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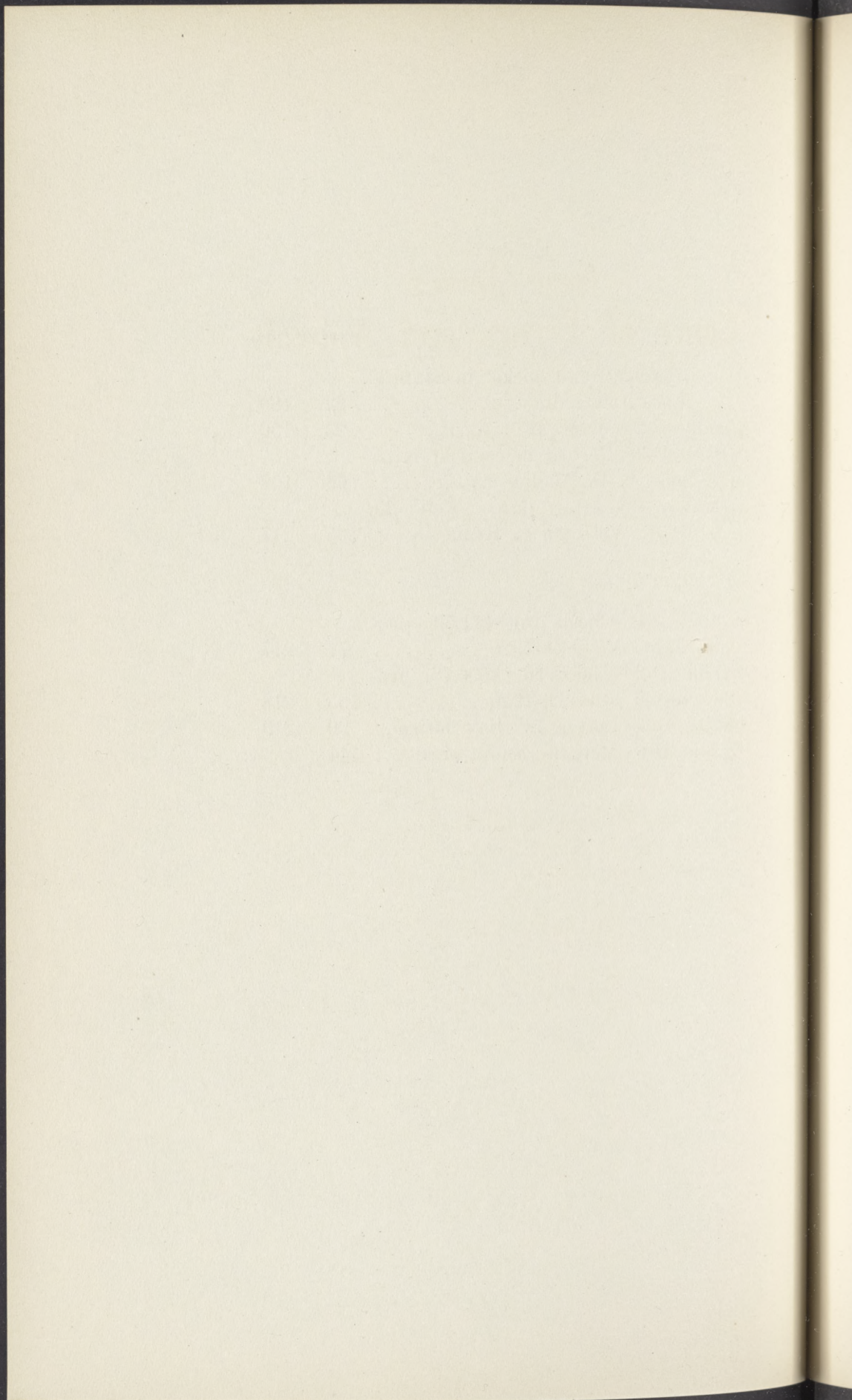
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# New Jersey Court of Errors and Appeals

## SUMMONS.

10

THE STATE OF NEW JERSEY TO HARRY WEISMAN

YOU ARE SUMMONED to answer the annexed complaint of LUCA DE CANDIA (L. S.) in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court, at Newark, N. J. within twenty days, after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you. (And see Notice endorsed hereon.)

20

WITNESS William A. Smith, Esq., Judge of the Essex County Circuit Court at Newark, this 24th day of March, Nineteen Hundred and Twenty-seven.

THOMAS BRUNETTO,  
Attorney,

30

John H. Scott,  
Clerk.

40

## COMPLAINT.

## ESSEX COUNTY CIRCUIT COURT

ESSEX COUNTY

10	LUCA DeCANDIA, <div style="text-align: right; padding-right: 20px;">Plaintiff,</div>	}	Action at Law
	vs.		
	HARRY WEISMAN, <div style="text-align: right; padding-right: 20px;">Defendant.</div>		

Plaintiff, Luca DeCandia, residing at 45 Watchung Plaza, in the Town of Montclair, in the  
 20 County of Essex and State of New Jersey, says that:

## FIRST COUNT

1. On the Sixth day of December, 1926, the defendant falsely and maliciously and without reasonable or probable cause, charged plaintiff, before E. R. Noble, Deputy Clerk of the Third Criminal Court of the City of Newark, County of Essex and State of New Jersey, with having committed the offense of uttering and delivering on  
 30 the 18th and 20th days of November, 1926, two checks for the payment of money, with intent to defraud, and procured said clerk to issue a warrant for the arrest of plaintiff on said charge, and thereupon plaintiff was arrested under said warrant and imprisoned for two hours, and compelled to give bail.

40 2. On the 28th day of February, 1927, at the trial of said cause, plaintiff was acquitted of said

*Complaint*

crime, and said prosecution is wholly ended and determined.

3. By reason of the premises, plaintiff was compelled to spend large sums of money to defend himself of said charge for the hiring of attorney, 10  
procuring bail and has incurred other expenses to properly prepare his defense to said charge, and plaintiff has been greatly injured in his credit and reputation and has suffered pain of body and mind and was prevented from attending to his business.

Damages will be claimed on this count in the sum of Five Thousand Dollars.

20

## SECOND COUNT

1. At the December term, 1926, of the Essex County Grand Jury, the defendant falsely and maliciously and without reasonable or probable cause, procured plaintiff to be indicted by the grand jury of the County of Essex, for the crime of uttering and delivering to Harry Weisman, the defendant herein, a check drawn by L. DeCandia upon a depository known as the First National 30  
Bank and Trust Company of Montclair, New Jersey, for the payment of \$11.50 with the intent to defraud, being violation of Chapter 72 of the Laws of 1919, by reason whereof plaintiff was arrested and confined for over twenty hours and compelled to give bail to procure his release, and defendant caused said indictment to be prosecuted, and at the trial thereof, on the 28th day of February, 1927, plaintiff was duly acquitted of 40  
said charge, and said prosecution is terminated.

*Answer*

2. By reason of the premises, plaintiff was compelled to spend large sums of money to defend himself of said charge for the hiring of attorney, procuring bail and has incurred other expenses to properly prepare his defense to said charge, and plaintiff has been greatly injured in his credit and reputation and has suffered pain of body and mind and was prevented from attending to his business.

Damages will be claimed on this count in the sum of Five Thousand Dollars.

Damages will be claimed in the sum of Ten Thousand Dollars.

THOMAS BRUNETTO,  
Attorney of Plaintiff.

**ANSWER.**

## ESSEX COUNTY CIRCUIT COURT

30	LUCA DeCANDIA, <div style="text-align: right;">Plaintiff,</div>	}	Action at Law.
	vs.		
	HARRY WEISMAN, <div style="text-align: right;">Defendant.</div>		

## ANSWER TO FIRST COUNT

1. He denies Paragraph 1 of said Count.

*Answer*

2. He has no knowledge or information as to the allegations in Paragraph 2, and leaves the said plaintiff to make due proof thereof.

3. He denies the allegations in Paragraph 3 of said Count. 10

## ANSWER TO SECOND COUNT

He denies each and every allegation in said Count contained.

## FIRST SEPARATE DEFENSE

The said plaintiff alleges that such charge as was made by him in the matters mentioned and referred to by the said plaintiff in his complaint filed herein, were based upon reasonable and probable cause at the time appearing to the said defendant. 20

## SECOND SEPARATE DEFENSE

Defendant denies that said plaintiff was arrested or indicted or brought to trial by any procurement on his part. 30

## THIRD SEPARATE DEFENSE

Any charge made by the said defendant against the said plaintiff, was made by him in good faith and in discharge of his public duty.

## FOURTH SEPARATE DEFENSE

Said plaintiff has not suffered or sustained any loss, damage or injury by reason of any act or deed on the part of the said defendant. 40

BENJAMIN M. WEINBERG,  
Attorney of Defendant.

## AMENDMENT TO DEFENDANT'S ANSWER.

## ESSEX COUNTY CIRCUIT COURT

10	LUCA DE CANDIA, <div style="text-align: right; padding-right: 20px;">Plaintiff,</div>	}	Action at Law.
	vs.		
	HARRY WEISMAN, <div style="text-align: right; padding-right: 20px;">Defendant.</div>		

The said defendant by leave of the Court here first had and obtained, amends his Answer filed herein, by adding thereto a FIFTH DEFENSE, as follows:

20 The said defendant before making the complaint referred to in plaintiff's complaint, laid all of the facts in connection therewith before Jacob W. Silverman, a competent Attorney and Counsellor-at-Law of New Jersey, who after a consideration of the facts submitted to him, advised this defendant in the discharge of his public duty, to make the said complaint referred to.

30 BENJAMIN W. WEINBERG,  
 Attorney for Defendant.

## JUDGMENT.

## ESSEX COUNTY CIRCUIT COURT

42700

LUCA DE CANDIA, Plaintiff, vs. HARRY WEISMAN, Defendant.	}	Action at Law On Verdict by a Jury. Judgment entered June 20, 1929. Damage     \$3,000.00 "         500.00 Costs         109.07 <hr style="width: 100px; margin-left: auto; margin-right: 0;"/> Total        \$3,609.07	10       
----------------------------------------------------------------------	---	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------

Thomas Brunetto, Atty. of Plaintiff. 20

This action was tried before Judge Nelson Y. Dungan, with a jury at the Essex Circuit Court on June 20, 1929.

The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the plaintiff Luca De Candia and against the defendant Harry Weisman for the sum of Three Thousand Dollars (\$3,000.00) as compensatory damages; in favor of the plaintiff Luca De Candia and against the defendant Harry Weisman for the sum of Five Hundred Dollars (\$500.00) as exemplary damages and One Hundred Nine Dollars and seven cents Costs of Suit. 30

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Three Thousand Five Hundred Dollars (\$3,500.00) damages and One Hundred Nine Dollars and seven cents 40

*Judgment*

costs making in the whole the sum of Three Thousand Six Hundred Nine Dollars and seven cents.

Judgment entered and signed June 20, 1929.

10 JOHN H. SCOTT,  
Clerk.

Recorded June 20, 1929.

Book 108 Circuit Court Judgments, page 106.

Order Consenting that Judgment be reduced to Two Thousand Three Hundred and Fifty Dollars.

NELSON Y. DUNGAN,  
Judge.

20 Filed and entered June 28, 1929.  
John H. Scott,  
Clerk.

State of New Jersey,  
County of Essex. ss:

I, John H. Scott, Clerk of the County of Essex in the State of New Jersey.

30 Do HEREBY CERTIFY That the foregoing is a true and correct copy of the record of Judgment in the Case of Luca De Candia, Plaintiff v. Harry Weisman, Defendant recorded in Book 108 Circuit Court Judgments, page 106 and the same is taken from and compared with Essex County Circuit Court Judgment Record Book 108 page 106 and as the same now remains on the files of said Office.

40 In Testimony Whereof, I have hereunto set my hand and affixed the official (Seal) seal of said County at Newark, N. J., this 29th day of July A. D., 1929.

JOHN H. SCOTT,  
Clerk.

## RULE TO SHOW CAUSE.

## ESSEX COUNTY CIRCUIT COURT

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 LUCA DE CANDIA,

Plaintiff,

vs.

HARRY WEISMAN,

Defendant.

 } Action at Law. 10
 

---

A verdict having been rendered in the above said cause against the said defendant and in favor of the said plaintiff, on the 20th day of June, 1929, and application being made to me within due time, 20

It is hereby ORDERED, this 21st day of June, 1929, that the said plaintiff show cause before me at the Hall of Records Building in the City of Newark, New Jersey, on the 27th day of June, 1929, at 9:30 o'clock in the morning thereof, Day-light Saving Time, why the said verdict so rendered in favor of the said plaintiff, should not be set aside on the grounds that said verdict is against the weight of the evidence and is excessive, hereby reserving to said defendant the benefit of all and every exception taken during the trial, to the reception and rejection of evidence, as well also, to the Court's refusal to direct a verdict in favor of the said defendant and to those portions of the Court's charge to which exceptions were duly taken and noted. And it is further ORDERED that the said plaintiff be and he hereby is restrained and enjoined from taking 30 40

*Order*

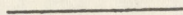
any further steps in the cause until the further Order of the Court.

NELSON Y. DUNGAN,  
Circuit Court Judge.

10 On motion of:  
Benjamin M. Weinberg,  
Attorney for Defendant.

True Copy.  
John H. Scott,  
Essex County Clerk,  
Per. Smith.

20



**ORDER.**

ESSEX COUNTY CIRCUIT COURT

LUCA DE CANDIA,

Plaintiff,

vs.

30 HARRY WEISMAN,

Defendant.

Action at Law.

40 A Rule to Show Cause having heretofore been issued, to wit, on June 21, 1929, why the verdict rendered in favor of the above named plaintiff and against the above named defendant, should not be set aside on the grounds that said verdict was against the weight of the evidence and was

*Order*

excessive, in which Rule to Show Cause, the said defendant reserved to himself the benefit of all and every exception taken during the trial to the reception and rejection of evidence, as well also, to the Court's refusal to direct a verdict in favor of said defendant, and to those portions of the Court's charge to which exceptions were duly taken and noted; 10

And, argument upon said Rule to Show Cause having been heard before me the 27th day of June, 1929, by Benjamin M. Weinberg, Esquire, on behalf of the defendant, for the Rule, and Thomas Brunetto, Esquire, on behalf of the plaintiff, against the Rule, and upon good cause being shown, 20

It is hereby ORDERED this 27th day of June, 1929, that unless the plaintiff consents, within ten days from the date hereof, to a reduction in the amount of the compensatory damages awarded, from the sum of \$3,000 to the sum of \$1850, exclusive of the sum of \$500 awarded to him as punitive damages, the Rule to Show Cause will be made absolute. Should however, the said plaintiff consent to accept the reduction in the verdict rendered, as hereinabove set forth, and the defendant be dissatisfied therewith, the consent by the said plaintiff to accept said reduced amount instead of having a new trial granted, shall not be a bar to, nor prevent the said defendant from prosecuting an appeal in the cause upon the grounds specially reserved in the Rule to Show Cause heretofore issued, as aforesaid, none of which grounds have been argued before me by 30 40

*Order Consenting that Judgment be Reduced*

the said defendant on the Rule to Show Cause heretofore granted by me, as aforesaid.

NELSON Y. DUNGAN,  
Circuit Court Judge.

On motion of:  
10 Benjamin M. Weinberg,  
Attorney for Defendant.

---

**ORDER CONSENTING THAT JUDGMENT BE  
REDUCED.**

ESSEX COUNTY CIRCUIT COURT

20

LUCA DE CANDIA,

Plaintiff,

vs.

HARRY WEISMAN,

Defendant.

On Applica-  
tion for New  
Trial

Application being made to this Court by the  
30 defendant for a rule to show cause why the ver-  
dict in the above entitled cause should not be set  
aside as being against the weight of evidence and  
the damages being excessive, said rule being re-  
turnable on the 27th day of June, 1929, and after  
the court having heard the argument of Benja-  
min Weinberg, Esq. on behalf of the defendant  
and Thomas Brunetto, Esq. attorney of the plain-  
tiff, against the said rule and after the court hav-  
40 ing heard the argument of the attorneys of the

*Order Consenting that Judgment be Reduced*

respective parties, a rule was entered, that if the plaintiff would consent within ten days from the 27th day of June, 1929, to a reduction in the amount of compensatory damages awarded from the sum of \$3000 to \$1850 exclusive of the sum of \$500 awarded to him as punitive damages, the rule to show cause would be made absolute and that if the plaintiff consented to accept the reduction in the verdict rendered, then the rule to show cause would be set aside; the said defendant, however, shall not be barred nor prevented from prosecuting an appeal of said judgment upon the grounds especially reserved in said rule to show cause, and the plaintiff, by his attorney, Thomas Brunetto, having consented that the part of said verdict relating to compensatory damages be reduced to \$1850 as provided in said order entered on the 27th day of June, 1929, it is on this 28th day of June, 1929,

ORDERED, that the Rule to Show Cause, entered on June 21st, 1929, and returnable on June 27th, 1929, why a new trial should not be granted, is hereby dismissed and made null and void, and that the judgment for the plaintiff be entered in the sum of \$2350, reserving to the defendant, however, the right to appeal upon the grounds specially reserved in said rule to show cause.

Let the above rule be entered on the minutes.

NELSON Y. DUNGAN,  
Judge of the Essex County  
Circuit Court.

On Motion of  
Thomas Brunetto,  
Attorney of Plaintiff.

## NOTICE OF APPEAL.

## ESSEX COUNTY CIRCUIT COURT

10	<table border="0" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;">           LUCA DE CANDIA,             vs.             HARRY WEISMAN,         </td> <td style="width: 50%; vertical-align: top; padding-left: 20px;">           Plaintiff,               Defendant.         </td> </tr> </table>	LUCA DE CANDIA,  vs.  HARRY WEISMAN,	Plaintiff,    Defendant.	}	Action at Law.
LUCA DE CANDIA,  vs.  HARRY WEISMAN,	Plaintiff,    Defendant.				

To:

Thomas Brunetto, Esq.,  
Attorney of Plaintiff.

20 SIR:

PLEASE TAKE NOTICE that the defendant herein appeals from the entire judgment of the Essex County Circuit Court entered against him in favor of the above named plaintiff, Luca De Candia, to the New Jersey Court of Errors and Appeals.

BENJAMIN M. WEINBERG,  
Attorney of Defendant.

**GROUNDS OF APPEAL.**

NEW JERSEY COURT OF ERRORS AND AP-  
PEALS

<p style="margin: 0;">LUCA DE CANDIA,  <div style="text-align: right; padding-right: 20px;">Plaintiff-Appellee,</div> <div style="text-align: center; padding: 5px 0 5px 20px;">vs.</div> HARRY WEISMAN,  <div style="text-align: right; padding-right: 20px;">Defendant-Appellant.</div> </p>	}	<p>On Appeal from Essex County Cir- cuit Court</p> <p>Action at Law.</p>	10
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	--------------------------------------------------------------------------------------	----

<p>To:  Thomas Brunetto, Esq.,  Attorney of Plaintiff-Appellee.</p>	20
-----------------------------------------------------------------------------	----

SIR:

PLEASE TAKE NOTICE that the defendant-appellant, as and for his grounds of appeal from the judgment entered against him in the above cause, hereby specifies and assigns the following:

(1) Because the Trial Court refused to strike out that portion of the testimony of the plaintiff Luca DeCandia wherein said plaintiff, in referring to the original giving of the check for the merchandise purchased by him from the defendant, said

30

“He says (meaning defendant), ‘Mr. De Candia, you got check book. Give me check. I hold it for you for a couple of days.’”

although defendant’s motion to so strike out was  
timely.

40

*Grounds of Appeal*

(2). Because the Trial Court erred in overruling defendant's objection to an answer given by the witness Thomas Brunetto while he was testifying, which answer was to the following question:

10           Question: "Among the four of you?  
               Answer: Yes. The conversation related whether we could go on with the hearing that morning or not. Mr. Silverman, in the presence of Mr. Weisman, stated that (answer interrupted and after argument, witness continued) his client was willing to drop the criminal proceeding."

20 and the further objection to the question as pursued by plaintiff's attorney, Mr. Adams, wherein he was permitted to say, over the objection of defendant's attorney,

              "That his client was willing to drop the criminal proceeding, etc."

which related to some arrangement regarding the giving of a mortgage to the defendant.

30           (3). Because the Trial Court erred in overruling defendant's objection to the offering in evidence of the record in the case of *Meyer H. Kitzman v. Luca De Candia*, which judgment was entered on July 23, 1927.

(4). Because the Trial Court erred in overruling defendant's objection to the following question:

40           Question: "Did you say that there was nothing said at that time in regard to a mortgage to be given by Mrs. De Candia?"

*Grounds of Appeal*

(5). Because the Trial Court overruled defendant's objection to the question asked by Plaintiff's attorney of the defendant's witness, Jacob W. Silverman, as follows:

Question: "Your advice to your client at that time was that, although no consideration at the time the check was made, the maker would still be criminally liable?" 10

(6). Because the Trial Court, over the objection of defendant's counsel, asked the said witness, Jacob W. Silverman the following question:

Question: "Do you know of any case in New Jersey that holds that?" 20

(7). Because the Trial Court erred in refusing to direct a verdict in favor of the defendant when duly moved, so to do.

(8). Because the Trial Court erroneously charged the jury as follows:

"Now, if, as I have read to you in the case decided by the Chief Justice, it was the agreement between the plaintiff and the defendant that this check for \$11.50 was not to be immediately used, then this statute under which these criminal proceedings were brought, does not apply and this defendant had no right to institute these criminal proceedings against the plaintiff. If that be the situation, then the defendant had no reasonable and probable cause for instituting the criminal proceedings so far as that check of \$11.50 is concerned." 30 40

*Grounds of Appeal*

(9). Because the Trial Court erroneously charged the Jury as follows:

10           “Then malice must be shown. Now, the  
malice necessary to be shown in a case of  
malicious prosecution is not necessarily  
spite and ill will of the defendant against  
the plaintiff, but malice means simply that  
the defendant intentionally did this wrong-  
ful act, if it was wrongful, against the  
plaintiff here. A wrongful act intention-  
ally and willfully done constitutes legal  
malice, which is all that is necessary to es-  
20           tablish malice in a case of malicious prose-  
cution, and that kind of malice is presumed  
from want of reasonable and probable  
cause.”

BENJAMIN M. WEINBERG,  
Attorney of Defendant-Appellant.

## TESTIMONY.

## ESSEX COUNTY CIRCUIT COURT

Wednesday, June 19, 1929.

LUCA DeCANDIA, <div style="text-align: right; padding-right: 20px;">Plaintiff,</div>	}	10
vs.		Action at Law
HARRY WEISMAN, <div style="text-align: right; padding-right: 20px;">Defendant.</div>		

Before: HON. NELSON Y. DUGAN, J., and a Jury.

20

For the plaintiff appears Thomas Brunetto.

For the defendant appears Benjamin M. Weinberg.

A jury is called and sworn.

(Mr. Brunetto opens the case in behalf of the plaintiff.)

(Mr. Weinberg opens the case in behalf of the defendant.) 30

WILLIAM G. O. CROWTHER, sworn in behalf of the plaintiff.

Direct-examination by Mr. Brunetto:

Q. You are connected with the County Clerk's office of Essex County? A. Yes, one of the court clerks.

40

*William G. O. Crowther—Direct*

Q. Have you the original complaint sworn to by Harry Weisman on or about December 6, 1926, before E. R. Noble against Luca DeCandia? A. We have not the complaint because that is in the custody of the Grand Jury.

10

Mr. Brunetto: I have it here now. I have subpoenaed also the clerk of the Grand Jury.

Q. Now, have you the record of the case of the State vs. Luca DeCandia wherein Harry Weisman was the complainant? A. I have it.

Q. Will you tell us whether an indictment was presented in that case by the Essex County Grand Jury. A. It was.

20

Q. If so, when? A. On January 22, 1927.

Q. Have you the original indictment with you? A. I have.

Mr. Brunetto: I offer that in evidence.

The Court: It will be received but not marked.

Mr. Brunetto: I have certified copies of the indictment, the complaint, and what took place if that is agreeable to let the certified copies go in.

30

The Court: They may have been put in in the first place.

Q. Mr. Crowther, does your record show when this indictment was presented by the Grand Jury? A. January 22, 1927.

Q. Do you know whether the defendant was notified to plead or whether he ever appeared to plead? A. He did plead.

40

*William G. O. Crowther—Direct*

Q. When was that? A. January 27, 1927.

Q. Will you tell us what happened on that day? A. He pleaded not guilty to the indictment.

Q. Do you know whether the defendant was released on that day, or does your record show that, or what happened? A. Not on that same day. 10

Q. When was he released? A. January 28, 1927.

Q. What does your record show whether he gave bail, or what, on January 28th? A. He was paroled in care of Thomas Brunetto.

Q. That was myself. Did he eventually give bail, do you know? A. On the 31st of January, 1927.

Q. What was the bail? A. \$500. 20

Q. Isn't that a thousand dollars, Mr. Crowther? A. The record shows \$500. In reference to that amount may I suggest something? On the indictment it is endorsed a thousand and in the record it is \$500.

Q. Who was the bondsman, do you know? A. National Surety.

Q. Was the case set down for trial? A. It was.

Q. What does your record show when it was set down the first time and what happened? A. February 9th was the first trial. That is 1927. Postponed until the 10th, and then until the 28th of February. 30

Q. What happened on the 28th day of February, 1927? A. He was tried.

Q. What was the result of the trial? A. A verdict of not guilty by a jury.

*William G. O. Crowther—Cross*  
*William R. Thomas—Direct*

CROSS-EXAMINATION by Mr. Weinberg:

Q. I just want you to make clear what indictment was tried. Was there more than one? A. There was one indictment, No. 426, December 10 Term, 1927. That was presented by the Grand Jury on January 22, 1927.

Q. There was only one indictment, then? A. That is all.

Q. Charging the one offense? A. One offense.

Q. The eleven dollar one? A. \$11.50.

Mr. Brunetto: Your Honor, I now offer in evidence certified copy of the complaint sworn to by Harry Weisman, dated December 6, 1926, a copy of the indictment against Luca DeCandia, presented by the Essex County Grand Jury at the December Term, 1926, and known as No. 426, and a copy of the docket showing the status of the way this case proceeded to final trial.

(The same are received in evidence and marked Exhibit P-1.)

30 (Argument.)

---

WILLIAM R. THOMAS, sworn in behalf of the plaintiff.

Direct-examination by Mr. Brunetto:

Q. Mr. Thomas, what is your business? A. I am a detective attached to the police headquarters in Newark, New Jersey.

40

*William R. Thomas—Direct*

Q. Were you employed in the same business in December of 1926? A. I was.

Q. Did you have anything to do with the service of the warrant on Luca DeCandia? A. I did.

Q. And the complaint sworn to by Harry Weisman charging DeCandia with uttering two bad checks, one for \$11.50 and another one for \$656.79? A. I did. 10

Q. Have you got the warrant with you? A. I have.

Q. Will you produce it, please?

Mr. Brunetto: I now offer in evidence the warrant issued on the complaint sworn to by Harry Weisman on December 6, 1926. 20

The Court: It will be admitted. Have you a copy?

Mr. Brunetto: I have made a copy of it, if that is agreeable to introduce in evidence.

(The same is received in evidence and marked Exhibit P-2.)

Q. Did you serve this warrant on the defendant Luca DeCandia? A. I did. 30

Q. When did you arrest him? A. I arrested Mr. DeCandia on the 7th day of December, 1926.

Q. Where? A. At Montclair, New Jersey, at his place of business, 45 Watchung Avenue Plaza.

Q. After you served the warrant on him, what did you do with Mr. DeCandia? A. I brought him down to police headquarters in Newark, New Jersey. 40

*William R. Thomas—Direct*

Q. What happened when you brought him down to police headquarters? A. I brought him to police headquarters and he requested that he be allowed to communicate with counsel, which I let him do, and he communicated with his counsel and  
 10 later on that day, later in the evening, rather, he was paroled by Judge Howe of the Third Criminal Court to appear in the Third Criminal Court on the 8th day of December, 1926.

Q. Do you know who was his counsel at the time, Mr. Thomas? A. Mr. Brunetto. That is yourself.

Q. Now, were you in court on the 8th day of December, 1926? A. I was.

20 Q. Will you tell us what happened on that day?

(Objected to.)

(Question withdrawn.)

Q. Mr. Thomas, do you know whether there was a hearing in the case of the State vs. Luca DeCandia on December 8th in the Third Criminal Court of Newark? A. There was a hearing.

Q. On the 8th day of December? A. There was.

30 Q. Was there any final disposition made of that case on December 8, 1926? A. There was not.

Q. What happened? A. The case was adjourned for one week until December 15, 1926.

Q. What happened to the defendant on that day, on December 8th? A. On December 8th his parole was continued in his counsel's custody until December 15th.

40 Q. Were you in the Third Criminal Court on December 15, 1926? A. I was.

*Luca DeCandia—Direct*

Q. Do you know whether there was a hearing in the case of the State vs. Luca DeCandia wherein Harry Weisman was the complaining witness?

A. There was.

Q. What disposition was made of the case? A. There was a hearing before Judge Howe and Judge Howe held the defendant in bond under bail for the Grand Jury. 10

Cross-examination waived.

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LUCA DECANDIA, the plaintiff, sworn in his own behalf. 20

Direct-examination by Mr. Brunetto:

Q. Mr. DeCandia, do you know Mr. Harry Weisman? A. Yes, sir.

Q. How long have you known him? A. Oh, five or six years.

Q. Did you ever do any business with him? A. Yes, sir.

Q. When did you start to do business? A. Well, I buy stuff from him five or six years, before pay cash, but five or six months open an account charge. 30

Q. Where was the place of business of Mr. Weisman? A. In Newark, on Commerce Street.

Q. Did you have any business dealings with Mr. Weisman on the 18th of November, 1926? A. Yes, sir.

Q. Did you buy anything from him that day? A. Yes, I buy \$30 stuff first and I pay cash, and 40

*Luca DeCandia—Direct*

after I pay I remember I needed two or three more packages. I asked Mr. Weisman wants to charge a couple of days. Mr. Weisman tells me, "Sorry, Mr. DeCandia, you can't make more bigger your bill. You pay cash now." I says, 10 "Yes, Mr. Weisman, please. I no got enough money then." He says, "Mr. DeCandia, you got check book. Give me check. I hold it for you for a couple of days."

Mr. Weinberg: If there is a statement which is going to contradict the face of the check, I am going to object to it on the ground it is varying the face of the written instrument. 20

The Court: Assuming this is a motion to strike out, it will be denied.

Mr. Weinberg: It is going so fast I can't get it all.

The Court: I am assuming it was a motion to strike out.

Q. All right, Mr. DeCandia. You said you wanted to buy some other merchandise. A. Yes. After I buy I pay cash. I don't remember, \$30 30 or \$35 stuff I buy then, and after I remember I needed a couple of more packages. I asked Mr. Weisman, "See, you want to charge me a couple of days?" And Mr. Weisman says, "I am sorry, Mr. DeCandia, I can't charge you any more. You got bigger bill to make. Give me check. I hold for a couple of days." I told him, "Mr. Weisman, please, I give check. You hold couple of days for me." And Mr. Weisman told me, 40 "Yes, all right, Mr. DeCandia, I hold for you."

*Luca DeCandia—Direct*

By the Court:

Q. What? A. Mr. Weisman told me, "All right. I hold for a couple of days."

By Mr. Brunetto:

Q. How much was that check for? A. \$11.50. 10

Q. Did you get the merchandise from Mr. Weisman? A. Yes, sir; in two or three packages.

Q. And you gave him the check? A. I give him check; yes, sir.

Q. Whom did you hear from the next time about the \$11.50 check? Did you have any other conversation with Mr. Weisman at this time? A. No.

Q. Did you have any conversation with him about the old bill? A. Oh, every morning I ask him for the old bill. Every morning I am going out, he told me, "Mr. DeCandia, what about the other bill?" I tell him, "Please, I got a house in Montclair. Just I sold the house I pay you that." 20

The Court: I do not know what he says at all. If he talks at that rate of speed, why, I cannot get it.

Mr. Brunetto: Your Honor, with the Court's permission, may I ask that the answer be stricken out and start all over again? 30

The Court: I think you had better do that and you had better ask him questions. When you tell a man who speaks as he does to tell his story, why, that is the way he goes. 40

*Luca DeCandia—Direct*

Q. Now, Mr. DeCandia, did Mr. Weisman say anything to you on November 18th about you paying the bill for \$656? A. Yes, sir.

Q. Did he ask you for the money? A. Yes.

10 Q. What did you tell him? Talk loud and slowly. A. I told him, "Mr. Weisman, please wait a little while, one month or two months. I got a house in Montclair for sale. When I sell the house I give the whole amount."

Q. What did Mr. Weisman say? A. Mr. Weisman tell me, "Mr. DeCandia, you no want to give check for me. Give me check. I hold check." I told Mr. Weisman, "I give this to you." I give him check for \$50 a month, see. So when I  
20 sell the house I give him whole amount; I finish up everything.

Q. What did Mr. Weisman say when you told him that? A. Mr. Weisman told me all right, come in the office; I make a check \$50 a month.

Q. Did you go in the office? A. Yes, sir.

Q. Did you make out the checks? A. Mr. Weisman just take off—I give him check book, so I can't write myself. I give the check book to  
30 Mr. Weisman and take all the checks and he tell me, "All right, Mr. DeCandia, you sign your name. I fill out."

Q. Did Mr. Weisman fill out the checks in front of you? A. Yes, sir. Mr. Weisman—just sign my name, and Mr. Weisman tell me, "All right, Mr. DeCandia, I fill it up for you."

Q. Did Mr. Weisman fill the checks out in front of you? A. No, no fill out in front of me. So  
40 I go outside; I talk to my son-in-law, and my son-in-law told me, "Pop, what do you do? Why you sign them checks? You sign your life." I tell

*Luca DeCandia—Direct*

my son-in-law, "No, no big bill Mr. Weisman. I make check \$50 a month.

Q. Did you hear from anybody in regard to this \$11 check after the 18th of November? A. Yes.

Q. Whom did you hear from? A. The bank. 10

Q. Now, when you heard from the bank, what did you do? A. When I see the bank call up eleven and a half check come back, I told what is the matter, Mr. Weisman crazy? Told me to hold the check for a couple of days and put in the bank. I call up right away Mr. Weisman in the business, and Mr. Weisman tell me, "Mr. DeCandia, all right, I fix." I told Mr. Weisman, "Please hold this check tomorrow morning. I 20 pay cash."

Mr. Weinberg: Is this a conversation with the bank now?

The Court: Not now, but he has been talking about a lot of conversation with the bank, bank officials, I suppose.

Mr. Weinberg: Unless the witness looks right at you in this court room you can't hear him at all.

The Court: This now is, I take it, that 30 Mr. Weisman, he says, as I understand him, he asked Mr. Weisman to hold the check for a couple of days.

Mr. Weinberg: The question directed to him was what he did after he heard the check wasn't paid. Then he said he went to the bank.

The Court: I do not know what he said. I can't tell you. 40

*Luca DeCandia—Direct*

By Mr. Brunetto:

Q. Mr. DeCandia, after you signed these checks in Mr. Weisman's office on Commerce Street, did you hear from anybody in regard to these checks, and if so, whom did you hear from? A. Yes, the  
10 bank.

Q. The bank? A. Yes, sir.

Q. When did you hear from the bank? A. The bank call up after a couple of days, the bank call up.

Q. Called you up? A. Yes, sir.

Q. And the bank told you something? A. Yes, sir.

Q. Then after the bank told you something,  
20 what did you do? A. I call Mr. Weisman's business.

Q. Did you go to Mr. Weisman's place of business or did you talk to him on the telephone?

A. No, I call him up, Mr. Weisman, I call him up.

Q. Now, did you talk to him? A. Yes, sir. No talk. I call him up.

Mr. Weinberg: When was that?

Q. When did you talk to Mr. Weisman on the  
30 telephone? A. When the bank told me the check, don't have enough money in the bank.

Q. How many days after the 18th? A. A couple of days.

Q. How did you know it was Mr. Weisman that you were talking to on the telephone? A. Oh, that is six or seven years business I know Mr. Weisman's voice right away.

40 The Court: I suggest that you interrupt this witness and call the clerk of the Grand Jury.

*George T. Callahan—Direct*

Mr. Brunetto: That is what I was going to say, your Honor, if it is agreeable to the other side.

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10

GEORGE T. CALLAHAN, sworn in behalf of the plaintiff.

Direct-examination by Mr. Brunetto:

Q. Mr. Callahan, you are assistant clerk of the Grand Jury of the County of Essex? A. I am.

Q. You held that position on December 6, 1926? A. I did.

20

Q. And you have since? A. I have.

Q. Have you the record in the case of the State vs. Luca DeCandia on the complaint sworn to by Harry Weisman? I show you a certified copy of the complaint marked Exhibit P-1. A. I have the complaint.

Q. Was that complaint ever presented to the Grand Jury, Mr. Callahan, that is, presented to the Grand Jury of Essex County? A. It was.

30

Q. Do you know what action was taken on it, whether there was an indictment or not?

Mr. Weinberg: One minute. He does not know what action was taken. He may tell what the report of the Grand Jury was if he made a record of it.

The Court: I think the record appears in the clerk's report.

40

*George T. Callahan—Cross, Re-direct*  
*Luca DeCandia—Direct*

CROSS-EXAMINATION by Mr. Weinberg:

Q. As I understand it, there is simply no record of another indictment, is that true, Mr. Callahan? A. Yes, sir.

- 10 Q. You simply have a record of one indictment?  
 A. One indictment.

RE-DIRECT EXAMINATION by Mr. Brunetto:

Q. Do you know whether there was another indictment? A. This is the only indictment.

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- 20 LUCA DECANDIA, recalled.

Direct-examination (continued) by Mr. Brunetto:

Q. Now, what did you say to Mr. Weisman?  
 A. I told Mr. Weisman I gave check the other day for \$11.50. "You promised to keep couple of days. Now the bank calls up and you put the check in."

- 30 Q. What did Mr. Weisman say? A. Mr. Weisman, "Well, Mr. DeCandia, the girl made a mistake. When I come tomorrow I will tell you." "Mr. Weisman, please keep the check tomorrow, and give him cash \$11.50." He tell me, "All right."

Q. When did you have any talk or hear from Mr. Weisman after this? A. After the next day calling in business to pay the check and buy more stuff, too.

- 40 Q. What check was that? A. The \$11.50.

*Luca DeCandia—Direct*

Q. Did you see Mr. Weisman there? A. Yes, sir.

Q. What did Mr. Weisman say to you? A. When I go in the next day I told him, "Mr. Weisman." I going in buy some stuff the next morning. I say, "Mr. Weisman," I told him, "Mr. Weisman, what kind of business man are you? You promised to keep the check for a couple of days; you put it in bank, so now come back. I told you I not got enough money in the bank." And I want to give him \$11.50 on the check book, and Mr. Weisman told me, "Mr. DeCandia, you can't do anything no more for me. I give it in the hands of the lawyer. Go to the lawyer. Can't take no more for me." Mr. Weisman refused the \$11.50; no want to give me check back. 10 20

Q. You say you wanted to give him the \$11.50. Did you offer it to Mr. Weisman? A. Yes, I wanted to give to Mr. Weisman.

Q. Did you have any other talk with Mr. Weisman after that, or when did you see Mr. Weisman next? A. After?

Q. Yes. A. After I going home. I buy stuff; I pay cash; and I going home, and I told him, "Mr. Weisman, I can't pay my bill all one time. I got a house in Montclair. Please wait a little while. When I sell the house I pay my bill." 30

Q. What did Mr. Weisman say? A. Mr. Weisman told me, "You got a house in Montclair? Good house?" "Yes, sure; it is good house." He says, "We will go out this afternoon, I come to see the house."

Q. Did you see him that afternoon? A. Yes, sir.

*Luca DeCandia—Direct*

Q. Where? A. Come in my store, Mr. Weisman and the lawyer.

Q. Did you go to your house? A. Yes, took the car, Mr. Weisman's car. I got to show you the house. I show him house and so on and ask  
 10 him how much mortgage you got and everything. He told me, "Mr. DeCandia, better you give me mortgage on the house. I don't want to buy the house; no got enough money. It is better give me mortgage on the house." I told him, "Mr. Weisman, I give you mortgage on the house." So after I talk with my wife. The house in my wife's name. I talk with my wife and my wife told me, "Well, I can't do nothing. I want to  
 20 talk to my lawyer first. I want to talk to Mr. Brunetto."

Q. Did your wife talk to Mr. Weisman? A. No, sir.

Q. Does your wife talk English? A. My wife can't talk English.

Q. What did Mr. Weisman say when you told him that? A. I going outside, I told him, "Mr. Weisman, I can't do nothing today. My wife want speak to the lawyer first, to my lawyer."  
 30 Another man come together Mr. Weisman, tell me, "I am the lawyer. Why do you want to go to the lawyer? I am the lawyer." "Yes, you are Mr. Weisman's lawyer. I want to talk to my lawyer." Mr. Weisman tell me, "Mr. DeCandia, you no want to sign the mortgage?" I tell him, "No, no can give mortgage of the house. I want to talk to the lawyer first." And Mr. Weisman tell me, "All right, you no give the mortgage I  
 40 send you to jail." I ask him, "Why you want

*Luca DeCandia—Direct*

to send me to jail?" He tell me, "I got check in the hands." Right away get mad, put him in the car, and go away the both.

Q. When did you hear from Mr. Weisman, or when did you hear about these checks the next time? A. After one day or two days, I don't remember sure, maybe a couple of days, the bank call me up again and say, "Mr. DeCandia, I got a check for \$600 and fifty," I don't remember which amount—"You want cover the check?" I ask him, "No check for \$600. I no make check for nobody for \$600." I ask the name who belong the check, and they told me Mr. Weisman's name. I have big surprise. Next day I go and I seen Mr. Weisman in the store, and I told him, "Mr. Weisman, why I give a check for you, lot of checks for \$50 a month, why you come in and show all one check one time?" He says, "Well, I can't help you, Mr. DeCandia, you go to my lawyer. The lawyer fix for you." 10 20

Q. Did you see Mr. Weisman after that? A. After see, I no buy no more stuff from Mr. Weisman. The lawyer sent a letter from me, a registered letter, sent me a letter. I go to talk to Mr. Weisman, "Why do you want to give this to lawyer? You know I got a house in Passaic. When I sell the house I pay the bill." 30

Q. What did Mr. Weisman say? A. Mr. Weisman tell me, "I can't do nothing. Go to the lawyer. Talk to the lawyer." I tell him, "Mr. Weisman, I can't go lawyer. What is the use of going to the lawyer? No got money."

Q. What did Mr. Weisman say? A. He says, "I can't help. I don't care." 40

*Luca DeCandia—Direct*

Q. Then what happened? A. After two or three days I see two detectives come in my store, one Newark detective and one Montclair.

Q. Who was the detective? Did you know him? Was that the gentleman who was on the witness stand this morning? A. Yes, sir.

Q. Mr. Thomas? A. Mr. Thomas was one and one from Montclair.

Q. And he arrested you? A. Came in the store and asked who is Mr. DeCandia.

The Court: One minute. Answer the question.

Q. What did he do to you? Did he arrest you? A. Yes.

Q. Where did he take you? A. Bring me down Newark in the head court Newark.

Q. Were you in jail that night? A. No.

Q. Did you go to court? A. Next day.

Q. What happened the next day?

By the Court:

Q. What did you do that night? Where did you go? Did you go back home after you had been brought to court? A. I don't remember.

Q. Where did you stay that night? A. That night I give in the bail, making bail \$500. Mr. Brunetto take me home.

By Mr. Brunetto:

Q. Mr. DeCandia, the first time you were arrested did you stay in jail or did you go home? A. I don't remember sure. Go home the first time.

Q. Did you have a lawyer the first time you were arrested? A. Yes.

*Luca DeCandia—Direct*

- Q. Who was your lawyer? A. Mr. Brunetto.
- Q. That was myself? A. Yes.
- Q. You saw me that night at police headquarters? A. Yes, sir.
- Q. And I took you home? A. Yes, sir.
- Q. All right. Now, the next day you went to the police court with me? A. Yes, sir. 10
- Q. What happened on that day? Did you have the trial in the police court? A. If I have go bail \$500, bail go to the Grand Jury.
- Q. Was that the next day or the week after? A. No, the week after. That day transfer the case.
- Q. It was put off for one week? A. Yes.
- Q. Now, did you see Mr. Weisman? A. Yes. 20
- Q. And his lawyer on December 8th in the police court in Newark? A. Yes. Outside, I talk outside.
- Q. Did you have a talk with Mr. Weisman and his lawyer? A. Yes, sir.
- Q. What did you say to them and what did they say to you? A. Mr. Weisman—
- Q. That is, when I say Mr. Weisman and his lawyer, tell us who did the talking. A. Yes, sir. Mr. Weisman told me, "Well, why no sign the mortgage? You sign the mortgage on the house and I drop the case for you." 30
- Q. What did you say to him? A. I told him, "My wife don't want to sign. What can I do? My wife don't want to sign."
- Q. You went to court on December 15, 1926? A. Yes, sir.
- Q. And on that day you had a hearing and you had to give bond for \$500? A. Yes, sir. 40

*Luca DeCandia—Direct*

Q. And now, did you get any notice from the prosecutor's office in regard to this case and this complaint of Weisman? A. I got notice to come in court; yes, sir.

10 Q. When did you go to court the next time?  
A. February. I don't remember the date; in February.

Q. How long after you were in the police court up there? A. How long I stay?

Q. Yes. How long after you were in the police court did you get the notice to come down to the big court here in Newark? A. Yes, sir.

Q. When did you go to the big court? A. The big court on the 27th or 28th day of February.

20 Q. Are you sure it was February? Wasn't it January? A. Or January. I don't remember the date.

Q. On the 27th or 28th of January what happened? A. I go in the Grand Jury. The Grand Jury have a thousand dollar bail.

Q. What happened? Did you go home on January 27th? A. No, I stay, go in jail.

By the Court:

30 Q. How long did you stay in jail? A. I stay one day, the night and the next day.

By Mr. Brunetto:

Q. Then you were paroled in my custody on the 28th? A. Yes.

Q. And you gave bail? A. Yes, sir.

Q. On the 31st of January? A. Yes, sir.

Q. Who arranged for your bail? A. Mr. Rockbar and you.

40 Q. Who was your lawyer at that time? A. Mr. Brunetto.

*Luca DeCandia—Cross*

Q. Now, were you tried on this indictment?

A. Yes, sir.

Q. When were you tried? A. Tried after—

The Court: There is no question about that now, is there?

10

Mr. Brunetto: No question.

The Court: He was tried and acquitted. The record shows that. We have that.

Q. Now, Mr. DeCandia, did you pay your lawyer any money? A. I no pay cash. I have a store in Montclair, and the lawyer live in Montclair, buy stuff from me.

Q. Did you get a bill from me?

(Objected to.)

20

Q. How much did you pay me in regard to this criminal proceeding started by Mr. Weisman? A. The whole business, \$350.

CROSS-EXAMINATION by Mr. Weinberg:

Q. How did you pay that? A. Pay him when I have money to pay Mr. Brunetto.

Q. How did you pay it? In money or promises or checks? A. I pay \$120 or \$125 stuff, and after I sold the house in Montclair I gave the rest to Mr. Brunetto. When I sold the house I gave the rest to Mr. Brunetto.

30

Q. You gave your lawyer \$125 worth of stuff? A. Merchandise.

Q. Then your wife sold her house and you paid? A. Yes, when I sold the house.

Q. And it amounted to \$350? A. \$350.

Q. Did you ever get a receipt for it? A. Sure, give me a receipt.

40

*Luca DeCandia—Cross*

Q. You got no receipt? A. I don't know. It is a long time ago.

Q. Listen. I am asking you whether you got a receipt. A. I ain't got it, no.

Q. All right, then your answer is no. Now, 10 I am going to ask you a few questions and just please go a little bit slower, will you, because I got very little of what you said. We start with the day when you gave that check for \$11.50. You said you bought some merchandise that day for which you paid cash. A. Yes, sir.

Q. What did you buy? A. I don't know what I buy. I buy—

Q. Wait a minute, now, stop. When you give 20 an answer stop. You don't know what you bought? Right? A. Yes.

Q. Do you know what you bought for the \$11.50? A. I buy two or three packages. I buy three packages.

Q. You bought three packages, did you? A. Yes, three package.

Q. And that amounted to \$11.50? A. \$11.50; yes, sir.

Q. You don't remember what you bought for 30 the \$30, though, do you? A. I don't remember the \$30.

Q. As a matter of fact, you only bought \$11.50 worth of that stuff that you remember, isn't that so? A. I don't remember what I buy.

Q. You do remember the \$11.50 worth was three packages? A. I don't remember. Three or four. Just three packages.

Q. Well, you said so. Now, when you gave 40 the check for \$11.50, you took this merchandise away with you, didn't you? A. Yes.

*Luca DeCandia—Cross*

Q. And at that time how much did you owe Mr. Weisman's firm? A. \$655, \$656; I don't remember right.

Q. Before you bought anything on that date, which was November 18th, Mr. Weisman told you about that account, didn't he? A. Yes, sir. 10

Q. He told you you couldn't get anything more on credit? A. Yes.

Q. How did you come to give him a check for \$11.50 after he told you that? A. Mr. Weisman no told me nothing no more credit. I told him, Mr. Weisman—Mr. Weisman ask me for money, and I told him, "Mr. Weisman, I can't pay my bill one time. This is the best thing for you. I give a check for \$50 a month," and I give him 20 those checks when I sold the house. Maybe I sell my house tomorrow or next month; I give him whole amount.

Q. You told all that story the day you went in for the \$11 and the \$30 worth of stuff? A. Yes, the same day.

Q. After you told him this story, how did you come to give him a check for the exact amount of the stuff you bought? A. Mr. Weisman asked me for the check. I no want to give him check. 30

Q. He asked you to give him a check for the \$11.50 worth? A. Yes.

Q. Before he would give it to you? A. I asked first he won't charge me for two or three package, and Mr. Weisman told me, "Sorry, Mr. DeCandia, I can't charge no more. I got a big bill with you."

Q. Then what did you do? Did you offer him that check for \$11.50? A. Mr. Weisman told me, 40

*Luca DeCandia—Cross*

“Mr. DeCandia, I do this for you. Give me a check. I hold a couple of days for you.”

Q. What I want to find out is as to whether or not before you gave this check for \$11.50, Mr. DeCandia, did Mr. Weisman tell you that your  
10 account was higher than he wanted to allow? A. Yes, sir.

Q. Then do you remember picking out three packages of stuff? A. I bought some stuff.

Q. You remember you got three boxes or packages, don't you? A. Yes. I buy \$11.50.

Mr. Brunetto: Your Honor, I think this witness has attempted to answer that question of Mr. Weinberg's. He says he does  
20 not know whether he got two or three or four, but Mr. Weinberg insists he remembers three packages. In his testimony he says he doesn't remember what it was. He says he doesn't remember.

The Court: This is cross-examination.

Q. At any rate, you gave him this check for \$11.50 and went away with the fruit that you bought, didn't you? A. Yes.

30 Q. You never paid your check for \$11.50? A. I want to pay after a couple of days.

Q. Now, wait a minute. At the time you gave that check you didn't have eleven cents in the bank to your credit. A. Yes, I told Mr. Weisman, too, I think.

Q. As a matter of fact, you were overdrawn a few pennies in the bank? A. I think.

40 Q. Will you answer the question? I am looking for the answer to the question. At the time you gave the check for \$11.50 you did not have a

*Luca DeCandia—Cross*

penny in your bank, in the Montclair bank, did you? A. Yes, sir.

Q. "Yes, sir," or "No, sir"? A. Yes, sir; no have money.

Q. Yes, you didn't have any money? A. Yes.

Q. And when that check came into the bank two days later on the 22nd, you didn't have any money in the bank, did you? A. No. 10

Q. And on November 22nd, you gave the check for \$656, and you didn't have any money? A. No, sir.

Q. On November 22nd when the check came into the bank you didn't have any money, did you? A. Yes, sir.

Q. And when did you? 20

The Court: He says, "Yes, sir." I do know what he means by "Yes, sir."

The Witness: I have no money. Sure I no have money; I no make check for \$650 for Mr. Weisman. I no make \$650 check. I make \$50 a month.

Q. How many checks did you give him? A. I give him fourteen checks.

Q. You gave him fourteen checks? A. Yes, 30 sir.

Q. Out of whose check book? A. I sign fourteen checks for Mr. Weisman.

Q. Out of whose check book? Yours? A. My check book.

Q. Where is your check book to show that? A. I show you on the jury the other time when I have the case.

Q. I am not asking you what you showed the jury the other time. I was not in the case. A. I haven't got it now. 40

*Luca DeCandia—Cross*

Q. Where is your check book showing how many checks you gave? A. I haven't got the check book now.

Q. You haven't got it now? A. No, sir.

10 Q. I show you a few checks. I show you a check dated November 18, 1926, for \$11.50. You signed that check, didn't you? A. Yes, sir.

Q. Drawn on the First National Bank & Trust Company of Montclair? A. Yes, sir.

Q. Did you get a ticket on the same day showing what you got for \$11.50? A. Yes, sir. See, three package. I remember three package.

Q. Can you read that? Do you know what packages they were? A. No, I can't read.

20 Q. Well, what were they? Do you know? A. No.

Q. Were they lettuce and stuff like that? I can't read it myself. I do not wonder if you cannot. A. I can't read.

Q. I can't read it either so well. I show you another check dated November 20th on the same bank for \$656.79. Is that signed by you, too? A. See, please—

30 Q. No, no. You talked enough and I didn't understand it. Just keep to my questions. You signed that check. A. I signed this check. I want to say just one—

The Court: Wait one minute.

The Witness: Yes, Judge.

Mr. Weinberg: I ask that these be marked for identification.

(The papers referred to are marked Exhibit D-1 for identification and D-2 for identification.)

*Luca DeCandia—Cross*

Q. Now, the first check was filled in by whom? Who put the name of Weisman & Obshatkin and the amount in? A. Mr. Weisman; yes, sir.

Q. And who filled in the name of Weisman & Obshatkin and the amount on the big check? A. From that Mr. Weisman. 10

Q. Did he fill in the second one? A. The second one I don't know who filled. I give fourteen checks.

Q. Now, wait a minute. Who signed this check that you are referring to? A. Signed on the bottom? I sign.

Q. I do not mean that. You get me talking the same way you do. Who filled out this check? A. I don't know who filled it out. 20

Q. Was it in the office? A. I give him check in the morning, four or five o'clock in the morning.

Q. When did you sign the big check? A. In the office.

Q. What time was that? A. Four or five o'clock in the morning.

Q. Do you mean to tell us that when you gave this check for \$11.50 on November 18th, that you told Mr. Weisman you didn't have that much money and he should hold the check? A. Yes, sir. 30

Q. And after you told him that you didn't have \$11 worth he let you take the merchandise away, did he? A. Yes, sir.

Q. Did I understand you to say that your son-in-law was around when you signed this big check for \$656? A. Yes, my son-in-law—

*Luca DeCandia—Cross*

Q. You are going to answer me if you do not anybody else. Did you say that your son-in-law was around when you signed this check for \$656?

A. Yes, sir; my son-in-law see sign fourteen checks; no one.

10 Q. Now, will you stop it? Maybe I will ask you about sixteen more, I don't know, but was he around when you signed the checks? You say a lot of them were signed? A. Yes.

Q. And he said, "Pop, what are you doing that for? What are you giving the checks for?" A. "You sign your life? Why you give a lot of checks?"

Q. Did you ever give checks before in your  
20 life? A. Yes.

Q. You know you haven't yet signed your life away on all those checks. A. Shall I tell you my story?

Q. You know what a check is, don't you? A. What is it?

Q. You know what a check is? You gave a lot of them, didn't you? A. I gave fourteen. I no give check for \$600.

Q. I say, you have in your lifetime given a  
30 great many checks, haven't you? A. I didn't give checks in my life.

Q. You only gave this one in your life. Now, the fact is, Mr. DeCandia, you never made any attempt yourself to pay these checks, did you? A. What did you say? No catch?

Q. You didn't try to pay these checks to Mr. Weisman. A. I tried to pay check, and I wanted to pay \$11.50 first, and Mr. Weisman refused it.

40 Q. Did you ever make an offer to Mr. Weisman of \$11.50? A. Yes, sir.

*Luca DeCandia—Cross*

Q. When was that? A. I going down the store I buy stuff. I pay cash for my stuff. I want to pay the check \$11.50, too.

Q. You bought stuff after this trouble, after this check came back? A. Yes.

Q. Have you got any record of it? A. I pay 10 cash. I no got no record.

Q. You know you never bought a nickel's worth after this, don't you? A. Yes, I buy a lot of stuff.

Q. Have you got any of those tickets like I showed you just now? You always got a ticket when you bought something, didn't you? A. That is two years ago.

Q. Now, listen to me. Did you always get a 20 ticket when you bought something? A. When I pay cash, no give me ticket.

Q. When you pay by check you get a ticket? A. When I pay cash, just like this \$10; whole \$10 business; I give cash money.

Q. Haven't you got any book that you entered the purchases from Weisman & Obshatkin? A. I no got no books.

Q. You have got nothing to show us whether you got anything after you gave those checks, 30 have you? A. No.

Q. Isn't it true that the very first offer that came regarding that \$11.50 was from Mr. Brunetto after the complaint was made against you? It was made through your lawyer, wasn't it, Mr. Brunetto, \$11.50, after the complaint was made against you? A. Yes, sir.

Q. I don't want you to be mistaken and not understand me. A. I no understand what you 40 mean.

*Luca DeCandia—Cross*

- Q. I didn't think you would say that, so I will put it again. Don't you know that the offer of \$11.50 was made through your lawyer, Mr. Brunetto, after Mr. Weisman made his complaint against you? A. I no understand it.
- 10 Q. You did go to Mr. Brunetto with some money? You did give him \$11.50, didn't you? A. After give Mr. Weisman.
- Q. You did. A. Yes.
- Q. That is what I say. You gave Mr. Brunetto \$11.50 at least? A. Yes, sir.
- Q. And told him to offer it to Mr. Weisman? A. To Mr. Weisman, yes.
- Q. That was after the complaint was made  
20 against you, wasn't it? A. Yes, sir.
- Q. You never did offer to pay any part of that \$656 check, did you? A. I told him when I sell the house I give whole amount.
- Q. But you never came to them and said, "Here is \$10 or \$20," or anything else like that, did you? A. I make a check for \$50 a month.
- Q. What? A. I give check for \$50 a month.
- Q. You gave it to him? A. I gave fourteen checks; yes, sir.
- 30 Q. You gave it to him? A. I gave fourteen checks; yes, sir.
- Q. You never paid any of them, did you? A. No put them in the bank.
- Q. Did you pay any of those checks? A. No, sir.
- Q. You never came to him with any money and said to him, "Here, I want to take up a check?" A. Started to put in.
- 40 Q. And you have never paid any part of that money up to this date, have you? A. No, sir.

*Luca DeCandia—Cross*

Q. There was a judgment went against you for this amount, wasn't there? A. Yes, sir.

Q. Now, you said in answer to Mr. Brunetto's question that you called him up when you found out that the check wasn't good, when the bank told you the check wasn't good? A. Yes, sir. 10

Q. And you called Mr. Weisman on the telephone? A. Yes, sir.

Q. Did you need the bank to tell you that the check wasn't good? Didn't you know it wasn't good? A. I know. I have a surprise when Mr. Weisman put in the check.

Q. What surprised you when you didn't have any money in the bank? A. I told him, "Mr. Weisman, hold the check. I bring the cash for 20 you."

Q. I am not talking about that. You covered that a long while ago. You said you received notice from the bank that the check wasn't paid. A. Yes.

Q. I am now speaking of the first check, and you went up there and the bank told you there was no money in the bank, didn't they? A. I going myself on the bank?

Q. Yes. You got notice from the bank. A. 30 Yes, sir.

Q. And you went up there. A. I didn't go on the bank.

Q. You didn't go to see the bank at all? A. No, sir. Go to see Mr. Weisman, no the bank.

Q. I thought you went to see the bank, you told me. A. No, sir.

Q. And you went to see him, or you called him up. Which? A. I called him up. 40

*Luca DeCandia—Re-direct*

Q. You never spoke to him over the telephone, did you? A. Oh, sure. I told him, "Please hold the check. Tomorrow morning I will bring cash for you."

Q. You never talked to him after that, did you?  
10 A. What?

Q. After that check was given until some long time after when you started to make offer of a mortgage that your wife wouldn't go through with? A. Oh, that is after the mortgage.

Q. You didn't own this property? A. What property?

Q. Oh, I don't know. I thought we were talking about some sort of property. You wanted to  
20 give a mortgage on some property? A. Yes.

Q. I am asking you: You didn't own that property, did you? A. I wanted to give mortgage on property, yes.

Q. You didn't own it? A. No, in my wife's name.

Q. Your wife owned it? A. Yes.

Q. And there was some talk about your wife giving a mortgage? A. Yes.

Q. But she never did give the mortgage? A.  
30 My wife told me—

Q. That mortgage was never given, was it? A. No.

Q. And the bill was never paid? A. No, sir.

RE-DIRECT EXAMINATION by Mr. Brunetto:

Q. Mr. DeCandia, you were sued for this bill that you owed to Mr. Weisman? A. Yes, sir.

40 The Court: You mean for this bill?

*Discussion*

Mr. Brunetto: For this bill. Your Honor, I subpoenaed the records in the case of Kitzman vs. Luca DeCandia. I ask if they are here. I served the clerk with a subpoena yesterday.

Mr. Weinberg: What is the purpose of that? Are we going to have another issue? 10

The Court: How is that?

Mr. Weinberg: I say, how can we raise another issue here? How would any such record be evidential?

The Court: Well, perhaps it would not be except that your cross-examination had in it the question as to whether or not there was such a suit. 20

Mr. Weinberg: Yes, and it is admitted.

The Court: Whether or not he had recovered a judgment against Mr. DeCandia.

Mr. Brunetto: There was no suit, your Honor, by Mr. Weisman. The cross-examination went on why he had not paid Mr. Weisman, and so forth. The fact is that immediately after the conclusion of this criminal proceeding before Judge Flannagan, Mr. Weisman assigned the full claim or the checks. Therefore De Candia could not pay Weisman. 30

Mr. Weinberg: I did not ask that. The record will never show that. I asked him whether he ever paid these checks, and whether there was a judgment obtained against him, and he admitted both those things. Now, if they were assigned to Kitzman, if that is a fact, it can be well 40

*Discussion*

and easily admitted and that is all that I think the record can go on.

10 The Court: You are willing to admit then, that they were assigned and upon that assignment judgment was obtained against him?

Mr. Weinberg: Yes.

Mr. Brunetto: By Kitzman.

The Court: Why produce the record with that admitted?

20 Mr. Brunetto: And he also admitted the original complaint was brought on the checks and then there was a defense and answer filed charging that there was a material alteration.

Mr. Weinberg: Pardon me. I do not think these pleadings are at all evidential, what you charge or what you did not charge in that case.

The Court: It is admitted now. Counsel admits that this claim against the plaintiff was assigned and the assignee obtained a judgment upon the claim. Now, what more?

30 Mr. Brunetto: And that the judgment was obtained on the book account.

Mr. Weinberg: What was obtained?

Mr. Brunetto: Your Honor, that is the purpose.

The Court: Never mind. Just strike all this out. Just proceed in the usual way. Produce the proof. Just one minute, now, we have not finished with this witness.

40 Mr. Brunetto: That is all.  
(Further argument.)

*Thomas Brunetto—Direct*

Mr. Brunetto: Your Honor, in this case I will have to offer myself as a witness, and I will ask Judge Adams to examine me on it.

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10

THOMAS BRUNETTO, sworn in behalf of the plaintiff.

Direct-examination by Mr. Adams:

Q. Mr. Brunetto, you were present in the Third Criminal Court with your client, Mr. DeCandia, on the 8th day of December, 1926? A. Yes, sir.

Q. When this criminal complaint came up for a hearing that was adjourned for a week? A. Yes, sir. 20

Q. Did you have or hear a conversation between Mr. DeCandia and Mr. Weisman, and Mr. Weisman's attorney on that day? A. Yes, sir.

Q. With reference to the transaction? A. Yes, sir.

Mr. Weinberg: What day was that?

Mr. Adams: That was December 8, 1926. 30

Q. Who was this attorney? A. Mr. Jacob Silverman.

Q. He was acting as attorney for Mr. Weisman at that time? A. Yes, sir.

Q. In that transaction? What was the conversation that you overheard or that you heard? A. The conversation, we had considerable—

40

*Thomas Brunetto—Direct*

By the Court:

Q. December 8th, was it? A. December 8, 1926.

By Mr. Weinberg:

10 Q. Whom was the conversation between? A. Between the four of us.

Q. Among the four of you? A. Yes. The conversation related whether we could go on with that hearing that morning or not. Mr. Silverman, in the presence of Mr. Weisman, stated that—

20 Mr. Weinberg: One moment, if your Honor please. I object to any conversation now with respect to this transaction that occurred after this complaint was made. I think there is only one inquiry in this case; that is, whether or not there was reasonable or probable cause on November, whatever the date was, or whenever the complaint was, for the making of that complaint. Now, whatever the parties or their attorneys may have talked about after or before cannot make a particle of difference. The whole thing is whether or

30 not your Honor can find that there is anything for a jury on the question of whether or not the giving of those checks under the conditions which they were given may be said to have resulted in a malicious act on the part of Weisman when he made his complaint.

40 Now, suppose that your Honor will find that there was reasonable and probable cause for the making of the complaint on

*Discussion*

the part of Weisman, can any conversation of Mr. Weisman and his attorney or the attorney of Mr. DeCandia or anybody else have any effect upon this case? The question of whether there is reasonable or probable cause is for your Honor, taking the testimony as it stands. When it is contradicted in the case it is for the jury to determine the real facts in the case. 10

The Court: In malicious prosecution, Mr. Weinberg, more than one thing must appear; not only that the criminal proceedings were instituted by the defendant, but that they were prosecuted by the defendant. It seems that on December 8th this matter had not been concluded favorably to this plaintiff, but that the proceedings continued to indictment and trial. So I suppose that whatever occurred between these parties prior to the time when the transaction was concluded may be evidence in the case upon the subject of whether or not it was the defendant who was continuing the prosecution and whether or not there was actual malice in the continuation of the prosecution. 20 30

Mr. Weinberg: Well, in the first place, I do not understand and I could not infer that that question could bring out any such thing at all. There can be no such thing, if I may be permitted to say to your Honor as malice on the part of a complaining witness in causing a court to continue hearings. He may be responsible, he is respon- 40

*Thomas Brunetto—Direct*

10           sible for all of the logical anticipated consequences of that deed. If his complaint in the natural order of things caused the machinery of the law to start up and continue, adjourning the case from one day to another, there can be no malice involved thereby because no one can force the court—

          The Court: Of course, I am rather assuming that the purpose of this examination of Mr. Brunetto is not simply a statement that there was a continuation, but that there was something else. If not that may be entirely unimportant.

20           Mr. Weinberg: I would certainly object if there is to be any such sort of testimony, because no litigant has a right to enforce the Court to continue the case. I am willing to admit that if this complaint was made without reasonable and probable cause, then our client is responsible for whatever inconveniences this present plaintiff suffered by reason of his reappearances in this court.

30           The Court: Are you willing to accept that admission in lieu of Mr. Brunetto's testimony?

          Mr. Adams: I accept that admission?

          The Court: In lieu of his testimony.

          Mr. Adams: Oh, no; not in lieu of it.

          The Court: The objection will be overruled.

40           Mr. Weinberg: Your Honor has indicated now that you thought these questions were going to bring out those facts. Now,

*Thomas Brunetto—Direct*

if they do not, you will give me leave to object to the answers? He started to give a conversation with the attorneys.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.) 10

(The court takes a recess from one to two o'clock P. M.)

(After recess.)

THOMAS BRUNETTO, resumes the stand.

Direct-examination (continued) by Mr. Adams: 20

(The last answer is read by the stenographer as follows: "Yes. The conversation related whether we could go on with that hearing that morning or not. Mr. Silverman in the presence of Mr. Weisman stated that if—")

The Court: The answer may continue.

Q. Will you continue the answer? A. That his client was willing to drop the criminal proceedings. 30

Mr. Weinberg: I object to that. Your Honor understood the question to relate to taking adjournments, and any bargains that might be made I think is highly incompetent.

The Court: I said I think it would be unimportant if it related to adjournments.

Mr. Adams: It was not directed to any such thing as Mr. Weinberg has in mind. 40

*Thomas Brunetto—Direct*

Mr. Weinberg: He has started up by saying that "If he would drop." If this is argument with respect to what they were going to do about this complaint, I object to it as incompetent and irrelevant.

10

(Objection overruled.)

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

Q. Now, will you continue, Mr. Brunetto?

(The last answer is read by the stenographer as follows: "That his client was willing to drop the criminal proceedings.")

20

A. Against Mr. DeCandia if Mr. DeCandia would sign a mortgage for the amount of Mr. Weisman's claim with an additional fee of around fifty dollars for his services. I told him that we couldn't make that kind of a bargain; in addition that I couldn't speak for Mrs. DeCandia because I had not had an opportunity to take the matter up with her about her giving the mortgage. He finally says, "Well suppose we will adjourn the matter up for a week, and that will give you the opportunity to take up the matter with Mrs. DeCandia." I says, "That is up to you." I says, "However, you and I cannot make any bargain as far as these criminal proceedings are concerned." He says, "Suppose we will adjourn the matter for one week and I will consent that your client be paroled in your custody in the meantime." I says, "That is agreeable to me."

40

*Thomas Brunetto—Direct*

Q. Is that all the conversation there on that morning with relation to that subject? A. Well, that is before Judge Howe came in.

Q. Was that all the conversation among those four? A. No. Then after Judge Howe came in the motion was made,—I don't know whether I made the motion or whether Mr. Silverman made the motion—that the matter be continued a week. After the motion we got out of the court room and then we spoke about it and Mr. Weisman says that if the mortgage was given to him by Mr. DeCandia, that he was willing to drop the proceedings. I told him that we couldn't make that kind of bargain, but however, if Mrs. DeCandia was willing to give a mortgage, that was up to her, and I would take it up with her; and that is all that was said. 10 20

Q. That was on what date? A. On the 8th.

Q. Of December, 1926? A. Yes.

Q. With reference to this proposed mortgage, did you hear anything further from either Mr. Weisman or his attorney after that? A. Two or three days after that I received a postal card through the mail from Mr. Silverman, and in response to the postal card I communicated with Mr. Silverman. 30

Q. Are you acquainted with Mr. Silverman's handwriting or signature, rather? A. No, but I spoke to him in regard to that postal card. As soon as I received it I called him up on the phone and I told him that—

Mr. Weinberg: I object to any conversation with Mr. Silverman.

The Court: I sustain the objection. 40  
Conversations in the presence of Mr. Weis-

*Thomas Brunetto—Direct*

man, of course, are entirely proper, but I understand this is not in the presence of Mr. Weisman.

The Witness: Yes.

10 Q. In the Third Precinct Court on that day Mr. Silverman, you said, appeared in behalf of Mr. Weisman? A. Yes, certainly.

Q. Made a motion? A. Yes.

Q. And the conversation that you testified to between Mr. Silverman and him occurring on that day also occurred in the presence of Mr. Weisman? A. Yes.

20 Mr. Adams: I offer the conversation with Mr. Silverman on the ground that he was the attorney and was acting at the time as attorney for Mr. Weisman.

The Court: The objection will be sustained.

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

(Exception noted as ground of appeal.)

30 Q. Mr. Brunetto, there has been testimony here that you appeared as attorney for Mr. DeCandia not only in the police court, but in the trial in the Court of Quarter Sessions on the indictment based upon this \$11.50 check, and that you acted for him in the entire transaction from the time of the original complaint. What charge did you make for your services? A. \$350. That included my disbursements.

40 Q. That included your disbursements? A. Yes.

*Thomas Brunetto—Cross*

Q. Were there any disbursements on behalf of the plaintiff in this action other than what was included in your \$350? A. No, sir.

Q. They were all included in your \$350? A. That is all included in my \$350.

10

CROSS-EXAMINATION by Mr. Weinberg:

Q. Was there a hearing before Judge Howe?  
A. Yes, sir.

Q. Did any persons testify there? A. Mr. Weisman himself.

Q. And after Mr. Weisman testified the Court held him for the Grand Jury? A. Yes, sir.

Mr. Adams: That is the plaintiff's case, your Honor, outside of the record. 20

The Court: I rather understood Mr. Weinberg this morning that he preferred to have that in before he opens his case.

(Counsel argue out of hearing of the jury.)

The Court: Gentlemen, it has been agreed between the attorneys in this case that the Court shall make a statement as to the amount which has been paid by the plaintiff in this case upon the amount which he owed to Mr. Weisman, or rather to put it more accurately, the amount which has been received by the assignee of Mr. Weisman upon that claim. It appears that this claim for \$656 and some cents for moneys which Mr. DeCandia owed to Mr. Weisman was assigned by Mr. Weisman to Meyer H. Kitzman, who brought suit against Mr. De- 30 40

*Discussion*

10 Candia to recover judgment against him for seven hundred odd dollars besides costs. Execution was issued upon this judgment and levy was made upon the goods and chattels of Mr. DeCandia, and those goods and chattels were sold by the sheriff for \$400, and after the deduction of the sheriff's costs of \$31.42, that left \$368.58, which was applied by the sheriff upon the judgment which Mr. Kitzman, the assignee of Mr. Weisman, had recovered against Mr. DeCandia.

Now, is that an accurate statement?

20 Mr. Weinberg: Well, now, I took Mr. Brunetto's statement for something when I spoke to your Honor. I am told that actually the plaintiff never got anything, that these goods were claimed by relatives or the family of the defendant. They never got them. That is what I am told.

The Court: Even though they were claimed, how could they have been sold?

30 Mr. Weinberg: I suppose for the right, title and interest and then taken away. That is the trouble in not going into these things, assuming that statements made are correct.

The Court: But here is the receipt of the sheriff that he paid this money over to the solicitor of the plaintiff.

40 Mr. Weinberg: No, no. When a thing of that sort is sold they give a credit on account of the claim. It is taken off; in other words, deducted.

*Record Offered in Evidence*

The Court: Then that statement should not be made?

Mr. Weinberg: Not from what I am just now informed, if your Honor pleases. Suppose we let that all out of it now. Forget everything about that. 10

The Court: All right, then. You may proceed with your proofs.

Mr. Brunetto: That is my offer. I offer the record.

Mr. Weinberg: He admitted he never paid it.

Mr. Brunetto: He did not admit that.

Mr. Weinberg: Let him go on the stand and prove what he paid. 20

Mr. Brunetto: Your Honor, then I offer the record in the case of Meyer H. Kitzman vs. Luca DeCandia, wherein judgment was entered on July 23, 1927.

The Court: Including the execution?

Mr. Brunetto: Yes.

The Court: It will be admitted.

(The papers referred to are received in evidence and marked Exhibit P-3.)

Mr. Weinberg: Your Honor did not agree to admit all the pleadings in that case. 30

The Court: I have not agreed to anything.

Mr. Weinberg: Mr. Brunetto just said that. He offered that and he said that was agreed on. I am objecting to anything more than the record of the fact that there was a judgment against him. 40

*Record Offered in Evidence*

10           The Court: I suppose that the execution depends upon the previous record of the case. It does not mean anything without the record of the case showing that a suit was brought and there was a judgment entered, and that execution was issued and the amount paid under the execution. I suppose the execution depends upon all the other pleadings.

20           Mr. Weinberg: The record of that, but not this jacket here containing the pleadings and all that, the rules to show cause and the motions to dismiss and answers and withdrawals of answers. That is another issue, I think, in that case.

          The Court: The objection will be overruled.

          (Defendant's counsel prays an exception to this ruling of the Court.)

          (Exception noted as ground of appeal.)

          Plaintiff rests.

30           Mr. Weinberg: May I make the motion that is in my mind at the conclusion of the case?

          The Court: For a direction, you mean, instead of a motion for a nonsuit?

          Mr. Weinberg: Yes.

          The Court: Very well.

*John W. Stafford—Direct*

DEFENDANT'S EVIDENCE.

JOHN W. STAFFORD, sworn in behalf of the defendant.

Direct-examination by Mr. Weinberg: 10

Q. What is your occupation, Mr. Stafford? A. General bookkeeper, First National Bank of Montclair.

Q. At our request and under our subpoena, did you bring the records of your bank showing the account of Luca DeCandia for the period including November 18th and 20th, and some days previous and subsequent thereto? A. Yes.

Q. Will you please turn to the account as you have it and tell us what was the state of Mr. DeCandia's account on November 18, 1926? A. The account was overdrawn \$45.14 at the close of business. 20

Q. How was that on November 19th? A. On the 19th at the close of business the account was overdrawn 31 cents.

Q. On November 20th? A. It was still overdrawn 31 cents.

Q. On the 21st? A. Overdrawn 31 cents. 30

Q. On the 22nd? A. There was a credit to Mr. DeCandia of \$6.49.

Q. What was his balance? A. That was the balance, \$6.49.

Q. Can you tell, Mr. Stafford, by looking either at your book or notice of protest when the check for \$656.79 reached your bank? A. On November 22nd.

By the Court: 40

Q. 1926? A. 1926; yes, your Honor.

*John W. Stafford—Direct*

By Mr. Weinberg:

Q. That is the day it was protested by the notary who protests for your bank? A. The same day.

10 By the Court:

Q. At the close of business, I suppose? A. Yes, at the close of business.

By Mr. Weinberg:

Q. That was the day when you said his balance was \$6.49? A. That was after his check had been returned protested.

Q. What? A. That was, the balance was \$6.49 after the check had been protested and returned  
20 for insufficient funds.

Q. After which? The \$11.50 check? A. No. This \$656 check.

Mr. Weinberg: I do not believe I understand that.

The Court: I do not know what the returning of the check protested had to do with his balance. I think that is what is bothering Mr. Weinberg.

30 Mr. Weinberg: Yes, I can't understand that.

By the Court:

Q. What did the fact of his check having been protested and returned have to do with his balance? A. Well, if the check had been paid and not returned he would have been overdrawn \$769.68.

40 Q. But it didn't enter into the book of the bank at all, did it? A. Oh, yes.

*John W. Stafford—Direct*

Q. You put it in and took it out? A. That is customary, yes, because these checks come in in the morning—we have a direct mail from Newark in Essex County—and they are posted under the presumption that the deposit might be made during the day to cover these checks. They are held until three o'clock, and then if sufficient funds are not there— 10

Q. You did not have any trouble that way? A. That is customary. That is the way it is always done, unless funds are uncollected, if it is on account of an out of town bank; that is, the check goes back uncollected.

Q. You say he was overdrawn 31 cents on November 20th? A. That is right. 20

Q. And on the 21st? A. No change. Still 31 cents.

Q. Now, did he deposit anything on the 21st? A. Nothing.

Q. If he did not deposit anything on the 21st and he was overdrawn 31 cents on that day, he could not have \$6 there on the next day? A. He put it there.

Q. What did he put in? A. Fifty.

Q. That would not be correct, deducting \$50. 30

The Court: There might have been a withdrawal.

A. There was five items came in on that day.

Q. Of what? Deposited or withdrawal? A. No, withdrawals.

Q. Five withdrawals. How many deposits came in? A. One.

Q. That is excluding, of course, the \$656 check. You are taking no account of that in find- 40

*John W. Stafford—Direct*

ing this balance of \$6 and some cents, are you? So there was deposited \$50 and withdrawn against it a sum that day so that at the close of business that night there was only \$6.49 that day?  
A. That is correct.

10 Q. In order to reach that you had to charge back this check for \$656.79, didn't you? A. And also one for \$120. There were five items came in that day. Shall I read them to you?

Q. Yes. A. \$13.20, \$20, \$656.79, \$10, and \$120.

By Mr. Weinberg:

Q. Was this check for \$656.79 entered as a credit to Mr. DeCandia? A. Yes.

20 Q. The check that he gave out you enter as a credit, Mr. Stafford? You don't mean that, do you? A. The check was debited when it came in. It wasn't paid, so it was re-credited to his account. The one offsets the other and brings the account right back to where it originally was.

Q. So that it was neither a credit nor a debit. It was a credit and a debit; one offsets the other?

A. It is the bookkeeping entry showing the transaction coming in and going out.

30 By the Court:

Q. What did you charge back? \$656.79? A. And \$120.

Q. That would make \$776.79—\$43.51; that from \$50 would leave you \$6.49, wouldn't it? A. That is correct.

By Mr. Weinberg:

40 Q. \$6.49. Is that the amount of the funds that were in the bank to pay this check of \$656 on that day? A. That is all that was there at the close of business.

*John W. Stafford—Cross*

By the Court:

Q. What about that other check? When did that come in, \$11.50? A. That came in on the 19th of November, 1926.

By Mr. Weinberg:

Q. Protested by your bank that same day? A. That is right. 10

CROSS-EXAMINATION by Mr. Brunetto:

Q. Mr. Stafford, was anything deposited to Mr. DeCandia's account on the 18th? A. Nothing.

Q. Anything on the 19th? A. \$44.83.

By the Court:

Q. That is a deposit, isn't it? A. That was deposited. 20

Q. What was withdrawn that day? A. Well, the only other transaction is the \$11.50 check coming in and re-credited as it was returned. That is the same situation as existed on that \$600 check.

Q. That leaves the 31 cents, doesn't it? A. Thirty-one cents, that is correct.

By Mr. Brunetto: 30

Q. Was anything deposited on the 20th? A. Nothing.

Q. On the 21st? A. Nothing.

Q. Anything deposited on the 23rd?

Mr. Weinberg: I object to that. The check had already been through and protested.

(Objection sustained.)

*Harry Weisman—Direct*

HARRY WEISMAN, the defendant, sworn in his own behalf.

Direct-examination by Mr. Weinberg:

10 Q. Mr. Weisman, where do you live? A. 341 Seymour Avenue.

Q. Are you a member of the firm of Weisman & Obshatkin? A. Yes, sir.

Q. How long has your firm been in business in Newark? A. Fourteen years.

Q. You are engaged in the general produce business? A. Yes, sir; wholesale fruit and produce.

Q. Do you know Mr. DeCandia? A. I do.

20 Q. He had been dealing with your firm for some time? A. Quite a number of years.

By the Court:

Q. Where is your place of business? A. At the present time at 201 Commerce Street.

Q. Where was it then? A. 26 Commerce Street, but when this transaction took place it was in 120 Commerce Street.

By Mr. Weinberg:

30 Q. You are what number now? A. 120.

Q. Do you recall November 18, 1926, that being the date on which Mr. DeCandia gave you a check for \$11.50? A. Yes, sir.

40 Q. Will you tell the Court and jury just what occurred between you and DeCandia on that day? A. Well, he had a charge account in our place for a few years, and he ran up a bill for an amount of six hundred and some odd dollars, six hundred and fifty, or six hundred and seventy—I don't recall the exact amount—and on that day,

*Harry Weisman—Direct*

November 18th, he came down to buy some more stuff. I got him over on the side and I told him that since he was indebted to us to that amount he exhausted his credit and we couldn't extend him any credit no more; so anything he wanted to buy he would have to pay cash for it, for which he agreed. He says, "All I need is a few packages, and I am going to pay for it." I says, "Very well." So he bought lettuce and cauliflower, and a crate of cauliflower, a crate of lettuce and a basket of green beans, which amounted to \$11.50; and he went into the office with me. He handed me his check book and I wrote out a check for \$11.50, which he signed. That was in payment for that purchase.

Q. Is this the check of \$11.50 that he signed and gave you? A. Yes, sir. This is my handwriting. I filled it in.

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

Mr. Weinberg: I offer it attached to the protest notice.

Q. I show you an invoice slip and ask you what that is. A. This is the cash sale that was made to Mr. DeCandia on November 18th, consisting of one cauliflower, \$2, one green beans, \$5.50, a crate of lettuce, \$4; makes up a total of \$11.50.

Q. Is that slip made in duplicate? A. Yes.

Q. What becomes of the other copy? A. The duplicate is given to the purchaser.

Q. Did the purchaser, Mr. DeCandia, get one?

A. He accepted that; yes, sir.

Q. Mr. DeCandia says that in addition to \$11.50 worth which is represented by this check, that

*Harry Weisman—Direct*

he purchased \$30 worth of merchandise from you for which he paid you cash; is that so? A. No, sir.

Q. Did he take the \$11.50 worth of merchandise away with him that day? A. Yes, sir.

10 Q. Did he call for it with the wagon? A. Yes, sir.

Q. Now, with regard to the check for \$11.50, did he say anything to you or did you say anything to him regarding the holding of that check for a couple of days? A. No, sir. We don't take any post-dated checks.

Q. What is that? A. We don't accept checks to be deposited two days later.

20 Q. Was anything said? A. No, sir.

Q. With respect to holding this check for two days? A. No, sir; not a word mentioned.

Q. Now, did you at that same time—that is, on November 18th—talk about the balance which he owed you? A. I did.

Q. What time did this transaction occur? A. About four-thirty in the morning.

Q. Now, at that time did you say anything about his balance? A. I did.

30 Q. What was that? A. I asked him how long before he will pay up what he owes, and he says, "In about a day or two I shall come down and settle up with you."

Q. Now, did he come down in a day or two? A. He came down two days later.

Q. That was on November 20th. A. On November 20th, about eight-thirty in the morning.

40 Q. What occurred on that day between you and DeCandia? A. He came in and he says that he was ready to pay up the balance.

*Harry Weisman—Direct*

Q. What did you say to him? A. I sent him into the office, and I says, "Go ahead inside and give it to the bookkeeper."

Q. Were you present in the office when the check for \$656 was signed, or not? A. No, sir; I was not. I was busy outside in the store. 10

Q. And at your office that was taken care of by whom? A. By our bookkeeper.

Q. What is her name? A. Miss Liffand.

Q. Do you know her handwriting? A. I do.

Q. You have seen that \$656 check before, I believe? A. I did.

Q. Is that in her handwriting? A. Yes, sir.

Q. Now, did you ever hear anything before today regarding fourteen checks that were given you on that day? A. No, sir. 20

Q. Is there any truth in that? A. No, sir.

Q. Was anything said about giving you \$50 a month? A. No, sir.

Q. Would your books show if you had received fourteen checks instead of one check? A. Of course it would.

Q. Would your books show if you had sold \$30 worth of merchandise for cash the same day you sold the \$11.50 worth? A. Sure it would. There would be a cash sale made out for it. 30

Q. Now, with reference to this \$656 check, after Mr. DeCandia went into the office and signed the check and came out, did he say anything then to you about holding that check or doing anything with it? A. No, sir; he did not.

Q. Did he tell you he had no money in the bank? A. No, sir.

Q. Or that he did not have enough money in the bank? A. No, sir. 40

*Harry Weisman—Direct*

Q. Had he up to that time said anything to you about the \$11.50 check being good or not? A. No, sir; he did not.

Q. On November 20th? A. He did not.

10 Q. Had you heard from the check of November 18th, \$11.50, at the time when he gave you the check for \$656? A. No, I had not. I don't believe he came back until either the 21st or the 22d.

Q. Well, now; the 20th I believe was on a Saturday. That is the day when the large check was given. When did you know that the small check was protested? A. Then it must have been on a Monday morning.

20 Q. Now, did Mr. DeCandia call you up on the telephone regarding this check and beg you to please not put it in the bank or not to sue on it or do something with it? A. No, sir; he did not.

Q. Did he ever call you up on the phone regarding it? A. No, sir; he did not.

Q. What was the first thing that you did after you heard that these checks had gone to protest? A. I drove up to his place of business.

30 Q. Where? A. Watchung Avenue Plaza. I think that is the name of the place where he was; Montclair.

Q. Did you see him? A. Yes, sir; I did.

Q. Did you have a talk with him? A. I did.

40 Q. Tell this Court and jury what was said then please? A. I told him that the check for \$11.50 went protested. "Oh," he says, "Mr. Weisman, you go to the bank and he got lots of money there." I said, "All right, I will go there." So I drove over to the bank and I asked for a certi-

*Harry Weisman—Direct*

fication on the check and the paying teller told me that there wasn't sufficient funds to satisfy it.

Q. That was on the \$11.50 check? A. On the \$11.50.

By the Court:

Q. Do you remember what date that was? A. 10  
That should have been on the—

Q. No. Do you remember what date that was?  
A. I don't exactly.

By Mr. Weinberg:

Q. Well, can you figure it out? A. I should judge it was either on that following Monday or Tuesday.

(The last question and answer are read 20  
by the stenographer.)

By the Court:

Q. You mean Monday the 22d, or the 23d? A.  
Yes.

By Mr. Weinberg:

Q. You were saying something about having gone to Montclair, or did you finish that, on November 22d or 23d, or whenever it was. That is 30  
the time you say you went and asked about your check and he referred you to the bank and you went to the bank? A. I asked about the check.

Q. Then what did you do about it? A. I went back to him and I told him that there was not any money in the bank to certify the check.

Mr. Brunetto: Your Honor, now of course I was under the impression that the day he went to the bank he was with Mr. 40

*John W. Stafford—Cross*

DeCandia. That is why I did not object to any conversation had at the bank between himself and the representative at the bank. Of course if Mr. DeCandia was not there I would like at this time to make  
 10 a motion to strike out his testimony as to any conversation had at the bank wherein Mr. DeCandia was not present.

Mr. Weinberg: Doesn't it already appear that there was not any money in the bank?

The Court: It does appear. I will strike it out, what was said in the bank.

By the Court:

20 Q. Do you remember the date? You say it was the 22d. A. November 22d or 23d.

By Mr. Weinberg:

Q. Now, you went back to him and what did he say?

The Court: I think you had better recall Mr. Stafford, as he is uncertain about the date.

30

JOHN W. STAFFORD, recalled.

By the Court:

Q. Suppose you tell us the state of his account on the 23d of November. A. The 23d?

Q. Yes. A. The balance was \$203.99 at the close of business.

Q. \$203.99? A. That is right, yes.

40 By Mr. Brunetto:

Q. How much was that? A. \$203.99.

*John W. Stafford—Cross*

Mr. Weinberg: We have the 23d, now.  
No mistake about that.

The Court: \$6.49 he said on the 22d.

By the Court:

Q. I suppose there is no possible way for your 10  
books to tell the time of day they came in, that  
deposit? A. Well, it would tell. There is three  
or four proofs go through each day, and each  
proof is stamped so that I could tell.

Q. That you have here? A. Not here, no; but  
the deposit tickets are stamped A. M., P. M., and  
afternoon.

Q. Oh, they are? A. Yes.

The Court: Thank you. Is there any- 20  
thing more?

Mr. Weinberg: I think your question in-  
dicates that the record brought here will  
not show the time of day that balance was  
made out.

The Court: That is right.

By Mr. Brunetto:

Q. Mr. Stafford, that was at the end of the  
business day it showed a balance of \$203.99, 30  
wasn't it? A. That is correct.

Q. How much was deposited that day? A. .  
\$207.50.

By Mr. Weinberg:

Q. Can you tell what that deposit was made up  
of? A. Not from the record here, unless I have  
the deposit ticket; I could tell whether it was  
checks or cash or a solid check, as we call it,  
whether it would take two days or a day or a 40  
week to collect it.

*John W. Stafford—Cross*

Q. Can you tell from looking at your record whether that balance could have been drawn against on that day, whether it was a definite credit of amounts to be collected? A. Well, it is  
 10 apparent here that it could not be, because on the same date we returned another check; evidently it was uncollected funds.

Q. How much? A. \$37.48; they would not pay against that deposit of \$207.50.

Q. So that it was merely a bookkeeper's balance, as I understand it? A. It wasn't cash balance, no.

By Mr. Brunetto:

20 Q. Does your record show that, or are you just guessing, Mr. Stafford, that that might have been the reason? A. The record shows it. If that money had been available this other check would not have been returned.

Q. Does your record show why the \$37 check was sent back? A. That is the only reason it would be.

Q. Does your record show that? Is it in your record? A. In what way?

30 Q. Shows that the reason why the \$37 check was sent back? A. There is no other reason why it could be.

Q. I am asking you if that is in your record. Does your record show that?

By the Court:

Q. In other words, I think what Mr. Brunetto means, whether the record says anything about it one way or the other except the fact. A. No, it  
 40 does not say. It says rt., returned, and that

*John W. Stafford—Cross*

would be the only reason we would return it, unless that had been a cash balance that was available.

Q. Except payment of stock, or something of that kind, I suppose? A. Yes.

10

By Mr. Brunetto:

Q. Mr. Stafford, do you know the reason why every check is returned, by just looking at your record two or three years ago? A. I can tell whether it is returned insufficient funds. Where there is a balance and a check is returned, there may be several reasons for it.

Q. Maybe the check wasn't properly signed? That might have been one of the reasons that the \$37 check was returned? A. That is correct.

20

Q. It might not have been properly endorsed? A. Yes.

Mr. Brunetto: Your Honor, I would like to offer his record in evidence, or I would like to examine Mr. Stafford here. I would like to offer his record here in evidence showing those particular days.

The Court: Is there any objection to leaving them, Mr. Stafford?

30

Mr. Weinberg: They are on the record.

The Witness: If they will be returned to me.

The Court: Do you want them marked for identification at least?

Mr. Brunetto: Yes.

The Court: Is there anything more you want than what he has read?

Mr. Brunetto: I have not seen the record, your Honor. There might be something

40

*John W. Stafford—Cross*

which I would like to talk to the jury about, or there might be something I would like to call your Honor's attention to.

10 The Court: I do not think on a venture of that kind I am going to admit them. Look at them now right away. This I suppose is the bank record.

20 Mr. Brunetto: Your Honor, I would like not to keep Mr. Stafford here. He has been testifying from this record sheet only to certain items, to certain parts. I would like to offer or ask Mr. Stafford to read into the record every item from which he was testifying, shown on this sheet, with regard to this particular account. For example, there is one amount, "Old balance." I would like to read from November 18th to November 23d.

By the Court:

Q. What is it? An extension ledger sheet? Carrying the balance forward in each item? A. That is right. Not on each item. Each transaction after each posting.

30 Q. There may be three or four items in a posting? A. That is correct.

Mr. Brunetto: Then there is another column. It says the deposits which were made on that day; another column, new balance.

Q. You can do that, read right across, can't you? A. Yes.

40 The Court: All right, do it. Just begin with November 18th to the end of November 23d. That is what you want?

Mr. Brunetto: Yes.

*John W. Stafford—Cross*

Q. All right. Go ahead. A. This will start at the beginning of business on the 18th.

Q. Yes, old balance. A. Old balance, overdrawn \$1.39; a debit of \$5 and one of \$38.75.

Q. That is \$43.75? A. \$43.75, yes. That left the account overdrawn \$45.14. On the 19th pick up that old balance for that date. 10

Q. That is the old balance? A. That is what we start the 19th with. The \$11.50 check came in. That left it overdrawn \$56.64. We picked that balance up again, overdraft of \$56.64, and apply a credit of \$44.83. That was a deposit, \$44.83. That leaves an overdraft of \$11.81; and that is picked up again and the credit for the check returned of \$11.50. That is handled the same as a deposit. 20

Mr. Brunetto: Your Honor, that is what I wanted. I want him to read direct from his book there, and he says this was picked up again. That does not appear in the ledger itself. I want him to read just what his record shows.

The Witness: That is what I am doing. I am reading every transaction that was made. 30

Q. That left an overdraft of 31 cents, didn't it? A. That is right.

Q. That is at the end of business on the 19th? A. Yes.

Q. That is the old balance for the 19th? A. That is correct.

Q. Which we begin with on the 20th? A. On the 20th, an overdraft of 31 cents. Two checks 40

*John W. Stafford—Cross*

came in of \$27.93, and one of \$10. That left an overdraft of \$38.24. That balance is picked up, \$38.24 overdrawn, the two checks returned treated as deposits, \$27.93 and \$10. That leaves an overdraft at the close of business on the 20th  
 10 of 31 cents.

Q. Then we begin with the 21st. A. There was no change on the 21st. The next transaction is on November 22d.

Q. Then you begin with an old balance of 31 cents? A. 31 cents.

Q. Overdraft? A. Overdraft.

Q. The 22d? A. Check for \$13.20.

Q. You have given us those, haven't you, \$13.-  
 20 20, \$20, \$656.79, \$10 and \$120? A. I gave you those in my previous testimony.

Mr. Weinberg: Yes. He is asking for that over again.

Q. All right. Let us have it. A. \$13.20, \$20, \$656.79, \$10 and \$120.

Q. That makes \$819.99? A. Sixty-eight.

Q. What? A. \$819.68.

Q. 819.99. You mean 68 cents with that 31  
 30 cents off? A. Yes. So you pick that 31 cents up as a minus balance.

Q. That should be added, shouldn't it, instead of taking it off? A. No. That is added on to the debit amount, yes.

Q. So that would be \$819.99, or that total overdraft would be \$820.30, wouldn't it? A. No. For \$819.68.

Q. Your books are wrong then? A. Here is  
 40 what they have done. May I show this to you?

*John W. Stafford—Cross*

They did not put that minus in there. The balance is right down below there.

Q. Then you charged back, you see, that date?

A. Well, before any charge back there was a fifty dollar credit put in there. That made the balance overdrawn \$769.68. That is the 31 cents. 10  
And then two checks were returned, \$656.79 and \$120.

Q. That makes \$776.79? A. Well, that next balance was a credit balance of \$6.49 on that. Do you want beyond there, the end of the 23d also? On the 23d balance was a credit \$6.49.

Q. Then you begin that as a credit balance?

A. That is the new balance, and a check for \$37.48 and \$10, and that left an overdraft of \$40.99. 20  
Then that balance was picked up again and a credit applied for \$207.50. That left a balance of \$156.51. Then there was a check returned. That balance is picked up, \$166.51, and a check returned \$37.48. That leaves a credit balance of \$203.99 at the close of business on November 23d.

Q. How is that? A. A credit balance of \$203.99 on the 23d at the close of business. Do you want beyond that date?

Q. No. Was that \$27.48, or \$37.48? A. \$37.- 30  
48.

Q. You did not return the \$10 check? A. No, not the \$10 one.

Q. I see. All right.

*Harry Weisman—Direct*

HARRY WEISMAN, the defendant, recalled.

Direct-examination (continued) by Mr. Weinberg:

10 Q. (Read by stenographer.) Now, you went back to him and what did he say? What did he say, meaning DeCandia? A. He says, "You go back to the store and I will be down in another day or two and I will make good the check."

Q. Now, what happened after the \$656 check was protested? A. I went up to him again.

Q. What did you then say to him? A. Well, he says I should wait another day or two. He is going to try and raise money and make good.

20 Q. Did you tell him how much the check was? A. I showed him the check. He knew what the amount was.

Q. Did he tell you at any time that it should have been a fifty-dollar check? A. No, sir.

Q. And that you had a lot of them payable every month or two or something of that sort? A. No, sir.

30 Q. Now, before making your complaint did you consult anybody? A. Yes. I consulted Mr. Silverman, Jacob Silverman.

Q. He is a lawyer in this city? A. Yes, sir.

Q. Of this state. Was your complaint made after consulting with him?

(Objected to on the ground that advice of counsel has not been pleaded.)

(Objection sustained.)

40 (Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

*Harry Weisman—Direct*

Mr. Weinberg: I ask your Honor to permit me to amend in that respect, then.

The Court: I will just look at that a moment. You may pass it by.

By Mr. Weinberg:

10

Q. Do you remember when your complaint was made? I think it appears here. A. I cannot recall the exact date.

Q. December 6, 1926. Did you appear in Court?

A. Yes, sir; I did.

Q. Did you appear at every time you were ordered to appear? A. I did.

Q. Were you present at the final hearing before Judge Howe on December 15, 1926? A. I was. 20

Q. Did you hear it announced that the defendant DeCandia was held for the Grand Jury, by Judge Howe? A. Yes, sir.

Q. When did you next appear in Court, if you can tell? February 28, 1927, did you appear in the Quarter Sessions? A. Before the Grand Jury. First I appeared before the Grand Jury.

Q. Before Judge Flannagan? A. Judge Flannagan; yes, sir.

30

Q. And you testified there? A. I did.

Q. Prior to your going before Judge Flannagan you appeared I imagine, before the Grand Jury? A. I did.

Q. Then you were notified to appear, I suppose, before the Petit Jury? A. Yes, sir.

Q. Now, when if anything was said about your taking the mortgage on his property in payment for your debt? A. That was after we had al- 40

*Harry Weisman—Cross*

ready obtained a judgment against Mr. DeCandia, possibly a year and a half later.

10 Q. Was anything said around about the time when this complaint was made and before any action was taken? Was any mortgage ever offered to you? A. No, sir.

Q. You never got one either? A. No, sir.

Q. Your firm is still in business? A. Yes, sir.

Q. At the same address? A. Yes, sir.

CROSS-EXAMINATION by Mr. Brunetto:

Q. Who is this man Kitzman? A. He is a salesman in our employ.

20 Q. You assigned this claim to Mr. Kitzman?  
A. I did.

Q. And you also turned these checks over to Mr. Kitzman at the time the assignment was made? A. What checks?

Q. The \$11.50 check and the \$656.79 check? A. I didn't turn them over, no. I didn't turn it over.

Q. You didn't turn the checks over to him? A. No.

30 Q. You say the first time the question of a mortgage was talked about was about a year and a half after these checks were given? A. Yes.

Q. And that is when the judgment was obtained about a year and a half? A. Yes, about that.

Q. About a year and a half after the judgment or after DeCandia was tried in Judge Flannagan's court? A. After the trial.

Q. After the trial? A. Yes.

40 Q. Would you say it was a shorter time than that? A. Possibly.

*Harry Weisman—Cross*

Q. Would you say it was less than a year? A. I am not sure about it. I should think it was about that.

Q. I show you an affidavit alleged to have been signed by you in the case of Kitzman v. Luca DeCandia, which affidavit is signed July 9th, 1927, and ask you to look at the signature to that affidavit and ask you if that is your signature? A. It is. 10

Q. Will you look that affidavit over and tell us if you read that affidavit before you signed it.

Mr. Weinberg: I object to that. It has been all through the courts and the presumption is that he had and he knows what he did. 20

The Court: The question may be answered.

(Argument.)

Q. (Read by stenographer.) Will you look that affidavit over and tell us if you read that affidavit before you signed it? What is your answer now? A. I did.

Q. And everything in the affidavit was true at the time you swore to it? A. Yes. 30

Q. When did Mr. DeCandia open up a charge account with you? A. How is that?

Q. When did Mr. DeCandia open up a charge account with your firm? A. That is something that I cannot recall unless we consult our books. I say I cannot recall what date he opened the charge account unless we consult the books.

Q. In your direct-examination you said about a couple of years before this check was given? 40

*Harry Weisman—Cross*

A. A couple of years. Possibly I did, but I cannot recall the exact date.

Q. Well, would you say it extended more than six months? A. Oh, yes; considerably more.

10 Q. And this balance of \$656.79—that was the balance that was due on this book account on November 20, 1926? A. Yes.

Q. Would you say that Mr. DeCandia had been buying from you at that time goods and merchandise on credit for over six months? A. Would I say?

The Court: I wonder what materiality that has?

20 Mr. Brunetto: Your Honor, this affects his credibility. To affect his credibility. This affidavit is different than what he has testified to.

The Court: You mean testified to upon direct-examination?

Mr. Brunetto: Yes. On direct-examination he said Mr. DeCandia had been purchasing goods from him on credit for years.

Mr. Weinberg: I doubt that.

30 Mr. Brunetto: A couple of years. That is my recollection, your Honor. I will ask the stenographer.

(A portion of the previous testimony is read by the stenographer as follows: "Question: He had been dealing with your firm for some time? Answer: Quite a number of years.")

By Mr. Brunetto:

40 Q. Will you answer this question? A. Will I answer what? Whether he has been dealing in our place?

*Harry Weisman—Cross*

Q. Yes. A. Yes, for years.

Q. Now, which is right? What you said in this affidavit which I call to your attention, or what you told us today?

Mr. Weinberg: What is in the affidavit? 10

Mr. Brunetto: I will call his attention to it.

Q. I call your attention to this statement in your affidavit of the 9th day of July, 1927. "From on or about the 21st day of August, 1926, to on or about the 23d day of October, 1926, the said firm of Weisman & Obshatkin sold and delivered to the defendant Luca DeCandia on a book account the merchandise more specifically 20 set forth in the third count of the complaint. Reference thereto is hereby made and is specifically set out."

The Court: What does that deny? That does not limit their transactions to any particular time.

Mr. Brunetto: From on or about the 21st day of August, 1926.

The Court: What I gather from that is 30 that that is the length of time he was contracting this bill, \$656.

Mr. Brunetto: I will go a step further, your Honor.

Q. Now, did you sell Mr. De Candia anything on credit besides the items covered by the amount of \$656.79 for which he gave you a check on November 20, 1926?

(Objected to as immaterial.) 40

(Objection sustained.)

*Harry Weisman—Cross*

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

(Exception noted as ground of appeal.)

10 Q. Now, Mr. Weisman, Mr. Jacob Silverman was your attorney at that time and he was your attorney on November 20, 1926? A. He was.

Q. And he was up to the day this case was tried in the Criminal Court before Judge Flannagan? A. He was.

Q. When did you go to Montclair, you say, to Mr. DeCandia's place of business? A. Either on the 22nd or 23rd of November.

Q. Did you go to his house? A. Not at that time. I went to his place of business.

20 Q. Well, when did you go to his house? A. I went to his house when he offered to give us a mortgage in payment for the amount, after we obtained a judgment against him.

Q. When was that? A. That was about a year and a half later.

Q. Who was with you at that time? A. Nobody but Mr. DeCandia.

Q. When did you meet Mr. DeCandia? A. In his place of business.

30 Q. And you went from his place of business to his house? A. With my car, yes.

Q. Wasn't Mr. Silverman up there with you? A. No, sir.

Q. Did Mr. Silverman ever go with you to Mr. DeCandia's house? A. No, sir.

Q. You say there was never anything said about this mortgage until after the criminal trial before Judge Flannagan? A. That is right.

40 Q. You are positive about that? A. Positive.

*Harry Weisman—Cross*

Q. Now, do you remember testifying in the police court at the hearing on December 15, 1926?

A. If I can remember what I testified?

Q. Do you remember appearing as a witness?

A. I do.

Q. Do you remember my asking you whether it 10  
was a fact that Mr. DeCandia had given you  
thirteen or fourteen checks of \$50 apiece to cover  
up your bill? A. You might have asked me. I  
am not positive, but I say you might have asked  
me.

Q. Then today is not the first time that you  
heard the story that Mr. DeCandia says that he  
gave you thirteen or fourteen checks to cover up  
this item of \$656? A. Did I say that it was the 20  
first time?

Q. Yes. A. When did I?

Q. Will you answer my question? Didn't you  
say that today, that this was the first time that  
you heard that? A. I did not.

Q. In answer to one of your attorney's ques-  
tions? A. I did not.

Q. You did not say that? A. I did not.

By the Court:

Q. Well, that was in your attorney's question, 30  
Mr. Weisman. He asked you if today was the  
first you ever heard of the fourteen checks and  
you answered yes to that question. A. Well,  
then I didn't understand.

Q. He asked you whether ever before today you  
heard about the fourteen checks and \$50 a month,  
and you said no. A. Then I didn't understand  
his question at the time.

*Harry Weisman—Cross*

By Mr. Brunetto:

Q. Is there any other question that your attorney asked you that you did not understand? A. I cannot recall.

10 Q. What is that, Mr. Weisman? A. I cannot recall.

Q. This is the only instance? That is the only question that you did not understand that your attorney asked you? A. Exactly.

Q. Do you want to change your answer to your attorney's question, then, that this is not the first time that you heard the story of Mr. DeCandia that he gave you thirteen or fourteen checks of \$50 apiece to cover this item of \$656?

20 Mr. Weinberg: He did not say thirteen or fourteen.

Mr. Brunetto: All right. Let us make it fourteen.

A. If I want to change the answer?

Q. Yes. A. To what?

Q. That today is not the first time? A. Yes, you may.

30 By the Court:

Q. Why do you say "You may"? He asked you whether you want to change your answer.

A. All right. I will change it.

By Mr. Brunetto:

Q. Then you want your answer to be that this is not the first time that you heard this? A. Yes.

40 Q. When did you first hear it? A. Possibly that I heard it in the police court at the time the complaint was made.

*Harry Weisman—Cross*

Q. That was the Third Criminal Court of Newark? A. I mean before Judge Howe. I don't know whether it is the Third or the Second.

Q. Did you hear the same story at any other time besides December 15, 1926? A. Yes, I think before Judge Flannagan we appeared. 10

Q. Before Judge Flannagan? A. Wasn't it, that criminal court of Judge Flannagan's?

Q. That was on February 28, 1927? A. I don't recall the date exactly.

Q. How long after your firm obtained the judgment against Mr. DeCandia, Mr. Kitzman obtained the judgment against Mr. DeCandia, was it that you went to Mr. DeCandia's place of business? A. That I cannot tell. 20

Q. You don't know whether it was two or three months or whether it was six months or whether it was a year? A. I can't recall the exact date.

Q. Do you remember being in the Third Criminal Court on December 8, 1926? A. If I remember being there?

Q. Yes. A. I was there, but I don't know what date it was. I can't recall the dates.

Q. That was the time that the case was adjourned for a week. A. Possibly. I will be frank with you that I don't even recall whether it was adjourned or not. 30

Q. Did you go to the Third Criminal Court more than one time or not? A. I think I did.

Q. Do you know how many times you went there in regard to this particular transaction? A. I cannot tell you.

Q. Do you remember you and your attorney, Mr. Silverman, and Mr. DeCandia and I at that 40

*Harry Weisman—Cross*

time, as we came out of the police court—that is, the Third Criminal Court of Newark—talking about this mortgage, about DeCandia's wife giving a mortgage on this property in Montclair?

A. No, sir.

10 Q. Would you say that there was nothing said at that time in regard to a mortgage to be given by Mrs. DeCandia? A. No, sir.

(Objected to as irrelevant and immaterial.)

(Objection overruled.)

(Defendant's counsel prays an exception to this ruling of the Court.)

20 (Exception noted as ground of appeal.)

Q. You say "No, sir," or you don't know? A. No.

Q. What time of the day did you go to the bank to have this \$11.50 check certified? A. Ninety-three in the morning.

Q. Was anybody with you? A. No, sir.

Q. But you don't know whether you went there on the 22nd or the 23rd? A. I am not positive.

30 Q. Now, did DeCandia call you up on the telephone? A. No, sir.

Q. Didn't he ever call you up on the telephone during the period that he was doing business with you? A. No, sir.

Q. Did you ever call him up on the telephone? A. I did.

Q. When? A. Many a time.

Q. Did you call him up at this time when you received word that the \$11.50 check was no good?

40 A. No, I called in person.

*Harry Weisman—Cross*

Q. What is that? A. I called in person at his place of business.

Q. Did you call him on the telephone when this \$656 check was N. G.? A. No, sir; I did not. At that time I couldn't run fast enough to see him.

Q. When did you see him in regard to this \$656 check? A. The very same morning when it came back, but I couldn't give you the exact date, whether it was the 23rd or the 24th. 10

Q. The 23rd or the 24th. That was after you went over to get the \$11.50 check certified? A. Yes, sure.

Q. Then you went up to the bank twice, didn't you? A. Yes.

Q. Once to get the \$11.50 check certified, and 20 the other time to get the \$656 check certified? A. Exactly.

Q. That was one day after the other? A. Either one day after the other or two days later.

Q. Now, Mr. DeCandia said something about the \$11.50 check at the time you spoke to him about the \$656 check, didn't he? A. He didn't say anything.

Q. Didn't he offer you the money, the \$11.50? A. He did not, I beg your pardon, at no time. 30

Q. At no time Mr. DeCandia had offered you \$11.50? A. No, sir.

Q. Do you know whether anybody else was with you and Mr. DeCandia in your place of business when he gave you the \$11.50 check? A. Nobody was in the office at that time but Mr. DeCandia and myself.

Q. Was anybody else with Mr. DeCandia outside of the office on the morning of November 40 18th? A. You mean when he made the purchase?

*Harry Weisman—Cross*

Q. Yes. A. I didn't see anybody at the time he made the purchase.

Q. Were you with Mr. DeCandia from the time he came in until the time he went out? I am talking now about November 18, 1926. A. I was.

10 Q. Were you with him the whole time? A. Why, how long a time do you suppose we had taken up?

Q. I don't know. You know. A. About three minutes.

Q. I don't know. You know. A. About three minutes. We haven't got much time to bother—

The Court: Just one minute. We will just strike this out.

20 The Witness: Just Mr. DeCandia and myself.

Q. Do you know his son-in-law? A. I do not.

Q. Dan Angelotti. A. I do not.

Q. Down in the police force of Montclair? A. I don't know anything about it.

Q. Did you ever see him in this store on Watchung Avenue? A. In his store?

30 Q. Yes, in DeCandia's store. A. I seen a young fellow there, but I don't know whether it was his son-in-law.

Q. You did not know if that was his son-in-law? A. No, sir.

Q. Would you say that that young fellow was in your store on the morning of November 18, 1926? A. I would not.

Q. He wasn't there? A. I say that I wouldn't say that he was.

40 Q. He might have been there? A. He might have been.

*Harry Weisman—Cross*

Q. How do you know that Mr. DeCandia was in your store on November 18th at 4:30 in the morning? A. How do I know it?

Q. Is there anything in your mind which fixes that particular occasion as his being there at 4:30 A. M.? A. Because I figure it was around that hour. It was around 4:30 in the morning that he was around. 10

Q. How often did he come to your place of business around this time? A. Oh, practically every day.

Q. Did he come there every day around 4:30 in the morning? A. Not always. Sometimes he came down at 6:00 o'clock. Sometimes he will be before that. 20

Q. Is there anything in your mind which fixes this particular morning as his being there at 4:30? A. Yes, the reason it fixes is because the check came back.

Q. That is the morning that he came there at 4:30, when the check came back? A. No, no. When he gave the check for that cash purchase.

Q. What is it in your mind that he was there at 8:30 on November 30, 1926? A. Because the bookkeeper was already in the place. 30

(Argument.)

Q. Mr. Weisman, on November 20, 1926, is there anything which fixes the occasion in your mind that DeCandia came there at 8:30 in the morning and not at 4:30? A. Yes.

Q. Why? A. Because the bookkeeper was there already. She usually gets in about twenty minutes after eight. She was about ten or fifteen 40

*Harry Weisman—Cross*

minutes in the place after Mr. DeCandia came in to pay. That is why it fixes the time in my mind.

Q. Now, where did Mr. DeCandia sign this check? A. In the office.

10 Q. Did you see him sign it? A. No, sir; I did not.

Q. How do you know he signed the check in the office? A. Because he went into the office. I sent him into the office to pay. He came down and he says that he wanted to pay up the amount what he owed. So I told him to go into the office and let the bookkeeper make out a check, because I was busy.

20 Q. Did anybody else offer you the \$11.50? A. Yes.

Q. Of Mr. DeCandia's? A. Yes, after I swore out a warrant for Mr. DeCandia for the two checks, I received the check from Mr. Brunetto for \$11.50.

Q. Was that before you went to the Grand Jury? A. That I can't recall. That I will not say yes or no. I don't remember that.

By the Court:

30 Q. Was it after you made the criminal complaint? A. Yes, sir.

By Mr. Brunetto:

Q. And you returned that check to me? A. I did.

Q. With a letter? A. With a letter.

Q. I show you a letter on the letterhead of Weisman & Obshatkin and ask you if that is your letter? A. Yes. The letterhead is ours and the

40 writing is the bookkeeper's.

*Harry Weisman—Re-direct*

Mr. Brunetto: I ask that that be marked for identification.

(The same is marked Exhibit P-4 for identification.)

Q. Is the bookkeeper in Court? A. Yes, sir. 10

The Court: What is the date of the letter?

Mr. Brunetto: February 25, 1927. It is signed by the bookkeeper.

Q. And you say Mr. DeCandia never called you up on the telephone during the time you had any dealings with him? A. No, sir.

RE-DIRECT-EXAMINATION by Mr. Weinberg: 20

Q. Just identify this letter, please, of November 26th, written by your office to DeCandia.

Mr. Weinberg: I will admit that it is the same handwriting, the bookkeeper's. This was an exhibit in the criminal case.

Q. That is the five-day notice? A. Yes.

Q. That was sent by your authority through your bookkeeper? A. Yes. 30

Mr. Weinberg: I offer this in evidence. (The same is received in evidence and marked Exhibit D-3.)

(The Court takes a recess until tomorrow, Thursday, June 20, 1929, at ten o'clock A. M.)

*Hearing of June 20, 1929*

Thursday, June 20, 1929.

10 The Court: Last night I spent considerable time on the point that was raised yesterday, and I read over the Bell case again, urged yesterday on the point of advice of counsel. I am just a little uncertain as to the rule which has been adopted in New Jersey. I am rather persuaded by the case which I quoted to you yesterday that it is the second rule that I mentioned in Corpus Juris; that is, in New Jersey the rule has not been adopted. In some of the states  
20 advice of counsel makes reasonable and probable cause, but I am just wondering, if there be the doubt about it that there seems to be whether the proper way to raise that point, if you want to raise it, would not be by amendment of your pleadings so that there would be no question.

30 Mr. Weinberg: To avoid that legal question I requested yesterday permission to amend. You probably did not catch it, but I did. I made the request when your Honor expressed some doubt, and then asked leave to amend. I do not want to get this Court in any doubtful position, of course, and the law is not expressed anywhere that I know of. The only suggestion is found in Corpus Juris where, under the head of probable cause that cited our Bell case. That would lead one to believe that  
40 on a defense of probable cause—

*Discussion*

The Court: The editor might have so understood it, but I read very carefully last night the Bell case and I read the second time those portions which were doubtful.

Mr. Weinberg: Now, after all, your Honor, isn't that merely evidence? Isn't that evidence that goes to show no malice? 10

The Court: It would seem to be. It is so usual to plead advice of counsel that that is what I have in mind as being a necessity. I do not know of that question ever to have arisen, that defense ever to have been offered under the mere defense of reasonable and probable cause.

Mr. Weinberg: Doesn't that indicate it- 20  
self?

The Court: Is there any use in having any doubt about it when an amendment can be made?

Mr. Weinberg: Well, if it is permitted that ends it. I did ask it yesterday, so I will repeat it now.

The Court: Is there any objection to that? 30

(Argument.)

Mr. Brunetto: Your Honor, I took up the question with my client and he feels that the case has been about three-quarters tried and he would rather go ahead with it and finish it. Your Honor, then with that pleading we are permitted to set up in our reply that we deny the allegation? 40

The Court: Oh, yes.

*Jacob W. Silverman—Direct*

JACOB W. SILVERMAN, sworn in behalf of the defendant.

Direct-examination by Mr. Weinberg:

10 Q. Mr. Silverman, you are an attorney-at-law in the State of New Jersey? A. Counsellor-at-law.

Q. You are an attorney? A. Yes.

Q. You have been admitted as counsellor? A. Yes.

Q. When were you admitted to practice? A. About nine years ago.

Q. What has been the general nature of your practice? A. I have a general practice.

20 Q. And in that practice have you had occasion to consider the statute which we commonly call the check statute? A. The Act of 1919?

Q. Yes. A. Yes, sir.

Q. Did you at any time represent Mr. Harry Weisman of the firm of Weisman & Obshatkin, and that firm also? A. Did I represent them? Yes.

30 Q. Do you recall a matter in which the defendant Luca DeCandia was involved, by reason of having given some checks to the firm of Weisman & Obshatkin? A. Yes, sir.

Q. Were you consulted in your professional capacity by Mr. Weisman concerning the action, contemplated action, to be taken against Mr. DeCandia? A. Yes, sir.

40 Q. Were you also consulted with respect to making a criminal complaint against him? A. I was consulted with respect to taking proceedings against Mr. DeCandia.

*Jacob W. Silverman—Direct*

Q. What proceedings? A. Well, just proceedings, and it was upon my advice that Mr. Weisman swore to a criminal complaint. When he came into the office he told me his story with reference to the checks. He didn't ask me anything about criminal proceedings. That was my idea, that suggestion. 10

Q. He simply came to you for the purpose of enforcing his claim? A. Yes, sir. He came to me with two checks.

Q. And after hearing the facts, do I understand you to say that you advised the criminal complaint? A. Well, I don't know at that time whether the notice had been served upon Luca DeCandia. 20

The Court: Won't you answer the question?

Q. (Read by stenographer.) And after hearing the facts do I understand you to say that you advised the criminal complaint? A. Well, I don't know if I advised it then, but I did subsequently.

Q. Well, you advised it before it was actually made? A. Yes.

Q. Now, what facts did Mr. Weisman give you with respect to the DeCandia transaction? A. Mr. Weisman showed me two checks, one in the approximate sum of \$12 and one in the approximate sum of \$600, and informed me that these checks had been given to him by Luca DeCandia, and the checks showed that they had been returned by the bank because of insufficient funds. There was either the slip attached to it or protest notices, and I don't recall whether Mr. Weisman 30 40

*Jacob W. Silverman—Direct*

showed me that he had sent a five-day notice or whether I did that myself, but I know that before a complaint was made—

10           The Court: One minute. Do not get off your subject.

Q. You were telling now what Mr. Weisman told you as to the facts. Keep to them.  
A. He told me that he had received two checks from Luca DeCandia, which had been returned N. G. An examination of the checks showed that.

By the Court:

20           Q. Is that all he told you? A. Well, he told me that he got these checks in his business in payment of merchandise.

By Mr. Weinberg:

Q. Did he tell you how he got the check for \$11.50, what that was for, if you recall? A. In payment of merchandise.

Q. Did he tell you what the \$656 was for? A. Also in payment of merchandise.

30           Q. Well, now; tell us a little more. Did he say when the merchandise had been obtained, when either of these checks were received by him? A. I can't remember the specific instance. It is quite some time ago, and I have had so many transactions in my office since then that I wouldn't venture to give the specific details of the conversation.

Q. Do you think you could identify either or both of those checks if I showed them to you?  
A. These are the checks.

40

Mr. Weinberg: The witness refers to Exhibits D-1 and D-2.

*Jacob W. Silverman—Direct*

Q. Were you present at the time the complaint was made? A. I took Mr. Weisman to the Criminal Court.

The Court: One minute.

A. (Continuing.) Yes, sir; I was. 10

Q. In what Court was the complaint made?  
A. Third Criminal Court, Part I, Seventeenth Avenue and Livingston Street, Newark, N. J., commonly known as the Fourth Precinct Police Court.

Mr. Weinberg: Is the complaint here?

Mr. Brunetto: I do not know. I have a copy.

Mr. Weinberg: That would not do any good. 20

Q. Did you see the original affidavit which was made by Mr. Weisman at the time the complaint was taken or just before the complaint was taken?

A. Yes, sir.

Q. Do you recall whether or not the matter stated in his affidavit agreed with the facts stated to you by him? A. Yes, sir. May I explain that, Mr. Weinberg?

Q. Sir. A. May I explain the— 30

Q. Being a lawyer, I suppose you are entitled to some latitude? A. Before we made a complaint in the case we conferred with Judge Howe. It was after Judge Howe got through with his calendar, calling the cases, he asked whether—

(Objected to.)

(Objection sustained.)

*Jacob W. Silverman—Direct*

A. (Continuing.) We laid the facts before the Court.

Mr. Brunetto: I move that that be stricken out, your Honor.

The Court: It is stricken out.

10

Q. Is Judge Howe a lawyer, to your knowledge?

A. Yes, sir; practicing in the Kinney building.

Mr. Brunetto: I move to strike that out, your Honor.

The Court: It will be.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

20

Q. Then confine it to what occurred between yourself and Mr. Weisman. A. A complaint was drawn by the clerk of the court at the instructions of the judge of the Court. I read the complaint and I advised Mr. Weisman to sign it.

Q. Now, what happened after that? A. Mr. DeCandia was picked up by the police.

Q. That you don't know. That you only know from hearsay. A. That is right.

30 Q. Were you in the Criminal Court at any time? A. Yes, sir.

Q. Will you tell us how many times? A. Well, I was there when he was arraigned and then the case was adjourned at the request of Mr. Brunetto, attorney for Mr. DeCandia.

Q. Do not go so fast. I will take you over that. You were there when he was first arraigned, DeCandia? A. Yes.

40 Q. Was Weisman there? A. Yes.

*Jacob W. Silverman—Direct*

Q. Were you there when the plea was announced? A. Yes.

Q. The plea of DeCandia? A. Yes.

Q. Was he represented by counsel? A. Yes.

Q. Who? A. Mr. Brunetto.

Q. What was his plea? A. Not guilty. 10

Q. Did anything happen after that? Did anything further occur on that day outside of the arraignment and the plea?

Mr. Brunetto: What day was that?

Mr. Weinberg: I do not know. The first day; the day of the arraignment.

The Court: December 8th.

Mr. Weinberg: Whenever it is. 20

A. Prior to the plea being interposed by Mr. DeCandia, Mr. Brunetto conferred with me.

Q. After the complaint was taken? A. Yes, sir. That was when he was arraigned before the Court.

Q. Was DeCandia present or not? A. Yes, he was present at the time Mr. Brunetto was talking to me.

Q. Within hearing? A. Yes, sir.

Q. What was the conversation between you and Brunetto? A. Mr. Brunetto said to me, "Jake," he says— 30

Q. Meaning whom? A. Meaning me. He says, "I know that DeCandia gave your client a couple of bum checks." He said, "If you will adjourn this case I will pay your client the amount of the checks, if you have no objection." I says, "I have no objection. We will lay the facts before the Court, and if the Court is agreeable to 40

*Jacob W. Silverman—Direct*

an adjournment, I am perfectly satisfied." So after the plea was taken Mr. Brunetto made a motion for an adjournment and I laid the facts before the Court and told him what Mr. Brunetto had told me, and Judge Howe adjourned the case  
10 I think for a week or two, I am not positive, but he granted the adjournment on the strength of the statement made by counsel.

Q. Now, in the meanwhile do you know whether or not DeCandia was under bond? A. I think Judge Howe held him in bail pending the adjournment. I think the bail was \$500 or \$1,000; I am not positive of the amount.

Q. Were you present at the final hearing up  
20 there? A. Yes, sir.

Q. Did DeCandia have anything to say at that examination or hearing? A. Nothing. Didn't say a word.

Q. Was anything said so far as you recall at that hearing regarding any fourteen checks? A. At the final hearing you mean?

Q. In the Police Court. A. You mean at the arraignment?

Q. No, at any time. I call it the final hearing.  
30 The hearing under which he was held finally for the Grand Jury. Suppose I strike that out. Was any testimony taken at all in the Police Court in this matter outside of the facts in the complaint? A. I am not sure whether there was a stenographer there or not.

Q. Do you know if any witnesses testified? A. Nobody testified except the complainant.

Q. Mr. Weisman? A. There was an examina-  
40 tion.

*Jacob W. Silverman—Direct*

The Court: That is what he said, wasn't it? I say, that was Mr. Weisman's testimony, I think, that he was the only one.

Q. Was anything said so far as you can recall regarding any fourteen checks? A. Nothing was said as far as I can recall. 10

Q. Did you ever hear anything about fourteen checks given by Mr. DeCandia? A. No, sir.

Q. At any time after that? A. No, sir.

Q. Were you present in the Criminal Court at the time the indictment was tried against DeCandia for issuing these checks? A. I was not. The case was then in the hands of the prosecutor. I had no interest in it. 20

Mr. Weinberg: Now, I understand, if your Honor please, that you have admitted this whole file of Kitzman against DeCandia.

The Court: Yes.

Mr. Weinberg: I do not know what is in it. I believe I had an objection to it.

The Court: Yes.

Q. You were the attorney, Mr. Silverman, for Kitzman, the assignee of the Weisman & Obshatkin account? A. Yes, sir. 30

Q. I show you a paper marked Summons and Complaint signed by Jacob W. Silverman as attorney. Is that yourself? A. That is me. Is that the original complaint?

Q. That is the original complaint taken from the files of the Court? A. Yes, sir.

Q. That was drawn either by you or under your orders? A. Yes, sir. 40

*Jacob W. Silverman—Direct*

By the Court:

Q. Is that suit upon these two notes? A. Let me look at that.

10

Mr. Weinberg: The complaint shows that an action was brought by Kitzman against the defendant on two notes, one for \$656.79 as shown in the first count, and \$11.50 as shown in the second count of the complaint, together with the fact of the protest of the respective checks and the amounts of protest.

By the Court:

Q. They are the two notes upon which the plaintiff was arrested, were they not? A. Yes, sir; two checks.

20

Q. I say, those two checks upon which that suit was brought? A. Yes, sir.

Mr. Weinberg: Will you give us the date of that complaint?

Mr. Brunetto: March 10th is the date of the summons, 1927.

30

The Witness: The same is tested on the 10th day of March and attested by the sheriff on the 11th day of March.

By the Court:

Q. What year? A. 1927.

By Mr. Weinberg:

Q. That was some months after the examination in the Police Court? A. Naturally. I presume it was. Yes, December, 1926, was the examination in the Police Court.

40

*Jacob W. Silverman—Direct*

Q. Now, I show you an answer that was filed by Mr. Brunetto on behalf of the defendant. Do you recall having seen that or a copy of it? A. Yes, sir.

Q. Will you look at the second defense? A. Yes, sir. The second defense states that the check— 10

Q. Well, read it. A. "The check sued on was rendered void after issue by a material alteration by the said payee, to wit, by the writing of the said payee of the sum of \$656.79 whereas he should have written \$50 as directed by this defendant."

Q. Had you heard of that before that answer was filed? A. First time. 20

Q. The first time you heard of that defense? A. Yes, sir.

Q. Now, what did you do after that answer was filed? A. The checks—

Q. Now, what did you do in this suit? A. I filed an amended complaint.

Q. Will you tell the Court and jury, please, the difference between the original complaint and the amended complaint? A. The amended complaint is the same as the original complaint except the third count is added. In other words, the first complaint, the original complaint was a suit composed of two counts embracing two checks, one in the sum of \$656.79, and one check in the sum of \$11.50. In the amended complaint a third count was added. 30

Q. Those two counts were retained, were they, in the amended complaint? A. Yes, sir. A third count was added showing a book account between 40

*Jacob W. Silverman—Direct*

the parties, and goods sold and delivered to the extent of \$673.09, which as a matter of fact was the aggregate total of the first two counts. In other words, the third count absorbed the first and second counts.

10 Q. I show you a paper which is marked answer to amended complaint. Did you ever see that or a copy of it? A. Yes, sir. That was an answer filed to the amended complaint by Mr. Thomas Brunetto.

Q. The same attorney? A. Yes, sir.

Q. Did that answer set up a defense different from what was contained in the first answer? A. Well, it sets up practically the same matter as  
20 the first answer and adds an answer to the third count.

Q. Which is the count for the book account? A. Yes.

Q. What does it say as to that? A. It says it denies that the plaintiff is the owner of said check and that he is the assignee of said book account. This defendant further says that the said plaintiff is not the true party for whose  
30 benefit said suit is instituted; that the said plaintiff is a dummy for and is suing in behalf of Weisman & Obshatkin, who are the true plaintiffs in said suit, and that the said suit is brought in the name of said plaintiff so that defendant could not file a counterclaim against said cause of action.

By the Court:

Q. Was a motion made to strike that out? A.  
40 Yes, sir. It was stricken out.

*Jacob W. Silverman—Direct*

By Mr. Weinberg:

Q. I show you your papers. A. Thereupon in behalf of the plaintiff Meyer H. Kitzman I filed a notice of motion in the Court setting forth that I would move to strike out the answer filed by the defendant Luca DeCandia on the ground that the same was insufficient in law and is false, frivolous and sham, and filed solely for the purpose of delay, and I attached to my moving papers the affidavit of Harry Weisman and the affidavit of Meyer H. Kitzman, the assignee and the plaintiff in the suit. 10

Q. Now, what happened on that motion? A. On the motion—on the return day of the motion the answer was stricken out by Judge Smith, judge of the Circuit Court, on the same grounds that I had urged upon the motion. 20

Q. And then as a result of striking same out what happened? A. The third count, taking in the first and second count, there was a judgment on the third count, and the proceedings on the first and second counts were abandoned.

By the Court:

Q. You mean summary judgment? A. Summary judgment. There is an order for summary judgment. There should be an order there signed by Judge Smith, and that judgment was entered in the sum of \$700.01, which was the full amount of plaintiff's claim plus interest at 6 per cent. 30

Mr. Weinberg: May I just be permitted to read this letter? It bears the file date of July 23, 1927, stamped John H. Scott, 40

*Jacob W. Silverman—Direct*

10 clerk, and recites, after giving the title of the cause, this: "This matter having come before me this 23d day of July, 1927, upon notice to the defendant by the plaintiff for an order striking out the answer to the third count of the complaint filed herein, and the separate defense to all counts, and for final judgment for the amount of plaintiff's claim, and upon considering the affidavits filed herein.

20 "It is on this 23d day of July, 1927, ordered that the answer to the third count be and the same is hereby stricken out and that the separate defense to all counts be stricken out in so far as the same affects the third count, and it is further ordered, that final judgment be entered in favor of the plaintiff against the defendant in the amount of \$700.01 and costs on said third count upon which the said plaintiff has elected to proceed only, together with the costs of said motion to be taxed. Signed William A. Smith, Judge of the  
30 Essex County Circuit Court, on motion of Jacob W. Silverman."

By Mr. Weinberg:

Q. Now, after that was any further step taken by you? A. I issued execution to the sheriff of Essex County.

Q. You ordered execution to be issued by the sheriff? A. Yes. That is right.

Q. Do you know whether execution was issued?  
40 A. Execution was issued on my judgment, on my

*Jacob W. Silverman—Direct*

order, and returned unsatisfied. I subsequently substituted myself as—I subsequently consented to have Leo J. Fischgrund substituted in view of the fact I was unable to collect it.

Q. And substituted, according to the file here, January 24, 1928. Is Mr. Fischgrund around these parts any more? A. No, sir. I understand he absconded. 10

Q. And that ended your connection with this case? A. Yes.

Q. Now, I have one further question to ask you, and that is why, after the first answer was filed by Mr. Brunetto to your original complaint, did you add a further count in which you attached copy of the book account that you sued on? A. 20  
These checks were merely evidence of merchandise which had been sold and delivered to Luca DeCandia. There was no question about that.

Mr. Brunetto: Your Honor, I move to strike that out.

The Court: It will be stricken out.

Mr. Weinberg: No question about that.

A. (Continuing.) The answer filed by Mr. Brunetto in behalf of the defendant Luca De- 30  
Candia to the original complaint raised an issue of fact which, in my opinion as a lawyer, could not be decided by the Court on a motion to strike out the answer, if the defendant filed an affidavit corroborating the facts that he set forth in his answer. I still felt that in view of the fact that these checks were given in payment of merchandise, that there would not be any question about the merchandise. 40

*Jacob W. Silverman—Direct*

Mr. Brunetto: I move to strike that out.  
strike out that part of how he felt.

The Court: It will be stricken out.

The Witness: It was my opinion.

10 Mr. Brunetto: I move to strike that out.

The Court: It will be stricken out.

The Witness: So I added the third count  
for goods sold and delivered and for a  
book account, which embraced the articles  
for which these checks in question had been  
given.

Mr. Brunetto: Your Honor, I move to  
He does not know anything about it, why  
these checks had been given.

20 The Court: I sustain the objection.

By the Court:

Q. I suppose by that you mean for which it  
was represented to you to be given? A. It was  
represented to be by my client. Of course I got  
all this information from my client; and we pro-  
cured a judgment on the third count.

By Mr. Weinberg:

30 Q. So far as your experience in the Courts of  
Essex County goes, is there any difference in the  
length of time it takes for final judgment in a  
contested matter or an uncontested one?

(Objected to as immaterial.)

(Objection sustained.)

A. It is a quicker way of getting the judgment.

The Court: One minute. I sustained the  
objection.

40 The Witness: Pardon me, your Honor.

*Jacob W. Silverman—Direct*

Q. Was the motion to strike the defendant's answer and to enter summary judgment opposed?

A. No.

By the Court:

Q. I suppose you don't know whether anything has been received from that judgment, do you, of your own knowledge? A. I know from information. 10

Q. I say of your own knowledge. A. My own knowledge, no. I think I can explain details, if your Honor please.

By Mr. Weinberg:

Q. What did you say you can explain?

The Court: He says he does not know of his own knowledge. 20

Q. Did any payment come through you, come to the plaintiff through you? A. No.

Q. Did any payment come to the plaintiff through you up to the time that you substituted another attorney in January, 1928? A. No.

Q. In the Police Court Mr. Brunetto testified that there was some talk with respect to giving the plaintiff a mortgage? A. Mr. Brunetto testified, did you say? 30

Q. Yes. Were you here yesterday when he testified? A. No, sir.

Q. That at the hearing in the Police Court, the third Criminal Court, you stated practically on behalf of Mr. Weisman, or rather he stated to you in the hearing of Mr. Weisman, that they wanted to settle this matter by his giving of a mortgage. Did anything of that sort occur? 40

*Jacob W. Silverman—Direct*

Mr. Brunetto: That is objected to. That is not the testimony as I remember it.

Mr. Weinberg: How do you remember it? I can only give it as nearly as I can remember it.

10

The Court: I can tell you what he did say, that Mr. Silverman said his client was willing to call off the whole proceeding if DeCandia would sign the mortgage.

Mr. Weinberg: I will accept that as my question.

The Witness: Nothing ever said to that, because that could not have been said, because as a matter of fact, DeCandia did not even have any property.

20

Mr. Brunetto: Your Honor, I move to strike out that part of his answer.

The Court: The last part will be stricken out.

Q. There was nothing said? A. No, sir; absolutely not.

Q. Was any conversation ever had between you and Mr. Brunetto regarding the giving of any mortgage? A. Never. Cash.

30 Q. That was what you referred to the first time the matter came up? A. Yes, sir.

Q. Was any cash ever actually tendered to you? A. Never.

Q. Of any sum at all? A. Never.

Q. In payment of either of the checks? A. Never.

Q. On account of either of these checks? A. No, sir.

40

*Jacob W. Silverman—Cross*

CROSS-EXAMINATION by Mr. Brunetto:

Q. Mr. Silverman, is your recollection of what happened in the police court very good? A. Well, as good as can be expected.

Q. That is, on December 8th? A. As good as can be expected in view of the fact that it happened two and a half years ago. 10

Q. You only have a vague recollection? A. Well, I have a pretty good recollection. If I have a vague recollection of things I will tell you.

Q. You are sure DeCandia gave a bond of \$500 on that date? A. I am not sure about that. He may have been paroled in your custody with my permission. I am not sure about that, because that was immaterial anyway so far as I was concerned. 20

Mr. Brunetto: I move to strike that out.

The Court: It will be.

Mr. Brunetto: I think the witness ought to answer my questions.

Q. You were present at the hearing? A. Yes.

Q. On December 15th? A. I don't remember the dates. I was present at the hearing. 30

Q. And you were also present before Judge Flannagan when DeCandia was tried; isn't that a fact? A. I was not, absolutely no.

Q. Isn't it a fact that you were sitting right next to the prosecutor?

The Court: Let me suggest that both counsel and witness calm down.

A. No, I was not. 40

*Jacob W. Silverman—Cross*

Q. Were you ever to Mr. DeCandia's house?

A. Never.

Q. With Mr. Weisman? A. Never.

Q. Are you sure about that? A. Never; absolutely.

10 Q. Were you ever to Mr. DeCandia's place of business? A. Never.

Q. Did Mr. Weisman ever tell you that Mr. DeCandia had offered him to pay the \$11.50 check?

A. Yes. He told me that he received, when the case was actually on trial in Judge Flannagan's court, he told me that he received a check from you in the sum of \$11.50. I think that was about three months after the complaint was made; and  
20 I told him it was the State's case and he had better not tamper with it, but return the check; otherwise he might get himself in trouble.

Q. You knew that a man could pay his bills?

(Objected to as argumentative and immaterial.)

(Objection sustained.)

Q. You were present when Weisman was cross-examined by me in the police court? A. Oh,

30 yes.

Q. On the 15th? A. I don't remember the 15th. I was present at all hearings.

Q. At the hearing in the police court? A. I was present at all hearings with reference to this case in the police court.

Q. You remember the question was brought up, or Mr. Weisman was asked if it was not a fact that Mr. DeCandia had given thirteen or fourteen checks, or fourteen checks of fifty dollars  
40 apiece? A. I don't remember any such question.

*Jacob W. Silverman—Cross*

Q. Will you say he was not asked that? A. Well, human memory is fallacious. I may be mistaken, but my best recollection is that you never asked it.

Q. I show you a postal card dated December 10, 1926, and I call your attention to your signature on your postal card, and ask you if that is your signature. A. That is not my signature. 10

Q. Did you ever send that postal card? A. I may have sent that. It is my stenographer's signature. A lot of detail work in the office is taken care of by my stenographer, clerks and assistants.

Q. Would you say that you ordered your stenographer to send that to me? A. I may have and I may not have. I can't remember. She may have written it on her own accord. 20

By the Court:

Q. Authorized by you in the usual conduct of the office business? A. In the usual conduct of the office, the clerks and girls sometimes send out letters. Of course, I have no objection.

Q. With your authority? A. With my authority and permission, but I may not know about the specific items they send out. 30

Mr. Brunetto: I ask that that be marked for identification. I will offer the card in evidence if Mr. Weinberg has no objection to it.

Mr. Weinberg: I have not any objection to it going in on your case as evidence. It can go in now for identification, or put it in on your own case.

(The same is marked Exhibit P-5 for identification.) 40

*Jacob W. Silverman—Cross*

By Mr. Brunetto:

Q. Mr. Silverman, do you remember the argument on the motion to strike out the answer? A. Do I remember it? In what respect, sir, do you mean?

10 The Court: Do you remember the argument, he says.

Mr. Brunetto: Your Honor, I am not finished with my question.

The Witness: Pardon me, Mr. Brunetto. Proceed with your question.

The Court: That is the question you have not answered.

20 The Witness: Have you finished your question?

Mr. Brunetto: No, I have not finished my question, your Honor.

The Court: Oh, all right.

By Mr. Brunetto:

Q. Do you remember the argument on the motion to strike out the answer and the amended complaint before Judge Smith, and my opposing the motion? A. You finally ended up by saying that you did not oppose the motion.

30 Q. Do you remember my opposing the motion so far as the checks were concerned? Isn't that a fact? A. Your worriment was concerned with the effect—

Mr. Brunetto: I move to strike out the "worriment."

The Court: It will be stricken out.

A. (Continuing) You did not oppose it at all.  
40 You were satisfied to allow a judgment to enter

*Jacob W. Silverman—Cross*

against the plaintiff on the third count, but you did not want your client to be placed in the position of where he might be sued on the first and second counts, and Judge Smith finally settled the matter by having me abandon the first and second counts, which I was perfectly satisfied to do, and by election proceed on the third count; and it so sets forth in the order, "And the plaintiff having elected to proceed on the third count." 10

Mr. Brunetto: Your Honor, that is not what I asked this witness. I think I asked him a question that he has answered, and now he is delivering a speech.

The Court: Is there any portion of it you want to strike out? 20

Mr. Brunetto: Yes.

The Court: Well, what portion of it? (The last answer is read by the stenographer.)

The Court: The whole answer will be stricken out.

By Mr. Brunetto:

Q. Do you remember that? A. You did not oppose it. 30

Q. Do you remember my being in the court room? A. Yes, I remember your being in the court room.

Q. And you remember my speaking after you made your motion to the Court? A. Yes.

Q. Mr. Silverman, at the time that Mr. Weisman consulted you about this matter, did he tell you that at that time DeCandia had offered to pay the check for the \$11.50? A. No, sir; he told me he had not paid. 40

*Jacob W. Silverman—Cross*

Mr. Weinberg: There is no such evidence in the case.

10 Q. Did Mr. Weisman tell you that the check for \$656 was on an old book account? A. Yes, sir; as I remember it he told me that that check was given for a past consideration, and the small check was given contemporaneously with the purchase.

Q. Of what? A. Of the items.

Q. In other words, the two checks were given at the same time? A. Oh, no. They were given separately.

20 Q. At the same time? A. The \$11.50 was given contemporaneously with the purchase, and the check of \$656 was given on a book account, on a past due book account.

Q. Did he tell you when he had received those checks? A. He told me he had received them on the date which they had. I asked him whether they were post-dated checks, having in mind the case of State vs. Barone. He said, no, they were given on the same date they were dated.

By the Court:

30 Q. Mr. Silverman, with that knowledge that a large check was given on a past due book account, did you advise him that he could make a criminal complaint upon that check? A. I did, sir.

Q. Upon what authority? A. On the theory that the check came back; that a five days' notice was sent to Luca DeCandia, and he failed to make good.

40 Q. I thought you said you had in mind the 1919 statute. A. That is the statute. I am referring

*Jacob W. Silverman—Cross*

to, if your Honor please. The Act provides that if the drawer of the check fails to make good after receiving five days' notice, that that is prima facie evidence of fraud.

Q. Even though you have knowledge that the check was given for a past due account? A. Yes, sir. I briefed that question, and there is only one decision on that in the case, and that is the State vs. Barone. That question has never been decided in this State. 10

By Mr. Brunetto:

Q. Your opinion, then, after your client told you these facts, was that although there was no consideration for a check, or a check was given for a past consideration, the maker would still be liable under the check statute? 20

Mr. Weinberg: I object to the question. It is double. One part he would not answer yes, and the other he would.

(The last question is read by the stenographer.)

The Court: I think the question is not as you intend it? You had better ask your question again, so we know just what it is intended to be. 30

Q. Your advice to your client at the time was that, although there was no consideration passing at the time the check was made, the maker would still be criminally liable?

Mr. Weinberg: I am going to object to the question, if your Honor please, on the further ground that I believe it is well established that it does not make a particle 40

*Jacob W. Silverman—Cross*

10 of difference whether counsel is right about it or not in his opinion as to the law. While I agree with him on his opinion if it means anything, that is not a question for consideration by the Court or jury, as long as he is competent to be employed for the purpose.

The Court: I do not believe that the advice of just any counsel is excuse for making complaint. I think it must be competent counsel. I think that might go to the competency of counsel.

Mr. Weinberg: I take an exception if the question is allowed.

20 The Court: The question will be allowed.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

A. That was my opinion from an examination—

Q. Wait a minute. A. I have not finished my answer.

30 Q. Well, you answered the question, that that was your opinion. A. From an examination of the statute.

Mr. Brunetto: I move to strike it out, what he is saying now, your Honor.

The Court: It will be stricken out.

Q. Do you know of any case in New Jersey that holds that?

40 Mr. Weinberg: I object to that. It is wholly immaterial. It cannot affect my

*Mary Lifland—Direct*

client as to what case he may know that holds that. Now, you are actually going into his knowledge, specifically as to whether or not the opinion he gave is backed up by a recorded case. In fact, that would open the door to having expert witnesses now take the stand to show that he was right or he was not right in his opinion. 10

The Court: The question may be answered.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.) 20

A. I know of no cases to the contrary.

Mr. Weinberg: Answer the question first, please.

The Witness: No, I relied on the statute.

Mr. Brunetto: I move to strike out the latter part.

The Court: It will be stricken out.

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30

MARY LIFLAND, sworn in behalf of the defendant.

Direct-examination by Mr. Weinberg:

Q. Miss Lifland, where do you live? A. Seymour Avenue, 193.

Q. Newark? A. Newark.

Q. What is your occupation? A. Bookkeeper. 40

Q. For whom? A. Weisman & Obshatkin.

*Mary Lifland—Direct*

Q. How long have you been a bookkeeper for that firm? A. About four years.

Q. What do your duties involve? A. General manager of the office, bookkeeping.

10 Q. Who else, if any one, is in the office besides you? A. No one.

Q. So what do you do from the time a sale is made until payment is made? A. I enter it in my book of accounts.

Q. Do you keep all the accounts yourself? A. All records; yes, sir.

Q. Is all posting made by you? A. Everything by me.

20 Q. Who has charge of the books in the office? A. I have.

Q. Who takes charge of the payments, cash, checks, notes? A. I do.

Q. Where do you put the cash and the checks and the notes when you receive them? A. Why, on the cash receipts—our business is a weekly business.

30 Q. Pardon me. I am now asking you as to your physical doings there. What do you do when you receive them? A. Oh, I deposit them the same day.

Q. Before you deposit them, what do you do with them? A. I make a record of them.

Q. Where do you put them? On the floor? A. Oh, no. A cash drawer with a combination.

Q. Do the employees, the drivers and others have access to the cash drawer? A. They do not.

40 Q. After that I suppose you make up a bank deposit slip and go through the pleasant duty of depositing money? A. Exactly.

*Mary Lifland—Direct*

Q. And sometimes taking it out. Now, who prepares the slips of the sales? A. The salesmen who sell the articles.

Q. What happens to the slips? A. They are handed to me.

Q. What do you do with them? A. I enter 10 them, make up my balance.

Q. I show you a slip and ask you what that slip is. A. That is the account of Luca De-Candia.

Q. From when? A. From June 19th.

Mr. Brunetto: Your Honor, I must object to this unless this witness is qualified that this is in her handwriting.

Mr. Weinberg: She has testified that 20 everything was done by her.

Q. Is this your handwriting? A. Yes.

Q. These figures are yours? A. Yes.

Q. And the account kept by you? A. Yes.

Q. Transfers made by you? A. Yes.

Q. And everything by you? A. Yes.

By the Court:

Q. From what date did you say? A. June 19, 1926, until the last posting on November 24, 1926. 30

By Mr. Weinberg:

Q. Can you tell whether that is when the account started or not? A. Why, he probably was a cash purchaser previous to that.

Q. No, I say can you tell from that sheet when the account started? A. Yes. The account started on my records.

Q. As a charge customer? A. Exactly.

*Mary Lifland—Direct*

By the Court:

Q. Was there any charge account before that time? A. Before that, I haven't the records of those.

10 By Mr. Weinberg:

Q. You haven't a record or you haven't the record, or you have no records or what? A. I have no records.

By the Court:

Q. That account which you have there I suppose contains only the charge purchases? A. Exactly.

20 Q. Not the cash purchases? A. No, cash records have nothing to do with this. This is the charge account, accounts receivable.

By Mr. Weinberg:

Q. Have you the records of the cash? Did you bring those with you? A. Only the record on that particular sale, the cash sale for which a check was given and came back.

30 Q. Is there a special entry for that? A. Well, since I had considered that as part of a cash sale, and when the check was returned I had to dispose of it in some way in order to fix my records, so I charged it to DeCandia on his book account.

Q. Well, have you the account showing receipt of it as a cash sale? A. Yes, sir.

Q. Where is that? A. May I have that book please?

40 Q. What book is this that you called for? A. This is the cash book. I have my original entry here. May I explain something first about the nature of our business?

*Mary Lifland—Direct*

Q. Well, I don't know. You mean as to the method of keeping books? A. No. This is a different kind of business from the usual business. That is why I want to explain it, if I may.

Q. In what respect do you mean? A. Well, the usual business is kept on a monthly basis. 10

Mr. Brunetto: Your Honor, that question has nothing to do with this particular transaction. Unless it has something to do with this particular transaction, I will have to object to it.

The Court: Of course you will have to omit that.

The Witness: It has to do with this particular transaction. This is a weekly sheet of accounts that are owing us, and each date is numbered, and on the days that I received a check for any one of these accounts I enter it. On my last page I make my entries for the c. o. d's that have come in on that day, and how much sales that were made and my deposits on that day in the week, because our business is a weekly business. I close my business every week, not every month, as is the usual procedure on other businesses. 20  
30  
Now, on this day, on the 18th of November, 1926, I had cash sales \$103.85, and in that the \$11.50 is considered.

Q. That is just in the total of the cash sales for the day? A. Considered as a cash sale.

By the Court:

Q. Are those four sheets that you have there, your sales for the 18th? A. No. These are my accounts receivable for the week of November 40

*Mary Lifland—Direct*

15th to 20th. This is my original entry, November, 1926.

Q. Accounts receivable. How is it that your cash transactions appear in that? A. Well, because they have to be credited to the account, and  
10 at the end of the week—

Q. You mean the cash payments? A. Yes.

Q. But unless the payments are made upon the account of customers, they do not appear in those sheets, do they? A. No, but I said—

Q. Now, that answers my question. They don't appear on the sheet? No cash transactions appear on that sheet? A. They do.

Q. Except payments upon bills receivable. A.  
20 The total cash transactions of the day appear upon these sheets. This makes up my deposits. I check up my deposit every day.

By Mr. Weinberg:

Q. Pardon me. You see the advisability of just sticking to the questions. You are telling us now about your total of all cash receipts irrespective of from whom they come? A. Exactly.

30 Q. Now, we are not interested in that. Will you look at your account and tell us what entry you have with respect to \$11.50 concerning Mr. DeCandia's account? A. Well, the original entry—

Q. Now, look at your entries please. I realize you are a woman, but there are rules of evidence.

By the Court:

Q. Now, you say you keep a cash book? A.  
40 Yes.

*Mary Lifland—Direct*

Q. And does the cash book show from whom the cash is received? A. No, sir; only cash sales.

Q. I say, does it show your cash sales? A. Yes.

Q. And to whom those sales were made? A. Not the cash sales, no. 10

Q. All right, now. Then go ahead. A. On that \$11.50 check I charged back to the account of Luca DeCandia on November 23d, the day the check was returned, the amount of \$13.86, being the \$11.50 and the \$2.36 protest fees.

Q. What was that date? November 23d. A. November 23d.

By Mr. Weinberg:

Q. That is when it was charged back? A. Right. 20

Q. Do you recall the check having come back from your bank? A. Yes, sir.

Q. What bank was that you were depositing it in? A. Federal Trust Company of Newark.

Q. Can you identify the check and the notice of protest that came back? Did that go through your hands? A. Yes, sir.

Mr. Brunetto: Your Honor, we admit 30 that this check came back and was protested for not being paid. That is an admitted fact.

The Court: That appears in the evidence.

Q. And after the receipt of this paper did you make that entry in the account? A. Yes, sir.

Q. When did you first get this check? A. I don't remember what time it was. 40

*Mary Lifland—Direct*

Q. Who gave it to you? A. It came in with the mail.

Q. No, no. I mean when it was first given to you. A. Oh, when I received the check? The check was in the drawer when I got there in  
10 the morning.

Q. It was there. A. Before I came.

By the Court:

Q. What day? A. On the 18th of November.

By Mr. Weinberg:

Q. I show you a check for \$656.79, Miss Lifland, and ask you if you ever saw that check before?

A. Yes, sir. I made that check out.

20 Q. You made it out? A. Yes, sir.

Q. At whose request? A. Mr. Luca DeCandia.

Q. And where did you make that out? A. In the office.

Q. Will you tell us the circumstances under which you made out that check? A. Why, Mr. Luca DeCandia came into the office and said he wanted to pay his account, and I accordingly figured out the amount for him, made it out, and he signed it.

30 Q. Did you tell him how much it was? A. Certainly. He had a knowledge of it because he received a statement every week.

Q. You sent him statements every week of his account? A. Absolutely. I have my copies here.

Q. Was any other check received by you other than that check for \$656 on that day? A. You mean from Mr. DeCandia?

40 Q. From DeCandia? A. No, sir.

*Mary Lifland—Direct*

By the Court:

Q. What date was that? A. November 20, 1926.

Q. Were fourteen checks from Mr. DeCandia of \$50 apiece, or substantially similar amounts, received by you or in your office on that day? A. 10  
No, sir. I know nothing about them.

Q. Did you ever see anything of any such number of checks? A. No, sir.

Q. Did you hear anything about them from Mr. DeCandia or anybody else that day? A. No, sir.

Q. Is there any record in your book anywhere of any checks of that number for \$50 or any similar amount? A. I never saw him, so they 20  
couldn't be in my books.

By the Court:

Q. I suppose your answer is then that they are not in your books? A. No, sir; they are not in my books.

By Mr. Weinberg:

Q. If these checks had been received in your office and come under your notice, would there have been an entry or not in your books? A. If 30  
they had been received; yes, sir; there would have been an entry.

Q. When did you first learn of any allegation that Mr. DeCandia gave a number of checks, fourteen, of \$50 apiece? A. In this court room.

Q. At this trial? A. Absolutely.

Q. Did any correspondence ever reach you or your office or you through your office concerning any such number of checks, or any statement that there was a claim that such a number of checks 40  
were given? A. No, sir.

*Mary Lifland—Direct*

Q. I show you a copy of a letter dated November 26th, which was in evidence, and ask you whether that is in your handwriting? A. Yes, that is my handwriting.

10 Q. That was mailed by you? A. By me.

Mr. Weinberg: It is marked Exhibit D-3. That was offered in evidence yesterday. I will take a minute to read this, if your Honor please. It is dated November 26, 1926, addressed to Mr. Luca DeCandia. "Dear Sir: This is to inform you that your two checks, \$656.79, protest fees of \$2.44, a total of \$659.23; and a check \$11.50, protest fees \$2.36, \$13.86 added to \$659.23, total of \$673.09, have been returned protested because of insufficient funds. We therefore look to you for payment of same within the next five days, and if at the expiration of that time your certified check for the amount of \$673.09 is not forthcoming, we shall immediately take legal steps to collect the same. Yours truly, Weisman & Obshatkin." And then I think it is M. Lifland. I do not know.

20

30

By Mr. Weinberg:

Q. Now, have you a credit on your books for this check for \$656.79? A. Yes, sir; when the check was tendered.

Q. And when you credited Mr. DeCandia's account with the checks for \$11.50— A. I did not credit him with the \$11.50.

40 Q. Oh, that was the cash account. So when you credited his account with the check of \$56.79,

*Mary Lifland—Cross*

was there a balance remaining? A. A balance after that?

Q. Yes. A. No, sir.

Q. That squared the account up altogether? A. Yes.

Q. Now, after these checks came back, have you recharged them? A. Absolutely. 10

Q. And does the balance show on your books? A. Yes, sir; \$673.09.

Q. That represents what? A. That represents the large check and the cash purchase, check for \$11.50, with the protest fees.

CROSS-EXAMINATION by Mr. Brunetto:

Q. Miss Lifland, when you received this check of \$11.50 from the bank on November 23, you made an entry in the book? A. Absolutely. 20

Q. Do you remember what time that was about when you received it? A. No, sir; I don't.

Q. Would you say it was late in the afternoon? A. I can't say. I don't believe it was late in the afternoon, because my business closes early.

By the Court:

Q. How early? A. Well, it is all according to the day's business. The place is closed about twelve or one o'clock, and I remain there to make all my entries, and I usually am finished at three or four o'clock. He started very early in the morning. 30

By Mr. Brunetto:

Q. After you made the entry in your book what did you do with the check? A. I had it there. The check was given to Mr. Weisman. 40

*Mary Lifland—Cross*

Q. What is that? A. I had the check there.

Q. And you kept it in your possession? A. What do you mean, kept it in my possession?

Q. As bookkeeper you kept the check after you made that entry in the books? A. The check  
10 was given to Mr. Weisman for his attention.

Q. What time did you give the check to Mr. Weisman? A. I don't know.

Q. Are you sure you gave it to him? A. Absolutely.

Q. When did you give it to him? A. I don't know. The day I received it.

Q. Are you sure about that, or are you just guessing at that? A. I am not guessing. I know  
20 that is the method of my business.

Q. Is that the reason why you say you gave it to him, because that is your method of doing business? A. Certainly.

Q. At that time? A. At all times.

Q. Outside of that you don't remember any particular occasion or any particular thing which took place on that day which reminds you that you gave this check to Mr. Weisman on that particular day? A. I don't need to. I would give  
30 it to Mr. Weisman under any and all circumstances.

Q. You did what you would customarily do on those occasions? A. It is the method of every bookkeeper.

Q. Was Mr. Weisman in his place of business that day? A. Certainly.

Q. Was he there during the whole time that you were there? A. I imagine he was, yes.

Q. Would you say whether he was or whether  
40 he wasn't? A. He was.

*Mary Lifland—Cross*

Q. He was? A. Absolutely.

Q. And he was there about the time you quit about three o'clock? A. I don't know whether he left after I did, or left with me. I don't know.

Q. But he was there while you were there? A. Absolutely. 10

Q. Do you know whether Mr. DeCandia at any time offered to pay any part of his bill? A. He did not.

Q. Do you know whether anybody offered to do that in his behalf.

Mr. Weinberg: I object to that. In the first place it is not cross-examination. In the second place, it is calling for hearsay. 20

The Court: The question was does she know. He asked her does she know. That may be answered yes or no.

A. I believe you sent the check—

The Court: No. Do you know?

Q. (Read by stenographer.) Do you know whether Mr. DeCandia at any time offered to pay any part of his bill? A. Mr. DeCandia did not at any time offer to pay any part of his bill. 30

Q. (Read by stenographer.) Do you know whether anybody offered to do that in his behalf?

A. Yes, but not the bill, the cash check.

By Mr. Brunetto:

Q. I show you a letter on the letterhead, date of February 25th, on the letterhead of Weisman & Obshatkin, marked Exhibit P-4, and ask you whether you wrote that? A. I did. 40

*Mary Lifland—Cross*

Q. I ask you whether you saw that check? A. I did when I mailed it.

Q. Why was that check returned? A. Because it wasn't the full amount of his indebtedness.

10 Q. In other words, Mr. Weisman wouldn't take any part of Mr. DeCandia's indebtedness?

(Objected to.)

(Question withdrawn.)

Q. Now, what time did you get to the place of business on November 23, 1926? A. November 23d?

Q. Yes. A. About eight o'clock.

20 Q. That was the morning that this check came back? A. Yes, it was the morning that I charged it back on my cash book.

Q. And you are sure that check came back on the 23d in the mail? A. If I can see the check I can tell you that. It has the day I charged it back.

Q. Will you look it over? A. This \$656.79.

Q. And the \$11.50 check. The one I have reference to is the check of November 18th? A. Yes.

30 Q. I understand that is the check that came in on the 23d that you made an entry in your book.

Mr. Weinberg: She did not say that.

The Court: That is what she said.

Mr. Weinberg: The check for \$11.50?

The Court: Yes.

A. I made the entry in the book on the 23d for the \$13.86, \$11.50 and \$2.44.

40 Q. Is that the same day that you say that check came back through the mail? A. It probably is. I am not sure.

*Mary Lifland—Cross*

Q. Do you want to change that testimony now that it wasn't the 23d? A. I said I made my entry charging back the account for the \$11.50 check plus the protest fees on the 23d of November.

Q. But the check might have come on another day? A. It may have come in the day before and the place was closed, but I didn't get it until the 23d. 10

Q. You opened the mail when this check came in? A. Right; on the 23d.

Q. And you made the entry just as soon as you opened the mail and you saw this check was returned? A. Yes, sir.

Q. Now, this check of \$656.79—what time of day was it that Mr. DeCandia came in? A. In the morning soon after I had come in. I distinctly remember that. 20

Q. Is there any record that you have here, or any memorandum which fixes the time in your mind that this was early in the morning that Mr. DeCandia came? A. No; just merely the fact—

Q. Just guessing at it? A. No, sir. I distinctly remember it. Merely the fact that I had not taken my hat and coat off.

Q. It was about eight o'clock? A. About eight o'clock, around that time. 30

Q. Was Mr. Weisman there? A. Exactly.

Q. And Mr. DeCandia made out a check and signed it? A. I made the check out.

Q. He signed it? A. He signed it.

Q. And then you filled in the amount? A. No, sir. He signed the check after I had made it out.

Q. Is that the only check he signed? A. At that time? 40

*Mary Lifland—Re-direct*

Q. Yes. A. Yes, sir.

Q. You are sure about that? A. Absolutely. That was all he owed us on that day.

Q. What? A. That was all he owed us on that day.

10 Q. Is that the reason why you tell us that is the only check he made out? A. Why, certainly, that he signed, that I made it. I made no other out.

RE-DIRECT-EXAMINATION by Mr. Weinberg:

Q. Did you understand Mr. Brunetto's last question?

20

(No answer.)

Mr. Brunetto: Mr. Stenographer, will you repeat my question?

(The last question is read by the stenographer as follows: "Question: Is that the reason why you tell us that is the only check he made out?")

The Witness: Is what the reason?

By the Court:

30 Q. Because that is the balance that he owed you? A. Yes, sir.

By Mr. Weinberg:

Q. Now, Miss Lifland, have you any recollection of the receipt of the check or more from Mr. DeCandia on November 20th? A. No, sir; only one check.

40 Q. How do you know that you received one check? A. Because I made it out.

*Mary Lifland—Re-cross*

Q. Is that your recollection of it? A. Well, that is all he owed us. He asked me to make out a check for the full amount he owed us.

Q. Do you remember that because that is all he owed you, or do you remember that because it is the fact that he gave you the one check? Which is it? A. Well, he gave me one check. Yes, the fact that he gave me one check. 10

Q. You remember that independent of any other circumstances, or don't you? A. I don't understand what you mean.

Q. Do you require anything else to refresh your recollection as to how many checks he gave you on November 20th? A. All I require is the fact that he came in and he asked me to make out a check for what he owed, so I made out the one check. I wouldn't make out more than one. 20

Q. Do you know that you made out only this one check? A. Absolutely; certainly.

RE-CROSS EXAMINATION by Mr. Brunetto:

Q. I call your attention to Exhibit D-3 and ask you to look that over. Will you tell us, did you mail that yourself? A. Absolutely. 30

Q. Where did you mail it? A. In the mail box.

Q. You didn't bring it to the post office yourself? A. I may have, yes; I mailed it at a post office, because this check, I had a return receipt required on this letter.

Q. Have you got the return receipt? A. It should be with this letter, because I attached them together.

Mr. Weinberg: I forgot it. Here it is. 40

*Mary Lifland—Re-cross*

Q. Where was this letter mailed? A. It may have been at the main post office, or post office in my section.

Q. What address? A. The one on Broad Street or the one on Clinton Avenue.

10 Q. Where was this letter addressed to? A. Why, to Mr. DeCandia's address.

Q. Where? A. On Watchung Place.

Q. Are you sure about that? Are you sure that is the address you mailed it to? A. I am not sure. I haven't got the envelope.

Mr. Weinberg: That was admitted by consent.

20 The Court: I do not see the purpose of taking time about that. It is already in evidence.

Mr. Brunetto: The letter is in evidence, but the letter was offered that it was mailed to the plaintiff here, but the letter has no address on it where it was sent to.

The Court: Is that the original letter?

Mr. Brunetto: That is a carbon copy.

30 The Witness: Copy. I have the receipt from him that he signed for it, so he received it.

Mr. Weinberg: It was admitted in evidence yesterday.

The Court: I thought it was.

Mr. Weinberg: That is his signature. I offer this in evidence, it being admitted that the return receipt card is signed by the plaintiff in the case.

40 The Court: It will be admitted.

(The same is received in evidence and marked Exhibit D-4.)

*Luca DeCandia—Cross*

By Mr. Brunetto:

Q. After you received that return card did you see Mr. DeCandia any more? A. I did not, no.

Q. Do you know whether he was at Mr. Weisman's place of business? A. I don't know. I didn't see him. 10

LUCA DECANDIA, recalled.

Further cross-examination by Mr. Weinberg:

Q. Mr. DeCandia, I understood you to say yesterday that you had paid no part on account of the judgment that was obtained against you by Kitzman. 20

Mr. Brunetto: That is objected to as being immaterial at this time. That was his testimony yesterday.

The Court: That was his testimony. I suppose that is merely introductory to another question. You may assume that he said it, because he did.

Q. Did the plaintiff Kitzman, who held this account from Weisman & Obshatkin, obtain anything from you in payment of this judgment or on account of this judgment either by execution or by your voluntary payment? 30

(Objected to.)

(Objection overruled.)

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

(Exception noted as ground of appeal.) 40

*Luca DeCandia—Cross*

By the Court:

Q. Did he get anything from you in cash or any other way? A. Who?

Q. Kitzman, on this judgment? A. Who is Kitzman? I don't know him.

10

Mr. Brunetto: Your Honor, I have an interpreter here.

Mr. Weinberg: He testified yesterday without one. I do not think that that is necessary.

The Witness: Why don't somebody talk Italian? It is better.

By the Court:

20 Q. Did Weisman get anything from you, either your money or your property? Did the sheriff get anything? A. Weisman? I give something to Weisman?

Q. Yes. A. I no give nothing to Weisman.

Mr. Weinberg: You see the reason I am doing it is because of this stipulation that I was entering into yesterday, that your Honor made upon the record.

30 Mr. Brunetto: Your Honor, on the face of it the record shows that there was a sale. There is a sale for a certain amount.

The Court: It seems to me the record speaks for itself.

Mr. Weinberg: But it does not. There is a lead pencil memorandum on that record that I was willing to take on Mr. Brunetto's statement. The record shows that there was a sale of some of this man's effects for the sum of \$400.

40

*Discussion*

The Court: Now, then, doesn't it further appear that the attorney he had at that time has absconded? That is the testimony.

Mr. Weinberg: Yes.

The Court: Now, he is not responsible 10  
if Mr. Weisman had an attorney who absconded with the money that was turned over to him by his execution.

Mr. Weinberg: Nobody is insisting on this, if your Honor please. My position is not and could not be prejudiced by any such situation.

The Court: Of course, that having crept into this case, it makes absolutely no 20  
difference. It crept in because of your question on cross-examination that he paid nothing upon it, and that might prejudice him in the eyes of the jury if he actually had paid something upon it, or if anything had been collected upon the judgment. That is the only purpose.

Mr. Weinberg: Then after that Mr. Brunetto showed this record, and your Honor frankly said to him right at your 30  
desk what you have just now said to the jury, whereupon I accepted his statement that there was a sale of \$400 received. Now, my purpose in examining this witness is to show that that was not true and there was not a dollar that was received that either went to his attorney who absconded or to anybody else, and that nothing was taken from this man on the execution. 40

*Discussion*

The Court: That shows just what you get by bringing something into the case that does not belong in it.

Mr. Weinberg: I did not bring it in at the start.

10 Mr. Brunetto: I pray an exception. I would like to give my reason for the objection.

The Court: Do it so we can get along with this.

Mr. Brunetto: I will make it short, your Honor.

Mr. Weinberg: If it is all out of the case, I am willing to withdraw it.

20 The Court: It is in the case that he has not paid anything, brought out upon your cross-examination, and then it was endeavored to show by the pleadings themselves that he had paid something, and upon the pleadings it does show that there was received three hundred and some odd dollars upon this judgment. Now, if you want to contradict that—

30 Mr. Weinberg: That is my purpose in asking the defendant himself whether he ever gave up anything, money, property or anything else, on account of this judgment.

Mr. Brunetto: And his answer is no, your Honor.

Mr. Weinberg: Then, that is ended.

The Court: I do not believe he understands that.

*Daniel Angelotti—Direct*

By the Court:

Q. Did you give up anything to Weisman or the person to whom Weisman assigned this claim, either cash or property, in payment of this judgment? A. I no give nothing.

10

Plaintiff rests.

(Argument.)

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DANIEL ANGELOTTI, sworn in behalf of the plaintiff in rebuttal.

20

Direct-examination by Mr. Brunetto:

Q. Mr. Angelotti, you are a son-in-law of Luca DeCandia? A. I am.

Q. By whom were you employed, or were you in partnership with your father-in-law? A. I was working for my father-in-law.

Q. In November, 1926? A. I was working for my father-in-law.

Q. Do you remember the day when your father-in-law gave this check for \$11.50 to Mr. Weisman? A. I do. 30

Q. Were you along with your father-in-law at that time? A. I was.

Q. Do you know whether your father-in-law bought any other merchandise besides the amounts covered by this \$11.50 check on that day?

Mr. Weinberg: I object to it as part of the main case. He introduced that himself.

40

*Daniel Angelotti—Direct*

The Court: He did introduce it, but it was not necessary to his case to show that, as Mr. Weisman says that no other purchase was made upon that date; so I am inclined to admit this upon rebuttal.

10 (Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

Q. Will you answer my question? A. If any other purchases were made?

Q. Yes, on that day. A. Yes, there was.

Q. Do you know what were purchased? A. Well, some merchandise. I really don't remember what it was.

20 Q. Do you know whether that was paid or whether it was charged? A. No, cash.

(Objected to.)

(Objection overruled.)

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

30 A. (Continuing) It was cash, part of it, and we had about \$11.50 short. We wanted to give some stuff back, but Mr. Weisman said there, it was all right to make out the check.

Mr. Weinberg: I object to that, now.

The Court: I sustain the objection.

Q. Did you see your father-in-law writing the check for \$11.50? A. Why, they went in the office. He was hollering about an old bill, and he brought  
40 him in the office.

*Daniel Angelotti—Direct*

Mr. Weinberg: I am objecting, if your Honor please.

The Court: I sustain the objection.

Q. Did you see whether your father-in-law wrote his name only on one check or on more than one check? A. Quite a number. 10

(Objected to.)

Mr. Brunetto: I thought Mr. Weisman's story was that on the 18th day of November there was only one check written, and this is to contradict that story that there was more than one.

The Court: That question may be answered. 20

Mr. Weinberg: On November 18th?

Mr. Brunetto: Yes.

Mr. Weinberg: There is no testimony there was more than one check given, even by the plaintiff. He testified to one check, \$11.50.

The Court: Mr. DeCandia testified that that transaction took place on November 18th when he gave the fourteen checks. 30

Mr. Weinberg: I do not know, if your Honor please.

The Court: He said, "he asked for the \$656 on November 18th, and I asked him to wait as I have a home in Montclair." Then he asked him to give him a check, "and I said I will give you checks for \$50 a month, and when I sell the house I will pay it all off." Weisman filled out the check and he signed it. 40

*Discussion*

Mr. Weinberg: That is the check of November 18th which Mr. Weisman admits he filled out.

10 The Court: He is discussing the \$656, and he said distinctly that that was the date. It was Mr. Weisman who said it was not upon that date. If there is a doubt about it, let us go back to the stenographer's notes. If I am wrong about it we do not want to go ahead with it.

20 (The previous testimony of Mr. DeCandia was read by the stenographer as follows: "Question: Now, Mr. DeCandia, did Mr. Weisman say anything to you on November 18th about you paying the bill for \$656? Answer: Yes, sir. Question: Did he ask you for the money? Answer: Yes. Question: What did he tell you? Talk loud and slowly. Answer: I told him, 'Mr. Weisman, please wait a little while, one month or two months. I got a house in Montclair for sale. When I sell the house I give the whole amount.' Question: What did Mr. Weisman say? Answer: Mr. Weisman tell me, 'Mr. DeCandia, you no want to give check for me. Give me check. I hold check.' I told Mr. Weisman, 'I give this to you.' I give him check for \$50 a month, see. So when I sell the house I give him whole amount; I finish up everything.")

30

40 (The previous question and answer of the present witness were read by the stenographer as follows: "Question: Did you see whether your father-in-law wrote his

*Daniel Angelotti—Direct*

name only on one check or on more than one check? Answer: Quite a number.”)

By the Court:

Q. Now, you think that was on the 18th, do you, the day you were there with him? A. Well, the morning I was there with him. I really don't know the date, but it was in November some-  
time. 10

Q. Well, was that the same day when he signed that check for \$11.50? A. \$11.50, yes.

The Court: That is the way I understood him.

By Mr. Brunetto:

Q. Now, at the time your father-in-law gave Mr. Weisman the check for \$11.50, did he say anything to Mr. Weisman? 20

(Objected to.)

(Objection sustained.)

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

(Exception noted as ground of appeal.)

Q. Now, Mr. Angelotti, did you go to Mr. Weisman's place of business at any time after your father-in-law gave him the \$11.50 check? A. Why, about five days after, four or five days after. 30

Q. Did you see Mr. Weisman? A. Yes.

Q. Did your father-in-law have a conversation with him? A. Yes.

Q. Did the conversation relate to this \$11.50 check? A. Yes. 40

*Daniel Angelotti—Direct*

Mr. Weinberg: I object to that.

The Court: What does that rebut?

Mr. Brunetto: The defendant says that De Candia never offered him the \$11.50 check, that the check was given, and this  
10 rebuts that question.

The Court: The question may be answered.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

A. Yes, he offered the \$11.50. He said, "What is the idea? You said you were going to keep  
20 the check for a few days, and now I haven't got any money in the bank and you go ahead and put it. Here is the \$11.50." He says, "No, you pay all my bill here or go and see my lawyer," and he said, "I offered you \$50 a month."

Mr. Weinberg: I object to that.

Q. Now, Mr. Angelotti, did you at any time see Mr. Weisman at your father-in-law's house in Montclair after this \$11.50 check was given? A.  
30 Yes, I did.

Q. Can you fix the time or about the time? A. It must have been on a Sunday afternoon, because I was with my wife, and it is kind of slow there on a Wednesday afternoon.

Mr. Weinberg: I ask that that be stricken out.

The Court: It will be stricken out.

Q. Can you tell us whether it was before your  
40 father-in-law was arrested on the complaint of Mr. Weisman, or afterwards? A. It was before.

*Daniel Angelotti—Direct*

Q. How long before? A. I couldn't say how long before. I know it was before.

Q. Would you say a month or a week or a day or what it was? A. I know it was before, because they were figuring up about the mortgage. They wanted to fix about a mortgage on the house. 10

Q. Did you hear Mr. Weisman say anything about a mortgage?

(Objected to.)

(Objection sustained.)

Q. Were you with your father-in-law on November 23rd in his place of business at Montclair around nine o'clock? A. No, I was not. 20

Q. Did you see Mr. Weisman on that day come to your father-in-law's place of business? A. I don't remember it was on that day or not, but he was at the place of business, and he was at the house twice. I seen him up there.

Q. Was that on the same day? A. No, it could not have been on the same day, because I was at the house—

The Court: No, no. Never mind "because." 30

Q. Was Mr. Weisman at your father-in-law's place of business that you know of at Watchung Avenue? A. He was there, yes.

Q. Wait a minute until I finish my question. After your father-in-law had given him the \$11.50 check and Mr. Weisman asked your father-in-law for payment of the \$11.50 check— A. He didn't ask him for that. Mr. DeCandia wanted 40

*Daniel Angelotti—Cross*

to pay him then. My father-in-law wanted to pay him the \$11.50.

Q. Did Mr. DeCandia offer to pay him the \$11.50 check? A. Yes.

Q. Now, listen, wait until I finish my question.  
10 At your father-in-law's place of business here in Newark? A. At the business. He came up for the mortgage up to the house. That is the time it was. I had been in Newark, too. I went down with him in Newark.

Q. What did Mr. Weisman say? A. He said, "You pay me the whole bill, otherwise go and see my lawyer."

20 CROSS-EXAMINATION by Mr. Weinberg:

Q. Let me see if we can get something straight here at all. Were you at the place of business of Weisman & Obshatkin when your father-in-law bought some merchandise? A. That morning, yes.

Q. When was it? Do you know? A. In the morning sometime.

Q. What time was it? A. It was early in the morning, about six-thirty, I guess.

30 Q. What time? A. About six-thirty or seven.

Q. Wasn't it around four-thirty? A. We usually get down to the market about four o'clock. It was around that time, before seven.

Q. It was before seven, but it was around four o'clock, wasn't it? A. It was kind of early, I know. I don't remember the time. I know it was early.

40 Q. You can remember the middle of the night, four in the morning, can't you? That is the middle to some of us. Don't you know it was before

*Daniel Angelotti—Cross*

daylight, long before daylight? A. Well, it was early in the morning. I don't really know just the time it was.

Q. Wasn't it before daylight? A. Before daylight?

The Court: That is the question. 10

The Witness: Well, I could not say.

Q. You can't say whether it was darkness or daylight that you were there? A. I told you there was a light in the store, because he had to go in the office and he had to put on the light. I think it was a little dark at that.

Q. What? A. He had to put a light in his office when he went in the office. 20

Q. The street lamps were burning too, weren't they? A. I didn't notice that.

Q. Do you know what time you left Montclair? A. It was near four o'clock some time, I guess.

Q. Where did you go after you left Montclair? A. Down in the old market.

Q. Whom did you visit in the old market? A. Why, we walked around. We walked around, then he told me about going into Mr. Weisman's, that he owes him a bill, and give him some business. 30

Q. Now, you know I didn't ask you that. I want to know whom did you call on down there in the market.

(Objected to as already answered.)

The Court: The question may be answered.

Q. Whom did you call on down in the old market? 40

*Daniel Angelotti—Cross*

Mr. Weinberg: I ask that this about Weisman be stricken out.

The Court: It will be.

Q. Whom did you call on in the market before  
10 you got to Mr. Weisman's place of business? A. We walked around, but I don't think we bought anything because we bought quite a few stuff, quite a number of packages in Mr. Weisman's place.

Q. Then your answer is you don't know who you called on in the market? A. Oh, we called on Mr. Weisman. That is sure.

Q. Before you got to Mr. Weisman? A. I  
20 don't really know. I don't think we called on anybody. We just walked around to see prices.

Q. Then you got to Mr. Weisman's place soon after you got into the market, didn't you? A. Well, we walked around the market.

Q. I am trying simply to refresh your recollection as to what time you got there. A. I know the light was on in the office.

Q. I do not care anything about that now. You said you left Montclair about half-past three.  
30 Will you or will you not say that you called at Mr. Weisman's place before five o'clock in the morning? A. I can't remember.

Q. Do you know who was there when you got there? A. Mr. Weisman and two other fellows.

Q. The bookkeeper, the lady wasn't there? A. No, sir; the lady wasn't there.

Q. Now, that was the day when he gave the check for \$11.50? A. \$11.50.

Q. Did he give any other check that day? A.  
40 Why, they went in the office.

*Daniel Angelotti—Cross*

Q. Did he give to your knowledge any other checks that day? A. Quite a few checks there he signed.

Q. Who filled those out? A. Nobody filled those out. He just signed his name to it.

Q. Oh, he signed blank checks? A. He signed 10  
blank checks.

Q. On November 18th? A. On November 18th. That is the morning I was down there.

Q. Did you see him sign any blank checks? A. Sign the checks? Certainly. It is an office with all glass around. I was looking right in.

Q. Now, you see my question isn't a description of the office, but whether you saw him sign any checks? A. Yes, I did. 20

Q. What were they? A. Blank checks.

Q. No amounts in them at all? A. No amount at all, no.

Q. Do you know how many they were? A. Excuse me. May I have a glass of water? You see I just got out of the hospital.

Q. Did you see the check for \$11.50, which is Exhibit D-1, on the morning of November 18th?

A. No, I didn't see the check for \$11.50.

Q. You didn't see that? A. No. It was in the 30  
office. I couldn't look. I just see he signed his name.

Q. Did you see any check that you can identify?  
A. Any checks?

Q. Yes. A. Quite a number of checks.

Q. Whose were they? A. His own, my father-in-law's name.

Q. Did you see where he got the checks from?

A. Where he got the checks from? 40

*Daniel Angelotti—Cross*

Q. Yes. A. From his pocket. He had a little book.

Q. Loose or in a book? A. In a book.

By the Court:

10 Q. That was in your father-in-law's own check book? A. Yes.

By Mr. Weinberg:

Q. You saw him sign a number of checks, but you didn't see this check for \$11.50? A. No.

Q. Do you know exactly how many he did sign? A. Well, he signed so much when he came out I asked him if he signed his life away.

Q. Why didn't you say that while he was doing it? A. It was inside the office.

Q. Why didn't you say that when he was doing it, while he was signing his life away? Why didn't you tell him that while he was writing them out? A. It was in Mr. Weisman's office inside.

Q. What? A. They were in the office.

By the Court:

Q. Did this check book have stubs in it? A. Yes.

30 Q. Were the stubs filled out? A. I doubt if they were, because I noticed him tearing them out.

Q. Did you see whether they were filled out or not, the stubs? A. No. I know he had only two checks left in the book.

By Mr. Weinberg:

Q. You know how to read and write English, do you not? A. Yes.

40 Q. You saw your father-in-law sign a lot of blank checks and you said nothing while that was

*Daniel Angelotti—Cross*

going on? A. I couldn't say anything. He was in the office.

Q. What was the matter with your voice then? Anything? Nothing was wrong with your voice then? A. Glasses all around. They were inside.

Q. I thought you said you were right there when that was being done? A. Yes, looking right in the office, glass all around. I was looking right in it. 10

Q. My question is why didn't you say something right then and there to your father-in-law? A. When he came out I told him.

Q. I am asking you why you didn't say it when he was signing the checks.

Mr. Brunetto: Your Honor, I object to this whole line of testimony. This witness has answered this question a whole lot of times. 20

The Court: I think he has. He says he did not say anything because his father-in-law was inside the office.

Q. Why didn't you go in the office? A. Why didn't I go in the office?

Q. Yes. A. It is his business. He was in there. I waited until he came out, and then asked him. 30

Q. Did you ever see any of those checks that you say he signed that day, after that time? A. No.

Q. You never saw any one of them, did you? A. No.

Q. Were you there on November 20th? A. November 20th? 40

*Daniel Angelotti—Cross*

Q. Yes, two days afterwards when your father-in-law went down? A. That falls on a Saturday, doesn't it?

By the Court:

10 Q. How is that? A. Does that fall on Saturday, November 20th?

Q. Yes. A. Well, we don't go down on Saturday.

By Mr. Weinberg:

Q. Did you ever do anything more or say anything more than you did that day after you saw your father-in-law sign this bunch of blank checks?

20

Mr. Brunetto: That is objected to, your Honor, unless the question is did he specifically say it to whom.

The Court: The question may be answered. Plaintiff's counsel prays an exception to this ruling of the Court.

(Exception noted as ground of appeal.)

A. Did I say anything?

30 Q. Yes, or do anything about your father-in-law having signed this bunch of checks? A. Not the bunch of checks. The \$11.50.

Q. Now, you are talking about a bunch of them that he signed. That is what you say he signed his life away on? A. Yes.

Q. Did you say anything about it after that, or do anything? A. About my father-in-law?

40 Q. To Mr. Weisman. Did you ever tell him or come down and communicate with him in any way

*Daniel Angelotti—Cross*

about these checks that he had got out of your father-in-law? A. We went down—

Mr. Brunetto: Your Honor, this is not proper cross-examination. There has not been anything said about that. I tried to bring that out and Mr. Weinberg objected to it. 10

The Court: The question may be answered.

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

(Exception noted as ground of appeal.)

A. I went there with my father-in-law about four or five days after, after we heard about this \$11.50, and my father-in-law told Mr. Weisman, "Why did you put the check?" 20

Q. Were you there with your father-in-law?

A. Yes, he was doing all the talking though.

Q. I am asking what you said about it. A. To anybody?

Q. Yes, about these checks. A. To my father-in-law I told, "Gee, you signed your life away. He can sign whatever he wants on the checks." 30 That is what I told him, "You are a damn fool," just like that. I had a little respect for my father-in-law. That is why I didn't tell him too much.

*Luca DeCandia—Direct*  
*Fidelia DeCandia—Direct*

LUCA DECANDIA, recalled in his own behalf, in rebuttal.

Direct-examination by Mr. Brunetto:

10 Q. Mr. DeCandia, did Mr. Weisman come to your place of business on the morning of the 22d or 23d of November, 1926, and speak to you about the \$11.50 check? A. No, sir.

Q. Did you go to Mr. Weisman's place of business on November 20th, 1926? A. No, not the 20th.

Q. Did you see that young lady, that book-keeper, at Mr. Weisman's place of business? A.  
 20 The first time I see this girl now. The first time I see this girl.

Q. Did you ever go to Mr. Weisman's place of business as late as half-past eight or eight o'clock in the morning? A. I can't go late. The latest I open my store in Montclair is half-past seven, eight o'clock at the least. I have a key to my store. I open the door myself, my son-in-law, every morning.

30

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FIDELIA DECANDIA, sworn in behalf of the plaintiff, testifies in Italian through interpreter, Carmen R. Angelo.

Direct-examination by Mr. Brunetto:

Q. You are the wife of Luca DeCandia, the plaintiff in this suit? A. Yes.

40 Q. You were living with your husband in Montclair in November and December, 1926? A. Yes.

*Motion for a Directed Verdict*

Q. While you were living with your husband, did you ever see Mr. Weisman come to your house? A. Yes, sir.

Q. When was it? A. One day while I was at home with my daughter Mr. Weisman came to my house.

20

Q. Do you know when that was, Mrs. DeCandia, whether it was before your husband was arrested on this check of Mr. Weisman, or afterwards? A. Before.

Q. How long before? A. I don't recall exactly how many days, but it was a short while before.

Plaintiff rests in rebuttal.

20

(The paper marked Exhibit P-4 for identification is received in evidence and marked Exhibit P-4.)

(The paper previously marked Exhibit P-5 for identification is received in evidence and marked Exhibit P-5.)

(The paper previously marked Exhibit D-2 for identification is received in evidence and marked Exhibit D-2.)

30

(The Court takes a recess from one until two o'clock.)

After recess.

(The following motion is heard in chambers:)

Mr. Weinberg: I now move, if your Honor please, for a directed verdict in favor of the defendant on the ground that,

40

*Summation*

10 taking the evidence in its most favorable light for the plaintiff, there is nothing for a jury to pass upon. In other words, the plaintiff has not shown by any facts or from any inferences that might be drawn from any testimony in the case, that there was malice on the part of the defendant in causing his arrest, or that his complaint was made without reasonable and probable cause.

(Argument.)

20 The Court: I think a question of fact is presented in the case, and that the Court cannot upon this disputed evidence decide whether there was or was not reasonable and probable cause, but must instruct the jury that if the facts were as testified to by the plaintiff, that there was not reasonable and probable cause for making the complaint, and if there was not reasonable and probable cause, proof of actual malice is not necessary to be shown, but legal malice, which is sufficient to support malicious prosecution, may be inferred from want of reasonable and probable cause.

30

The motion therefore will be denied.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Mr. Weinberg sums up to the jury in behalf of the defendant.)

40 (Mr. Brunetto sums up to the jury in behalf of the plaintiff.)

The Court charges the jury as follows:

## CHARGE OF THE COURT.

DUNGAN, J.:

Gentlemen: In the year 1919 the Legislature of this state passed a law to the effect that any person who, with intent to defraud, shall make or draw any check or order for the payment of money upon any bank or other depository, knowing at the time of such making or drawing that the maker or drawer has not sufficient funds in, or credit with, such bank or other depository for the payment of such check, in full, upon its presentation, shall be guilty of a misdemeanor, and punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both fine and imprisonment. As against the drawer or maker thereof, the making, drawing, or delivering of a check or order, payment of which is refused by the drawee, shall be *prima facie* evidence of intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository.

Construing that statute the Chief Justice of our Supreme Court has said, in a case decided in 1922, that the legislative purpose to be gathered from the language of this section of the statute seems to be plain, and that is to make criminal the fraudulent giving of a check which is immediately payable, the maker knowing when he delivers it that he has not sufficient funds in the bank upon which it is drawn, out of which it can be paid, and this purpose is made clear, if the first section of the supplements leaves it at all in doubt, by section 2 thereof, which declares that as against the maker of the check the refusal

*Charge of the Court*

of payment by the bank shall be *prima facie* evidence of intent to defraud. Then he continues. The giving of a check presently payable or immediately payable is an implied representation by the drawer that he then has on deposit  
10 in the bank upon which it is drawn sufficient to meet it upon its presentation for payment. The giving of a post-dated check—that is, a check dated at a future day, and to which I may add, the giving of a check, even though dated upon that date, with the understanding of both parties that it shall not be presented until a subsequent date—carries with it no such implication, but rather the contrary.

20 This is the law upon which you are to gauge the actions of this defendant, who was the complainant in the criminal cause, made against the plaintiff in this cause in December, 1926.

Here are a few dates which it will be well for you to remember. Admittedly the plaintiff here gave to the defendant Weisman on November 18, 1926, a check for \$11.50. The defendant produces  
30 here and made it a part of the basis of his criminal complaint, a check dated November 20, 1926, made by the plaintiff here to him for \$656.79, which the plaintiff here says he never saw until the criminal proceedings were brought against him, and that he never signed any such check at all. The one check was presented immediately, deposited perhaps that day, because it was presented at the bank upon which it was drawn the following day, the 19th, and was protested on  
40 the 19th. The other one, that dated the 20th, was

*Charge of the Court*

presented November 22d at the First National Bank & Trust Company of Montclair and protested.

Thereupon on December 6, 1926, the defendant in this suit made a criminal complaint against this plaintiff under the statute which I have read to you. The warrant was issued for the arrest of this plaintiff upon that same day. He was arrested the next day and brought to police headquarters and then paroled in the custody of his attorney, who was Mr. Brunetto, who is trying this case for him, but no hearing was had then, but on December 8th there was a hearing at which no decision was given. Again he was paroled for a week in the custody of his attorney, and on December 15th he was held for the Grand Jury and obliged to give \$500 bail. Thereafter on the 22d day of January, 1927, he was indicted for the fraudulent giving of the check of \$11.50; not the other check at all, but for the \$11.50 check. On January 27th he pleaded not guilty and then was held in bail at the sum of \$1,000, and on February 28th, a month later, was tried and a verdict rendered in his favor of not guilty.

Now, this is a case for malicious prosecution, which means that there was no legal basis, according to the plaintiff's contention, for the criminal complaint which was made against the plaintiff here by the defendant, and that the defendant had no reasonable and probable cause for making that complaint, and that it was done maliciously.

*Charge of the Court*

The purpose of criminal proceedings in this or any other state is not to enforce private rights, but to redress public wrongs. Imprisonment for debt in the absence of fraud was long ago abolished in this state by the provisions of our  
 10 Constitution. The mere fact that Mr. DeCandia owed Mr. Weisman money, even though that money has never been paid, would not justify Mr. Weisman in starting the criminal machinery in motion, which resulted in his arrest and indictment and trial on a criminal charge.

In a case of this kind, however, the burden is upon the plaintiff, and it is upon the plaintiff  
 20 in this case to establish by the greater weight of the evidence five things, and all of those must be established by the greater weight of the evidence before he is entitled to your verdict.

First, that there was commenced a criminal prosecution by the defendant in this case against the plaintiff, who was the defendant in the criminal prosecution. Now, there is not any question about that. That is established and an admitted  
 30 fact.

Second, the final determination in favor of the present plaintiff. That is not denied. The acquittal of the defendant in the criminal proceedings, who is the plaintiff here, was a determination of those criminal proceedings in his favor. That is established.

Third, the plainiff must show that there was absence of reasonable and probable cause for  
 40 making the criminal complaint against him. It

*Charge of the Court*

is not necessary for the defendant to show affirmatively that he had reasonable and probable cause, but it is the duty of the plaintiff to show that the defendant had not reasonable and probable cause for making the criminal complaint against him. 10

Then malice must be shown. Now, the malice necessary to be shown in a case of malicious prosecution is not necessarily spite and ill will of the defendant against the plaintiff, but malice means simply that the defendant intentionally did this wrongful act, if it was wrongful, against the plaintiff here. A wrongful act intentionally and wilfully done constitutes legal malice, which is all that is necessary to establish malice in a case of malicious prosecution, and that kind of malice is presumed from want of reasonable and probable cause. So if you find that reasonable and probable cause was absent when the defendant in this suit made that criminal complaint, you would be justified in determining that he did so maliciously, although not necessarily. That may be rebutted by evidence in a case such as this. 20

So you see that the principal question which you have to decide in this case is whether there was reasonable and probable cause. In cases where the facts are not in dispute that always is a question for the judge to decide and not the jury, but where the facts are in dispute, then under proper instructions from the Court it is for the jury to say whether or not the facts are such as to establish reasonable and probable cause, or whether want of reasonable and probable cause is established. 30 40

*Charge of the Court*

Now, has it been shown that there was no reasonable or probable cause for making this complaint? The planitiff, Mr. DeCandia, says this is what happened substantially; and there seems to be some difference between counsel and the Court

10 as to just what the facts were. I am going to state to you the facts as I understand them, and any misquotation of the facts by the Court or counsel or anybody else should be disregarded by you, and you should bring to bear upon your determination of this case when you go to the jury room your recollection of the facts in the case. As I understood the plaintiff DeCandia, he said that on the 18th day of November, 1926, he with

20 his son-in-law went to the place of business of Mr. Weisman at 120 Commerce Street in this city and bought \$30 worth of stuff, for which he paid cash. Prior to that time he had been dealing upon credit and had contracted a bill of over \$656, which he had not paid, and he admits that upon that occasion he was told that he could not deal any more upon credit. So he bought \$30 worth of goods and paid cash for it. Then he found he

30 needed three things more—I think they were lettuce and beans and I have forgotten what the third one was—and he told Mr. Weisman that he had not the money to pay for those goods, and Mr. Weisman told him that he could not trust him any more, but he said, “I will give you a check for this \$11.50. I will give you a check for this \$11.50 and you hold it.” Either he said that to Mr. Weisman or Mr. Weisman said to him, “I will hold it for a couple of days.” It makes

40 no difference if that was the understanding be-

*Charge of the Court*

tween them that the check was to be held and was not to be immediately used.

The impression which the plaintiff seeks to give by his testimony is that it was the agreement between him and Mr. Weisman that this check, 10 should not be immediately used, but that Mr. Weisman should hold it for a day or two, that the check was presented as I have already told you, and protested the next day, and then this criminal procedure was started. Now, if, as I have read to you in this case decided by the Chief Justice, it was the agreement between the plaintiff and defendant that this check for \$11.50 was not to be immediately used, then this statute under which these criminal proceedings were 20 brought does not apply and the defendant had no right to institute these criminal proceedings against this plaintiff. If that be the situation, then the defendant had no reasonable and probable cause for instituting the criminal proceedings so far as that check of \$11.50 is concerned.

Now, go to the check for \$656.79. The plaintiff says that on that very day, the 18th day of 30 November, Mr. Weisman discussed with him the payment of that indebtedness, six hundred and fifty-six dollars and some cents. He told him that he had a property and that if he would wait a little while, wait a few days, he would try to sell the property and pay him all that he owed. Then he said Mr. Weisman proposed to him that he give him a check or checks, and that before he left there that was agreed to, and he gave four- 40 teen checks agreeing to pay \$50 a month. When

*Charge of the Court*

the check appeared it was a check for \$656 and some cents, and his son-in-law says that he had signed those checks in blank. I did not understand this from the testimony of Mr. DeCandia, although he may have said so—I had some difficulty in getting his testimony—but his son-in-law said that he gave a number of checks (he does not know how many) and those checks were signed in blank.

If it was the understanding between Mr. Weisman and him either that he gave the checks filled out for \$50 or gave these checks in blank, that they were to be presented and there was to be paid \$50 a month, and that he gave no check and there was no understanding that a check should be filled out for \$656, then in making the criminal complaint upon that check with that understanding, no check for the amount which the plaintiff authorized being immediately payable, there would be no reasonable and probable cause on the part of the defendant Weisman for making a criminal complaint so far as that check is concerned. If there was no reasonable and probable cause for making the criminal complaint which was made against this plaintiff, then he is entitled to your verdict in this case for such damages as he has sustained, unless the defense of advice of counsel has been made out.

Advice of counsel, under proper circumstances and conditions, is a complete defense to an action for malicious prosecution. Quoting from an authority which is much used on the subject of malicious prosecution, the author says, and that I

*Charge of the Court*

charge you is the law in this state: Advice of counsel makes out a complete defense, and "defendant makes out a complete defense by showing that he submitted to proper counsel the 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. \* \* \* The advice to avail as a defense must have been given by a competent, disinterested, regularly admitted and practicing attorney and counsellor-at-law in good standing," and there is no testimony in this case but that Mr. Silverman, who gave this advice, conformed to that requirement.

10

20

But there is some question in this case as to whether what was told to Mr. Silverman was the kind of disclosure which a defendant in a case of this kind must have made to his attorney to make out a complete defense. "The mere fact that the defendant consulted and took the advice of reputable counsel is not, without more, sufficient to constitute a defense in an action for malicious prosecution. \* \* \* Defendant must show that he truly and correctly, fully and fairly, and in good faith, stated to such counsel all the facts bearing upon the guilt or innocence of accused, whether known by him to be material or not, and although he honestly believed that some of the facts were not material."

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Now, the facts that I have already stated to you manifestly are not the facts which this defendant stated to Mr. Silverman when he obtained his ad-

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*Charge of the Court*

vice to institute these criminal proceedings, because he tells an entirely different story from that told by the plaintiff in this case. If you find the facts to be as told by Mr. DeCandia in this case and if those facts were not told to counsel as Mr. DeCandia states them, and if you believe them to be the true facts, then the facts were not fully and fairly stated to counsel and he has not made out a defense sufficient to exonerate him in this case upon the advice of counsel.

His story, as I have told you, is quite different. He says that on this day (they both agree as to the date when the first transaction took place) the 18th of November, 1926, the plaintiff came down to buy stuff, "and I told him he could not have any more credit but must pay cash, and he said he would pay cash," and that he bought \$11.50 worth of material—that is, the cauliflower, the green beans and the lettuce, three articles—and he bought nothing more. He did not buy \$30 worth that day, he says. He says that the plaintiff took out his check book, "I filled it out," and he signed the check and said nothing to him about holding the check. If that is the way this transaction occurred, then it comes directly under this statute, because if that is the way it happened you have the right to assume that the plaintiff fraudulently gave the check for the purpose of obtaining this bill of goods which the defendant would not let him have upon credit; and if he did fraudulently obtain the goods in that way as I have told you, the case comes exactly under the statute, and the defendant had reasonable and probable cause for making this complaint against

*Charge of the Court*

him. If he fully and fairly told all the facts as you find them to be established in this case to his counsel, and you find the facts to be as he states, then he is justified in this case by advice of counsel also in making the criminal complaint.

Now, as to the other check. He says that about two days later the plaintiff came down there about eight-thirty in the morning and said he was ready to pay up the balance, and he said to him, "You go to the office and give a check to the bookkeeper." So he went in. The bookkeeper says he gave her (the plaintiff says he was not there at all) this check for \$656, an entirely different story. He said at first that he never heard of the fourteen checks until yesterday. Correcting himself yesterday he said that it was not the first time he heard about the fourteen checks, that the first time was probably in the Police Court at the time they had the hearing.

Now, gentlemen, I shall not repeat any more of the testimony. It has been argued to you in full. I think I have repeated enough of it to you to illustrate the provisions of the law which you are to apply to your consideration of the facts in this case. It is sufficient to say if the greater weight of the evidence shows that there was want of reasonable and probable cause in making this criminal complaint, the plaintiff is entitled to your verdict unless it has been established by the defendant that he made such a disclosure of the facts to competent counsel as would justify him in acting upon his advice, and that in making this criminal complaint he did act upon his advice.

*Charge of the Court*

If you decide that want of reasonable and probable cause has not been shown, your verdict should be for the defendant. If you decide that it has been shown, then you should award your verdict to the plaintiff for such damages as he  
10 has sustained.

As has been suggested to you in the argument, he is entitled to be compensated in this case for the loss of his liberty, for the further peril to his liberty, for his loss of time, for the injury to his reputation and character, for the mental suffering, and for the impairment of credit. You have been told nothing about how much that  
20 amounts to in dollars and cents, but what will be compensation to him for his mental suffering, for the peril to his liberty and to his reputation and character, is a matter which must be left to your discretion and judgment.

In addition to that, if he is entitled to your verdict, he is entitled to have returned to him the amount of money which it cost him to defend himself against this charge; and it appears that that, including all expenses and counsel fees,  
30 amounted to \$350.

Now, there is another class of damages which may be considered in a case of malicious prosecution, and that is exemplary or punitive damages added to compensatory damages where it appears, if it does appear, that the prosecution was instituted through hatred or ill will—that is, provided want of reasonable and probable cause  
40 is shown and where the proceedings complained of were commenced under circumstances of op-

*Exceptions to Charge*

pression, wantonness or a reckless disregard of plaintiff's rights. So if you decide that the plaintiff is entitled to your verdict and that this criminal suit which is complained of here was started under circumstances which call for punitive damages, such damages may be awarded in addition to compensatory damages. In the event that you so find I am going to ask you to bring in a separate verdict for compensatory damages and another verdict for punitive or exemplary damages, separating them. In other words, if it be a certain amount for the expenses and for the loss of liberty and humiliation and mental suffering, put that in one item. If you decide that it is a case calling for exemplary damages, put that in another item, and render your verdict accordingly in separate items.

10

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(The jury retires.),

Plaintiff's counsel prays an exception to the portion of the Court's charge stating that there was a hearing on December 8th, on the ground that his recollection of the evidence was that the hearing was on December 15th.

30

Plaintiff's counsel prays an exception to the portion of the Court's charge which says that if the plaintiff obtained these goods in violation of the statute without saying anything about them, representing that the check was all right, without any agreement that it was to be held over, it comes within the provisions of the statute, on the ground that defendant should have gone further and that there is not a violation of the statute

40

*Exceptions to Charge*

until he fails to pay within the five days; and if there is an effort to pay within five days, then there is no violation of the statute.

Exceptions noted as grounds of appeal.

- 10 Defendant's counsel prays an exception to that portion of the charge in which the Court said, not exactly, but substantially, that a check given with the understanding that it is to be paid in the future acts in the same manner and is to be treated in the same manner as a post-dated check.

Exception noted as ground of appeal.

- 20 Defendant's counsel prays an exception to that portion of the charge in which the Court said, after referring to the two checks, the one for \$11.50 and the other for \$656, that one check was deposited immediately, leaving the inference that the other check was not, the proof being that they were both deposited on the date they were given.

Exception noted as ground of appeal.

- 30 Defendant's counsel prays an exception to that portion of the charge in which the Court defined malicious prosecution, saying it means that there was no legal basis for the complaint.

Exception noted as ground of appeal.

- 40 Defendant's counsel prays an exception to that portion of the charge in which he said that malice must be shown, not spite or ill will, but that the plaintiff intentionally did the wrongful act wilfully. In other words, there is a distinction between ill will and wilful act.

Exception noted as ground of appeal.

*Exceptions to Charge*

Defendant's counsel prays an exception to that portion of the charge in which the Court said that the plaintiff's testimony shows that on the day he bought the \$11.50 worth of merchandise and gave the check in question, that he gave the fourteen checks which he said it was agreed would be \$50 a month. 10

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that portion of the charge in which the Court said that the plaintiff is entitled to a verdict unless the defense of advice of counsel is proved, on the ground it appears by that statement that that is the only defense that the Court allowed the defendant to have, not his own defense that there was no malice. 20

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that portion of the charge in which the Court said, after mentioning Mr. DeCandia's testimony and the son-in-law's and the others and stopped with Mr. Weisman's testimony, "I think I have repeated enough of the facts upon which you can determine the case," or substantially to that effect. 30

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that portion of the charge not only respecting punitive damages, but to the manner in which the verdict should be brought in, on the ground that special verdicts cannot be brought in unless there are 40

*Charge of the Court*

separate allegations upon which those various verdicts can stand, and there is no claim or allegation in the complaint that the plaintiff seeks or is entitled to receive punitive damages.

10 (The jury later returns.)

The Court: I am told you want some instructions. Is that right? Or have you agreed upon your verdict? Have you agreed upon your verdict or do you want some further instructions?

A Juror: Further information with regard to the damages. Will you explain to us what the headings of those damages are?

20 The Court: Compensatory damages and exemplary damages. They are the two classes of damages I mentioned, damages which will compensate the plaintiff or compensatory damages. If he is entitled to your verdict he is entitled to be compensated, as I told you, for the peril to his liberty and the loss of his liberty—he says he was two days and one night in jail and was arrested and was taken in custody by the officer—the humiliation the mental suffering and the ex-

30 penses. That would be compensatory damages.

If you decide that the evidence justifies going beyond compensatory damages, giving damages which will be a punishment in addition, and make an example of him, exemplary damages, then that is the other class of damages.

Does that explain it?

A Juror: Yes, sir. Your Honor, may I ask in reference to the sheriff's sale?

40 The Court: Surely.

*Hearing of June 27, 1929*

A Juror: What property was sold? It says personal property. Was it store contents?

The Court: The execution which is in evidence, which you have with you, tells you all that I know. I do not know anything about it.

A Juror: It just says personal property. 10

The Court: Yes. I do not know a thing more about it.

(The jury again retires.)

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**HEARING OF JUNE 27, 1929.**

ESSEX COUNTY CIRCUIT COURT 20

Thursday, June 27, 1929.

LUCA DeCANDIA,

Plaintiff,

vs.

HARRY WEISMAN,

Defendant.

On Rule to  
Show Cause.

30

Before: HON. NELSON Y. DUNGAN, J.

For the plaintiff appears Thomas Brunetto.

For the defendant appears Benjamin M. Weinberg.

DUNGAN, J.

(After argument.) Regardless of the impressions which the evidence made upon the Court, 40

*Hearing of June 27, 1929*

unless the verdict of the jury is such as to indicate passion, prejudice, mistake or misconduct, the Court ought not to set it aside. I am satisfied from the arguments in this case and from my recollection of the evidence that there was a disputed question of fact and that so far as the finding against the defendant is concerned the jury might have found that way without any charge, such as indicated, of passion, prejudice, misconduct or mistake.

I do recall very definitely that when the verdict was announced I was quite shocked at the amount of compensatory damages. The amount of exemplary damages, if the jury found that the complaint was made with actual malice or that it was made recklessly and without investigation of the facts, is not excessive. But I do not feel the same way about the compensatory damages. There was not one word of proof in the case as to any money damage which came to the plaintiff, except, if it may be termed a money damage, the expenses of his attorney, which involved not only the attorney's fee but the expenses of getting bail and all other expenditures incident to the trial. The plaintiff appears to be a man in a small business, and there is no proof of a dollar of loss to his business by reason of his arrest and his trial. So that element of damage is entirely lacking.

We charge the jury in these cases that loss of reputation is an element of damage. As I have said, this man was a man in moderate circumstances and position in life, the effect of which

*Hearing of June 27, 1929*

would be that he probably would not be injured in reputation to the extent of a person who occupied a high position in life; for instance the president of one of our leading banks, or an attorney whose reputation for honesty means everything to him with his clients. But in addition to that I suppose the losses which come to a person and upon which compensatory damages should be based must be shown by the evidence, and aside from the loss of reputation which might be presumed from the fact of his arrest and imprisonment, there is no proof of any loss of reputation, no proof of loss of friends, no proof of any disreputation and shunning by his friends and acquaintances because of this. The whole proof is that he was arrested there at his business in the store, and it is not shown that that was in the presence of a soul except a member of his family. He was taken to the police headquarters, and it is not shown that there was a single one of his acquaintances or friends there. It is not shown that there was a word of this that reached the newspapers. At this time he was paroled, as soon as he could reach his counsel, in his custody. The time for hearing was set. He appeared and he was again paroled in the custody of his counsel. The hearing not being had that day, the case was adjourned to the 15th, and on the 15th he gave bail. That is a subject of expense which is in the amount allowed to him in the charges of the attorney.

Now, up until the time of his indictment he did not spend a day or an hour in custody except the custody of the policeman going to the police sta-

*Hearing of June 27, 1929*

tion and remaining there, not behind the bars, but in the police station until his attorney came. It is true that after his indictment, according to his testimony, he spent part of a day, a night, and a part of the next day in jail.

10 \$2,650 it seems to me is a pretty large sum for that. It is too much and it is disproportionate for the wrong received by him. The difficulty always is to fix an amount which is fair and right without setting the entire verdict aside, but the Supreme Court and all trial courts I think have assumed to do that.

20 It seems to me that it is generous to the plaintiff to say that \$1,500 would be compensation for the elements of his damage aside from the amount which was paid to his attorney. That I am not including in the \$1,500, which should be added, which would make \$1,850. If the plaintiff will consent to a reduction of the compensatory damages to \$1,850, making with the exemplary damages \$2,350, the rule to show cause will be discharged. Otherwise it will be made absolute.

30 If you want to consult with your client about that you may do so; or, if you are prepared to decide now, I will decide the matter. Otherwise I will give you until—How long would you want?

Mr. Brunetto: Twenty-four hours, your Honor.

**EXHIBIT P-1.****THIRD CRIMINAL COURT OF THE CITY OF  
NEWARK**

State of New Jersey  
City of Newark  
Essex County

10

Harry Weisman residing at No. 341 Seymour Ave in the City of Newark, complains of Lucia De Candia who is to be found deponent thinks at No. 45 Watchung Plaza, Montclair, in said City and said complainant being duly sworn on oath doth depose and say, that on the 18th and 20th day of November, A. D. 1926, at the City of Newark, the said Luca De Candia did then and there, with intent to defraud, make and deliver two certain checks for the payment of money, to wit: Eleven Dollars and fifty cents and six hundred fifty six dollars and seventy nine cents upon a certain bank, to wit: First National Bank & Trust Company of Montclair, N. J., knowing at the time of such making and delivering that the maker had not sufficient funds in, or credit with such bank for the payment of such checks in full, upon its presentation, contrary to the form of the statute in such case made and provided.

20

30

Deponent therefore prays that the said Lucia De Candia may be apprehended and held to answer said complaint and dealt with as Law and Justice may require.

**HARRY WEISMAN.**

Subscribed and sworn

December 6, 1926.

Before me

E. R. Noble

Dep. Clerk of the Third  
Criminal Court of the  
City of Newark.

40

*Exhibit P-1*

## Exhibit P-1 (continued)

Essex County to wit:

10 The Grand Jurors of the State of New Jersey,  
for the County of Essex upon their oath present  
that Luca De Candia on the 18th day of Novem-  
ber, in the year of our Lord one thousand nine  
hundred and twenty six at the City of Newark,  
in the County of Essex aforesaid with intent to  
defraud did utter and deliver to Harry Weisman  
a check drawn by L. De Candia upon a depository  
known as the First National Bank and Trust Com-  
pany of Montclair, New Jersey, for the payment  
20 of eleven dollars and fifty cents to the order of  
Weisman and Obshatkin and dated the 18th day  
of November nineteen hundred and twenty the  
said drawer L. De Candia then not having and  
the said Luca De Candia then knowing that the  
said drawer had not then sufficient funds in or  
credit with said depository for the payment of  
said check in full upon its presentation, contrary  
to the form of the statute in such case made and  
provided and against the peace of this State, the  
30 government and dignity of the same.

JOSEPH L. SMITH,  
Deputy Attorney General.

*Exhibit P-1*

## Exhibit P-1 (continued)

## ESSEX QUARTER SESSIONS

The Court  
 Met Present 10  
 Hon. Dallas Flannagan,  
 Presiding

426 Dec. 1926

The State	}	Sur Indictment for Uttering Bad Check	20
vs.			
Luca De Candia.			

January 22, 1927, Indictment presented by  
 Grand Jury

January 27, 1927, Defendant pleaded Not  
 Guilty

February 9, 10, 28, 1927, Trial dates.

February 28, 1927, Verdict Not Guilty and the  
 defendant discharged. 30

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 Exhibit P-1 (continued)

## ESSEX COUNTY CLERK'S OFFICE

State of New Jersey  
 County of Essex s. s. 40

I, JOHN H. SCOTT, Clerk of the Court of  
 Common Pleas, in and for the County of Essex

*Exhibit P-2*

in the State of New Jersey, DO HEREBY CERTIFY that the annexed instrument is a true and correct copy of a Complaint and Indictment and abstract of the criminal record in the matter of  
 10 The State vs Luca De Candia for Uttering Bad Check and the same is taken from and compared with the original record on file in my office and as the same now remains on the files of said office.

In Testimony Whereof, I have hereunto set my hand and affixed the official  
 L. S. seal of said Court and County of Newark, N. J. this 21st day of March, A. D. 1927.

20

JOHN H. SCOTT,  
 Clerk.

---

**EXHIBIT P-2.**

## STATE WARRANT

## PART I

30

THIRD CRIMINAL COURT OF THE CITY OF NEWARK

State of New Jersey  
 County of Essex  
 City of Newark ss:

TO ANY OFFICER OR MEMBER OF THE POLICE FORCE  
 OF THE CITY OF NEWARK

40 WHEREAS HARRY WEISMAN, residing at No. 341 Seymour Avenue hath this day made complaint

*Exhibit P-2*

on oath, before the Third Criminal Court of the City of Newark, that on the 18th and 20th days of November A. D. 1926, at the said City of Newark, Luca De Candia (male) did then and there with intent to defraud make and deliver two certain checks for the payment of money, to wit: 10  
 the total sum of Six Hundred Seventy three Dollars and nine (\$673.09) cents, upon a certain bank, to wit: The First National Bank & Trust Co. knowing at the time of such making and delivering that the maker had not sufficient funds in, or credit with such bank for the payment of such checks in full, upon its presentation, contrary to the form of the statute in such case made and provided. 20

These are, therefore, in the name of the "State of New Jersey," to command you to apprehend the said Luca De Candia if to be found in said County and him forthwith bring before the Third Criminal Court of the City of Newark, or before some other Criminal Court of the City of Newark, in said County, to answer said complaint, **HEREOF FAIL NOT.**

Witness, John C. Howe, Esquire, Judge of said 30  
 Court at Newark aforesaid this 6th day of December A. D. one thousand nine hundred and twenty six.

E. R. NOBLE,  
 Clerk.

**EXHIBIT P-3.**

State of New Jersey,  
Essex County. ss:

10 Chas. F. Hummel, Special Deputy Sheriff of  
the County aforesaid, being duly sworn, on his  
oath deposes and says that on the 12th day of  
March, A. D. 1927, he delivered personally to the  
said defendant Luca DeCandia, a true copy of  
the within summons and complaint, with a ten  
days' notice endorsed thereon.

CHAS. F. HUMMEL.

Subscribed and sworn to this  
14th day of March, A. D. 1927.

20 Harvey W. Keough,  
Notary Public of New Jersey.  
My Commission expires June 1, 1927.

---

Exhibit P-3—Continued

**Summons.**

30 STATE OF NEW JERSEY, to: LUCA DECANDIA:

(Seal) YOU ARE SUMMONED to answer the an-  
nexed Complaint of MEYER H. KITZ-  
MAN, in an action at law in the Es-  
sex County Circuit Court. And take  
notice that unless you file your an-  
swer to said Complaint with the Clerk of the said  
Essex County Circuit Court, at Newark, within  
40 writ, and the annexed Complaint, the Plaintiff

*Exhibit P-3*

may proceed in the suit, and judgment may be entered against you.

Witness, WORRALL F. MOUNTAIN, Judge of the said Essex County Circuit Court, at Newark, this 10th day of March, Nineteen Hundred and Twenty-seven. 10

JOHN H. SCOTT  
Clerk.

JACOB W. SILVERMAN  
Attorney

---

Exhibit P-3—Continued

20

**Complaint.**

ESSEX COUNTY CIRCUIT COURT

MEYER H. KITZMAN,

Plaintiff,

vs.

LUCA DE CANDIA,

Defendant.

30

FIRST COUNT.

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

He is the holder and owner of a certain check made by the Defendant, a true copy of which is as follows: 40

*Exhibit P-3*THE FIRST NATIONAL BANK & TRUST  
COMPANY

OF MONTCLAIR, N. J.

55-187

10

No.

November 20, 1926

Pay to the  
order of WEISMAN & OBSHATKIN \$656.79  
SIX HUNDRED FIFTY-SIX and 79/100 Dollars.  
(Signed) L. DECANDIA

Endorsed by:

20

Weisman & Obshatkin  
Weisman & Obshatkin

Said check was protested by the said First National Bank & Trust Company, because of insufficient funds, at a cost of Two Dollars and Forty-four Cents (\$2.44).

The Plaintiff therefore demands as damages on this count, the sum of Six Hundred Fifty-nine Dollars and Twenty-three Cents (\$659.23), with  
30 legal interest and the costs of this suit to be taxed.

## SECOND COUNT.

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

He is the holder and owner of a certain check  
40 made by the Defendant, a true copy of which is as follows:

*Exhibit P-3*THE FIRST NATIONAL BANK & TRUST  
COMPANY

OF MONTCLAIR, N. J.

Pay to the order	10
of WEISMAN & OBSHATKIN	\$11.50
ELEVEN and 50/100 Dollars	
(signed) L. DeCANDIA.	

Endorsed by:

Weisman & Obshatkin  
Weisman & Obshatkin

Said check was protested by the said First Na- 20  
tional Bank & Trust Company, because of insuffi-  
cient funds, at a cost of Two Dollars and Thirty-  
six (\$2.36) Cents.

The Plaintiff therefore demands as damages on  
this count, the sum of Thirteen Dollars and  
Eighty-six Cents (\$13.86), with legal interest and  
the costs of this suit to be taxed.

JACOB W. SILVERMAN, 30  
Attorney of Plaintiff.

*Exhibit P-3*

Exhibit P-3—Continued

**Affidavit of Merits.**

## ESSEX COUNTY CIRCUIT COURT

10

MEYER H. KITZMAN,

Plaintiff,

vs.

LUCA DECANDIA,

Defendant.

20 State of New Jersey,  
County of Essex. ss:

THOMAS BRUNETTO, being duly sworn according to law on his oath says, that he is the Attorney for the Defendant in this action; that he this affiant believes that the said defendant has a just and legal defence to the action on the merits of the case.

THOMAS BRUNETTO.

30 Subscribed and sworn before me,  
this nineteenth day of March, 1927.  
Elinor M. Lynch,  
A Notary Public of New Jersey.

40

*Exhibit P-3*

Exhibit P-3—Continued

**Answer.**

ESSEX COUNTY CIRCUIT COURT

10

MEYER H. KITZMAN, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">vs.</div> LUCA DeCANDIA, <div style="text-align: right;">Defendant.</div>	}	Action at Law
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	---------------

The defendant residing in the Town of Montclair, County of Essex and State of New Jersey, answering the First Count in plaintiff's complaint says: 20

Defendant denies that he drew the check sued on.

FIRST SEPARATE DEFENSE TO THE FIRST COUNT.

Defendant denies that the plaintiff is the owner of said check. 30

SECOND SEPARATE DEFENSE TO THE FIRST COUNT.

The check sued on was rendered void after issue by a material alteration by the said payee; to wit: By the writing of said payee the sum of \$656.79, whereas he should have written \$50. as directed by this defendant.

ANSWER TO THE SECOND COUNT.

Defendant denies that the plaintiff is the owner of said check, but admits that he drew said check. 40

THOMAS BRUNETTO,  
Attorney for Defendant.

*Exhibit P-3*

Exhibit P-3—Continued

**Amended Complaint.**

ESSEX COUNTY CIRCUIT COURT

10

MEYER H. KITZMAN,

Plaintiff,

vs.

LUCA DECANDIA,

Defendant.

Action at Law

20

FIRST COUNT.

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

He is the holder and owner of a certain check made by the Defendant, a true copy of which is as follows:

30 THE FIRST NATIONAL BANK & TRUST COMPANY.

OF MONTCLAIR, N. J.

55-187

Nov. 20, 1926

Pay to the order of

WEISMAN & OBSHATKIN

SIX HUNDRED FIFTY-SIX and 79/100

\$656.79

Dollars

40

(signed) L. DECANDIA

Endorsed by:

Weisman & Obshatkin

Weisman & Obshatkin

*Exhibit P-3*

Said check was protested by the First National Bank & Trust Company, because of insufficient funds, at a cost of Two Dollars and Forty-four Cents (\$2.44).

The Plaintiff therefore demands as damages on this count, the sum of Six Hundred Fifty-nine Dollars and Twenty-three Cents (\$659.23), with legal interest and the costs of this suit to be taxed. 10

## SECOND COUNT.

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

He is the holder and owner of a certain check made by the Defendant, a true copy of which is as follows: 20

THE FIRST NATIONAL BANK & TRUST  
COMPANY

OF MONTCLAIR, N. J.

Pay to the order of WEISMAN & OBSHATKIN \$11.50  
ELEVEN and 50/100 Dollars 30

(signed) L. DeCANDIA.

Endorsed by:

Weisman & Obshatkin  
Weisman & Obshatkin

Said check was protested by the said First National Bank & Trust Company, because of insuffi- 40

*Exhibit P-3*

cient funds, at a cost of Two Dollars and Thirty-six (\$2.36) Cents.

10 The Plaintiff therefore demands as damages on this count, the sum of Thirteen Dollars and Eighty-six Cents (\$13.86) with legal interest and the costs of this suit to be taxed.

## THIRD COUNT.

The Plaintiff residing in the City of Newark, County of Essex and State of New Jersey, complains of the Defendant as follows:

20 On or about the first day of March, 1927, Harry Weisman and Isidor Obshatkin, trading as Weisman & Obshatkin, of 190 Commerce Street, Newark, N. J., assigned unto the Plaintiff a certain book account of the said Weisman & Obshatkin, against the Defendant, a true copy of which is as follows:

WEISMAN & OBSHATKIN				to L. DECANDIA.			
1926	Articles	Amt.	Total	1926	Art.	Amt. Total	
30	Aug. 21	1 org.	7.00		Aug. 18	1 grape	2.00
		1 "	6.50	13.50		2 pears	8.50
		1 bean	2.00			2 plum	4.75
		1 pea	2.75			1 lemon	7.50 22.75
		2 lettuce	4.00	8.75	19	1 lett.	1.25
	18	2 bean	5.00			1 pea	3.00
		2 lettuce	4.00			1 lett.	6.00
		3 peaches	6.75			1 sweet	3.00
40		2 pota.	9.50	25.25		6 peach	6.00 19.25

*Exhibit P-3*

1926	Articles	Amt.	Total	Day	Articles	Amt.	Total
19	1 orange	6.75		16	1 onion	5.50	
	1 grape	2.00			1 pea	5.00	
	1 apple	2.50	11.25		1 lett.	5.00	
20	5 peaches	13.75	13.75		5 bean	17.50	
	1 orange	5.50	5.50		3 celery	7.50	40.50 10
21	1 pea	3.50			2 pear	9.50	
	3 lett.	11.00			3 grape	6.75	
	2 beans	4.50			1 org.	8.00	24.25
	32 berries	4.09	23.09		17 melons	22.95	22.95
23	2 pot.	11.00		17	1 cauli.	4.50	
	1 sweet	3.50			9 melon	22.50	
	2 lett.	5.00	19.50		2 pear	6.00	
24	1 pea	8.00			1 lett.	5.00	
	2 bean	4.50			1 cuke	2.00	20
	32 berries	3.77			2 pea	9.00	
	1 pepper	1.00	17.27		1 sweet	5.00	
	2 grapes	5.00			2 pota.	9.50	63.50
	6 plums	8.50			2 plum	1.50	
	1 pear	3.50			1 orange	7.00	
	1 org.	6.50	23.50		2 grapes	4.00	12.50
26	6 melons	9.00		9/22	1 caul.	4.00	
	2 peaches	7.00			1 pea	8.00	
	1 lettuce	6.00			1 pear	2.75	
	2 pota.	9.50			1 pear	4.00	18.75 30
	32 berries	3.77			1 "	5.00	
	2 apples	4.00	39.27		1 plum	3.25	
28	1 pea	8.50			1 apple	3.00	11.25
	2 lett.	14.00		23	5 melon	10.00	
	1 sweet	9.00			2 plum	3.50	
	1 cauli.	5.00			4 melon	6.00	
	2 beans	4.50	41.00		1 lett.	5.00	
	1 grape- fruit	7.25			1 bean	4.50	
					2 apple	5.00	40

## Exhibit P-3

1926	Articles	Amt.	Total	1926	Articles	Amt.	Total
10	30	1 pea	8.50			2 pota.	9.00 43.00
		1 bean	2.50			1 orange	7.00
		1 lett.	8.00			2 grapes	4.65 11.65
		3 melon	5.25	24.25	24	3 celery	7.50
		9-1	7 peaches	10.00		1 caul.	4.00
			2 pota.	9.00		1 pea	4.50
			5 melon	13.75		2 lett.	2.50
			1 lett.	10.00		1 onion	4.50
			1 pear	3.50		3 melon	2.25 25.25
			1 grape	3.00	25	1 grape	2.25 2.25
20	9-10	2 beans	7.00			2 bean	10.00
		17 melons	22.95			2 lett.	12.00
		1 cuke	1.75	31.70		1 pota.	4.50 26.50
		5 melons	14.50		29	2 pear	6.00
		5 melons	14.50			2 plum	3.90
		1 pear	3.75	32.75		1 peach	3.00
		11	2 beans	7.00		1 spinach	1.75
			3 lett.	11.00		3 melon	7.50
			1 pea	7.00		1 bean	5.00 27.15
			1 grape	2.50		1 apple	2.75
30		1 plum	3.25	5.75		1 grape	2.00
	14	1 caul.	4.50			1 org.	8.50
		2 bean	8.00			1 org.	7.50
		2 lett.	2.50			1 "	8.75
		1 sweet	3.00			1 pear	3.50 33.00
		2 pota.	9.00	27.00	30	8 plums	4.00
		1 org.	7.00			2 plums	3.00
		1 pear	4.50			1 cauli.	4.00
		1 grape	2.50			2 melon	3.50 14.50
		1 plum	3.25		4	8 "	14.00
	1 grape	2.50	19.75		1 caul.	3.75	

*Exhibit P-3*

1926	Articles	Amt.	Total	
4	3 melon	6.75		
	1 lett.	5.00		
	1 pea	9.00		
	2 pear	5.50		
	2 peaches	5.00		10
	2 pota.	4.75		
	2 grapes	5.00	58.75	
10/7	8 sprouts	2.25		
	1 lett.	4.50		
	1 "	1.25		
	2 pota.	9.50		
	6 melon	9.90		
	2 "	4.00		
	1 turnip	3.00		20
	1 onion	5.50	39.90	
	1 grape fruit	6.75		
	1 org.	8.25	15.00	
9	1 bean	3.50		
	1 lett.	5.00	8.50	
13	1 peach	2.25		
	1 caul.	2.50		
	1 onion	1.75		
	1 mroom	2.25	8.75	30
15	3 bean	6.75		
	1 pea	8.50		
	2 cauli.	4.50		
	2 pota.	11.00	30.75	
	1 pear	4.50		
	1 gr. fruit	6.50	11.00	
16	1 lett.	5.00	5.00	
19	1 bean	2.50		
	1 celery	2.75	5.25	40
	1 grape	3.00		



*Exhibit P-3*

Judgment will therefore be demanded in the sum of Six Hundred Seventy-three Dollars and Nine Cents (\$673.09) with legal interest and the costs of this suit to be taxed.

JACOB W. SILVERMAN, 10  
Attorney of Plaintiff.

---

Exhibit P-3—Continued

**Answer to Amended Complaint.**

ESSEX COUNTY CIRCUIT COURT

MEYER H. KITZMAN,

Plaintiff,

vs.

LUCA DECANDIA,

Defendant.

20

Action at Law

The defendant, Luca DeCandia, residing in the Town of Montclair, County of Essex and State of New Jersey, answering the First Count in the plaintiff's amended complaint says: 30

ANSWER TO FIRST COUNT.

He denies the allegations of the first count.

ANSWER TO SECOND COUNT.

He admits that he made a check as set forth in the second count, but denies all the other allegations of said count. 40

*Exhibit P-3*

## ANSWER TO THIRD COUNT.

He denies that Harry Weisman and Isidor Obshatkin, trading as Weisman & Obshatkin, assigned to plaintiff a certain book account as  
10 stated in said count.

## FIRST SEPARATE DEFENSE TO FIRST COUNT.

Defendant denies that the plaintiff is the owner of said check.

## SECOND SEPARATE DEFENSE TO FIRST COUNT.

The check sued on was rendered void after  
20 issue by a material alteration by the said payee; to wit; By the writing by said payee the sum of \$656.79, whereas he should have written \$50 as directed by this defendant.

## SEPARATE DEFENSE TO ALL COUNTS.

Defendant denies that the plaintiff is the owner of said check and that he is the assignee of said book account. This defendant further says that the said plaintiff is not the true party for  
30 whose benefit said suit is instituted; that the said plaintiff is a dummy for and is suing in behalf of Weisman & Obshatkin, who are the true plaintiffs in said suit, and that the said suit is brought in the name of said plaintiff so that defendant could not file a counter-claim against said cause of action.

THOMAS BRUNETTO,  
Attorney of Defendant.

*Exhibit P-3*

Exhibit P-3—Continued

**Notice of Motion.**

## ESSEX COUNTY CIRCUIT COURT

10

MEYER H. KITZMAN,

Plaintiff,

vs.

LUCA DECANDIA,

Defendant.

Action at Law

To: Thomas Brunetto, Attorney of Defendant. 20

PLEASE TAKE NOTICE, that on Saturday, July 23d, 1927, at 10:00 A. M., or as soon thereafter as counsel may be heard, I shall move before the above Court for an Order striking out the Answer to the third count as set forth in "Answer to Third Count" and "Separate Defense to all Counts," and for summary judgment for the full amount of Plaintiff's claim, as set forth in said third count, on the grounds that said Answer filed by the Defendant, is insufficient in law and is false, frivolous and sham and filed solely for the purpose of delay; and attached hereto are the affidavits upon which the Plaintiff will rely in support of such motion. 30

JACOB W. SILVERMAN,  
Attorney for Plaintiff.

40

*Exhibit P-3*

Exhibit P-3—Continued

Affidavit of Harry Weisman.

## ESSEX COUNTY CIRCUIT COURT

10

MEYER H. KITZMAN,

Plaintiff,

vs.

LUCA DECANDIA,

Defendant.

Action at Law

20

State of New Jersey,  
County of Essex. ss:

HARRY WEISMAN, of full age, being duly sworn upon his oath, deposes and says:

I am a member of the firm of WEISMAN & OB-SHATKIN, commission merchants doing business at 120 Commerce Street, Newark, New Jersey, which is a general partnership composed of Isidor Obshatkin and Deponent.

30

I am entirely familiar and cognizant of the transaction set forth in the third count of the Complaint filed in the above named cause.

From on or about the 21st day of August, 1926, to on or about the 23d day of October, 1926, the said firm of Weisman & Obshatkin sold and delivered unto the Defendant, Luca DeCandia, on a book account, the merchandise more specifically

40

set forth in the third count of Complaint, refer-

*Exhibit P-3*

ence whereto is hereby made as if specifically set out.

The Defendant, Luca DeCandia, thereby became indebted to the said Weisman & Obshatkin in the sum of One Thousand Nine Hundred Thirty Dollars and Eighty-eight Cents (\$1930.88) upon which the Defendant paid on account the sum of One Thousand Two Hundred Fifty-seven Dollars and Seventy-nine Cents (\$1257.79), leaving a balance due and owing of Six Hundred Seventy-three Dollars and Nine Cents (\$673.09), the said items being more specifically described in the said third count. 10

The Defendant, Luca DeCandia, in consideration of the said indebtedness, gave unto the said Weisman & Obshatkin two checks, more specifically described in the first count and second count, being as follows: 20

First check in the sum of	\$656.79
Second check in the sum of	11.50
	<hr/>
Total	\$668.29

The said two checks were protested because of insufficient funds, protest fees being as follows: 30

First check	2.44
Second check	2.36
	<hr/>
Grand Total	\$673.09

On March 1st, 1927, my said firm, Weisman & Obshatkin, assigned unto the Plaintiff, Meyer H. Kitzman, the said book account, a true copy of which assignment is as follows: 40

*Exhibit P-3*

“IN CONSIDERATION of the sum of One Dollar and other good and valuable consideration, receipt whereof is hereby acknowledged, we the undersigned, Harry Weisman and Isidor Obshatkin, trading as Weisman & Obshatkin, do hereby sell, transfer and assign over unto Meyer H. Kitzman, of the City of Newark, County of Essex and State of New Jersey, the book account between the undersigned and Luca DeCandia, of Montclair, N. J., upon which there is due from the said Luca DeCandia a balance of Six Hundred Seventy-three Dollars and Nine Cents (\$673.09) as represented by two protested checks in the total said sum of Six Hundred Seventy-three Dollars and Nine Cents (\$673.09).”

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this first day of March, Nineteen Hundred and Twenty-seven.”

WEISMAN & OBSHATKIN,  
By Harry Weisman.

Signed, sealed and delivered  
in the presence of  
Jacob W. Silverman.

I further allege that there is due from the Defendant to the Plaintiff on said book account, the sum of Six Hundred Seventy-three Dollars and Nine Cents (\$673.09), together with legal interest from November 20th, 1926, and that the Defendant has no defense to same of whatsoever nature.

*Exhibit P-3*

Deponent further states that the said Answer of the Defendant is false, frivolous and sham, and filed solely for the purpose of delay and vexation.

HARRY WEISMAN.

10

Subscribed and sworn to  
before me this  
9th day of July, 1927.  
W. HEMPBELL JR.  
A Master in Chancery  
of New Jersey.

Exhibit P-3—Continued

20

Affidavit of Meyer H. Kitzman.

ESSEX COUNTY CIRCUIT COURT

MEYER H. KITZMAN,

Plaintiff,

vs.

LUCA DeCANDIA,

Defendant.

Action at Law. 30

State of New Jersey,  
County of Essex. ss:

MEYER H. KITZMAN, of full age, being duly  
sworn according to law upon his oath, deposes 40  
and says:

*Exhibit P-3*

I am the Plaintiff in the above named case. I reside at 423 Belmont Avenue, Newark, N. J.

10 I have read the foregoing affidavit of HARRY WEISMAN and same is true to the best of my knowledge and belief, especially as to the assignment to me of the book account of WEISMAN & OBSHATKIN against LUCA DE CANDIA of Montclair, N. J. dated March 1st, 1927. I am the sole owner of the said book account at the present time, together with the checks embracing same.

20 I have received nothing on account of said book account from the Defendant, and there is due to me thereon at the present time, the sum of Six Hundred Seventy-three Dollars and Nine Cents (\$673.09) together with legal interest from November 20th, 1926.

I verily believe that there is no defense to the third count and that the Answer to same is filed solely for the purpose of delay and vexation.

MEYER H. KITZMAN.

30 Subscribed and sworn to  
before me this  
5th day of July, 1927.  
A. WM. WANSE,  
Notary Public of N. J.

*Exhibit P-3*

Exhibit P-3—Continued

**Order.**

## ESSEX COUNTY CIRCUIT COURT

MEYER H. KITZMAN, <div style="text-align: right; padding-right: 20px;">Plaintiff,</div> <div style="text-align: center; padding: 5px 0;">vs.</div> LUCA DeCANDIA, <div style="text-align: right; padding-right: 20px;">Defendant.</div>	}	10    Action at Law
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	---------------------------------

This matter having come before me this 23d day of July, 1927, upon notice to Defendant by the Plaintiff, for an Order striking out the Answer to the third count of the Complaint filed herein, and the separate defense to all counts, and for final judgment for the amount of Plaintiff's claim, and upon considering the affidavits filed herein. 20

It is on this 23d day of July, 1927, ORDERED that the Answer to the third count be and the same is hereby stricken out and that the separate defense to all counts be stricken out insofar as same affects the third count, and it is further ORDERED, that final judgment be entered in favor of the Plaintiff against the Defendant, in the amount of Seven Hundred Dollars and One Cent (\$700.01) and costs, on said third count, upon which the said Plaintiff has elected to proceed only, together with the costs of said motion to be taxed. 30

On motion of Jacob W. Silverman, Attorney of Plaintiff. 40

WM. A. SMITH,  
 Judge of the Essex County  
 Circuit Court.

*Exhibit P-3*

Exhibit P-3—Continued

## IN ESSEX COUNTY CIRCUIT COURT

10	MEYER H. KITZMAN,	}	Received July 25, 1927.
	vs.		Fi Fa de bonis et terris
			Retble Third Tues. Sept.
			1927.
	LUCA DECANDIA.		Jacob W. Silverman Atty.
			Substituted Atty. Leo J.
			Fischgrund 1/24/28.

DAMAGES \$700.01

20 COSTS 64.77

Interest from July 23, 1927.

Personal property Sold. Feb. 21, 1928 to  
Plaintiff for \$400.00

Less Sheriff's Fees Levy 6.92

Advertising 5.00

Selling 1.00

Statement 1.00

Commission 10.00

30 Bill of Sale 7.50 31.42

---

\$368.58

Receipt from the Solicitor \$368.58

CONRAD DEUHLER  
Sheriff

*Exhibit P-3*

## Exhibit P-3—Continued

**Circuit Court Execution—on Contract.**

Essex County. ss:

THE STATE OF NEW JERSEY, To the Sheriff of the County of Essex, GREETING: We command you, That of the goods and chattels, rights and credits, of LUCA DE CANDIA, defendant, in your County, you cause to be paid the sum of Seven Hundred dollars and one cents, which MEYER H. KITZMAN, plaintiff, lately in our Circuit Court, holden at Newark, in and for our said County of Essex, recovered against the said defendant and also Sixty-four Dollars and seventy-seven cents cost thereon, all which was adjudged to said plaintiff by the judgment and determination of said Circuit Court, appears of record. And if sufficient goods and chattels, rights and credits, of the said defendant in your County, you cannot find whereof to make the said sum of money, then and in that case we command you that you cause the whole or the residue as the case may require, of the said sums of money, to be made of the lands, tenements, hereditaments, and real estate in your County, whereof the said defendant was seized on the 23rd day of July in the year One Thousand Nine Hundred and Twenty-seven or at any time afterwards, in whosoever hands the same may be: And have you those moneys before our Circuit Court aforesaid, at Newark, aforesaid, the 3rd Tuesday of September next, to render unto the plaintiff for his re-

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20

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40



**EXHIBIT P-4.**

WEISMAN & OBSHATKIN  
Wholesale Dealers in  
FRUIT AND PRODUCE  
120 Commerce Street

Newark, N. J. Feb. 25, 1927 10

Mr. T. Brunetto

Dear Sir:

We are returning herewith your check for \$11.50 as same is not the amount due us.

Very truly yours,

WEISMAN & OBSHATKIN 20

**EXHIBIT D-1.**

THE FIRST NATIONAL BANK & TRUST  
COMPANY  
OF MONTCLAIR, N. J.  
55-187

No..... Montclair, New Jersey 30  
November 18 1926

Pay to the  
order of Weisman & Obshatkin \$11 50/100  
Eleven 50/100..... Dollars  
L DE CANDIA

Protested for non-payment November 19, 1926,  
at the First National Bank & Trust Company, of 40  
Montclair, N. J.

**EXHIBIT D-2.**

**THE FIRST NATIONAL BANK & TRUST  
COMPANY**

OF MONTCLAIR, N. J.

55-187

10

No.....

Montclair, New Jersey

Nov. 20th 1926

Pay to the

order of Weisman & Obshatkin \$656 79/100

Six Hundred fifty six and.....79/100 Dollars

L DE CANDIA

20

Protested for non-payment November 22, 1926,  
at the First National Bank & Trust Company, of  
Montclair, N. J.

**EXHIBIT D-3.**

WEISMAN &amp; OBSHATKIN

Wholesale Dealers in

FRUIT &amp; PRODUCE

26 Commerce Street

10

Newark, N. J. Nov. 26 1926

Mr. Luca De Candia

Dear sir,

This is to inform that your two checks

\$656.79	protest fees	2.44	\$659.23	
11.50	“ “	2.36	13.86	20
			<hr/>	
	amounting to		\$673.09	

have been returned, protested because of insufficient funds.

We therefore look to you for payment of same within the next 5 days, and if at the expiration of that time your certified check for the amount of \$673.09 is not forthcoming, we shall immediately take legal steps to collect same.

30

Yours truly

WEISMAN &amp; OBSHATKIN

M. LIFLAND

40

de

23

EXHIBIT D

STATE OF NEW YORK

In SENATE,

January 1, 1912.

REPORT

10

OF THE

COMMISSIONERS

OF THE

LAND OFFICE

IN RESPONSE TO A RESOLUTION

PASSED BY THE SENATE

15

APRIL 1, 1911.

ALBANY:

WHELAN & COMPANY, PRINTERS.

1912.

THE STATE OF NEW YORK.

IN SENATE,

20

JANUARY 1, 1912.

REPORT

OF THE

COMMISSIONERS

25

OF THE

## New Jersey Court of Errors and Appeals

LUCA DE CANDIA, Plaintiff-Appellee, vs. HARRY WEISMAN, Defendant-Appellant.	} Action at Law. On Appeal from Essex County Cir- cuit Court.
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### BRIEF ON BEHALF OF DEFENDANT- APPELLANT.

#### Preliminary Statement.

The plaintiff, Luca De Candia, brought this action for damages against the defendant, Harry Weisman, charging in the first count of his complaint, that the defendant Harry Weisman, maliciously and without reasonable or probable cause, charged him with having uttered and delivered on the 18th and 20th days of November, 1926, two checks with intent to defraud him, the said defendant; that plaintiff was thereafter arrested on a warrant and compelled to give bail, and that thereafter, he was tried and acquitted of said charge.

The second count in his complaint charged that the defendant, without reasonable or probable cause, procured plaintiff to be indicted by the Grand Jury of Essex County, for the crime of uttering and delivering to the defendant a check (which is one of the checks referred to in the first count) drawn by the plaintiff upon the First National Bank and Trust Company of Montclair, New Jersey, for the payment of \$11.50, with intent to defraud, in violation of Chapter 72 of Laws of 1919; that plaintiff was, thereafter,

arrested, and gave bail, etc., and that said defendant caused said indictment to be prosecuted, and that thereafter, he was tried and acquitted of the offense charged.

#### Statement of Facts.

In addition to what is set forth in the "Preliminary Statement," mention is made of the following fact: The plaintiff, on November 18, 1926, after purchasing produce to the amount of \$11.50, from the defendant's firm—Weisman & Obshatkin—gave his check to that firm for the amount stated (p. 27). His account, on that day and the following three days, in the First National Bank of Montclair on which it was drawn, was overdrawn (p. 65). This check was protested on November 19, 1926 (p. 217). On November 20, 1926, as defendant claims, plaintiff gave to defendant's firm another check on the same bank for \$656.29, which amount represented an old balance owed by him to the firm (pp. 134-135). This check was also dishonored and was protested for non-payment on November 22, 1926 (p. 218).

Plaintiff did not deny his signature to that check, but claimed that he gave no check for \$656.29, but that he gave in payment of his old account a "lot of checks for \$50 a month" (l. 21, p. 35). It appears that the amount of any one of the checks mentioned exceeded the amount which plaintiff had on that day in the bank. According to the bank official who testified, the most that the plaintiff had in the bank on November 22, 1926, when the larger check was protested, was \$6.49 (p. 68).

There was no indictment on the check for \$656.29. The only indictment presented, being for the giving of the check for \$11.50 (p. 22).

The plaintiff admitted the giving of the check for \$11.50 in payment of the produce then purchased, but insisted that the defendant promised to hold that check for a "couple of days" and not try to cash it.

A verdict was rendered against the said defendant, after which, on his application, the plaintiff was ordered to show cause why the verdict should not be set aside on the grounds that the said verdict was against the weight of the evidence, and was excessive. Said rule reserved to the defendant the benefit of all and every exception taken during the trial, etc. (Record, p. 9).

Argument having been heard on said rule, the verdict was somewhat reduced. The Court in making the order reducing the verdict, provided therein that

"Should however, the plaintiff consent to accept the reduction in the verdict rendered, as herein above set forth, and the defendant be dissatisfied therewith, the consent by the said plaintiff to accept said reduced amount instead of having a new trial granted, shall not be a bar to, nor prevent the said defendant from prosecuting an appeal in the cause upon the grounds specially reserved in the Rule to Show Cause heretofore issued, as aforesaid, none of which grounds have been argued before me by the said defendant on the Rule to Show Cause heretofore granted by me, as aforesaid" (p. 11).

The plaintiff thereafter, on an order obtained from the trial court, had the rule to show cause dismissed, it appearing that he was satisfied to accept the reduction in the amount of damages awarded.

In said order, the Court again reserved to the defendant the right of appeal on the grounds

reserved to said defendant in the rule to show cause (pp. 12-13).

The defendant, not being satisfied with the Court's refusal to set the verdict aside nor with the amount of damages allowed by the Court, chose to appeal the cause, and gave notice of appeal, and assigned his grounds of appeal (p. 15).

### **ARGUMENT OF THE LAW.**

Plaintiff sought to justify his cause of action against the defendant upon the grounds that he, the defendant, failed to hold the check for \$11.50 for a "couple of days," although he had promised so to do; and that he, the defendant, deposited a check for \$659.29 which, the plaintiff says, he never gave to him (although he nowhere denies his signature to that check) and that the defendant caused his arrest for the non-payment of said checks and his indictment on the first mentioned one; that all prosecutions have terminated favorably to the plaintiff and that defendant's action, in having prosecuted the plaintiff, was unwarranted and malicious.

The defendant has assigned nine grounds for reversing the judgment rendered against him, but will argue only those which appear hereinafter.

#### **First Ground of Appeal.**

(First Assignment.)

This ground of appeal (p. 15) brings up the question of whether the plaintiff, having admitted the giving of the check to the defendant for \$11.50, for merchandise which he then took and carried away, could vary the time of payment of that check, by oral proof.

Plaintiff testified that he had made a \$30 purchase from defendant's firm, for cash, after which he remembered that he needed two or more packages (of produce). He said defendant demanded cash for the same, but that he told defendant he did not have enough money, whereupon, defendant said he would hold the check a "couple of days."

Plaintiff testified in broken English, sometimes responsively, and other times not so. He spoke quickly and unintelligibly but the exception was clearly noted, as appears from the statements of the trial judge on page 26.

It is nowhere denied that plaintiff, *after purchasing the merchandise in question, gave his check on the day it bears date.* It was not claimed to have been a post-dated check, nor a check not dated, but a check *complete on its face*, which however, the plaintiff says defendant agreed to hold for a "couple of days." If such a plea can be made, then it is respectfully submitted that Chapter 72 of the Laws of 1919, commonly called the "bad check law," is an idle gesture. Nothing can prevent a violator of that law, from procuring merchandise or money, or what-not, and then, after the check given by him in payment thereof has been dishonored, insist that the check—which was the promise to pay—was subject to a variance or change in its terms, and thus, place every person who has been defrauded by the giving of such a worthless check, in grave danger by subjecting him to an action for damages for a malicious prosecution should the offender be prosecuted and that prosecution fail.

We cannot conceive that this Court will allow variance of the terms of a written check by parol evidence in such a case, any more than it

will permit the changing or varying of the terms of a written lease, as in *Naumberg v. Young*, 44 N. J. L. 331; or, varying the time and terms of payment of a promissory note, as in *Zuckerman v. Handleman*, 2 N. J. Misc. 3.

In the case of *Stiles v. Vandewater*, 48 N. J. L. 67, the defendant, the maker of a note upon which suit had been brought, offered to prove that the note was given upon an oral agreement that it was to be renewed when due. The trial court refused to hear the testimony and in the opinion by the Supreme Court, Justice Depue, states the following on the subject, on page 69:

“Another ground of reversal is that the court refused to hear the evidence offered by the defendant to show that the note, although payable by its terms in three months, that it should be renewed. The offer was not to show an agreement to that effect in writing. It must be taken, therefore, to be an offer to establish such agreement by parol and oral testimony was incompetent to vary the terms of a written contract.” Citing 2 *Parsons on Bills*, 503; 1 *Daniel Negotiable Instruments* 80; *Wright v. Remington*, 41 N. J. L. 48; 14 *Id.* 457.

In the case of *Middleton v. Griffith*, 57 N. J. L. 442, this Court states the rule as follows, at page 448:

“There is no fraud charged, and parol evidence was not admissible tending to vary the import of this note. It cannot be converted by parol evidence from an absolute into a conditional contract. *Meyer v. Beardsley*, 1 *Vroom* 236; *Chaddock v. Van Ness*, 6 *Id.* 517; *Wright v. Remington*, 12 *Id.* 48. Evidence of a parol contemporaneous agreement that the note should not be paid, in whole or in part, is not admissible. *Remington v. Wright*, in the Court of Errors and Appeals, 14 *Id.* 451; *Johnson v. Ramsay*, *Id.* 279; *Anthony v. Fritz*, 16 *Id.*

1; *Hendrickson v. Hutchinson*, 5 Dutcher 18; Whart. Ev., Sec. 1058; Byles Bills, p. 500; *Stiles v. Vanderwater*, 19 Vroom 67; *Buchanan v. Adams*, 20 *Id.* 636. These cases all illustrate this rule of law, and therefore a contemporaneous agreement which varies or alters the terms and import of a promissory note, by adjudication in this court, is inadmissible and cannot defeat a recovery."

Whatever might be said as to the variance of this rule, in the case of a criminal prosecution, the substance of the rule should not be varied in an action where, as here, *plaintiff's cause of action is dependant upon, and directly traceable, through the check.* He was obliged to, and did, *affirmatively prove* that he purchased the merchandise in question for which he gave his check dated on the day it was given, and for the amount herein stated. He admitted further, and it was proved in the case, that there was no money in the bank to pay the check, and that due notice, which was required by law, was given him. He, however, avoids his responsibility under the law by also *affirmatively proving* that although he gave the check, made payable as aforesaid, it was not, in fact, to be paid as therein stated, but that *by an oral agreement, it was to be held a "couple of days," and thus, be made payable on a date other than that stated in the written order to pay*—a clear evasion of the parol evidence rule.

Inasmuch as the jury's verdict was predicated—at least in part—on the testimony of the plaintiff, which varied the terms of the check itself, it is submitted that the gravest injury resulted to the defendant. Therefore, for the reasons herein assigned, the judgment, etc., should be reversed.

## Second Ground of Appeal.

### (Third Assignment.)

This assignment goes to the Court's permitting (over defendant's objection) the entire record in the case of *Kitzman v. De Candia*, to be received in evidence.

It appears from a statement made by the learned trial judge (by agreement between the trial attorneys), that Weisman, the defendant (or more correctly Weisman's firm—Weisman & Obshatkin) assigned the checks in question to one Meyer H. Kitman, who brought suit against the present plaintiff De Candia, to recover the amounts due thereon; that judgment was obtained against him and that execution issued; that a levy was made and certain goods and chattels sold by the sheriff for an amount, which amount was applied upon the judgment which Mr. Kitman recovered against DeCandia (see Statement, bottom p. 61, top p. 62). It appears, however, that the statement was corrected by the attorney for the defendant who stated to the Court that it was discovered that the stipulation was wrong, and that the plaintiff actually never obtained anything on the execution, and that the goods and chattels were claimed by friends and relatives of the family of the defendant (p. 62). After that statement was made, it was agreed that the statement by the Court should be "forgotten" (top p. 63) and the plaintiff was ordered to proceed with his proof. Plaintiff's attorney then offered the record of the Kitman case in evidence which the Court ordered received (p. 63). To the reception of this record, an objection was duly taken (see p. 64). The record of the Kitman case is printed on pages 193 to 216, inclusive, and contains:

- a. the complaint of Meyer Kitzman *v.* Luca De Candia;
- b. defendant's affidavit of merits;
- c. defendant's answer;
- d. plaintiff's amended complaint;
- e. defendant's answer to amended complaint;
- f. plaintiff's motion to strike out certain parts of defendant's answer and for summary judgment;
- g. affidavit of Harry Weisman in support of said motion;
- h. affidavit of Meyer H. Kitzman in support of said motion;
- i. order striking out defendant's answer and summary judgment;
- j. entry of judgment against defendant.

In permitting in evidence the entire record of the Kitzman case, great injury might have been done the defendant Weisman, because,

*Firstly*, the affidavit of merits contained a self-serving declaration by the defendant that he had a legal defense to the action on the merits of the case (p. 196).

*Secondly*, defendant's answer contained self-serving declarations in his behalf (p. 197).

*Thirdly*, a wrong impression might have been obtained because of the fact that the plaintiff Kitzman added a count to his original complaint, for goods sold and delivered which was in the same amount as that represented by the checks originally sued upon (pp. 198-205, inc.).

*Fourthly*, defendant's answer to the amended complaint again contained self-serving declarations by way of his defenses to plaintiff's action (pp. 205-206).

*Lastly*, a new issue was given to the jury which might have been decided adversely to the plaintiff therein, and thus caused an unfavorable reflection upon the defendant herein.

Even allowing the execution in the Kitzman case to go in evidence, was injurious, because of the fact that, although it purported to show some payment on account, its error was substantially explained by De Candia, the then defendant in the case, who stated that he had never paid anything on the Kitzman judgment (pp. 146 to top 149).

After the record was put in evidence the defendant, acting within his rights, had the various papers which made up that record and which were contained in a "jacket" examined by his witness Jacob W. Silverman, an attorney who had acted for the defendant Weisman in the criminal proceedings and as attorney for Kitzman in the civil suit. That witness, simply went on to explain, principally, the difference in the various papers that were filed and the changes therein made, as well as the procedure in the cause (see Record, pp. 111-116, inc.). This again permitted the attorney for De Candia to cross examine Silverman as to those pleadings and to create an atmosphere entirely foreign to the questions at issue.

That the record of the Kitzman case, which was put in evidence, prejudiced the defendant Weisman upon his trial, is shown from a colloquy between the learned Court and the jury. It seems that after the jury retired, after receiving the Court's charge, it returned to the court for further instructions. The conversation between the jury and the Court appears on the bottom of page 182 and top of 183 (at which time, it might properly be said, neither of the attorneys were present) and is as follows:

A Juror: Yes, sir. Your Honor, may I ask in reference to the Sheriff's sale?

The Court: Surely.

A Juror: What property was sold? It says personal property. Was it store contents?

The Court: The execution which is in evidence, which you have with you, tells you all that I know. I do not know anything about it.

A Juror: It just says personal property.

The Court: Yes. I do not know a thing more about it.

The consideration, therefore, by the jury as to what goods were sold or what money was realized in view of the plaintiff's positive statements as hereinabove shown that nothing was paid on account of the Kitzman judgment, clearly shows that injury undoubtedly resulted to the defendant from a consideration of the record. If De Candia paid anything on account of the Kitzman judgment, his testimony was the best evidence and any memorandum made by some court officer or any of the papers in the cause, was merely hearsay. Besides this, the question as to whether store contents or any other kind of property, was sold (if any were in fact sold) was immaterial, but with all of the papers before them the jury, as indicated by its questions, evidently considered those facts and its verdict, therefore, may have been the result of some evidence obtained from the record of the Kitzman case, which was not germane to the present issue.

It is therefore respectfully urged, for the reasons hereinabove set forth, that the judgment, etc., be reversed.

### Third Ground of Appeal.

(Fifth and Sixth Assignments.)

In view of the fact that the 5th and 6th assignments practically present to this Court the same question, they will be argued together.

The fifth assignment relates to a question asked of one Jacob W. Silverman, called by the defense, as follows:

“Q Your advice to your client at that time was that, although no consideration passed at the time the check was made, the maker is criminally liable?”

and the sixth assignment which was an exception to a question asked the same witness by the trial court, as follows:

“Q Do you know of any case in New Jersey that holds that?”

Jacob W. Silverman, an attorney and counselor-at-law of this State, was sworn on behalf of the defendant. He is the attorney to whom the defendant applied for advice before the criminal complaints were made. Mr. Silverman testified as to what the defendant told him concerning the transactions involving the checks, and testified as to the advice which he gave to his client, the defendant. After having qualified and given his testimony as above stated, he was properly cross examined by plaintiff's attorney as to what information had been given him by the defendant, before he gave him any advice. After the Court questioned him as to what his legal authority was for advising his client that he could make a criminal complaint upon a check given on a past due book account (p. 124) he was further questioned as to his legal knowledge on that subject. The first question asked, to

which defendant took exception, appears in line 33, page 125, as follows:

Q (By plaintiff's attorney): "Your advice to your client at the time was, that, although there was no consideration passing at the time the check was made the maker would still be criminally liable?"

After an objection was made by defendant's attorney to this question upon the ground that it was immaterial whether counsel was right in his opinion, as long as the witness was competent, the Court said:

"I do not believe that the advice of just any counsel is excuse for making complaint. I think it must be competent counsel. I think that might go to the competency of counsel."

An objection was then taken to the question, which objection was overruled.

The answer gave it as the witness' opinion that he believed a complaint was legally justified under the statute, whereupon the Court asked the following question, to which an exception was duly taken:

"Q Do you know of any case in New Jersey that holds that?" (Bot. p. 126),

to which the witness answered

"A No, I relied on the statute."

The latter part of this answer was stricken out, so that witness' answer became merely "No."

The whole effect of the questions asked of, and the answers given by, the witness Silverman, was that he was unlearned in the law and that naturally, therefore, the defendant was not excused from the result of his complaint, because he relied upon a lawyer who advised him erroneously in the matter.

It is a complete defense to an action for malicious prosecution to show that the defendant fairly presented the facts to competent counsel and that he was advised by him to take the action which he did, irrespective of the fact that his opinion was wrong. The rule is laid down in the early case of *Potter v. Casterline*, 41 N. J. L. 22, which was an action for malicious prosecution based upon the charge, against the plaintiff, of larceny. Quoting from 1 Am. Lead. Cas. 267 (\*215) the Court said, at page 29:

“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 gave by that counsel, *however erroneous that opinion may be, he is not liable to this action.* \* \* \*

A defendant cannot excuse himself by showing that he consulted with an unprofessional person and followed his advice.” (Italics mine.)

In view of the conclusion to which the jury might possibly have come respecting the ignorance of counsel on that particular subject (if he was ignorant), which conclusion was amply justified by the questions and answers as herein stated, the defendant was undoubtedly prejudiced in his defense.

The test of incompetency is not based upon any exact knowledge of a particular legal principle, and the Court having developed the fact from the witness that he had no knowledge of any cases supporting his opinion, his testimony was, evidently, given little or no credit by the jury.

It is, therefore, respectfully submitted, that for this reason, the judgment, etc., be reversed.

**Fourth Ground of Appeal.**

(Eighth Assignment.)

The error complained of here, is, that the Court erroneously charged the jury as follows:

“Now, if, as I have read to you in the case decided by the Chief Justice, it was the agreement between the plaintiff and the defendant that this check for \$11.50 was not to be immediately used, then this statute under which these criminal proceedings were brought, does not apply and this defendant had no right to institute these criminal proceedings against the plaintiff. If that be the situation, then the defendant had no reasonable and probable cause for instituting the criminal proceedings so far as that check of \$11.50 is concerned.”

This objection is raised by defendant's exception to charge found on page 180, line 30.

If the argument made by the defendant herein under his first assignment is sound, then naturally, what the Court said, as above, constituted legal error, for he repeats that if the agreement between the plaintiff and the defendant was, that the check for \$11.50 was not to be immediately used, then the defendant had no right to institute the criminal prosecution. It thus appears that the utmost importance attaches to the question as to whether the Court erred in permitting the plaintiff De Candia to give testimony that the check for \$11.50 which he gave to defendant, was not to be immediately used but was to be held a “couple of days.”

If, therefore, the first assignment of error is good, then this present assignment is equally good, and the defendant was prejudiced by the charge made by the Court in the respect mentioned, and the judgment, etc., should, for this reason, be reversed.

All other grounds of appeal assigned for reversal, but which have not been argued herein, are hereby abandoned.

It is most respectfully urged that, because of the errors herein pointed out, the verdict of the Circuit Court heretofore rendered, upon which verdict judgment was entered, should be set aside and a new trial granted.

Respectfully submitted,

BENJAMIN M. WEINBERG,  
Attorney for and of Counsel  
with Defendant-Appellant.

## New Jersey Court of Errors and Appeals

LUCA DE CANDIA, <i>Plaintiff-Appellee,</i>  <i>vs.</i>  HARRY WEISMAN, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i>  <i>On Appeal from Essex County Cir- cuit Court.</i>
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### BRIEF ON BEHALF OF DEFENDANT- APPELLANT.

#### Preliminary Statement.

The plaintiff, Luca De Candia, brought this action for damages against the defendant, Harry Weisman, charging in the first count of his complaint, that the defendant Harry Weisman, maliciously and without reasonable or probable cause, charged him with having uttered and delivered on the 18th and 20th days of November, 1926, two checks with intent to defraud him, the said defendant; that plaintiff was thereafter arrested on a warrant and compelled to give bail, and that thereafter, he was tried and acquitted of said charge.

The second count in his complaint charged that the defendant, without reasonable or probable cause, procured plaintiff to be indicted by the Grand Jury of Essex County, for the crime of uttering and delivering to the defendant a check (which is one of the checks referred to in the first count) drawn by the plaintiff upon the First National Bank and Trust Company of Montclair, New Jersey, for the payment of \$11.50, with intent to defraud, in violation of Chapter 72 of Laws of 1919; that plaintiff was, thereafter,

arrested, and gave bail, etc., and that said defendant caused said indictment to be prosecuted, and that thereafter, he was tried and acquitted of the offense charged.

#### Statement of Facts.

In addition to what is set forth in the "Preliminary Statement," mention is made of the following fact: The plaintiff, on November 18, 1926, after purchasing produce to the amount of \$11.50, from the defendant's firm—Weisman & Obshatkin—gave his check to that firm for the amount stated (p. 27). His account, on that day and the following three days, in the First National Bank of Montclair on which it was drawn, was overdrawn (p. 65). This check was protested on November 19, 1926 (p. 217). On November 20, 1926, as defendant claims, plaintiff gave to defendant's firm another check on the same bank for \$656.29, which amount represented an old balance owed by him to the firm (pp. 134-135). This check was also dishonored and was protested for non-payment on November 22, 1926 (p. 218).

Plaintiff did not deny his signature to that check, but claimed that he gave no check for \$656.29, but that he gave in payment of his old account a "lot of checks for \$50 a month" (l. 21, p. 35). It appears that the amount of any one of the checks mentioned exceeded the amount which plaintiff had on that day in the bank. According to the bank official who testified, the most that the plaintiff had in the bank on November 22, 1926, when the larger check was protested, was \$6.49 (p. 68).

There was no indictment on the check for \$656.29. The only indictment presented, being for the giving of the check for \$11.50 (p. 22).

The plaintiff admitted the giving of the check for \$11.50 in payment of the produce then purchased, but insisted that the defendant promised to hold that check for a "couple of days" and not try to cash it.

A verdict was rendered against the said defendant, after which, on his application, the plaintiff was ordered to show cause why the verdict should not be set aside on the grounds that the said verdict was against the weight of the evidence, and was excessive. Said rule reserved to the defendant the benefit of all and every exception taken during the trial, etc. (Record, p. 9).

Argument having been heard on said rule, the verdict was somewhat reduced. The Court in making the order reducing the verdict, provided therein that

"Should however, the plaintiff consent to accept the reduction in the verdict rendered, as herein above set forth, and the defendant be dissatisfied therewith, the consent by the said plaintiff to accept said reduced amount instead of having a new trial granted, shall not be a bar to, nor prevent the said defendant from prosecuting an appeal in the cause upon the grounds specially reserved in the Rule to Show Cause heretofore issued, as aforesaid, none of which grounds have been argued before me by the said defendant on the Rule to Show Cause heretofore granted by me, as aforesaid" (p. 11).

The plaintiff thereafter, on an order obtained from the trial court, had the rule to show cause dismissed, it appearing that he was satisfied to accept the reduction in the amount of damages awarded.

In said order, the Court again reserved to the defendant the right of appeal on the grounds

reserved to said defendant in the rule to show cause (pp. 12-13).

The defendant, not being satisfied with the Court's refusal to set the verdict aside nor with the amount of damages allowed by the Court, chose to appeal the cause, and gave notice of appeal, and assigned his grounds of appeal (p. 15).

### **ARGUMENT OF THE LAW.**

Plaintiff sought to justify his cause of action against the defendant upon the grounds that he, the defendant, failed to hold the check for \$11.50 for a "couple of days," although he had promised so to do; and that he, the defendant, deposited a check for \$659.29 which, the plaintiff says, he never gave to him (although he nowhere denies his signature to that check) and that the defendant caused his arrest for the non-payment of said checks and his indictment on the first mentioned one; that all prosecutions have terminated favorably to the plaintiff and that defendant's action, in having prosecuted the plaintiff, was unwarranted and malicious.

The defendant has assigned nine grounds for reversing the judgment rendered against him, but will argue only those which appear hereinafter.

#### **First Ground of Appeal.**

(First Assignment.)

This ground of appeal (p. 15) brings up the question of whether the plaintiff, having admitted the giving of the check to the defendant for \$11.50, for merchandise which he then took and carried away, could vary the time of payment of that check, by oral proof.

Plaintiff testified that he had made a \$30 purchase from defendant's firm, for cash, after which he remembered that he needed two or more packages (of produce). He said defendant demanded cash for the same, but that he told defendant he did not have enough money, whereupon, defendant said he would hold the check a "couple of days."

Plaintiff testified in broken English, sometimes responsively, and other times not so. He spoke quickly and unintelligibly but the exception was clearly noted, as appears from the statements of the trial judge on page 26.

It is nowhere denied that plaintiff, *after purchasing the merchandise in question, gave his check on the day it bears date.* It was not claimed to have been a post-dated check, nor a check not dated, but a check *complete on its face*, which however, the plaintiff says defendant agreed to hold for a "couple of days." If such a plea can be made, then it is respectfully submitted that Chapter 72 of the Laws of 1919, commonly called the "bad check law," is an idle gesture. Nothing can prevent a violator of that law, from procuring merchandise or money, or what-not, and then, after the check given by him in payment thereof has been dishonored, insist that the check—which was the promise to pay—was subject to a variance or change in its terms, and thus, place every person who has been defrauded by the giving of such a worthless check, in grave danger by subjecting him to an action for damages for a malicious prosecution should the offender be prosecuted and that prosecution fail.

We cannot conceive that this Court will allow variance of the terms of a written check by parol evidence in such a case, any more than it

will permit the changing or varying of the terms of a written lease, as in *Naumberg v. Young*, 44 N. J. L. 331; or, varying the time and terms of payment of a promissory note, as in *Zuckerman v. Handleman*, 2 N. J. Misc. 3.

In the case of *Stiles v. Vandewater*, 48 N. J. L. 67, the defendant, the maker of a note upon which suit had been brought, offered to prove that the note was given upon an oral agreement that it was to be renewed when due. The trial court refused to hear the testimony and in the opinion by the Supreme Court, Justice Depue, states the following on the subject, on page 69:

“Another ground of reversal is that the court refused to hear the evidence offered by the defendant to show that the note, although payable by its terms in three months, that it should be renewed. The offer was not to show an agreement to that effect in writing. It must be taken, therefore, to be an offer to establish such agreement by parol and oral testimony was incompetent to vary the terms of a written contract.” Citing 2 *Parsons on Bills*, 503; 1 *Daniel Negotiable Instruments* 80; *Wright v. Remington*, 41 N. J. L. 48; 14 *Id.* 457.

In the case of *Middleton v. Griffith*, 57 N. J. L. 442, this Court states the rule as follows, at page 448:

“There is no fraud charged, and parol evidence was not admissible tending to vary the import of this note. It cannot be converted by parol evidence from an absolute into a conditional contract. *Meyer v. Beardsley*, 1 *Vroom* 236; *Chaddock v. Van Ness*, 6 *Id.* 517; *Wright v. Remington*, 12 *Id.* 48. Evidence of a parol contemporaneous agreement that the note should not be paid, in whole or in part, is not admissible. *Remington v. Wright*, in the Court of Errors and Appeals, 14 *Id.* 451; *Johnson v. Ramsay*, *Id.* 279; *Anthony v. Fritz*, 16 *Id.*

1; Hendrickson *v.* Hutchinson, 5 Dutcher 18; Whart. Ev., Sec, 1058; Byles Bills, p. 500; Stiles *v.* Vanderwater, 19 Vroom 67; Buchanan *v.* Adams, 20 *Id.* 636. These cases all illustrate this rule of law, and therefore a contemporaneous agreement which varies or alters the terms and import of a promissory note, by adjudication in this court, is inadmissible and cannot defeat a recovery."

Whatever might be said as to the variance of this rule, in the case of a criminal prosecution, the substance of the rule should not be varied in an action where, as here, *plaintiff's cause of action is dependant upon, and directly traceable, through the check.* He was obliged to, and did, *affirmatively prove* that he purchased the merchandise in question for which he gave his check dated on the day it was given, and for the amount herein stated. He admitted further, and it was proved in the case, that there was no money in the bank to pay the check, and that due notice, which was required by law, was given him. He, however, avoids his responsibility under the law by also *affirmatively proving* that although he gave the check, made payable as aforesaid, it was not, in fact, to be paid as therein stated, but that *by an oral agreement, it was to be held a "couple of days," and thus, be made payable on a date other than that stated in the written order to pay—a clear evasion of the parol evidence rule.*

Inasmuch as the jury's verdict was predicated—at least in part—on the testimony of the plaintiff, which varied the terms of the check itself, it is submitted that the gravest injury resulted to the defendant. Therefore, for the reasons herein assigned, the judgment, etc., should be reversed.

**Second Ground of Appeal.**

(Third Assignment.)

This assignment goes to the Court's permitting (over defendant's objection) the entire record in the case of *Kitzman v. De Candia*, to be received in evidence.

It appears from a statement made by the learned trial judge (by agreement between the trial attorneys), that Weisman, the defendant (or more correctly Weisman's firm—Weisman & Obshatkin) assigned the checks in question to one Meyer H. Kitman, who brought suit against the present plaintiff De Candia, to recover the amounts due thereon; that judgment was obtained against him and that execution issued; that a levy was made and certain goods and chattels sold by the sheriff for an amount, which amount was applied upon the judgment which Mr. Kitman recovered against DeCandia (see Statement, bottom p. 61, top p. 62). It appears, however, that the statement was corrected by the attorney for the defendant who stated to the Court that it was discovered that the stipulation was wrong, and that the plaintiff actually never obtained anything on the execution, and that the goods and chattels were claimed by friends and relatives of the family of the defendant (p. 62). After that statement was made, it was agreed that the statement by the Court should be "forgotten" (top p. 63) and the plaintiff was ordered to proceed with his proof. Plaintiff's attorney then offered the record of the Kitman case in evidence which the Court ordered received (p. 63). To the reception of this record, an objection was duly taken (see p. 64). The record of the Kitman case is printed on pages 193 to 216, inclusive, and contains:

- a. the complaint of Meyer Kitzman *v.* Luca De Candia;
- b. defendant's affidavit of merits;
- c. defendant's answer;
- d. plaintiff's amended complaint;
- e. defendant's answer to amended complaint;
- f. plaintiff's motion to strike out certain parts of defendant's answer and for summary judgment;
- g. affidavit of Harry Weisman in support of said motion;
- h. affidavit of Meyer H. Kitzman in support of said motion;
- i. order striking out defendant's answer and summary judgment;
- j. entry of judgment against defendant.

In permitting in evidence the entire record of the Kitzman case, great injury might have been done the defendant Weisman, because,

*Firstly*, the affidavit of merits contained a self-serving declaration by the defendant that he had a legal defense to the action on the merits of the case (p. 196).

*Secondly*, defendant's answer contained self-serving declarations in his behalf (p. 197).

*Thirdly*, a wrong impression might have been obtained because of the fact that the plaintiff Kitzman added a count to his original complaint, for goods sold and delivered which was in the same amount as that represented by the checks originally sued upon (pp. 198-205, inc.).

*Fourthly*, defendant's answer to the amended complaint again contained self-serving declarations by way of his defenses to plaintiff's action (pp. 205-206).

*Lastly*, a new issue was given to the jury which might have been decided adversely to the plaintiff therein, and thus caused an unfavorable reflection upon the defendant herein.

Even allowing the execution in the Kitzman case to go in evidence, was injurious, because of the fact that, although it purported to show some payment on account, its error was substantially explained by De Candia, the then defendant in the case, who stated that he had never paid anything on the Kitzman judgment (pp. 146 to top 149).

After the record was put in evidence the defendant, acting within his rights, had the various papers which made up that record and which were contained in a "jacket" examined by his witness Jacob W. Silverman, an attorney who had acted for the defendant Weisman in the criminal proceedings and as attorney for Kitzman in the civil suit. That witness, simply went on to explain, principally, the difference in the various papers that were filed and the changes therein made, as well as the procedure in the cause (see Record, pp. 111-116, inc.). This again permitted the attorney for De Candia to cross examine Silverman as to those pleadings and to create an atmosphere entirely foreign to the questions at issue.

That the record of the Kitzman case, which was put in evidence, prejudiced the defendant Weisman upon his trial, is shown from a colloquy between the learned Court and the jury. It seems that after the jury retired, after receiving the Court's charge, it returned to the court for further instructions. The conversation between the jury and the Court appears on the bottom of page 182 and top of 183 (at which time, it might properly be said, neither of the attorneys were present) and is as follows:

A Juror: Yes, sir. Your Honor, may I ask in reference to the Sheriff's sale?

The Court: Surely.

A Juror: What property was sold? It says personal property. Was it store contents?

The Court: The execution which is in evidence, which you have with you, tells you all that I know. I do not know anything about it.

A Juror: It just says personal property.

The Court: Yes. I do not know a thing more about it.

The consideration, therefore, by the jury as to what goods were sold or what money was realized in view of the plaintiff's positive statements as hereinabove shown that nothing was paid on account of the Kitzman judgment, clearly shows that injury undoubtedly resulted to the defendant from a consideration of the record. If De Candia paid anything on account of the Kitzman judgment, his testimony was the best evidence and any memorandum made by some court officer or any of the papers in the cause, was merely hearsay. Besides this, the question as to whether store contents or any other kind of property, was sold (if any were in fact sold) was immaterial, but with all of the papers before them the jury, as indicated by its questions, evidently considered those facts and its verdict, therefore, may have been the result of some evidence obtained from the record of the Kitzman case, which was not germane to the present issue.

It is therefore respectfully urged, for the reasons hereinabove set forth, that the judgment, etc., be reversed.

### Third Ground of Appeal.

(Fifth and Sixth Assignments.)

In view of the fact that the 5th and 6th assignments practically present to this Court the same question, they will be argued together.

The fifth assignment relates to a question asked of one Jacob W. Silverman, called by the defense, as follows:

“Q Your advice to your client at that time was that, although no consideration passed at the time the check was made, the maker is criminally liable?”

and the sixth assignment which was an exception to a question asked the same witness by the trial court, as follows:

“Q Do you know of any case in New Jersey that holds that?”

Jacob W. Silverman, an attorney and counselor-at-law of this State, was sworn on behalf of the defendant. He is the attorney to whom the defendant applied for advice before the criminal complaints were made. Mr. Silverman testified as to what the defendant told him concerning the transactions involving the checks, and testified as to the advice which he gave to his client, the defendant. After having qualified and given his testimony as above stated, he was properly cross examined by plaintiff's attorney as to what information had been given him by the defendant, before he gave him any advice. After the Court questioned him as to what his legal authority was for advising his client that he could make a criminal complaint upon a check given on a past due book account (p. 124) he was further questioned as to his legal knowledge on that subject. The first question asked, to

which defendant took exception, appears in line 33, page 125, as follows:

Q (By plaintiff's attorney): "Your advice to your client at the time was, that, although there was no consideration passing at the time the check was made the maker would still be criminally liable?"

After an objection was made by defendant's attorney to this question upon the ground that it was immaterial whether counsel was right in his opinion, as long as the witness was competent, the Court said:

"I do not believe that the advice of just any counsel is excuse for making complaint. I think it must be competent counsel. I think that might go to the competency of counsel."

An objection was then taken to the question, which objection was overruled.

The answer gave it as the witness' opinion that he believed a complaint was legally justified under the statute, whereupon the Court asked the following question, to which an exception was duly taken:

"Q Do you know of any case in New Jersey that holds that?" (Bot. p. 126),

to which the witness answered

"A No, I relied on the statute."

The latter part of this answer was stricken out, so that witness' answer became merely "No."

The whole effect of the questions asked of, and the answers given by, the witness Silverman, was that he was unlearned in the law and that naturally, therefore, the defendant was not excused from the result of his complaint, because he relied upon a lawyer who advised him erroneously in the matter.

It is a complete defense to an action for malicious prosecution to show that the defendant fairly presented the facts to competent counsel and that he was advised by him to take the action which he did, irrespective of the fact that his opinion was wrong. The rule is laid down in the early case of *Potter v. Casterline*, 41 N. J. L. 22, which was an action for malicious prosecution based upon the charge, against the plaintiff, of larceny. Quoting from 1 Am. Lead. Cas. 267 (\*215) the Court said, at page 29:

“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.* \* \* \*

A defendant cannot excuse himself by showing that he consulted with an unprofessional person and followed his advice.” (Italics mine.)

In view of the conclusion to which the jury might possibly have come respecting the ignorance of counsel on that particular subject (if he was ignorant), which conclusion was amply justified by the questions and answers as herein stated, the defendant was undoubtedly prejudiced in his defense.

The test of incompetency is not based upon any exact knowledge of a particular legal principle, and the Court having developed the fact from the witness that he had no knowledge of any cases supporting his opinion, his testimony was, evidently, given little or no credit by the jury.

It is, therefore, respectfully submitted, that for this reason, the judgment, etc., be reversed.

**Fourth Ground of Appeal.**

(Eighth Assignment.)

The error complained of here, is, that the Court erroneously charged the jury as follows:

“Now, if, as I have read to you in the case decided by the Chief Justice, it was the agreement between the plaintiff and the defendant that this check for \$11.50 was not to be immediately used, then this statute under which these criminal proceedings were brought, does not apply and this defendant had no right to institute these criminal proceedings against the plaintiff. If that be the situation, then the defendant had no reasonable and probable cause for instituting the criminal proceedings so far as that check of \$11.50 is concerned.”

This objection is raised by defendant's exception to charge found on page 180, line 30.

If the argument made by the defendant herein under his first assignment is sound, then naturally, what the Court said, as above, constituted legal error, for he repeats that if the agreement between the plaintiff and the defendant was, that the check for \$11.50 was not to be immediately used, then the defendant had no right to institute the criminal prosecution. It thus appears that the utmost importance attaches to the question as to whether the Court erred in permitting the plaintiff De Candia to give testimony that the check for \$11.50 which he gave to defendant, was not to be immediately used but was to be held a “couple of days.”

If, therefore, the first assignment of error is good, then this present assignment is equally good, and the defendant was prejudiced by the charge made by the Court in the respect mentioned, and the judgment, etc., should, for this reason, be reversed.

All other grounds of appeal assigned for reversal, but which have not been argued herein, are hereby abandoned.

It is most respectfully urged that, because of the errors herein pointed out, the verdict of the Circuit Court heretofore rendered, upon which verdict judgment was entered, should be set aside and a new trial granted.

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