Only the vehicles that stopped in front of the booth were counted (p. 105, lines

10-12). Plaintiff's report (Exhibit D-2, p. 129, lines 20-40), which he signed, registered 559 tickets issued.

Defendant, by its president, then consulted the company's attorneys, before whom the entire situation was laid and defendant was in consultation with its attorneys during the entire proceeding. On November 11, 1927, defendant's attorneys conferred with the plaintiff at Weehawken (p. 41, lines 29-31; p. 45, lines 25-27; p. 47, lines 39-40; p. 48, lines 1-4), and questioned plaintiff for a period of about three hours (p. 49, lines 10-40). On November 12, 1927, defendant's attorneys conferred with State Railway Police Officer Joseph McGrath, and advised the complaint (p. 18, lines 1-35; p. 19, lines 1-10), which on information and belief was signed by Joseph McGrath, State Railway Police Officer, and was dated November 12, 1927 (Exhibit P-1, p. 121, lines 1-35; p. 122, lines 1-25). Before the complaint was signed, State Railway Police Officer McGrath conferred with a Mr. Price, who was employed by the defendant, and was informed by Mr. Price that Burns' Detective Agency had evidence that Evanyke was stealing from the defendant company (p. 20, lines 29-40), and was informed by defendant's attorney to the same effect (p. 22, lines 11-30; p. 23, lines 10-30), after which and upon advice of defendant's counsel the complaint was signed (p. 19, lines 1-10; p. 23, lines 27-29).

Motions for nonsuit and direction of verdict were made on the same grounds (p. 70, lines 15-38; p. 109, lines 1-21). Since the same grounds were urged in support of each motion, we shall consider the motions together.

(a)

There was no proof of want or absence of reasonable and probable cause for the criminal complaint.

It is undisputed that before the complaint was signed Evanyke was suspected of stealing from the defendant company and this testimony was offered by the plaintiff's own witness Joseph McGrath, who, before the complaint was signed, knew that the Burns Detective Agency was watching Evanyke and that one of its representatives had checked the number of cars that passed Evanyke's booth on his tour of duty on November 10, 1927 (p. 22, lines 10-40; p. 23, lines 1-30). McGrath further testified that he was informed by Price to the effect that Burns Detective Agency had evidence that Evanyke was stealing from the defendant company, and he had this knowledge before the complaint was signed (p. 20, lines 20-41). This proof was offered by the plaintiff and stands uncontradicted. It is not denied that the normal fluctuation in traffic was about one-sixth, whereas on Evanyke's tours of duty, fluctuation was over one-twenty-fifth, and that when traffic went low Evanyke's reports were low, but that when traffic was high, Evanyke's reports on the same remained low to the extent of about 100 vehicles out of line from day to day (p. 96, lines 30-40; p. 97, lines 1-11; Exhibits D-2 and D-3). Further, there is no dispute that for the tour of duty, 4:00 P. M. to 12 M., November 10, 1927, Evanyke reported 557 vehicles (p. 129, lines 22-40), while for the same period a representative of the Burns Detective Agency, who was retained by defendant company to watch Evanyke, by a mechanical device known as a "stop watch," clocked exactly 658 vehicles (p. 104, lines 1-13; p. 106, lines 33-37).

To support an action for malicious prosecution the plaintiff must show that the defendant instituted the proceedings without reasonable or probable cause.

Apgar v. Woolston, 43 N. J. L. 57;
Magowan v. Rickey, 64 N. J. L. 402;
Miller v. Lai, 77 N. J. L. 135;
Weisner v. Hansen, 81 N. J. L. 601;
Vladar v. Klopman, 89 N. J. L. 575;
McLaughlin v. L. V. R. R. Co., 93 N. J. L. 263.

In the *Apgar* case, *supra*, DEPUE, J., writing the opinion for the Court, at page 60, says:

“The principal feature in an action for a malicious prosecution, is the fact that the prosecution was without probable cause. In the opinion of Lords MANSFIELD and LOUGHBOROUGH, in the leading case of *Johnstone v. Sutton*, 1 T. R. 544, this emphatic language is used: ‘The essential ground of this action is that a legal prosecution was carried on without a probable cause; we say this is emphatically the essential ground, because every other allegation may be implied from this; but this must be substantially and expressly proved, and cannot be implied.’ The general rule is that the failure of the proceedings against the plaintiff must be averred and proved; but such failure is not evidence either of the defendant’s malice or of the want of probable cause in instituting them. *Stewart v. Sonneborn*, 98 U. S. 187. It is invariably necessary in an action of this nature to give some positive evidence arising out of the circumstances of the prosecution, to show that it was groundless. 2 Stark. Ev. 913.”

From the opinion in the *Vladar* case, *supra*, by GUMMERE, C. J., we quote at page 576:

“The fundamental grounds upon which an action for malicious prosecution rests are that

it was instituted against the plaintiff without reasonable or probable cause; and that the defendant was actuated by a malicious motive in making the charge. Unless the evidence in the case establishes the existence of both these grounds, the plaintiff's suit must fail."

Finally, in the *Magowan* case, *supra*, in an opinion by VAN SYCKEL, J., we observe the following at page 403:

"It is not necessary to consider whether the evidence necessary to supplement the proof of want of probable cause was adduced by the plaintiff.

"The testimony submitted on the trial by the defendant clearly shows that the circumstances communicated to him, and upon which he had reasonable ground to rely, fully justified his action.

"While it is immaterial whether or not he was actuated by malice, if he had reasonable and probable cause for making the complaint, yet in this case it fully appears that the defendant acted cautiously, after due investigation and deliberation, and not rashly, and that there is an entire absence of evidence upon which the charge of malice can be rested."

We submit, that under the evidence to the effect that plaintiff was under surveillance for a week or ten days; that his returns averaged a shortage of about 100 cars per day for a period of a week or ten days; that on November 10, 1927, he was clocked for 100 vehicles more than he accounted for, and that all during the proceedings defendant was in consultation with its attorneys with respect to the matter, there was reasonable and probable cause for the defendant to institute the proceedings against Evanyke, that is, assuming, but not admitting, that it did institute these proceedings, and further, to repeat the language of the Court in the *Magowan* case, *supra*:

"It fully appears that the defendant acted cautiously after due investigation and deliberation, and not rashly, and that there is an entire absence of evidence upon which the charge of malice can be rested."

(b)

The facts being uncontroverted, the question of probable cause was for determination by the Court and not the jury.

The undisputed testimony is discussed under subhead (a) *supra*, and here we deem it but necessary to advert to the same. VOORHEES, J., speaking for the Supreme Court, in the case of *Miller v. Lai*, *supra*, at page 137, says (italics ours):

"In an action for malicious prosecution it is incumbent upon the plaintiff to show that there was no probable cause for the prosecution, and also that the defendant was actuated by malice in instituting such prosecution. There must be both want of probable cause and malice. If probable cause is shown, then the question of malice becomes immaterial, because there being probable cause, one of the essential elements necessary to maintain the action is disproved. *The question of the existence of reasonable and probable cause must be decided by the court and should not be left to the jury.* *Magowan v. Rickey*, *supra*; *Robitzek v. Daum*, 220 Pa. 61.

"*Whether the proof of certain facts constitutes probable cause is a question of law, and it is error to submit such question to the jury.* *Travis v. Smith*, 1 Pa. St. 234."

Again, in the case of *Vladar v. Klopman*, *supra*, GUMMERE, C. J., writing the opinion for this Court at page 578, says:

"But where the facts are not controverted, the question of probable cause is one of law

to be determined by the court and its submission to the jury is improper.”

Magowan v. Rickey, 64 N. J. L. 402;

McFadden v. Lane, 71 N. J. L. 621;

Lane v. Penna. R. R. Co., 78 N. J. L. 672;

Hartdorn v. Webb Manufacturing Co., 89 N. J. L. 262;

Sunderbrand v. Shills, 82 N. J. L. 700.

And continues at page 579 as follows:

“It has been suggested that the rule first adverted to in this opinion, namely, that proof of the falsity of the charge justifies an inference of malice and of absence of probable cause for making the complaint, and that which permits a court, as a matter of law, to determine upon the undisputed facts in a case that probable cause exists are out of harmony with each other, and that, therefore, one or the other must be unsound. We think not. The first rule merely creates a presumption which the defendant must overthrow in order to defeat the plaintiff’s action. The second rule permits the absolute destruction of the presumption by uncontroverted proof of facts which demonstrate that the defendant had probable cause for making the charge laid against the plaintiff. It is true that, ordinarily, where a fact is proved which raises a presumption of liability on the part of the defendant, and other facts are put in evidence which tend to overthrow that presumption, a question is presented for the determination of the jury rather than of the court. But actions for malicious prosecution have always been differentiated by the courts, so far as this special feature of litigation is concerned. The rule which makes the existence or non-existence of probable cause, when the facts are not in dispute, a matter to be determined by the court, is probably the outgrowth of a public policy, the purpose of which was to encourage criminal prosecutions at the instance of private

citizens, by making them certain that they might safely intervene to put in motion the machinery of the criminal law against apparent violators of its provisions, without being liable to be mulcted in damages, in case the prosecution should fail through lack of sufficient evidence or, perhaps, through the vagaries of the trial juries of earlier days. But, whatever may be its foundation, and whether it be logical or not, it has been too long in existence, and too universally followed, to be now subject to question."

A case directly in point is *McLaughlin v. L. V. R. R. Co.*, 93 N. J. L. 263, where the Supreme Court reversed the Trial Court for not holding as a matter of law that reasonable and probable cause existed.

(c)

Assuming, but not admitting that defendant did institute proceedings against the plaintiff, it did so upon the advice of counsel.

The rule of law applicable under this argument was laid down by the Supreme Court in the case of *Potter v. Casterline*, 41 N. J. L. 22, 29, speaking through WOODHULL, J., quoting as follows:

"In 1 Am. Lead. Cas. 267 (215), what I understand to be the true rule upon this point is thus stated: 'If a party lays all the facts of the case fairly before counsel of competency and integrity, before beginning proceedings, and acts *bona fide* upon the opinion given by that counsel, however erroneous that opinion may be, he is not liable to this action.'"

This is the general rule as laid down in all cases throughout the United States, and in 38 C. J. 427, 428, under the title "Malicious Prosecution," Section 1, the rule in a multitude of cases from thirty-nine jurisdictions is as follows:

"Since in most jurisdictions advice of counsel goes to the question of probable cause, and must be considered in determining that matter, in such jurisdictions defendant makes out a complete defense by showing that he submitted to proper counsel a statement conforming to legal requirements concerning the guilt of the accused; that in good faith he received advice justifying the prosecution and acted on that advice in instituting the proceedings complained of. If he shows these things he is entitled to immunity from damages, although it may appear that the facts did not warrant the advice nor the prosecution, or that the accused was innocent."

Stated in footnote "a" on page 429, the reason for the rule is as follows:

"This must be so; for if a citizen, who has a just cause to believe, and honestly does believe, that a crime has been committed, after conducting such precaution cannot be protected from liability for damages, it would follow that a conviction would have to be guaranteed in every criminal prosecution, and that the criminal law would in many instances fail of enforcement." Citing cases.

On this point it appears that Mr. Carroll Winslow, president of the defendant company, watched the plaintiff for a period of a week or ten days (p. 96, lines 30-31), and that because there were shortages in the plaintiff's receipts averaging about 100 cars per diem, defendant retained a professional detective agency to watch the plaintiff, and the report of this detective agency of the returns on one of the plaintiff's tours of duty exceeded the plaintiff's report by about 100 vehicles (p. 96, lines 32-40; p. 97, lines 1-10), and that the traffic fluctuation on plaintiff's tours of duty should have been about one-sixth and were, in fact, about one-twenty-fifth. Upon all of this information Mr. Winslow

then communicated with Collins & Corbin, defendant's attorneys, and laid the whole story before them, and he was in consultation with the defendant's attorneys and consulted them before anything was done toward signing a criminal complaint (p. 97, lines 13-25). On November 11, 1927, defendant's attorneys conferred with plaintiff at Weehawken (p. 41, lines 29-31; p. 45, lines 25-27; p. 47, lines 39-40; p. 48, lines 1-4), and questioned the plaintiff for a period of about three hours (p. 49, lines 10-40). On November 12, 1927, defendant's attorneys conferred with State Railway Police Officer Joseph McGrath and advised the complaint (p. 18, lines 1-35; p. 19, lines 1-10; p. 23, lines 27-29), and thereafter, on the same day, complaint in fact was signed on information and belief by Joseph McGrath, State Railway Police Officer, complaining witness (Exhibit P-1, p. 121, lines 1-35; p. 122, lines 1-25).

There can be no dispute that all the facts in possession of the defendant as hereinbefore set forth, were laid before counsel. If the criminal prosecution was instituted by the defendant, under the undisputed facts it conclusively appears that the prosecution was instituted in reliance, in good faith on advice of counsel, given after a full and fair statement to the attorney of all the facts. It cannot be said that a full and fair statement of all the facts was not given to the defendant's attorneys and the evidence thereon need not here be repeated, for it has been already considered *supra*. The well settled rule that advice of counsel is a complete defense to an action for malicious prosecution of a criminal action where it appears that the prosecution was instituted in reliance, in good faith on such advice, given after a full and fair statement to the attorney of all the facts, was repeated and again followed in one of the latest

cases, *Weinstein v. Klitch*, No. 104, decided by this Court on May 20, 1929.

In the case of *Bell v. Atlantic City R. R. Co.*, 58 N. J. L. 227, where the defendant's rule to show cause was made absolute, the Supreme Court, in a *per curiam* opinion at 228, says:

"The same criticism applies to the repudiation by the jury of the evidence that the proceeding complained of was set on foot upon the advice of counsel. As the testimony is understood by us, it plainly shows that all the facts in the possession of the defendant were laid before counsel and that his advice was that it was his duty to prosecute. In this respect we see no reason to doubt that a complete bar to the action was established."

Dalton v. Godfrey, 97 N. J. L. 455;

Bennett v. Pillion, No. 47, decided by this Court February 4, 1929, 7 A. R. 265; 144 Atl. 601.

Assuming that defendant did institute the criminal proceeding against the plaintiff, it is demonstrated beyond peradventure and conclusively, that all the material facts within the defendant's knowledge, that is, those which would justify or negative making of the criminal complaint, were fully and truthfully stated by defendant to its attorneys and further, that none of the material parts of these facts or statements were false to the defendant's knowledge and upon this short ground, that the complaint was advised by defendant's counsel, it is respectfully submitted that the Trial Court erred in denying defendant's motions for nonsuit and direction of verdict.

II.

CONCLUSION.

For these reasons, we respectfully submit,
that the judgment below should be reversed
and a *venire de novo* ordered.

Submitted October Term, 1929.

EDWARD A. MARKLEY,
Of Counsel.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

New Jersey Court of Errors and Appeals

MICHAEL EVANYKE,
Plaintiff-Respondent,

vs.

ELECTRIC FERRIES COMPANY,
a corporation,
Defendant-Appellant.

ACTION AT
LAW.

ON APPEAL
FROM
SUPREME
COURT.

BRIEF OF J. RAYMOND TIFFANY IN BEHALF OF MICHAEL EVANYKE, PLAINTIFF-RE- SPONDENT.

Statement of Facts.

This case was tried at the Passaic Circuit of the Supreme Court and the jury returned a verdict in favor of the respondent for \$1500.

The first count of the complaint alleges that on November 12, 1927, the appellant, by its agents and servants, falsely and maliciously, and without just and probable cause, and with intent to harm and defame plaintiff, who was then employed by it in a fiduciary capacity as a ticket seller and cashier, at its office in Weehawken, New Jersey, charged plaintiff with feloniously embezzling and converting to his own use, and without the assent or knowledge of appellant, the sum of \$1000; that as a result of said complaint, respondent was arrested, lodged in jail, was deprived of his liberty and was otherwise greatly humiliated; that respondent thereafter neglected to, and did not prosecute its said complaint against respondent

and after several adjournments the complaint was dismissed; that said complaint was founded on malice and was made without justification or probable cause, but with intent to injure and harm this respondent.

The second count re-alleges the facts and charges assault and false imprisonment.

The answer was a general denial and a statement that: "The arrest of the plaintiff as alleged in the complaint was made not by, through or at the instigation of this defendant, but by one Joseph McGrath, State Railway Police Officer, who is responsible not to the plaintiff, but to the sovereign State of New Jersey."

The testimony discloses that Evanye, prior to the making of the complaint in question had never been charged with crime, nor his integrity questioned (Record, p. 39, l. 37; p. 40, ll. 1-4); that he was employed in a fiduciary capacity as cashier and ticket seller for the appellant, at the entrance to its ferries in Weehawken, Hudson County, New Jersey; that he was at all times attended by a police officer in the employ of the defendant company.

"Q. And was there anybody else in the shanty besides you? A. There was an officer there.

* * * * *

Q. Was there an officer with each collector?

A. Yes, sir.

Q. And what was the purpose of the officer being there? A. Well, he was there to see that no car passed down there without a ticket.

Q. I see. And was that officer always present? A. Always, yes, sir."

(Record, p. 42, ll. 11-21.)

It is conceded that when those vehicles whose drivers did not have passes permitting them to

go upon the boats without paying fare, wished to cross on the ferry, they would stop at the ticket seller's booth, tender the amount of fare, and that the ticket-seller would then ring that amount upon the cash register, automatically indicating the amount of fare collected, the date and the number of the ticket given the passenger. The ticket would be handed to the driver, and he would present it to a ticket collector, who was a member of the crew of the boat (Record, p. 43, ll. 1-40).

It is admitted that Evanyke could not "beat" the cash register, but it was surmised that some one was acting with a ticket collector and re-selling the tickets (Record, p. 86, ll. 11-25).

There is not one scintilla of evidence of any charge made that Evanyke was the person acting in cohorts with the ticket collector, or that Evanyke received any moneys by reason of the re-sale of tickets, and Winslow's testimony was merely nothing more than a statement that such a scheme could be used to defraud the company. The nearest he came to charging the respondent was to say that

"when we first started we would ring up the—a ticket seller would ring up the ticket on the cash register, and when the car would get down to the end of the bridge a bridgeman would collect the ticket, and at the end, when the boat went out, put them in an envelope and leave them in the office, and we found that——"

"Well, I found that the tickets collected that way, especially the evening shifts—it is impossible to break the series on a cash register—but during the evening, when there was nobody around, that the bridgeman, instead of putting all those tickets away the way he should, would hold some of them out and *send* them back to the ticket office, and when a car would come through, instead of ringing it up on the cash register, that same ticket would

be sold, and a ticket could be sold four or five times over" (Record, pp. 85 and 86).

The same witness continued:

"When the ticket is collected at the bridge that man, *if he wished to be dishonest*, and had a confederate, could have his confederate at the ferry bridge hold out some of these tickets and send them back or take them back during the evening. When a car came through, instead of ringing that on the cash register—and keep doing that over and over again—would run up into a big amount"
* * * (Record, p. 87). (Italics ours.)

That is the nearest suggestion of Evanyke's being a participant in the conspiracy to defraud the company. No charge was made against any bridgeman, or other employee, nor was the name or identity of such employee mentioned at the trial, nor was there any proof anywhere in the record that anyone had delivered tickets to Evanyke for the purpose of re-sale, and there was not even a suggestion in the evidence that Evanyke did not, during the time he was watched by the Burns operative, actually ring up on the cash register all moneys received, and sell a proper ticket to each vehicle that stopped at the booth.

It will be noted that Winslow's statement was merely his theory of a method by which an employee could be dishonest, or, as he put it, "*That is how you can beat a cash register*" (Record, p. 87, l. 29).

Not one iota of evidence was offered that Evanyke ever received previously used tickets, or re-sold them, nor is there one shred of evidence in the record that Evanyke did not deposit, in the cash register, every cent received from drivers of vehicles as they purchased tickets.

The only other person to testify concerning Evanyke's conduct was a Burns operative who

said that, at the request of the appellant, he did on November 10, 1927, from a point somewhat away from the collector's booth, watch the vehicles that passed the same, and that he clocked by a mechanical contrivance each vehicle so passing the booth; that his count was 658 during the tour of Evanyke's duty (Record, p. 103, ll. 30-40).

It is interesting to note that Evanyke's report of that same tour of duty (Record, p. 129, ll. 20-40) discloses that his opening ticket number was 39836 and the closing ticket number was 40394; that the number of tickets issued was 559; that there was a spoilage amounting to \$1.60. In other words, the detective apparently clocked exactly 100 vehicles more than the number of tickets Evanyke reported as having sold. This detective did not produce his report, although he said he had made one (Record, p. 104, l. 14).

In rebuttal, the plaintiff testified that he never received any tickets back from the bridgeman or anyone else who collected them, never re-sold tickets, and that he registered in every vehicle that passed his box by ringing it up on his machine (Record, p. 108, ll. 30-40).

Winslow testified that he was prompted to have Evanyke watched because of fluctuation from day to day in the traffic reports and that Evanyke's tour was out of line with the fluctuations (Record, p. 96, ll. 32-36).

In spite of Winslow's personal watching and the Burn's detective's investigation, the appellant did not produce any evidence of any act on Evanyke's part that was even remotely related to embezzlement or any other dishonest act. The testimony further discloses that when Winslow, and his counsel with police officers, first confronted Evanyke with the charge, he immediately and at all times thereafter denied any conspiracy or act of dishonesty against the company.

The high-handed manner used by the appellant in depriving respondent of his liberty and destroying his reputation is strikingly illustrated by the tactics employed in bringing about the issuance of the warrant.

In all probability, realizing that it had no evidence to justify its action and fearing lest it be held responsible, the respondent caused the complaint (P-1—Record, p. 121) to be signed by McGrath, one of its employees who had no personal knowledge whatever of the facts and so informed both respondent and its counsel (Record, p. 18, ll. 30-35). Yet he was obliged to sign the complaint upon which the warrant was based (Record, p. 19, ll. 7-10).

The God of the Dividends (and probably the bonding company) demanded a sacrifice, and Evanyke was chosen to play the role of Abraham's son.

After signing the complaint, McGrath never again appeared in the case until called as a witness in the proceedings from which the appeal was taken and which resulted in a verdict for damages in favor of appellant.

The facts leading to the arrest, as testified to by Evanyke are as follows:

“Q. You knew he was an officer? A. Yes.

Q. All right. Now tell us the conversation that Mr. Winslow and yourself had. A. Mr. Winslow told me that he would like to speak to me, and he said he wanted me to walk over towards the men that were standing there, the Chief of Police of Weehawken or Captain of Detectives and Mr. McIntyre. And he says—he introduced me to those gentlemen. He says, ‘That is the Chief of Police right there.’ Of course, I got scared. I didn’t know what was up, see? And he says, ‘There has been some trouble here,’ and he says, ‘You are the one bright fellow around here that could help

us out.' I says, 'I would be glad to help you out, Mr. Winslow.' And he says, '*There is some shortage; we don't know where it is from.*' So he says, 'Will you come up with us to the police station?' So right then and there I kind of got—I says, 'Why the police station? Isn't the ferry company property good enough to talk on?' So Mr. McIntyre said, 'Yes, but it will be quieter up there; come on up. You will get a chance to talk better up there.'

I says to Mr. McIntyre, 'If I am going up off the Electric Ferries property I am going up against my will. If you want to talk any matters like this, the Electric Ferries office is good enough.' So, of course, when I told him I was going up against my will I went right up with these gentlemen, and saw police officers there.

Q. You went where? A. To the Police Department in Weehawken.

Q. That is about how far from the Electric Ferries? A. About a half a mile.

Q. How did you get up there? A. Walked up.

Q. Did you go all around the boulevard loop or go right straight across? A. I think we cut across.

Q. I see. A little farther that way, is it? A. Yes.

Q. Now, when you got up to the police station, whereabouts in the police station did you go? A. Why, they took me right upstairs to the third floor, a little room up there (Record, pp. 46-47).

Q. Who all was there? A. Why, Mr. Winslow, Mr. McIntyre, and a lady.

Q. Do you know who the lady was? A. No, sir, I do not.

Q. Yes? A. Chief of Police of Weehawken and Captain Lyons of Detectives in Weehawken.

Q. Who else? A. And one of the Burns Detective Agents there.

Q. Was McGrath there? A. No, sir.

Q. Had you had anything to do with McGrath up to that time? A. No, sir, never (Record, p. 48).

* * * * *

Q. Now, when you got up to the police station was Mr. McIntyre there? A. Yes, sir.

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

Q. Mr. McGrath? A. No, sir, he wasn't there.

Q. Mr. Price? A. No, sir.

Q. How long were you at the police station, in this upper floor? A. About three hours.

Q. *During that three hours what were you doing there?* A. Mr. McIntyre was questioning me.

Q. And what was he questioning you about? A. Well, he said there is a shortage of 100 cars 'on your shift yesterday.'

Q. 100 cars on your shift the day before? A. Yes.

Q. Was Mr. Winslow present at this questioning? A. Yes.

Q. What did you say to him? A. I says, 'I don't know how that is possible.' I says, 'I wasn't any money over or anything; that was all straight. It couldn't be.'

Q. Did they accuse you of being responsible for it? A. Yes, sir.

Q. And did they tell you how they thought you did it? A. They told me they had a Burns Detective Agent clocking me with a clock, and—

Q. And was anything said about how many cars passed without—according to this Burns Agent? A. He says I was a hundred cars short, that is all.

Q. A hundred cars short? A. Yes.

Q. And was anything said about passes? A. No, sir.

Q. Well, now, after you were there during this length of time did you at any time admit that you knew or had anything to do with any such shortage? A. No, sir.

Q. Or that there was any shortage? A. I denied it (Record, p. 49).

Q. You denied it. And was the Burns man there? A. Yes, sir.

Q. Did he talk? A. No, he didn't talk.

Q. Now, what was the next thing? After you were there where did you go? Did you go back on the job? A. Well, I went down, and went down near the ticket box and there was another man in my place.

Q. Did you go to work? A. No, sir'' (Record, p. 50).

On the second page of appellant's brief it is alleged that the facts were laid before Joseph McGrath, the police officer, who, *by reason thereof*, signed the complaint. That is not a statement of the fact, for Mr. McGrath specifically testified that he was taken to the company's counsel at the station house and there, after telling them that he knew nothing about the case, was told that he would have to make the complaint, or his job was at stake (Record, p. 18, ll. 32-36; p. 19, ll. 1-10).

POINT I.

Appellant Is Responsible for Making the Complaint.

The appellant cannot evade liability by shunting the making of the complaint upon McGrath.

Sturla vs. The Central Railroad Company of New Jersey, 4 N. J. Mis. R. 277; *Tucker vs. The Erie Railroad Company*, 69 N. J. L. 19; *Goldberg vs. The Central Railroad of New Jersey*, 97 N. J. L. 374; *Rockwell vs. The Erie Railroad Company*, 3 N. J. Mis. R. 373.

POINT II.

Appellant will attempt to justify its action, alleging that it acted upon the advice of its counsel.

In the instant case this is no defense, for the record clearly discloses that all of the facts of the case were not fully and fairly laid before counsel, before beginning the proceedings.

The fact is that the case fails to disclose what, if any, facts were laid before counsel. The only testimony in this regard being that of Winslow, which, as to that point, we set forth in full.

“Q. Now, after having got the report of the Burns detective did you consult your attorneys about this situation? A. I did.

Q. Who did you see? A. I called up Collins and Corbin and talked to Mr. Markley, and he turned me over to you.

Q. And after laying the whole story before me what did I tell you? A. *Well, you advised me to cross-question him; that is the way I remember it. It is so long ago.*

Q. And before anything was done at all you consulted your attorney during the entire proceeding? A. Yes” (Record, p. 97, ll. 12-25). (Italics ours.)

There is not a shred of testimony of the facts or evidence laid before counsel or what counsel's advice may have been other than where the record merely discloses that *counsel's advice was to cross-question Evanyke.*

Counsel did not take the stand.

This being an affirmative defense, the burden is upon him who seeks to obtain the benefit, to prove that he did fully and fairly state all of the facts within his knowledge to his attorney, and that he

then received and acted upon the advice of his attorney.

Bennett vs. Fillion (E. & A.), Vol. 7,
#6 N. J. Adv. Rep. p. 265.

There is not one shred of evidence that counsel advised the institution of proceedings for embezzlement in a criminal court.

POINT III.

There was a complete want or absence of reasonable and probable cause for the criminal complaint.

The best that can be said of the evidence is that the appellant felt there was too great a *fluctuation* in traffic during Evanyke's tour of duty.

Without any facts, Winslow, appellant's president and treasurer, conceived a method by which he supposed his company might be defrauded.

This method required the participation of at least *three* people, (1) the ticket seller, (2) the ticket collector, (3) a messenger to re-deliver the used tickets to the ticket seller for re-sale.

There is no evidence justifying the thought that the "fluctuation" during Evanyke's tour was unduly high—no records were produced substantiating the charge.

Then again the proper "fluctuation" was $1/6$ —but Evanyke's was only $1/25$ —(Record, p. 97, ll. 9-12), in other words the "fluctuation" while Evanyke was on duty was far less than normal.

Then again the company really had such an easy method of proving the truth or falsity of its suspicions.

All it had to do was to examine the tickets on each boat and find out whether or not they were in numerical order.

Tickets sold early in the day would quickly be discovered because of the lower numbers. Cars went on the boats in the order they passed the ticket seller's booth and purchased their tickets and in the order of the ticket numbers.

Again inspectors could easily have examined the tickets given to the drivers immediately after they left the ticket seller's booth, or a trusted employee could have been stationed near the booth to ascertain whether each sale was rung up.

No method of procedure was taken to ascertain Evanyke's guilt. All the company had was a so-called "fluctuation" of vehicles during Evanyke's tour, a fluctuation of which no proof was made and which was without relation to any facts; a count of vehicles passing the ticket seller's booth on one day and upon that state of facts, *a citizen is deprived of his liberty and charged with a serious crime which is never prosecuted.*

It is also most important to remember that the vehicles coming from the boat pass the ticket seller's booth on the same side as the vehicles entering the slip, and evidently the detector of crimes obtained from the William J. Burns International Detective Agency either pushed his automatic indicator and registered not only the vehicles passing the ticket collector on their way to the boat, but some of those who were passing in the opposite direction, or, perchance, while he was perched seventy-five feet from the booth, in the woods, on that cold, dark November day, contracting a beautiful cold (Record, p. 104) his fingers pressed the little button too often. Such clocking machines have been found defective.

Finally, in this regard, we call the Court's attention to the fact that no reasonably prudent man would charge another with a serious crime upon one test of a count by a mechanical contrivance that varied just 100 vehicles from the

report of a trusted employee. As against Winslow's suspicions and the detective's count, we have the emphatic denial by Evanyke of any wrongdoing, and the facts being in dispute the jury was justified in finding a want of probable cause.

The appellant made no attempt whatever to substantiate its complaint in the police court, although the defendant therein appeared on the adjourned dates, and finally the complaint was dismissed for lack of prosecution.

"Where the question whether or not the defendant had probable cause for instituting the prosecution against the plaintiff depends, in part, at least, upon facts the existence of which are in dispute; it is the function of the jury to settle those facts, and, upon doing so, to determine on the whole case whether or not probable cause has been shown, such determination being based upon proper instructions submitted by the trial court."

Vladar v. Klopman, 89 N. J. L. 578.

✕It has also been held in many cases and approved by this court in *Vladar v. Klopman*, *supra*, that where there was proof submitted by the plaintiff which showed that the charge made in the criminal proceeding was false, such proof was sufficient to justify an inference of want of probable cause and malice.✕

Navarino v. Dudrap, 66 N. J. L. 620;

Weisner v. Hansen, 81 N. J. L. 601.

"While malice is the basis of the action and must be proved it is inferable from want of probable cause, and the *nolle pross* of the indictment was some evidence of want of probable cause."

Dalton v. Godfrey, 97 N. J. L. 455;

Mik v. Kospriski, 5 N. J. Mis. Rep. 141;

Helstowski v. Greenberg, 2 N. J. Mis. Rep. 1094.

The language of this court in *Hammell v. Mack International Motor Truck Corporation*, 141 Atlantic Reporter 775, decided May 14, 1929, #16 and 17 was

“We need not stop to discuss the well settled rule that malice may be inferred from want of probable cause.”

It is respectfully submitted that there was ample proof of want or absence of reasonable and probable cause for the making of the criminal complaint; that the facts were controverted, and the case was properly submitted for determination by the jury; that the evidence fails to disclose such facts as would excuse the appellant on the ground that it acted upon advice of counsel and that the judgment should be affirmed and the appeal dismissed.

Respectfully submitted,

J. RAYMOND TIFFANY,
Attorney for and of Counsel
With Michael Evanyke,
Plaintiff-Respondent.

