

1955

# J. Hensley Cottrell v. Grand Union Tea Co. and C. E. Pope : Brief of Appellant

Utah Supreme Court

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Robert W. Hughes & Dwight L. King; Counsel for Appellant;

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Case No. 8396

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

J. HENSLEY COTTRELL,  
*Plaintiff and Appellant,*

— vs. —

GRAND UNION TEA COMPANY,  
a corporation, and C. E. POPE,  
*Defendants and Respondents.*

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9-22-1919  
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**BRIEF OF APPELLANT**

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

#### A. PRELIMINARY STATEMENT

Appellant will be referred to throughout this brief as plaintiff; respondents as defendants. All italics are ours.

#### B. THE FACTS

This appeal by plaintiff is from a judgment by the Court granting defendants' motions for a directed verdict and judgment notwithstanding the verdict. Plaintiff obtained a verdict in the trial in the amount of \$2,650.00.

Plaintiff was employed by defendant, Grand Union Tea Co., as a route salesman in March of 1953 (R-42). His duties provided that he sell defendant's merchandise throughout a specified territory. Defendants furnished him with a truck to carry the merchandise (R-43). At the commencement of said employment plaintiff provided a cash bond in the sum of \$50.00 and paid an additional \$2.00 per week into his bond fund (R-43).

Plaintiff was employed until July, 1953, at which time he resigned.

On the 27th day of June, 1953, two weeks before plaintiff resigned, defendants ran an audit on plaintiff's accounts which revealed he was \$1.45 short. The shortage was not unusual and plaintiff received no complaint regarding it (R-48).

During the course of plaintiff's employment he made bi-weekly remittances. The type of remittance report used by plaintiff is shown by Exhibit 2 (R-49). The last remittance made by plaintiff on July 11, 1953, revealed a shortage of approximately \$70.00 (R-50; 167). At that time plaintiff informed defendants that the cause of his shortage was the loss of his wallet (R-52; 166).

Plaintiff left his employment believing that his cash bond in the sum of \$80.00 would come within \$16.00 of covering the shortage (R-53). Plaintiff did not hear anything further about the shortage until the 15th of November, 1953, (R-176). At that time Mr. Fives of the

Liberty Mutual Insurance Company (R-174) called at plaintiff's home. Mr. Fives did not have his records with him. Plaintiff and his wife, who was an auditor, requested an opportunity to examine the records. Mr. Fives was claiming \$40.00, but plaintiff believed he owed only \$16.00 (R-61; 128). Fives agreed to call back at a time when Mrs. Cottrell could examine the audit papers showing the shortage and determine the amount and whether same accrued in money or product (R-128-9; 175). Mr. Fives told plaintiff not to worry too much and that "he spent the biggest part of his time nailing Grand Union Employees, former employees, to the wall" (R-60)

Friday, December 4, 1953 (R-176) Fives called plaintiff on the phone and said he was coming out. Plaintiff requested he wait until his wife was home (R-61; 176). On this visit Fives stated the shortage was \$70.00 (R-62). Plaintiff and Fives had words and Fives' departing statement was, "Mr. Cottrell, they are going to make an example out of you" (R-63).

Neither plaintiff nor his wife ever had an opportunity to go over the audit with Fives (R-128-9). The first contact with the public authorities by defendants was on December 7th, 1953. Hal Taylor, deputy county attorney, held a conference with Mr. Pope, regional manager of Grand Union Tea Company. He then and there issued a complaint charging the plaintiff with the felony of embezzling money in excess of \$50.00 from Grand

Union Tea Company and Pope signed the complaint (Exhibit 9). On December 8th, 1953, at about 8:00 a.m. plaintiff was arrested at his home (R-64).

He was incarcerated in the county jail and his bond fixed at \$1500.00. Plaintiff posted bond and was released the evening of December 8th (Exhibit 11). The preliminary hearing was set for January 13th, 1954. The charge was dismissed for lack of evidence (Exhibit 11).

Plaintiff filed his action for malicious prosecution. It came on for trial May 25th, 1955. At the close of the evidence the Court submitted to the jury the following questions for answer (R-222):

#### QUESTION NO. 1

Do you find from the preponderance of the evidence that the acts of defendants in obtaining a criminal complaint for embezzlement against the plaintiff were motivated by malice, as that term is defined for you?

Answer "yes" or "no"      *yes.*

#### QUESTION NO. 2

Do you find from the preponderance of the evidence that the defendants prior to the issuance of the criminal complaint on December 7th, 1953, failed to disclose to Mr. Taylor the following:

(a) The contents of Exhibit 1. Answer "yes" or "no"      *yes.*

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- (b) The contents of Exhibit 2. Answer “yes” or “no” *no.*
- (c) The contents of Exhibit 3. Answer “yes” or “no” *no.*
- (d) The contents of Exhibit 4. Answer “yes” or “no” *yes.*
- (e) The contents of Exhibit 5. Answer “yes” or “no” *no.*
- (f) The fact that money was held by the Company pursuant to Exhibit 4. Answer “yes” or “no” *yes.*
- (g) The amount of money held by the Company pursuant to Exhibit 4. Answer “yes” or “no” *yes.*
- (h) The fact that remittances were made by the plaintiff to the defendants by check or money order on occasions. Answer “yes” or “no” *yes.*

QUESTION NO. 3

Do you find from the preponderance of the evidence that the defendants failed to furnish or produce any information or documents requested by Mr. Taylor before the issuance of the criminal complaint on December 7th, 1953?

Answer “yes” or “no” *yes.*  
(R-222-3)

The jury answered the questions as indicated and then returned a verdict in favor of the plaintiff as follows (R-223-A).

General Damages .....	\$2,000.00
Special Damages .....	650.00
Total Verdict .....	\$2,650.00

The basis for the Court's ruling in favor of defendants' motion for directed verdict and judgment notwithstanding the verdict, as plaintiff understands them to be, was that the evidence shows without contradiction that a full, fair and complete disclosure was made by defendants to the county attorney and that in reliance upon his decision to issue a criminal complaint, defendants acted in good faith.

The Court found that there was actual malice on the part of defendants in the obtaining of the complaint (R-230). It was the Trial Court's decision that the answers to questions Nos. 2(a), 2(d), 2(f), and 2(h), and question No. 3, were not supported by any evidence (R-230). All other answers to the special interrogatories the Court found were supported by evidence.

The basic question presented by this appeal is, was there evidence to support the answers made by the jury to the enumerated questions.

## STATEMENT OF POINTS

### POINT I.

**THERE IS EVIDENCE SUPPORTING THE JURY'S FINDING THAT DEFENDANTS FAILED TO MAKE A COMPLETE DISCLOSURE TO TAYLOR BEFORE THE COMPLAINT WAS ISSUED.**

**(a) THE EVIDENCE SUPPORTS THE FINDING THAT THE EMPLOYMENT CONTRACT WAS NOT FURNISHED TAYLOR BEFORE DECEMBER 7TH, 1953.**

(b) THE EVIDENCE SUPPORTS THE FINDING THAT THE CASH BOND WAS NOT DELIVERED TO TAYLOR BEFORE DECEMBER 7TH, 1953.

(c) THE EVIDENCE SUPPORTS THE FINDING THAT THE FACT THAT A SUM OF MONEY WAS WITHHELD BY DEFENDANTS PURSUANT TO THE CASH BOND WAS NOT REVEALED TO TAYLOR BEFORE DECEMBER 7TH, 1953.

(d) THE EVIDENCE SUPPORTS THE FINDING THAT THE FACT THAT REMITTANCES WERE MADE BY PLAINTIFF TO DEFENDANT THROUGH HIS PERSONAL CHECK OR MONEY ORDER WAS NOT DISCLOSED TO TAYLOR BEFORE DECEMBER 7TH, 1953.

(e) THE EVIDENCE SUPPORTS THE FINDING THAT THE DEFENDANTS DID NOT FURNISH ALL INFORMATION OR DOCUMENTS REQUESTED BY TAYLOR BEFORE DECEMBER 7TH, 1953.

## ARGUMENT

### POINT I.

THERE IS EVIDENCE SUPPORTING THE JURY'S FINDING THAT DEFENDANTS FAILED TO MAKE A COMPLETE DISCLOSURE TO TAYLOR BEFORE THE COMPLAINT WAS ISSUED.

The Court in the findings of fact found that a full disclosure of all material facts bearing on the prosecution of plaintiff for embezzlement had been made by defendants to the Salt Lake County Attorney, and that defendants acted upon the advice given them by the county attorney and honestly and in good faith signed the criminal complaint. He also found that probable cause existed for the issuance of the complaint.

In paragraph two of his findings the Court found that in the findings of the jury defendants were motivated by malice in the obtaining of the criminal complaint, was supported by evidence. It is submitted that the findings of fact in and of themselves are contradictory and reveal that the Trial Court made a mistake of law in finding that a criminal complaint which was obtained as a result of malice could be at the same time honestly and in good faith signed.

If malice existed, it is plaintiff's position it permeated all of the activities of defendants and they could not act in good faith nor honestly in seeking a criminal complaint against him.

The Trial Court findings, which are consistent with the jury findings of the existence of malice, it is respectfully requested must be considered in weighing the question of whether or not there is evidence which supports the other jury findings concerning the documents furnished to Taylor and the information disclosed to him before he issued the complaint.

It must be kept clearly in mind that after the complaint was issued a large amount of information was furnished to Taylor, but the crucial date as far as the plaintiff is concerned, is December 7th, 1953. After Taylor had all of the information he dismissed the complaint for lack of evidence. When he had only a part of the evidence, he issued the complaint against plaintiff.

It is respectfully submitted that the record in this case reveals that Taylor after a complete disclosure dismissed the complaint against plaintiff for lack of evidence (Ex. 11). The crucial question presented is when was a full disclosure made to Taylor?

(a) THE EVIDENCE SUPPORTS THE FINDING THAT THE EMPLOYMENT CONTRACT WAS NOT FURNISHED TAYLOR BEFORE DECEMBER 7TH, 1953.

The route salesman's contract is Exhibit I. The jury found in answer to question 2(a), that it was not furnished Taylor before December 7th, 1953. This document was delivered to Taylor by Pope at some time after his first visit to Taylor's office. Pope testified that he visited Taylor on two occasions only. That his visits were four or five days apart (R-17). The first visit, it is established, occurred on the 7th day of December, 1953 (R-182). On that visit Pope delivered to Taylor the following documents (R-18):

- (1) Remittance Report, Exhibit 2.
- (2) Auditor's Report, Exhibit 3.
- (3) Shortage Statement by defendants, Exhibit 5.

Taylor testified that he received Exhibits 2 and 5 on Pope's first visit (R-141).

The memories of Pope and Taylor concerning the date of the first visit by Pope to Taylor, are hazy. However, on the first visit Pope was accompanied by Fives,

and Fives had written reports which established the date of the visit beyond doubt (R-182).

Fives had been to the home of plaintiff on the 4th of December and left the home with the closing statement, "we intend to make an example out of you."

December 4th was a Friday; Pope obtained from Alonzo W. Watson a letter of probable cause. This letter, Exhibit 10, was dated the 7th of December, 1953. The letter was in hand when Pope and Fives visited Taylor on the first occasion (R-182). The complaint was issued on Monday the 7th of December, 1953. Plaintiff was arrested on the early morning of December 8th. From the evidence of defendants it thus appears that the answers made by the jury are supported by evidence. Even counsel for defendants on the 7th of December had not been furnished a copy of the contract of employment. His letter, Exhibit 10, paragraph 2, states "the files do not disclose a sales contract existing between the employee, J. H. Cottrell, and your Company."

The contents of the contract of employment are of the utmost importance and would be the basic document which must be considered in determining the relationship existing between plaintiff and defendants. The evidence revealed that there were material deviations from the terms of the contract and before an intelligent decision could be made as to whether or not there existed probable cause for the issuance of a criminal complaint, the

exact terms of the contract of employment must be understood, and any deviations in practice from said terms would necessarily have to be discussed. It is submitted that deviations from the exact terms of the employment contract could not be discussed without examination of the exact terms of the employment contract.

It is useless to speculate as to what course Taylor would have taken had he had Exhibit I before him December 7th, 1953, before he issued the criminal complaint. It might even be that counsel for defendant, Alonzo W. Watson would not have written the letter of probable cause had he been afforded an opportunity to examine the sales contract between plaintiff and defendant. What is of the most crucial importance is that the failure of defendants to furnish Taylor the employment contract, Exhibit I, proves that a complete disclosure was not made to him before he issued the criminal complaint.

Without a complete, accurate and full understanding of the contents of the contract of employment, Exhibit I, Taylor could only rely upon the memory of Pope as to that document's contents. It is respectfully submitted that Taylor did rely upon the memory of Pope as to the employment contract and that there was not a complete disclosure of all material facts by Pope before the issuance of the criminal complaint.

It is respectfully submitted that the evidence supports the jury's findings that on December 7th defendants failed to disclose to Taylor the contents of Exhibit I.

(b) THE EVIDENCE SUPPORTS THE FINDING THAT THE CASH BOND WAS NOT DELIVERED TO TAYLOR BEFORE DECEMBER 7TH, 1953.

When plaintiff was first employed by defendant it was required of him that he furnish a cash bond. This cash bond amounts to and is a document reciting that plaintiff has paid over and deposited with defendant the sum of \$50.00. The cash bond document also provides that plaintiff shall permit the deduction from his weekly earnings an additional sum of \$2.00 per week, until the total amount of deposit amounts to \$250.00. The cash bond agreement is Exhibit 4. The jury found that Exhibit 4 or its contents were not disclosed to Taylor by defendants before the criminal complaint was issued. By the time plaintiff's employment was terminated there had been paid into defendants an additional \$30.00 and there was on deposit therefore the sum of \$80.00 (R-28).

The evidence concerning the date on which Taylor received both the contract of employment and the cash bond agreement seems to be undisputed. Taylor himself testified that he requested Pope on his first visit to furnish the contract of employment and the employees bond agreement and that these documents were brought to his office by Pope some time after the first visit (R-142). From our discussion of the crucial dates contained in Point I (a), the Court is well aware that the second visit of Pope occurred some time after the 7th of December, the date on which the criminal complaint was issued. The testimony of Taylor concerning the bond is very revealing:

“By Mr. King: (R-152)

“Q. Did they tell you the amount of money Mr. Cottrell had accumulated in their Company, to send against any shortages?

“A. Yes.”

“Q. They told you that was \$80.00?”

“A. I don’t recall the figure, but I remember discussing the matter with them as to what was there. And I recall they told me he made some sort of a weekly withdrawal for the time he had been in the Company, or each time a certain amount was taken out, and I remember discussing the matter, but I don’t remember what the amount was.”

Had Taylor the bond before him on December 7th, he could have determined the amount of plaintiff’s cash bond, for he knew of plaintiff’s termination date (R-160).

In regard to this cash reserve built up by plaintiff, Pope testified that said sum was applied to the plaintiff’s shortage (R-38).

This information was not passed on to Taylor for he in giving his considerate opinion determined (R-158) that the approximate sum of \$70.00 had been embezzled (Exhibit 2, plaintiff’s Remittance Report). Nowhere or at any time did Taylor consider or know that the \$80.00 bond had been applied to the shortage of plaintiff’s funds. He considered the bond money as an entirely separate entity still in existence (R-159).

The employees cash bond, Exhibit 4, with the contract of employment, Exhibit 1, clearly reveals that defendants did not consider plaintiff as the custodian or trustee of the funds or property which he had in his possession. The bond reveals that defendants recognized that shortages would create an indebtedness on the part of the employee to defendants. The cash bond provides as follows: (Paragraph three.)

“It is further mutually understood and agreed that in the event any shortage or other indebtedness of the employee to the Company shall be disclosed by any audit that shall be made of the accounts of the employee at any time, the employee will accept as final any statement based upon such audit showing the amount of such shortage or other indebtedness and that no other or further proof shall be required to fix the existence or amount of such shortage or other indebtedness.”

Could Taylor have had any doubt in his mind about the existence of a debtor-creditor relationship between plaintiff and defendant had there been disclosed to him the terms of the employees cash bond, Exhibit 4, before he issued the complaint on December 7, 1953? Could his state of mind have been, as it was revealed to the Court in the following exchange:

“By the Court:

“Q. I am trying to determine what information they gave you that led you to the conclusion that the crime had been committed?

“A. Well, I think my thinking about it was, your Honor, that there was, — I had discussed — we generally discussed in the office — that the posting of the bond in the form that it was posted, did not excuse or could be offset against the taking of funds that, under the terms of the contract, he was still the custodian. He was still required to remit to the Company the amounts he collected, and then, if there were an eventual shortage, after he remitted to the Company, that, the Company could go against the bond to protect themselves.” (R-159)

It is respectfully submitted that the evidence is substantially without conflict that Taylor did not receive the employee's cash bond, Exhibit 4, prior to the time that he issued the criminal complaint, nor did he ever have accurate, complete and fair information concerning its content. The only way that such information could be furnished is by defendants furnishing a copy of the employee's cash bond, Exhibit 4. There can be no doubt that this evidence would justify the jury in answering question 2 (d) “yes” when asked if defendant failed to disclose to Taylor the contents of Exhibit 4 prior to the issuance of the criminal complaint.

**(c) THE EVIDENCE SUPPORTS THE FINDING THAT THE FACT THAT A SUM OF MONEY WAS WITHHELD BY DEFENDANTS PURSUANT TO THE CASH BOND WAS NOT REVEALED TO TAYLOR BEFORE DECEMBER 7TH, 1953.**

Under the terms of Exhibit 4, employee's cash bond, plaintiff permitted defendants to deduct from his weekly

earnings the sum of \$2.00. These weekly deductions had increased the amount of the original cash deposited from \$50.00 to \$80.00. Under the terms of the employee's cash bond, defendants were entitled to use this sum to off-set any amount of shortages or other indebtedness and when it did so use the amount of the employee's cash bond to off-set shortages or other indebtedness, the amount of the total claimed shortage would be only \$48.00. The fact that the application of the \$80.00 sum to the shortages shown by defendants' audits reduced the shortage to \$48.00, a sum less than the amount which the embezzlement complaint charged was embezzled, can be used by the jury as evidence that Taylor did not know of the existence of the \$80.00 figure, and did not know that said sum could be applied to the shortages to determine the amount of indebtedness between plaintiff and defendants. This evidence alone, it is respectfully submitted, would justify the jury answering question 2 (f) with a "yes."

In addition, however, Pope was asked to relate all of his conversations with Taylor before the criminal complaint was issued and his narrative fails to mention the fact that he informed Taylor of the money which was being held by defendant under the terms of Exhibit 4, the employee's cash bond (R-22). Not only did Pope fail to mention the fact that they had the sum of \$80.00 which belonged to plaintiff, but he did not tell Taylor,

according to his own evidence, that Grand Union could, did, or had applied the sum to reduce the amount of the indebtedness from plaintiff to defendants (R-38).

Again, we note that in the letter of probable cause Mr. Watson makes no mention of any employee's cash bond or any sum held by defendants to apply against shortages or other indebtedness. A reading of the letter of probable cause would leave one with the impression that plaintiff was short in his accounts a sum of \$127.03 and that there was no off-set or other sum in existence which would reduce this amount of shortage or other indebtedness.

It is respectfully submitted that from the letter of probable cause alone, the jury could find that defendants did not reveal to Taylor the fact that only \$48.00 was owing by plaintiff to defendants, but on the contrary led him to beleive that there was \$127.03 total shortages due from plaintiff to defendants.

Taylor's memory of the conversations between himself, Pope and Fives on their December 7th visit is devoid of any mention of the \$80.00 employee's cash bond amount (R-141).

Fives makes no mention of any conversation concerning the \$80.00 amount during the visit with Pope and Taylor on December 7th. If the amount of money held by defendant in accordance with the terms of Exhibit 4, employee's cash bond, was ever mentioned to

Taylor, Taylor, Pope and Fives completely forgot about that fact when testifying at the trial. If that amount was mentioned to Watson, he neglected to include it in the contents of his letter of probable cause. Certainly, this lack of testimony or other evidence concerning the disclosure of the deposit of \$80.00 by plaintiff would justify and support the answer which the jury made to question 2 (f) when they said that the defendants failed to disclose the fact that money was held by defendants pursuant to the employee's cash bond.

(d) THE EVIDENCE SUPPORTS THE FINDING THAT THE FACT THAT REMITTANCES WERE MADE BY PLAINTIFF TO DEFENDANT THROUGH HIS PERSONAL CHECK OR MONEY ORDER WAS NOT DISCLOSED TO TAYLOR BEFORE DECEMBER 7TH, 1953.

After plaintiff entered the employment of defendants according to the terms of Exhibit 1, the employment agreement, he was instructed that he should not turn over to the Company the actual funds which he collected on his route. It was testified at the trial by the employee of defendants that the general practice was not to have the route salesmen turn over the nickels, dimes, quarters, and dollars which they collected on their routes, but rather to deposit that money in their own account and pay the Grand Union Tea Company a personal check or money order representing the difference between the funds collected and the credit for expenses and salary incurred in the employees' operations (R-55, 169).

This practice supports the language of Exhibits 1 and 4 which revealed that defendants consider that the employee, plaintiff, was indebted to them for the amount which he collected in excess of his salary and expenses.

In discussing the criminal complaint with Taylor, this matter would have been of particular interest if a fair, full and complete disclosure was to be made to him. Concerning whether or not such a disclosure was made, Taylor testified that it was not. The exchange between counsel for plaintiff and Taylor concerning this matter is as follows:

*“By Mr. King: (R-150)*

“Q. Did they inform you he (defendant Cottrell) was to turn into them the actual cash he collected on the route, less those deductions?

“A. Yes.

“Q. They told you that?

“A. Whether they used that word or not, I don't know, that was the impression I got, that the only variance—the variance between what the contract said and what they, in practice, had adopted, was that they could turn in this yellow slip, Exhibit 2, and on that slip they were allowed to enter items of expense, but that they were required to turn in the rest of it.

“Q. And they were required to turn in the cash they collected on the route; is that your understanding?

“A. Yes, that is my understanding.

“Q. And that understanding—did you receive that understanding from your conversation, and from information that was furnished to you by Mr. Pope and Grand Union Tea Co.?”

“A. Yes, that is the only place I could get the information.

“Q. Mr. Taylor, if Mr. Pope had told you that cash was not turned in, but the cash was deposited in the bank account of the salesman, the check drawn for the difference between the amount as shown on the yellow sheet to be credited to his account and the amount he owed Grand Union, would that fact have any bearing on your decision?”

“A. I understand the question you are asking me is this, if they had told me they allowed these salesmen to deposit the money in their bank and issue them a check for the money, if it would have made any difference?”

“Q. Yes.

“A. I would think it would.”

The fact that defendant did not expect or require plaintiff to pay over to him his actual collections is very material to the basic question of whether or not he was a trustee or a debtor. Once the actual amounts collected on his route were deposited in his personal account and became intermingled with funds from other sources, the identity of the Grand Union funds would be destroyed. It is clear that a necessary element of embezzlement is that a trustee-trustor relationship must exist.

Without the relationship, the crime cannot be committed. This fact, Taylor was very conscious of, as was revealed by the quoted testimony.

It is respectfully submitted that the jury's findings 2 (h) that remittances were made by plaintiff to defendants by check or money order on occasion was not disclosed to Taylor prior to the issuance of the criminal complaint, is supported by overwhelming and uncontradicted evidence.

(e) THE EVIDENCE SUPPORTS THE FINDING THAT THE DEFENDANTS DID NOT FURNISH ALL INFORMATION OR DOCUMENTS REQUESTED BY TAYLOR BEFORE DECEMBER 7TH, 1953.

The only documents furnished Taylor by Pope and Fives on their first visit were Exhibits 2, 3, and 5 (R-18). None of these Exhibits had any bearing on the contractual relationship existing between plaintiff and defendants. None of the documents disclosed the amount of the employee's cash bond nor the sums which had been collected pursuant to it. As has been demonstrated here under Points 1 (a) through (d), the record discloses that the very basic, crucial document and information was not furnished to Taylor until after the first visit by Pope and Fives. The first visit occurred on December 7th, the second visit three or four days thereafter, and after the criminal complaint had been issued. As far as the documents are concerned, certainly they were

not all furnished before the complaint was issued and Taylor is clear in his testimony that he requested them at the first visit.

On Fives' visit to plaintiff on December 4th, his demand for payment was in the amount of \$48.00 and he exhibited records to Cottrell which supported his demand for \$48.00 (R-177). On the 7th of December when Fives and Pope saw Taylor for the first time, no mention was made of the difference between the audited shortages and the \$80.00 employee's cash bond. See Point (d) for a discussion of the memories of Fives, Pope and Taylor concerning amounts which were discussed. Is it conceivable that Taylor would issue a criminal complaint charging embezzlement of a sum in excess of \$50.00 if it had been revealed to him that the amount owing was only \$48.00?

It is respectfully submitted that the jury's findings that defendants failed to furnish or produce information and documents requested by Taylor before the issuance of the criminal complaint on December 7th is supported by substantial and uncontradicted evidence.

Plaintiff has not discussed the law concerning malicious prosecution for the reason that he considers his appeal to turn on the question of what evidence there was to support the findings of the jury in their answer to special interrogatories. It is submitted, however, that there can be no controversy concerning legal principles

applicable. The advice and counsel of a public official concerning the commencement of criminal proceedings is not a defense to malicious prosecution actions unless the public official has revealed to him prior to the issuance of the criminal complaint all facts known to the defendants which have a bearing on the criminal action or, as is sometimes stated, there has been a full, fair, complete and accurate disclosure to the public official.

This principle of law is well established :

*Messinger v. Fulton*, 173 Kan. 851, 252 P. 2d 904;

*Schippel v. Norton*, 38 Kan. 567, 16 P. 804;

*Railroad Co. v. Brown*, 57 Kan. 785, 48 P. 31; and

*Kennedy v. Wagner*, 138 Kan. 541, 27 P. 2d 214.

In considering the proposition as to whether or not the evidence is sufficient to support the findings of the jury in the answer to special interrogatories, plaintiff submits that there is no possibility of dispute as to the law applicable. This Court in its recent decision has announced clearly its settled principle.

See *Morbey v. Rogers*, .... Utah ...., 252 P. 2d 231, (P. 232) :

“It is well settled that in order for a court to grant a request for a directed verdict or for a judgment notwithstanding the verdict, (on negligence of defendant) the record must disclose

no evidence against the parties so requesting upon which reasonable minds could find him guilty of the negligence charged.”

See also *Kemalyan v. Henderson* (Wash.), 277 P. 2d 372, (P. 374) :

“This court is fully committed to the rule that a motion for a directed verdict, or for judgment notwithstanding the verdict, admits the truth of the evidence of the party against whom the motion is made and all inferences that reasonably can be drawn therefrom, and requires that the evidence be interpreted most strongly against the moving party and in the light most favorable to the opposing party.”

## CONCLUSION

It is respectfully submitted that this Court should order the reinstatement of the verdict in favor of plaintiff and against defendants and should order judgment entered for the sum of \$2,650.00 together with plaintiff's costs incurred.

Respectfully submitted,

ROBERT W. HUGHES &  
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RECEIVED.....copies of the within Brief  
of Appellant this.....day of December, 1955.

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By.....  
Counsel for Respondents