(15) 1092

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TESTIMONY.

For Plaintiff.

For Defendant.

NOTICE AND GROUNDS OF APPEAL.

Filed July 3, 1928.

New Jersey Supreme Court

NATHAN WEINSTEIN, *Plaintiff,* vs. JOSEPH A. KLITCH, *Defendant.*	*Action at Law.* *Notice and Grounds of Appeal.*

To the defendant, or John J. Breslin, Jr., his attorney:

TAKE NOTICE that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

1. The Court refused to grant plaintiff's motion to strike out all the testimony that did not refer to the complaint, and also on the question of the acting on the advice of counsel.

2. The Court refused to grant plaintiff's motion for a directed verdict as to $550.

3. The Court allowed defendant to amend his answer, without any request therefor by defendant and without specifically setting out the amendment.

4. The Court directed a verdict for defendant, without any request therefor by defendant.

5. The Court directed a verdict for defendant on the ground defendant acted on the advice of an attorney.

CORN & SILVERMAN,
Attorneys of Plaintiff-Appellant.

JUDGMENT RECORD.

NEW JERSEY SUPREME COURT.

NATHAN WEINSTEIN,	*Plaintiff,*	*Judgment Record.*
vs.		*Action at Law.*
		On Postea.
JOSEPH A. KLITCH,	*Defendant.*	*Judgment for Defendant.*
		John J. Breslin, Jr., Attorney.

Joseph A. Klitch, the defendant in this cause, was summoned to answer unto Nathan Weinstein, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued April 20, 1927.)

Plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, says that:

1. On December 16, 1925, at the Borough of North Arlington in the County of Bergen and State of New Jersey, defendant made a complaint of false pretenses in due form to Kingston S. Bennett, Recorder of said Borough, thereby charging plaintiff with receiving a large amount of cement blocks, valued at three hundred sixty-nine dollars and ninety cents ($369.90), with intent to defraud and cheat the defendant; and the said Recorder, at the request of defendant, is-

sued a warrant in due form upon said complaint for the arrest of plaintiff.

2. Thereafter plaintiff was arrested upon said warrant and brought before said Kingston S. Bennett, as Recorder aforesaid, and in consequence of the false testimony of the defendant, then and there given in support of said charge, plaintiff was bound over under bail of one thousand dollars ($1,000) to the next term of the Court of Quarter Sessions of Bergen County, to await action of the Grand Jury upon said charge.

3. The Grand Jury found no indictment against plaintiff upon said charge and plaintiff and his bail were duly discharged from their recognizance on June 29, 1926.

4. Said charge was in fact false.

5. Defendant made said charge from motives of malice.

6. There was no reasonable or probable cause for said prosecution.

7. Plaintiff is, and for eleven years last past has been a builder and real estate operator.

8. Said prosecution has injured plaintiff in his business and has caused many persons to cease from trading with him and extend to him credit in his building and real estate operations. It has injured his reputation and cost him five hundred and fifty dollars ($550) in conducting, upon his side, the examination of said charge before said Recorder. It has caused him great mental anguish and suffering.

Plaintiff demands fifty thousand dollars ($50,000) damages.

CORN & SILVERMAN,
Attorneys of Plaintiff.

(Filed April 30, 1927.)

Answer.

The defendant, residing in the Borough of North Arlington, County of Bergen and State of New Jersey, answering says:

1. He denies the truth of the allegations contained in said complaint.

The defendant further answering says:

1. That on the 16th day of December, 1925, the plaintiff was indebted to the defendant in the sum of three hundred and sixty-nine dollars and ninety cents ($369.90) for certain cement blocks delivered to the plaintiff at the request of the plaintiff.

2. That the defendant recovered a judgment in the Montclair District Court in the above-mentioned sum, which judgment was subsequently docketed in the Bergen County Court of Common Pleas.

3. At the time the said cement blocks were supplied to the plaintiff by the defendant the plaintiff falsely and illegally represented to the defendant that the plaintiff was the owner of the premises in North Arlington, on which premises the cement blocks were used.

4. As the result of the false representation the defendant did supply and delivered the said cement blocks to the plaintiff.

5. That the complaint made against the plaintiff was made in good faith and upon probable cause.

JOHN J. BRESLIN, JR.,
Attorney for Defendant.

(Filed May 13, 1927.)

Reply—Verdict.

Plaintiff, replying to the defendant's answer, says that:

1. He joins issue on the answer.

2. He admits paragraphs 1 and 2 of the further answer.

3. He denies paragraphs 3, 4 and 5 of the further answer.

CORN & SILVERMAN,
Attorneys of Plaintiff.

(Filed May 13, 1927.)

This case was tried before the Honorable William A. Smith in the Essex Circuit Court on March 27, 1928, to whom the same was referred for trial.

By direction of the Court, a verdict was entered in favor of the defendant.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant, Joseph A. Klitch, do recover of the said plaintiff, Nathan Weinstein, his costs, which have been taxed at the sum of fifty-one dollars and fifty cents.

Costs $51.50.

Judgment entered March 31, 1928.

WM. S. GUMMERE,
C. J.

Opening.

TESTIMONY.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

Tuesday, March 27, 1928.

NATHAN WEINSTEIN
vs.
JOSEPH A. KLITCH.
Action at Law.

Before Hon. William A. Smith, *J.*, and a jury.

For the plaintiff appear Corn & Silverman (by Joseph J Corn).

For the defendant appears John J. Breslin, Jr.

Counsel consent to proceed with eleven jurors.

(The jury is sworn.)

Mr. Corn: It is admitted that on December 16, 1925, the defendant, as complainant, made and signed a complaint against the plaintiff to Kingston S. Bennett, Recorder of the Borough of North Arlington in the County of Bergen and State of New Jersey, as follows: That Nathan Weinstein, designedly and feloniously and by false pretenses, the said Nathan Weinstein demanded and secured from the said complainant a large amount of cement blocks valued in the sum of $369.90, with intent to cheat and defraud the said Joseph A. Klitch, knowing at the time of ordering that the blocks were to be used for a building belonging to the Metropolitan Realty Company at Newark, N. J.; that said Recorder

Opening.

at request of defendant issued a warrant in due form upon said complaint for the arrest of the plaintiff; that thereafter plaintiff was arrested on said warrant and brought before said Recorder; that thereafter said plaintiff was bound over before said Recorder under bail of $1,000 to the next term of the Court of Quarter Sessions of Bergen County to await the action of the Grand Jury upon said charge; that the Grand Jury found no indictment against plaintiff upon said charge; that said plaintiff and his bail were duly discharged from their recognizance on June 9, 1926; that plaintiff expended the sum of $550 for defending said action, and that said sum is reasonable.

Mr. Corn opens for the plaintiff.

Mr. Breslin opens for the defendant.

Mr. Corn: It seems that the defendant has raised a new defense in his opening, and I do not want to be put to proof on that; he has raised the defense of advice of attorney and it is not raised anywhere in the pleadings.

The Court: I will hear the defendant.

Mr. Breslin: The answer says that complaint against the plaintiff was made in good faith and upon probable cause and that covers disclosures to an attorney.

The Court: I suppose that goes to the question of whether it is good faith or not.

Mr. Breslin: They could have asked for a bill of particulars.

The Court: If complaint is made upon good faith it is a defense, isn't it?

Mr. Corn: It happens in a malicious prosecution that it does not matter how a complaint is

made, if it is made upon the proper advice of attorney it is a complete defense. You can have probable cause and malice and advice of attorney. The defense has raised in this case one of probable cause and lack of malice, but the third defense is not raised.

The Court: If it was made on the advice of attorney, then you can say it was made for probable cause, can't you?

Mr. Corn: No, your Honor. The cases hold that if it is made on advice of attorney and the facts are disclosed to the attorney, that that is a complete defense, regardless of probable cause and regardless of malice.

The Court: But that is the probable cause, isn't it? He has good cause to make it because his attorney advised him to make it.

Mr. Corn: Well, when the time comes we will raise the usual objection.

NATHAN WEINSTEIN, sworn in his own behalf.

Direct examination by Mr. Corn.

Q Mr. Weinstein, do you recall when you were arrested under the complaint of Joseph A. Klitch? A In December, 1925.

Q What happened on that day? A I was called up from the police headquarters to come down here to Newark. When I came down there they told me there was a complaint from Klitch—

Q What happened then? A So they turned me over to the North Arlington authorities.

Q Where did you go from police headquarters? A Down to North Arlington.

Q Who went with you? A I think the police from North Arlington took me down there.

Q Where did you go in North Arlington? A Down to Recorder Bennett.

Q What happened there? A He put me under bail for the Grand Jury.

Q Did you provide the bail? A Yes, sir.

Q How long from the time you left Newark until the bail was provided? A About four hours.

Q Did you see any notice in the newspapers of this prosecution? A Yes, sir.

Q Did you have any conversation with Mr. Klitch before your arrest with reference to the cement blocks which you bought from him? A He was around several times.

Q When was the last time before you were arrested? A About six weeks or two months before that.

Q Did you have any conversation with Mr. Klitch? A Yes, he met me over the house—

Q Where is the house? A In the apartment house on Ridge Road.

Q Ridge Road where? A North Arlington.

Q What was the conversation? A He asked me about money, and I said that when I got the mortgage he will get it. He said if he don't get the money he will break my neck.

Q What did you say? A I said, "I'm not dead yet."

Q What did he say? A He said, "I will get you yet."

Q And then you were arrested? A Yes, sir.

Q What business have you been in for the past ten years, Mr. Weinstein? A Building and real estate.

Q Where? A In Newark and the surrounding section.

Q At the time when you were arrested were you doing any building? A I was.

Q Where? A Newark.

Q Where in Newark? A North Newark; on Tiffany Boulevard.

Q What were you building there? A Fifteen houses.

Q What kind of houses were they? A Two-family.

Q Were you building anything else? A No; that's all.

Q Did you ever finish those houses on Tiffany Boulevard? A No.

Q Why not? A They found out that I was arrested.

Q Who found out? A Some of the creditors came around and asked me what the trouble was there.

Q Were you able to get credit? A No; I had a hard job getting credit.

Cross examination by Mr. Breslin.

Q You are a big builder and contractor? A Yes, sir.

Q You are a builder of houses? A Yes, sir.

Q Apartment houses? A Yes, sir.

Q This apartment house that you started in North Arlington you did not finish, did you? A I certainly did.

Q There are a lot of judgments against you, aren't there? A Yes, sir.

Q Have you gone through bankruptcy yet? A No, sir.

Q After you finished the apartment houses in North Arlington there were a lot of judgments against you, weren't there? A No, sir; a few.

Q And, of course, those judgments did not affect your credit when you started to build in Newark. In other words, a man with a few judgments like you could get all the credit he wanted.

Objected to.

Objection sustained.

Q You did buy cement blocks from him, didn't you? A Yes.

Q For this apartment? A Yes.

Q And there is no dispute that you owe him $396.60 for the blocks, is there? A There is a dispute.

Q You were sued in the Montclair District Court? A Yes, sir.

Q And there was a judgment against you? A Yes.

Q And you did not contest the case? A No, sir.

Q You know Mr. Hughes? A Yes, sir.

Q He is the man who dug the cellar? A Yes, sir.

Q He brought you around to Klitch? A He brought Klitch up.

Q Did you at any time tell Klitch that you were the owner of that apartment house? A Never did—

Mr. Corn: I object to this. There is nothing in our direct examination about that.

The Court: He is open to cross examination on the whole case and we might as well take it.

Q Did you ever tell him you were the owner of the apartment house? A Never did.

Q What did you tell him your connection with this apartment house was? A Hughes told him he is doing the job for me and he should give me the blocks, and then we agreed on the price.

Q And nothing was said as to who owned the apartment house? A No, sir, because Hughes had the contract with me.

Q Klitch did not ask you who owned the apartment house? A No, sir.

Q Did you ever tell Klitch who owned the apartment house? A We never came to discuss it. I said, "I am doing the apartment house." He said he is a friend of his and I might as well give him the job.

Q You did not own the apartment house, did you? A No, sir.

Q A corporation owned it? A Yes, sir.

Q When you were arrested were you put in a cell? A No, sir.

Re-direct examination by Mr. Corn.

Q These judgments against you, were they recovered before or after your arrest? A That was afterward.

Q Of the judgments against you, approximately what percentage were recovered before and what percentage after December, 1925? A About ninety-five per cent. was after.

Re-cross examination by Mr. Breslin.

Q Have you ever done any building in Morristown? A No, sir.

Joseph A. Klitch—for Plaintiff—direct.

JOSEPH A. KLITCH, defendant, sworn in behalf of the plaintiff.

Direct examination by Mr. Corn.

Q Mr. Klitch, you are the defendant in this action? A Yes, sir.

Q Do you own any real estate? A Yes, sir.

Objected to as immaterial and irrelevant.

Mr. Corn: This is a suit for punitive damages, your Honor.

The Court: I will allow it.

Q Do you own any real estate? A Very little.

Q Do you own any? A Yes, sir.

Q Where? A North Arlington.

Q What is it? A Three vacant lots and a piece of river-front property.

Q What are the lots worth? A They cost me $60 apiece.

Q What is the river-front property worth? A It cost me $75.

Q Do you own the business that you are running? A Yes.

Q What are your assets in that business?

The Court: You mean net or—

Q Net assets. A You mean my own interest in it?

Q Yes. A A couple of thousand dollars.

Q Does anybody else have an interest in it? A Yes.

Q Who? A Mr. Albert Schoor.

Q Do you own any other personal property?

A What I got on.

Q Have you any money in the bank or building and loan stock? A Two months old.

Q And that is all you are worth? A That's all.

Q You say on the net figure your assets all around would be about $3,000? A About that—my own.

Q Exclusive of your wife's? A Yes, sir.

Cross examination by Mr. Breslin.

Q In other words, you need this $369 pretty badly at the present time? A Absolutely.

PLAINTIFF RESTS.

JOSEPH A. KLITCH, recalled in his own behalf.

Direct examination by Mr. Breslin.

Q Before you sold these blocks to the plaintiff did you have any conversation with him? A Yes, sir, on December, 1924.

Q Where did you have that conversation? A Directly in front of my shop.

Q Who was present? A Mr. Hughes.

Q And yourself and who else? A Mr. Hughes, Mr. Weinstein and myself.

Q What did Mr. Weinstein say as to the ownership of this apartment house? A He asked me for a price on blocks, and he said, "Mr. Hughes is digging the cellar," which I knew him. I asked him, "Who owns the building?" He said, "I am the owner and contractor." I gave him a price and he said I was high. He asked

me if I could give it a half cent cheaper. I said, "I have the same price for anybody." He said he paid cash, and it was agreed on two per cent. in thirty days. The total bill amounted to $519.90. I was to have it in thirty days, two per cent. In sixty days I got a check of $150 and it came back, "No good."

Mr. Corn: If your Honor please, the complaint here is that Weinstein ordered blocks knowing that they were to be used for a building being built for the Metropolis Realty Company of Newark, N. J. It should be confined to the complaint; that is the complaint which is in evidence and which is before the Court.

The Court: Go ahead.

Q To get back to the original transaction, as a result of this representation made by the plaintiff to you, what was the value of the blocks? A $519.90.

Q And then he gave you this bum check for $150? A Yes, sir.

Q Was it subsequently made good? A Yes, sir.

Mr. Corn: May I have a ruling, your Honor, and have him confined in his examination?

The Court: I think he may be examined on it. I will rule later.

Q That left a balance of approximately what? A $369.90.

Q Did you sue him for that amount? A Yes, sir.

Q And you got a judgment in the Montclair District Court? A I got a judgment in the Montclair District Court.

Mr. Breslin: I offer a certified copy showing that the judgment was entered.

(The same is received in evidence and marked Exhibit D. 1.)

Q After you got judgment did you go around to see Weinstein about collecting your judgment? A I was up there on two or three different occasions. The last time I seen him it was kind of late in the fall, and he laughed at me. He said, "I don't own the building. You can go to the devil. It belongs to the corporation."

Q After that where did you go? A To the lawyer's office.

Q Whom did you go to see? A Your office.

Q Did you tell me those facts? A Yes, sir.

Q All the facts? A Yes, sir.

Q And what did I tell you?

Mr. Corn: I object. It comes up squarely on the point.

The Court: I will allow it; if necessary he may amend to show it. I don't see that there is any surprise.

Mr. Corn: If it is going only to the question of probable cause, that is all right, but if he is going to rely on the probable cause that the attorney told him to make the complaint, I do not think we ought to meet it at this time.

The Court: I will allow it and I will allow him to amend if necessary.

Q What did I tell you to do? A Get a warrant for obtaining goods under false pretenses.

Q And that is the reason you made the complaint? A Yes, sir.

Q You are not a lawyer? A No, sir.

Q Have you your original books here? A Yes, sir.

Q How were the original goods charged? To the corporation or to Weinstein? A Nathan Weinstein.

Mr. Breslin: I will withdraw this offer at the present time and Mr. Corn may cross examine.

The Court: This complaint says that at the time he knew they were to be used for the building belonging to the Metropolis Building Company. That negatives the fact that they were to be used for this plaintiff here.

Mr. Corn: That is correct. What I meant is that his probable cause should be confined to the truth of his complaint and not to one other point about any bum check or anything else he might have.

The Court: Go ahead.

Cross examination by Mr. Corn.

Q Mr. Weinstein came to you in December, 1924, to buy cement blocks? A Yes, sir.

Q And you asked him who owned the building? A Yes, sir.

Q Who did he say owned the building? A He said, "I am the owner and contractor," in the presence of Mr. Hughes.

Q Did you ever verify that fact? A Later on when he told me I could go to the devil for my

money I told it to Mr. Breslin, and he wrote a letter and found out it belonged to the Metropolis Realty Company, a corporation.

Q At the time you sold the goods? A No, at the time I told him, he went and found out that it belonged to the corporation.

Q How long have you been in the cement block business? A About fourteen years.

Q Did you ever file a mechanic's lien on anybody's property? A About three or four.

Q If Weinstein did not own this property you could have filed a mechanic's lien against it.

Objected to as argumentative and speculative.

The Court: It is a matter of law.

Mr. Corn: I am asking him if he knows.

The Court: I will sustain the objection.

Q Weinstein came to you with Mr. Hughes, did he? A He drove down to my place with Mr. Hughes in the car.

Q And you know that before you made the complaint against Weinstein that Hughes got paid, do you not?

Objected to as immaterial.

Objection sustained.

Q When you went to see Mr. Breslin, just what did you tell him? A Just what Weinstein told me, that I could go to the devil and collect my money; that he didn't own it.

Q I want to know exactly what you told Mr. Breslin. A I told him that I was down on the job to see Weinstein and he laughed at me and

said, "You can go to the devil and collect the money. I don't own the building."

Q And that is all? A I don't remember.

Q I am asking you to tell me everything you told Mr. Breslin. A That's what I told him.

Q That Weinstein laughed at you and told you to go to the devil and that he wasn't the owner of the building, and then Mr. Breslin told you to make a complaint? A Later on.

Q When you did make the complaint, Mr. Breslin did not appear with you before the Recorder, did he? A No.

Q Mr. Breslin is the assistant prosecutor in Bergen County? A Yes, sir.

Mr. Breslin: I will admit it; I have no reason not to admit it.

Q How soon before you made this complaint did you see Mr. Breslin? A Oh, it might have been a week.

Q A week before? Did Mr. Breslin tell you that in June I had written him a letter telling him that Mr. Weinstein was not the owner of this property? A Mr. Breslin did tell me that somebody wrote a letter telling me if I took half of my money that I would get it, and if I would take half of my—

Q But he didn't tell you that I wrote a letter telling him that Weinstein was not the owner of the property? A No, sir.

Q Did Mr. Breslin at your request write a letter to find out what the encumbrances were on this property? A I don't know.

Q You never saw the letter I wrote to Mr. Breslin, did you? A No, only that if I could take half or one-third of my money—one letter was for half and the other for a third.

William Hughes, direct.

Q When did you learn that Weinstein was not the owner of this property? A When Mr. Breslin was informed from Trenton that he was only an officer of the corporation.

Q And that was before you made the complaint? A That was about a week before.

Q And before that you didn't know? A I absolutely did not know it was a corporation.

WILLIAM HUGHES, sworn in behalf of the defendant.

Direct examination by Mr. Breslin.

Q Mr. Hughes, you live in North Arlington? A Yes, sir.

Q What is your business? A Trucking contractor.

Q Do you know the plaintiff in this case, Weinstein? A Yes, sir.

Q You dug the cellar of this apartment house job in North Arlington? A I did.

Q Do you recall when you were at Klitch's place of business with Weinstein and Klitch? A Yes, sir.

Q Can you tell us what Weinstein said with reference to the ownership of the apartment house? A We went down in Weinstein's car and he and Mr. Klitch had a conversation about the price of blocks, and he gave him a price, and Weinstein wanted to know if he wouldn't make it cheaper; he said he paid cash, and he said, "Will you give me two per cent. off?" He said, "Yes, two per cent. thirty days cash." And Mr. Klitch wanted to know who was the owner of the

place, and he said, "I am the owner and the contractor, too."

Q Who said that? A Mr. Weinstein.

Cross examination by Mr. Corn.

Q Are you sure Mr. Weinstein said that? A Yes, sir; he told me the same thing, if I am not mistaken, in your own office, too.

Q You made an agreement with Mr. Weinstein, did you not? A Yes, sir.

Q Do you want to read that agreement and see if that is the agreement for the work? A I haven't got my glasses with me.

Q Did you ever read the agreement that you had with Mr. Weinstein for the doing of this work? A I did, but it is so long ago that I forgot it.

Mr. Corn: I offer it in evidence.

Mr. Breslin: I object on the ground that it is not binding on the defendant.

Mr. Corn: I ask that it be marked for identification.

(The same is marked Exhibit P. 1 for identification.)

Q And in that agreement Mr. Weinstein made with you he represented himself as the contractor, did he not?

Objected to.

Objection sustained.

Q Didn't the agreement expressly provide that Mr. Weinstein was the contractor?

Objected to on the ground that the agreement is the best evidence as to its contents.

The Court: Isn't that the answer?

Mr. Corn: I have shown him the agreement.

The Court: He has not identified it.

Mr. Corn: He has identified his signature.

The Court: That is all it shows.

Q Have you your glasses with you? A No, sir.

Q Have you anybody who can read this to you? A I don't know; it was so long ago; I got so disgusted with it I don't want to see it no more.

Q But you know your signature? A Yes.

Q Can you say whether or not this is your agreement— A It must be if I signed it unless something has been added to it.

Q What were the contents? A I was to get half the money when the cellar was finished and the balance in ten days or thirty days, and I never got neither one.

Q Don't you recall at the time when the agreement was made Mr. Weinstein in my office told you that he was the contractor and that there was a general contract on file?

Mr. Breslin: I fail to see how the statements made by Mr. Weinstein to this witness are binding on my client.

The Court: I will allow it; it goes to the credibility of this witness.

Mr. Breslin: I will withdraw any objection I made, then.

William Hughes, cross.

A No, sir. I know in your office there was a man in there for to coax people along and wanted to know if he was ready for money yet, but the money never came.

Q Do you know that you were to do the work in accordance with the plans of Simon Cohen, the architect?

Objected to.

Objection sustained.

Q At that time weren't you shown the plans of the building and on it was written "Natwein Realty Co. owner"? A No, sir, I never seen no plans; never seen no architect. The cellar was staked out and I dug it.

Q Don't you recall that there was talk about the changing of the signs of the excavation? A You couldn't change it much, because it was out of the property lines on both sides.

Q That it was to be 50 by 50 instead of 60 by 50, and that there were changes made? A Never with me.

Q Who provided the plans for the work? A Mr. Weinstein was there every day.

Q And he pointed out what was to be done? A He gave me the four stakes and the depth, and that's all the work there is to a cellar.

Q And you say at that time you did not know that Weinstein was the owner of the property? A No, I did not.

Q When you came to collect your money didn't you tell your lawyer that Weinstein was not the owner of the property? A When did I collect it?

Q Did you file a mechanic's lien? A I did, and I got a judgment, too, didn't I?

Q And you filed it against Weinstein as the owner? A Yes.

Q Not as the contractor? A I couldn't tell you. Mr. Cook done my work for me.

DEFENDANT RESTS.

Mr. Corn: If your Honor please, I am compelled to call upon Mr. Breslin to take the stand.

JOHN J. BRESLIN, JR., sworn in behalf of the plaintiff.

Direct examination by Mr. Corn.

Q Mr. Breslin, you are the attorney for Joseph A. Klitch and you were such from December, 1924, until today, were you not? A Yes.

Q Mr. Klitch states that he acted on your advice in taking the complaint against Nathan Weinstein. A That is correct; I take all the blame.

Q What did Mr. Klitch tell you at the time? A He recited all the essential facts in the case.

Q Just what were the essential facts? A He recited the facts that the present plaintiff had represented to him that he was the sole owner of this apartment house and that Mr. Klitch had subsequently learned from the mouth of the plaintiff himself that he was not the owner, and that he had instituted suit in the Montclair District Court and recovered judgment against Weinstein and after he recovered judgment he went around to Weinstein and Weinstein said to him, "You may go to the devil. It belongs to the

corporation.'' I told him to go down to Judge Bennett and draw a complaint against him for obtaining goods under false pretenses.

Q Did you ever see the complaint since? A No, sir.

Q Did you ever see the complaint? A If you want me to tell you about it—the Court and jury is not entitled to it—I can tell you—

Q Will you look at that complaint and tell me whether that is the complaint? A I told him to make a complaint against him for obtaining goods under false pretenses.

Q Did you tell him to enter that particular complaint? A I never saw the complaint. I told him to go down to Judge Bennett, and whatever Judge Bennett drew up I don't know.

Q You simply told him to enter a general complaint? A Yes, sir.

Q After that you had nothing further to do with it? A Nothing further to do with it.

Q Did you receive a letter from me in June, 1925? A I cannot recall that.

Q You haven't your file here? A No, I thought there wouldn't be anything to the case and I didn't bring any letters here or anything else.

Q Did you examine the property to see who was the owner? A One of the searchers did; I didn't take care of that.

Q Have you the searcher's report? A I didn't bring any records with me because I thought it was a question of law and I didn't think the case would warrant my bringing the records with me.

Mr. Breslin: I waive cross examination.

Mr. Corn: If your Honor please, at this time I move, as I intimated before, to strike out all the testimony that does not refer to this particular complaint, and also on the question on the acting on the advice of counsel. He acted on the advice of counsel and counsel did not tell him to make this complaint—

The Court: I do not think that the technicality of the form of the complaint makes any difference; that is not disputed. It is a question of whether he made a complaint of this character which would cause another man's arrest—

Mr. Corn: Of course, the complaint is not, as the defendant contends, that Weinstein represented he was the owner of the premises at all, except by innuendo.

The Court: It is deficient in that it does not set out all the facts. That is not malicious prosecution. If he proves he had the facts and the complaint itself was not in full form, I do not think that makes any difference. It is too technical.

PLAINTIFF RESTS.

Mr. Corn: I move for a directed verdict. The cases hold that in an action of malicious prosecution the burden is not on the plaintiff to establish his innocence of the complaint on which the prosecution is based. Want of probable cause may be presumed, and from want of probable cause a jury may find malice. If this is going to the jury on the question of advice of counsel I am surprised. I had interrogated Mr. Breslin on that very matter: If that is a defense in it-

self and not going to probable cause, if he wants to show his absence of malice and that he had probable cause and brings in a side issue that he spoke to his attorney, that is one thing, but if he says he laid all the facts before his attorney and his attorney advised it, that must be raised in the pleadings.

The Court: I said I would allow him to amend it because it would be admissible on the question of whether he had probable cause. I mean the advice of attorney would be admissible so it would get into the record, anyway.

Mr. Corn: That would go on the question of probable cause.

The Court: But you were bound to meet it whether you knew it or not.

Mr. Corn: We have denied it. Now, it is for the jury to decide whether that statement was made or not. They claim that even if the plaintiff did not make such statement, if he told it to his attorney he is absolved. I do not think that is proper. We ought have had an opportunity to interrogate.

The Court. That has not been put into this case. I will grant a motion for the direction of a verdict in favor of the defendant against the plaintiff.

Mr. Corn: On what ground, may I ask?

The Court: On the ground that he acted on the advice of an attorney.

Mr. Corn: That matter was not put in as a special defense and we had no way of knowing.

The Court: You are bound, whether or not he acted on the advice of counsel, to know that he was going to charge probable cause, and that

is one of the grounds of probable cause. I will grant the motion.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

NATHAN WEINSTEIN, *Plaintiff-Appellant,* *vs.* JOSEPH A. KLITCH, *Defendant-Respondent.*	*On Appeal from Supreme Court.*

APPELLANT'S BRIEF.

Facts.

This suit is for damages for malicious prosecution. The criminal complaint, issuance of warrant, plaintiff's arrest, his being held to bail, failure of Grand Jury to indict and his having expended $550 for his defense were admitted (State of Case, pp. 6-7).

The answer set up that plaintiff owed defendant $369.90 for cement blocks; that a judgment was recovered for that sum in the Montclair District Court; that when the blocks were supplied plaintiff falsely represented to defendant that plaintiff was the owner of the premises in which the blocks were used, and that the complaint was made in good faith and upon probable cause.

At the trial, the Judge stated he would allow an amendment to the answer to set up advice of counsel; no motion for such amendment was made, nor was the answer actually amended. The court directed a verdict for defendant on the ground of advice of counsel; no motion for such direction of verdict was made or reasons assigned by counsel.

There was evidence pro and con as to the making of the representation of ownership of the

building in question. Counsel testified he told defendant to enter a general complaint of false pretenses, but did not see the complaint.

Appellant withdraws the first two grounds of appeal set out in his notice.

Plaintiff appeals from the court allowing or seemingly allowing an amendment to the answer without request and without the amendment being set out, from the court directing a verdict without request, and from the court directing a verdict when the facts were in dispute and when the answer was not in fact amended to set out advice of counsel.

ARGUMENT.

POINT 1. The Court allowed defendant to amend his answer, without any request therefor by defendant and without specifically setting out the amendment.

The answer did not set up advice of counsel. On defendant's opening to the jury it seemed this defense was to be raised, and plaintiff objected (State of Case, p. 7, l. 21, to p. 8, l. 23); the court intimated that advice of attorney is an item of probable cause.

Plaintiff then objected to evidence of advice of counsel and the court allowed the testimony, saying, "If necessary he may amend to show it" (same, p. 16, l. 30), and "I will allow him to amend if necessary" (same, p. 16, l. 39).

At the close of the case plaintiff objected to consideration of advice of counsel and the court said, "I said I would allow him to amend it because it would de admissible on the question of whether he had probable cause. I mean the ad-

vice of attorney would be admissible so it would get into the record, anyway'' (same, p. 27, l. 11).

There was no amendment to the answer; there was merely a suggestion by the court that he would allow an amendment to set up advice of attorney. The materiality consists in the fact that the only ground on which the court directed a verdict was that defendant acted on the advice of an attorney (same, p. 27, ll. 28-34).

Had the amendment been presented for consideration, plaintiff may have properly objected to its form or sufficiency, and, by having exceptions noted, bring up on appeal the allowance of such amendment. If it be considered that the answer has been amended because the court said he would allow an amendment, plaintiff has been prevented from objecting to the contents.

The amendment, if considered such and if its form is ascertainable, is bad for it does not set out the facts constituting defense of counsel: that is, when and by whom and to whom made, what facts were related to counsel, what his advice was, etc., unless we incorporate most the testimony of the defendant and his counsel.

> A plea of ''probable cause'' is not good unless it contains facts which in law are sufficient to justify the arrest.
> *Spencer* v. *Anness,* 32 N. J. L. 100.

Defendant should not be permitted to defend on the ground of advice of counsel, without an amendment duly setting up such defense. Supreme Court Rule 58 provides:

> The answer must specially state any defense which is consistent with the truth of the material allegations of the complaint, and any defense which, if not stated, would be likely to cause surprise, or would raise issues not arising out of the complaint.

The defense of advice of counsel is consistent with the truth of the material allegations of the complaint, is likely to cause surprise, raises an issue not arising out of the complaint and hence is unavailable unless set out in the answer. And hence this defense was improperly considered under the pleadings as drawn, and could not furnish the basis of a direction of verdict for defendant.

Defendant made no motion for amendment of his answer, even though at three different times the trial court said he would allow defendant to amend.

Assuming that the answer was amended, was the court permitted to amend it without any request or motion by defendant? This matter does not seem to have been passed on in any reported case. We think the court was not at liberty to do so.

A judge is a public officer lawfully appointed to decide litigated questions according to law (23 Cyc. 504). A judge presiding at a jury trial, in his remarks and conduct of the case, should endeavor to maintain a strict impartiality (12 Cyc. 538). Assuredly, a judge may not be an attorney in a case before him. The judge is the referee at, but not a participant in, the trial. To preserve his neutrality, he should not assist or resist either party, except "to decide litigated questions according to law." Of what concern is it to the judge whether a pleading read this way or that; when the point is raised by counsel in admission of testimony or in leave to amend, or in some other manner, he renders his decision. At a jury trial, for the judge to make and grant his own motion to amend a pleading seems to go far beyond the conception of the relative rights of court, jury and counsel.

Juries are readily swayed in favor of the party whom the trial judge seems to favor. The judge should refrain from any conduct or remarks which tend to indicate which party he prefers, except by fair comment on the testimony.

In the instant case no injustice would have been done if defendant had not been allowed the defense of advice of counsel. He had ample opportunity to amend his answer before and during the trial; the fact that he made no motion for amendment would indicate that he intended to stand on the answer as drawn.

We concede that the court may properly suggest amendments to pleadings, where a jury is not sitting in the case, or for the court to suggest that certain evidence would be admissible if the pleadings were changed to conform. But it hardly seems appropriate for a judge actually to amend an answer, in the presence of the jury trying the facts in the case, without any motion by defendant for the amendment; or, as in this case, for the judge to say he will allow defendant to amend, without request by defendant, or statement of the form of the amendment or the reasons therefor. Plaintiff is thereby prevented from presenting his side; the decision of the court is announced before the issue is raised by counsel.

POINT 2. The Court directed a verdict for defendant, without any request therefor by defendant.

The trial judge directed a verdict without motion by defendant. What transpired (State of Case, pp. 26-28) was that plaintiff began a motion for direction of verdict to the extent of

$550 when the court interposed, and directed the verdict for defendant.

What was said under Point 1 applies as well here.

An examination of the reported cases in this state, in which verdicts were directed, seems to show that in each instance a motion was made. The practice is established that at the close of the testimony the party desiring a verdict-direction makes his motion and sets forth the reasons; and if the reasons given are not valid, the court will be sustained in refusing to grant the motion even though valid reasons existed which, if they had been stated by counsel, would have justified granting the motion.

If the judge may on his own initiative direct a verdict and pick out the reason therefor (as was done in this case), there is little left to be done by counsel at a trial; for the judge would surely then have power, without waiting for the attorneys to make requests, to challenge the jurymen, object to questions asked of witnesses and to exhibits offered in evidence, to non-suit, to dismiss, to qualify experts, etc., etc.

We concede that a judge may step somewhat out of his neutral position when a party is not represented by counsel. But a system of jurisprudence which permits the trial judge to aid counsel to the extent of making motion for direction and assignment of the reasons is open to the objection that the court will cease to be the arbiter (for he can hardly be expected to deny his own motions or to say his own reasons for granting his motions are erroneous) and to the objection that the court may, unconsciously perhaps, lean to a favored litigant or

counsel by expounding for him the law and the time for application of the law.

There are instances when a judge may, of his own motion, non-suit or dismiss an action: as where the subject-matter is illegal (for instance, the famous case of the highwayman who filed a bill for an accounting against his partner-in-crime), or against public policy, or where the court has no jurisdiction. We have, however, been unable to find any reported case in any jurisdiction in which a court directed a verdict without motion of the party in whose favor the direction was made. From the right of a judge to non-suit of his own act cannot be spelled out a similar right to direct a verdict, for a non-suit, as has been well said, is but the snuffing of a candle which plaintiff may relight at his pleasure, whereas a direction of verdict is a final adjudication of the matters in issue.

> There is, however, a substantial difference between a non-suit and a direction of verdict. Only the latter is conclusive of the controversy. *Burnett* v. *State*, 62 N. J. L. 510.

As intimated by this Court in *Settel* v. *Public Service* (94 N. J. L. 137), the granting of a non-suit or a direction of verdict is not an act of judicial discretion. If a party applies for such action by the trial court, and the evidence and the law warrant it, the court must grant the motion. As a corollary, it should follow that the trial court has no discretion to search the evidence and the law and to non-suit or direct a verdict until proper request for such action is made by the parties.

It is not obligatory for a party who may be granted a motion for direction, to make such motion. If the motion is not made, the party is

deemed to have waived a direction; perhaps he preferred exoneration by verdict of the jury rather than by direction of the judge.

POINT 3. The Court directed a verdict for defendant on the ground defendant acted on the advice of an attorney:

Aside from the presumption of want of probable cause from failure to indict, and aside from the presumption of malice from want of probable cause, plaintiff testified that there was no probable cause,

> Q Did you at any time tell Klitch that you were the owner of that apartment house? A Never did (State of Case, p. 11, l. 32).
>
> Q Did you ever tell him you were the owner of the apartment house? A Never did.
>
> Q What did you tell him your connection with this apartment house was? A Hughes told him he is doing the job for me and he should give me the blocks, and then we agreed on the price.
>
> Q And nothing was said as to who owned the apartment house? A No, sir, because Hughes had the contract with me.
>
> Q Klitch did not ask you who owned the apartment house? A Never did.
>
> Q Did you ever tell Klitch who owned the apartment house? A We never came to discuss it. I said, "I am doing the apartment house." He said he is a friend of his and I might as well give him the job (State of Case, p. 12, ll. 3-19).

and that there was malice.

> Q What did he (defendant) say? A He said "I will get you yet."
>
> Q And then you were arrested? A Yes, sir (State of Case, p. 9, l. 34).

The court certainly was not justified in granting a direction of verdict on the ground of probable cause or no malice.

> Whether the plaintiff has established "want of probable cause" is for the court, if the facts proven as to probable cause are undisputed, but if there be a controversy about them the question is for the jury. *Toth* v. *Greisen,* 51 Atl. Rep. 927 (not officially reported).
>
> 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. *Weisner* v. *Hansen,* 81 N. J. L. 601; *Sunderbrand* v. *Shills,* 82 N. J. L. 700; *Vladar* v. *Klopman,* 89 N. J. L. 575.

As to advice of counsel, this defense is not raised in the pleadings (as shown under Point 1). No amount of evidence could supply the deficiency in the answer. At any rate it was a fatal variance.

> It is sound law and sound reason that there must be no variance to the prejudice of the adverse party between the case declared upon and the same proven, and that recovery must be *secundum allegata et probata. Jordan* v. *Reed,* 77 N. J. L. 584.

Then again there should be no direction of verdict on this ground if the material facts (as, here, whether or not plaintiff represented ownership to defendant) are disputed, for of course defendant cannot hide behind counsel's advice on a false statement of facts and it is for the jury to decide the truth of the facts when the evidence is conflicting.

> The contention that there should have been direction of a verdict upon the ground that

> defendant, upon making the criminal complaint, acted upon the advice of counsel, is untenable. Assuming that defendant informed his counsel of all the facts, all the details, as he said he did, counsel's advice would protect him only if none of the material statements were false to defendant's knowledge. Here again the issue depends upon a question of fact, namely, whether it is true that the plaintiff admitted to defendant that she took his money. He said she said so, and she said she did not. *Dalton* v. *Godfrey*, 97 N. J. L. 455.

Plaintiff denies having said he was the owner. Can the trial court say defendant made to his attorney a full and fair statement of the facts, none of which defendant knew to be false? This could be done only by disregarding plaintiff's testimony for if plaintiff's story is true defendant's statement to counsel was falsely made and was not full or fair.

> Of course, if the defendant has not made a full and fair statement of the facts to his counsel, it is quite plain that advice of counsel could not be availed of by the defendant in justification. The nature of the advice was dependent upon the facts related by the defendant to his attorney; and all this was properly left to the jury for its determination. *Helstowski* v. *Greenberg*, 101 N. J. L. 560.

It would seem that if the complaint made by a defendant is based on facts which in themselves are sufficient to warrant the prosecution, a defense of probable cause is made out. If defendant in good faith laid all the facts truthfully before counsel and was by the latter advised to make the complaint, a defense of advice of counsel is made out whether or not the facts themselves were sufficient to warrant the prosecution. If the material facts are not controverted

defendant should be granted a direction of verdict, upon showing either that they constituted a fair basis for the prosecution or that the charge was made upon attorney's advice after full disclosure. But, however, if there is any evidence contradicting the truth of the facts on which defendant based the complaint, a jury question is presented, be the defense probable cause or advice of counsel or absence of malice or all of these.

In the instant case the version of defendant, as to his transaction with plaintiff, might have warranted a direction on the ground of probable cause, were it not for plaintiff's testimony denying the truth of the making of the representation. Advice of counsel, therefore, was but a circumstance to be considered by the jury (if they believed plaintiff did not say he was the owner of the building), tending to mitigate the damages by a showing of some cause for the prosecution or of some item of good faith—to the somewhat similar effect as testimony of defendant's good reputation or of defendant's being a member of a worthy association.

In passing on a motion for direction of verdict, the court must resolve all factual questions and inferences in favor of the opposing party.

> The trial judge could not ignore the testimony of other witnesses for the plaintiff in favor of that given by her on cross examination, nor pass upon conflicting claims to credibility. The motion was in effect a demurrer to so much of the whole testimony as was favorable to the plaintiff, admitting its verity in point of fact for the purpose of denying its sufficiency in point of law. *Hayward* v. *North Jersey St. Ry. Co.*, 74 N. J. L. 678.

Therefore, in this case, the trial judge was obliged to assume that plaintiff did not make the representation of ownership to defendant, and that defendant was untruthful in stating to his attorney that plaintiff did make such representation. Therefore (under the decision in *Dalton* v. *Godfrey, supra*) there should not have been a direction of verdict for defendant.

It should be plain that the mere giving of the advice, without showing that it was founded on a full, fair and truthful statement of the facts, is not enough. In neither of the cases cited above, *Dalton* v. *Godfrey* and *Helstowski* v. *Greenberg* (which, by the way, seem to constitute all the reported cases in this state on the question of advice of counsel), does it appear that any contradiction was offered by plaintiff as to what defendant told his attorney and what the attorney told plaintiff? Certainly, it would be almost impossible to procure evidence to refute the statements testified to by defendant and his counsel as having been made to each other, except perhaps if a more or less hostile witness happened to be present at the time or if defendant or his attorney should trip on cross examination. If the mere advice is a complete justification, then any person could knock on an attorney's door, pay a fee, recite a tale of wrongs committed by plaintiff, receive advice to prosecute, and prosecute without incurring any liability to respond in damages to the plaintiff, even though what was related to counsel was false in fact. Nor does plaintiff need to show that defendant knew the statements made to counsel were false; the jury may, under proper instruction from the court, draw such inference from the contractory evidence in the case.

Assuming that the question was only as to what was said between attorney and client, the evidence here is conflicting as to what conversation took place between defendant,

> Q When you went to see Mr. Breslin, just what did you tell him? A Just what Weinstein told me, that I could go to the devil and collect my money; that he didn't own it.
>
> Q I want to know exactly what you told Mr. Breslin. A I told him that I was down on the job to see Weinstein and he laughed at me and said, "You can go to the devil and collect the money. I don't own the building."
>
> Q Is that all? A I don't remember.
>
> Q I am asking you to tell me everything you told Mr. Breslin. A That's what I told him (State of Case, p. 18, l. 32 to p. 19, l. 8).

and Mr. Breslin, his attorney.

> Q What did Mr. Klitch tell you at the time? A He recited all the essential facts in the case.
>
> Q Just what were the essential facts? A He recited the facts that the present plaintiff had represented to him that he was the sole owner of this apartment house and that Mr. Klitch had subsequently learned from the mouth of the plaintiff himself that he was not the owner, and that he had instituted suit in the Montclair District Court and recovered judgment against Weinstein and after he recovered judgment he went around to Weinstein and Weinstein said to him, "You may go to the devil. It belongs to the corporation." I told him to go down to Judge Bennett and draw a complaint against him for obtaining goods under false pretenses (State of Case, p. 24, l. 28 to p. 25, l. 8).

Defendant does not say he told his counsel of the sale of the blocks to plaintiff, that plaintiff represented himself to be the sole owner

of the building, that suit was recovered in the Montclair District Court, nor do these two witnesses agree as to just what plaintiff said—defendant stating "I don't own the building" and his attorney reciting "It belongs to the corporation." It might also be noticed that Mr. Breslin says defendant told him that plaintiff had represented to be the *sole* owner, whereas there is no other testimony in the case intimating that Weinstein had claimed to be the *sole* owner. Defendant testified that plaintiff said "I am the owner and contractor" (State of Case, p. 14, l. 38; same, p. 17, l. 36); defendant's witness, Mr. Hughes, says the same (p. 21, l. 2). There is a difference between being an owner and a sole owner, for if A says "I am the owner of the house" he may not be held for misrepresentation should title be in A and B, but he would be guilty if he stated he was the sole owner. From this it could be said that defendant's statement to counsel was not full, or rather was over-full.

A nice point presents itself in this case, as to which we have been unable to find any reported decision, pro or con. The attorney testified:

> Q Did you ever tell him to enter that particular complaint? A I never saw the complaint. I told him to go down to Judge Bennett, and whatever Judge Bennett drew up I don't know.
>
> Q You simply told him to enter a general complaint? A Yes, sir.
>
> Q After that you had nothing further to do with it? A Nothing further to do with it.

The advice, then, went no further than recommending a general complaint for obtaining goods under false pretenses. Is this sufficient to constitute a defense or must the attorney see the

complaint as drawn and advise his client to sign it? We believe that to be available as a defense it is necessary for plaintiff to show that the particular complaint in question was made after its inspection by counsel and on his advice. For in this complaint (State of Case, pp. 6-7) plaintiff is accused of *designedly and feloniously, demanded and secured blocks valued at $369.90, with intent to cheat and defraud, knowing at the time of ordering that the blocks were to be used for a building belonging to Metropolitan Realty Co.*, yet none of the facts to support these recited accusations were related to the attorney nor appeared in the evidence nor were advised by the attorney to be inserted in the complaint. The complaint seems to sound more in larceny than in false pretenses. The value of the blocks was $519.90 (State of Case, p. 15, l. 24). Had defendant made a complaint against defendant for false pretenses in obtaining a horse, counsel's advice as related in the case would, of course, be of no avail. Where is the line to be drawn? It should seem as if counsel must state, in effect, "That from these facts, as stated to me by defendant, I was of the opinion that he was legally justified in making the complaint as drawn, and so advised him before he signed it"; or defendant should so testify. The law, by allowing the defense of attorney's advice, places a hardship on an injured plaintiff, for he is prevented thereby from recovering damages no matter how erroneous that advice might be. To minimize abuses of this defense the law could well refuse to allow it, unless the advice covers the making of the actual complaint; a fair-minded, prudent complaining witness should not only truthfully lay all the facts before his counsel, but should refrain from signing the complaint until his counsel inspects and approves it, if the complain-

ant intends to seek protection from responding in damages by reason of his counsel's advice.

Appellant therefore respectfully contends that the judgment under review should be reversed.

In conclusion, that it may not appear even by implication that we question the integrity or impartiality of the trial judge, we feel we should make clear that we have not the slightest doubt but that he acted entirely without favor or bias and that he would have decided in the same way if the evidence were the same and the parties were interchanged.

CORN & SILVERMAN,
Attorneys of Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

Nathan Weinstein, Plaintiff-Appellant, vs. Joseph A. Klitch, Defendant-Respondent.	On Appeal from Supreme Court

BRIEF OF RESPONDENT

FACTS

The plaintiff based his action on the theory of malicious prosecution. There was no conflict as to certain facts. It was admitted that the defendant had signed a complaint, alleging that the plaintiff had procured goods under false pretenses, that a warrant had issued upon said complaint; that the plaintiff had been apprehended and subsequently the case dismissed by the Grand Jury. (See State of Case, pages 6 and 7, lines 1 to 20.)

The defense offered by the defendant was that the plaintiff had secured certain building blocks under a misrepresentation as to his ownership of

a certain apartment house in North Arlington and that subsequently the defendant secured a judgment in the sum of $369.90 for said block.

The defendant further offered testimony to show that he had interviewed an attorney-at-law of the State of New Jersey, and revealed to him all the material and essential facts in the case. (See page 24, line 30.)

As the result of said interview, he was advised by the said lawyer to make a complaint. (See page 17, line 1.)

After all the evidence had been presented, the trial judge concluded that the defendant had affirmatively established that the criminal complaint was based upon probable cause and therefore directed a verdict for the defendant. (See page 27, line 30.)

The plaintiff urges on appeal three reasons for a reversal. The first two are of a trivial nature. The third, and meritorious one, is whether or not the court was justified in directing a verdict.

POINT ONE.

THE COURT DID NOT ERR WHEN IT PERMITTED THE DEFENDANT TO SHOW THAT HE HAD CONSULTED AN ATTORNEY BEFORE HE MADE THE CRIMINAL COMPLAINT.

The answer in this case specifically alleges that the complaint was made in good faith and upon probable cause. (See page 4, line 35.) Therefore, the court was justified in permitting the above-mentioned evidence. The plaintiff could have demanded by means of a bill of particulars as to what constituted good faith on the part of the defendant. The plaintiff further could have demanded the defendant to apprise him of the nature of the facts that constituted probable cause. If the defendant interviewed an attorney prior to the institution of the criminal complaint, he acted in good faith. His actions prior to the institution of this complaint would be evidence of good faith, consequently this objection is without merit.

POINT TWO.

THE COURT DID NOT ERR WHEN IT DIRECTED A VERDICT FOR THE DEFENDANT WITHOUT ANY MOTION ON THE PART OF THE DEFENDANT.

It is an elementary principle that a trial court has the exclusive duty of passing upon the question as to whether or not certain facts may be pre-

sented to a jury. It is the duty of the trial court to ascertain whether or not the evidence warrants its submission to a jury.

The trial court should not allow any issue to be submitted to a jury when the question is one of law. The court in the instant case, after considering the testimony, came to the conclusion that the question was one of law, therefore, it was the court's duty to direct verdict for the defendant and not permit the case to go to the jury.

If the contention for the plaintiff were sound, the trial court would allow issues to go to the juries and have legal error committed while the court would be helpless unless a motion were made.

The court is presumed to know the law and act accordingly. Therefore, the trial court in this instance committed no error.

POINT THREE

THE COURT DID NOT ERR WHEN IT DIRECTED A VERDICT FOR THE DEFENDANT.

The law in our State is well settled that in a suit for malicious prosecution, if the defendant can establish probable cause, an action will not lie against him. This theory is enunciated in Magowan vs. Rickey. (See 64 N. J. L., page 402.) This case has been followed in Vladar vs. Klopman (89 N. J. L. p. 575) Lane vs. Pennsylvania Railroad Company (78 N. J. L. p. 672).

In the Magowan case, the defendant stated with substantial accuracy the facts to the Prosecutor of the Pleas. In the instant case, the defendant revealed the essential facts to his attorney.

Justice Van Syckel stated in the Magowan case, the question of existence of a reasonable and probable cause for the prosecution, was a proper one for the court. There are other cases supporting this doctrine. (See McFadden vs. Lane, 71 N. J. L., p. 624) Hartdorn vs. Webb Manufacturing (75 Atlantic, p. 893) Sunderland vs. Sills (82 N. J. L., p. 700).

Applying the above rules of law, it is most convincing that Court did not err when it directed a verdict for the defendant. A brief summary of the evidence will support this conclusion.

Joseph Klitch, the defendant, testified that prior to the sale of the cement blocks, he talked with the plaintiff in the presence of Hughes (see page 14, line 31). Weinstein told Klitch he was the owner of the building. (See page 14, line 39.) Klitch delivered cement blocks to Weinstein and Weinstein paid on account of said indebtedness the sum of One Hundred and Fifty Dollars, leaving a balance of Three Hundred Sixty-nine dollars and ninety cents. Subsequently, Klitch recovered a judgment for said amount. At a later date, when he attempted to collect the money, Weinstein laughed at him and told him that he (Weinstein) did not own the building (See page 16, line 18). Klitch then went to the office of his lawyer and recited all of the facts. (See page

16, line 25.) The lawyer advised him to make a complaint for obtaining goods under false pretenses. (See page 17, line 2.)

Hughes, another witness for the defendant, testified that he was present when Weinstein represented to Klitch that he was the owner of the building. (See page 21, line 1.)

John J. Breslin, Jr., testified that he is an attorney for Klitch in this matter. He further related that Klitch acted on his advice, (see page 24, line 25), in making the complaint and revealed to him all the essential facts. (See page 24, line 39).

None of the above-mentioned testimony was contraverted or disputed. In this state of the case the court was correct in its decision.

Citizens without legal training, who are business men of ordinary intelligence, who consult lawyers before making a criminal complaint and act on their advice, should be protected. Sound public policy demands that private citizens should be helped in bringing defendants to the bar of justice.

For the reasons expressed above, it is respectfully urged that judgment be affirmed.

JOHN H. BRESLIN, JR.,

Attorney for Respondent.