

1959

Stratford L. Wendelboe v. Richard B. Jacobson, Billy Joe Lang and John H. Douglas : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

STRATFORD L. WENDELBOE,

Plaintiff and Appellant,

vs.

RICHARD B. JACOBSON, BILLY JOE
LANG, and JOHN H. DOUGLAS,

Defendants and Respondents.

} Case No.
9025

BRIEF OF APPELLANT

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IN THE SUPREME COURT of the STATE OF UTAH

STRATFORD L. WENDELBOE,

Plaintiff and Appellant,

vs.

RICHARD B. JACOBSON, BILLY JOE
LANG, and JOHN H. DOUGLAS,

Defendants and Respondents.

Case No.
9025

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The plaintiff and appellant will be referred to as plaintiff or in his own name, and the defendants and respondents will be referred to collectively as defendants or individually in their own names.

All italics are ours.

The plaintiff Stratford L. Wendelboe, a private citizen,

brought this action against defendants Richard B. Jacobson and Billy Joe Lang, police officers of Salt Lake City, Utah, and defendant John H. Douglas, a special police officer of Salt Lake City, Utah, in three causes of action, (1) for assault and battery, (2) for false arrest and imprisonment, and (3) for malicious prosecution. On each cause of action the plaintiff asked for \$5,000.00 actual and \$5,000.00 punitive damages (R. 1-5).

The defendants answered plaintiff's complaint and defendant John H. Douglas denied that he acted affirmatively or participated in any way in what he termed the lawful imprisonment and arrest of plaintiff by defendants Jacobson and Lang. The defendants claimed the plaintiff's injuries and damages arose from his unlawful resisting of arrest by defendants and from his attempt to flee and from his unlawful assault and battery upon the defendants. As to the third cause of action dealing with malicious prosecution, they claimed they were advised by competent legal authority that they should proceed with the complaints, and they further claimed that all the charges were made upon good faith and upon proper cause (R. 6-8).

On the 24th of November, 1958, the plaintiff replied to defendants' answer (R. 9). The case came on for pretrial on the 24th of November, 1958. The pretrial merely made certain stipulations and the admission of certain photo exhibits. The one important matter which could have cut the time of this trial in half was not decided. The original transcript of the proceedings of Salt Lake City against Wendelboe, certified by the court reporter, was offered in evidence. The Judge did

not admit it and said there would be an issue on its admissibility. This transcript contained all the testimony of the three defendants in this case against Wendelboe for resisting an officer, and had the evidence contained in that transcript been admitted or stipulated, the record in this case would have been cut in half. Bickering between counsel and the Court and the Court and the plaintiff would have been practically eliminated.

The case came on for trial on the 15th day of January, 1959, at which time the plaintiff submitted to the defendants and to the Court his requested instructions. The defendants' requested instructions were not served upon the plaintiff until the 19th day of January, 1959. The jury was impaneled and the case proceeded to trial on January 15th, Thursday the 16th, Friday the 17th, and the Court, having an important commitment in California the following week, had the case proceed on Saturday morning, and on Monday the 20th. The Court instructed the jury and the case was argued and submitted to the jury the afternoon of the 20th. The jury did not reach a verdict that evening and was excused, and the following day about noon, returned a verdict of no cause of action on each count.

The following is a list of the exhibits offered in evidence. Unless otherwise indicated, they were received.

- Exhibit 1. A map of the locality
- 2 to 7. Large photos showing injuries to the plaintiff Wendelboe
- 8 to 11. Small photos of the intersection
- 12. Registration of automobile of plaintiff

13. Army ID card, admitted for illustration purposes and withdrawn
14. Plaintiff's temporary driver's license
15. Trousers
16. Shirt and jacket
17. Coat
18. Thirteen sheets of newspaper clippings
19. Supplemental report of defendant Jacobson, not admitted
20. Statement of defendant Jacobson
21. Statement of defendant Douglas, not admitted
22. Statement of Billy Joe Lang
23. Booking sheet at city jail, not admitted
24. Report of alcohol analysis of plaintiff
25. Evidence report
26. Vehicle complaint report, not admitted
27. Flashlight
28. Long coin purse
29. Clock in leather case
30. Copy of battery complaint, City vs. Wendelboe
31. Assault complaint, City vs. Wendelboe
32. Resisting complaint, City vs. Wendelboe
33. Amended resisting complaint, City vs. Wendelboe
34. Second amended resisting complaint, City vs. Wendelboe
35. Demurrer to resisting complaint, not admitted
36. Demurrer to battery complaint, not admitted
37. Demurrer to assault complaint, not admitted
38. Handcuffs and key

The plaintiff filed his notice of a motion for new trial claiming (1) the verdict was contrary to law, (2) the verdict was contrary to evidence, (3) error in law, and (4) prejudicial conduct of the court (R. 92). The defendants' motion for attorney fees and the motion for new trial were heard on

February 4, 1959. The motion for new trial was argued and promptly denied; attorney Shirley P. Jones, Jr., defendants' counsel, was sworn and testified; and the Court ordered attorney fees to be fixed at \$1250.00 and fixed the witness fees (R. 94-97).

Then, within the time allowed by law, the plaintiff filed his appeal to the Supreme Court (R. 100). The plaintiff made his designation of record (R. 102). The defendants cross-appealed (R. 101) and asked for an additional designation of record on appeal (R. 104).

To try and aid this Court, the writers have set out in full in the appendix the following exhibits: 14, 19, 20, 21, 22, 23, and 24, and have set out the following instructions: No. 18, 19, and 21.

STATEMENT OF THE FACTS

Stratford L. Wendelboe, the plaintiff, had been a resident of Utah for thirty-seven years. He was a graduate and post-graduate of the University of Utah. In 1943 he entered the army as a private and was discharged as a lieutenant in 1946. He remained as an officer in the reserves, and at the time of the trial he was a captain.

He married in 1950 and lives with his wife and two children at 1171 East Fourth South. In April, 1958, plaintiff had a phone and a listing in the phone book (R. 465). Since 1953, he worked in Salt Lake City as a real estate salesman, then he operated his own brokerage office for three years. After that he was a salesman. Because of unemployment, on February

14, 1958, he obtained a chauffeur's license and began driving Yellow Cab. His shift with Yellow Cab was from 3:00 p.m. until 1:00 a.m. (R. 107-112).

The plaintiff enjoyed a very good reputation for truth and veracity and a very good reputation for being a peaceful and law-abiding citizen in this community. Dr. William P. Runsler, a professor in the Department of Foreign Languages at the University of Utah for thirty-two years, testified as to plaintiff's excellent reputation. Dr. Runsler had known the plaintiff for twenty to twenty-five years (R. 391-393).

Defendant Richard B. Jacobson, twenty-eight years of age, joined the Police Force in March, 1954. At the time of the incident he was a third grade patrolman assigned to radio patrol division (R. 247).

Defendant Billy Joe Lang, twenty-five years of age, had only been with the Police Department three months at the time of this occurrence and he was a sixth grade patrolman (R. 347).

Defendant John H. Douglas, a jeweler by occupation, twenty-one years of age, was a reserve police officer. He graduated in March, 1958, and was sworn in on April 16, 1958 (R. 325).

On April 5, 1958, the plaintiff went to work about 3:00 p.m. driving Yellow Cab. At about 2:00 a.m. he stopped at his home and gave his wife \$25.00, then he went to the cab company and checked out about 3:00 a.m. April 6th (R. 112-113). He entered his own car, a 1950 Chevrolet sedan which had been driven almost 100,000 miles. The body was rusting

through and the upholstery was dilapidated (R. 112-114). Both Jacobson and Lang described this car as being a "clunk" (R. 251 and 360). The plaintiff was going home. He drove to South Temple, then east to Fifth East and down Fifth East to Second South, where he parked with the intention of buying an evening newspaper at the stand connected with the pole on the southwest corner of the intersection (see Exhibit 10). He had followed a police car down Fifth East. He parked some thirty to fifty feet south of the intersection. The defendants claimed it was farther south (defendant Jacobson measured what he thought was the distance three days before the trial and testified plaintiff's car was seventy feet south (R. 251). Plaintiff was waiting for the police car to get out of the locality before he got out of the car (R. 115-116). The reason for this was that once before the plaintiff had been stopped by police officers while getting a newspaper from a stand. The police claimed that he was trying to steal change from the stand. The plaintiff didn't want to go through that again (R. 220).

Second South and Fifth East was a lighted intersection according to officer Jacobson (R. 251). (See Exhibit 1, a map of the locality, and Exhibits 8-11, photos of the locality). There was a service station under construction on the southwest corner (R. 116). The plaintiff was sitting in the car with a nickel in his hand waiting for the officers to go so he could get his paper without fuss and trouble (R. 221).

On this night defendant Jacobson, the senior officer of the three defendants, was on duty from 11:30 p.m. through 7:30 a.m. Defendant Billy Joe Lang was with him and also de-

fendant John H. Douglas, who was there for the purpose of training. They were all in uniform and armed with revolvers and tear gas guns. Douglas' assignment that night was to watch defendants Lang and Jacobson and learn the ropes of police work (R. 247-249). Defendants hadn't made an arrest or questioned anybody up to the time of the Wendelboe occurrence. This was the first opportunity for them to show trainee Douglas how it was done (R. 348). The defendants Jacobson and Lang were instructing defendant Douglas by demonstration how to take care of suspicious people (R. 324).

There is no dispute that the police car drove up, facing north, alongside plaintiff's car, facing south. The officers Jacobson and Lang got out on the driver's side of Wendelboe's car and defendant Douglas covered the front of plaintiff's car. Defendant Lang testified that Douglas was stationed there to observe (R. 348-350). All agree that officer Jacobson approached the plaintiff and that he asked for identification. Wendelboe claims that he reached into his wallet and started hunting for his driver's license. Jacobson then asked him what he was doing there and the plaintiff answered "Just minding my own business" or "None of your business." The defendants assert and the plaintiff denies that he used the word "damn" for emphasis (R. 117-118). Wendelboe claims that before he could find his driver's license he was ordered out of the car by Jacobson, and that he finished thumbing through and found his driver's license and gave it to Jacobson while out of the car. The certificate to the 1950 Chevrolet was in the plaintiff's wallet.

The plaintiff Wendelboe produced his temporary driver's

license (Exhibit 14), Wendelboe's name and address on it, and defendant Jacobson asked plaintiff where he lived and he said his name was Stratford L. Wendelboe and that he lived at 1171 East Fourth South (R. 112-121).

Defendant Jacobson testified that when he approached Wendelboe and asked for some identification that Wendelboe produced the driver's license (Exhibit 14) on which there was the name "Stratford L. Wendelboe," serial number and address of 378 South 12th East. Jacobson kept Exhibit 14 for some time and Jacobson claims he then asked him for other identification and that plaintiff didn't seem to respond (R. 250-251). He said he asked Wendelboe to step out because Wendelboe had upset him. The reason defendant Jacobson gives for being upset was that he claimed that the plaintiff thumbed right past his I.D. card and Jacobson thought perhaps it might be someone else's. Defendant Jacobson, notwithstanding he had Exhibit 14 (Wendelboe's driver's license) in his hand, claimed he didn't know who Wendelboe was (R. 312).

Jacobson claimed that he pointed to Wendelboe's identification card and said that that would be an excellent identification (R. 321-322). The defendants knew there were many cards in the wallet (R. 312).

It does not appear that officer Jacobson reached for the I.D. card or any of the cards in the wallet. After Wendelboe got out of his car the defendants took him over to the police car, forced him to put his hands on the roof of the car, and the defendants searched him and at that time, according to plaintiff, they took a travel clock (Exhibit 29) and a coin purse (Exhibit 28) out of his pockets. The defendants claim

they took a flashlight and a small book from his pockets at that time. The defendants claim the travel clock and coin purse were taken from the plaintiff later at the city jail. • •

According to the plaintiff, the defendants again asked him what he was doing there, which was the third time, and they said they were going to run him in if he didn't tell them, so he yelled out that he was just there to buy a newspaper.

The defendants became very angry and someone asked him where he wanted his car impounded. This was between the two cars. The defendants then placed the plaintiff in the rear of the police car. At no time was plaintiff Wendelboe asked if the car belong to him (R. 331).

The defendants nor any of them asked Wendelboe his occupation (R. 322). All three defendants observed Wendelboe's wallet and that it was full of cards.

Defendant Lang said plaintiff Wendelboe was told he could consider himself in custody before he was put in the police car, but he was not informed what he was in custody for (R. 355).

Before plaintiff Wendelboe was placed in the police car, he was told by the defendants that they were going to run him in and asked who he would like to have impound his car. Before Wendelboe could answer, he was placed in the police car. Wendelboe saw the officers searching his car; he tried to get out of the police car. He wanted to talk to the officers about impounding and searching his car, but defendant Lang had slammed the door of the car against his leg. Finally the door

of the car was released and the plaintiff Wendelboe got out and went over to talk to the officers (R. 123-124).

The defendants admit that Wendelboe was told he was under arrest before he was placed in the police car (see Jacobson's statement, Exhibit 20, and R. 272). However, Jacobson admitted that he told Wendelboe he could arrest him for vagrancy (R. 265). Defendant Jacobson also stated that he told the plaintiff Wendelboe while he was in the car that he could arrest him for not connecting himself with the car (R. 267).

They had no report of any stolen car similar to plaintiff Wendelboe's Chevrolet that evening and, notwithstanding the defendants were suspicious about whose car Wendelboe was in, they definitely asked him what wrecker he wanted to come and impound the car (R. 268). When Wendelboe didn't answer what wrecker he wanted, the defendant Jacobson called the dispatcher at the police station and asked that the nearest and quickest wrecker be sent. The dispatcher had access to the lists of cars and their numbers and owners. Officer Jacobson didn't ask the dispatcher to give him the listing of the license plates on the Wendelboe car. When asked why he didn't ask the dispatcher, Jacobson replied, "I just simply didn't." The defendants made no effort whatsoever to check the license plates. None of them asked Wendelboe whose car it was (R. 268-272). The simple act of checking the license on the Wendelboe car with the dispatcher could have ended all this confusion had any of the defendants wished to ask that question.

Wendelboe was not asked for the registration of his car

except right at the start. At that time defendant Jacobson told Wendelboe he could use his registration for identification and Wendelboe told him he had his driver's license right there (R. 181).

After Wendelboe was put in the back seat of the police car, no one got in to talk to him, and he was not asked for further identification (R. 196) and he was not again asked for the registration of his automobile (R. 197). Wendelboe was not given a chance to show his identity. All he wanted to do was get out of the police car to talk to the officers about impounding his car (R. 198-200).

Defendant Jacobson turned his back to the police car and started to search the Wendelboe car, and he became aware that Wendelboe was endeavoring to get out of the police car and defendant Lang was trying to close the door of the car but Wendelboe's foot was inserted in the door. So Jacobson said to defendant Lang, "Let him out if he wants to get out that badly" (R. 272, Exhibit 20). Defendant Jacobson meant that Wendelboe could get out of the police car even though he was under arrest (R. 272).

Defendant John H. Douglas stated that he and officer Jacobson were searching the Wendelboe car when he saw officer Lang endeavoring to keep Wendelboe inside the police car. His legs were between the door and the frame, and officer Lang was endeavoring to hold the door shut. Then officer Jacobson said, "Let him out if he wants out that bad. Maybe he will tell us who he is." Lang released the pressure on the door and Wendelboe came out toward his own car. He brushed or pushed officer Jacobson aside in a move that looked like he

was going directly to his car, but he didn't kick or strike either Lang or Jacobson. They both grabbed him (R. 334).

We go back to the plaintiff's version of what happened after he got out of the car. He went over toward his car to talk to the officers about the impounding and the two officers started raining blows with their fists and flashlights on him. He received a terrific blow on his nose, then blows rained down on him with fists and flashlights from all directions. At one time the butt end of a flashlight was rammed forcibly into his chest. He was hit on his head, his shoulders, his face, and his body, and he did not strike at them. All he did was to try to ward off the blows with one free hand. Then one of the officers wrapped his arm around plaintiff's neck and proceeded to bend him backward. Prior to that, one of them had said "Shall I give him the hold?" or words to that effect. Then he was rendered unconscious. The next thing he remembered, he was lying on the ground to the rear of his car with his hands handcuffed behind him and his face on the pavement. He felt terrible at that time. There was a man from the ambulance who wiped the blood off his face (see photos of Wendelboe, Exhibits 2 to 7, inclusive).

During the altercation, the plaintiff yelled and screamed very loud for the defendants to stop beating him (R. 131-132).

In regard to the fight, defendant Douglas testified that when Lang released the pressure on the police car door Wendelboe came out towards his car and pushed or brushed officer Jacobson aside but he did not either strike or kick either officer Lang or Jacobson. Both of the officers grabbed Wendelboe and then officer Jacobson threw the first blow that landed on the

chin of Mr. Wendelboe. This slowed Wendelboe up and they secured one handcuff. Then officer Lang struck Wendelboe over the head with a flashlight two or three times. Officer Douglas was carrying a tear gas pencil and he yelled for the officers to get back so he could fire the tear gas pencil at the plaintiff Wendelboe. Mr. Douglas said, "That actually would be, shall we say, an easy method of ending the skirmish," but he couldn't fire it because the other officers were present. He was willing to spray tear gas on Mr. Wendelboe but not on the other officers (R. 345). The two cars were only five feet apart (proposed Exhibit 21).

After Mr. Wendelboe had been hit several times with the flashlight, Jacobson put a judo hold on him which made him light-headed. He sank to his knees and officer Jacobson secured the other handcuff (R. 334-338).

The plaintiff Wendelboe, after the handcuffs were on him, was sitting on the ground back of the police car with his hands handcuffed behind him. Officer Douglas' opinion was that Wendelboe was not drunk (R. 343-344).

On cross-examination Mr. Douglas testified that Mr. Wendelboe had not been unnecessarily mishandled and the way he was treated was proper police procedure (R. 346).

Officer Lang's version of the fight:

Officer Lang said he was trying to keep Wendelboe in the police car when Jacobson said, "Let him out if he wants out that bad." The Wendelboe car was approximately ten feet from the police car. Officer Lang thought that Jacobson's purpose in letting him out was that there was a possibility he

wanted to *co-operate* with the officers. Mr. Lang admitted that he used the word “co-operate” all through his report and co-operate meant to answer questions but not imperiously (R. 359).

When Wendelboe got out of the police car he didn't hit Lang, but Lang claims he pushed him aside. Then Lang grabbed his arm as the plaintiff was heading straight for his car and Lang told him he wasn't going any place. He said that he and Jacobson tried to put Wendelboe back in the police car. The reason he said they were doing this was because “it was obvious that he wasn't going to co-operate with us so we wanted him back in the police car.” Then there was a struggle and he broke loose from officer Jacobson, who clipped Wendelboe on the chin with his fist. After clipping him on the chin he tried to get the handcuffs on him. One handcuff was on him and there was such a flailing of arms that officer Lang let Wendelboe have it on the head with his flashlight and, as he stated in his report, the only reward he got for hitting him over the head was a broken flashlight. He expected to slow Wendelboe down enough to finish handcuffing him. According to Lang, Wendelboe should have co-operated. Lang possibly hit him three times with a flashlight.

When the ambulance was called, Wendelboe was in a slumped position at the rear of the automobile with his hands handcuffed behind him and he was leaning up against the bumper of the car and he was bleeding (R. 357-36).

Officer Jacobson's version of the altercation:

Officer Jacobson told Lang to let Wendelboe get out of the car. As he got out, he kind of pushed officer Jacobson aside

as if he was breast stroking, but he made no attack on anyone. According to the report of Jacobson (Exhibit 20), he stated that

“Wendelboe emerged from the car, and was very determined to leave the area, and be shut of the whole affair. He proceeded to push me aside, and go toward his car. I attempted to bring him back, and a short scuffle ensued, during which Wendelboe shouted for us to stop beating him. At this time, the scuffle was growing more violent, and therefore I clipped him on the chin. Prior to my striking him, the efforts of both myself, Lang, and Reserve Officer John Douglas had been restricted to attempting to subdue Wendelboe with as little violence as possible.”

Jacobson, in his testimony, said that Wendelboe shouted for help and shouted for the officers to stop beating him when they just had him by the arm starting to put him back in the police car. Jacobson then said he clipped Wendelboe on the chin. The blow dislocated a knuckle on Jacobson's right hand. In his report made on the 6th of April, 1958, officer Jacobson referred to this part of the altercation as follows:

“Officer Jacobson dislocated a knuckle of the right hand when it came in contact with Wendelboe's chin, and officer Lang suffered the loss of a three-cell flashlight.” (R. 277 and proposed Exhibit 19).

Then, according to Jacobson, he managed to snap one handcuff on Wendelboe, and the next thing he knew, officer Lang had struck Mr. Wendelboe with a flashlight. Then he, Jacobson, slipped behind Wendelboe and gave him a reverse headlock described by the officer as follows:

“Essentially it is one of catching right up under the chin with the hand and bearing it up underneath the

chin with the arm. It holds the person off balance and cuts off the blood supply to the head and eventually they get groggy."

This treatment weakened Wendelboe, then they handcuffed Wendelboe's arm behind his back.

In his report, proffered Exhibit 19, officer Jacobson had as follows:

"Attention City Prosecutor. Kindly attempt to obtain from this man restitution in the following amounts. Cleaning \$1.05, flashlight \$3.00." (R. 279-280).

Officer Jacobson couldn't say how many times Lang hit Wendelboe with the flashlight, but finally Wendelboe was subjugated, and he, Wendelboe, had a cut on his mouth and was bleeding (R. 282-283).

During all of this, officer Jacobson claimed that at no time did he lose his temper. He didn't know about officer Lang.

The plaintiff Wendelboe was checked by the ambulance driver. He was bleeding and had a split lip and the driver wiped blood from around his mouth. At that time, Wendelboe was lying at the rear of his car and then the three defendants put Wendelboe back in the police car, his arms handcuffed together behind him, and they drove to the city jail (R. 126-127). There, the defendants decided it would be wise to have their prisoner examined by a physician since they were not sure how seriously he was cut up around the mouth.

Then they drove to the County Hospital and as they rounded one corner Wendelboe was dumped from the seat onto the floor of the police car (R. 129). Wendelboe claims that

when they got to the hospital they dumped him on the ground and at that point his flashlight and notebook that he had fell out of his pocket. Then he was transferred to a table and taken into the hospital (R. 130-131).

At the hospital he was suffering considerable pain and the handcuffs had bitten into his wrists, his thumb was numb, his back was hurt (R. 132-135).

While at the County Hospital officer Jacobson requested a brother officer, Graham, to make arrangements for Wendelboe to take a blood alcohol test. This was later taken and came back absolutely negative (see Exhibit 24).

Officer Jacobson testified that he had nothing to do with Stratford Wendelboe's name and address being on the hospital records. He said he wasn't certain that was Wendelboe's name and he, Jacobson, wouldn't give the name "Stratford Wendelboe" to the hospital unless he was absolutely certain (R. 288).

Defendant officer Lang testified that he was present when the nurse at the hospital asked Wendelboe his name and he replied "Stratford L. Wendelboe" and gave his address. At that time none of the officers told the nurse or anyone at the hospital that was not Wendelboe's name, nor did any of the defendant officers ask any of the hospital personnel to see if they could get the patient to furnish identification (R. 368-369).

Defendant Jacobson admitted that he heard the doctor at the hospital ask the plaintiff what his name was and he replied "Stratford Wendelboe" (R. 300).

Then the defendants, Douglas, Jacobson and Lang, left Mr. Wendelboe in the custody of officer Graham and they drove to the L.D.S. Hospital to have Jacobson's hand treated, the one in which he broke his knuckle on Mr. Wendelboe's nose (R. 365-369). Mr. Wendelboe left the hospital in a wheelchair and was placed in a police car and was again handcuffed. (The court struck the testimony about the handcuffs because the three defendants were not present (R. 143)).

While returning to the station from the L.D.S. Hospital the officers were advised that car No. 7 was bringing Wendelboe to the jail. Jacobson admitted writing in his report, Exhibit 20:

"We met them there and since Wendelboe had chosen to be unconscious again, assisted in carrying him into the jail. There, he put on his unconscious act some more, arousing only to demand a lawyer, newsmen and Chief Skousen."

Officer Graham, defendants Jacobson, Lang and Douglas carried Wendelboe into the booking pen of the jail and put him on the floor. At that time, the plaintiff roused himself and called for Chief Skousen, newspaper men, and lawyers.

About all that was bothering officer Jacobson at that time was the identity of Mr. Wendelboe, yet the officers had no difficulty in knowing Wendelboe's real name when they took the blood for alcohol analysis (See Exhibit 24). Defendant Jacobson admitted that he had given him the name of "Stratford Wendelboe," and in fact, while Mr. Wendelboe was lying down in the jail, officer Jacobson got down on one knee, right alongside of him so that he would be certain that he would be understood, and said:

"MR. WENDELBOE, you can't get out of here until you get in. I have to know who you are, where you live, and the pertinent facts about you on this booking sheet. It is necessary to establish who you are." (R. 294).

Wendelboe didn't answer. At that time, the plaintiff had a badge on his trousers indicating he was a cab driver.

Then the defendants had Mr. Wendelboe booked as "John Doe," not "John Doe, alias Stratford Wendelboe," and officer Jacobson denied that he had him booked as John Doe so that his friends, relatives or lawyers couldn't locate him (R. 290-296).

Then Wendelboe was charged with (1) assault, (2) battery, (3) vagrancy, (4) drunk, and (5) resisting (R. 389 and see proposed Exhibit 23).

It is not denied that he was booked originally as "John Doe." For some reason or other, that record has disappeared.

Jailor Larry B. Lunnen was on duty between 3:00 a.m. and 6:00 a.m. He was there when they booked Wendelboe. He examined Wendelboe's wallet and said he didn't see a registration certificate for the automobile. However, on cross examination, he stated he saw a card with the name "Stratford L. Wendelboe" and when he found that one, he didn't go any further. It was a membership card and that satisfied him that the prisoner's name was Wendelboe. He said officer Roach filled in the booking sheet. Officer Lunnen also brought out the fact that the details on the booking sheet were furnished by the arresting officers as the booking officers weren't present when the arrest was made (R. 431).

Defendant Lang testified that Wendelboe refused to *co-operate* with the officers at the jail and that he refused to give information. Officer Lang admitted that the report, Exhibit 22, contained the following:

“For some unknown reason he had to be carried into the city jail, and once inside, he refused to co-operate with us and was taken to the drunk tank and stripped of his clothing.” (R. 371).

Defendant Jacobson in his report, Exhibit 20, stated:

“Since he was so belligerent previously, and indicated an ability to be more difficult, he was stripped, and placed in the drunk tank.”

In his supplementary report, proposed Exhibit 19 made prior to Exhibit 20, officer Jacobson stated:

“He was transported to jail where he refused to remove himself from the car and had to be carried in. He again refused to co-operate in the jail, would not give his name or any information concerning himself, therefore, he was placed in the drunk tank.”

Defendant Lang claimed that he was subordinate to officer Jacobson at all times that night and that all decisions were made by officer Jacobson, that he didn't arrest the plaintiff but that Jacobson did. However, Lang admitted he assisted officer Jacobson (R. 382-387). Officer Lang also admitted that the arresting officers made out a statement upon which they state the reasons for which they brought the prisoner in. They call it the authority of arrest. They give the information to the jailors who do the typing (proposed Exhibit 23). Officer Lang didn't remember the exact wording of Exhibit 23, but

he knew that Mr. Wendelboe was being charged with assault, battery, vagrancy, drunk and resisting (R. 289).

Plaintiff Wendelboe was then carried downstairs to the isolation cell in the basement of the jail by the defendants Jacobson, Lang, and Douglas and someone else, and there they stripped him of all his clothes except his shorts (R. 295). Defendant Douglas admitted he went downstairs with Wendelboe, but he didn't help carry him or didn't help undress him (R. 341-343).

The isolation cell that plaintiff Wendelboe was placed in was approximately 16 by 16 feet or 16 by 20 feet, high ceiling, a window about 5½ feet from the floor with a screen over it, the floor concrete or stone. The steel door had a window in it about 16 by 18 inches with bars over it and a door over the window so the door could be closed. There were no furnishings; no mattress, bed or chairs (R. 296). When officer Jacobson was asked what was in the cell besides Wendelboe and his shorts, officer Jacobson answered "About four walls, the floor and the ceiling is essentially it, sir" (R. 297).

Officer Merrill was on duty as jailor in the early morning of April 6, 1958, and saw Wendelboe in this cell at about 7:15 a.m. When officer Merrill went down to see Wendelboe, Wendelboe was booked as "John Doe," with no address. Officer Merrill had a scratch pad and he obtained his name, age and birthday because Wendelboe was unable to come upstairs. Wendelboe was lying on his back on the floor of the cell with just his shorts on.

Wendelboe remained in this cell with no carpet, chair, or

mattress in the neighborhood of five hours, and at 12:30 or 1:00 o'clock in the afternoon he was placed in another cell with approximately eight or nine men. Then he was released on bond (R. 152-154) for which he had to pay a \$30.00 premium (R. 161).

Plaintiff went home and, on account of his condition, was obliged to go to bed. His head was throbbing, his nose was plugged with blood, and he was sore all over. There were bruises on his head, face, shoulders, and ankles, and he had a broken nose (R. 157-162).

Dr. Marshall S. Decker examined the plaintiff at his home and he testified as to the bruises on plaintiff's head, body and ankles, and the multiple abrasive wounds on his scalp, and the bruises on the upper lid of the right eye, and he testified to the fact that plaintiff had many abrasive wounds over his body and that his nose was broken (R. 184-191).

W. Cleon Skousen, Chief of Police of Salt Lake City, was called by the plaintiff. He identified the following exhibits which were offered in evidence by the plaintiff:

- (a) Exhibit 19, Supplementary report of officer Richard Jacobson, not admitted
- (b) Exhibit 20, Statement of officer Jacobson, not admitted (later admitted upon consent of defendants' counsel)
- (c) Exhibit 21, Statement by John Douglas concerning the affair, not admitted
- (d) Exhibit 23, Booking sheet of the jail, not admitted
- (e) Exhibit 24, The alcohol analysis of the blood of the plaintiff, admitted

(f) Exhibit 25, An evidence report, no objection, admitted

(g) Exhibit 26, A report identifying Wendelboe's car, not admitted (R. 227-238).

The Chief of Police, over objection, testified there was a hot area in Salt Lake City in which there had been an unusual and increased crime activity, in fact, a crime wave, and that 5th East and 2nd South was within that area, and that the time of the increased crime would begin at 11:00 o'clock and extend to around 4:00 or 5:00 a.m. The Chief had given specific instructions to the captain to see that the area was carefully checked. There was no mention of any particular crimes being committed, or any on that evening (R. 396-404).

In regard to this hot area, officer Jacobson testified he had specific instructions from his captain to "put the heat on that area" (R. 438).

The Chief also testified that when an individual was behaving in an abnormal manner and seemed depressed, he had ordered that such people be placed in isolation and sufficient clothing removed for his own protection so that he would not commit suicide (R. 404-410).

On the court calendar of the Police Court for April 7, 1958, it appeared that plaintiff Wendelboe was charged with (a) vagrancy, (b) drunk, (c) assault, (d) battery, (e) resisting an officer. On that day, there were no formal complaints prepared on any of the charges except the drunk charge. Officer Hunsaker signed the drunk charge. It was the practice, and is still the practice, that when a person's name appears on an arrest report and the arresting officer is not present, that Mr. Hunsaker sign the complaint (R. 452-453). Plaintiff Wendelboe

was required to and did appear and pled not guilty to those various charges. He was represented by attorney E. J. Skeen (R. 241).

Had Wendelboe pled guilty, he would have been sentenced then and there without a formal complaint. It was the custom and practice at the Police Court that a formal complaint issued only when a plea of not guilty was entered (R. 452).

On the 9th day of April, 1958, defendant Jacobson swore to a complaint (Exhibit 30) charging Mr. Wendelboe with battery, and another complaint (Exhibit 31) charging Mr. Wendelboe with the crime of assault. Demurrers were filed to these charges and they were dismissed.

On the 13th day of June, 1958, the defendant Jacobson swore to a complaint, Exhibit 32, prepared by City Prosecutor Melvin Morris charging Mr. Wendelboe with resisting an officer while in the discharge of his official duties, charging (a) Place: Approximately 210 South Fifth East, and (b) Physical force and resistance to arrest of and by officer Jacobson. A demurrer to this complaint was filed. An amended complaint was prepared by different City Attorneys, Mr. Hale and Mr. Lowry, on June 15, 1958, and was sworn to by defendant Jacobson. This complaint charged that Mr. Wendelboe delayed, obstructed and resisted Richard B. Jacobson, who was then and there endeavoring to make an arrest of Mr. Wendelboe. Mr. Wendelboe demurred to this amended complaint on the grounds that the complaint failed to allege the specific duty being discharged to which resistance was offered and, further, that the complaint failed to allege for what crime or

violation of city ordinance officer Jacobson was arresting Mr. Wendelboe. Thereupon, City Attorneys Hale and Lowry prepared another amended complaint which was sworn to by officer Jacobson and filed on July 15, 1958. This complaint alleged that Mr. Wendelboe willfully, knowingly and unlawfully delayed, obstructed and resisted Richard B. Jacobson, who had reasonable cause to believe that Wendelboe had committed a felony, namely, that he had stolen an automobile, and that while officer Jacobson was engaged in the act of attempting to arrest him he, Wendelboe, struck and resisted him. Wendelboe was tried on this second amended complaint on the 7th and 8th days of August, 1958, and after the City had rested its case, the Court dismissed the action because of lack of evidence.

This disposed of all the charges brought by defendants against Mr. Wendelboe on account of the incident of April 6, 1958.

The arrest sheet (proposed Exhibit 23) and supplementary report of officer Jacobson (proposed Exhibit 19) made no mention of a stolen car. It was only in his report to Assistant Chief L. R. Greeson (Exhibit 20) that there was any mention of any suspicion that the car Wendelboe was in was stolen. As to that, the last paragraph in Exhibit 20 states:

"It was our feeling that Wendelboe was parked there for either a lookout, or since the keys were not in the car, we felt it may have been stolen. On the ground near the car we found a pocket novel with a rather lurid cover. We felt that perhaps he was indulging in self abuse prior to our approach. At the Hospital, he said he was stopped to buy a paper, but since

he was parked about 50 feet from a paper rack, and could have been parked 5 feet away, this sounded a bit thin." (R. 303).

The court refused on several occasions to admit Exhibit 20, but as to the contents quoted above, Mr. Jacobson admitted he had put that in the report (R. 303-304).

Defendant Lang testified that he didn't suspect that Wendelboe was masturbating in the car and he had no reason to believe he was (R. 390).

The pocket novel with the lurid cover which Jacobson said was on the ground near the car (referred to by Mr. Jacobson in his report) for some reason or other was not produced by the defendants.

Melvin H. Morris, city attorney, testified for the defense in regard to filing the complaints against Wendelboe. Mr. Morris was admitted to the Bar in October, 1956. He did other work until June, 1957. He became City Prosecutor on March 24, 1958, and he actually assumed the duties of the office on the morning of April 7th. That was the day the case broke.

Mr. Morris testified that he would have given the battery complaint, first, because Wendelboe forced the door violently against Lang, and second, because he shoved Lang aside.

He testified that Mr. Jacobson informed him that he arrested Mr. Wendelboe for failure to disclose his connection with the automobile or failure to produce the registration. Mr. Jacobson told attorney Morris that Wendelboe *refused* to give him the registration (R. 448-451).

The total time that defendant Jacobson spent with him was fifteen minutes on the early morning, between 8:00 and 9:30 a.m., of April 7th (R. 451).

Mr. Morris had nothing to do with the preparation of the last two amended complaints and advising the defendants or Mr. Jacobson to sign these complaints charging Mr. Wendelboe with resisting an officer. These two complaints were prepared by Mr. Hale and Mr. Lowry, and neither was called as a witness. Mr. Hale and Mr. Lowry prosecuted this case in the City Court.

The newspaper clippings, Exhibit 18, were introduced for the one purpose of showing the publicity or notoriety given to this affair.

On February 4, 1959, there was a hearing on the attorney's fees to be awarded the defendants.

Mr. Jones testified he spent 12 hours with the defendants Jacobson, Lang and Douglas in the week prior to the trial, and 3 hours at the time of service of the complaint. That made 15 hours spent interviewing the three defendants in this case. He testified he spent 4 hours with the Chief and other people. With Judge Barker, he spent 2 hours interviewing him as a possible witness; with Mr. Hale, former City Attorney, 1 hour; with Mr. Melvin Morris, 4 hours, or a total of 26 hours. He claimed there was much that he didn't keep track of.

The pretrial he claimed was worth \$75.00, his research in connection with Instruction No. 17 was 24-plus hours, 45 hours he spent in researching, or a total of 71 hours. He testified that the trial consumed Thursday, Friday, Saturday and

Monday, four days, and that he spent all day Sunday preparing his final draft of instructions and in going over evidence with the reporter until 8:00 or 9:00 o'clock that night, and he spent \$130.00 with the reporter for a transcript.

Mr. Jones figured his time for research at \$25.00 an hour, but the figure suggested to the court is based on \$20.00 an hour. One of the attorneys for the plaintiff suggested that Mr. Jones' charges were outrageous.

Instruction No. 17, according to Mr. Jones, was a "\$600.00 instruction," 24-plus hours at \$25.00 per hour.

The Court allowed \$1250.00 attorney fees and judgment for that amount was given the defendants against the plaintiff.

POINT I

THE VERDICT OF THE JURY IN THE FALSE ARREST AND IMPRISONMENT COUNT WAS CONTRARY TO LAW AND THE EVIDENCE, AND THE COURT ERRED IN FAILING TO GRANT PLAINTIFF'S REQUESTED INSTRUCTION NO. 6 TO INSTRUCT THE JURY TO FIND THE ISSUES AS A MATTER OF LAW IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS.

There is little dispute as to the actual facts concerning the "false arrest and imprisonment" count. The plaintiff Wendelboe was parked at a well-lighted intersection at about 3:15 a.m. The defendants, officers Jacobson and Lang and trainee Douglas, were checking the neighborhood, and using Jacobson's words, were instructing defendant Douglas how to "put the heat on." They pulled up five feet east of the

Wendelboe car, and like well-trained members of a gestapo unit, jumped out. One officer covered the front and defendant Douglas stood by with his tear gas gun ready for action. Defendant Jacobson then abruptly demanded from Wendelboe identification. Mr. Wendelboe at that time was not resentful and was willing to comply (R. 206). He opened his wallet and started to obtain the identification and was ordered out of his car. Outside the car he produced his driver's license containing his name and address. There was nothing about this 1950 Chevrolet of Wendelboe's to indicate that it had been stolen. There was nothing to indicate that Mr. Wendelboe was violating any law whatsoever. While Mr. Wendelboe was sitting in his car, he was not committing or attempting to commit any public offense.

Section 77-13-3, Utah Code Annotated 1953, sets forth the five occasions when a police officer may arrest a person without a warrant (R. 73). Notwithstanding, Mr. Wendelboe was forced to put his hands on the top of the police car and was searched and some of his belongings were taken from his pocket.

The defendants, in their reports and in their testimony, gave various reasons why the plaintiff was arrested and imprisoned. The first report concerning this incident was Exhibit 23, the booking sheet, which the defendants admit was dictated by the defendant officers to the jailor:

"This man was arrested at 3:00 A.M. for being drunk and sitting in a car. He was taken out of his car and placed in the police car and suddenly broke out of the police car and started to fight. SEE COMPLAINT REPORT FOR FULL DETAILS . . . AT TIME OF

BOOKING THIS MAN REFUSED TO GIVE ANY INFORMATION AT ALL . . . ”

This was the time when he was charged with assault and battery, drunk, vagrancy, and resisting. There was no evidence that Mr. Wendelboe was drunk or even had been drinking. There is no evidence that Mr. Wendelboe suddenly broke out of the police car and started to fight. This report did not mention that he had refused information about himself or his car prior to the arrest. The only mention of Wendelboe's failure to *co-operate* are the last words:

“At the time of booking, this man refused to give any information at all.”

Of course, at that time Mr. Wendelboe had been severely beaten, choked, handcuffed, and was in a state of shock and despair.

There were no grounds for arresting Mr. Wendelboe for vagrancy. The vagrancy booking was so ridiculous that even the defendants did not pursue this charge by asking for a complaint.

Mr. Wendelboe was illegally detained, ordered out of his car and illegally searched, then he was ordered into the police car. While Mr. Wendelboe was sitting in the rear of the police car, he saw the defendant officers search his car. He heard them talk about getting a wrecker to impound his car. Mr. Wendelboe knew that his rights were being violated and he also knew that he couldn't afford to pay someone for towing and impounding his car, so he endeavored to get out of the car. He attempted to open the police car door and defendant Lang was holding it shut. Mr. Wendelboe wanted to get over to

his car; he wanted to talk to the officers and try and convince them not to impound his car. Contrary to the reports of the officers, he didn't break out of the police car and start to fight. The evidence is uncontradicted that defendant Jacobson said, "Let him out if he wants out that badly," and when he got out he received an unmerciful beating and was rendered unconscious.

Mr. Wendelboe was restrained of his liberty and imprisoned from the time he was ordered out of his automobile and searched. This detention and imprisonment continued. He was taken to the County Hospital with his arms handcuffed behind him, manhandled and dumped on the ground. He was taken into the hospital, humiliated, and subjected to the taking of a blood test. He was again handcuffed, taken to the city jail and booked as JOHN DOE under obviously false charges. Then he was carried to a dungeon and his clothes were stripped from him and he remained there practically naked for five or six hours until he was able to get a professional bondsman to bail him out for a premium of \$30.00.

Hepworth v. Covey Brothers Amusement Co., Supreme Court of Utah, June 22, 1939, 97 Utah 205, 91 P(2d) 507:

"False arrest may be committed only by one who has legal authority to arrest or who has pretended legal authority to arrest. False imprisonment may be committed by anyone who imprisons without legal right . . . false arrest is merely one means of committing a false imprisonment. False imprisonment may be committed without any thought of attempting an arrest."

The above case defines false imprisonment.

Plaintiff Wendelboe was not committing or attempting to commit a public offense when he was accosted while sitting in his automobile and, therefore, the arrest and retention was illegal.

Oleson v. Pincock, 68 Utah 507, 251 Pac. 23:

“Officer cannot legally make arrest without warrant or good cause in misdemeanor cases unless offense is committed or attempted in his presence.”

Justice Frick in the above case also says:

“The right to liberty is too sacred to permit an officer, or any one else, for that matter, to interfere with it without authority of law.”

State v. Anselmo, 46 Utah 137, 148 Pac. 1071, is our leading case on the right of an officer to arrest a person suspected of having committed a felony. This case also holds:

“The decisions of the courts are practically unanimous that whether an officer was authorized to make an arrest, or whether the arrest was lawful or unlawful, when the facts are not in dispute, is a question of law for the court.”

Therefore, in this case the lower Court should have instructed the jury to find for the plaintiff Wendelboe on account of false imprisonment as a matter of law.

Another case, Roe v. Lundstrom, 89 Utah 530, 57 P(2d) 1128:

“Peace officers no longer stand as the symbol and embodiment of the law, except in film, fiction, and the lands of traffic. Except in emergencies where a prohibited offense or breach of the peace is committed or threatened, a police officer is protected only when

armed with a warrant. In this case there was neither a warrant nor an arrest. The power conferred upon police officers to 'preserve the public peace, prevent crime, detect and arrest offenders,' etc. (R. S. Utah 1933, 15-6-66), was not regularly pursued. It is impossible to escape the conclusion that officer Smith was guilty of a trespass."

The above case is germane to this case in that it deals with cotrespassers:

"All persons who command, instigate, encourage, advise, countenance, co-operate in, aid or abet the commission of a trespass by another are cotrespassers with the person committing trespass and are each liable as principals to the same extent and in the same manner as if they had performed the wrongful act themselves. . . The law is well settled that those who aid in the commission of a wrongful act by another are liable for the resulting damages, although they expected no benefits from the wrongful act and, in fact, received none."

In the case of *Allen v. State*, Wisconsin Supreme Court, March 11, 1924, 197 N.W. 808, 39 A.L.R. 782, the Court quotes with approval the following:

"Concerning this arrest the court said: 'That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor, and his person searched by force, without a warrant or arrest.'"

The Court also quoted with approval from the *Beam* case, 104 S.C. 146, 88 S.E. 441, as follows:

"Common as the event may be, it is a serious thing

to arrest a citizen, and it is a more serious thing to search his person; and he who accomplishes it must do so in conformity to the laws of the land. There are two reasonse for this: One to avoid bloodshed, and the other to preserve the liberty of the citizen. Obedience to law is the bond of society, and the officers set to enforce the law are not exempt from its mandates."

See *People v. Stein*, Supreme Court of Michigan, 251 N.W. 788, 92 A.L.R. 481. The Court said:

"The law is so jealous of the sanctity of the person that the slightest touching of another, or of his clothes, or cane or anything else attached to his person, if done in a rude, insolent, or angry manner constitutes a battery for which the law affords redress. 2 Bishop New Crim. Law, Sec. 72. An officer, therefore, who would justify laying hands on a person for the purpose of making an arrest must come protected by the shield provided by law.

"A felony is so serious a violation of law that an officer may without a warrant, arrest one on reasonable suspicion of his having committed a felony even though no felony had been committed, if he had reasonable grounds for his belief. Beale Crim. Pl. & Pr Sec. 20. Not so, however, of a past misdemeanor (Must show warrant etc.)."

Case goes on to say on page 58:

"Public officers duly equipped with the authority of the law represent the majesty of the law, and to them when so equipped, every good and true citizen should yield prompt and willing obedience, and they should be afforded the fullest protection in the discharge of their duties. But nothing can so militate against the effective administration of justice and the proper regard for law as unlawful and reckless conduct

on the part of officers who are charged with its enforcement." (113 S.E. 893).

The second report (Exhibit 19) contains the first mention that the car might have been stolen. In that report officer Jacobson also stated that they felt that Mr. Wendelboe might have been masturbating:

"It was our feeling that Wendelboe was parked there for either a lookout, or since the keys were not in the car, we felt it may have been stolen. On the ground near the car we found a pocket novel with a rather lurid cover. We felt that perhaps he was indulging in self abuse prior to our approach. At the Hospital, he said he was stopped to buy a paper, but since he was parked about 50 feet from a paper rack, and could have been parked 5 feet away, this sounded a bit thin."

The testimony of the officers and Mr. Wendelboe conclusively demonstrate that the defendants were putting the heat on a person who did not *co-operate* as they felt he should. As one of the officers said, "*co-operate* meant to answer questions not imperiously." According to Webster "*imperious*" means arrogant and overbearing.

After the charges of drunk, assault, and battery against the plaintiff Wendelboe were dismissed, the defendants filed a catch-all complaint of resisting an officer. When they were required to state what crime Wendelboe was committing, they elected to rely on the fact that Mr. Wendelboe was being arrested under suspicion of grand larceny because of stealing an automobile. That case was tried and dismissed and this civil case started. Then the idea occurred to them to create some facts to justify a charge that Mr. Wendelboe was im-

prisoned and arrested for delaying, obstructing, and resisting a police officer in the performance of his duty.

This creates a strange paradox. There was insufficient grounds to arrest Mr. Wendelboe for a felony. He was not committing any misdemeanor in their presence. He was violating no law whatsoever. Therefore, what excuse could be given to justify the arrest? The answer appears in this case. They would claim they were investigating him to see if he might have committed a misdemeanor, and if his answers didn't come fast or quick enough and with the proper awe and respect, they would be justified in arresting him, manhandling him, beating him, and stripping him naked and depriving him of his liberty.

The lower Court also adopted this theory, see Instructions 7 and 17. These two instructions will be discussed in other points.

Such a theory makes mockery of the entire Bill of Rights. Such a theory permits the police officer to step around every safeguard and protection that a citizen possesses. Such a theory creates a police state. If such should be the law, let the Legislature so declare it.

The lower Court erred in not instructing the jury to find the issues as a matter of law for the plaintiff on this false imprisonment count.

POINT II

THE COURT ERRED IN GIVING THE JURY INSTRUCTION NO. 7.

INSTRUCTION NO. 7

You are instructed that any person who drives or is in control of an automobile upon the streets of Salt Lake City, Utah, must at all times carry in the vehicle or upon his person a valid registration certificate of that automobile and the law requires that he display and show registration certificate to a police officer upon demand.

If you believe from a preponderance of the evidence in this case that Officer Jacobson at the time and place complained of by the plaintiff, demanded such registration certificate from the plaintiff and that said plaintiff failed or refused to thereupon display the registration certificate to Officer Jacobson, then you are instructed that at that moment plaintiff Stratford L. Wendelboe committed a public offense for which Officer Jacobson and these defendants had the right and the authority to take him into custody and place him under arrest.

This instruction is contrary to law.

State v. Sandman, 4 Utah (2d) 69, 286 P(2d) 1016, does not aid the defendants. In that case the defendant refused an inspection and attempted to dispose of evidence. In this case Mr. Wendelboe was endeavoring to comply with all the demands of the defendants. He was arrested and deprived of his liberty even before he could comply. The Sandman case holds there must be some affirmative interference. To merely cause an officer some inconvenience or annoyance, if not substantial, is not sufficient under the law on which to predicate a charge such as interfering with an officer. Something that is merely trivial will not be regarded by the law as interfering. The evidence in this case is uncontradicted that Mr. Wendelboe

did not either fail or refuse to display his registration certificate. Before Mr. Wendelboe could get his certificate he was taken from his car, illegally searched, and put in the back of the police car. If it hadn't been the defendants' desire to punish him, he would have had time to and he would have produced his registration certificate which was in his wallet and a score of other cards to satisfy even the most exacting officer.

Section 41-1-40, U.C.A. 1953, provides:

"... Every such registration card shall at all times be carried in the vehicle to which it refers or shall be carried by the person driving or in control of such vehicle who shall display the same upon demand of a police officer or any officer or employee of the department."

41-2-15, Sec. (b), provides as follows:

"The licensee shall have such license in his immediate possession at all times when driving a motor vehicle and shall display the same upon demand of a justice of peace, a peace officer or a field deputy or inspector of the department. It shall be a defense to any charge under this subsection that the person so charged produce in court an operator's or chauffeur's license theretofore issued to such person and valid at the time of his arrest."

The city ordinances follow the state law.

The following acts are prohibited and the commission thereof is hereby declared to be a misdemeanor, Section 41-1-142, subsection (f):

"To operate upon any public highway of this state any vehicle required by law to be registered without having the registration plate or plates securely at-

tached thereto, and registration card issued by the department to denote registration thereof securely attached thereto . . . ”

Reading 41-1-140 in connection with 41-1-142, there appears to be an inconsistency. The former, 41-1-140, says the registration shall be carried in the vehicle or by the person driving the car. The penalty provides that the registration shall be securely attached. There does not appear to be a penalty for failure to display. See *State of Ohio vs. Elon Farren*, Supreme Court 1942, 45 N.E. (2d) 413, 143 A.L.R. 1016, and annotation on page 1019.

We approach the proposition of officers asking to see a driver's license or registration card as a subterfuge for searching the car of a driver to find if he is guilty of some other crime. This has been annotated in 154 A.L.R. 809-814. The case of *Cox v. State*, Supreme Court of Tennessee 1944, 181 S.W. (2d) 338, 154 A.L.R. 809, and the annotation, holds that a statute similar to ours certainly did not contemplate conveying authority upon the officers enabling them to circumvent the constitutional provision against searches of the person and property of a citizen without a valid search warrant, and if the conviction should be sustained every highway patrolman in the state would at once construe it to mean that he had full authority to search an automobile anywhere and at any time without a search warrant. Such a holding would abrogate the constitutional inhibition against unlawful searches and seizures. In order for a search to be lawful it should be made to appear that the examination is made in good faith and not as a mere blind or excuse for a failure to procure a valid search warrant.

This Instruction No. 7 states that at the moment Mr. Wendelboe *failed* or refused to display the registration certificate he committed a public offense. The Court did not define what public offense he was committing. Was it failure to display or was it operating an automobile without a registration certificate on his person or attached to the automobile?

The Court also goes on to say that officer Jacobson and the defendants, when Wendelboe *failed* to display the registration, had the right and authority to take him into custody and place him under arrest. The Court overlooked the fact that he was already under arrest. According to officer Jacobson, it was after Mr. Wendelboe had been ordered from his car, illegally searched, and placed in the police car that he asked for the registration or, as officer Jacobson put it, "something to connect Mr. Wendelboe with the car."

This instruction is not only contrary to law but it is argumentative, confusing, and tends to comment on the evidence and it constituted prejudicial error.

POINT III

THE COURT ERRED IN GIVING INSTRUCTION NO. 17.

INSTRUCTION NO. 17

The defendants in this case at the time and place complained of by the plaintiff had the power and authority and the positive and absolute duty to investigate any circumstances or situation whatsoever which would reasonably suggest to them a reasonable possibility that a public offense of any kind was being com-

mitted or because of the circumstances was about to be committed at that time and place.

If these defendants had a reasonable suspicion upon any reasonable grounds whatever that the plaintiff, sitting and parked in the automobile in question in the manner and at the place as appears from the evidence at approximately 3:15 a.m. on the morning of April 6, 1958, might be committing any public offense whatever, or that he might be about to commit any public offense whatever, then these defendants had the power and the authority and the absolute duty to approach the plaintiff and ask him what he was doing at that time and place because police officers and these defendants not only have the duty to arrest persons who are actually committing a public offense of any kind whatever but they have the positive duty to detect, uncover, reveal, or discover the existence or presence of any fact which might show that a public offense of any kind was being committed or was about to be committed. They have a positive duty to prevent crime before it occurs, to investigate reasonably suspicious or unusual circumstances, and no person has any right whatsoever to resist, interfere with, obstruct or delay a police officer in the exercise of this duty even if such person is himself the one being investigated in circumstances which reasonably appear to be unusual or suspicious, and such person if he wilfully does or says anything which resists, interferes with, delays or obstructs a police officer in the legal exercise of his duties, then such person at that moment by such statement or conduct itself is guilty of a crime and public offense.

This instruction, first, is contrary to law. Second, it really isn't an instruction but an argument to convince the jury to bring in a verdict for the defendants. The words "absolute" and "positive" are used on several occasions and these would

only unduly influence the jury. These words have no place in instructions. This instruction does not state the law and is in direct contradiction to previous instructions of the Court.

In Instruction No. 9, the Court told the jury what the law of arrest is in the State of Utah and quoted from Sec. 77-13-3, U.C.A. 1953, and also defined an arrest by quoting Sec. 77-13-2, U.C.A. 1953. In Instruction No. 10, the Court instructed the jury correctly as to the defendants' rights on arresting for a felony. Instructions No. 9 and 10 are inconsistent with and contradictory to this Instruction No. 17.

We adopt the argument in our preceding point concerning Instruction No. 7 in regard to this Instruction No. 17. Utah has not seen fit by legislative enactment to change the law of arrest. David Fellman, in his book "The Defendant's Rights," page 15, says:

"Reform of the Law of Arrest. A committee appointed by the Interstate Commission on Crime prepared a Uniform Arrest Act in 1939 which proposes several drastic changes in the prevailing law of arrest. (Virginia Law Review, Vol. 28, pages 315-347, for the text of the Act and an authoritative analysis of its provisions. To date only three states have adopted it. The most important and widely debated provision (Sec. 2) would authorize the police to stop and question anyone acting in a suspicious manner in a public place, and detain him for a total period not exceeding two hours. This detention is not an arrest, and is not recorded as one. At the end of the detention the person so detained must be released or arrested and charged with a crime. At the present time arrest on suspicion in order to investigate is not legal, although it is a common occurrence. The Uniform Act also allows

arrest (Sec. 6(1)(B)) for a misdemeanor not committed in the presence of the officer if he believes the offender will not be apprehended unless arrested immediately. Finally, the Uniform Act provides (Sec. 6(2)(B)) that an arrest is lawful, even if originally it was not, if something turns up after arrest which establishes that a felony has been committed."

Mr. Fellman, in discussing the Uniform Act, states:

"Policemen have no power to detain people merely on suspicion. While they may search the person after arrest for weapons and evidence of the crime, they have no authority to 'frisk' people without first arresting them. The Uniform Act would legalize frisking of persons detained but not arrested, if the peace officer has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon."

Thus, we see that even if Instruction No. 17 were properly written and the argument and comments and persuasion left out, it would not be proper even under this new law of arrest which only three states have adopted. It is an instruction that could conceivably be the orders to a gestapo unit in a police state. This instruction practically told the jurors that if these police officers hadn't arrested and imprisoned Mr. Wendelboe, they would have been derelict in their duty. Not content with saying that they should arrest upon suspicion, the instruction says that if anything appeared to be unusual they should investigate him and then if he did or *said anything* which resisted, interfered with, delayed, or obstructed them, that person at that time was committing a crime.

This instruction is everything contrary to our Bill of Rights. If this instruction were the law, it would give absolute power to the police officer and make this a police state.

If this instruction were the law, it might make for more police efficiency but it is possible to pay too high a price for efficiency. There can be no doubt that without the restraint which the law insists upon, the police could catch and prosecutors could convict far more lawbreakers than they do now, but deterring criminals is not the only objective of our penal system. There are other equally important objectives such as maintaining a decent respect for man's dignity and preserving an atmosphere of freedom. Many people have expressed their disagreement with the notion that the best penal system is the one that produces convictions and sentences in 100 per cent of the cases of crime. Louis B. Swartz, in 107 *Pennsylvania Law Review*, p. 157, says:

"The paradoxical fact is that arrest, conviction, and punishment of every criminal would be a catastrophe. Hardly one of us would escape, for we have all at one time or another committed acts that the law regards as serious offenses. Kinsey has tabulated our extensive sexual misdeeds. The Bureau of Internal Revenue is the great archive of our false swearing and cheating. The highway death toll statistics inadequately record our predilection for manslaughter. 100% law enforcement would not leave enough people at large to build and man the prisons in which the rest of us would reside."

Joseph O'Meara, *Notre Dame Law*, Vol. 31, pp. 3 to 13, says:

"The simple truth is that you have to be for the Bill of Rights or not; you can't be for the Bill of Rights for yourself and your friends; it's all or nothing. A breach in the dyke imperils the whole countryside, not just the area adjacent to the break. There is only one

protection against the flood and that is to contain it entirely."

This Instruction No. 17 shows what the trend is even among the Judiciary. This Court should summarily say: "We will have none of this. The Constitution and the Bill of Rights are still the law in the State of Utah."

Thus, we say this instruction is (a) contrary to law, (b) inconsistent and totally opposed to Instructions No. 9 and No. 10, (c) it is argumentative, (d) it uses undue emphasis, and (e) it amounts to comments on the evidence by the court.

Is it any wonder that the jury after arguing one-half day, going home and coming back the next and arguing for another half-day, finally in confusion brought in a verdict of no cause of action against this plaintiff on all counts?

POINT IV

THE JURY'S VERDICT IN THE CAUSE OF ACTION FOR ASSAULT AND BATTERY WAS CONTRARY TO THE EVIDENCE AND THE LAW. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY AS REQUESTED BY THE PLAINTIFF, REQUEST NO. 1, TO FIND FOR THE PLAINTIFF AND AGAINST THE DEFENDANTS. THE COURT ALSO ERRED IN GIVING ITS INSTRUCTION NO. 8.

The plaintiff in this case was ordered out of his car by the defendants and he was immediately taken to the police car, his hands were put on the top of the police car and he was

illegally searched. This, of course, amounted to an assault and battery. However, the bruel battery came later.

He was placed in the police car. This police car was parked five feet from his car. Mr. Wendelboe, when he heard the officers talking about impounding his car, attempted to get out of the police car and officer Jacobson told Mr. Lang, who was keeping him in the car, to let him out. He came out of the car at the invitation of defendants, and immediately he was "clipped" on the chin by officer Jacobson. Officer Lang beat him over the head with a flashlight. Defendant Douglas was standing by with a tear gas gun waiting to spray Mr. Wendelboe if the opportunity presented itself so that his brother officers would not suffer from it. He was aiding, abetting, and assisting the other officers. Mr. Wendelboe, as appears from the evidence, was unmercifully beaten. He was choked into unconsciousness, and his arms were handcuffed behind him and he was left sitting or lying on the ground. Later he was carried to the police car, taken to the County Hospital, taken back to jail, and finally carried down to a dungeon where the defendants stripped him of his clothes and locked him in a bare cell, naked.

We need no authority to say that under the law those facts constitute assault and battery. The arrest and detention were illegal. Assuming for the sake of argument (not admitting the fact at all) that the defendants had legally detained Mr. Wendelboe, they had no right to invite him out of the police car and as he started for his car, to beat him into unconsciousness, break his nose and cause him the other indignities. Later, the officers claimed that when Mr. Wendelboe was beaten,

they had an idea he might be escaping or, as one officer said, "they had to put him back in the police car." Their excuses sound pretty thin. It smacks too much of the TV westerns where the bounty hunter or sheriff allowed his prisoner to get a few feet away then shot him, using the excuse that the prisoner was attempting an escape.

In "Our Lawless Police" by Ernest Jerome Hopkins, Viking, 1931, Mr. Hopkins' important and valuable volume concludes rather pessimistically that:

"The policeman has usurped in amazing degree, the power to punish; and that without the formality even of arrest. Embedded in our national mores is the subversive idea that because a man wears the star of authority, he thereby enjoys some sort of general disciplinary control over the population. It is an old, and a peculiarly American, fallacy; on duty or not, the citizen in uniform has no power to punish other citizens; for him to do so is as definitely 'against the law' as it is for you to punish your neighbor. Only the courts of law may punish, and their right is definitely restricted. Our government itself may not use fist, club, blackjack, or revolver as penalties for even the worst of crimes. Our constables, agents of government, long ago arrogated to themselves this extraordinary privilege, and our public today hardly realizes what it implies. It is an invasion of the most fundamental right that can be granted by any government to its people: The right of personal or bodily safety."

Two of these officers were instructing a neophyte, defendant Douglas, how to handle a person that did not show them the proper awe and respect. Read the reports of these officers in the exhibits. They were angry because Wendelboe didn't *co-operate*. Failure to *co-operate* appears to be the excuse

of every gestapo to wreck vengeance on their victim. To have blackjacked Wendelboe while he was sitting in the police car would have been too obvious, so defendant Jacobson invited him out of the police car and Mr. Wendelboe was severely beaten, and the excuse now attempted to be advanced by the defendants is that Mr. Wendelboe was endeavoring to escape.

INSTRUCTION NO. 8

Police officers have the right and the authority, when legally making an arrest, to use force if necessary to prevent a person from escaping or attempting to escape or remove himself from custody.

If the amount of force and restraint used, in your opinion, appeared necessary to these defendants under the circumstances which existed at the time and place, as shown by the evidence in this case, and if you further believe that these defendants had reasonable grounds for the belief that they were using only the degree of force necessary to retain the plaintiff in custody and prevent his escape or his resistance to being retained in custody while making a legal arrest, if such you find to be the fact, then you are instructed that the plaintiff is not entitled to recover anything by way of damages for injuries, if any, to his person incurred at that time and place.

You are instructed that one may resist an unlawful attempt to arrest him, and in doing that may use such force as is necessary to prevent the arrest.

The entire instruction has no place in this case.

(a) There was no evidence that there had been a legal arrest, and the Court should have so instructed (see Point I).

(b) There was no evidence in this case that there was an escape or an attempt to escape.

(c) The Court's wording tended to impress the jury into believing that in the court's opinion Mr. Wendelboe, when he received his terrific beating, was either attempting to escape or escaping from a legal detention.

(d) In the second paragraph, besides being erroneous for the above reasons, it also tended to give the jury the idea that whatever the defendants believed was reasonable force was proper, rather than what a reasonably prudent officer would believe was proper under the circumstances.

(e) The second paragraph gave the jury the impression that in the Court's opinion there had been a legal arrest and that there was an actual attempted escape.

Instruction No. 8 was unsupported by the evidence, contrary to the law, confusing and, of course, prejudicial.

POINT V

THE VERDICT OF THE JURY IN REGARD TO THE MALICIOUS PROSECUTION CAUSE OF ACTION WAS CONTRARY TO LAW AND CONTRARY TO THE EVIDENCE, AND THE COURT ERRED IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 23 FOR A DIRECTED VERDICT IN FAVOR OF THE PLAINTIFF, AND THE COURT ERRED IN GIVING INSTRUCTION NOS. 18, 19, AND 21.

The defendants caused the following charges against Mr. Wendelboe to appear on the Police Court calendar for April 7, 1958:

- (a) vagrancy
- (b) drunk
- (c) assault
- (d) battery
- (e) resisting an officer

The only formal complaint was the drunk charge filed by officer Hunsaker for the defendants. It was the custom that Mr. Hunsaker would sign complaints when the arresting officer was not present in court to sign for himself.

Mr. Wendelboe was present in court and pled not guilty. Had he pled guilty, he would have been sentenced on each charge then and there. On the 9th day of April, 1958, officer Jacobson swore to two complaints (Exhibits 30 and 31) charging Mr. Wendelboe with assault and battery. Demurrers were filed to the charges and those, along with the drunk charge, were dismissed. On the 13th day of June, 1958, defendant Jacobson swore to a complaint (Exhibit 32) prepared by City Prosecutor, Mr. Morris, charging Wendelboe with resisting an officer. At this point Mr. Morris' connection with the case ceased. A demurrer was filed to this complaint and an amended complaint was prepared by City Attorneys, Mr. Hale and Mr. Lowry, on June 15th. Another demurrer, and finally on July 15th another amended complaint sworn to by officer Jacobson was filed. This complaint alleged Mr. Wendelboe obstructed and resisted officer Jacobson, who had reasonable cause to believe that Wendelboe had committed a felony, to wit, stealing an automobile, and while officer Jacobson was engaged in the act of attempting to arrest him, he, Wendelboe, struck and resisted him.

There are three elements necessary to be proven in malicious prosecution:

- (1) Proceedings complained of were without probable cause
- (2) Proceeding was malicious
- (3) The proceeding was finally terminated in favor of the plaintiff

Kennedy v. Burbidge, 54 Utah 497, 183 Pac. 325;
Singh v. Macdonald, 55 Utah 541, 188 Pac. 631.

All the criminal proceedings caused to be instituted against the plaintiff, Mr. Wendelboe, were terminated in his favor. This is not disputed.

When the facts are not in dispute, probable cause for malicious prosecution is a question for the court alone. Where the facts are in conflict, it is for the jury to determine the true state of facts. Straka v. Voyles, 69 Utah 123, 252 Pac. 677; Wisniski v. Ong, Supreme Court of Arizona, 1958, 329 P(2d) 1097; Hyciuk v. Robinson, Supreme Court of Oregon, June 4, 1958, 326 P(2d) 426; A.L.I. Restatement Torts, Sec. 666.

There was no conflict in this case on the probable cause question. The Court should have instructed the jury that no probable cause existed. Instead of that, in Instruction No. 19, the Court in the completely erroneous instruction, says:

"A person has probable cause for instituting criminal prosecution if such person reasonably believes that the party so charged committed the offense for which he was charged."

The court erroneously instructed the jury that it was what these defendants reasonably believed, rather than as said in

Drake v. Anderson, Supreme Court of Oregon, January, 1959,
334 P(2d) 477:

"In rule that want of proper cause is gist of malicious prosecution action, 'proper cause' comprehends existence of such facts and circumstances as will excite in a reasonable mind the honest belief that the person is guilty of the crime charged."

Clark v. Alloway, Supreme Court of Idaho, 1946, 170
P(2d) 425:

"It may be nearly accurate to say that probable cause consists of a belief in the charge or facts alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation. Boeger v. Langenberg, 97 Mo. 390, S.W. 223, 10 Am. St. Rep. 322.

" 'Probable cause as is applicable to this action is (the existence of such facts or circumstances as would excite the belief of a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.)' Luther v. First Bank of Troy, 64 Idaho 416, 420, 133 P(2d) 717, 719."

There was never an actual charge brought against Mr. Wendelboe for vagrancy. He was humiliated and, to a certain extent, disgraced by the charge being made a public record and appearing on the police court calendar for all to see.

The drunk charge was utterly without foundation. There was no evidence to sustain that charge. The defendants Lang and Douglas didn't think he was drunk yet they didn't object to him being booked as drunk. Defendant Jacobson said he wasn't sure, he couldn't smell; but nevertheless, he allowed

that booking of drunk to be made, knowing full well that a charge of drunk would be filed against Mr. Wendelboe the next morning.

The two cases of assault and battery were just a shot in the dark to begin with (see Exhibits 30 and 31). These charges were dismissed when a demurrer was filed demanding to know who was assaulted and who was battered and what means were used.

Then the resisting an officer charge was prepared by Mr. Morris and, later, the two amended complaints by Attorneys Hale and Lowry. All of these charges were terminated in favor of Mr. Wendelboe.

City Prosecutor Morris was called by the defendant officers to justify the issuance of the criminal complaints and thus prove there was probable cause. The 7th day of April, 1958, the day this case broke in court, was Mr. Morris' first day as a public prosecutor. He spent a total of fifteen minutes with the defendants. True, Mr. Morris attempted on the stand to justify every act of these defendants. This is not unusual for prosecutors. Mr. Morris' testimony revealed that the defendants failed to make a full and complete disclosure of all the facts to him. Mr. Morris said Mr. Jacobson told him that Mr. Wendelboe "busted" out of the car with force. If Mr. Jacobson told Mr. Morris that, it was false. Mr. Morris testified that Mr. Jacobson told him that Mr. Wendelboe *refused* to give him the registration. If defendant Jacobson told Mr. Morris that, it also was untrue. Mr. Morris testified that in his opinion Mr. Wendelboe committed an assault on officer Lang when Wendelboe endeavored to get out of the police car while Mr. Lang

was holding the door. Mr. Morris said in his opinion Mr. Wendelboe committed a battery on officer Lang as he brushed by him. It appears that the defendants didn't fully inform Mr. Morris of the facts or Mr. Morris would have known that Mr. Wendelboe had been illegally arrested, illegally searched, and illegally imprisoned in the police car.

Mr. Morris didn't attempt to justify the issuance of the drunk charge nor the first and second amended complaints to the resisting charge. The defense did not see fit to call in Mr. Hale and Mr. Lowry, the City Attorneys who handled the last two amended complaints, to justify the defendants' actions.

The Restatement Torts, *supra*, also states:

"It is for the jury to determine whether the client sought the advice of his attorney in good faith or whether the advice was sought to protect him from liability for initiated proceedings upon which he had already determined."

These officers didn't have time in fifteen minutes to fully state all the circumstances surrounding the false arrest of Mr. Wendelboe. From Mr. Morris' own testimony, it appears that the officers and Mr. Morris were looking for some excuse upon which they possibly might predicate a charge against Mr. Wendelboe.

In view of the fact that Prosecutor Morris endeavored to justify the issuance of the assault, battery, and the first resisting complaint, as to those charges there might have been a jury question as to probable cause under proper instructions. The "advice of counsel" defense was not available to the defendants

in the vagrancy and drunk charges, and that defense was not available to the defendants in the two amended complaints of the resisting charges which were prepared and handled by two different attorneys.

Sweatman v. Linton, 66 Utah 208, 241 Pac. 309

McKenzie v. Canning, 42 Utah 529, 131 Pac. 1172

Ure v. Eaton, 95 Utah 309, 80 P(2d) 925

Now we come to the question of malice. It was malicious in the first place, taking this man to jail and booking him on the five charges. The reports of the officers show that they intended to hurt and disgrace Mr. Wendelboe. The wisecracks made by Mr. Jacobson in his supplemental report (Exhibit 19) and spreading upon the police court records the fact that they thought Mr. Wendelboe might be masturbating in the car. The uncontradicted evidence of vicious beating at the hands of these three officers certainly indicates malice in the highest degree. The fact that this man was taken to the jail and stripped of his clothes and placed in a dungeon, naked, by these defendants would indicate the highest degree of malice on their part. Malice may be inferred from the circumstances of the case. Jensen v. Leonard et al., District Court of Appeals, California, 1947, 186 P(2d) 206.

To further confuse this issue of malicious prosecution, the court in Instruction No. 21 informed the jury that unless a defendant filed a formal charge against the plaintiff they could not be considered to have instituted the prosecution of the plaintiff. It is common knowledge that when more than one officer makes an arrest, only one of them signs the complaint. The complaint is not signed by each and every arresting

officer, in fact, many times it is not signed by any of the arresting officers.

The court, in Instruction No. 2 (R. 67), uses the words "that the defendants caused to be made and subscribed and sworn to," etc. Instruction No. 21 is not only contrary to law, but it is also directly in conflict with Instruction No. 2.

In Instruction No. 18, the court instructed the jury that if Mr. Wendelboe had committed any of the offenses, assault, battery, drunk, or resisting, that would be a complete defense to the plaintiff's third cause of action. This is not the law and this instruction is directly opposed to Instruction No. 2, paragraph 2, where the court said that if any of the proceedings complained of were without probable cause and were malicious and were terminated in favor of the plaintiff Wendelboe, he should recover.

The proceedings were terminated in favor of the plaintiff at a cost to plaintiff of \$640.50 (attorney fees, bail bond, and reporter fee), the proceedings were without probable cause, and they were malicious. The Court should have granted plaintiff's request for a directed verdict. The verdict of the jury was contrary to all of the evidence and to law, and the Court, by its Instructions No. 18, 19 and 20, misdirected the jury as above set forth and hopelessly confused the issues.

POINT VI

THE COURT ERRED IN ADMITTING TESTIMONY OF THE CHIEF OF POLICE THAT SECOND SOUTH AND FIFTH EAST WAS THE CENTER OF A STATISTICAL CRIME WAVE.

The Chief of Police, over objection, testified that Second South and Fifth East was the heart of a hot area in Salt Lake City in which there had been an unusual and increased crime activity, in fact, a crime wave, and that the time of the increased crime would begin at around 11:00 p.m. and extend to around 4:00 or 5:00 a.m. There was no evidence that there had been any particular crimes in that area on the nights of April 5th and 6th, 1958.

As Fellman says in "The Defendant's Rights":

"Not only are the basic rights of fair procedure guaranteed to all people, the bad as well as the good, but they are also assured to us in times of crisis as well as in times of tranquility. The plea of extraordinary conditions does not and should not be permitted to support an adjournment of our basic rights. In fact, the Constitution itself was written in an age of crisis, and was designed to serve the nation in days of crisis. Furthermore, in a very real sense the modern world seems to be in a constant state of crisis. In all probability western civilization, of which we are an inseparable part, has been in a state of crisis, more or less, since the beginning of the Industrial Revolution, and perhaps since the invention of printing. In view of the state of the modern world, if crisis were a good and sufficient excuse for an adjournment of our rights, then it would seem to follow that we would have no rights. This much Justice Davis made clear in his opinion in the celebrated case of *Ex parte Milligan*, 4 Wall (U.S.) 2 (1866), decided a year after the Civil War:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever

invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence . . . '

" . . . However tempting it may be in days of especially great tension to copy the totalitarian methods of our opponents, we must realize that this only subverts our own cherished design of the good life. As Mr. J. Edgar Hoover recently observed in *Iowa Law Review*, Vol. 37, pp. 175-195, 186 (1952): 'Free Government cannot be defended by dictatorial methods—in so doing the defender will devour the very thing to be defended. The protection of the individual is just as important as the safety of the state.' "

It is not the law, and never will be the law, let us hope, that the Chief of Police by proclamation can abrogate the Constitution and the Bill of Rights at certain boundaries during certain times. If we ever should come to this sorry situation, the Chief of Police should at least be required to inform the public of the proscribed or interdicted areas.

POINT VII

THE COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE THE BOOKING SHEET AT THE CITY JAIL (EXHIBIT 23), SUPPLEMENTAL REPORT OF DEFENDANT JACOBSON DATED 4-6-58 (EXHIBIT 19), AND THE STATEMENT OF DEFENDANT JOHN H. DOUGLAS (EXHIBIT 21).

The plaintiff called the Chief of Police of Salt Lake City who identified Exhibit 23, the booking sheet of the city jail, and he testified it was part of the records of the Department. He identified the supplemental report of officer Jacobson (Exhibit 19) as a record of the Department.

The Court refused to admit the booking sheet, found it to be secondary evidence and the plaintiff could call the defendantse who made the report under Rule 43 (R. 231). The same rule was made on Exhibits 19 and 21. In order to get the contents of these before the jury, it was necessary to call the various defendants as witnesses under Rule 43(B), which gave the defendants' counsel the right to cross examine his own witnesses and, to a large extent, put words and testimony in their mouths on his cross examination.

These exhibits were admissible for the purpose of showing that the defendants and each of them were vindictive and malicious toward this plaintiff.

The court's refusal to admit these reports in evidence not only caused great delay and confusion, but was prejudicial to this plaintiff. Jones on Evidence, 5th Ed., Vol. 3, Sec. 549.

POINT VIII

THE COURT'S CONDUCT WAS PREJUDICIAL TO THE PLAINTIFF.

We will not take the space to set out everything the court said in every instance, but will refer to the instances by record page.

From almost the very beginning of the testimony of the plaintiff, without objection or suggestion of defense counsel, the Court took it upon itself to discipline and reprimand the plaintiff.

R. 123, R. 126, R. 127, R. 128, R. 129, R. 134, R. 135, R. 138, R. 143, R. 146, R. 147, R. 150-151, R. 152, R. 169-170, R. 202, R. 210.

The Court finally informed Mr. Wendelboe that he was going to take care of him (R. 211). This is the point where the Court threatened the plaintiff with a fine and referred to him as a glib talker and running off the mouth and that he had said his piece at least fifteen times, and he (the Court) had put up with this for two days and that the witness had been warned repeatedly to answer questions and not go into a long dissertation for something he hadn't been asked about, and that he (Wendelboe) tried to run the lawsuit. These remarks of the Court were excepted to by the plaintiff and, according to the court reporter's version, the Court replied:

"Well, any prejudice that has been brought to you I think has been brought by your own conduct, or at least your witness."

The difficulties really came to a head over so-called questions of counsel for the defendants. These questions for the most part were not questions but were speeches that it would have been impossible for Mr. Wendelboe to have answered yes or no to these questions.

The trial Judge was not so particular about the defendants answering their questions with a yes or no (R. 322). There,

counsel for the plaintiff was admonished to let Mr. Jacobson finish his answer.

The Court's comment to the jury in regard to his disciplining of Mr. Wendelboe did not correct the situation at all. The damage had been done (R. 298-299).

POINT IX

THE COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL AND IN ENTERING JUDGMENT FOR ATTORNEY'S FEES FOR THE DEFENDANTS.

The Court was given an opportunity by motion for new trial to correct the obvious miscarriage of justice occasioned by the errors occurring during the trial of this case. The Court listened to arguments for new trial and summarily denied the motion, and at that time entered his order giving defendants judgment for \$1250.00 attorney fees.

The judgment against plaintiff for attorney fees should be reversed.

CONCLUSION

Solon, asked how justice could be secured in Athens, replied:

"If those who are not injured feel as indignant as those who are."

Time and space will not permit plaintiff to point out all of the errors of the Court which adversely affected him.

There is little dispute as to the actual facts of what happened to the plaintiff at the hands of the defendants on that night. The defendants had no reason to believe that Mr. Wendelboe was committing a felony or had committed a felony as he sat in his automobile. The defendants' initial approach demonstrated they weren't after Mr. Wendelboe for information, but were showing trainee Douglas how to "put the heat on." The plaintiff, like all good citizens, had no objection to informing the police of his identity, and he gave that information. The average citizen very seldom causes a policeman trouble if the officer makes his investigation in a decent, courteous manner. However, a policeman has no more right to violate the law and trample on human rights than any other person, even though he is *investigating*. As was so aptly said in *White v. Towers*, Supreme Court of California, 1951, 235 P(2d) 209:

"We agree that the police should not be unduly hampered, but surely the individual citizen is entitled to some protection and should be reimbursed or compensated for injuries done to him without right and with malice. Are the police, or any employees of any governmental body, to be given carte blanche to arrest, or bring unwarranted criminal actions, without probable cause, and with malice, and go scot free?"

Mr. Wendelboe was ordered from his car, illegally searched, deprived of his freedom, and brutally beaten. He was subjected to the utmost humiliation. He was held on multiple charges, stripped of his clothes, and confined in a dungeon incommunicado. The defendants did not deny these facts. It was met by what we used to term a plea in confession and avoidance. They claimed (a) he might have been drunk, (b)

he might have been a vagrant, (c) he might have been masturbating, (d) he might have stolen the car, (e) he might be a lookout. When all these excuses failed, the defendants lit upon the novel idea that on that evening it was their duty to investigate a "hot area." They claimed that if they asked a person in that area a question and the person failed to respond instantaneously and in a manner suitable to these defendants, at that instant that person became a lawbreaker and they had the right, yes, even the duty, to arrest that person. The Court in Instructions No. 7 and 17 informed the jury that the defendants' excuses in that regard were valid.

The brutal beating received by plaintiff at the hands of the defendants was admitted, and in their reports they boasted about how they rendered Mr. Wendelboe more docile, how defendant Jacobson "clipped" him on the chin and gave him the "hold," and how defendant Lang "bopped" him on the head with a flashlight. The excuse advanced by the defendants was that Mr. Wendelboe was trying to escape. The evidence points to the fact that he never tried to escape, he never attacked them, but he only got out of the police car at the invitation of the defendants. However, the Court again in Instruction No. 8 injected the escape element into this case so as to justify the defendants' acts in beating the plaintiff.

There was no conflict in the evidence as to the malicious prosecution count, and no excuse was given for this man being charged with some five different crimes, and the record shows no valid excuses. However, the Court again in his Instructions No. 14, 19, 20, and 21 so confused the issue that the jury could not possibly know what to do in the matter.

Not only did the plaintiff suffer the physical and mental indignities at the hands of the defendants, but during the trial he was subjected to injudicious reprimands from the Court. He was continually interrupted when endeavoring to give a truthful answer to a question. On the other side of the coin, the Court informed the counsel for plaintiff when cross examining the Chief of Police, "Well, I think the witness is entitled to some consideration and respect here" (R. 408).

The Court properly deleted words in plaintiff's requested Instruction No. 15 (R. 50) and said he questioned all adjectives except "willfully" and "maliciously," yet in Instruction No. 17 the Court thoroughly garnished the instruction with adjectives and superlatives and argument.

The trial Court should have directed verdicts in each of the three actions in favor of the plaintiff and left only the damages to be determined by the jury. This case has been a complete approval of police brutality and lawless enforcement of the law and lawless interference with the rights of a citizen. To top it all off, the plaintiff now has a judgment against him for \$1250.00 attorney fees and for costs.

To say that this is the worst case that the writers have come across would be untrue. Police brutality and utter unconcern for the ^{peoples} plaintiff's rights is not uncommon in this City and State. To some extent, the theory that the end justifies the means has been adopted in this locality. The law can and should be enforced legally, and it should never be enforced brutally. It appears the defendants and the Chief of Police believe the law to be as expounded by the lower Court in this case in Instructions No. 7 and 17. Now is the time for this

Court to place Instruction No. 17 upon the pages of the Utah Reports for all to see and say: "This is not the law and never has been the law in Utah."

This Court should reverse the trial Court and order that the judgment for the defendants be set aside and that the plaintiff be awarded judgment on each cause of action and his damages be determined by a jury, and the Court should make appropriate orders concerning plaintiff's attorney fees.

Respectfully submitted,

RAY S. McCARTY & SUMNER J. HATCH
Attorneys for Plaintiff
and Appellant
409 Boston Building
Salt Lake City, Utah

APPENDIX

To: Asst. Chief L. R. Greeson
FROM: Billy J. Lang
Subject: Stratford Wendelboe

EXHIBIT NO. 22

Sir:

In regard to the incident concerning Officer R. B. Jacobson and myself, with Stratford Wendelboe, I feel compelled to submit to you an account of what happened which is as follows.

At approximately 3:15 A.M. Sunday April 6th, while patrolling our district in the vicinity of Fifth East and Second South, we observed a car parked on the south west corner of the intersection approximately 20 ft. south of the Ped. lane.

The engine of this car was running and the head lights were out. We approached the car and found it to be occupied. The occupant was asked for identification by Officer Jacobson, he produced a temporary Utah drivers license bearing the name of Stratford Wendelboe. This being rather inadequate I.D., he was asked for other identification and the registration to his car. He was also asked to be seated in the police car all in a polite manner.

He showed reluctance in getting in the car, at which Jacobson asked him what he was doing there at that time of night. To this inquiry he stated it was his own damn business and none of ours. He was then advised that he was under arrest and was asked which wrecker he wanted for his car. He refused to answer and Streators was called. He was then placed in the police car. I was then going to help Officer Jacobson with the searching of Wendelboe's car, when he opened the door and said "You can't do this to me," and started getting out of the police car. I tried to hold the door

closed and told him to stay in the car but he had one foot out and I couldn't make him remove it. Finally after a brief struggle, with no success in keeping him in the car, Jacobson said let him out of he wants out that bad. I stepped back from the door. He then came out and started for his car shoving Jacobson and I aside or attempting to.

I then grabbed Wendelboe by the arm and told him he wasn't going any place and Officer Jacobson and I both tried to put him back in the car and he resisted quite violently, to this Officer Jacobson clipped him on the chin which didn't seem to slow him down. We managed to force him against the rear of his car and an attempt was made to handcuff him but by this time it was a full scale battle. I tried to subdue him by hitting him on the head with my flash light, but the only reward for my effort was a broken flash light. Finally, Jacobson managed to get behind him and apply a head lock for a few seconds which slowed him down enough to get the handcuffs on him.

The ambulance was then called as Wendelboe had suffered a cut lip. Officer McKay of Car No. 2 administered first aid and left. Wendelboe who had been more or less laying at the rear of his car was then picked up and placed in the police car and transported to the city jail.

Arriving there we decided it would be wise to take him on to the county hospital and have him examined by a physician. He was taken to the county hospital and examined by the Physician on duty at that time, who stated that Wendelboe was not seriously injured. He was left in the custody of Officer Graham of car No. 7, who also had a prisoner there to be examined.

I then drove Officer Jacobson to the L.D.S. hospital where his hand was examined and he was released.

On our way down, Car No. 7 called and requested we meet him at the city jail, when we arrived, we found Wendelboe slumped over in the rear seat. For some unknown reason he had to be carried into the city jail and once inside he refused to cooperate with us and was taken to the drunk tank and stripped of his clothing.

I firmly believe Officer Jacobson and Reserve Officer John Douglas, whom I failed to mention previously in this letter, and myself used absolutely no more force than was necessary in subduing this man and that it could all have been avoided had he chosen to cooperate with us by answering the questions asked him in a courteous manner.

I am truly sorry for the embarrassment this incident has caused the Department but I see no possible way it could have been avoided.

EXHIBIT 21

Re: Stratford Wendelboe
D-2584

Time: 3:10 A.M. 4-6-58

STATEMENT OF JOHN DOUGLAS, 1393 Laird Avenue, IN 7-0936, who is employed by National Jewelry, 26 East 2nd South, EL 9-1772. Statement given in the office of W. Cleon Skousen, Chief of Police. Taken and typed by Clarice L. Holt, Administrative Secretary.

Chief Skousen: Mr. Douglas, will you tell us in your own words what happened on the morning of April 6, 1958 in connection with the arrest of Stratford Wendelboe?

A. Yes sir, we were driving along in the Police car along 5th East nearing 2nd South, Officer Jacobsen,

Officer Lang, and myself. We had just checked out the service station on the northwest corner of 5th East and 2nd South when we noted a Chevrolet parked 50 to 60 feet away from the corner facing south and parked on 5th East. Officer Jacobsen was driving and pulled the police car along side of the car. We noticed one man was seated in the automobile and the car was running. Officer Jacobson and Officer Lang were first to get out, and a few seconds later, I followed. Officer Jacobson asked the man for his driver's license and then a moment later asked him for his registration for the automobile.

Q. Did he produce a driver's license?

A. Yes, he produced a temporary permit. At this time Officer Jacobson asked the gentleman to get out of his car. At no time did he raise his voice or talk in any other way than a routine check out. He asked Mr. Wendelboe what he was doing here at this time of night. Mr. Wendelboe answered back, "It's none of your damn business. I am a citizen and I have my rights." Officer Jacobson then stated that if he could not account for his being there at this hour of the morning, that he would be placed under custody and would be taken to jail. The gentleman did not answer, and Officer Jacobson then informed him that he was under arrest and asked him at this time what wrecker he would like to impound his car. Mr. Wendelboe did not answer. At this time he was searched and was very belligerent and did not want to be searched. After talking to him Officer Jacobson persuaded him to put both hands on top of the Police car. Then Officer Jacobson made a routine search of his person. His articles were put on top of the car and he was ordered to sit inside, which he did. At this time Officer Jacobson and

myself started to check out his automobile. Officer Lang was standing between the two cars.

Q. How far apart were the two cars?

A. Only about 5 feet, sir, they were very close. At this time Mr. Wendelboe started to get out. Officer Lang held the door, but Mr. Wendelboe had already gotten one foot out of the door. Officer Jacobson then said, "If he wants out that bad, let him out." Mr. Wendelboe then made a direct attempt towards the open door of his car. In order to do this he pushed Officer Jacobson aside. Officer Jacobson and Officer Lang grabbed Mr. Wendelboe in an attempt to re-seat him in the automobile.

Q. Re-seat him?

A. Yes. Officer Jacobson at this time was doing most of the holding, and Mr. Wendelboe was doing most of the throwing of his arms rather than an actual punching. At this time the first blow was struck when Officer Jacobson hit him in the mouth. Mr. Wendelboe seemed to be very mad at this action and made a direct attempt toward the rear of the automobile and towards 2nd South.

Q. What did you think he was trying to do?

A. I thought he was trying to run.

Q. When he first started thrashing about after being apprehended by the 2 officers, what did you think he was trying to do as he resisted them?

A. I thought at first he was trying to get to the open door of his car to leave the scene and then he was going to run.

Q. Was it then that he was struck by the officer?

A. Yes, it was a few seconds later.

Q. Was that when you first had the impression he was trying to escape?

A. Yes, my first impression of him trying to escape was when he first opened the door and made the break for his car. They were near the rear of the car, and both Officer Jacobson and Officer Lang were trying to restrain this gentleman rather than trying to be the aggressors in the battle. I was holding Officer Jacobson's tear gas gun and yelled at them I thought it would be best to shoot him with this rather than to fight him, and that would end the fight. Officer Lang still wrestling with his left arm clipped him on the head with his flashlight, the battery end, not the end containing the glass. The glass in the flashlight was not broken, and the only signs of blood on Mr. Wendelboe were from his mouth and nose. To my knowledge he was not bleeding from the head at all. At this time Mr. Jacobson grabbed him in a headlock and he was still struggling to get away from this. Officer Jacobson then subdued him enough that he sat on the cement directly in back of his car and then the handcuffs were put on. One handcuff had been put on earlier in the fight but because of Mr. Wendelboe's constant and vigorous struggling, the other could not be secured to his arm. The ambulance was then summoned to look at Mr. Wendelboe's mouth and nose. The ambulance driver then treated him, and we informed the Dispatcher we were taking him to jail. As we arrived at the City Jail, it was noted he was still bleeding from the mouth. Not knowing the extent of his injuries, we took him to the County Hospital and there had a doctor check him and his wounds about the mouth. Mr. Wendelboe asked the doctor at this time—where was his magazine. At this time Officer Jacobson produced a small notebook which seemingly contained notes on prospective car buy-

ers. Officer Jacobson said, "Is this the one you mean?" Mr. Wendelboe said, "No." Officer Jacobson said, "Do you mean the one with the picture of a girl on the front?" Mr. Wendelboe said, "No, you are not going to make a case out of that for me."

At this time we left Officer—I don't remember his name, but the officer from Car 7—with the prisoner as Officer Jacobson had hurt a knuckle on his hand and wanted it looked at at the L.D.S. Hospital.

My next contact with Mr. Wendelboe was at the City Jail. He had been brought up by the officer in Car 7. Mr. Wendelboe was seated on the floor of the jail. He would say nothing at this time. However, he had talked freely to the doctors and nurse at the hospital.

- Q. Did he appear to be in a dazed condition or a belligerent mood?
- A. Just in a belligerent mood. He did not appear to be dazed in the least nor did he appear sick. He was sitting with his arms crossed, and the only thing he said while in Jail was that Officer Jacobson had no right to search him when Officer Jacobson was taking away the rest of his personal property which was turned over to the jailer in charge. At this time he was informed that among other charges he was being charged as a drunk and that if he didn't stand up and cooperate with the jailer and officers, it would be necessary and routine to put him into the drunk tank. As before he would say nothing. It was then that Officer Jacobson and another officer whose name I didn't get, and myself carried this gentleman to the drunk tank below. He was stripped of all his clothes except his shorts. This, to my knowledge is routine procedure in a

case in which a drunk has been fighting. It is done so no more difficulties can come of it.

Q. Are these all of the facts connected with this incident insofar as you are able to recall?

A. Yes sir, they are.

Q. If called upon to testify under oath concerning these facts, would you be willing to do so?

A. Yes sir, I would.

Signed — John Douglas

Statement given April 7, 1958 at 3:00 P.M.

EXHIBIT 20

To: Asst. Chief L. R. Greeson

From: Richard B. Jacobson

Subject: Stratford Wendelboe

Sir:

At approximately 3:15 A.M. on Sunday, April 6, Billy Lang and I were patrolling in the vicinity of 5th East and 2nd South when we were attracted to the presence of a car parked near the service station under construction on the Southwest corner.

This car was running, and there was a man behind the wheel. We drove over to check it out, (I was at the wheel), and found it to contain Stratford Wendelboe.

I asked this man to produce some Identification, and he showed me a temporary Utah driver's license. This paper had no physical description of the owner, therefore I asked for additional papers. At this time I observed that there was no key in the ignition, so I asked him for the registration for his car, also.

While he was fumbling in his wallet, I asked him to be seated in the police car, that we might have more light.

At no time, while making these requests was any officer discourteous, or untoward in any manner. We made every effort to be pleasant, while maintaining caution in what we regarded odd circumstances.

Since Wendelboe was reluctant to get into the car, I asked him what he was doing in that location, and he stated that it was none of my damn business what he was doing, stating that he was a citizen, and had a right to be there.

At this time, he was advised that he could consider himself in custody, and unless he felt it proper to give us the information at that time, it would be necessary to place him in jail. When he remained silent, I advised him that he was under arrest.

At this time, I inquired if he had a preference as to what wrecker we called to take possession of his car. Again, he did not answer, therefore, we called Streater, by way of the dispatcher. Up to this point, neither of us had even raised our voices toward this man.

As I turned my back to the police car, where Wendelboe had been directed, and had finally gone, and started to make a search of the car he was in, prior to impounding, I became aware that Wendelboe was attempting to get out of the car, and Lang was trying to close the door Wendelboe had opened.

As Wendelboe had inserted his foot in the door, it was difficult for Lang to get the door closed, and I told him to let him out, if he wanted to get out that badly.

Wendelboe emerged from the car, and was very determined to leave the area, and be shut of the whole

affair. He proceeded to push me aside, and go toward his car. I attempted to bring him back, and a short scuffle ensued, during which Wendelboe shouted for us to stop beating him. At this time, the scuffle was growing more violent, and therefore I clipped him on the chin. Prior to my striking him, the efforts of both myself, Lang, and Reserve Officer John Douglas had been restricted to attempting to subdue Wendelboe with as little violence as possible.

Rather than slow him down, the blow to the chin of Wendelboe served to rile him up the more. He is an extremely powerful man, and was in a high state of agitation.

He broke away from the three of us, and we managed to force him into the rear of his car. At this time, he was flailing wildly with his hands, and fighting fiercely.

Officer Lang popped him on the head with his flashlight, which must have stung him, as it certainly made him angry. It was then that I managed to slip behind him for the first time, and apply a headlock, which he struggled against, the result of which was that part of the blood to his head was cut off, and he became weak. At this time, he was lowered to the ground gently, and he was handcuffed. He was at this time sitting up, and was fully conscious, leaning against his car. At no time did he lose consciousness, in the true sense of the word, though there is no doubt that the headlock made him light-headed.

I must point out that at no time during all this, did either officer lose his temper. This man was subjected to no more rigorous treatment than was absolutely necessary to render him subject to arrest. At the time he was finally subjugated, all further action against him stopped entirely.

Since Wendelboe had suffered a cut about the mouth, and was bleeding slightly, an ambulance was summoned to render first aid. Officer McKay responded. At this time Wendelboe was sitting, or lying to the rear of his car. After treating Wendelboe, the ambulance left.

Wendelboe was placed in the police car, and at this time was feigning unconsciousness, rousing himself only when he felt the urge to berate the officers. He was transported to the jail, and there we thought it wise to have him examined by a physician, since we were not sure how seriously he was cut about the mouth. Without removing him for booking, we took him to the County Hospital, where he was examined by the attending physicians, who reported that he was not injured to any serious degree, and was released.

Since I was at the L.D.S. Hospital having my hand examined, Car No. 7, manned by Officer Graham, volunteered to watch him, as they had a prisoner of their own being treated.

At the hospital, Wendelboe was entirely lucid and completely oriented. He was able to answer all the questions put to him by the doctors. They reported that except for his high state of excitement, and possible drunkenness, they were unable to account for his behavior.

Since our contact with Wendelboe had been so brief, and we had been unable to observe him in any way, I was unable to determine for myself whether he was drunk enough to cause this behavior. Due to a nasal condition, I was not able to smell any liquor on his breath, however Harvey Roach said he could smell some drink at the jail.

While at the County Hospital, I requested that a blood-alcohol be drawn on Wendelboe to determine

if he was drunk. It is my personal opinion it will be low in content, as his reflexes were too quick to be stunned by drink.

While returning to the station from the L.D.S. Hospital, we were advised that car No. 7 was bringing Wendelboe to the jail. We met them there, and since Wendelboe had chosen to be unconscious again, assisted in carrying him into the jail. There, he put on the unconscious act some more, rousing only to demand a lawyer, newsman, and Chief Skousen.

Since he was so belligerent previously, and indicated an ability to be more difficult, he was stripped, and placed in the drunk tank.

It is my own opinion that this entire matter is an unfortunate incident from the beginning, however, it was not of our making. If Wendelboe had been more reasonable, and answered questions put to him courteously and in a proper manner, and for a lawful purpose, the whole thing could have been avoided, and very likely he would have been permitted to go on his way. As it was, we were inclined to wonder if the circumstances did not warrant full checkout.

It is our feeling that Wendelboe was parked there for either a lookout, or since the keys were not in the car, we felt it may have been stolen. On the ground near the car we found a pocket novel with a rather lurid cover. We felt that perhaps he was indulging in self abuse prior to our approach. At the Hospital, he said he was stopped to buy a paper, but since he was parked about 50 feet from a paper rack, and could have been parked 5 feet away, this sounded a bit thin.

Richard Jacobson

INSTRUCTION 18

You are instructed that even though the charges filed against the plaintiff in the City Court of Salt Lake City, Utah, were dismissed by the City Prosecutor and the Judge, you may still nevertheless determine whether or not the plaintiff Wendelboe actually committed such offenses for which he was charged and if you find from a preponderance of the evidence in this case that the plaintiff actually did commit the offenses charged against him by these defendants, or any of them, then your finding is a complete defense to the plaintiff's third cause of action and your verdict should be against the plaintiff and in favor of such defendant or defendants, no cause of action.

INSTRUCTION 19

In connection with the plaintiff's third cause of action; to wit, that for malicious prosecution, you are instructed that if these defendants, or any of them, had probable cause for instituting such prosecution, if you find that these defendants, or any of them, did institute such prosecution, then you are instructed that such defendant or defendants are not liable for any damages in this connection. A person has probable cause for instituting criminal prosecution if such person reasonably believes that the party so charged committed the offense for which he was charged.

The fact that a case is dismissed by the City Prosecutor without the production of evidence on his case is not evidence of a lack of probable cause, but is evidence of a termination of the case favorable to the plaintiff. Dismissal of a case after evidence by the prosecutor has been introduced is evidence you may consider on the question of a lack of probable cause.

INSTRUCTION NO. 21

In connection with the plaintiff's third cause of action; to-wit, that for malicious prosecution, you are instructed that these defendants, or any of them cannot be considered to have instituted the prosecution of the plaintiff unless such defendant filed a complaint or a formal charge against the plaintiff Wendelboe.

UTAH STATE DEPARTMENT OF PUBLIC SAFETY

NO. 117845 324701 B

Receipt for Application Fee for Original Driver's License

Applicant's Name	<u>Stratford L Wendelboe</u>	Date	<u>2-14-58</u>
Address	<u>378 12th E 500</u>	DEPT. OF PUBLIC SAFETY	
Applicant's Signature		BY	<u>[Signature]</u>

RESULTS OF EXAMINATION

NO.	RESULT	EXAMINER	DATE
1	<u>P</u>	<u>[Signature]</u>	<u>2/14/58</u>
2			
3			

Operator ☐ Chauffeur ☒ Original ☒ Lapsed ☐
 Chauffeur Classification A ☒ C ☒

1. This is a receipt for the \$2.00 fee paid. 2. The law prohibits any refund. 3. The law allows you only THREE examinations within SIX MONTHS to complete your application. 4. Keep this receipt until you receive your Driver's License Certificate.

(Erasures and obliterations will void this receipt)

INSTRUCTION PERMIT

This is your permit, when STAMPED and SIGNED below by a Driver's License Examiner, to drive a motor vehicle when accompanied by a Licensed Driver ONLY.

TEMPORARY PERMIT

This is your temporary permit to drive ONLY when STAMPED and SIGNED below by a Driver's License Examiner.

8-14-58EX #9

Bottle #476

REPORT OF ALCOHOL ANALYSIS

Specimen of Blood Received from W. Dixon
 Name Stratford L Wendelboe Address 378 12th East
 Received April 8, 1958 Reported April 8, 1958

RESULT OF ANALYSIS % of alcohol. This quantity of alcohol in urine is equivalent to at least 1.00 % of alcohol in the blood. 0.15% of blood alcohol is the minimum concentration above which all individuals are deemed to be under the influence of alcohol. However, some individuals are adversely affected by alcohol concentration as low as 0.05%.

M. E. McLachlan

POLICE DEPARTMENT

SUPPLEMENTARY REPORT

SALT LAKE CITY

1. OFFENSE DRUNK, Etc.	11. DATE AND TIME OCCURRED 4-6-58 3:00AM	3. D OR MF NO. D-2584	4. CASE NO.
9. VICTIM (Business)	12. VICTIM (Person)		

12. DETAILS OF INVESTIGATION

ARRESTED: Stratford WENDELBOE, D-2584

While patrolling our district about 3:00AM we observed a Chevrolet containing the arrested person parked on the south-west corner of the intersection of 3rd South & 5th East.

We attempted to check him out, however, this man refused to cooperate or answer any questions. He produced his driver's license. When asked what he was doing in this area he stated that it was none of our business. He was told that he could consider himself in custody, and directed to sit in the police car. He climbed in after some argument and the door was closed. While the reporting officers were checking the car prior to impounding he pulled the police car door open, attempting to get out, stating that we had no business searching his car. A non-violent effort was made to make him stay in the car, at which time he forcibly pushed the car door open and attempted to get out. At this time a considerable tussle ensued during which we all became considerably mussed up. Officer Jacobsen dislocated a knuckle of the right hand when it came into contact with Wendelboe's chin, and Officer Lang suffered the loss of a three cell flashlight. Both of our uniforms were spattered with blood. Reserve Officer John Douglas was also bloodied in the scuffle. This man was finally rendered more docile.

He proceeded to feign unconsciousness, so he was taken to the County Hospital where he was examined by the attending physician, who reported that in his opinion there was no physical reason why he could not be released as he had suffered no permanent injury.

He was transported to jail where he refused to remove himself from the car, and had to be carried in. He again refused to cooperate in the jail, would not give his name or any information concerning himself, therefore; he was placed in the drunk tank.

A blood alcohol was drawn in the presence of Officers Colbert and Graham who assisted us while the reporting officer had his hand attended to.

Inasmuch as our contact with this person was so brief in duration and negative in quality it is difficult to say just how drunk he was. However, the physicians at the hospital can establish no reason for his behaviour other than drunkenness.

ATTN: City Prosecutor - Kindly attempt to obtain from this man restitution in the following amount: Cleaning \$1.05
One flashlight \$3.00

Recovered from the scene was a flashlight and street guide book belonging to Mr. WENDELBOE. These will be placed in evidence.

NOTE: Use Continuation Report Form SLCPD-5 if additional space required.

43. TYPED BY: 658-8		34. DATE: 4-6-58	35. COPIES TO:	36. SIGNATURE OF REPORTING OFFICER: <i>Robert Jacobsen</i>		DIVISION CP 42	
41. INDEXED BY:	42. DATE:	43. APPROVING SUPERVISOR	44. CLEARED BY ARREST OR: DATE: 4-6-58 D NO. 2584	36. EXCEPT. CLEAR	37. UNFOUNDED:	38. INACTIVE: X	39. ACTIVE:
			45. CLEARANCE FORM MADE ON: DATE: D NO.				

SLCPD-4 7-57-Q.P.

SUPPLEMENTARY REPORT

RECORD OF ARREST

SALT LAKE CITY, UTAH

DISPOSITION

NO. **117845** DATE _____ Released on Bond Yes _____ No _____ Date _____

Amount _____ Cash _____ Bail _____

Bondsman _____

Continued To _____

Sentenced To _____

Date Released _____

Signed _____

Signed _____

DELBOR, Stratford L. Place of Arrest **5th East & 2nd South.** Arrest No. **2584**

Residence **378 So. 12th East.** Date **4-6-58** Time **5:36 AM** M. F. Number **1-2-584**

Birth Date 11-25-1920.	Age 37	Sex Male	Color White
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Charge **Assault & Battery; 32-1-2 & 32-1-3 CO Drunk; 32-1-24 CO/Resisting; 32-1-31 CO Vagrancy; 32-1-52 CO**

Weight **150** Eyes **Blue** Hair **Brown** Comp. **Ruddy**

Hold Off By _____ Date _____

This man was arrested at 3:00AM for being drunk and sitting in a car he was taken out of is car and placed in the police car and suddenly broke out of the police car and started a fight...SEE COMPLAINT REPORT FOR FULL DETAILS....AT TIME OF BOOKING THIS MAN REFUSED TO GIVE ANY INFORMATION AT ALL...

Arresting Officer E. Jacobsen.	No. 436-2	Division Radio	Booking Officer H. Roach	No. 614-8
John Douglas.	475-2	Radio	Cliff Edmunds	
	922-9	Radio (Reserve)	Lunnen.	