216 Va. 596
CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
APR 4 1975
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 741149

DAISY MILLER TWEEDY,

Appellant,

v.

J. C. PENNEY COMPANY,
INC., ET AL,

Appellee.

APPENDIX

ROBERT C. WOOD, III
EDMUNDS, WILLIAMS, ROBERTSON,
SACKETT, BALDWIN & GRAVES
P. O. BOX 958
LYNCHBURG, VIRGINIA 24505

Counsel for the Appellant

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

* * * * * * * * * * * * *

RECORD NO. 741149

* * * * * * * * * * * * *

DAISY MILLER TWEEDY,

APPELLANT,

V.

J. C. PENNEY COMPANY,
INC., ET AL,

APPELLEE.

* * * * * * * * * * * * *

APPENDIX

* * * * * * * * * * * * *

TABLE OF CONTENTS

Motion for judgment filed 2/2/73	1
Response filed 2/25/73	2
Amended grounds of defense filed 5/21/73	3
Amended motion for judgment	4
Motion to elect	5
Discussion with the Court and counsel	9
Non-suit of defendant Harry Anderson	11
Testimony of Daisy Miller Tweedy	12
Testimony of Bonnie Tate Cocke	35
Testimony of Harry E. Anderson	47
Motion to strike the evidence	52
Plaintiff's Instruction 1	55
Defendant's objection	56
Plaintiff's Instruction 1-A	60
Plaintinff's Instruction 1-B	61
Defendant's objection	62
Plaintiff's Instruction 2	63
Defendant's objection	64
Plaintiff's Instruction 3	65
Defendant's objection	65
Defendant's exception	65

TABLE OF CONTENTS CONTINUED

Plaintiff's Instruction 4	66
Defendant's objection	66
Plaintiff's Instruction 5	66
Defendant's objection	67
Defendant's Instruction A	67
Defendant's Instruction B	68
Plaintiff's objection	68
Defendant's Instruction C	69
Defendant's Objection	69
Defendant's Instruction D	70
Plaintiff's objection	70
Defendant's Instruction E	71
Defendant's objection	71
Defendant's Instruction F	71
Plaintiff's objection	72
Defendant's Instruction G	72
Plaintiff's objection	72
Defendant's Instruction H	73
Defendant's objection	73
Motion to set aside the verdict	74
Order reflecting jury's verdict	75
Motion to vacate judgment	77
Order vacating judgment filed 5/15/74	78

TABLE OF CONTENTS CONTINUED

Opinion of court dated 7/17/74	78
Final order of court entered 7/24/74	86
Appellant's assignments of error	87
Appellee's assignments of error	88

MOTION FOR JUDGMENT

Filed February 2, 1973

Your plaintiff, Daisy Miller Tweedy, moves the Court for judgment against the defendants, J. C. Penney Company, Inc., Harry E. Anderson, Jack Ragsdale and Bonnie Tate Cocke, jointly and severally, on the grounds and for the amounts hereinafter set forth:

1. On October 14, 1972, at approximately 9:30 a. m., plaintiff was a customer at a store located at Pittman Plaza, Lynchburg, Virginia, owned and operated by the defendant, J. C. Penney Company, Inc.

2. At said time and place in the presence of other customers and persons all said defendants (a) said words to plaintiff which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace; (b) slandered plaintiff by falsely accusing her of wilfully concealing merchandise belonging to defendant, J. C. Penney Company, Inc.; (c) unlawfully detained plaintiff in a small room on defendant's, J. C. Penney's, premises, after plaintiff had expressed her desire to leave said premises; (d) maliciously and wilfully, without probable cause, caused a criminal warrant to be issued against plaintiff, falsely charging plaintiff with violating Section 18.1-126 of the Code of Virginia, 1950, as amended, which warrant was dismissed by the Municipal Court for the City of Lynchburg; and (a) maliciously and falsely had plaintiff arrested and imprisoned.

3. By reason of such aforesaid words and conduct by all of said defendants, jointly and severally, plaintiff has suffered severe physical and emotional harm to her person, damage to her reputation, and has been and is subjected to humiliation, embarrassment, infamy and disgrace.

WHEREFORE, your plaintiff moves the Court for judgment against the defendants and each of them, jointly and severally, in the amount of $25,000.00 compensatory damages and $25,000.00 punitive damages.

RESPONSE

Filed February 26, 1973

Come now J. C. Penney Company, Inc., Harry E. Anderson, Jack Ragsdale and Bonnie Tate Cocke, by counsel, and respond to the motion for judgment filed by the plaintiff as follows:

(1) The statements and allegations contained in paragraphs 1, 2 and 3 are denied.

(2) The motion for judgment fails to state a cause of action.

(3) The causes of action alleged in the motion for judgment are barred by the Statute of Limitations.

(4) The defendants have no knowledge as to the incident in question but, if justified by the evidence, will rely upon the defenses of justification, truth and privilege.

(5) Each and every statement and allegation contained in the motion for judgment, except those expressly herein admitted, are denied.

AMENDED GROUNDS OF DEFENSE

Filed May 21, 1973

Comes now J. C. Penney Company, Inc., Harry E. Anderson, Jack Ragsdale and Bonnie Tate Cocke, by counsel, and respond to the motion for judgment filed by the plaintiff as follows:

(1) The statements and allegations contained in paragraphs 1, 2 and 3 are denied.

(2) The motion for judgment fails to state a cause of action.

(3) The causes of action alleged in the motion for judgment are barred by the Statute of Limitations.

(4) The defendants will rely upon the defenses of justification, truth and privilege and, in addition thereto, will rely upon the defense that the defendants had at the time of such arrest probable cause to believe that the plaintiff committed willful concealment of goods or merchandise within the meaning of Section 18.1-127 of the Code of Virginia of 1950, as amended.

(5) Each and every statement and allegation contained in the motion for judgment, except those expressly herein admitted, are denied.

20 MR. WOOD: Plaintiff, Daisy Miller Tweedy, by counsel
21 stipulates that she is withdrawing for consideration by this
22 court and the jury, which has been sworn, counts in Paragraphs
23 2-B, slander; 2-C, unlawful detention; and 2-E, malicious arrest
24 and imprisonment. Plaintiff will only proffer proof on
25 Counts 2-A, words and insults, and D, malicious prosecution. Now,
1 I think that is -- excuse me, also we will not attempt to
2 prove any punitive damages.
3 THE COURT: Of course, on that recent case you
4 have to prove actual --
5 MR. WOOD: There is no question of punitive damages
6 in this case.
7 THE COURT: All right.
8 MR. ROSENBERGER: I understand then, Mr. Wood, that
9 you are in effect amending your motion for judgment to omit
10 Paragraph 2-B, Paragraph 2-C, and -- Paragraph 2-B deals with
11 falsely accusing of wilfully concealing merchandise --
12 MR. WOOD: Slander. I don't think I can go under
13 either theory.
14 MR. ROSENBERGER: So you are amending your motion
15 to withdraw Paragraph 2-B dealing with slander, Paragraph 2-C
16 unlawful detention, and Paragraph 2-E malicious and false
17 arrest.
18 MR. WOOD: Yes.
19 MR. ROSENBERGER: And you are amending it so as to
20 eliminate the claim of $25,000.00 for punitive damages and
21 you make no claim for punitive damages.

22 MR. WOOD: That is right.

23 MR. ROSENBERGER: That is on the basis that you admit

24 there is no actual malice --

25 MR. WOOD: I am not going to admit anything. I just

1 say we are not asking for punitive damages, we won't offer

2 an instruction on it.

3 MR. ROSENBERGER: We have no objection to the

4 amendment. Am I correct in saying that is what you are doing,

5 you are amending your motion?

6 MR. WOOD: I am not going to offer any proof on it.

7 THE COURT: It just means there are only two left

8 that evidence will be offered on and considered on.

[Tr. pp. 5, l. 9 - 9, l. 1; 10, l. 16 - l. 18]

MOTION TO ELECT

9 MR. ROSENBERGER: Your Honor, the defendants by

10 counsel in following the motion filed on Friday ask the court

11 to require the plaintiff to elect which of the two causes

12 of action alleged in the motion for judgment she will pursue,

13 because those two involve more than one right and different

14 kinds of proof against different persons which will result in

15 confusion at the trial both in the way of evidence and also

16 because of the different parties involved.

17 THE COURT: What is your position on that, Mr. Wood?

18 MR. WOOD: Well, Judge, the case he cited, Daniels v.
19 Truck Company, was one that included a tort and one is express
20 warranty and one is unlawful repossession which clearly would
21 be different circumstances and different evidence to be considered
1 that we have to prove more than malicious prosecution is
2 malice. Malice can be inferred if the jury believe that the
3 defendants or any one of them or the defendants lacked probable
4 cause in bringing this action against my client Mrs. Tweedy,
5 and probable cause is really the issue in both of them. The
6 statute gives the defendants immunity if the jury believes
7 they had probable cause to institute this warrant against Mrs.
8 Tweedy for concealment and it will also be a bar to the action
9 of malicious prosecution if they think they had probable cause.
10 So I would say that there certainly wouldn't be anything
11 confusing about it and it would be helpful and expedite this
12 case and keep it from being tried twice -- in fact, I am not
13 sure you can try it twice, if you lost on one I think you
14 would be bound by it.
15 THE COURT: Of course, this case was filed about
16 eighteen months ago and the response was filed at that time,
17 and here at 3:00 o'clock on Friday afternoon when it is going
18 to be tried on Monday you filed a motion which I don't think
19 is a timely motion, it should have been filed earlier. In
20 Duncan, 214 Virginia, I don't know if the question was raised
21 itself, it said (reading citation) --
22 MR. WOOD: In that case of Weatherford v. Burchette
23 there was insulting words and slander and malicious --

24 THE COURT: I will overrule the motion.

25 MR. ROSENBERGER: I cited that earlier, in the case

1 of Standard Products v. Wooldridge in 214 Virginia 776 the

2 court commented on the Daniels case --

3 THE COURT: I read that three times and I can't

4 understand it.

5 MR. ROSENBERGER: It makes it pretty clear in the

6 last sentence on Page 481 "We did not permit the enjoinder

7 in Daniels because the causes of action were unrelated".

8 In other words, this is the same thing here, insulting words

9 and malicious prosecution.

10 THE COURT: They were related.

11 MR. ROSENBERGER: But they were for different

12 causes.

13 THE COURT: Do you think it should be brought in

14 on one and then brought in on the other?

15 MR. ROSENBERGER: Apparently so. The court said

16 they were unrelated and involved more than one right and

17 different kinds of proof against different persons which

18 would result in confusion at the trial. Now, I contemplate

19 we are going to get into the question that this charge against

20 her was dismissed, I don't think that that will be omitted,

21 and I move now to exclude that evidence because even if it

22 were dismissed we are not precluded from showing that we had

23 probable cause to believe it was committed. We don't have

24 to prove it beyond a reasonable doubt at the trial, the burden

25 is on the commonwealth to prove it beyond a reasonable doubt,

so I think that would be unrelated and immaterial. Now, that has to do with the malicious prosecution and, you see, we get this involved in the question of insulting words and it will involve different kinds of proof when you get around to instructions --

THE COURT: Why wasn't the question raised until the day before the trial?

MR. ROSENBERGER: Frankly, I didn't file a responsive pleading in the case and when I got to working on instructions then I found out what the problem would be on the instructions and then the misjoinder and causes of action. He has sued the Penney Company, and a manager and a clerk and you have three different parties. Now, I will admit that what the clerk did would be binding on the J. C. Penney Company because it was a qualified privilege as Mr. Wood recognizes, she was protecting under her employment the property of the store.

MR. WOOD: I don't think whether it was a qualified privilege --

MR. ROSENBERGER: You said it was a question of malice but that wouldn't bind Mr. Anderson. You have a combination of causes of action, you have three different parties and it is going to be very difficult and confusing and it would be prejudicial --

THE COURT: In other words, the clerk's action wouldn't be binding on the manager but it would be binding on the company.

16 MR. ROSENBERGER: Your Honor, we still think you have
17 a misjoinder as to the evidence and the instructions.
18 THE COURT: I will overrule it.

[Tr. pp. 10, l 16 - 12, l. 15]

DISCUSSION WITH THE COURT AND COUNSEL

16 MR. ROSENBERGER: Your Honor, we still think you have
17 a misjoinder as to the evidence and the instructions.
18 THE COURT: I will overrule it.
19 MR. ROSENBERGER: We would ask the court to have
20 Mr. Wood refrain from speaking about whether or not she was
21 convicted or acquitted in the Police Court because it is a
22 different form of proof, because the fact that she was acquitted
23 does not affect the issues in this case because we are entitled
24 to prove that it appeared reasonable to Bonnie Tate Cocke that
25 she was guilty of trying to take this merchandise.
1 MR. WOOD: Judge, that is one of the elements
2 of my proof, I have to prove that the allegations against
3 her came out favorably to her.
4 MR. ROSENBERGER: I will stipulate that it was
5 dismissed but I don't want it to go to the jury.
6 THE COURT: How are they going to know unless it is
7 told they were dismissed?
8 MR. ROSENBERGER: If he says he believes that is
9 essential to his case from a standpoint of law I will say
10 the charge was dismissed --

11 THE COURT: The jury has to know that.

12 MR. ROSENBERGER: I think that is prejudicial and
13 that is another thing with the problem of the insulting words
14 statute which goes --

15 MR. WOOD: Can you get an instruction on that? I
16 have an instruction on insulting words and what I have to
17 prove under malicious prosecution and that is just a matter
18 of explaining it to the jury.

19 THE COURT: Well, I am going to overrule the motion.
20 And do you have any authority on whether you can show the
21 dismissal?

22 MR. WOOD: Well, Judge, the elements of malicious
23 prosecution are that it was started at the request of the
24 defendant, that the prosecution ended favorably to the plaintiff
25 and it is done without probable cause and with malice and it

1 is in all the cases, that is always proved.

2 MR. ROSENBERGER: But Judge, in this case it is
3 not sufficient that it be dismissed. We are entitled to
4 show that it reasonably appeared to this lady that --

5 THE COURT: You can still show that.

6 MR. ROSENBERGER: But, you see, this other business,
7 there is a difference in proof that the jury doesn't understand
8 and I think if it goes in that she was acquitted, then the
9 jury will conclude that we were wrong in charging her. That
10 is the problem that you have with it.

11 THE COURT: I think it is an element of his case.
12 He has to prove that the allegation ended favorably to his
13 client. I overrule your motion.

14 MR. ROSENBERGER: We respectfully object and except
15 for the reasons stated.
16

[Tr. pp. 9, l. 4 - 10, l. 13]

NON-SUIT OF DEFENDANT HARRY ANDERSON

4 THE COURT: Are you willing to drop the manager
5 and go ahead --
6 MR. WOOD: Well, I think the question of agency
7 will be clear in this case. The clerk -- and Mr. Rosenberger
8 has stipulated in the depositions and see if I state it
9 correctly --
10 MR. ROSENBERGER: I will state on the record that
11 Bonnie Tate Cocke was employed there and had charge of the
12 sportswear department where this incident occurred, and in
13 protecting her employer's property she made the charge against
14 the plaintiff, there is no question about that.
15 MR. WOOD: Acting in the scope of her employment.
16 MR. ROSENBERGER: Yes -- she had to be.
17 MR. WOOD: How about Harry Anderson?
18 MR. ROSENBERGER: He didn't actually make the charge,
19 it was reported to him by the lady. He merely said to your
20 client what the lady had told him and there you have a different
21 question there as to proof.

22 MR. WOOD: Well, we have non-suited the case as
23 to Jack Ragsdale because we didn't know at the time we filed
24 the action how much he was involved in it.
25 MR. ROSENBERGER: He wasn't even in the store at the
1 time.
2 MR. WOOD: Bonnie Tate Cocke got the warrant out.
3 Would you stipulate that she did that in the ordinary course
4 of her business?
5 THE COURT: That doesn't make any difference.
6 MR. ROSENBERGER: I don't think that it was in
7 the ordinary course of her business.
8 THE COURT: Won't you non-suit Anderson and then
9 we can go ahead with the case?
10 MR. WOOD: I don't think it will make any difference.
11 I will non-suit Anderson.
12 THE COURT: And then it will be Bonnie Tate Cocke
13 acting as agent for Penney Company --

[Tr. pp. 14, l. 21 - 35, l. 10; 58, l. 5 - 60, l. 5]

TESTIMONY OF DAISY MILLER TWEEDY

21 Q Mrs. Tweedy, speak up loud enough for the members
22 of the jury to hear you.
23 A Yes, sir.
24 Q And talk to them. For the record will you give
25 us your full name.

1 A Daisy Maddox Tweedy.

2 Q And where do you live, Mrs. Tweedy?

3 A Route 29, Wards Road.

4 Q How old are you?

5 A Sixty-two.

6 Q Are you married?

7 A Yes, sir.

8 Q How long have you been married?

9 A Forty-two years.

10 Q Have you lived in Lynchburg all your life?

11 A Yes, sir.

12 Q Now, have you shopped at J. C. Penney from time

13 to time?

14 A Yes, sir, I have.

15 Q Now, did you go to J. C. Penney on October 14, 1972?

16 A Yes, sir.

17 Q Whom did you go with?

18 A My husband.

19 Q How did you go there?

20 A In the car.

21 Q In whose car?

22 A His car -- our car.

23 Q Do you drive an automobile?

24 A No, sir.

25 Q All right, what time did you go there?

A Well, it was approximately around quarter to 10:00 -- 10:00 o'clock, something like that.

Q All right. Now, will you tell the jury what you did as you entered J. C. Penney.

A I entered J. C. Penney, go over to the rack of size 38 pants and pick off three pairs of pants --

Q Now, had you been to that area of the store before?

A Oh, yes, lots of times. I pick up three pairs of pants, I go in the first little booth on the lefthand side as you go in the door.

Q Now, Mrs. Tweedy, will you come down here to the jury box and bring your pocketbook with you --

A (Witness leaves stand and goes to jury box).

Q Can you show the jury approximately the size of that dressing room?

A It was small like this (indicating), and I set my pocketbook down here and there was no room except for one person --

Q Can you describe the interior for us.

A There was a little small shelf right there (indicating).

Q This is the curtain right here as you go in. Where was the shelf?

A On the wall, on the solid wall.

Q For clarification for the jury why don't you make this the curtain as you go in.

A That is right. And there was one hook on the wall and a three-cornered shelf, and I laid my little lightweight coat on it and I took off my pants and laid them up on the shelf with my coat.

Q You said you took them off. Is that the pants you wore in?

A Yes, sir. And the first pair of pants on the rack, I held them up and saw they were too small and I just doubled them up and dropped them on my pocketbook.

Q Are these similar in nature to the ones you had (indiating to witness)?

A Other than they were larger. These are larger, these are mine. The others were smaller and I did just like this (indicating), I doubled them up and dropped them on top of the pocketbook, and I reached for the others to put them on and Mrs. Cocke --

Q Was your pocketbook open or closed down.

A No, it was closed. It was a little larger pocketbook but it was closed.

Q And is this what it looked like at the time (indicating)

A That is right, but it was doubled up.

Q You can go back to the witness stand and I will take the pants.

A (Witness resumes stand).

Q All right, after you laid the pants on the pocketbook

1 what happened?

2 A Mrs. Cocke peeped around the door and she asked

3 was I doing all right and I said "Yes, I guess so".

4 Q Was the curtain pulled at that time or not?

5 A Yes, it was pulled.

6 Q Do you know whether or not it was pulled all the

7 way?

8 A I couldn't say for sure.

9 Q And then what happened?

10 A Then I continued to try on the pants that did fit

11 me and about that instant she reached around behind me and

12 took those pants out and I figured she thought I didn't hang

13 them back on the rack or they were partly on the floor --

14 Q Was anything said at that time?

15 A No.

16 Q And then what happened?

17 A In a split second or two she came back and said

18 "The manager wants to talk to you". I said "For what?"

19 She said "You had those pants in your pocketbook" and I said

20 "You know very well I didn't have them in my pocketbook".

21 And she said "The manager wants to talk to you" and I said

22 "Yes, ma'am, I will talk to the manager."

23 Q Were you dressed at this time or not?

24 A I had to take those pants off and put mine on.

25 Q Can you describe for us the kind of hanger the

pants were on?

A Just one little hook, there was only one on there and I had the new pants hanging on it.

Q How would you put the pants over the rack?

A With something like little hooks.

Q Would you pin them on?

A Well, something like little catch hooks. I can't describe it exactly.

Q And tell us what happened as you went to the manager.

A I walked with her to the middle of the floor next to the escalator and some gentleman was there and I told him there must be a mistake or misunderstanding or something because this lady said I had the pants in the pocketbook and I didn't have them in there. He said "She says you did" and I said "I certainly didn't have the pants in my pocketbook". And he said "Come on downstairs, we will talk about it" or something. And I followed him on down and I sat there and I asked them how long I would have to sit there, you know.

Q Did you know at the time what this all was about?

A No, I didn't realize -- I never had anything to happen to me like that, I didn't know about these things. And finally I asked him the second time how long I had to sit there and he said "The police will soon be here". And I knew my husband was out on the parking lot and I knew he would be disturbed if he came in and couldn't find me he would be disturbed.

And finally, it was some time, and I had to go with the police out and around --

Q Do you know approximately how long you were in the office of the manager?

A I can't say. It seemed a long time, it was a right good while.

Q Did the manager interrogate you or ask you about what happened?

A He asked me and all I could tell him is what I mentioned what I said, that was all. No, he didn't --

Q Do you recall whether he asked you whether your pocketbook was open or closed or anything like that?

A No, he just looked astonished, just looked at me.

Q Did he make any attempt to investigate what happened in the room?

A No.

Q Was there anybody else around there?

A No, there was nobody else around -- no. And the police came and I had to follow him out around in the crowd and I was --

Q How did you leave? The same way you came in?

A No, I had to follow the police out the back to his car and around to the front at the parking lot where my husband was at. And at that time I was embarrassed and nervous and I didn't know who was looking at me or what.

Q And where did you go after you left J. C. Penney?

A He carried me down to the police station.

Q Who is "he"?

A I don't know, it was a small guy, a small policeman.

Q It was a police officer?

A Yes.

Q Do you know what time you got to the police station?

A No. At that time I wasn't keeping up with the time. And he just told my husband to follow us and he didn't know what was going on. And they took me back and took pictures and fingerprints and it took a long time from 10:00 o'clock that morning until 3:00 o'clock in the afternoon.

Q Do you know how long you were at the police station?

A No, sir. It was right long.

Q What did they do to you exactly in the police station?

A Well, took fingerprints and asked me all kinds of questions and took pictures, and that was about the extent of it.

Q Mrs. Tweedy, do you recognize this warrant (handing to witness)?

A Yes, sir.

Q Was that given to you at that time?

A Yes -- yes, sir.

MR. WOOD: I would like to read it to the jury.

THE COURT: All right. Are you offering it in evidence

MR. WOOD: Yes, sir.

(The document above-referred to was marked Plaintiff's Exhibit No. 1 and received in evidence)

MR. WOOD: This warrant reads as follows (reading exhibit to jury).

BY MR. WOOD:

Q Now, Mrs. Tweedy, were you subsequently tried for this offense?

A Yes, sir.

Q Do you remember the date of it or not?

A I don't remember the exact date.

Q All right. Were you found guilty or not guilty?

A Not guilty.

Q If you look on the back of this warrant the word "Dismissed" is written.

MR. WOOD: If you members of the jury will pass that around (handing to jury).

BY MR. WOOD:

Q Now, Mrs. Tweedy, has there been any change or difference in the way you feel subsequent to this occurrence on October 14, 1972 from the way you felt beforehand?

A Yes, sir, there certainly has.

Q Will you tell the jury just how this has affected you.

A Well, I have just been nervous, humiliated, and I won't go out. In fact, I just won't go shopping by myself any place anymore and if I can get somebody else to do it for me I get them to do it. And I don't get any pleasure out of life and I don't sleep at night most of all.

Q Do you take any medication?

A I just take some nerve pills that my daughter had and I plan to go to the doctor and I just hope it will wear off.

Q Are you still taking medication at the present time?

A Yes, sir, occasionally. It seems to help for a while but then it seems to wear off.

Q How do you feel at this present moment?

A I feel nervous and embarrassed, and I just don't know the words for it.

Q Why did you go see an attorney in regard to this?

A I beg your pardon?

MR. ROSENBERGER: I object to that question why she went to see an attorney -- I object to that.

THE COURT: What is your objection?

MR. ROSENBERGER: There is no materiality here.

THE WITNESS: Well --

THE COURT: Wait a moment, Mrs. Tweedy. What is the materiality of that, Mr. Wood?

MR. WOOD: Judge, it shows her feelings about this.

THE COURT: You can ask her what she did.

THE WITNESS: It was not through any revenge or anything. I felt maybe it would help if I went to an attorney. I did not do it through revenge or hatred. I thought maybe if I brought it up there would be a remedy in there somewhere and help the next person.

MR. ROSENBERGER: I move to strike that.

THE COURT: Yes. I ask the jury to disregard that question and answer. Go ahead.

BY MR. WOOD:

Q At any time, Mrs. Tweedy, were those pants that were on your pocketbook not in full view of you while you were in the room?

A No.

Q Have you ever been convicted of any felony or any crime involving moral terpitude?

A No, sir.

Q Now, you said something about having trouble sleeping at night. Can you tell the jury exactly what your problem is on that?

A Just when I aim to go to sleep that just runs through

my mind, it just looks like I can't forget about it. If I happen to go to sleep I wake up and think about it and that is the last thing I think about before I go to sleep, and it just makes me weak, I can't do my work.

Q What kind of work do you do? Can you expound on that?

A Well, I just do a little housework and then go nextdoor to my mother's and come back and try to concentrate from time to time. I can't explain it, I don't know, I am all to pieces.

Q At any time did you have any intent to conceal merchandise when you were at J. C. Penney on October 14, 1972?

A No, sir.

Q Or to take it away and not pay for it?

A No, sir, none whatsoever.

MR. WOOD: Answer Mr. Rosenberger.

CROSS EXAMINATION

BY MR. ROSENBERGER:

Q Mrs. Tweedy, you tell us about being nervous -- when I took your deposition didn't you tell me you did your housework all right?

A At times.

Q You didn't qualify it then. You said you did your housework all right.

1 A I do it all right when I can get to it and I am
2 able to do it, but sometimes I am so nervous I can't do it
3 and I have to stop and get myself together to do it.
4 Q And from October 14, 1972 down to this date you
5 have never been to a doctor because of any nervousness that
6 came out of this thing, did you?
7 A No, sir. I was ashamed, to tell you the truth.
8 Q Well, the answer is you haven't, whether you are
9 ashamed or not.
10 A No, sir.
11 Q Now, Mrs. Tweedy, on this morning of October 14, 1972
12 you went into Penney's just after the store was closed -- I mean,
13 just after they opened, you went in just as the store opened?
14 A Yes, sir.
15 Q And I believe you told me there was nobody much
16 there, no crowd.
17 A Not an awful lot.
18 Q And I think you told the jury this morning there
19 was nobody else around except you and Mrs. Cocke.
20 A Oh, in the dressing room -- I meant in the dressing
21 room.
22 Q Now, actually there was no problem about getting
23 waited on, there was no crowd in there buying anything, was there?
24 A I didn't notice that particular.
25 Q And I believe when I took your deposition you told me

you went straight to the rack 38.

A Yes, sir.

Q And you took off these slacks and took them into the dressing room.

A Yes, sir.

Q You didn't ask anybody to wait on you, did you?

A No, sir.

Q Actually, didn't you take in four pair of slacks?

A No, sir.

Q Are you saying three pair because there is a sign in the dressing room that says three pair?

A Not that I know of.

Q Three garments only.

A I didn't notice.

Q In any event, you didn't ask anybody to wait on you -- you just went in.

A No, sir.

Q Did you have on that same coat you have on now?

A No, sir, it was a small, lightweight one.

Q And I believe you told me you put your coat and the slacks you took off on the shelf.

A Yes, sir.

Q Wouldn't you normally have put your pocketbook down before you took off your coat and slacks?

A Yes, sir, I put it down beside me on the floor.

1 Q You didn't put it on the shelf?

2 A It wasn't large enough.

3 Q What wasn't?

4 A The shelf.

5 Q In other words, your pocketbook was larger than the

6 shelf?

7 A Well, not necessarily but I automatically put it

8 down beside me to take off my coat.

9 Q You said not necessarily -- didn't you tell me

10 the shelf was too small for the pocketbook?

11 A I can't say that because right off I can't say.

12 Q I only took your deposition last week, didn't I?

13 A Yes, sir.

14 Q Didn't you tell me positively, I mean without any

15 qualification, you put your pocketbook on the floor because

16 the shelf wasn't big enough for the pocketbook?

17 A I might have said it then. It could be possible

18 it wasn't big enough.

19 Q Will you hold up the pocketbook you have there?

20 A You say must I hold it up?

21 Q Will you hold it up.

22 A Yes, sir (witness does so).

23 Q That is the pocketbook that we measured. Will

24 you turn it around sideways.

25 A Yes, sir (witness does so).

1 Q And you told me the pocketbook that you had was
2 larger than that one?
3 A Slightly larger -- not too much larger. It had
4 a compartment on the side like this one.
5 Q Didn't you tell me it was wider and taller?
6 A It might have been a little taller and a little
7 wider.
8 Q And a little wider. That was the reason I measured
9 that one, wasn't it?
10 A I guess so.
11 Q Now, at the time I was talking to you about it I
12 asked you where the pocketbook was, didn't I?
13 A I don't quite remember. You probably asked me did I
14 have it.
15 Q Mrs. Tweedy, didn't I say "Mrs. Tweedy, where is the
16 pocketbook" and didn't you say it was at home.
17 A Well, if I did I meant I thought it was at home
18 but usually every fall we do some cleaning and old shoes,
19 clothes and pocketbooks and whatever it may be, we carry some
20 things over to the Good Will in Fort Hill and I discovered my
21 daughter, in cleaning, disposed of it. But I didn't know at
22 the time -- I didn't think I would have any need of it.
23 Q Last week I took your deposition on April 15th, do
24 you remember, in my office?
25 A Yes, sir.

1 Q And didn't I ask you what kind of bag you had?

2 A Yes, sir, I remember.

3 Q And didn't you say "It was something like this",

4 indicating that bag, but it was larger?

5 A Yes.

6 Q And you said it was Navy blue.

7 A Yes, sir.

8 Q And I asked you "Where is the bag?"

9 A The bag, as I say, has gone in some Good Will --

10 Q Didn't you say "I have got it at home"?

11 A I possibly said it.

12 Q And I said "Will you give it to Mr. Wood" --

13 A No, I don't have it. I discovered later it

14 had gone in the bag with some Good Will merchandise.

15 Q And didn't you say "Yes" at that time?

16 A Well, I didn't think it was that important if I

17 did. I probably did.

18 Q Well, you said "if I did" -- will you read it here

19 (indicating)?

20 A I believe you, sir.

21 Q And I asked you "Is it larger than this one?"

22 and your answer was "It is larger than that one".

23 A Well, I don't know --

24 Q You said it was larger.

25 A Well, it was larger.

Q And then I said to you "This one looks to me to be about fourteen inches wide, is that about right?" and you said you didn't know and then we measured the bag, is that correct?

A Yes, sir.

Q Now, about your bag, when Mrs. Cocke came in she reached over and picked those pants up, didn't she?

A She reached behind me and picked them up and went out with them.

Q Now, when you were describing how you put those pants on the bag you said that you folded the pants and then rolled them up.

A Not rolled -- just doubled them up, just doubled them up on the floor as I described.

Q The question was "What do you mean you doubled them up?" "A. Like you would fold them up or roll them up and lay them down just like that (indicating)". And by "indicating" didn't you fold that blue coat you have on now?

A I didn't fold them up, I just doubled them up and dropped them.

Q Didn't you take your coat and roll it?

A Yes, I described it like that.

Q And you rolled them.

A No, I didn't roll them.

Q And the next time we referred to it was on Page 17

"Q. When you say you folded them up, how many times did you fold them up?" And you answered "It wasn't tight, they were loosely rolled, just enough to just drop them".

A Well, I meant it all to be the same thing, I dropped them and folded them as I dropped them.

Q Why didn't you put them back on the hook because they had to go back to the rack --

A Well, I just didn't, and I was going to put them back when I went back to the rack.

Q And you knew these pants were too small for you.

A Yes, sir -- that is right.

Q Do you live at home alone?

A No, sir, I live with my husband.

Q Does anyone else live there?

A No, sir. My daughter visits occasionally but she doesn't live there.

Q She was there at the time, wasn't she?

A I believe she was.

Q And she was there when I took your deposition.

A I believe so.

Q How many daughters do you have?

A I have three.

Q Any of them in court today?

A No, sir.

Q Now, Mrs. Tweedy, when we were talking about the

1 bag and the pants, Mrs. Cocke when she asked you to go down
2 to the -- actually, when she came in there didn't she say to
3 you "You are trying to steal those pants"?
4 A No, she just said "The manager wants to talk to
5 you. You had those pants in your pocketbook". And I said
6 "You know very well I didn't".
7 Q Well, why would she say to you then "You have them
8 in your pocketbook" if you didn't?
9 A I don't know.
10 Q You had never seen this lady before, had you?
11 A No, sir.
12 Q And there was no argument and no fuss, was there?
13 A No, sir.
14 Q And when she said "I want you to go see the manager"
15 you said "All right".
16 A Well, yes, of course.
17 Q And when you got down to see the manager he told you
18 what the lady had said.
19 A Yes, sir.
20 Q And she repeated that to him again, didn't she?
21 A Yes, sir.
22 Q Now then, you said you went to court and when Mrs.
23 Cocke went to court she told the Judge that you had these pants
24 rolled up and in your pocketbook, didn't she.
25 A That is what she said.

Q And the Judge said "Well, if you could see them, then they weren't concealed".

A Yes, sir.

Q And that is the reason he dismissed the case.

MR. WOOD: I object to that. He doesn't know why he dismissed the case.

THE COURT: Sustained.

BY MR. ROSENBERGER:

Q And Mr. Anderson, the other gentleman out there with Penney's, he didn't make any charge against you, he just told you what the lady said.

A I don't know who made the charges. They were made.

Q There was a gentleman there --

A They were made.

Q And the reason you talk about concealment was that was the charge that was tried.

A Yes, sir.

Q They didn't say at the trial you were trying to steal, did they?

A Well, they said I had them concealed in the pocketbook.

MR. ROSENBERGER: Thank you, Mrs. Tweedy.

THE COURT: Any further questions, Mr. Wood?

MR. WOOD: Just a second, Judge -- I am not sure.

THE COURT: All right.

(Pause)

MR. WOOD: I think that is all.

THE COURT: All right, have a seat back where you were.

MR. ROSENBERGER: Mrs. Tweedy, just one question occurred to me. When you were down there in the manager's office you just told him that that was a mistake.

THE WITNESS: Yes, sir.

MR. ROSENBERGER: That is all.

Q Mrs. Tweedy, there has been some confusion --

MR. ROSENBERGER: I object.

Q Or some discrepancy as to what happened when you went into the dressing room. I want you to tell the jury as best you can remember in order what you did as you got into that dressing room.

MR. ROSENBERGER: She has been into all that.

MR. WOOD: Well, she really hasn't been into it fully. But there was some discrepancy.

THE COURT: Any discrepancy you can ask her about but she can't go over it all again.

BY MR. WOOD:

Q How many pairs of pants did you take in there?

A I only took three pairs of pants in there.

Q When you got in there did you take your pants off or not?

23 A Yes, I took them off.

24 Q And where did you put them?

25 A I doubled them up and put them on the little shelf

1 over in the corner.

2 Q And when Mrs. Cocke came in did you have your pants

3 on or not?

4 A I had a pair of the company's pants on, the red ones.

5 Q That you were trying on?

6 A That is correct, sir.

7 Q And the rest of them were up on the wall, is that

8 correct?

9 A Yes, sir, except for the pair on the floor on the

10 pocketbook.

11 Q When you went out after the exchange between you

12 and Mrs. Cocke what did you have on -- did you have on your

13 pants or not?

14 A I had my pants on when I left the dressing room.

15 Q I see. What did you do with the red pants you

16 were trying on?

17 A I left them in the dressing room.

18

19 MR. WOOD: That is all.

20 CROSS EXAMINATION

21 BY MR. ROSENBERGER:

22 Q When this lady came in the dressing room there was

23 one empty hanger up on the hook with the other pants?

24 A There was two up there.

25 Q Two pair of pants?

1 A One pair on the wall and two empty hangers. I had
2 on one pair of pants and one on my pocketbook and I had one on
3 the hook, so there was two empty hangers on the wall.
4 Q Two empty hangers on the wall.
5 A Yes, sir.

[Tr. pp. 43, l. 15 - 57, l. 1]

TESTIMONY OF BONNIE TATE COCKE

15 Q Mrs. Cocke, you were employed at J. C. Penney on
16 October 14, 1972, is that correct?
17 A Yes, sir, that is right.
18 Q And when you went back to the dressing room were you
19 able to observe Mrs. Tweedy through the curtain or did you have
20 to pull the curtain back?
21 A No, the curtains are so they won't close completely.
22 Q So you could see into the dressing room.
23 A And I walked by and you could see into the dressing
24 room.
25 Q Now, you did see the pair of pants in the dressing
1 room, did you not?
2 A Which pair of pants?
3 Q The pair of pants on the floor.
4 A I saw them inside her handbag.
5 Q And you saw them --
6 A I saw them in her handbag.
7 Q And you reached in and took them out of the dressing
room?

8
9 A I walked in and spoke to Mrs. Tweedy before I did
10 that.
11 Q But you went in and took the pants out of the dressing
12 room yourself.
13 A Yes, sir.
14 Q And you saw them with your own eyes.
15 A Yes, sir.
16 MR. WOOD: That is all.
17 MR. ROSENBERGER: Judge, while she is on the stand
18 I will interrogate her now.
19 THE COURT: All right, go ahead.
20 MR. ROSENBERGER: To save time.
21
22 DIRECT EXAMINATION
23 BY MR. ROSENBERGER:
24 Q Mrs. Cocke, what was your position there at Penney's
25 at the time?
1 A At the time of the incident I was department head
2 of sportswear.
3 Q Will you speak up a little louder, like you are
4 yelling at your husband.
5 A Okay.
6 Q Now, were you paid a salary or were you paid a
7 commission?
8 A Both.
9 Q And your commission was based on what?
10 A The commission was based on the --

11 MR. WOOD: Your Honor, I object to this. I think
12 it is irrelevant.
13 THE COURT: I will overrule the objection.
14
15 BY MR. ROSENBERGER:
16 Q What was the commission based on?
17 A The commission was based on total department sales --
18 not individual sales, total department sales.
19 Q So that the more merchandise that was sold the more
20 salary you would get.
21 A Correct.
22 Q Now, on this particular morning was there a crowd
23 in the store or just you and another sales person and Mrs. Tweedy?
24 Do you remember anyone else in there?
25 A Well, it was early Saturday morning so the crowd wasn't
1 there yet. It was slow.
2 Q Now, will you describe for the jury when you passed
3 by and there was this crack in the curtain what you saw.
4 A I went into the dressing room, into the hallway
5 leading into the dressing rooms, I passed by the dressing room
6 Mrs. Tweedy was in, I looked in the curtain and Mrs. Tweedy
7 was leaning over her handbag, she was getting up from leaning
8 over her handbag.
9 Q What did you say?
10 A I walked in, I told her that she was attempting to
11 steal the slacks.
12 Q Why did you say that?
13 A They were completely in a roll inside her handbag,

14 two or three inches inside her handbag. There was no portion
15 of them outside the handbag.
16 Q Mrs. Cocke, were they just stuffed into the handbag
17 like I would grab a pair of pants and stuff them in?
18 A No, they were very neatly rolled one side over the
19 other in a very small tight roll completely inside the handbag.
20 Q And how far from the top?
21 A I would say three inches.
22 Q You have seen the handbag Mrs. Tweedy has with her
23 today. Was the one she had there that day the same size or
24 will you tell us what size it was?
25 A It may have been larger. It was pretty much the same

1 style, a zipper opening all the way across the top, sort of
2 a split, open type of style, similar to what she has now.
3 Q And when you saw those pants in Mrs. Tweedy's
4 pocketbook what did you say?
5 A I told her she was attempting to steal the slacks
6 which was obvious. I told her she needed to talk to the
7 manager, I walked out the dressing room to the opening of the
8 dressing area, told the sales girl out there to call the
9 manager, that we had a customer trying to steal a pair of
10 slacks. She did so and I gave Mrs. Tweedy time to get her
11 belongings together and we walked to the escalator and Mr.
12 Anderson was at the top of the escalator about the time we got
13 there and he escorted us downstairs.
14 Q Did you repeat to Mr. Anderson what you had told
15 Mrs. Tweedy?
16 A In Mrs. Tweedy's presence?

17 Q Yes.

18 A Well, I told Mr. Anderson on the outside of the

19 room she was in and I think she could have heard me then.

20 Q And you told him she was attempting to steal the

21 slacks.

22 A Right.

23 Q Are you positive no part of the slacks were outside

24 the bag?

25 A I am very positive.

1 Q Can you tell us what color these slacks were?

2 A They were Navy blue.

3 Q And after that you came down and who did you go

4 to see?

5 A After when?

6 Q After the incident did you come downtown to get

7 the warrant?

8 A After I saw the policeman at the store I went back

9 to work. And they asked me to go downtown and swear out a

10 warrant for her and I did that.

11 Q When you went down to get the warrant did you tell

12 the Judge what the charge was or did you tell him what the

13 facts were?

14 A I just told him exactly what happened.

15 Q Did you tell him what you have told us?

16 A Yes.

17 Q And did you testify under oath in court as to what

18 you have told us?

19 A Yes, sir.

20 Q And you told him the same thing.

21 A Yes, sir.

22 Q Now, did you realize at the time when you saw these
23 pants down in the pocketbook whether there was a distinction
24 between concealing merchandise or attempting to steal merchandise?

25 A No.

1 MR. WOOD: I object to that. She testified to what
2 the facts were.

3 THE COURT: She can testify to her knowledge of the
4 law. I overrule the objection.

5 MR. ROSENBERGER: You can examine, Mr. Wood.

6 CROSS EXAMINATION

7 BY MR. WOOD:

8 Q Mrs. Cocke, when you came into the dressing room
9 you saw the pair of pants, did you not? You saw them with
10 your own eyes -- correct?

11 A I saw the pants inside the handbag. The handbag
12 was not zipped.

13 Q The handbag was not zipped?

14 A No.

15 Q And you are sure there was no part of them on the
16 floor?

17 A I am positive.

18 Q But you were still able to see the pants themselves.

19 A Yes.

20

21 THE COURT: Was the handbag open?

22 THE WITNESS: The slacks had been put inside the
23 handbag and of course you could see the top portion

24 of the slacks, but the handbag was not zipped.

25 THE COURT: The top was open?

1 THE WITNESS: It was spread apart.

2 THE COURT: Maybe not all the way but it was

3 partially?

4 THE WITNESS: Right -- it was spread apart.

5

BY MR. WOOD:

6 Q And you could see the slacks.

7 A Yes, you could see the slacks.

8 Q And you didn't actually see her put them in there.

9 A No, I didn't actually see her put them in there.

10 Q So just by looking through a curtain which wouldn't

11 close all the way you could see the slacks.

12 A Yes, I could see the slacks.

13 Q And based on that you thought Mrs. Tweedy was

14 trying to steal them.

15 A Yes, I drew that conclusion.

16 Q That is a very small room, isn't it?

17 A Yes.

18 Q Mrs. Tweedy described it as being about this wide

19 (indicating).

20 A That is about right.

21 Q And I think she got mixed up, she said the shelf

22 was here (indicating).

23 A Facing the right -- the shelf would have been on the

24 right facing the dressing room mirror.

25

Q And a hook -- there was no chair in the room?

A There usually is.

3 Q Do you know whether there was one in there?

4 A I do not know at that particular time.

5 Q And Mrs. Tweedy's handbag was down beside her

6 on the floor.

7 A Yes.

8 Q Do you recall whether there was anything on the

9 shelf?

10 A I do not recall.

11 Q And actually when you first went in she didn't have

12 any pants on at all, did she?

13 A When I went in she was fully clothed. She had on a

14 dark pair of slacks of her own and a white blouse and she was

15 leaning over her handbag.

16 Q You mean when you went in she had on her pants

17 that she wore in?

18 A Yes, sir.

19 Q I thought you said you gave her time to get her slacks

20 on.

21 A No, I said I gave her time to get her belongings

22 together.

23 Q And you are absolutely sure she was not in the

24 process of trying on another pair of pants?

25 A I testify I did not see her with her clothes off or

1 getting undressed.

2 Q Did you reach around the curtain or pulled the

3 curtain?

4 A I am sure I had to pull the curtain to get in.

5 Q Did you look at her when you did that?

6 A Yes.

7 Q And did you have to bend down to get the slacks?

8 A I had to bend down because the pocketbook was

9 on the floor.

10 Q And you say you actually reached into her pocketbook

11 to get the slacks out?

12 A Yes.

13 Q And you said you told the manager?

14 A No, I asked somebody else to tell the manager.

15 Q But you related this to somebody else in the store.

16 A Yes.

17 Q And did you tell the manager that later?

18 A Yes, when we seated her in the office I told Mr.

19 Anderson Mrs. Tweedy was attempting to steal the slacks.

20 Q Did he ever talk to her about it?

21 A He repeated what I had told him.

22 Q Did he make any attempt to investigate it?

23 A No.

24 Q Did you make any other attempt to --

25 A No, there was no need.

1 Q You didn't know Mrs. Tweedy, did you?
2 A No.
3 Q If you were so sure she was attempting to steal
4 the slacks why didn't you wait for her to get out of the
5 dressing room?
6 A Why didn't I wait for her to get out of the dressing
7 room?
8 Q Yes.
9 A I suppose because she had seen me.
10 Q How do you know she had seen you?
11 A She saw me go past the dressing room.
12 Q She had to go past you to go out of the store,
13 didn't she?
14 A No.
15 Q She couldn't have gotten out by going down the
16 hall, could she?
17 A She could have taken a left and in five feet
18 she would have been in the foundation department.
19 Q But you could have stayed in the entrance of that
20 dressing room and seen her come out, couldn't you?
21 A Yes.
22 Q And then you would have been sure she was attempting
23 to steal the pants.
24 A Well, Mrs. Tweedy knew I had seen her with the pants.
25 Q Would you answer my question?

THE COURT: Repeat the question.

BY MR. WOOD:

Q If you had stayed out at the entrance to the dressing room and seen her come out then you would have been sure she was attempting to steal the merchandise, would you not?

A If I had stayed at the entrance to the dressing room I would have seen her come out -- yes.

Q And you would have been sure she had the pocketbook in her hand and the pants in it.

A Possibly.

Q And acting on that you went out and got the criminal warrant.

A Acting on what?

Q What you just testified to about seeing the pants in the dressing room.

A Yes -- seeing the pants in the pocketbook I swore out a warrant, yes.

MR. WOOD: I think that is all I have.

THE COURT: Any further questions?

MR. ROSENBERGER: Yes, sir.

REDIRECT EXAMINATION

BY MR. ROSENBERGER:

Q Mrs. Cocke, I overlooked asking you how many hangers

1 A Yes.

2 Q That you think took several seconds?

3 A Yes.

4 Q How could you tell how many were on the hook --

5 you weren't in there that long.

6 A Yes, I was because they were just on the right

7 as I went in the dressing room. They were easy to count.

8 Q And you saw what was on the shelf?

9 A I am not sure what was on the shelf.

10 Q You are not sure what was on the shelf but you

11 knew she had three pairs on the hook.

12 A Yes, sir.

13 Q And you saw all that in a matter of a few seconds.

14 A It is my job to be observant as to what is in that

15 dressing room, as to what is in Penney's.

16 Q And there is no doubt in your mind there were three

17 pairs of pants on the hook.

18 A There is no doubt.

19 Q Plus the pair you saw on the handbag.

20 A Plus the pair I saw in the handbag.

21 Q Plus you were sure Mrs. Tweedy had her pants on.

22 A Correct.

23 Q And you observed all that in a few seconds.

24 A Correct.

1 MR. WOOD: That is all.

[Tr. pp. 60, l. 16 - 65, l. 25]

TESTIMONY OF HARRY E. ANDERSON

16 Q You are Mr. Harry Anderson?

17 A I am.

18 Q And for whom do you work, Mr. Anderson?

19 A J. C. Penney Company.

20 Q And where do you work?

21 A Presently in Mentor, Ohio.

22 Q On October 14, 1972, a Saturday morning, where were

23 you working?

24 A Pittman Plaza, Lynchburg, Virginia.

25 Q For J. C. Penney?

1 A Yes, sir.

2 Q Were you the manager of the store at that time?

3 A Yes, sir.

4 Q Was Mr. Pressler, the present manager, was he

5 stationed in Lynchburg at that time?

6 A No, he was in Louisiana at the time.

7 Q Now, was Mr. Jack Ragsdale in that store that day?

8 A No, he was off that day.

9 Q He is assistant manager?

10 A He was at that time.

11 Q All right, sir, will you tell us if you got a call

12 to come up to the floor that Mrs. Cocke had charge of?

13 A Yes, I did. I received a call from Loretta Perkins

14 who was a sales person in the ladies sportswear department

15 saying that Mrs. Cocke had asked for me to come up to the first

16 floor.

17 Q Did she tell you why you were called up there?

18 A Yes, she told me Mrs. Cocke had stopped a shop lifter.

19 Q And when you got up there you met Mrs. Cocke and

20 Mrs. Tweedy?

21 A Yes, I did.

22 Q And was there any conversation then or did you all

23 go somewhere else?

24 A There was no conversation except I told Mrs. Tweedy

25 to follow me downstairs to the office.

1 Q And she followed you voluntarily -- nobody was

2 holding on to her or anything like that.

3 A No, no one held on to her.

4 Q Was there any loud conversation or anything other

5 than just casual conversation?

6 A No, there was no loud conversation.

7 Q Now then, where did you people go?

8 A We went down the escalator to the lower level and

9 into the offices, and I asked Mrs. Tweedy to sit in Mr.

10 Ragsdale's office.

11 Q Now, when this matter was reported to you -- well,

12 first, did Mrs. Cocke relate to you what she had seen Mrs. Tweedy

13 do or --

14 A Well, after we asked Mrs. Tweedy to sit in Mr.

15 Ragsdale's office then outside the office Mrs. Cocke told me

16 what happened.

17 Q Then did you relate that to Mrs. Tweedy?

18 A Yes, I did.

19 Q What did you tell Mrs. Tweedy?

20 A That she had rolled up a pair of women's slacks

21 and had them in her pocketbook up in the dressing room in the

22 sportswear department.

23 Q And where were the slacks?

24 A Inside her handbag.

25 Q And did Mrs. Cocke verify that to you in front of

1 Mrs. Tweedy?

2 A Well, yes. Mrs. Tweedy denied it and Mrs. Cocke

3 was in the office also, and I turned to her and asked her to

4 repeat to Mrs. Tweedy what happened and she did repeat it.

5 Q She did repeat it again.

6 A Yes.

7 Q And as a result of that you had the office call

8 the police.

9 A Yes. After Mrs. Tweedy denied it then I went out,

10 which is right adjacent to that office, I walked to our

11 telephone operator and asked her to call the Police Department.

12

13 MR. ROSENBERGER: You may examine.

14 CROSS EXAMINATION

15 BY MR. WOOD:

16 Q Mrs. Tweedy denied it all along, didn't she?

17 A Yes, she did.

18 Q And she used the words "This is ridiculous" or words

19 to that effect?

20 A I beg your pardon?

21 Q She used the words "This is ridiculous" or words
22 to that effect when you told her this?
23 A I do not recall the word "ridiculous".
24 Q And you did not make any investigation yourself,
25 did you?
1 A No. Upon Mrs. Cocke's statement there was no other
2 investigation I could make.
3 Q But other than the fact that the pocketbook was open
4 or closed you did not make any other investigation?
5 A Well, when Mrs. Cocke told me the pants were
6 in the handbag --
7 Q And did she tell you whether the handbag had a zipper?
8 A Yes.
9 Q Did she tell you whether the zipper was open or not?
10 A Yes, it was open. That is how she could see the
11 slacks in the bag.
12 Q She could see the slacks in the bag without any
13 problem?
14 A Yes.
15 Q And Mrs. Tweedy was in the dressing room?
16 A Yes.
17 Q And would have had to have gone out of the dressing
18 room.
19 A Right.
20 Q And the bag was on the floor.
21 A Right.

22 Q And other than that you didn't have any questions
23 at all of Mrs. Tweedy, did you?
24 A No. She denied it and Mrs. Cocke told me what
25 transpired. There was nothing further I could question Mrs.
1 Tweedy about.
2 Q Now, is it your policy to prosecute all charges
3 of this type that your employees make? Is it a store policy?
4 A 100%.
5 Q 100%.
6 A Yes.
7 Q Without looking into the particular facts and
8 circumstances of each particular case?
9 A What do you mean by "facts and circumstances"?
10 Q Well, each alleged offense or occurrence would
11 have particular facts and circumstances peculiar to it.
12 A Well, if an associate of the store or a security
13 police, an off-duty police we use in the store saw it and
14 witnessed it and said they saw it and the facts apparently
15 bore it out, then "Yes" we prosecute it.
16 Q And you bring a charge -- that is your store policy.
17 A Yes.
18 Q Even when the person is still in a dressing room
19 and had never gone out of the dressing room and never carried
20 the pants out of the dressing room in any sort of container,
21 and even when the pants were seen by the naked eye --
22 MR. ROSENBERGER: If Your Honor please, this is
23 argument.

24 THE COURT: Yes, this is pure speculation about
25 other cases. You can talk about what happened in this case.

[Tr. pp. 66, l. 14 - 69, l. 20]

MOTION TO STRIKE THE EVIDENCE

14 MR. ROSENBERGER: If Your Honor please, the defendant
15 by counsel moves the court to strike the evidence on the ground
16 that the evidence is insufficient as a matter of law to prove
17 liability against either defendant for insulting words or for
18 malicious prosecution. The incident arose on a privileged
19 occasion where the employee of the defendant was acting in her
20 duty in protecting the merchandise in the store of the defendant
21 and it would be necessary to prove actual malice, and there is
22 absolutely none here. And further in support of our position
23 there is no proof of any actual malice. The plaintiff has
24 struck from the case the allegation as to punitive damages
25 which would be based on actual malice. Further, in regard to
1 malicious prosecution --
2 THE COURT: Do you have to prove malice on
3 insulting words?
4 MR. WOOD: No, sir.
5 MR. ROSENBERGER: On a qualified privilege you
6 would have to prove malice on insulting words where there is
7 a qualified privilege and the same thing would apply here
8 in regard to malicious prosecution. You have to prove No. 1
9 lack of probable cause, I think it is a matter of law that

10 the evidence would support probable cause. And No. 2, you
11 have to prove malice and the plaintiff has failed to prove
12 actual malice in either case.
13 MR. WOOD: Under the insulting words statute
14 there is no need to show actual malice or any malice at all
15 and there is no qualified privilege here between the employee
16 and the plaintiff Mrs. Tweedy. If there were some privilege
17 there malice would, I think, be an element of the case but
18 there is no privilege between those two. Now, as far as probable
19 cause is concerned, of course the statute itself gives the
20 defendants immunity if they acted with probable cause and it
21 said so in FBC Stores v. Duncan where it was reversed because
22 the Judge did not give an instruction on immunity. And I think
23 there is certainly a question of fact to be decided here by the
24 jury as to whether or not under the facts and circumstances
25 existing there was probable cause. It is not just the belief
1 of this woman who rushed in and grabbed the pants -- even
2 under her testimony the pocketbook was open and the pants
3 were open and obvious and under our version the pants were
4 partially on the floor.
5 THE COURT: Don't you have to prove malice on
6 malicious prosecution? I agree with you on the other.
7 MR. WOOD: For malice we showed there was this
8 criminal proceeding and it ended favorably for Mrs. Tweedy
9 which is undisputed. And we have the burden of showing
10 probable cause again which is a jury question, and I think the
11 same remarks I made on insulting words would apply to

12 malicious prosecution. You don't have to show it on compensatory
13 damages, you would have to on punitive damages. And the cases
14 have said you can infer malice from lack of probable cause
15 and I think we would be entitled to an instruction for the
16 jury to consider that. If there was no probable cause they
17 can infer malice from that, and in Giant v. Pig the court
18 ruled it was a question for the jury.
19 THE COURT: Anything else, Mr. Rosenberger?
20 MR. ROSENBERGER: I was looking for 150 Virginia.
21
22 (Pause)
23 MR. ROSENBERGER: Our position is she was charged
24 with protecting the merchandise of the store and it was a
25 qualified privilege, it was something she had an interest in
1 as the employee of the store and as a result the occasion
2 was privileged. And in order to recover for insulting words --
3 that is like commonlaw slander exactly now, except where
4 it is per se slander. This would be per se slander if I said
5 "You are attempting to steal" or accusing her of committing
6 a crime. And on this occasion it was privileged because she
7 was protecting the merchandise and that is what she was hired
8 for.
9 THE COURT: You mean a person who is hired can
10 just say anything they want to?
11 MR. ROSENBERGER: No, if you abuse your privilege
12 it is a different thing, but I say here you don't show any
13 actual malice. This lady never knew this woman, there
14 was no real feeling, no motivating cause.

15 THE COURT: But from the act itself you can infer
16 malice from --
17 MR. ROSENBERGER: But under these circumstances --
18 THE COURT: Well, I am going to overrule your
19 motion, Mr. Rosenberger.
20 MR. ROSENBERGER: We respectfully object and except.

[Tr. pp. 83, l. 5 - 84, l. 1]

PLAINTIFF'S INSTRUCTION 1

5 The court instructs the jury that defendant, Bonnie Tate
6 Cocke, was the agent and employee of the defendant J. C. Penney
7 Company, Incorporated, and on October 14, 1972, and all other
8 times mentioned in this action was acting in the ordinary
9 course of J. C. Penney Company's business and within the scope
10 of her employment; therefore, defendant J. C. Penney is liable
11 for the actions of its employee, Bonnie Tate Cocke.
12 If you believe from a preponderance of the evidence that
13 defendant, Bonnie Tate Cocke, maliciously spoke words to the
14 plaintiff which from their usual construction and common
15 acceptance are construed as insults and tend to violence and
16 breach of the peace, then such words are actionable, and damages
17 are presumed, and the plaintiff has a right to sue Bonnie Tate
18 Cocke and her employer, J. C. Penney, and to recover such damages
19 as determined proper by you in accordance with other instructions
20 of this court unless, however, you further believe that on
21 October 14, 1972 the defendants had probable cause to believe

22 that plaintiff did wilfully conceal merchandise, with the intent
23 to convert to her own use, belonging to J. C. Penney without
24 authority and with the intention of converting said merchandise
25 to her own or another's use without having paid the full purchase
1 price thereof.

[Tr. pp. 70, 1. 8 - 73, 1. 5; 74, 1. 8 - 75, 1. 14]

DEFENDANT'S OBJECTION

8 MR. ROSENBERGER: The defendant by counsel objects
9 to Instruction No. 1 on the ground that this is a finding
10 instruction that does not contain all of the elements necessary
11 for the jury to return a verdict in favor of the defendants.
12 This points up the point that we made at the beginning of the
13 trial that we have two causes of action here and this, as
14 counsel stated during the time we were discussing instructions,
15 this one relates to acts for insulting words; it does not
16 contain the fact that this was on a qualified occasion that
17 the words were spoken and that they should have been spoken.
18 And in order for the plaintiff to recover the plaintiff must
19 prove actual malice or malice in fact, and there is no evidence
20 of any malice in fact. And the plaintiff as a matter of law
21 is not entitled to recover in this action for a violation of
22 the insulting words statute. The occasion is qualified privileged
23 as a matter of law because of the interest of the defendant in
24 protecting the merchandise of the store and there was nothing
25

about the occasion to take it out of the privilege or nothing about the occasion that would give rise to the inference of malice which is an essential element to be proven under the insulting words statute. This finding instruction contains no reference to malice whatsoever.

MR. WOOD: I would like to say a couple of things: 1, it is the position of the plaintiff that there is no qualified privilege here between a store employee and a customer. The only qualified privilege possibly would be between the employee and her immediate supervisor or boss; secondly, that there is no necessity on the part of the plaintiff to show malice under the insulting words statute.

MR. ROSENBERGER: We might say in reply that the privilege has to do with the occasion under which the words were spoken, not to the relationship of the parties; and second, in order to prove a case under the insulting words statute there must be malice.

THE COURT: In going over 1 I have come to the conclusion that malice is a necessary part and should be included in 1. I will tell them in 2 as to probable cause and malice. So you will have to add in there to recover damages "unless you further believe that the statements were made maliciously" -- you are going to have to put that in there somewhere where it should go in. I will refuse 1 and if you want to re-write 1 with malice in there I will give 1. I am

1 going to refuse this because I think malice is necessary.
2 MR. WOOD: I have to get it in there.
3 THE COURT: You can put it in anywhere it should go.
4 MR. ROSENBERGER: I would point out that the way
5 that instruction is written it in effect changes the burden
6 of proof here because the plaintiff must prove malice and
7 that the words were spoken without probable cause. The burden
8 is on the plaintiff to prove --
9 THE COURT: This doesn't deal with the burden of
10 proof one way or the other.
11 MR. ROSENBERGER: I am saying that because this
12 is a finding instruction and it omits that, they would have
13 to prove it.
14 THE COURT: It starts off "If you believe from a
15 preponderance of the evidence" and you have to believe all
16 that from a preponderance of the evidence.
17 MR. ROSENBERGER: But down below it says "unless
18 you further believe" -- that would take the burden off. Right
19 down at the last three lines "unless, however, you further
20 believe that the defendants had probable cause to believe"--
21 MR. WOOD: That is my point all along that you do
22 have the burden of proof.
23 THE COURT: You may be right but I don't know.
24 MR. WOOD: Let's see if we can get it in here.
25 THE COURT: "Maliciously spoke the words to the

1 plaintiff".

2 MR. WOOD: All right, let me see -- you are refusing

3 my 1?

4 THE COURT: And I will give it with the word

5 "malicious" in it.

8 THE COURT: I will give you an opportunity.

9 MR. ROSENBERGER: In addition, Judge, my objection

10 to No. 1 is to that last part "unless, however, you further

11 believe that the defendants had probable cause" -- that in

12 effect changes the burden of proof and it does not show --

13 THE COURT: You said all that, Mr. Rosenberger.

14 MR. ROSENBERGER: Yes, sir. And then in the

15 last part using the technical term "wilful concealment" which

16 is confusion in this case because the plaintiff actually saw

17 them down in the pocketbook, but it would be sufficiently

18 covered if the instruction referred to "had cause for charging

19 her with taking possession of the slacks with intent to

20 convert them". So I say this part of the instruction with the

21 technical part of the statute only is confusing to the jury

22 and that "wilful concealment", because as a matter of fact our

23 employee actually saw the goods in the pocketbook and this

24 would let her recover even if the jury believe that the lady

25 was taking possession of them.

1 THE COURT: I will add "with the intent to convert

2 to her own use".

3 MR. ROSENBERGER: The "concealed" part --

4 THE COURT: That is what the warrant charged her

5 with -- "wilfully concealed with intent to convert to her

6 own use".

7 MR. WOOD: I have no objection to putting in that

8 part.

9 MR. ROSENBERGER: I except for the reasons stated,

10 Your Honor.

11 MR. WOOD: Now, Judge, let me make sure I am looking

12 at each one.

13 THE COURT: I am giving 1 so don't object to that.

14 1-A is the one you want to object to.

PLAINTIFF'S INSTRUCTION 1-A

The Court instructs the jury that defendants, Bonnie Tate Cocke was the agent and employee of the defendant, J. C. Penney Company, Inc., and on October 14, 1972, all all other times mentioned in this action was acting in the ordinary course of J. C. Penney Company's business and within the scope of her employment; and therefore, defendant, J. C. Penney is liable for the acts of its employee, Bonnie Tate Cocke.

If you believe from a preponderance of the evidence that defendant, Bonnie Tate Cocke spoke words to the plaintiff which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace, then such words are actionable, and damages are presumed, and the

plaintiff has a right to sue Bonnie Tate Cocke and her employer, J. C. Penney, and to recover such damages as determined proper by you in accordance with other instructions of this Court unless, however, you further believe that on October 14, 1972, the defendant had probable cause to believe that plaintiff committed willful concealment of goods or merchandise belonging to J. C. Penney without authority and with intentions of converting said merchandise to her own or another use without having paid the full purchase price thereof.

PLAINTIFF'S INSTRUCTION 1-B

The Court instructs the jury that defendant, Bonnie Tate Cocke was the agent and employee of the defendant, J. C. Penney Company, Inc., and on October 14, 1972, and all other times mentioned in this action was acting in the ordinary course of J. C. Penney Company's business and within the scope of their employment; and therefore, defendant, J. C. Penney is liable for the acts of its employee, Bonnie Tate Cocke.

If you believe from a preponderance of the evidence that defendant, Bonnie Tate Cocke, spoke words to the plaintiff which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace, then such words are actionable, and damages are presumed, and the plaintiff has a right to sue Bonnie Tate Cocke and her employer, J. C. Penney, and to recover such damages as determined proper by you in accordance with other instructions of this Court

unless, however, you further believe that on October 14, 1972, the defendant had probable cause to believe that plaintiff committed willfull concealment of goods or merchandise of the defendant, J. C. Penney.

The Court further instructs the jury that the defendant has the burden to prove by a preponderance of the evidence that the defendant had probable cause to believe that plaintiff committed willful concealment of merchandise.

[Tr. pp. 73, l. 6 - 74, l. 1; 75, l. 15 - l. 25]

DEFENDANT'S OBJECTION

6 MR. WOOD: Make that 1-A then. And I want to offer
7 1-B, too, which you have already refused. I want to offer
8 as 1-A this instruction.
9 THE COURT: This is the one I have already refused.
10 MR. WOOD: All right, that was 1-A.
11 THE COURT: Which I have refused. Give me 1-B.
12 MR. WOOD: That would be 1-A.
13 THE COURT: I made it 1-A that you told me to.
14 MR. WOOD: And make it 1-B.
15 THE COURT: I will do it if you put "malicious"
16 in it. So put the word "malicious" in it.
17 MR. WOOD: I want to offer 1 as 1-C.
18 MR. ROSENBERGER: Where is 1?

19 MR. WOOD: We have 1-A, 1-B and 1-C.

20 THE COURT: I am refusing 1-A and 1-B.

21 MR. WOOD: I have gotten confused. You refused

22 1-A because there is no "malice" in it and 1-B is what you call

23 1.

24 THE COURT: Yes. 1-B is the one with a different

25 burden of proof and I am refusing that. Why don't you all go

1 ahead and try your case and come back for objections?

15 MR. WOOD: The plaintiff by counsel objects to the

16 refusal of the court to give Instruction 1-A on the ground

17 that malice is not an element of the cause of insulting words,

18 and the term or word "maliciously" before the word "spoken"

19 is an incorrect statement, and 1-A correctly states the

20 elements of the cause. 1-B, the plaintiff by counsel objects

21 to the refusal to give 1-B on the ground that it correctly

22 states that the defendant has the burden of proof to show probable

23 cause that the plaintiff wilfully concealed the merchandise

24 and that the plaintiff doesn't have to show probable cause, it

25 doesn't have the burden under the insulting words statute.

[Tr. p. 84, l. 2 - l. 12]

PLAINTIFF'S INSTRUCTION 2

2 The court instructs the jury that if you believe from

3 a preponderance of the evidence the defendant, J. C. Penney,

4 acting through its employee Bonnie Tate Cocke preferred

5 a criminal charge against the plaintiff for wilfully concealing

6 merchandise belonging to J. C. Penney without authority and
7 with the intention of converting said merchandise to her
8 own or another's use without having paid the full purchase
9 price thereof, and if you further believe from a preponderance
10 of the evidence that the defendant in so doing, acted without
11 probable cause and maliciously, then your verdict shall be
12 in favor of the plaintiff against the defendants.

[Tr. p. 76, l. 2 - l. 18]

DEFENDANT'S OBJECTION

2 MR. ROSENBERGER: The defendant by counsel objects
3 to Instruction No. 2 on the ground of No. 1, that it is already
4 covered by Instruction 1; on the ground that this instruction
5 also refers to concealment which is a technical part of the
6 name of that statute and we should refer to it as taking
7 possession of the slacks with intent to convert.
8 THE COURT: I will add in there "wilful concealment
9 with intent to convert".
10 MR. WOOD: It is in there already.
11 THE COURT: That is right.
12 MR. ROSENBERGER: And that under the evidence
13 this is confusing to the jury by the using of the word
14 "concealment" since the defendant saw the merchandise in the
15 bag and the charge would be good if the jury believed that
16 she was taking possession of it, and even if they did believe
17 she was taking possession they would find against the defendant
18 just because of the technical use of "concealment".

[Tr. p. 84, l. 13 - l. 18]

PLAINTIFF'S INSTRUCTION 3

13 The court instructs the jury that the test of probable
14 cause is not the opinion or belief of the person bringing the
15 charge that the accused is guilty of a crime, but rather whether
16 the facts and circumstances known, or made known, to such person
17 are sufficient to justify a prudent and reasonable man in the
18 belief that the accused is guilty of the crime charged.

[Tr. pp. 76, l. 21 - 77, l. 2]

DEFENDANT'S OBJECTION

21 MR. ROSENBERGER: And the defendant by counsel
22 excepts for the reasons stated for No. 2. Now, as to Instruction
23 No. 3, the defendants by counsel object to Instruction 3 on
24 the ground that it is not a proper definition of a probable
25 cause as that term should be used in these instructions dealing
1 with the insulting words statute and the malicious prosecution
2 statute and it is argumentative.

[Tr. p. 77, l. 3 - l. 15]

DEFENDANT'S EXCEPTION

3 THE COURT: The court is of the opinion that it is
4 a proper instruction and is going to give it as offered.
5 MR. ROSENBERGER: We except for the reasons stated.

[Tr. p. 84, l. 19 - l. 22]

PLAINTIFF'S INSTRUCTION 4

19 The court instructs the jury that malice can be inferred
20 from the utterance of insulting words, and further instructs
21 the jury that malice may be inferred from want of probable
22 cause.

[Tr. p. 77, l. 9 - l. 15]

DEFENDANT'S OBJECTION

9 MR. ROSENBERGER: The defendant by counsel objects
10 to Instruction 4 on the ground that malice may not be inferred
11 under the facts and circumstances of this case and that under
12 the facts and circumstances malice may not be inferred in
13 this case because of the presence of probable cause. And in
14 addition, in order for the plaintiff to recover in this case
15 there must be evidence of express malice or malice in fact.

[Tr. pp. 84, l. 23 - 85, l. 8]

PLAINTIFF'S INSTRUCTION 5

23 The court instructs the jury that if from the evidence
24 and the other instructions of the court you find your verdict
25 in favor of the plaintiff against any one or more of the

1 defendants, then in assessing the damages to which she is
2 entitled, you may take into consideration any mental pain and
3 suffering, indignity, humiliation, embarrassment and insult
4 to which she was subjected, and from these as you may believe
5 proven by a preponderance of the evidence your verdict should
6 be for such sum as will fully and fairly compensate the plaintiff
7 for the damages sustained by her, not to exceed the sum sued
8 for in the motion for judgment.

[Tr. p. 77, l. 17 - l. 24]

DEFENDANT'S OBJECTION

17 MR. ROSENBERGER: And we except for the reasons
18 stated to 4. And then as to 5 the defendants by counsel
19 object to 5 on the ground that this instruction really changes
20 the burden of proof as to damages and the manner in which the
21 instruction is written.
22 THE COURT: The court is going to give 5 as written.
23 MR. ROSENBERGER: The defendants by counsel
24 except for the reasons stated..

[Tr. p. 85, l. 9 - l. 11]

DEFENDANT'S INSTRUCTION A

9 The court instructs the jury that you may not return
10 a verdict for the plaintiff merely because the charge of
11 concealing merchandise against her was dismissed.

[Tr. p. 85, l. 12 - l. 22]

DEFENDANT'S INSTRUCTION B

12 The court instructs the jury that the plaintiff has the
13 burden to prove by preponderance of the evidence that the
14 defendant Bonnie Tate Cocke did not have probable cause for
15 charging her with taking possession of the slacks, with the
16 intent of converting them to her own use, without paying the
17 full purchase price, and that at the time the charge was made,
18 the defendant, Bonnie Tate Cocke, was motivated by malice toward
19 the plaintiff, and if the plaintiff fails to prove by preponderance
20 of the evidence both the lack of probable cause and malice,
21 or if it as probable that she has failed to do so as that she
22 has, then you shall return your verdict in favor of the defendants.

[Tr. p. 78, l. 5 - l. 15]

PLAINTIFF'S OBJECTION

5 MR. WOOD: Plaintiff by counsel objects to the
6 giving of Instruction B on the ground that it incorrectly
7 states the burden of proof on the plaintiff in regard to
8 probable cause or the cause of action for insulting words,
9 that the defendant has the burden of proof to prove probable
10 cause to have the statutory immunity under 18.1-127, I think.
11 We further object to the giving of this instruction because
12 malice is not a element to be proved by the plaintiff under
13 the insulting words statute and that it is only an element
14 to be proved under the cause for malicious prosecution and
15 as a result this ~~statute~~ section is confusing.

DEFENDANT'S INSTRUCTION C

The Court instructs the jury that even if you believe from the preponderance of the evidence that there was a lack of probable cause, but the plaintiff failed to prove, by preponderance of the evidence, that the defendant Bonnie T. Cocke, acted with malice in making the charge, or if you believe from a preponderance of the evidence that the defendant Bonnie T. Cocke, acted with malice in making the charge, but the plaintiff failed to prove by preponderance of the evidence the lack of probable cause, then you shall return your verdict in favor of the defendants.

[Tr. pp. 78, l. 24 - 79, l. 5]

DEFENDANT'S OBJECTION

24 MR. ROSENBERGER: The defendants by counsel except
25 to the action of the court for refusing Instruction C on the
1 ground that this instruction points up the fact that it is
2 not sufficient that the plaintiff prove the lack of probable
3 cause or in the absence of malice it is not sufficient that
4 the plaintiff prove malice in the absence of probable cause,
5 and for that reason the instruction should be given.

[Tr. pp. 85, l. 23 - 86, l. 4]

DEFENDANT'S INSTRUCTION D

23 The court instructs the jury that probable cause, as that
24 term is used in these instructions, means the knowledge of
25 such facts and circumstances, as would cause a reasonable person
1 to believe that the person charged is guilty. It is not
2 necessary that the person charged be guilty beyond reasonable
3 doubt, but only that there is probable cause to believe his
4 guilt.

[Tr. p. 79, l. 8 - l. 16]

PLAINTIFF'S OBJECTION

8 MR. WOOD: The plaintiff by counsel objects to the
9 giving of Instruction D on the ground that the jury could infer
10 from this that the opinion or belief of the person bringing
11 the charge would be sufficient to establish probable cause
12 which is not the case, actually it is whether a person is
13 acting reasonably and prudently under the facts and circumstances
14 then and there existing at the time the incident occurred,
15 and therefore this is an incomplete statement of what is a
16 definition of probable cause.

DEFENDANT'S INSTRUCTION E

The Court instructs the jury that malice, as that term is used in these instructions, means hatred, revenge, personal spite, ill will, a desire to injure the plaintiff or a wanton or willful disregard of the rights of the plaintiff, however, it cannot be presumed or inferred from a mere mistake.

[Tr. pp. 79, l. 22 - 80, l. 4]

DEFENDANT'S OBJECTION

22 MR. ROSENBERGER: The defendants by counsel except
23 to the action of the court in refusing to give Instruction E
24 on the ground that this is a definition of malice which would
25 be applicable to the facts and circumstances in this case, and
1 we agree that there is no evidence of actual malice but since
2 the case is going to the jury and since the plaintiff could
3 only recover on a proof of actual malice the instruction
4 should be given as it is substantially taken from Gaut v. Pyles.

[Tr. p. 86, l. 5 - l. 10]

DEFENDANT'S INSTRUCTION F

5 The court instructs the jury that if you believe from
6 the evidence that the defendant, Bonnie Tate Cocke, had
7 knowledge of such facts and circumstances as would cause a
8 reasonable person to believe that the plaintiff was guilty
9 of the charge made against her, then you shall return your
10 verdict in favor of the defendants.

[Tr. p. 80, l. 7 - l. 15]

PLAINTIFF's OBJECTION

7 MR. WOOD: The plaintiff by counsel objects to the
8 giving of Instruction F on the ground that the jury can infer
9 from this that if Bonnie Tate Cocke believed or had the opinion
10 that the plaintiff was guilty of concealing merchandise then
11 she had probable cause which is not the definition of probable
12 cause, a proper legal definition, that her knowledge or belief
13 alone is not enough to establish probable cause. It is what
14 a reasonable person would be doing under the facts and circum-
15 stances then and there existing.

[Tr. p. 86, l. 11 - l. 16]

DEFENDANT'S INSTRUCTION G

11 The court instructs the jury that if you believe from
12 the evidence that the controlling motive of the defendant,
13 Bonnie Tate Cocke, was to protect the merchandise of her
14 employer, and to enforce the criminal laws, without personal
15 animosity against the plaintiff, then you shall return your
16 verdict in favor of the plaintiff --

[Tr. p. 81, l. 10 - l. 20]

PLAINTIFF'S OBJECTION

10 MR. WOOD: Again, the plaintiff by counsel objects
11 to the giving of Instruction G on the ground that the jury can

12 infer that they can find probable cause solely from the opinion
13 or belief of Bonnie Tate Cocke that she was trying to protect
14 the merchandise of her employer. It is stated in Giant v. Pig
15 that the belief of a witness is not probable cause, it is
16 whether she was acting in a prudent and reasonable manner under
17 the facts and circumstances then and there existing and this
18 instruction will mistakenly lead the jury to believe that if
19 Bonnie Cocke had the belief that was sufficient for them to
20 find for the defendant.

DEFENDANT'S INSTRUCTION H

The Court instructs the jury that even if you believe from the evidence that the defendant, Bonnie T. Cocke, was merely mistaken in her belief that the plaintiff was guilty as charged, then you should return your verdict in favor of the defendants.

[Tr. p. 82, l. 2 - l. 7]

DEFENDANT'S OBJECTION

2 MR. ROSENBERGER: The defendants by counsel object
3 and except to the action of the court in refusing H on the
4 ground that if the defendant Cocke merely made a mistake
5 in her belief that the person was guilty as charged, then
6 she would not be liable for insulting words or for malicious
7 prosecution.

[Tr. pp. 88, l. 1 - 89, l. 2]

MOTION TO SET ASIDE THE VERDICT

1 MR. ROSENBERGER: If Your Honor please, the defendants
2 by counsel move the court to set aside the verdict of the jury
3 and to render judgment for the defendants non absente verdicto
4 or, in the alternative, to grant the defendants a new trial
5 on the ground that the verdict is contrary to the law and the
6 evidence and without evidence to support it; for the action of
7 the court in failing to require the plaintiff to elect which
8 of the causes of action that it would prosecute; for failure
9 to strike the evidence at the conclusion of all the evidence;
10 for the action of the court in giving Plaintiff's Instructions
11 1, 2, 3, 4 and 5, and for the action of the court in refusing
12 Defendants' Instructions C, E and H; and for the ruling of the
13 court in particular that malice in this case may be inferred
14 from the uttering of the words or from a failure to prove
15 probable cause; and on the further ground that this is a general
16 verdict and it cannot be determined which of the causes of
17 action the jury returned a verdict against the defendants on.
18 It points up the point that we made at the beginning of the
19 trial that there should be a separation of the causes of action.
20 THE COURT: The court is of the opinion that those
21 matters were considered at the time of the trial and the court
22 gave the best ruling it could at the time, so I am going to
23 enter up -- I will overrule your motion and enter up the jury
24 verdict for the plaintiff in the sum of $1500.00.
25 MR. ROSENBERGER: Your Honor, defendants by counsel

1 respectfully object and except for the reasons stated.

2 THE COURT: All right.

ORDER REFLECTING JURY'S VERDICT

This day came the parties, by their attorneys, and the defendants having heretofore filed their responsive pleadings, the plaintiff replies generally thereto and prays that the same be inquired of by the country, and the defendants likewise, and thereupon said parties demanding a jury, there came a jury, to-wit: Dorothea Fuller, Mrs. Garland M. Gay, Andrew C. Graves, Clarence Jefferson, Henry A. McCormick, Langston Walker and James S. Lewis, who, having been duly summonsed, selected, tried and sworn, according to law, the plaintiff, in the absence of the jury, moved the Court to amend her motion for judgment by withdrawing clause 2 (b) relating to slander; clause 2 (c) relating to unlawful detention of the plaintiff and clause 2 (e), relating to false arrest, and the allegation relative to punitive damages, and the motion was granted and the motion for judgment amended accordingly; and thereupon the defendants, by their attorney, moved the Court to require the plaintiff to elect which of the two causes of action alleged in the motion for judgment she will pursue, for the reason that the several alleged causes of action involve more than one right and different kinds of proof against different parties, which will result in confusion at the trial and thereupon the plaintiff, by counsel, took a non-suit as to the defendant, Harry E. Anderson, and thereupon the Court overruled the motion of

the defendants to require the plaintiff to elect and the defendants, by their attorney, duly objected and excepted for the reasons stated, and thereupon the evidence having been heard in full, the defendants, by their attorney, moved the Court to strike the evidence on the grounds that it is not sufficient to support a verdict for the plaintiff against the defendants, as a matter of law, as the evidence failed to prove actual malice on the part of the defendant, Bonnie Tate Cocke, and since the occasion was one of qualified privilege, she is not entitled to recover damages against the defendants and there was no proof of malice to support a verdict for malicious prosecution and all of the credible evidence showed that the defendant, Bonnie Tate Cocke, had probable cause for charging the plaintiff with taking possession of the slacks, with the intent of converting them to her own use, without paying the full purchase price, and that the defendant, Bonnie Tate Cocke, was not motivated by malice, which motion the Court overruled, and the defendants, by their attorney, duly objected and excepted; and the said jury, having heard arguments of counsel and received the instructions of the Court, were sent to their room to consult and consider their verdict and after sometime returned into Court and presented their verdict written on a blank sheet of paper in the words and figures following, to-wit: "We, the jury, on the issues joined, find for the plaintiff, Daisy Miller Tweedy, against both defendants and fix damages at $1,500.00, Clarence Jefferson, Foreman."

WHEREUPON, the defendants, by their attorney, moved the Court to set aside the verdict of the jury and to render judgment for the defendants non obstante veredicto or, in the alternative, to grant the defendants a new

trial, on the grounds that the verdict is contrary to the law and the evidence and without evidence to support it; for the action of the Court in refusing to require the plaintiff to elect which of the two alleged causes of action she would pursue; for the action of the Court in refusing to strike the evidence at the conclusion of all of the evidence; for the action of the Court in granting plaintiff's Instructions 1, 2, 3, 4 and 5 and for refusing defendants' Instructions C, E and H, and it is impossible to tell whether the jury returned a verdict on the alleged action for insulting words under the statute or for the alleged cause of action for malicious prosecution, which motion the Court overruled, and it is considered by the Court that the plaintiff, Daisy Miller Tweedy, recover of the defendants, J. C. Penney Company, Inc. and Bonnie Tate Cocke, the sum of $1,500.00, with interest thereon from April 29, 1974, and her costs in this behalf expended, and the defendants, by their attorney, duly objected and excepted for the reasons stated.

MOTION TO VACATE JUDGMENT

Filed May 1, 1974

The defendants, by counsel, move the Court to vacate the judgment rendered herein in favor of the plaintiff against the defendants in the amount of $1,500.00 on April 29, 1974, so as to consider the reasons, stated by the defendants in writing, for setting aside the verdict and rendering judgment for the defendants non obstante veredicto, or, in the alternative, to grant the defendants a new trial.

ORDER VACATING JUDGMENT

Filed May 15, 1974

On motion of the defendants, by counsel, and it appearing to the Court proper in all respects so to do, the judgment rendered in favor of the plaintiff against the defendants in the amount of $1,500.00 on April 29, 1974 is vacated, and the Court takes the motion of the defendants for a judgment non obstante veredicto, or for a new trial, under advisement, and this Orde is entered after due notice to counsel for the plaintiff.

OPINION OF COURT

Dated July 17, 1974

The above case is before the Court on a motion to set a jurys verdict aside in favor of the plaintiff in the amount of $1,500.00, against the defendants. The case was submitted to the jury on the questions of insulting words and malicious prosecution. The Court, inter alia, instructed the jury that malice had to be proven and that same may be inferred from the utterance of insulting words and from want of probable cause. The Court refused the defendant's instruction that actual malice must be proven against the defendants and further that the defendant, Mrs. Cocke, had a qualified privilege to make the accusation.

The facts have to be taken in the light most favorable to the plaintiff since she recovered a verdict. Very briefly, the plaintiff entered Penney Store and took several garments into a dressing room in order to try them on. The dressing room had a draw curtain in front that was not fully closed. The plaintiff did not try on the first garment but folded them and put them on top of her large handbag on the floor. The defendant Mrs. Cocke noticed the garments on the floor on top of her bag and accused her of attempting to steal the merchandise. She was directed to go to the office where the manager told her that a warrant would be issued for her arrest. This was done and at the trial it was dismissed.

The question is whether or not the defendant Mrs. Cocke had a qualified privilege to the plaintiff to make the statement she did?

Counsel for the plaintiff cites the case of M. Rosenberg & Sons v. Kraft, 182 Va. 512, 526 (1944), in which it was stated as follows:

> "A privileged occasion is...an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

Counsel for defendant cites the case of Rosenberg v. Mason, 157 Va. 217, (1931), at page 348, which is as follows:

> "(22) Where the occasion is qualifiedly privileged the words spoken are not actionable, even though untrue and defamatory, unless the scope of the privilege of the occasion is exceeded or the words are spoken with actual malice; and in such cases the burden is upon the plaintiff to prove that the words were spoken with actual malice. Chaffin v. Lynch, 83 Va. 106, 1 S.E. 803 and Id., 84 Va. 884, 886, 6 S.E. 474; Brown v. Norfolk & W.Ry. Co., 100 Va. 619, 42 S.E. 664; 60 L.R.A. 472; Chalkley v. Atlantic Coast Line R.Co., 150 Va. 301, 143 S.E. 631; Powell v. Young, 151 Va. 985, 144 S.E. 624 (opinion on rehearing), 151 Va. 1003, 145 S.E. 731; Chesapeake Ferry Co. v. Hudgins, 155 Va. 874, 156 S.E. 429.
>
> (23) The evidence shows as a matter of law that the occasion was privileged***."

Neither of the defendants cited any Virginia case in which the same identical factual situation is present as in the case before the Court. In the case of Aylor v. Gibbs, 143 Va. 644 (1925), the question of qualified privileges was before the Court. The Court there stated that whether an occasion is privileged, qualified, or absolute, is a question for the Court. In that case the plaintiff sued the defendant for making false accusations to him concerning the theft of funds. There was no employer-employee relationship. The Court there instructed the jury that the occasion in which the words were uttered was one of qualified privilege. In the case of Peoples Insurance Company v. Talley, 166 Va. 464, (1936) the question of qualified privilege was there discussed in which the Court stated that where the utterance is one of qualified privilege that in order for the plaintiff to recover, the statements must be uttered with malice.

In the case of Crawford and Company v. Graves, 199 Va. 495 (1967), the Court quoted the Aylor case, supra, at page 499 as follows:

> "[W]hen the words complained of are uttered upon an occasion of qualified privilege, then in order to recover it must appear from the evidence that the language used was disproportioned in strength and violence to the occasion, or went beyond the exigency of the occasion, or that the occasion was abused to gratify the ill will of the defendant; in other words, that the defendant was acting from actual malice. Strong and violent language or insinuations disproportionate to the occasion may raise an inference of mailce and thus lose the privilege that might otherwise attach to the occasion."

In the case of Ridgeway v. Safeway Stores, Inc., D. C. Va. (1948), 139 Fed., Supp. 290, the Court applying Virginia law had the question as to an employee accusing a customer of failing to pay for an item. The factual situation is somewhat similar to that before the Court and on page 293 stated as follows:

"The authorities seem to hold rather uniformly that a communication made in good faith by any person in discharge of his duty is qualifiedly privileged and there can be no recovery for such communication unless the language used is disproportionate in strength and violence to the occasion or unless the language used goes beyond the requirements of the occasion or is uttered with actual malice. Aylor v. Gibbs, 143 Va. 644, 129 S.E. 696; Montgomery Ward and Company v. Watson, 4 Cir., 55 F2d 184; Kroger Grocery and Baking Company v. Yount, 8 Cir., 66 F. 2d 700, 701, 92 A.L.R. 1166."

"....[4] Some contention is made by the plaintiff that the communication made by the checker was actionable per se and that therefore the rule of privileged communications could have no application to this case and therefore no malice need be shown. In view of the language used by the Circuit Court of Appeals for this Circuit, in the case of Montgomery Ward and Company v. Watson, supra, I am unable to agree with this contention. In that case at page 187, Judge Parker said:

'***. In the case of a publication not privileged of words actionable per se, malice need not be shown, but is implied in law from the publication itself. In the case of a privileged communication, however, express malice as distinguished from malice in law must be shown; that is to say, if the occasion be privileged, the plaintiff may not recover, although he proves that defendant used language actionable per se and that same was false, unless he goes further and shows that in using same defendant was moved by actual malice, such as ill will, spite, grudge, or some ulterior motive.***" (emphasis supplied)

"[5] Before carefully examining the cases here cited there was some question in my mind whether the rule concerning privileged communications between customer and employee, as in this case, is the same as in the case between an employer and employee. Kroger Grocery and Baking Company v. Yount, supra, covers the precise point. That case arose in Missouri and cited Montgomery Ward and Company v. Watson, supra, which was an appeal to the United States Circuit Court of Appeals for the Fourth Circuit. The last mentioned case was an appeal from West Virginia, and dealt with an employer and employee. The instant case occurred in Virgina and turning to Aylor v. Gibbs, supra, decided by the Virginia Court, it will be observed that the communication was between parties having no employer and employee nor employee and customer relationship. It would thus appear that the three cases considered together answer fully that question. Hence it is seen that in determining whether the communication is qualifiedly privileged, it is necessary to consider the occasion or circumstances rather than the status or relationship between the parties."

In the case of May Department Stores Company, Inc. v. Devercelli, et al, D.C., 314 A. 2d 767, (1973), which is factually similar to the case before the Court, the Court there applying Virginia law had the question as to conditional privilege before it.

In that case it was an action to recover for false imprisonment, slander arising out of apprehension and detention of the plaintiff by store detectives suspecting him of concealing the merchandise. The Court stated at page 773, as follows:

"[8] Appellant also contends that its motion for a directed verdict on this count should have been granted as a matter of law. In support of the motion it argues that the

words were spoken under circumstances providing a qualified privilege and that no effort was made to prove actual malice in this regard which would then become an essential element to such a cause of action. We agree. As to what constitutes a privileged occasion, the Virginia Supreme Court of Appeals has quoted with approval from Newell on Slander and Libel 2d ed. at 388 as follows:

'A privileged communication is one made in good faith upon any subject matter in which the party communicating has an interest or in reference to which he has, or honestly believes he has, a duty, to a person having a corresponding interest or duty, and which contains matter which without the occasion upon which it is made, would be defamatory and actionable.'

Peoples Life Ins. Co. of Washington, D.C. v. Talley, 166 Va. 464, 186 S.E. 42,44 (1936). See also Marsh v. Commercial and Savings Bank of Winchester, 265 F.Supp. 614,621 (WDVa.1967) and Flowers v. Zayre Corp., 286 F. Supp. 119 (S.C.1968), which, as here, involved a store's security officer. Also Ridgeway v. Safeway Stores, Inc., 139 F. Supp. 290 (E.D.Va.1948), which involved remarks by a store employee to a suspected shoplifter. We hold that the insulting words here, as in the foregoing authorities, were uttered under circumstances providing appellant a qualified privilege."

".... The Virginia Court held in both Marsh, supra 265 F.Supp. at 612 and Talley, supra 186 S.E. at 44, that although the question of whether the store employees acted with malice ordinarily is one of fact for the jury that when the communication is privileged there can be no recovery unless there is evidence from which a jury may fairly conclude there was malice in the utterance of the words.

However, appellee failed to offer extrinsic evidence to prove actual malice as to the so-called insulting words. We fail to find any evidence in the record of malice being involved in this part of the questioning. In this respect it has been said that on an occasion of qualified privilege '...if the language of the communication, and the circumstances attending its publication by the defendant are as consistent with the nonexistence of malice as with its existence, there is no issue for the jury, and it is the duty of the trial court to direct a verdict for the defendant.' National Disabled Soldiers' League v. Haan, 55 App.D.C. 243, 248-249, 4 F.2d 436,441-442 (1925), quoted with approval in Marsh, supra. To the same effect, see Kroger Grocery & Baking Co. v. Yount, 66 F.2d 700 (8th. Cir. 1933)."

It appears to the Court that the defendant Cocke in the case before the Court had a qualified privilege to make the communication. The plaintiff was a party to the occasion and had a corresponding interest to receive it. There was reciprocity. Had the defendant Cocke made the statement to some third party it would not have been privileged. The Court is of the opinion that the instruction that malice may be inferred from the spoken word was in error. That in order to recover in the case before the Court, actual malice must be proven, such as ill will, spite, grudge, or some ulterior motive. It is, therefore, the opinion of the Court that this constituted prejudicial error and the defendants should be entitled to a new trial.

The next question to be considered is whether the words spoken by the defendant Cocke were of such character and nature as to submit the question of malice to the jury?

It is stated in Peoples Life Insurance Company, supra, on page 469 as follows:

"It is well recognized that when the words complained of are uttered upon an occasion of qualified privilege, then in

order to recover it must appear from the evidence that the language used was disproportioned in strength and violence to the occasion, or went beyond the exigency of the occasion, or that the occasion was abused to gratify the ill will of the defendant; in other words, that the defendant was acting from actual malice. Strong and violent language or insinuations disproportionate to the occasion may raise an inference of malice and thus lose the privilege which might otherwise attach to the occasion. Ramsay v. Harrison, supra [119 Va. 682, 89 S.E. 977]; Vaughan v. Lytton, 126 Va. 671, 101 S.E. 865; Robinson v. Van Auken, 190 Mass. 161, 76 N.E. 601. Aylor v. Gibbs, Supra.

In Chalkley v. Atlantic Coast Line R. Co., 150 Va. 301, 143 S.E. 631, 632, it is said:

[7] Generally, of course, malice is a question of fact to be submitted to a jury, but where the communication is privileged, unless there is evidence from which a jury may fairly conclude that there was malice, there can be no recovery.

[8] It is said in National Disabled Soldiers' League v. Haan, 55 App. D.C. 243, 4 F. (2d) [436] 441, that 'if the plaintiff fails to offer evidence of an extrinsic character to prove actual malice on the part of the defendant, in the publication of a libel on a qualifiedly privileged occasion, and if the language of the communication and the circumstances attending its publication by the defendant are as consistent with the non-existence of malice as with its existence, there is no issue for the jury, and it is the duty of the trial court to direct a verdict for the defendant.'"

In the evidence in the case before the Court, the defendant Cocke did not know the plaintiff, had never had any prior dealings with her, and made the statement to her in the course of her employment. There was no evidence of malice or ill-feeling. She had a duty to protect her employer's merchandise and there is no evidence that the language was violent or disproportionate to the occasion which may give rise to an inference of malice. Where the language was not disproportionate to the occasion and consistent with the non-existance of malice, the Court has the duty to enter summary judgment and not submit the matter to the jury. The Court is of the opinion that as a matter of law the facts in the case before the Court do not constitute actual malice since there was no proof of ill-will, hatered or actual malice. The Court is of the opinion that there was insufficient evidence to submit the question to the jury. The Court will set aside the jury's verdict and enter a final judgment for the defendants.

Please prepare an order and have same properly endorsed and submit to the Court for entrance.

FINAL ORDER OF COURT

Entered July 24, 1974

This day came the parties, by their attorneys, and the Court having maturely considered the motion of the defendants for a judgment non obstante veredicto, or, in the alternative, to grant the defendants a new trial, took time to consider thereof, and counsel for both parties having heretofore filed memoranda in this matter and the Court having considered the same, and now being of opinion that it is proper in all respects so to do, for the reasons stated in the memorandum opinion of the Court, which is filed herewith and incorporated herein by reference, the Court doth sustain the motion of the defendants, and it

is Considered by the Court that the plaintiff take nothing by her motion for judgment, but for her false clamor, be in mercy, etc., and the defendants go thereof without day and recover against the plaintiff their costs by them about their defense in this behalf expended, and the plaintiff, by her attorney, duly objects and excepts.

APPELLANT'S ASSIGNMENTS OF ERROR

Counsel for Daisy Miller Tweedy, plaintiff, hereby gives notice of appeal to the Supreme Court of Virginia from a final judgment herein entered on July 24, 1974. Daisy M. Tweedy does hereby set forth her assignment of errors as follows:

1. The Court erred in setting aside the jury verdict for the plaintiff and entering a final judgment for defendants, J. C. Penney Company, Inc. and Bonnie Tate Cocke.

2. The Court erred in holding that defendant Bonnie Tate Cocke had a qualified privilege to make the communication to plaintiff under the circumstances of this case.

3. The Court erred in holding that plaintiff, in order to recover in this case, must prove actual malice.

4. The Court erred in granting plaintiff's instruction 1.

5. The Court erred in refusing plaintiff's instructions 1-A and 1-B.

6. The Court erred in granting defendants' instructions B, D, F and G.

7. The Court erred in ruling as a matter of law that there was insufficient evidence to submit the issue of actual malice to the jury.

A written transcript of the testimony of the trial is to be hereinafter filed.

APPELLEE'S ASSIGNMENTS OF ERROR

TAKE NOTICE, that pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, the defendants in the case of Daisy Miller Tweedy v. J. C. Penney Company, Inc. and Bonnie Tate Cocke file their assignments of cross-error, as follows:

(1) The action of the Court in refusing to require the plaintiff to elect which of the two causes of action alleged in the motion for judgment she would pursue;

(2) The action of the Court in granting plaintiff's Instructions 1, 2, 3, 4 and 5; and

(3) The action of the Court in refusing defendants' Instructions C, E and H.