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(Filed January 17, 1922.)

Bergen County Circuit Court

ADOLPH BERKOWITZ,

Plaintiff-Respondent,

vs.

HARVEY M. LYONS,

Defendant-Appellant.

} Notice of
} Appeal.

20

To: Benjamin R. Buffet, Esq.,
Attorney of Plaintiff.

Take notice that the defendant appeals to the
Court of Errors and Appeals of the State of New
Jersey, from the whole of the judgment entered in
this cause in the Bergen County Circuit Court.

30

Dated, January 16, 1922.

LOUIS OGUST,
Attorney of Appellant.

(Filed February 26, 1922.)

40

10

Grounds of Appeal.

BERGEN COUNTY CIRCUIT COURT

20

ADOLPH BERKOWITZ,
Respondent,

vs.

HARVEY M. LYONS,
Appellant.

Grounds of
Appeal

To: Benjamin R. Buffett, Esq.,
Attorney of Plaintiff-Respondent.

Take notice that the following are the defendant's grounds of appeal herein:

- 30 1. Refusal by the Court to grant defendant's motion for a non suit at the close of plaintiff's case.
2. Refusal by the Court to grant defendant's motion for a non-suit at the close of the whole case.
3. Because there is no evidence sufficient to sustain the jury's verdict.
4. Because the testimony of the witness, Elmer J. S. Coe, was allowed to stay in evidence.
- 40 5. Because the Court refused to allow the defendant to testify as to conversations he had with the witness, Raymond E. Fellage in the absence of the plaintiff.
- The following questions were overruled.
6. To the witness, Charles Van Gelder:
- Q. Yes. But have you ever been put in a position to compare signatures to find out whether they were genuine or not? A. I never have claimed to be an expert in that line.
7. To the witness, Harvey M. Lyons:

Grounds of Appeal.

Q. And then, what happened after that? A. Why, I was out to Mr. Fellage's house in Bogota.

Q. Where does Mr. Fellage live? A. Bogota.

Q. Yes. A. And I was speaking to Mr. Fellage about it.

Q. Yes. A. I asked him if he wanted to buy a machine.

Q. Yes. A. So he told me that he—

20

8. To the witness, Harvey M. Lyons:

Q. And did Mr. Fellage buy the car?

Q. And what did Mr. Fellage tell you?

9. To the witness, Harvey M. Lyons:

Q. What did Dolly tell you that Mr. Van Gelder had said?

10. To the witness, Harvey M. Lyons:

Q. Yes. And had you had any conversation with Dolly before you went to New York? A. Yes, sir—

Q. What was the conversation?

30

11. To the witness, Raymond E. Fellage:

Q. Well, Mr. Lyons was not selling the car, was he, to Mr. Berkowitz?

12. To the witness, Raymond E. Fellage:

Q. You knew, Mr. Fellage, didn't you, that Mr. Dolly was selling the car?

LOUIS OGUST,
Attorney of Appellant.

40

10

Stipulation.

(Filed February 26, 1922.)

BERGEN COUNTY CIRCUIT COURT

20

ADOLPH BERKOWITZ,
Respondent,

vs.

HARVEY M. LYONS,
Appellant.

Stipulation.

30

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the time of the Appellant to serve and file his grounds on the appeal herein be and the same hereby is extended to and including the 27th day of February 1922.

Dated, February 16, 1922.

LOUIS OGUST,
Attorney for Appellant.
BENJAMIN R. BUFFETT,
Attorney for Respondent.

40

Summons.

(Filed March 10, 1920.)

[L. S.] THE STATE OF NEW JERSEY,

To: HARVEY M. LYONS,

You are summoned to answer the annexed complaint of Adolph Berkowitz, in an action at law, in the Bergen County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of said Circuit Court at Hackensack in the County of Bergen, within twenty days after service upon you of this writ and the annexed complaint, that plaintiff may proceed in the suit and judgment be entered against you. 20

Witness Willard W. Cutler, Judge of the Circuit Court at Hackensack this 6th day of March, nineteen hundred and twenty.

BENJAMIN R. BUFFETT,

Attorney.

GEO. VAN BUSKIRK, 30

Clerk.

Complaint.

BERGEN COUNTY CIRCUIT COURT

BERGEN COUNTY, NEW JERSEY

20

ADOLPH BERKOWITZ,
Plaintiff,

against

HARVEY M. LYONS,
Defendant.

The plaintiff who resides in the City of New York and whose place of business is at No.415 West 55th Street, in the City of New York, says:

30

1. That the defendant Harvey M. Lyons resides at Edgewater, in the County of Bergen and State of New Jersey. That on or about the 17th day of January, 1920 the defendant accompanied by one Raymond Fellage came to the plaintiff's place of business and offered for sale a 1919 Buick touring car which was in the defendant's possession and at that time stored on the premises of the defendant at Edgewater as aforesaid. That the said defendant represented to the plaintiff that this car was the property of one A. J. Dolly of Bridgeport, Conn. and could be purchased for the sum of \$1050.00. That the said defendant represented to the plaintiff that the said Dolly desired to sell the car and had left the said car with him for that purpose. That relying on the representations of the defendant, the plaintiff gave the said defendant his check for the sum of \$1050.00 which check is as follows:

40

Complaint.

No. 485

Jan. 17, 1920.

THE FIRST NATIONAL BANK

Edgewater, N. J.

Pay to the order of A. J. Dolly.....\$1050.00/100

Ten Hundred Fifty DollarsDollars.

Endorsed A. J. Dolly Adolph Berkowitz.

Harvey M. Lyons

20

2. That subsequently the said car was delivered at the plaintiff's place of business in New York City and upon examination proved to be a 1920 model, manufacturer's number 567271 and upon learning this the plaintiff communicated with the Automobile Bureau of the Police Department of the City of New York and inquired if a 1920 model Buick, giving the manufacturer's number, was on their list of stolen cars and the said Automobile Bureau notified the plaintiff that they had such a car upon their list and the said Automobile Bureau later came and took the car away delivering it to the proper owner who resided at 119th Street in the City of New York.

30

3. That the said check was endorsed by the aforesaid A. J. Dolly and by the said Lyons who plaintiff is informed and believes received cash therefor at the First National Bank of Edgewater.

4. That at the time of the delivery of the said car, the plaintiff had his place of business in New York, there was also delivered a Bill of Sale made out by the said A. J. Dolly and acknowledged before Charles Van Gelder of Edgewater, New Jersey, a notary public of New Jersey. That upon the said Bill of Sale the address of the said Dolly was given at No. 242 Main Street, Bridgeport, Conn.

40

5. Plaintiff is informed and believes that there is no such address as 242 Main Street, Bridgeport

Complaint.

and plaintiff is informed and believes that there is no such person in existence as A. J. Dolly.

6. The plaintiff relying upon the representations of the defendant as to the ownership of the car and believing the same to be true, gave the defendant Lyons the aforesaid check. That all of the aforesaid representations plaintiff is informed and
20 believes made by the defendant were false and fraudulent and were known to the defendant at the time the transaction was made to be false and fraudulent and were made for the purpose of deceiving the plaintiff and the defendant did actually deceive the plaintiff by the said representations. And the plaintiff believes that the said defendant made the said representations with intent to deceive and that the defendant knew that the said car was a stolen car at the time it was delivered to
30 the plaintiff herein and received the plaintiff's check therefor.

By reason of the foregoing the plaintiff has been damaged in the sum of \$1050 and he therefore demands judgment against the defendant for the said sum of \$1050.00 with interest from the 17th day of January, 1920, besides costs.

BENJAMIN R. BUFFETT,

Attorney for Plaintiff,

71 Palisade Avenue,
Bogota, New Jersey.

Answer.

(Filed March 27, 1920.)

BERGEN COUNTY CIRCUIT COURT

BERGEN COUNTY, NEW JERSEY.

ADOLPH BERKOWITZ,
Plaintiff,

against

HARVEY M. LYONS,
Defendant.

Answer.

20

The defendant residing in Edgewater, Bergen County, New Jersey, answering the complaint herein, says that

1. He denies the truth of the matters contained in paragraph "1" of the complaint, except that he admits that he resides in Edgewater, New Jersey. 30

2. He admits paragraphs "3" and "4" of the complaint.

3. He neither admits nor denies the allegations contained in paragraph "5" of the complaint but as to the same puts the plaintiff upon his proof.

4. He denies the truth of the matters contained in paragraph "6" of the complaint.

FIRST DEFENSE.

40

The defendant will object upon the trial that the complaint discloses no cause of action.

LOUIS OGUST,
Attorney of Defendant.

Judgment.

BERGEN COUNTY CIRCUIT COURT

| | | | |
|----|---|---|-------------------|
| 20 | <p style="text-align: center;">ADOLPH BERKOWITZ, Plaintiff,</p> <p style="text-align: center;">against</p> <p style="text-align: center;">HARVEY M. LYONS, Defendant.</p> | } | Action at Law. |
|----|---|---|-------------------|

30 This action having been tried before Willard W. Cutler, with a jury, in the presence of Counsel of the respective parties on the 22nd day of September 1921, and the jury having returned a verdict in favor of the plaintiff for One thousand and fifty dollars (\$1050) damages.

It is ordered that judgment final be entered in favor of the plaintiff, Adolph Berkowitz, and against the defendant, Harvey M. Lyons for the sum of One thousand and fifty dollars (\$1050.00) damages and plaintiff's costs to be taxed.

Rule entered Sept. 26, 1921.

On motion of
BENJAMIN R. BUFFETT,
Pltffs. Atty.

| | | |
|----|---------|-----------|
| 40 | Damages | \$1050.00 |
| | Costs | 67.19 |
| | | \$1117.19 |

Order.

BERGEN COUNTY CIRCUIT COURT

ADOLPH BERKOWITZ,

vs.

HARVEY M. LYONS,

Action at
Law.

20

Benjamin R. Buffett,
Pltff's Atty.

Amount of damages on trial one thousand and fifty dollars and costs sixty-seven and 19/100 dollars.

Damages ten hundred and fifty dollars.

Costs sixty-seven & 19/100 Dollars.

Eleven hundred and seventeen & 19/100 dollars.

Judgment signed and entered September 26, 1921 at 12 m.

30

40

101

BERGEN COUNTY SUPREME COURT

20

ADOLPH BERKOWITZ,
Plaintiff,

vs.

HARVEY M. LYONS,
Defendant.

Action at
Law.

Hackensack, N. J., September 22, 1921.

Before—Hon. WILLARD W. CUTLER, Judge, and a
Jury.

For the Plaintiff, B. R. BUFFETT, Esq.

For the Defendant, LOUIS OGUST, Esq.

333 A jury was empanelled, accepted and sworn.
Counsel open the case to the Jury.

ADOLPH BERKOWITZ, the Plaintiff, sworn
as a witness on his own behalf, testified as follows:

Direct-examination by Mr. Buffett:

Q. Where do you live, Mr. Berkowitz? A. 415
West 55th Street, New York.

40 Q. What is your business? A. Automobile paint-
ing and trimming.

Q. And where are you in business? A. 450 West
55th Street, New York City.

Q. Where? New York City? A. Yes.

Q. Now, do you remember the 17th of January,
1920? A. I do.

Q. Will you tell me what occurred on that date?
A. I do. A Mr. Fellage from the Stearns Company
came up and asked me—

Adolph Berkowitz—Direct—for Plaintiff.

Mr. Ogust: I object, may it please your Honor, to any conversation between this witness and Mr. Fellage.

Mr. Buffett: I am asking him about the 17th of January.

The Court: That would be hearsay; conversation with someone else cannot be given.

Mr. Buffett: I consent it be stricken out. 20

Q. I am asking you about January 17, 1920. Do you remember that date? A. Yes.

Q. Did you see anybody on that date? A. Yes.

Q. Who was it? A. I saw Mr. Fellage and Mr. Lyons.

Q. Where? A. Up in mine place.

Q. And tell us what took place there. A. Mr. Fellage asked me whether I wanted to buy an automobile. 30

Mr. Ogust: I object, may it please your Honor, unless in the presence of the defendant.

The Court: That is what the witness testified to.

The Witness: In the presence of Mr. Lyons. He brought me a bill of sale made out by A. J. Dolly, and introduced me to Mr. Lyons. 40

Q. Now, I show you this paper and ask you if that is the paper that they gave you purporting to be a bill of sale? A. Yes, this is the bill of sale.

Mr. Buffett: Any objection to it going in evidence?

Mr. Ogust: May I see it? (Referring)
No objection.

10

Adolph Berkowitz—Direct—for Plaintiff.

The Court: Let it be marked.
(Paper marked Exhibit P-1.)

Q. Now, Mr. Berkowitz, at the time this paper was handed to you, will you tell me what conversation you had with Mr. Lyons or with Mr. Fellage in Mr. Lyon's presence? A. Well, I addressed
20 Mr. Lyons as Mr. Dolly, and then, after giving me the bill of sale, he said, "Well, I am not Mr. Dolly; I am Mr. Lyons." So I said, "I see, but who is this Mr. Dolly?"

Mr. Ogust: Will you speak up a little louder?

The Witness: Yes; sure. I say, "What is his address?" He said, "242 Main Street, Bridgeport."

30 Q. Were? A. Bridgeport, Connecticut. So I turned around and looked at Mr. Fellage. I said, "What is this?" He said, "Well, I know Mr. Lyons very well." He said, "It is all right." I said, "If you say so, all right; I give him the check."

Q. How long have you known Mr. Fellage? A. Oh, I known Mr. Fellage for about seven years.

Q. And you and he are in the same building? Aren't you? A. Yes, in the same building.

40 Q. Now, I call your attention to the notation on the bottom, "242 Main Street, Bridgeport, Connecticut", and ask you if that was put there by you? A. Yes, I jotted it down myself.

Q. And you put it there after Lyons had given you the address? A. Yes, sir.

Mr. Ogust: Will you please let—may it please your Honor, I wish the counsel would allow the witness to testify, not himself.

Adolph Berkowitz—Direct—for Plaintiff.

The Court: Yes. Do not lead.

Mr. Buffett: Very well.

Q. I show you this, and ask you what that is?

A. That is a check I handed over to Mr. Lyons.

Mr. Buffett: Any objection to it going in evidence?

20

Mr. Ogust: (Referring) No objection.

The Court: Let it be marked.

(Check marked Exhibit P-2.)

Q. Mr. Berkowitz, that check was cashed, wasn't it? A. Yes.

Mr. Buffett: This check reads: "First National Bank, Edgewater, N. J., January 17, 1920. Pay to the order of A. J. Dolly, \$1050.00, written out in full. Signed, Adolph Berkowitz. Endorsed, A. J. Dolly and Harvey M. Lyons."

30

Q. Now Mr. Berkowitz, have you investigated in Bridgeport for the address, 242 Main Street?

A. Yes, sir.

Mr. Ogust: I object.

Q. Personally? A. Personally.

The Court: Why?

40

Mr. Ogust: Unless he testifies personally.

Q. What did he find? A. I find Main Street, but that no such number; the only number we could find in Main Street is 238—that is an intersection, until 254; and I had a policeman from headquarters—

10

Adolph Berkowitz—Direct—for Plaintiff.

Mr. Ogust: I object, may it please your Honor.

The Court: Not what somebody else told you; only what you did yourself.

Q. Where did you go when you went to Bridgeport? A. Sir?

Q. First where did you go when you went to Bridgeport? A. First I went to Main Street.

Q. Where did you go when you went there first? A. Went to the police station.

Q. The police station? A. Yes.

Q. And did anybody accompany you on your investigation? A. Yes; a plain clothes man, a policeman.

Q. And you found as you have stated that there was— A. We investigated all the neighbors there. The only number is Main 238. There is no 242 only 254, and then I suggest we should go if there is another Main Street.

Mr. Ogust: I object to any suggestion of this witness to somebody else.

The Court: Yes.

Q. Did you make any further investigation? A. I did.

Q. Where? A. I went to East Main Street, and I found there numbers 198 and 246. There is no such a number there, and I inquired about the neighbors; there is no such a person ever been living around there.

Q. Did you make inquiries of anybody around there if they knew anybody by the name of Dolly? A. I did.

Q. What did you find out? A. People living there the last ten or twelve years never know a name like that.

40

Adolph Berkowitz—Direct—for Plaintiff.

10

Mr. Ogust: I object, may it please your Honor.

The Court: You cannot tell how long they lived there.

Mr. Buffett: No. That is hearsay.

The Court: Strike that out. But if he made inquiry and could not find it, that is competent.

20

Q. What did you find on your inquiry? A. I did not find such a number.

Q. Now, with reference to the man Dolly, what did you find out about him? A. I did not find anything. There is no such a person in existence around there.

Q. Now, when did you get that car into your possession? A. On January 17, 1920.

30

Mr. Ogust: January what?

Q. 17th, 1920. And that is the date of the check, is it? A. Yes, sir.

Q. What day of the week was it? A. That was on Saturday.

Q. What time of the day? A. Why, about one or one-thirty.

Q. Now, did you see it that day? A. No, I did not.

40

Q. When did you first see it? A. Why, Monday.

Mr. Ogust: I object, if it please your Honor.

The Court: Why?

Mr. Ogust: When he went to see the car.

The Court: Oh, it is a part of the transaction.

10

Adolph Berkowitz—Direct—for Plaintiff.

Q. What did you find out about the machine?

A. I find out a couple of days later. I spoke to a fellow, selling my car—

Q. What? A. —for \$1350.

Mr. Ogust: I object to any conversation with somebody else.

20

The Court: No. What you discovered.

The Witness: I discovered the car was a stolen car.

Mr. Ogust: I move that be stricken out.

The Court: Strike it out.

Q. How did you find out? A. I called up the police headquarters. I gave them the number of the bill of sale and the number of the car.

30 Q. Who did you talk to? A. I spoke to the detective, Scherer.

Q. Is he in court? A. He is in here, yes.

Q. What did he tell you?

Mr. Ogust: I object to the conversation between them.

Mr. Buffett: All right; I withdraw it.

40 Q. What later became of the machine? A. Mr. Scherer gave me a receipt and took the car back to police headquarters next day.

Q. What happened after that? A. I went down to police headquarters and met a Mr. Klaus there to identify his car. And the detective delivered him the car.

Q. Now, did you have any conversation with Lyons other than what you have said, on January the 17th? A. No.

Q. How did Lyons come to sell you this car?

Adolph Berkowitz—Direct—for Plaintiff.

10

Mr. Ogust: I object to that, if it please your Honor.

A. Through Mr. Fellage.

Mr. Ogust: Just one second.

The Court: I will hear you.

Mr. Ogust: There is no testimony whatsoever in this case that Lyons sold him this car, and the question is certainly calling for a conclusion.

20

The Court: Find out what the conversation was about the car with Lyons.

Mr. Buffett: I will withdraw that and say this:

Q. How did Lyons come to deliver it to you?

Mr. Ogust: I object to that as calling for a conclusion on the part of this witness.

30

The Court: Yes. Tell us any conversation about the transaction. That is proper.

Q. At the time he was in your office—I withdraw that—at the time he was in your office with Fellage, what conversation did you have with him other than what was said? A. Nothing else.

Q. Did you have any conversation with Fellage in the office in Lyons' presence with reference to it? A. No. Not any more than I asked him if it is all right, and he says, "It is all right." He knows Mr. Lyons, and Mr. Lyons is a responsible man.

40

Q. Now, you had an account at the Edgewater Bank at the time this check was drawn on the Edgewater Bank, didn't you? A. Yes, sir.

Q. You have been doing business in Bergen

101

Adolph Berkowitz—Cross—for Plaintiff.

County, haven't you, for sometime? A. Yes, sir.

Mr. Ogust: I object to that as entirely immaterial to the issue.

The Court: Oh, proceed.

Mr. Buffett: Counsel in his opening referred to it, and I want to show why he had that account.

20

The Court: Oh, proceed.

Q. You had been doing business in Bergen County for some years, hadn't you? A. Yes, sir.

Q. And you had an account in that bank, hadn't you? A. Yes, sir.

Mr. Buffett: That is all. Your witness.

332 Cross-examination by Mr. Ogust:

Q. The only thing, Mr. Berkowitz, that Mr. Lyons said to you on the 17th of January was that, when you asked him where Dolly lived, he said he believed it was 242 Main Street, Bridgeport, Connecticut, is that right? A. He did not say he believed; he said he lives there.

40 Q. He said he lived at 242 Main Street, Bridgeport, Connecticut, that was his address; is that right? A. Yes.

Q. Had you ever had a conversation with Mr. Lyons before that time? A. No.

Q. In your life? A. Never.

Q. Had you ever seen Mr. Lyons before? A. Never.

Q. That time, in your life? A. Never.

Q. Outside of that one question that you asked Mr. Lyons, was there any other conversation between you and Lyons? A. No.

Adolph Berkowitz—Cross—for Plaintiff.

Q. And outside of the one question that you said that you asked of Mr. Fellage in his presence, and that was about that he knew Mr. Lyons, and you said, "Well, if you say so"—meaning Fellage—"then, it is all right"—outside of that there was no other conversation in the presence of Mr. Lyons, was there? A. No.

Q. Now, you said, Mr. Berkowitz, that you did not look at the car that day at all? Isn't it a fact, Mr. Berkowitz, that before you turned over this check, that you went right there, the car was right on the same floor where you were? You were in your office and here is your place there where you do your auto painting, and the car was standing there. Isn't it a fact that you examined that car thoroughly? A. No. 20

Q. You did not look at it at all? A. No, sir.

Q. That car was how many feet from where you were talking, or handing over the check to Mr. Lyons? A. About 10 feet. 30

Q. And you did not look at the car and you did not examine the car? A. No.

Q. And you did not look at it before you handed over the check at all? A. No.

Q. You did not know what condition the car was in? A. No.

Q. You did not know the first thing about the car? A. I did not know, only Mr. Fellage— 40

Q. Outside of what you had been told by somebody else, you did not know the first thing about that car when you handed over a check for a thousand and fifty dollars to a man that you did not know; is that right? A. Yes.

Q. And you have been in business how many years? A. About 12 years. And we doing that every day.

10

Adolph Berkowitz—Cross—for Plaintiff.

Mr. Ogust: I move that be stricken out, if it please your Honor.

The Court: Strike that out.

Q. You say that Mr. Fellage said Mr. Lyons is a responsible man? A. Yes.

20 Q. No question about that in your mind? A. (Witness shakes head in the negative.)

Q. What? A. No. That is what he told me.

Q. Do you remember testifying before in this case? A. Yes.

Q. You were asked what conversation took place? A. Yes.

Q. Did you ever testify to that before, Mr. Berkowitz? A. That what?

Q. That Mr. Fellage said that Mr. Lyons is a responsible man? A. Yes.

30 Q. You did say that? A. Yes.

Q. All right. Now, let me give you some of your testimony. Now, who asked you to make the check out to Mr. Dolly, before I go on that? Who asked you to make the check out to Mr. Dolly? A. Mr. Fellage.

Q. Mr. Fellage. So that everything that you did was according to conversations and instructions that you had theretofore had with Mr. Fellage? A. Yes.

40 Q. Is that right? A. Yes. The check had to be made out because the sale was that way.

Q. Just one second.

Mr. Ogust: I move it be stricken out, if it please your Honor. It is not responsive.

The Court: No. I think it is in answer to your original question.

Mr. Ogust: I asked him if he made out

Adolph Berkowitz—Cross—for Plaintiff.

the check according to the instructions of Mr. Fellage.

The Witness: To the bill of sale.

Q. Then you made it out according to the bill of sale? A. Yes.

Q. Now then, did you testify on the previous examination, on the previous trial, as follows: "And I said to the girl, I said, 'Make out a check'"? A. Yes. 20

Q. "Who do you want to make out the check to, Mr. Fellage"? A. Yes.

Q. "He said, 'Make it out to A. J. Dolly' ". A. Yes, as the bill of sale reads.

Q. Now, just one second. That had nothing to do with the bill of sale, did it? You weren't going according to the bill of sale then, were you? A. Why, certainly, he had a bill of sale. He said, "Make it out to the bill of sale." 30

Q. Then you didn't have to ask Mr. Fellage who to make out the bill of sale to, did you? A. Why, certainly; that goes in the conversation where you do business.

Q. Now, just one second. I asked you, did you read the bill of sale at all? A. Yes, I just took a look at it.

Q. What do you mean by taking a look? A. Well, it means I have no time there; I didn't have much time, and I just depended on Fellage that it is all right. 40

Q. Now, just one second. I asked you, did you read this bill of sale? A. I do not remember exactly whether I read it at all, just that very minute.

Q. Well, did you look over any part of the bill of sale? A. Just the front part of it; "A. J. Dolly," that is what I remember.

10

Adolph Berkowitz—Cross—for Plaintiff.

Mr. Ogust: Pardon me, your Honor. Is the bill of sale up there?

Mr. Buffet: Right here (handing paper).

Q. Now, when you say the front part of it, you mean up at the very top? A. No, I think the front.

Q. You read the whole front page, is that right?

20 A. No. Not the front page. Just close it up and you will see the name "A. J. Dolly".

Q. You didn't open this at all? A. I do not think I did, because I did not have much time. That is why I did not look at the car either.

Q. I see. So that without looking to find out whether the paper you were getting was a bill of sale or a dog license, or anything else, you took a piece of paper that was folded up? A. Yes.

30 Q. All you saw was the name "A. J. Dolly"? A. Yes.

Q. And you were satisfied that that was a sufficient bill of sale? A. Yes, sir; depending on people I—

Q. Just answer the questions, please.

The Court: Yes. Just stop when you answer the question.

Q. And with that piece of paper folded up, you had the girl write out a check for a thousand and fifty dollars? A. Yes, sir.

40 Q. To A. J. Dolly? A. Yes, sir.

Q. Now, you were depending there entirely, you say, upon Mr. Felage, is that right? A. Yes.

Q. You had no interest in Mr. Lyons at all, did you? A. No.

Q. You didn't care anything about him, did you, as far as he was concerned? A. Pardon me. Let me answer straight, something.

Q. Now, just answer. Pardon me, Mr. Wit-

Adolph Berkowitz—Cross—for Plaintiff.

ness. You please answer yes or no to the question, unless you cannot answer it. A. Why you don't ask me questions to suit me?

Q. Your counsel will take care of that, Mr. Berkowitz. The only person that you relied on in this whole transaction was Mr. Fellage, isn't that so? A. Yes.

Q. You did not rely on Mr. Lyons, did you? A. 20
I did ask Mr. Fellage whether he is a responsible man, and he knows him, and he said yes.

Q. And that was right in the presence of Mr. Lyons? A. Yes.

Q. Now, I will read to you your testimony on the previous trial and ask you if you testified as is there stated? "Question: What is his name? Answer: Mr. Fellage. He said, 'Oh, it is all right. I know Mr. Lyons.' He said, 'No trouble to it.' I said, 'Well, all right,' I said; 'You said so, so 30
it is all right.'" Is that right? Did you so testify? A. Yes.

Q. Did you say one word about, in that conversation, that there was a word about Mr. Lyons being a responsible man or not a responsible man? A. Well, you did not ask me, I suppose.

Q. Oh, this is your attorney's questions; not mine, Mr. Berkowitz. A. Well, I suppose he did not ask me that question, and I didn't have to tell it to him. 40

Q. Oh, I see. You were not asked on the previous trial what the entire conversation was, is that right? A. Whether I was asked?

Q. Yes. A. Well, you read it from the paper. You can remember. I cannot remember everything was asked.

Q. Oh! Then you do not remember whether you were asked that question a few minutes ago

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Adolph Berkowitz—Cross—for Plaintiff.

right in this court, do you? A. No, I cannot remember.

Q. But you do remember very distinctly every word that was said in January, 1920? A. Yes. Because it was only a few words said, and it is easy to remember.

20 Q. I see. But on the previous trial you were asked so much that you cannot remember what you were saying at that time, is that right? A. You didnt let me say anything last trial, either.

Mr. Buffett: I am going to object to your attitude in this matter:

Mr. Ogust: I take exception, may it please your Honor, to the counsel's remarks.

The Court: Proceed. It is cross examination.

30

Q. So, when there are a few words said, you remember them? A. Positively.

Q. But when you testify to a whole lot, you do not remember? A. How can you? No.

Q. I see. How soon afterward, Mr. Berkowitz, was it that you telephoned? A. What?

40 Q. How soon after this Saturday, the 17th of January, was it that you telephoned to the Police Department? A. Why, it was the next Wednesday right after that.

Q. When was the first time after that Saturday that you say you looked at the car? A. Monday.

Q. How long had this car been in your place before Mr. Lyons got there? A. Well, I did not—how can I tell when the car was there, when I didn't see the car? Mr. Lyons come up with Mr. Fellage in the office, and we transacted business.

Adolph Berkowitz—Cross—for Plaintiff.

Q. Now you testify that you do not know how long the car was there before Mr. Lyons came there that Saturday, is that right? A. He came up with the elevator, I suppose, that very Saturday, because when I got into the office, Mr. Fellage told me the car is upstairs.

Q. Now, I didn't ask you that, Mr. Berkowitz, and you know it. What I asked you was this: How long was this car in your place of business before Mr. Lyons got there that day? A. It might be one minute or it might not be a minute later, I do not know. I would not say that. 20

Q. You could not say whether it was there an hour even, or a minute, is that right? A. No. When Mr. Fellage came up he told me the car was up here.

Q. Was that in the presence of Mr. Lyons too? A. Yes, I think it was at that same time. 30

Q. I see. So you do not know how long the car had been there? A. Well, it might be in the next five minutes or five minutes before I got there, or five minutes later.

Q. Did you know on the previous trial how long the car had been in the place before Mr. Lyons got there? A. Well, about the same thing as I say now.

Q. Well now, let me refresh your recollection: "Question—this is a question put to you—At that time the car was in your place? Answer: Yes, sir. And how long—question: And how long had it been in your place; how many hours? Answer: Why, about five minutes." A. That is right; that is what I say now. 40

Q. Did you so testify? A. Just now; yes.

Q. Oh, you are now testifying— A. I said it was five minutes before I got up to the office or

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Adolph Berkowitz—Cross—for Plaintiff.

five minutes after I got up to the office. I did not see no car. I simply depend on Mr. Fellage, I know him so long. He say the car is up here.

20

Mr. Ogust: I move it be stricken out about him depending on Mr. Fellage. The question is, how long had the car been in his place?

The Court: I am going to let that stand. If you want to ask him about that, you may ask him whether he testified so and so. That is your question.

Q. Mr. Berkowitz, did you testify on the previous trial on this question: "Question: At that time the car was in your place? Answer: Yes, sir." Is that right? A. That is right.

30 Q. "And how long had it been in your place; how many hours? Answer: Why, about five minutes." A. Yes.

Q. Is that right? A. Yes.

Q. You so testified on the previous trial? A. Yes.

Q. Have you ever bought cars before, Mr. Berkowitz? A. Well, not quite often, no; no.

Q. Well, you had a few cars, hadn't you? A. For my own use; yes.

40 Q. For your own use only. You bought this car for your own use too? A. No.

Q. You did not buy this for your own use? A. No.

Q. And what did you buy this car for? A. Why, just for speculation.

Q. For speculation? A. Yes. Then I wasn't sure I might use it myself, because I had an old car at that time.

Adolph Berkowitz—Cross—for Plaintiff.

Q. I see. Now, are you changing your answer, Mr. Berkowitz? A. No.

Q. Because you see me turning the pages of your testimony on the previous trial— A. I am not—

Q. —or because you bought this car for your own use? Which is it? A. I am not watching what you are doing there. I am telling you that at the time I intended to buy that car, whether I sold it or whether I kept it for myself. 20

Q. Now, I ask you this question again, Mr. Berkowitz, and please answer it: Did you buy this car for your own use or for speculation? A. I did not have set my mind whether I intend to sell it or whether I going to keep it myself. Then I decided I am going to sell it.

Q. On the previous trial I ask you if this question was put to you and if you gave these answers: "Question: Did you consider a Buick a high-class or a low-class car? Answer: Well, a low-class. Question: And when you bought that for your own use, Mr. Berkowitz—And you bought that for your own use, Mr. Berkowitz? Answer: Yes. Question: You say when the car came up you did not look at it at all? Answer: No. Question: You did not even go and see what you were paying out a check for \$1050.00 for until a number of days later? Answer: No. Question: Is that right? Yes. Question: You did not know that the machine inside there was a dilapidated tin can or was a car that just came out of the factory, did ou? Answer: Depending on Felage, took his word." Is that right? A. Yes. 30

Q. Mr. Berkowitz, when was this that you say you went up to Bridgeport, Connecticut? A. 40

10

Adolph Berkowitz—Cross—for Plaintiff.

Why, the early part of the spring; right after that trial.

Q. What is that? A. Right after that trial. The last trial.

Q. Oh! Right after the last trial? A. To convince myself. You asked me to. I said I would go up.

20 Q. After the last trial was it?

Mr. Buffet: I object. That was what was said up here in court. The cross-examination was based on that.

The Court: Proceed.

By Mr. Buffet:

Q. You say you were only ten feet from the car. Is there a partition around your office? A. Yes, sir.

30 Q. And how far would you have to go to go and see it? A. Why, I would have to go around through the office and go to the entrance, and look where the car is.

Q. What time of the day was this? A. Why, it was after hours; it was about one or one-thirty

Q. After working hours on Saturday, wasn't it? A. Yes.

Q. And had all your employes gone? A. Everybody.

40 Q. And what were you waiting there for then that late? A. Why, I just wait for him to give him the check.

Q. Yes. A. I finish up the transaction; close it.

Q. And you were in a hurry, weren't you? A. I was in a hurry; I had to see some people.

The Court: Do not lead the witness.

Mr. Buffet: That is all.

William J. Shearer—Direct—for Plaintiff.

By Mr. Ogust:

Q. As a matter of fact, you said, Mr. Berkowitz, you were very busy? A. Yes.

Mr. Ogust: That is all.

The Witness: That doesn't mean I got to be busy in the shop. I can be outside busy.

Mr. Ogust: That is all.

20

WILLIAM J. SHEARER, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct-examination by Mr. Buffet:

Q. What is your full name, Mr. Shearer? A. William J. Shearer.

30

Q. Where do you live? A. 1349 Bergen Street, Brooklyn.

Q. What is your business? A. Patrolman, City of New York.

Q. And are you connected with any department, any special department in the Police Department? A. Automobile squad.

Q. How long have you been in that; how long have you been in that? A. About 3 years.

Q. And you know Berkowitz here, don't you? A. I do, yes, sir.

40

Q. He just stepped out of the room for a minute. And you remember January, 1920? A. I do; yes, sir.

Q. Now, do you remember seeing Berkowitz at that time? A. Yes, sir.

Q. And did you have a conversation with him? A. I did; yes.

10

William J. Shearer—Direct—for Plaintiff.

Q. With reference to what?

Mr. Ogust: I object, if it please your Honor, to any conversations between this witness and Berkowitz.

The Court: He may tell what it is in relation to; not the conversation.

20

A. In reference to a stolen automobile, or reported stolen automobile.

Q. Now, how did you know that Berkowitz had this car? A. Why, he called me on the telephone, or called the office, and I was on day duty and gave me some numbers.

Mr. Ogust: May it please your Honor, I object to the conversation.

30

The Court: No, the conversation is not proper.

Mr. Buffet: I beg pardon?

The Court: The fact that he had a conversation with Berkowitz is proper, but the conversation is not because it was not in the presence of the defendant.

Q. Did you go to Berkowitz's place of business during January, 1920? A. I did.

Q. For what purpose? A. Investigation.

40 Q. And what did you find? A. A reported stolen automobile.

Q. And did you find it there? A. I did.

Q. How did you know it was there? A. I was informed so.

Q. By whom? A. Over the telephone; supposedly Mr. Berkowitz.

Q. And you afterwards saw Berkowitz? A. I did.

William J. Shearer—Direct—for Plaintiff.

Q. And that telephone conversation was confirmed afterwards? A. Yes, sir.

Q. Did you take the car from there? A. I did.

Q. Where did you take it? A. To headquarters.

Q. And what happened to it then? A. It was subsequently turned over to the owner or the claimant.

Q. What was his name? A. William Kraus, 20
I believe it was.

Q. And did he take it away? A. He did.

Q. Did he identify it before he took it away?
A. Yes, sir; positively.

Q. Who was present when he identified it? A.
Mr. Berkowitz, Mr. Kraus, myself, and I think
there was another officer there; I am not positive.

Q. Now, did you subsequently—or, did you see
Lyons with reference to this matter? A. I did.

Q. Where? A. I think the first time I saw him 30
was at Edgewater.

Q. What did you go there for? A. To inter-
view him.

Q. And you saw him? A. I did.

Q. And talked with him? A. Yes, sir.

Q. And what was the conversation? A. Why,
I asked him how he come to sell this car to this
Mr. Berkowitz, and he told me that this man
Dolly had given him the authority to sell the car.

Q. What else? A. And I asked him where Dolly 40
was, and he told me he lived in Bridgeport, 242
Main Street was the address he knew him to live
at. And I asked him where he was now, and he
said that he had left to go back to Bridgeport, to
the best of his knowledge. And then I requested—
I think it was either after or before—I requested
him to come over to headquarters for the purpose
of investigating it further.

10

William J. Shearer—Direct—for Plaintiff.

Q. Did he come? A. He did.

Q. Yes. Did you have a conversation with him, then? A. And I took it up with my superior in the squad and we had quite a conversation over it, and I continued the investigation and made a further request for him to come back later.

Q. Did he come? A. On the advice of counsel
20 —I did not—

Mr. Ogust: I object. I move it be stricken out.

The Court: What he said about it he may tell us.

Mr. Ogust: What he said, yes.

A. Well, I did not have the conversation with Lyons with reference to coming back. It was through the Chief of Police of Bridgeport.

30

Mr. Ogust: I object to any conversation with the Chief of Police.

The Court: Strike it out.

Q. Did he come back? A. Not to my knowledge; he did not come to me.

Q. You did not see him? A. No, sir.

Mr. Buffett: Your witness.

40

Cross-examination by Mr. Ogust:

Q. Mr. Shearer, since January, 1920, have you talked this matter over with anybody at all? A. You mean, the details of the case?

Q. Yes. A. Oh, yes.

Q. All the conversations and everything? A. Yes, indeed.

William J. Shearer—Cross—for Plaintiff.

Q. And when was the last time that you talked about these conversations? A. At the trial here.

Q. That was how many months ago? A. Oh, possibly two or three. I do not just recall the exact date.

Q. I see. Well, I might refresh your recollection. It was in the early part of May of this year. Since that time have you talked this over with anybody? Have you? A. Not in detail, no. 20

Q. No. And you remember distinctly that Mr. Lyons said that he had the authority from Dolly to sell this car? A. I have a memorandum to that effect made at the time.

Q. So are you speaking from your own recollection, or from this memorandum that you talk about? A. From the memorandum.

Mr. Ogust: That is all. 30

Redirect-examination by Mr. Buffett:

Q. You say you have a memorandum? A. I have.

Q. Let me see it.

Mr. Ogust: I object, may it please your Honor, to the memorandum being used.

Mr. Buffett: You brought it out. 40

The Court: You may show it.

A. It is only the facts that I have to keep.

Q. When was this memorandum made? A. Well, part of it was made at the time of the investigation and part of it was made subsequent.

Q. Which part was made at the time of the investigation, that in blue ink or black? A. Blue.

10

William J. Shearer—Redirect—for Plaintiff.

Q. And subsequently that was put on afterwards? A. Right.

Q. I show it to you and ask you if that will refresh your recollection in answering the questions?

20

Mr. Ogust: I object on the ground that the witness has testified throughly without saying that he had recourse to anything.

The Court: He may look at the memorandum and see if there is anything else.

Q. After refreshing your recollection from the memorandum referred to, will you state now what the conversation was with reference to—

30

Mr. Ogust: I object on the ground that the witness has not said that he did not recollect, or that he required any memorandum to refresh his recollection.

The Court: If he made a memorandum at that time, he may read it.

Mr. Ogust: The memorandum is nothing more than what he could testify to now.

The Court: If there isn't anything, there isn't anything further to be said.

40

Mr. Ogust: What I am getting at, your Honor is this: There has nothing arisen in the case whereby the witness has said that he required to refresh his memory from anything.

The Court: You got it out on your cross-examination. He may use it.

Mr. Ogust: He does not require any further examination on that point.

The Court: He may use it if he desires.

William J. Shearer—Redirect—for Plaintiff.

Mr. Ogust: Note my exception.

The Court: Yes. Take your exception.

By the Court:

Q. Anything else on that memorandum? A. No. Just the facts that I have to keep, that is all. The matter of record that I take from the department.

20

Q. What you have already testified? A. Parts of it, yes. I have about a hundred cases.

Q. Oh, of course, I understand.

By Mr. Buffett:

Q. Do you remember the day this car was stolen? A. On January the—

Mr. Ogust: I object to it, if it please your Honor. How does this witness know the day this car was stolen? 30

Mr. Buffet: I want to know if he remembers it.

The Court: He does not know anything about the stealing of the car except what he has been told.

A. It was reported stolen by Mr. Kraus.

Q. When? 40

The Court: He may tell us when it was reported stolen.

A. January 11, 1920.

Q. And do you remember the day it was turned over to Mr. Kraus at Police Headquarters? A. On January 23rd, two days later.

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Walter A. Lang—Direct—for Plaintiff.

Mr. Buffet: That is all.

Mr. Ogust: That is all, Mr. Shearer.

Mr. Buffett: Now, Mr. Lang.

20 WALTER A. LANG, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct-examination by Mr. Buffett:

Q. Mr. Lang, where do you live? A. Fort Le , New Jersey.

Q. And what is your business? A. Paying Teller of the First National Bank, Fort Lee.

Q. And were you ever connected with the First National Bank of Edgewater? A. Yes, sir.

30 Q. In January, 1920? A. Yes, sir.

Q. Now, I show you this check and ask you if you know the endorsement on there, the last endorsement?

The Court: What? Exhibit P-2?

Mr. Buffett: Yes, P-2.

A. Yes, sir.

Q. And whose signature is it? A. Harvey M. Lyons.

40 Q. Did you cash that check personally? A. I did.

Q. And did you hand the money personally to Lyons? A. Yes. After he was identified.

Q. All right.

Mr. Buffett: That is all.

Mr. Ogust: No cross-examination.

Mr. Buffett: If the Court please, I obtained a commission to take the testimony

Walter A. Lang—Direct—for Plaintiff.

of William Kraus in the City of New York. Such testimony was taken before Judge Doremus, and the commission is here. May I read it?

The Court: You may read it.

Mr. Buffet: Depositions taken of the subscribing witness—

The Court: One minute, before you do that. Members of the Jury: About these depositions, that is evidence of a witness taken in accordance with the statute where a witness cannot be present, and the evidence has the same effect as if he had been present on the witness stand. 20

Mr. Buffet: (Reading) "William Kraus, a witness produced on behalf of the plaintiff, testified as follows: 30

By Mr. Buffett:

Q. Where do you reside? A. I reside at No. 501 West 111th Street, New York City.

Q. What is your business? A. Garage business.

Q. Were you, in January, 1920, the owner of a Buick automobile, Mr. Krauss? A. Yes.

Q. Do you still own it? A. Yes.

Q. Have you had possession of it ever since you bought it in January, 1920? A. It was stolen some time in January, 1920. 40

Q. Did you recover possession of it? A. Yes.

Q. When? A. About two weeks after it was stolen.

Q. Where did you recover possession of it? A. From the Police Department.

Q. Where? A. It was downtown somewhere—a police station.

10

Deposition of William Kraus—for Plaintiff.

Q. Who was present when you recovered it? A.
A detective.

Q. Do you know his name? A. No.

Q. Anyone else? A. Mr. Berkowitz.

Q. And you did recover possession of it? A.
Yes.

Q. Do you know how Mr. Berkowitz got it? A.
20 Not any more than what he told me or rather what
I heard him say when I recovered possession of it.

Q. Where was this car stolen from? A. From
Morningside Avenue near 118th Street, New York
City.

Q. And the car which you recovered back was
the same car which was stolen from you? A. Yes.

Q. Do you know the manufacturer's number of
the car now? A. No, I do not recall the number
now.

30 Q. Did you have an owner's card at that time?
A. Yes, I did.

Q. Did the number on your card correspond
with the manufacturer's number of the automo-
bile?"

Mr. Buffett: There was an objection by my
friend on the ground that it was incompe-
tent, on the ground that the best proof
would be the introduction of the card itself.

40 The Court: No. That objection is over-
ruled.

Mr. Ogust: Note my exception.

The Court: Take your exception.

Mr. Buffett: The answer is "yes, but it is
not here.

Mr. Ogust: No, he did not answer that.
You proceed with the question.

Mr. Buffett: All right.

Deposition of William Kraus—for Plaintiff.

By Mr. Buffett (Continuing reading)

“Q. Have you that card now? A. No, I have not.

“Q. Are you acquainted with Mr. Berkowitz at all? A. Not any more than seeing him at the time I mentioned.

“Q. Have you seen him since? A. Yes.

20

“Q. When? A. A day or two ago.

“Q. Who was present then? A. I saw him with you.

“Q. Is the gentleman present now who was with you at the time you recovered possession of your car? A. Yes, he is.

“Q. What is his name? A. I do not know his first name—his last name is Berkowitz.

“Q. Is he the man who was present with me when I saw him the other day? A. Yes, he is.” 30

Mr. Buffett: Then comes Cross-examination by Mr. Ogust.

Mr. Ogust: I will waive that cross-examination, may it please your Honor.

The Court: Do you consent to that?

Mr. Buffett: I think we had better have it.

The Court: You may read it.

40

Mr. Ogust: Your Honor, I do not want to be put in the position of—I think that I am entitled, if I do not want to proceed with the cross-examination, I do not have to.

The Court: Oh yes, you have. You have it all.

Mr. Ogust: There was no rebuttal following the cross-examination.

10

Deposition of William Kraus—for Plaintiff.

The Court: Oh, no. The parties are entitled to it. It is a part of the examination. You could not any more strike it out than you could strike out the cross-examination of a witness. Proceed.

20

Mr. Ogust: I think you will find there are a number of objections to this particular cross-examination, if my friend wants it; I wanted to save a little time.

By Mr. Buffet: (Reading)

“Cross-examination by Mr. Ogust:

“Q. Mr. Krauss, where did you live in the spring of this year? A. At the same address.

30

“Q. You have lived continuously at 501 West 111th Street, New York City, for how long? A. About three years.

“Q. The address you have given is your home address? A. Yes.

“Q. That has been your home address for the past three years? A. Yes.”

Mr. Buffett: Objection by me on account of irrelevancy.

40

By Mr. Buffett: (Reading)

“Q. You have no other address in the past three years?”

Mr. Buffett: The same objection.

“Q. Are you in the garage business at No. 501 West 111th Street, New York City? A. No, at No. 127 West 99th Street, New York City, and 110th Street and Central Park West, New York City.

Deposition of William Kraus—for Plaintiff.

“Q. Do you remember what day in January it was that you say you recovered your car? A. No, I really do not remember.

“Q. Was it about January 20th? A. My recollection is that it was along about that time.

“Q. In the spring of this year were you asked to go to Court at Hackensack, New Jersey?”

20

Mr. Buffett: Objected to by me.

“A. I was requested to go to court one day, some time ago.

“Q. Where were you asked to go, Mr. Krauss? A. I do not recall.”

Mr. Buffett: Objection by me as being irrelevant, incompetent and immaterial.

30

“Q. Were you given any directions to go? A. Someone called me on the telephone and requested me to go to court at the time.

“Q. Did you promise to go, Mr. Krauss? A. I said I would go.

“Q. What was the reason you did not go?”

Mr. Buffett: That was objected to by me as irrelevant, immaterial and incompetent.

40

“A. I was delayed a little. I recall I was to meet someone at my office, who was to go with me. I was delayed somewhat and they had already gone.”

Mr. Buffett: The same objection.

“Q. Were you subpoenaed to come here today, Mr. Krauss? A. No.

19

Elmer J. S. Coe—Direct—for Plaintiff.

“Q. You have come down at the request of Mr. Berkowitz? A. Yes.”

The Court: Well, proceed.

Mr. Buffett: That is our case. Oh, I beg your pardon. Mr. Coe.

20

ELMER J. S. COE, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct-examination by Mr. Buffett:

Q. Where do you live, Mr. Coe? A. Morsemere, New Jersey.

Q. And what is your business? A. National Surety Company.

Q. Previous to going with the National Surety Company, what was your business? A. First National Bank, Edgewater.

Q. And were you connected with the bank at the time this check went through in January, 1920? A. I was.

Q. And do you know the—I guess there is no question about the endorsement—are you acquainted with Charles Van Gelder? A. I am.

Q. Was he a depositor at the bank? A. He was.

Q. I show you this purported bill of sale, and ask you if that is Van Gelder's signature? A. (Referring) That is, as I recall it; yes, sir.

Mr. Ogust: What is the question and what is the answer?

Mr. Buffett: That is his signature, as he recalls it.

Elmer J. S. Coe—Direct—for Plaintiff.

Mr. Ogust: You mean, Charles Van Gelder?

Mr. Buffett: Right.

Q. Now, I ask you to look this over and tell me if the writing on the bill of sale is in the handwriting of Charles Van Gelder? You are acquainted with his handwriting, aren't you? A. Yes, sir.

Q. He was a depositor in the bank? A. Yes, sir.

Q. Please answer the question now. A. Well, it looks very much the same to me.

Q. Would you say—

Mr. Ogust: Just one second, Mr. Buffett.

Mr. Buffett: All right.

Mr. Ogust: I move to strike out the testimony, may it please your Honor, on the ground that what it may look to Mr. Coe, the witness, is not evidence.

Mr. Buffett: True; I will consent to it.

The Court: I won't strike it out. Proceed and see how far it is going to go.

Mr. Ogust: Exception, may it please your Honor.

Q. You have seen Mr. Van Gelder's handwriting a number of times, haven't you, Mr. Coe? A. Quite often; yes.

Q. He is a depositor in the bank, you say? A. Yes.

Q. Will you compare the handwriting, the endorsement A. J. Dolly on the back of that check, and tell me if that is the same writing?

Mr. Ogust: One second.

Q. As in the body of that instrument?

Mr. Ogust: I object, if it please your Hon-

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Elmer J. S. Coe—Direct—for Plaintiff.

or, on the ground that the witness has not qualified as being an expert in handwriting, and especially as to say whether the handwriting,—that is, that somebody else's name is the same as the handwriting on another instrument.

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The Court: The question is whether he can tell us whether that is the handwriting of this gentleman.

Mr. Buffett: If the Court please, I can qualify him.

Mr. Ogust: Knowing a signature of a depositor, may it please your Honor, is one thing. To be able to testify that that writing has been done by the same man as the writer of the signature is another proposition.

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The Court: You may cross-examine him as to his qualifications as to that, if you desire.

By Mr. Ogust:

Q. Mr. Coe, outside of seeing Mr. Van Gelder's name on checks in the bank, have you ever had occasion to see him write other things? A. No, I do not think I have.

40 Q. So that the only thing that you know about Mr. Van Gelder's handwriting are the few letters that go to make up the name Charles F. Van Gelder, is that right? Charles Van Gelder, is it, or middle initial? A. No, I do not think there is any middle initial.

Q. Charles Van Gelder, is that right? A. I would not say that is the same writing, no. I do not say he wrote the body of this bill of sale; no, I cannot swear to that.

Elmer J. S. Coe—Direct—for Plaintiff.

Mr. Ogust: I move, if it please your Honor, that the testimony of this witness be stricken out.

The Court: You may ask him anything further that you desire as to his qualifications as an expert.

By Mr. Buffett:

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Q. How long have you been paying teller of the bank? A. Why, I was paying teller of the bank for about 10 years.

Q. And you have been used to comparing handwritings, haven't you? A. Yes.

Mr. Ogust: I object to that, if it please your Honor.

The Court: Oh, proceed.

30

Mr. Ogust: It is not a question of comparing signatures. It is a question of a witness who has only seen the signature of a person and who now says that he will not state, even from his—assuming that he has that experience as a paying teller—who will not state that that signature, that the name of A. J. Dolly is in the handwriting of Mr. Van Gelder.

The Court: Proceed.

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Mr. Ogust: Note my exception, may it please your Honor.

The Court: Yes. Note your exception.

Q. And in connection with your business, you have had occasion to compare writings, haven't you, notes and checks and signatures? A. Yes. Quite frequently.

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Elmer J. S. Coe—Direct—for Plaintiff.

Q. And you say you are familiar with Van Gelder's handwriting? A. Oh, yes, his signature; that is principally all.

Q. Yes; now—

Mr. Ogust: May I cross-examine here, your Honor?

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The Court: Wait until he finishes. One at a time.

Mr. Ogust: He is going to go to the paper now, and I want to cross-examine as to how much he knows of Mr. Van Gelder's signature, if your Honor please.

The Court: Proceed.

By Mr. Ogust: ,

30 Q. Mr. Coe, in your duties as cashier of the First National Bank, you did not examine every check that came in, did you? A. No, sir, I did not.

Q. That was the duty of the receiving teller or the paying teller? A. The signature clerk, yes.

Q. The signature clerk; you were not the signature clerk? A. No, sir.

Q. And if you saw the handwriting of Charles Van Gelder, the signature, that is, of Charles Van Gelder, it was only once in a very great while, isn't that so? A. Very seldom, yes.

40 Q. Mr. Van Gelder did not discount notes in your bank, did he, so far as you remember, Mr. Coe? A. Why, he did once in a while.

Q. Well, how often did he discount notes, Mr. Coe? A. About once every three or four years, probably.

Q. Once every three or four years? A. Probably.

Q. And how long were you at the First National

Elmer J. S. Coe—Direct—for Plaintiff.

Bank? A. How long?

Q. How long were you at the First National Bank? A. Four years and a half.

Q. So that in that time he may have discounted one or two—possibly two—notes, is that right?

Mr. Buffett: Objected to as speculative.

The Court: Oh, proceed.

20

Q. Is that right, Mr. Coe? A. Yes. Well,—

Q. And if he were discounting a note, then perhaps his signature would come to your attention, isn't that so? A. Well, yes, as cashier.

Q. As cashier; but outside of that, in the ordinary routine of the bank? A. Well, Mr. Ogust, I have seen his signature at other times, not only on notes, but on different papers that were executed by him.

30

Q. As a notary public, you saw his signature on different occasions? A. Yes.

Q. Is that the idea? A. Yes.

Q. But outside of that, you do not know anything about his handwriting, except that he has got a very nice "Charles Van Gelder", that he writes, that any man who runs may read, isn't that so? A. Just like himself.

Q. Just like himself, you say? A. Right.

By Mr. Buffett:

40

Q. I ask you to compare the signature on that check—

The Court: I do not think you have qualified him as an expert any more than as to signatures.

Mr. Buffett: He says he has seen his writing on papers that were executed.

The Court: That does not make any dif-

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Elmer J. S. Coe—Direct—for Plaintiff.

ference; that would qualify him as to his signature; but how does that qualify him to show that other writing was done by this gentleman? You see, you have not qualified him for that. You have qualified him so far as the signature is concerned, and I have allowed you to testify to that. But

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you have not qualified him as an expert on general handwriting.

Q. Have you ever testified before as an expert on handwriting?

Mr. Ogust: I object, if it please your Honor, on the ground that that does not qualify him.

Mr. Buffett: I want to see how much he knows.

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The Court: If he has had experience in that line, why, it is another matter.

Mr. Ogust: Why, he may have been called every day to testify; how good his testimony was is another matter.

The Court: Oh, no; proceed.

Mr. Ogust: Note my exception.

Q. Have you, Mr. Coe? A. I have.

40

Q. How many times? A. Three times.

Mr. Ogust: How many? Three times?

The Witness: Three times.

The Court: Was that the handwriting or only signatures?

The Witness: That was to handwriting and signature, both.

The Court: Well, what experience have

Elmer J. S. Coe—Direct—for Plaintiff.

you had in regard to handwriting? That is the question.

The Witness: Why, none as to handwriting; it was simply as to signature principally.

The Court: All right.

The Witness: Principally.

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Q. Well, as a signature expert, Mr. Coe, will you tell me if that signature is the same as the writing in the body of this instrument?

Mr. Ogust: I object, if it please your Honor.

The Court: I do not think he is qualified so far as that goes. You have not qualified him as an expert. You see, an expert, to be of any value at all, must have unusual qualifications. 30

Mr. Buffett: I appreciate that.

The Court: Otherwise, he is simply giving an opinion. Now, this gentleman has qualified as an expert on signatures; but he has not gone any further than that, and what he has testified as to the signature of this gentleman, if it is competent, it may stand; but when it comes to somebody else's handwriting— 40

Mr. Buffett: Well, I am trying to show that the handwriting is the same, that the man who drew the bill of sale—the man who executed as a notary, is the man who drew it.

Mr. Ogust: I object, may it please your Honor.

The Court: You have not qualified him as

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Motion to Dismiss Complaint.

an expert on handwriting.

Mr. Buffett: Then I withdraw the witness and rest.

Mr. Ogust: I move the testimony of the witness be stricken out.

The Court: It may stand, what was taken.

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Mr. Ogust: Exception. May it please your Honor, I move to dismiss the complaint and for a non-suit on the ground that the plaintiff has not proved his cause of action. The cause of action alleged in the complaint is as follows: That the defendant Harvey M. Lyons resides at Edgewater, in the County of Bergen and State of New Jersey; that on or about the 17th day of January, 1920, the defendant accompanied by one Raymond Fellage came to the plaintiff's place of business and offered for sale a 1919 Buick touring car which was in the defendant's possession at that time, and at the time stored on the premises of the defendant at Edgewater as aforesaid; that the said defendant represented to the plaintiff that this car was the property of one A. J. Dolly of Bridgeport, Connecticut, and could be purchased for the sum of \$1,050.; that the said defendant represented to the plaintiff that the said Dolly desired to sell the car and had left the said car with him for that purpose; that relying on the representations of the defendant, the plaintiff gave the said defendant his check for the sum of \$1,050., which check is as follows:—

Before I turn this page, if it please your Honor, I will say there is not one scintilla,

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Motion to Dismiss Complaint.

not one bit of proof as to any of one of those allegations, and the testimony of the plaintiff himself is that he had no conversation whatsoever with the defendant, and there is no proof in this case, if it please your Honor, that anybody had the authority or was the agent of this defendant in talking to the plaintiff. That subsequently—that is, that subsequently after the 17th day of January, if it please your Honor—the said car was delivered at the plaintiff's place of business in New York City and upon examination proved to be a 1920 model, manufacturer's number 567271, and upon learning this the plaintiff communicated with the Automobile Bureau of the Police Department of the City of New York and inquired if a 1923 model Buick, giving the manufacturer's number, was on their list of stolen cars and the said Automobile Bureau notified the plaintiff that they had such a car upon their list and the said Automobile Bureau later came and took the car away, delivering it to the proper owner who resided at 119th Street in the City of New York.

Three: That the said check was endorsed by the aforesaid A. J. Dolly and by the said Lyons, who, plaintiff is informed, and believes, received cash therefor at the First National Bank of Edgewater.

That at the time of the delivery of the said car, the plaintiff had his place of business in New York, there was also delivered a bill of sale made out by the said A. J. Dolly and acknowledged before Charles Van Gelder, of Edgewater, New Jersey, a

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Motion to Dismiss Complaint.

notary public of New Jersey. That upon the said bill of sale the address of the said Dolly was given as 242 Main Street, Bridgeport, Connecticut. And plaintiff is informed and believes there is no such address as 242 Main Street, Bridgeport, and plaintiff is informed and believes there is no such person in existence as A. J. Dolly.

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The plaintiff, relying upon the representations of the defendant as to the ownership of the car, and believing the same to be true, gave the defendant Lyons the aforesaid check. That all of the aforesaid representations plaintiff is informed and believes made by the defendant were false and fraudulent and were known to the defendant at the time the transaction was made to be false and fraudulent and were made for the purpose of deceiving the plaintiff and the defendant did actually deceive the plaintiff by the said representations. And the plaintiff believes that the said defendant made the said representations with intent to deceive and that the defendant knew that the said car was a stolen car at the time it was delivered to the plaintiff herein and received the plaintiff's check therefor.

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I say, if it please your Honor, that in the entire case the plaintiff has not proven a single one of those allegations outside of what we admitted in our answer, and that was that the defendant endorsed the check after Dolly did, and got the money from the bank on that. There is no proof whatsoever, your Honor, of any fraud or deceit, on the part of this plaintiff, and I will call

Charles Van Gelder—Direct—for Defendant.

your Honor's attention to some very recent cases, in fact they are not in the printed volumes yet. (Citing cases and Argument.)

The Court: Motion refused. I think there is enough to go to a jury.

Mr. Ogust: Note my exception.

The Court: Certainly. Take your exception. 20

CHARLES VAN GELDER, sworn as a witness on behalf of the defendant, testified as follows:

Direct-examination by Mr. Ogust:

Q. Mr. Van Gelder, where do you live? A. Edgewater. 30

Q. New Jersey? A. Yes, sir.

Q. And how long have you lived there, Mr. Van Gelder? A. About 38 years.

Q. And are you in business in Edgewater? A. Yes.

Q. And have you held public office in this County, Mr. Van Gelder? A. Yes.

Mr. Buffett: I object, if the Court please.

The Court: Oh, proceed; he may testify. 40

Q. Have you, Mr. Van Gelder? A. Yes, sir.

Q. And in the County? A. Yes.

Q. And in Edgewater? A. Yes.

Q. And for how many years? A. 10 or 12 years.

Q. And what is your business, Mr. Van Gelder?

A. Real estate and insurance.

Q. And you also happen to be a notary public, Mr. Van Gelder? A. Yes, sir.

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Charles Van Gelder—Direct—for Defendant.

Q. And now, do you remember the 17th of January, 1920? A. Yes.

Q. Do you remember a person representing himself as A. J. Dolly coming into your office? A. Yes, sir.

Q. And will you tell the Court and the Jury—

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Mr. Buffett: Now, if the Court please, I consider that leading, if a person comes in and represents himself as.

The Court: You ought to object before the witness answers. Proceed.

Q. What kind of a looking man was this man Dolly, the man who said his name was A. J. Dolly? A. Well, is Mr. Lyons here in Court?

Q. No, he just went outside; he will be back.

30 A. Well, he was a man about Mr. Lyon's build, but I thought probably a little taller and a little more full-faced.

Q. And how was he dressed? A. Well, very genteelly, nothing flashy about him, ordinarily.

Q. And what was the conversation that you had with Mr. Dolly, or the man who represented himself as Dolly? A. He came in and—

40 Q. What did he want? A. He came in about eleven o'clock, or ten minutes past, somewhere around there, and asked me whether I would make him out a bill of sale.

Q. Yes. A. I said, "Yes". He said, "All right". I said, "Where is your witnesses?" He says, "I haven't got them". I said, "You will have to get them". And he said, "All right, I will get them". And I said, "You have to be here in half an hour, because I have an appointment; I have to go away." So he went and got them and brought

Charles Van Gelder—Direct—for Defendant.

them to my office and I made out the bill of sale.

Q. Now, who did he bring, Mr. Van Gelder? A. Well, it was Mr. Lyons and two other—

Q. I see. A. —men.

Q. Now, when he came back, you say you then made out this bill of sale; is that right? A. That is right.

Q. And did you see this man who said he was Dolly sign his name there? A. I certainly did; I handed him the pen. 20

Q. And he signed that right in your presence? A. He surely did.

Q. And then you took the acknowledgment as a notary public of the State of New Jersey, is that right? A. Yes, sir.

Q. And that is your signature on the back of this bill of sale, is that right? A. Yes, sir.

Q. Taking the acknowledgment? A. That is my signature; in other words, my name. Now, there is a difference between my signature, as I have said, my bank signature, and my name. 30

Q. Well, anyway, this is your notary signature? A. Right.

The Court: Do you have more than one signature?

The Witness: Yes. C. Van Gelder in my banking, instead of Charles. 40

Q. So that your name in the bank is a good deal shorter than your name on your notary certificate? A. Yes.

Q. Now, Mr. Van Gelder, after this happened, what did you do? What did this man who said he was Dolly do? A. Signed his name and answered the questions that I asked him on the bill of sale.

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Charles Van Gelder—Direct—for Defendant.

Q. What did you do with the bill of sale? When you wrote it out, whom did you get the facts from?

A. From Mr. Dolly.

Q. And after you got them, you wrote them down? A. Yes.

Q. And then what did you do? A. Handed it to him.

20

Q. And what did he do? A. Asked me my price.

Q. I see. Well, what did he do with the paper?

A. I do not know. Mr. Lyons and these other two men went out of the office. I paid no further attention to them.

Q. Was Mr. Lyons there during the whole time this bill of sale was made out? A. Yes.

Q. And did Mr. Lyons give you any information? A. None whatever; never said a word to me.

30

Q. Now, when was the next time, Mr. Van Gelder, that you heard anything about this bill of sale?

A. A detective called at police headquarters, and police headquarters at Edgewater asked me to stop there. So he asked me about that bill of sale, whether I had made out that bill of sale. I told him "Yes". Then, the next time I was requested to go to the Prosecutor's office at New York, which I did. He asked me the same questions that you are now asking me.

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Q. Did you tell them all you knew about the matter? A. I told him all I knew. He asked me whether I would be willing to come before the Court without a subpoena. I said I certainly would, and he said it was a stolen automobile, and he asked me whether it would be necessary for him to subpoena me. I said, "No; if you notify me, I will appear."

Q. Now, Mr. Van Gelder, there has a certain amount of innuendo been raised—

Charles Van Gelder—Direct—for Defendant.

Mr. Buffett: I object to the opening statement of counsel.

The Court: Let us hear the question. I cannot rule on the question before I hear it.

Q. There has been a certain amount of innuendo raised, Mr. Van Gelder, that the signature of A. J. Dolly on the back of this check, Plaintiff's Exhibit 2, is the same handwriting as wrote the name Charles Van Gelder as a notary public of the State of New Jersey, and the body of that bill of sale. 20

Mr. Buffett: I object to that, if the Court please, because it is not a correct statement of what has been said.

The Court: Counsel objected to the testimony and the Court ruled it out, so that it is not competent. 30

Mr. Ogust: Except, if it please your Honor, your Honor said you would allow the testimony of Mr. Coe to stand as far as he had gone.

The Court: Well, he did not testify to it.

Mr. Buffett: All he testified was that Charles Van Gelder's signature on that was Charles Van Gelder's signature.

Q. I withdraw the question. Mr. Van Gelder, — A. Yes. 40

Q. —are the words "A. J. Dolly" on the back of that check in your handwriting?

Mr. Buffet: I object to it, if the Court please.

The Court: Yes; he may answer that question.

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Charles Van Gelder—Direct—for Defendant.

A. No.

Q. Did you ever see that check until I gave it to you now? A. No.

Q. Did you ever have anything to do with this check at any time? A. No; never.

Q. And Mr. Van Gelder—if your Honor will let me have that bill of sale—thank you—you saw
20 Dolly, the man who said he was Dolly, sign this bill of sale; right? A. Yes.

Q. Right in your presence? A. Yes.

Q. Now Mr. Van Gelder, are you familiar, in the course of your business, with the signatures of different people? A. I have had a good deal of experience along that line, I think.

Q. And how long have you had this experience, Mr. Van Gelder? A. Well, as Collector of Taxes, for ten or twelve years.

30 Q. You were Tax Collector? A. Yes.

Q. And people—received checks and so on from them?

Mr. Buffet: Do not lead.

Q. From having seen this man who called himself Dolly sign this bill of sale, and comparing the name, the word A. J. Dolly on the back of this check, would you say that they were written by
40 the same person?

Mr. Buffett: Wait. I object on the ground he is not qualified.

The Court: You may cross-examine as to his qualifications.

Q. Mr. Van Gelder, counsel wants to cross-examine you on your ability to answer that question.

Charles Van Gelder—Direct—for Defendant.

Mr. Buffet: Thank you.

By Mr. Buffett :

Q. How many times have you had to compare handwritings, Mr.— A. How many times have I had to compare handwriting?

Q. Yes. A. Well, I do not know as I ever had to compare them; but I knew different handwritings from people I knew.

Q. Yes. But have you ever been put in a position to compare signatures to find out whether they were genuine or not? A. I never have claimed to be an expert in that line.

Mr. Buffett: I object to the testimony.

The Court: Objection sustained. He does not claim to be an expert.

Mr. Ogust: You do not need to be an expert in this case, if it please your Honor. I am only asking him to compare a signature that he saw written by a certain person with another signature that is claimed to be written by the same person, and ask him if it is the same signature?

The Court: Objection sustained.

Mr Ogust: I think I have a case here, your Honor,—

The Court: It does not make any difference.

Mr. Ogust: Note my exception, may it please your Honor.

The Court: Note your exception. His opinion on the subject would be no better than the opinion of the members of the jury.

Mr. Ogust: That is true.

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Charles Van Gelder—Direct—for Defendant.

By Mr. Ogust:

Q. Outside of having prepared this bill of sale for this man who said he was Dolly, Mr. Van Gelder, did you have anything to do with this transaction? A. None whatever.

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Q. Mr. Van Gelder, during how many years have you been a notary public in Edgewater? A. About 12 years.

Q. During that time, have you known Harvey Lyons, the defendant in this action? A. (No response.)

Q. Have you known Harvey Lyons? A. Why, yes; I have known him from boyhood up.

Q. And you have known him as in business over in Edgewater? A. Yes, yes.

Q. Where he is in business now? A. Yes.

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Q. And was in business in January, 1920? A. Yes.

Mr. Buffett: Do not lead, please.

Q. And during the whole time that you have been a notary public, has Mr. Lyons ever come up to your place to have—to identify people as witnesses as the signers of any instruments? A. Yes.

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Mr. Buffett: I object as incompetent, irrelevant and immaterial. It has nothing to do with this case.

The Court: No; nothing at all.

Mr. Ogust: May it please your Honor, the charge is fraud. I think we can show whether or not the defendant—

The Court: It does not appear so far that anybody ever identified this man Dolly.

Mr. Ogust: Oh, may it please your Honor,—

Charles Van Gelder—Direct—for Defendant.

The Court: There is not a particle of evidence.

Q. Mr. Van Gelder, when this man who called himself Dolly, the first time you saw him, came along— A. Yes.

Q. And you said that you required somebody to witness his signature? A. Yes. 20

Q. Is that right? A. That is right.

Q. And he came up there with another man?

The Court: No; do not lead.

Q. Who did he come up there with, Mr. Van Gelder? A. With Mr. Lyons and two other men.

Q. And did you have any conversation with Mr. Lyons? A. None whatever.

Q. Well, what was said when he came up? A. Why, Dolly—the man who was supposed to be this Dolly, as he represented himself, asked for this here bill of sale. 30

Q. Well, did you say anything? A. Yes. I asked him those questions, where he lived, and so forth.

Q. All right. Did you ask him anything about his identification? A. No. These other men said they knew him.

Q. Well, that is what I am trying to get at. Just think for a moment. Was there anything said about the identification of Dolly for which you sent him away the first time? A. Well, there was nobody there. I simply sent him away to get the people to identify him. 40

Q. Exactly. That is what I want to know, Mr. Van Gelder. A. Yes.

Q. Now, when he came back with two people— A. Yes.

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Charles Van Gelder—Direct—for Defendant.

Q. —did anybody say anything to you about who this man was? A. I asked if they knew this man Mr. Dolly and they said yes.

Q. Who said that? A. Why, one of the other witnesses, one of them. I do not know which particular one.

20 By the Court:

Q. Did you know the three witnesses? A. I knew two out of the three.

Q. Which did you know? A. Mr. Lyons for one, and the other fellow was a driver over there.

Q. Who? A. I have forgotten his name. At that time he was a man that drove a taxi cab and worked for Mr. Lyons.

Q. One of Mr. Lyons' employes? A. Yes.

30 Q. Now, who identified Mr. Dolly? A. Well, this here young fellow.

Q. Which fellow, the fellow that drove for Mr. Lyons? A. Yes.

Q. Can't you tell what his name was? A. It has just slipped my memory now.

By Mr. Buffett:

Q. Is he in court? A. That I do not know.

40 By the Court:

Q. And you never saw him before? A. Saw this here other witness?

Q. Yes. A. Yes. Dozens of times over in Edgewater.

Q. I see. And then did you ask—how did he come to tell you that was Mr. Dolly? Did you ask him, or did he volunteer the statement? A.

Charles Van Gelder—Cross—for Defendant.

No, I asked him. I said whether they knew Mr. Dolly on this affidavit and they said yes.

Q. Now, which one said that? A. I think the young man that was with Mr. Lyons. What his name was, I do not know.

Q. Did Mr. Lyons say anything about him? A. That I do not know. They stood behind me, and I was in a hurry to get the bill of sale made. 20

Q. All right.

By Mr. Ogust:

Q. I show you the signature of the witnesses on this; were those the people who told you? A. Yes

Mr. Buffett: If the Court please, he has already testified he could not remember the names. 30

Q. Mr. Van Gelder, will you please look at this and refresh your recollection if you can? A. Edward Lenning. I will have to get my glasses for that. It is Frank Buckley, I think, was the one.

Q. And they identified this man? A. Yes.

Mr. Buffet: Not "they" at all. He said Frank Buckley. That is not "they".

The Witness: When I filled out the affidavit here, then I asked them if they knew this man; they said yes. 40

Mr. Ogust: All right, Mr. Van Gelder. That is all.

Cross-examination by Mr. Buffett:

Q. Mr. Van Gelder,— A. Yes.

Q. Which one works for Lyons? Which one of

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Charles Van Gelder—Cross—for Defendant.

these fellows works for Lyons? A. Well, I am not positive whether it was that Buckley, or the other man.

Q. You do not know which one of them worked for Lyons, do you? A. No, to tell you the truth, I do not know; because I have seen both of them around there.

20 Q. And you do not know whether they are in Court or not, do you? A. No, I haven't made an investigation of the people that are in court, surely.

Q. And Lyons did not sign as a witness, did he? A. No.

Q. And he didn't say anything about Dolly in your presence? A. No, nothing whatever. I never asked him anything about it.

30 Q. That bill of sale is in your handwriting, isn't it? A. It certainly is, yes, that is my handwriting.

Q. And you do not deny it? A. Why, I certainly do not. There is nothing for to deny, and I never did.

Q. And you are sure this was made out on the 17th day of January? A. Yes, sir.

Q. Then will you admit that that is a mistake in the body of the instrument when it says the 7th day of January? A. Yes, I will admit that is an error from passing over it in a hurry.

40 Q. That is a pardonable mistake. A. I will admit that.

Q. And in the hurry you did not bother to find out particularly whether Dolly was Dolly, or Dolly was somebody else, did you? A. I am not an investigator.

Q. I appreciate that. You are an ordinary business man? A. Yes.

Harvey M. Lyons—Direct—for Defendant.

Mr. Buffett: I think that is all.

Mr. Ogust: That is all, Mr. Van Gelder.

HARVEY M. LYONS, the defendant, sworn as a witness on his own behalf, testified as follows:

Direct-examination by Mr. Ogust:

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Q. Mr. Lyons, where do you live? A. Edgewater, New Jersey.

Q. Are you a married man? A. Yes, sir.

Q. Doing business in Edgewater? A. Yes, sir.

Q. What is your business? A. Trucking business; ice and trucking business.

Q. And how long have you been in that business in Edgewater? A. 11 years.

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Q. What is that? A. 11 years.

Q. 11 years? A. Yes, sir.

Q. Do you remember about the 16th, or about the middle of January, Mr. Lyons? A. Yes, sir.

Q. Or the early part of January; do you remember meeting or knowing a person who represented himself to be Dolly? A. Yes, sir.

Q. And did this man who said he was Dolly, did he have an automobile? A. Yes, sir.

Q. And about the middle of January, will you tell the Court and the Jury what Mr. Dolly wanted—this man who said he was Dolly—wanted you to do? A. He wanted me to buy this automobile.

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Q. Did he give any reason for it? A. Yes, sir.

Q. What was the reason? A. Why, he said he went broke. He had hard luck. He was out gambling, and he went broke, and he wanted to sell the machine.

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Harvey M. Lyons—Direct—for Defendant.

Q. And had you ever ridden in this machine with him? A. Yes, sir.

Q. How many times? A. Twice.

Q. Never been molested while you were in the machine, were you?

Mr. Buffett: I object to that, if the Court please. That is not an issue here.

20

Q. Where had you driven with him in this car?

A. From 104th Street.

Mr. Buffett: I object as incompetent, irrelevant and immaterial. It doesn't matter where he rode. We are not concerned as to where he rode in the machine. We allege that he had the machine and sold it to us; what happened prior to that—

30

The Court: I think he may testify to that.

Q. Where had you driven in this car with this man who said he was Dolly? A. From 104th Street and Columbus Avenue to 129th Street Ferry.

Q. That was in New York City? A. Yes, sir.

Q. And when he asked you to buy this car, what did you tell him, Mr. Lyons? A. I told him—

Q. What is that? A. I told him I had one.

Q. And then, what happened after that? A. Why, I was out to Mr. Fellage's house in Bogota.

Q. Where does Mr. Fellage live? A. Bogota.

Q. Yes. A. And I was speaking to Mr. Fellage about it.

Q. Yes. A. I asked him if he wanted to buy a machine.

Q. Yes. A. So he told me that he—

40

Harvey M. Lyons—Direct—for Defendant.

Mr. Buffett: I object to any conversations with Felage. That is one of the things that we could not testify to.

The Court: No. I do not think it is competent.

Mr. Buffett: I beg pardon?

The Court: It is not competent, of course.

Mr. Ogust: Your Honor rules it is not competent? 20

The Court: Oh, certainly it is not competent; not in the presence of the other party.

Mr. Ogust: If it please your Honor, you will remember that the plaintiff testified that it was because of the conversations that he had had with Felage, and the arrangements that he had made with Felage, and the confidence that he had in Felage, that he bought this car without saying a word to this defendant. 30

Mr. Buffett: May I say, if the Court please, that all that was in the presence of Lyons and what is "sauce for the goose is sauce for the gander."

The Court: Proceed.

Mr. Ogust: Note my exception.

The Court: Exception. 40

Q. As a result of this conversation you had with Mr. Felage, Mr. Lyons, what happened after that?

A. Why, Dolly drove out there that night to show Mr. Felage the car, and I went with him.

Q. Do you know if he showed Mr. Felage the car? A. Yes, sir.

Mr. Buffett: Now,—all right.

10

Harvey M. Lyons—Direct—for Defendant.

The Court: Proceed.

Q. And did Mr. Fellage buy the car?

Mr. Buffett: I object to it, if the Court please. It is irrelevant, immaterial and incompetent.

The Court: Yes.

20

Mr. Ogust: Note my exception, may it please your Honor.

Q. Well, as a result of the conversations that this Mr. Dolly had with Mr. Fellage, what was the next thing that you knew about Fellage or the car or Dolly or Berkowitz? Anything happen after that night, that Friday night? A. Yes, sir; Saturday.

30

Q. The 16th of January? A. Yes, sir; Saturday morning about 10 o'clock.

Q. Yes. A. Mr. Fellage, it was understood that he was going to call Mr. Dolly up—

Mr. Buffett: I object to what Fellage understood.

The Court: The question is, what you know yourself.

40

Q. Well, what happened? What happened? Anybody call you up? A. Yes, sir.

Q. Anybody speak to you? Who? A. Mr. Fellage.

Q. Spoke to you? A. Yes, sir.

Q. And what did Mr. Fellage tell you?

Mr. Buffett: I object to it, a conversation in the absence of the plaintiff.

The Court: Objection sustained.

Mr. Ogust: Exception.

Harvey M. Lyons—Direct—for Defendant.

The Court: Take your exception.

Q. And as a result of this conversation, Mr. Lyons, that you had with Mr. Felage on the telephone on the morning of the 17th day of January, what did this Mr. Dolly do?

Mr. Buffett: I object unless he knows. 20

Mr. Ogust: Well, of course, unless he knows.

Q. Do you know what Mr. Dolly did? A. Yes, sir.

Q. What did he do? A. He went up to Mr. Van Gelder's office to get a bill of sale made out.

Q. Yes. A. He came back out there in the garage, and I had to go up to the bank to get money to pay the men. 30

Q. About what time was this? A. About quarter to twelve.

Q. Yes. A. So I went up with him.

Q. You went up with Dolly? A. Yes.

Q. What did Dolly tell you that Mr. Van Gelder had said?

Mr. Buffett: I object to that. The plaintiff was not there.

The Court: Sustained.

Mr. Ogust: Note my exception. 40

Q. As a result of the conversation that you had with Dolly, where did you go with Dolly? A. To Mr. Van Gelder's real estate office.

Q. And what happened there?

Mr. Buffett: I object to that, if the Court please; the plaintiff was not there. Mr.

10

Harvey M. Lyons—Direct—for Defendant.

Van Gelder has testified to that.

The Court: Oh, I think he may—

Q. Tell us, Mr. Lyons.

The Court: You allowed the testimony to come in. Proceed.

20

Q. Tell us what took place at Mr. Van Gelder's office. A. I wasn't there very long because I had to get back to the bank before the bank closed. It closed at 12 o'clock, and I had to get the payroll for the men.

Q. You left Mr. Dolly there?

The Court: Let him tell.

30 A. I left Mr. Dolly at Mr. Van Gelder's real estate office, and I went up to the garage. The men went home about quarter past twelve on a Saturday; so,—

Q. And that afternoon, Mr. Lyons, what happened? A. I went to New York.

Q. Who did you go with? A. Myself.

Q. Yes. And had you had any conversation with Dolly before you went to New York? A. Yes, sir.

40 Q. What was the conversation? A. Why, he told me—

Mr. Buffett: I object to that, if the Court please. My friend here objected to everything that I tried to bring in in connection with Felage because the defendant was not there. Now, he is trying to bring in conversation that this man had with Dolly when the plaintiff was not there.

The Court: The question of law is very

Harvey M. Lyons—Direct—for Defendant.

plain. You cannot put in hearsay testimony.

Mr. Ogust: Your Honor will note my exception.

The Court: Isn't that the rule?

Mr. Ogust: If it please your Honor, except this—

The Court: Isn't that the law? Except what? 20

Mr. Ogust: I do not want it to appear that I am merely taking exceptions unnecessarily.

The Court: What is your exception?

Mr. Ogust: Here is the exception to this rule, your Honor—

The Court: No, no. What is the exception?

Mr. Ogust: The exception is this: that 30
Fellage, apparently from the plaintiff's own mouth, is the man who told—if he made any representations on behalf of this defendant, if he were this man's agent, it was on that that I assume that your Honor claims that there is a *prima facie* case sufficient to go beyond the motion for a non-suit. Now, if your Honor rules that I cannot show how it came about that Fellage 40
told Berkowitz all these things, then how we can prove our case, your Honor, I do not know; and I am proceeding along those lines and doing nothing except what the law allows me, and taking an exception.

The Court: You cannot prove it in that way.

Mr. Ogust: Why,—

The Court: Proceed.

10

Harvey M. Lyons—Direct—for Defendant.

Mr. Ogust: Very well, your Honor.

Q. Do you know where this car was at this time?

A. No, sir.

Q. Was it at your place? A. No, sir.

Q. Had it ever been at your place? A. No, sir.

Q. Did you ever have it in your possession? A.

20 No, sir.

Q. And as a result of this conversation that you had with this man Dolly, where did you go that Saturday afternoon? A. I went down to—stopped at 55th Street.

Q. What did you do there? A. I got a check for Mr. Dolly.

Q. Did you have business in New York that afternoon? A. Yes, sir.

Q. What business? A. I had to buy parts.

30

Mr. Buffett: I object to that.

The Court: He may testify to that.

Q. What was your business in New York that afternoon? A. I had to go down and by some parts for the trucks.

Q. You have a number of trucks? A. Yes, sir.

Q. And you say you stopped off at Berkowitz' place to get a check? A. Yes, sir.

40 Q. And did you get a check? A. Yes, sir.

Q. Did you have any conversation whatsoever with Mr. Berkowitz? A. No, sir.

Q. Did you give Mr. Berkowitz the address of this man Dolly? A. No, sir.

Q. If you remember? A. I do not think I did.

Q. Did you have any conversation with him at all, whatsoever? A. No, sir.

Q. Did you have any conversation at all, or

Harvey M. Lyons—Direct—for Defendant.

did he have any conversation with Fellage, in your presence? A. No, sir.

Q. And the only thing that happened was what, Mr. Lyons? A. I received a check and left there.

Q. When you came up there at that time, when you came upstairs, was that automobile in Mr. Berkowitz's place? A. Yes, sir.

Q. Had you brought it down? A. No, sir.

20

Q. Had any of your men brought it down? A. No, sir.

Q. Had you anything to do whatsoever with the bringing of that automobile to Mr. Berkowitz's place? A. No, sir.

Q. Had you anything to do whatsoever with selling this car to Mr. Berkowitz? A. No, sir.

Q. Did you represent to Mr. Berkowitz that Mr. Dolly was the owner of the car?

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Mr. Buffett: I object to that, if the Court please.

The Court: He may answer that.

Mr. Buffett: A characterization—represent.

The Court: Proceed; he may answer.

Mr. Ogust: I withdraw the question.

Q. Did you say, Mr. Lyons, that Mr. Dolly was the owner of this car? A. Why, you could see that on the bill of sale.

40

Q. Did you say it though? Did you say anything to Mr. Berkowitz? A. No, sir; I did not say anything.

Q. You had no conversation at all with him? A. No, sir.

Q. And did you deliver this bill of sale to Mr. Berkowitz at that time? A. Yes. I never read it

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Harvey M. Lyons—Direct—for Defendant.

or anything, though. It was folded up just the way it was handed to me, and that is the way I handed it to him.

Q. Now, Mr. Lyons, after you gave him this bill of sale, what did Mr. Berkowitz do? When you gave him the bill of sale, what did he do? A. He told his girl to make out a check.

20 Q. All right. Did he look at the bill of sale, do you know? A. He must have looked at it.

Q. Well, do you know if he read the bill of sale or anything? A. Well, he was looking at it, but I couldn't tell you whether he read it or not.

Q. Then, you say, he told the girl to make out a check? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now, who told him to make it out to A. J. Dolly? A. Who told him?

30 Q. Yes. A. He must have looked at the bill of sale.

Q. Did you tell him? A. No, sir.

Q. Now, do you know if Mr. Berkowitz looked at the car before he gave you this check, Mr. Lyons? A. Yes, sir.

Q. What did he do? A. I do not know. He was looking at it as he went up with Mr. Fellage.

Q. When you came there you found him looking at the car? A. Yes, sir.

40 Q. Now Mr. Lyons, after you got this check, what did you do? A. I had it in my pocket until Monday morning, and I had trucks working, and this Mr. Dolly—

Q. Where were you working at that time?

Mr. Buffett: Let him finish.

A. Turner Construction Company, Edgewater.

Harvey M. Lyons—Direct—for Defendant.

Q. You were doing trucking work for them? A. Yes, sir.

Mr. Buffett: I object to that. It does not matter who he was doing the work for.

The Court: It does not throw any light on the subject.

Q. You say Dolly came down there? A. Yes, sir. 29

Q. Tell the Court and the Jury what happened then.

Mr. Buffett: When was this, please?

The Witness: Monday morning about ten o'clock.

Q. Then tell us what happened then? A. Why, I handed Mr. Dolly the check, and I was in the restaurant at the time when he came in.

Q. When you say restaurant, what do you mean? 30
A. It is a little lunch room, you wouldn't call it a restaurant; and I handed him the check and he endorsed it and look at the check, and how it was made at the Edgewater Bank, and he said, "I cannot get this cashed here because I am not known. Will you come up with me?" So I said, "Sure, I will come up with you." So I had it cashed and gave him the money.

Q. Who put the words "A. J. Dolly" on the back of that check? A. Mr. Dolly himself. 40

Q. And that was in your presence? A. Yes, sir.

Q. And did you put on "Harvey M. Lyons"? A. Yes, sir.

Q. And you went up to the bank and got the money? A. Yes, sir.

Mr. Buffett: Do not lead.

Mr. Ogust: Well, he has already testified.

10

Harvey M. Lyons—Direct—for Defendant.

Mr. Buffett: If he has already testified, do not ask him again.

Q. Now, Mr. Lyons, what did you do with this money that you got from the bank? A. Give it to Mr. Dolly.

Q. Anybody see you give this money to Mr. Dolly? A. Yes, sir.

Q. Who was it? A. One of my men was driving a truck, drove us up there.

Q. What is his name? A. Mr. Scherer.

Mr. Buffett: What is his name?

The Witness: Scherer.

Mr. Buffett: How do you spell it?

The Witness: S-c-h-e-r-e-r.

Q. And after you gave the money to Mr. Dolly, what happened? A. He gave me fifty.

Q. What became of Mr. Dolly? What did you do after that? A. He drove down and got off at the ferry and I said, "I will see you in a couple of days." And I have been looking for him ever since. I could never find him.

Q. Now Mr. Lyons, when was the next thing that you heard about this transaction? A. I guess it was a week or two after I was down at the Turner Construction Company, and Chief O'Brien called me up, and the officer was up there with another gentleman.

Q. The officer who testified? A. Yes.

Q. And they asked you questions? A. Yes, sir.

Q. Did you answer all those questions? A. I did; yes, sir.

Q. He asked you to come over to Police Headquarters in New York? A. Yes.

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Harvey M. Lyons—Direct—for Defendant.

Mr. Buffett: Do not lead, please.

Mr. Ogust: Oh, it is all in the testimony.

Mr. Buffett: I know; but—

Q. Then what did you do as a result of these requests, Mr. Lyons? Did you go to New York? A. I did.

Q. And what did you do over there? A. I answered all the questions that they wanted answered. 20

Mr. Buffett: I object, if the Court please, as not responsive.

The Court: Oh, I think it is responsive. It does not do much good, though.

Q. And was it an exhaustive examination?

Mr. Buffett: I object to it. 30

The Court: Oh, that is not competent. The only relevancy at all would be what he said to contradict the officer that has testified.

Mr. Ogust: That is true; I am coming to that.

Q. Now Mr. Lyons, the officer testified that you told him that you had the authority to sell that car. Did you ever say any such thing to this officer? A. No, sir. 40

Q. Or to any other officer? A. Not to anyone.

Q. Did you, as a matter of fact, ever have the authority to sell this car?

Mr. Buffett: I object to that, if the Court please.

A. No, sir.

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Harvey M. Lyons—Direct—for Defendant.

Mr. Buffett: That is immaterial.

The Court: Well, if he did not say it to the officer and the officer testified to it, he may contradict it.

Mr. Buffett: That is right.

Q. Did you, as a matter of fact, ever have— A.

20 No, sir.

Q. —authority to sell this car? A. No, sir.

Q. Did you, as a matter of fact, ever sell this car? A. No, sir.

Q. To Berkowitz or anybody else? A. No, sir.

Q. Do you sell cars for other people? A. No, sir.

Mr. Buffett: I object to it, if the Court please.

The Court: It is immaterial. The question is what he did with this car, if anything.

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Mr. Ogust: That is all.

Cross-examination by Mr. Buffett:

Q. Where did you first meet Dolly, Mr. Lyons?
A. 104th Street and Columbus Avenue.

Q. What place is it? A. A cabaret and restaurant.

Q. Cabaret and restaurant? A. Yes, sir.

40 Q. The first time you ever saw him was how long before this transaction took place? A. Oh, maybe two weeks, three weeks before that.

Q. You never saw him before in your life? A. No. About three weeks before. I guess it was.

Q. Now, where was Dolly staying during the time, do you know? A. I could not tell you that.

Q. In New York or Edgewater? A. In New York; he wasn't in Edgewater.

Harvey M. Lyons—Cross—for Defendant.

Q. And then you met him in there, and then you came out with him, out of the restaurant? A. Not the first time.

Q. Where did you meet him the second time? A. The same place.

Q. And the second time you went from there to Edgewater? A. No, sir. The fourth or fifth time.

Q. Then, you met him again in there? A. Yes, sir; surely. 20

Q. Did you make a practice of meeting him there? A. No, sir.

Q. How many times a week? A. Did I meet him?

Q. Yes. A. I could not tell you that. Maybe I met him four or five times in the three weeks.

Q. Did he have this car at the time? A. I could not tell you that. I did not see what kind of a car he had got. He drove to the ferry.

Q. How many times did you meet him before you drove with him? A. To the ferry from 104th Street and Columbus Avenue. Oh, maybe three or four times. 30

Q. You talked with him? A. Certainly.

Q. Very friendly? A. Yes.

Q. Did he tell you where he lived then? A. No, sir, he did not, because I did not ask him.

Q. And he wanted you to sell this car? A. He wanted me to buy the car.

Q. Well, he wanted you to buy it? A. Yes, sir. 40

Q. I beg your pardon. And then you took him out to Fellage's? A. Yes, sir.

Q. How long had you known Fellage? A. Mr. Fellage? Oh, I guess six or seven years.

Q. Is he in Court? A. Yes, sir.

Mr. Buffet: Mr. Fellage, stand up, please.
(Man stands.) All right.

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Harvey M. Lyons—Cross—for Defendant.

Q. And you have had automobile transactions with Fellage before, haven't you? A. No, sir; never before.

Q. You are very friendly with him, aren't you? A. Yes, sir.

Q. Didn't you ever bring cars out to Fellage's house? A. Did I ever bring them out?

20 Q. Yes. A. Just when I went myself.

Q. Yes. And other cars? A. I have.

Q. Haven't you, I say? A. No, sir.

Q. Where does Fellage live? A. Bogota, Palisade Avenue.

Q. Whereabouts? A. I am not sure whether it is 70 or 75 Palisade Avenue, Bogota.

Q. You did not know that I live at 71, did you? A. I do not know where you live.

30 Q. And isn't it true that you have frequently brought machines out to Fellage's place in Bogota?

A. No, sir.

Q. Prior to this? A. No, sir.

Q. And you mean to tell me now I never saw you there? A. Certainly you saw me. I used to go there often.

Mr. Ogust: I object.

Mr. Buffett: I withdraw it.

40 Q. With other machines? A. Why, we don't keep one machine for a lifetime.

Q. And you say Dolly drove out to Fellage's? A. Yes, sir.

Q. From Edgewater? A. Yes, sir.

Q. Showed him the machine. On a Saturday morning, you went to Van Gelder's office, you say?

A. About quarter of 12, yes, sir.

Q. And you were in a hurry to get back? A. Yes, sir.

Harvey M. Lyons—Cross—for Defendant.

Q. You did not sign that bill of sale as a witness, did you? A. I have to leave there because I had to get to the bank.

Q. You did not sign as a witness, did you? A. No, sir; I do not think I did.

Q. Now, when did you last see this automobile? A. That Saturday that it left Edgewater to go to New York.

20

Q. And who drove it? A. I couldn't tell you that. It was a friend of Dolly's drove it down.

Q. It wasn't Dolly himself? A. No, sir; Dolly was with him.

Q. Dolly is an expert driver, isn't he? A. I couldn't tell you that.

Q. And didn't he drive with you from 104th Street and Columbus Avenue? A. Yes, sir; he did. I could not tell you whether he is an expert or not.

Q. Do you know what time he got to Berkowitz's place of business? A. I could not say. I got there about three o'clock and the machine was there then.

30

Q. And you did not see Berkowitz until three o'clock in the afternoon? A. I think it was between two-thirty and three o'clock.

Q. How do you know that Dolly did not get this check when he delivered the car? A. Because he asked me to get the check for him. He had a telegram that morning to go back to Connecticut and he wouldn't trust this man with the money.

40

Q. Where did he meet you Monday morning? A. At the Turner Construction Company where I was working.

Q. And you went with him to the bank and you were identified and obtained the money? A. Yes, sir.

Q. How much did you get out of the transaction?

Harvey M. Lyons—Cross—for Defendant.

A. \$50. I wasn't supposed to get a thing. I never asked him for a thing.

Q. Did Dolly tell you why he happened to take the check from Berkowitz? A. He told me he had to go back to Connecticut.

Q. Did he tell you what urgent business he had that took him that he couldn't wait until three o'clock to get a check? A. I didn't ask him any questions.

Q. Did he give you his address in Connecticut? A. He did.

Q. What was it? A. That address, 242 Main Street; something like that.

Q. And Mr. Berkowitz asked you his address and you gave it to him and he put it on the bill, isn't that right? A. I don't think so; no, sir.

Q. Who did give him that address? A. I couldn't tell you that.

Q. Will you swear positively that Berkowitz did not ask you Dolly's address, and that you gave it to him? You are under oath, remember. A. I know that, yes, sir. I am not lying.

Q. I did not say you were. A. Well, then—

Q. Will you swear positively that Berkowitz did not ask you for that address? A. Yes, sir; I will.

Q. He did not ask you? A. No, sir.

Q. And when you went there you had no conversation with him at all? A. With Mr. Berkowitz; no, sir. He was looking at the car. I had to ride up in the elevator with Mr. Felage because the place was closed up.

Q. After business hours, wasn't it? A. Yes, sir.

Q. Do you know why Felage did not get a check for Dolly? Do you know? A. No, sir.

Q. And you cannot tell me why Dolly did not get it himself? A. No, sir.

Harvey M. Lyons—Cross—for Defendant.

Q. Nor why Dolly's friend did not get it? A. He said he would not trust him. Dolly said he had a telegram and had to go back home.

Q. And you have never seen Dolly since? A. No, sir; and I have looked for him, too.

Q. Since he got the money? A. Yes, sir

Q. Who was with you when you got the check? A. I was alone. Mr. Fellage was there and Mr. Berkowitz and his bookkeeper. 20

Q. Do you know if Fellage got any money out of the transaction? A. No, sir; I know he did not.

Q. You got it all? A. \$50; yes.

Mr. Ogust: I object to that.

Q. That is what I mean, all of the fifty? A. Yes, sir.

Q. And Fellage procured the sale and got nothing? A. I do not know what understanding he had with Mr. Berkowitz. I suppose he had some understanding with Mr. Berkowitz. 30

Mr. Buffett: I move to strike that out.

Mr. Ogust: Why, I think it is responsive, your Honor.

The Court: Yes, it may stand.

Q. Are you acquainted in Bridgeport? A. No, sir; I went through there. 40

Q. Have you ever been there? A. I drove through there, yes, sir. Not to Bridgeport; right this side; Fairfield, Connecticut. I lived there for about two months.

Q. Well, you have been to Bridgeport? A. Not into Bridgeport; no, sir.

Q. Didn't you know there was a nest of auto

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Harvey M. Lyons—Cross—for Defendant.

mobile thieves caught in Bridgeport some time ago? A. I could not tell you anything about that.

Mr. Ogust: What is that question?

The Court: Strike that question out.

20 Q. Now, when you saw the detective in Edgewater, did you have a conversation with him? A. Yes, sir. In the station house in Edgewater.

Q. What did you tell him then? A. Just what he asked me.

Q. What was that? A. Just the same as I am telling you now.

Q. What was that? A. About where I met Dolly and everything, just as I told you before, the same thing.

30 Q. And that is all you said? A. Yes, sir; and he asked me to go to New York, and I done it.

Q. Who was with you at the Campus Restaurant the first time you met Dolly? A. Mr. Scherer; not the first time; he was there when we met him.

Q. Who else? A. That is all.

Q. Nobody else? A. No, sir.

Q. Who was there the second time? A. I could not tell you that.

40 Q. Who was there the third time? A. Well, Mr. Scherer was there one night when he drove down to the ferry that was the first time Mr. Scherer met him, that night.

Q. There wasn't any party there? A. Oh; there was a party there. I never go to that place and go alone.

Q. How many was in your party? A. Six.

Q. Who were they?

Mr. Ogust: I object.

Harvey M. Lyons—Cross—for Defendant.

A. Now, listen—

Mr. Buffett: I withdraw it.

Q. Was Dolly one of the party? A. He was there; yes, sir.

Q. Did you make up the party for him at that time? A. No, sir; I met him there. You do not have to make up any parties there.

20

Q. And he just joined the party there? A. You do not have to make up any parties there. You always have company.

Q. What does Dolly look like? A. A man something like Mr. Shearer, but not quite so heavy—this detective here.

Q. What complexion is he? A. Light, about like Mr. Shearer there.

Q. How old a man is he? A. I should judge him to be between twenty and twenty-five.

30

Q. Has he any distinguishing marks on his features? A. I could not tell you that

Q. Does he wear a moustache? A. No, sir, no, sir.

Q. Smooth face? A. Yes, sir.

Q. Does he wear any jewelry? A. I did not look him over to see whether he had any jewelry or not.

Q. You do not know that? A. No, sir.

Q. A good looking fellow? A. Yes, quite a nice looking man.

40

Q. A nice man to make up a party?

Mr. Ogust: I object to that, if your Honor please.

The Court: It is immaterial. Proceed.

Q. Where did you leave Dolly? A. Over there where I met him.

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Harvey M. Lyons—Cross—for Defendant.

Q. Where? A. The Campus, 104th Street.

Q. Dolly told you he lived in Bridgeport, didn't he? A. Yes, sir.

Q. You did not go to Bridgeport to look for him?

Mr. Ogust: I object.

Q. He said he had not been in Bridgeport? A. No, sir.

Q. You did not go to Bridgeport, did you? A. No, sir.

Q. You did not go to 242 Main Street either to look for him, did you?

Mr. Ogust: I object.

The Court: He is entitled to go into that. He said he looked for him. Let him find out where he looked.

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A. The police up there told me they looked for him.

Q. What did they tell you? A. That he didn't live there; that no such party lived there. Why should I go up there?

Q. Was that before or after you looked, the police told you? A. They looked right away just as soon as they found out his address.

Q. Was it before or after that, that you looked, that the police told you that? A. I went over that night to try to find him.

Q. Why didn't you go to Bridgeport where he told you he lived?

Mr. Ogust: I object.

A. Because the Police Department would do that.

Q. You just told me you were trying to find out about it and went to New York? A. I did.

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Harvey M. Lyons—Redirect—for Defendant.

Q. Why didn't you go to Bridgeport immediately? A. Because I notified the police and they went there to find out about it.

Q. What police did you notify? A. Edgewater.

Q. Do you know any police in Edgewater that went to look for him? A. I do not know that.

Mr. Buffett: That is all.

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Redirect-examination by Mr. Ogust:

Q. Mr. Lyons, will you just tell the Court and the Jury how it happened you got this \$50 that you testified you got? A. I got the \$50.

Q. You said Dolly gave you \$50? A. Yes, sir.

Mr. Buffett: I think he has testified.

The Court: He may answer.

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Q. Just explain how it happened. A. I got that Monday morning.

Q. I know. But just how it happened. What was the conversation that you had with Dolly? A. That morning?

Q. What happened that you got the \$50? A. That morning, do you mean?

Mr. Buffett: I object.

The Court: You may tell us.

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A. That morning?

Q. Yes. A. He come down there and I was in having something to eat.

Q. Have you testified to that? A. Yes, sir.

Q. Come to the point where you went to the bank and got the money and you came out and

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Harvey M. Lyons—Redirect—for Defendant.

gave him the thousand and fifty dollars; what happened? A. Why, he handed me \$50 for my trouble.

Q. What did he say? A. He said, "Here is \$50 for your trouble."

Q. Had you had any agreement with this man Dolly for receiving any commission or brokerage or anything? A. No, sir.

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Mr. Ogust: That is all.

The Court: Who witnessed that paper?

By Mr. Buffett:

Q. Dolly didn't go with you to Berkowitz's office? A. No, sir.

Q. He was not there at the time? A. No, sir; no one was there when I got there.

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The Court: Who were the two witnesses that signed the bill of sale?

The Witness: One man was with Mr. Dolly, and one man worked for me.

The Court: Who was the man who worked for you?

The Witness: Buckley.

The Court: What did Buckley know about this man?

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The Witness: He was there at the Turner Construction Company and saw him two or three times.

The Court: That is all he knew?

The Witness: Yes, sir.

John J. Sherer—Direct—for Defendant.

JOHN J. SCHERTR, sworn as a witness for the defendant, testified as follows:

Direct-examination by Mr. Ogust:

Q. Mr. Schurer, do you remember this man who you knew as Mr. Dolly? A. Well, I remember seeing him a couple of times.

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Q. You saw him a few times before the 17th of January? A. Oh, yes.

Q. Of 1920? A. Yes.

Q. Now, do you remember the 19th of January, which was a Monday? The 19th of January, 1920, did you see Mr. Dolly at that time? A. On a Monday?

Q. Yes. A. Well, that was—I went into the restaurant where they were.

Q. Yes. Were you working on the job down there? A. Yes.

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Q. At the Turner Construction Company? A. Yes; I was working.

Q. Were you working with Mr. Lyons at that time? A. Yes, sir.

Q. Did you see Mr. Dolly down there? A. I see him around there and I went into the restaurant and I see him in the restaurant with Mr. Lyons, talking.

Q. And what happened after that? A. And Mr. Lyons ask me to drive him up to the bank with the truck, so I drove him up to the bank.

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Q. What bank did you drive up to? A. The First National.

Q. And then what happened there from what you know? A. And Mr. Lyons went in.

Q. Yes. A. To cash a check, I suppose.

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John J. Scherer—Cross—for Defendant.

Q. Yes. A. And he come out with money and gave it to Mr. Dolly.

Q. Yes. A. And Mr. Dolly gave him a bill. Now, What the bill was, I do not know. I did not see that.

Q. I see. And what happened. A. So we went on down to the ferry and he got off.

20 Q. Who got off? A. Dolly. And Mr. Lyons and I rode right down to the job.

Q. Is that the only thing that you know about this case? A. That is all I know.

Mr. Ogust: That is all.

Cross-examination by Mr. Buffett:

30 Q. When did you first meet Dolly? A. Oh, I met him over at the Campus. I was introduced to him one time.

Q. How many times did you meet him? A. Oh, I saw him three or four times over in Edgewater.

Q. You never saw him before you met him at the Campus a short time before this took place, is that right? A. I never saw him before, no.

Q. You do not know whether he is Dolly, or who he is, do you? A. Well, he was introduced to me as Mr. Dolly.

40 Q. Who introduced you? A. Mr. Lyons introduced me.

Q. Mr. Lyons introduced you. Did you see him after you saw him at the Campus? A. Well, he drove us to the Campus—or to the ferry that night, and then I didn't see him for a couple of days after and I saw him in Edgewater.

Q. What did he do with the car? A. He left something I do not know.

John J. Scherer—Cross—for Defendant.

Q. He went back? A. I do not know. He left us out at the ferry and that is all I remember.

Q. You never saw the car in Edgewater? A. No.

Q. You never saw the car in Edgewater at all? A. No. I saw him several times in Edgewater.

Q. But you never saw the Buick car? A. No. Only that night that he rode us from the Campus to the ferry.

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Q. That wasn't the— A. Whether that was the car, I do not know.

Q. Would you know Dolly if you saw him now? A. Well, I guess I would.

Q. Is he in court today? A. No, I do not believe he is. I do not see him.

Q. Did you help Lyons to look for him? A. Did I help him?

Q. Yes. A. No.

Q. You did not go with him, did you? A. No.

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Q. Although you met him with Lyons? A. Yes.

Q. At the Campus Restaurant? A. Right.

Q. Did you hear Dolly say he lived in Bridgeport? A. No, I did not hear him say that. He just introduced me to him. Whatever business they had between themselves, why, I didn't know nothing about.

Q. Now, how long have you been working for Lyons? A. Oh, about four years.

Q. You are sort of friendly with him, aren't you? A. Surely.

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Q. You work together? A. Yes.

Q. And go around together? A. Well, we do occasionally.

Q. Yes. A. Go around.

Q. And you have talked with him about this case several times? A. About that case?

Q. This case? A. I have talked to him?

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John J. Scherer—Cross—for Defendant.

Q. Yes. A. No, sir.

Q. You never spoke to anybody about this case, did you? A. No, sir.

Q. Not since the first time you met Dolly until the present time? A. I never had talked to him about the automobile case at all.

20 Q. And when you come into the Court now, you are giving your testimony without having spoken to anybody about this case? A. I didn't speak to nobody.

Q. You didn't even speak to Mr. Ogust, the attorney, about it? A. Well, he asked me what I knew about it.

Q. Yes. A. I do not remember just what it was. He just asked me what I knew about it, and I told him what I knew about it.

30 Q. And what you knew about it is what you are telling me now? A. Yes; the same thing.

Mr. Buffett: That is all.

Mr. Ogust: That is all. Mr. Fellage, will you please take the stand?

RAYMOND E. FELLAGE, sworn as a witness on behalf of the defendant, testified as follows:

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Direct examination by Mr. Ogust:

Q. Mr. Fellage, where do you live? A. Bogota, New Jersey.

Q. And what is your business? A. Used car manager for the S. P. Stearns Company at the present time.

Q. And in January, 1920, was that the same

Raymond E. Fellage—Direct—for Defendant.

business that you were in? A. No. I was store keeper for the same concern at that time.

Q. You were storekeeper for the S. P. Stearns Company? A. (Witness nods head in the affirmative.)

Q. And is that the same building that Berkowitz had his place of business? A. Yes.

Q. And how long have you known Berkowitz, Mr. Fellage? A. About ten years. 20

Q. And you remember the night of the 16th of January, a Friday night, 1920? A. Yes.

Q. On that night were you at home? A. Yes.

Q. And who came to your house? A. Mr. Lyons and Mr. Dolly.

Q. Now, had you had any conversation with Mr. Lyons before he came to your house? A. That same afternoon.

Q. And will you tell the Court and Jury what the conversation was between you and Lyons that afternoon? A. Why, it referred to a Buick car that was for sale, and— 30

Q. Did he tell you who was offering it for sale? A. He did not mention the party's name just a fellow.

Q. I see. A. But I would see if I could turn you, please? A. Why, it was mentioned that this fellow had gone broke gambling, and the car was for sale. 40

Q. Yes. A. And I said at the present time I could not buy it as I just bought property; I had no ready cash.

Q. I see. A. Now give us the conversation, will the car over.

Q. Now, how long have you known Lyons, Mr. Fellage? A. Well, about five years; since I have lived in Jersey.

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Raymond E. Fellage—Direct—for Defendant.

Q. Pretty friendly with him? A. (Witness nods head in the affirmative.)

Q. Good friends with him? A. (Witness nods head in the affirmative.)

Q. You are a good friend of Berkowitz? A. Yes.

Q. That night did you ask him to bring the car over? A. Yes.

20 Q. And what happened that night? A. Why, I took a ride around Jersey.

Q. Well, did the car come over? A. Yes.

Q. And who was in the car? A. Mr. Lyons and Mr. Dolly.

Q. Now, will you describe to the Court and the Jury what Mr. Dolly looked like? A. Why, he is a fellow between twenty and thirty years old, about five feet eight or ten, weight maybe 140 pounds, and well-dressed, not flashy.

30 Q. You have heard the description given to him by the other witnesses? A. Yes.

Q. And that is about right? A. Yes.

Q. Now, will you tell the Court and the Jury the conversation that you had with Dolly that night? A. There was really no conversation other than he had the car for sale, and I was looking it over to see if the car was all right.

Q. I see. A. As a speculation.

40 Q. Did he tell you what he wanted? A. (No response.)

Q. Did he tell you how much he wanted, if you remember? A. Well, I would not say that he said how much he wanted.

Q. Well, what was the conversation, as you remember it, Mr. Fellage? A. That he had to sell the car to get money.

Q. Yes. A. Of course, my object was to get it as cheap as I could.

Raymond E. Fellage—Direct—for Defendant.

Q. Did you make him an offer? A. I would say that I did offer a thousand dollars, although I do not remember.

Q. I see. Well, you say you had a demonstration of the car that night? A. Yes.

Q. You went out in the car with Dolly? A. Yes.

Q. Did he drive you around, or did you drive the car? A. He drove the car first, and I drove it after. 20

Q. Did it appear as though he knew how to drive that car? A. Yes.

Mr. Buffett: It is immaterial, if the Court please. I object to it.

Q. And after you had had the demonstration, what happened? A. I come back to the house, and he and Mr. Lyons went away. 30

Q. What did you tell Dolly? A. I told him that I would see if I could sell the car.

Q. For him? A. Naturally, speaking to him.

Q. Then what did you do that night, or the following morning? A. Referring to this Buick car?

Q. Yes. Referring to the car, of course. A. I went down to work as usual, went up to Mr. Berkowitz and asked him if he wanted to buy a car on speculation.

Q. Yes. A. And Mr. Berkowitz says, "If you say the car is all right"—as much as to say a good deal, "and we can make money on it, all right." 40

Q. I see. Now, when you say, "We can make money on it," what was the proposition? Was there any proposition between you and Berkowitz? A. Oh, a fifty-fifty deal on the profits.

Q. Were you to get fifty-fifty on the proposition? A. Yes.

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Raymond E. Fellage—Direct—for Defendant.

Q. And you thought the car was all right, is that right, Mr. Fellage? A. (Witness nods head in the affirmative.)

Q. And then, what did you do after your conversation with Berkowitz? A. When he said he would buy it, I called up Mr. Lyons and told him that we would take the car, and he must have a bill of sale with him.

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Q. Yes. Did you—you said you telephoned Lyons? A. Witness nods head in the affirmative.)

Q. That you and Berkowitz would take the car?

The Court: No. Do not lead.

Mr. Buffett: I object. Do not interpolate anything in here in the testimony that is not there.

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The Court: Just what the conversation was with Mr. Lyons over the 'phone.

Q. And what else did you tell Mr. Lyons?

The Court: No. What was the conversation?

The Witness: The conversation was that we would take the car, and he must have a bill of sale with him.

The Court: We would take the car?

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The Witness: Well, we, or I; I do not even remember.

The Court: Well, what did you say? That is what we are asking you. What did you say to Mr. Lyons?

The Witness: Well, I could not say; I imagine I would say Mr. Berkowitz would buy the car.

The Court: Why would you say—

Raymond E. Fellage—Direct—for Defendant.

The Witness: And I might have said I would buy the car. I do not know.

Q. Well, did you give him the information, Mr. Fellage, on the telephone, regarding what should go into the bill of sale? A. Made out to Mr Berkowitz.

Q. You said that the purchaser's name should be Mr. Berkowitz, is that right? A. Yes, sir. 20

Q. Did you give him the first name? A. Yes. Mr. Berkowitz was paying the money; he should have the benefit of the bill of sale.

Q. So after that, do you remember when the car came there? A. The car came there around twelve o'clock.

Q. And do you remember whether—did Mr. Lyons bring the car down? A. No.

Q. Who brought the car down, do you know? A. I do not know who they are. They were two young fellows, say around eighteen, twenty or twenty-two years old. 30

Q. And when they brought the car there, what did they do? A. They waited around until Mr. Lyons come, in the meantime going to get something to eat.

Q. About what time did Mr. Lyons come? A. I should say between one and one-thirty. 40

Q. And when Mr. Lyons came, where was the car? A. On the fifth floor of that building, Mr. Berkowitz.

Q. Well, you say when they brought the car, they came downstairs with it? Did it go up immediately to Mr. Berkowitz' place? A. Those fellows came to me because Mr. Lyons had sent them to me. I was familiar with the building and I just said the fifth floor and the car went there.

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Raymond E. Fellage—Direct—for Defendant.

Q. This car remained up in Berkowitz's place from about twelve you say to one-thirty?

Mr. Buffett: I object to that unless he knows.

20 A. I did not stand there and watch the car. I presume it stayed there.

Q. Well, I mean to say it went up to Mr. Berkowitz's place? A. Yes, sir.

Q. And then did Mr. Lyons come there alone, or did he come with somebody? A. Mr. Lyons come alone, as far as I know. I did not see anybody with him.

Q. And what took place then? A. We went up to Mr. Berkowitz's and, of course, closed up the deal, you might say.

30 Q. Well, what took place; was there any conversation? A. Yes. Mr. Berkowitz asked me, he might have said, "Is everything all right?" and how long I had known Mr. Lyons, or something like that, or, "Do you know him?"

Q. I see. A. I also remember that Mr. Ganton mentioned as knowing Mr. Lyons and he was a reliable man in Edgewater, at that time.

Q. Well, Mr. Lyons was not selling the car, was he, to Mr. Berkowitz?

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Mr. Buffet: I object.

The Court: Objection sustained.

Mr. Ogust: Exception.

The Court: Yes.

Q. You knew, Mr. Fellage, didn't you, that Mr. Dolly was selling the car?

Raymond E. Fellage—Direct—for Defendant.

Mr. Buffett: Objection

The Court: Sustained.

Mr. Ogust: Exception.

Q. Did Mr. Lyons ever say anything to you about this car? A. None other than I have just stated.

Q. Did he say anything to Mr. Berkowitz up there that day about this car? A. Only that the car was delivered there. He might have come in and said, "Your car is here"; something like that. I do not remember of him saying anything.

Q. You do know when he came up there Berkowitz gave him a check? A. Positively; yes.

Q. Now, did you see Berkowitz examine this car? A. I believe that we all looked at the car; not to examine it, but just as much as to see the car is there.

Q. I see. You went out and looked around; is that the idea? A. It was either before the bill of sale was turned over, or after; I would not swear which.

Q. And it was on the representations that you made to Mr Berkowitz—

Mr. Buffett: No; I object to that.

Q. —that Mr. Berkowitz said he would take the car for your mutual advantage?

Mr. Buffett: I object.

The Court: The question is too leading.

Mr. Buffett: Yes.

Q. Mr. Berkowitz has testified that it was on your say-so that he took the car; is that right? A.

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Raymond E. Fellage—Direct—for Defendant.

(Witness nods head in the affirmative.)

Q. And that car was bought for the mutual benefit and profit of both of you, is that right?

Mr. Buffett: I object to that, if the Court please.

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The Court: That, of course, is too leading. You have already had the witness's testimony and counsel should not ask him again on a leading question.

Q. Mr. Fellage, have you ever been subpoenaed here by the plaintiff in this action? A. (Witness shakes head in the negative.)

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Mr. Buffett: I object to that. It does not matter whether he has or not. We did not call him.

The Court: It is immaterial.

Mr. Ogust: Note my exception. That is all.

Cross-examination by Mr. Buffett:

Q. You still live in Bogota, don't you, Mr. Fellage? A. (Witness nods head in the affirmative.)

Q. You said you have known Lyons about five years? A. Since I lived in Jersey; yes, sir.

Q. You have been pretty friendly with him, haven't you? A. Surely.

Q. And he comes to your house, and you go to his? A. Yes.

Q. And you enter into little deals together and turn over money sometimes, don't you? A. Never have, no, outside of—

Raymond E. Fellage—Cross—for Defendant.

Q. Lyons is in the coal business, isn't he? A. Yes, sir.

Q. And frequently delivers coal at your house, doesn't he? A. Yes.

Q. Sure. And once in a while he comes over with a machine and leaves it at your house? A. No.

Q. He never has? A. No.

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Mr. Ogust: Please speak up, Mr. Fellage, so the stenographer can hear what you are testifying.

Q. He has never brought a machine which has been damaged to your house to repair? A. He has brought one on a truck, not his machine, hauled it from New York to my house.

Q. That is what I mean. Has he left any automobiles with you? A. Yes.

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Q. Now, you first stated that Lyons offered it to you, but you told him you could not buy it because you just bought some real estate; that was true, wasn't it? A. (Witness nods head in the affirmative.)

Q. Why do you change it later and say you did not know whether you would buy it, or Berkowitz would buy it? Why did you change your testimony? A. On saying either of us would buy it? I said I or we on the telephone just as if there were three people in it, I would say we.

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Q. Now, do you know whether that machine went immediately up to Berkowitz's floor after it came to the building? A. Within the lapse of ten minutes, maybe, waiting for the elevator.

Q. Did you notify Berkowitz immediately it

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Raymond E. Fellage—Cross—for Defendant.

came up to the floor? A. Well, Berkowitz was not in at that time.

Q. He came later? A. Yes.

Q. And when Berkowitz came in, you and Lyons went up to see him, is that right? A. Right.

Q. And you told him the car is here? A. Right.

20 Q. And then he asked you in Lyons' presence, after the bill of sale was shown to him, who Dolly was, didn't he? A. I do not think he asked me who Dolly was.

Q. Did he address Lyons as Dolly when he came into his office? A. That I would not say; I do not remember.

Q. And you do not remember whether Lyons replied, "I am not Dolly, I am Lyons," do you? A. No, I cannot remember that conversation.

30 Q. Had you ever told Berkowitz that Lyons was in this transaction? A. (Witness shakes head in the negative.)

Q. So that there was no means of Berkowitz knowing, if you know, whether Lyons had anything to do with it or not until he actually came to his office? A. No.

Q. And Lyons was present when you told him that Lyons was all right; isn't that right? A. Lyons was there. I told him Lyons—

40 Q. And he was there when you told him that "this is the car" and "this is the machine I told you about?" A. Yes.

Q. And "what I have told you is true"? A. (Witness nods head in the affirmative.)

Q. Is that right? A. (Witness nods head in the affirmative.)

Q. And Lyons did not contradict it, did he; he just stood there and said nothing? A. There was no contradictions at all.

Raymond E. Fellage—Cross—for Defendant.

Q. How often have you seen Dolly? A. That one time; that one night.

Q. Do you remember what he looks like, now? A. Sure.

Q. Was Lyons with him at that time? A. Yes.

Q. How long prior to the turning over of the car to Berkowitz was this? A. That was Friday night, and the car was turned over Saturday noon. 20

Q. What price did Lyons give you on the car?

Mr. Ogust: I object to that.

A. I do not think Lyons gave any price.

Mr. Ogust: There is no testimony here that Lyons gave any price.

The Court: The question is competent on cross-examination. 30

The Witness: There was nothing said between Lyons and I regarding the price.

Q. What price did you give Berkowitz on it? A. A thousand dollars. And I said I thought it could be bought for a thousand dollars.

Q. And the check was for a thousand and fifty? A. I do not know anything about the check.

Q. You saw the check made out, didn't you? I was in the place not paying any attention. I knew there was a check made out. 40

Q. Didn't you hear Berkowitz tell his book-keeper to make it out for a thousand and fifty dollars? A. I heard him tell him to make out a check and probably for that amount; but I cannot remember he said that amount.

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Raymond E. Fellage—Cross—for Defendant.

By the Court:

Q. How did it happen to be made out for fifty dollars more than you said he could buy it for?

A. I did not know anything about the financial end of it.

20 Q. Well, if you do not, who does? A. I had nothing to do with it.

By Mr. Buffett :

Q. You do not know whether the Dolly—whether the Dolly that came to your house, his name was Dolly, except what Lyons told you? A. That is all.

Q. For all you know, Dolly, the man who was represented to you as Dolly, was somebody else, isn't that right? A. I do not know.

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Mr. Ogust: I object.

The Witness: I do not know.

Q. Dolly did not tell you where he lived? A. No.

Q. You did not try to find him after this took place, did you? A. No.

By the Court:

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Q. Did you make an arrangement with Berkowitz about this car? A. I asked him if he wanted to buy this car.

Q. Did you sell it to him? A. No.

Q. If you didn't, who did? A. The man who gives the bill of sale. I have never seen the bill of sale.

Q. Then, you did not sell the car to Berkowitz? A. No, sir.

Raymond E. Fellage—Cross—for Defendant.

Q. And you do not know anything about the price? A. All I know is around a thousand dollars. I said I thought it could be bought for a thousand.

Q. And that is all you know about it? A. (Witness nods head in the affirmative.)

Q. Well then, how did you come to telephone to Lyons if you did not know anything about the sale of the car? A. I just told him that— 20

Q. Yes. But your price had not been agreed upon. How did you come to telephone him to make out the bill of sale to Berkowitz if you had not agreed upon any price? A. Well, if he would not sell the car for that money, as we had agreed the night before practically, because I had made a half-way offer of a thousand dollars, which would have been accepted at our end, it wouldn't never— 30

Q. How did the \$50 get on there? A. That I had nothing to do with.

Q. Did you tell Lyons what to put in the bill of sale? A. A thousand dollars, as far as I know.

The Court: All right.

By Mr. Buffett:

Q. Who raised it to a thousand and fifty dollars, do you know? A. I had nothing to do with the money end of it, outside of the fact that I told Mr. Berkowitz that I thought the car could be bought for one thousand dollars. 40

Mr. Buffett: That is all.

Redirect-examination by Mr. Ogust:

Q. Mr. Fellage, is that as far as you can recol-

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Raymond E. Fellage—Cross—for Defendant.

lect since that time, or have you any positive recollection whether it was a thousand, or a thousand and fifty dollars?

Mr. Buffett: I think he has fully testified on that, if the Court please.

The Court: Counsel may ask the question if he wants to.

20

A. Why, I would not say either way, whether it was a thousand, or it was a thousand and fifty, but I am under the impression it was a thousand.

Q. You have been a friend of Mr. Berkowitz's for quite a number of years? A. Yes

Mr. Buffett: He has testified 10 years.

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Q. You never had any other automobile transactions with Mr. Lyons, did you?

Mr. Buffet: I beg your pardon; he testified he had.

The Court: You may ask him the question.

40

Q. Have you ever had any other automobile transactions with Mr. Lyons, buying or selling automobiles with Mr. Lyons? A. Only in the line of trucking, hauling a car for me.

Q. Well, that has nothing to do with buying or selling? A. No, sir.

Mr. Ogust: That is all.

By the Court:

Q. How long did these two young men stay there that brought this car down? A. They stayed

Raymond E. Fellage—Redirect—for Defendant.

there until Mr. Lyons come, probably, say, about an hour or an hour and a half.

Q. What were they waiting for? A. Waiting for somebody to tell them to go, I suppose.

Q. And did Mr. Lyons tell them to go? A. I did not hear that. I presume so, as they went.

Q. Where was the last you saw of those two young men? A. Waiting on the sidewalk in front of the place. 20

Q. Did you see Lyons speak to them? A. I would not want to say I did, because I was on the second floor attending to my business.

By Mr. Buffett:

Q. You saw Dolly, didn't you? A. Yes, sir; at the house.

Q. Was one of the young men Dolly? A. No.

The Court: Well, we will take a recess until two o'clock. (Recess.) 30

After recess. Two o'clock P. M.

Mr. Ogust: The defendant rests, may it please your Honor.

The Court: The defendant rests. Any rebuttal?

Mr. Buffett: The plaintiff rests.

Mr. Ogust: Before summing up, your Honor, please, I want to renew my motion to dismiss the complaint, for a non-suit, on the ground that the plaintiff has not proven the allegations of his complaint. He has not proven that the defendant or his agent by any evidence, any legal evidence, made any representations to this plaintiff wherein and whereby the plaintiff was deceived. There 40

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Motion to Dismiss Complaint.

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is no proof in the case that if any representations were made, they were made with the knowledge and with intent to defraud or deceive the plaintiff. There is no proof in this case that any representations were made by the defendant whatsoever. There is no proof that any representations were made by this defendant before the consummation of the deal whereby the plaintiff bought this automobile. Under the law, as I understand it, your Honor, the proof of fraud must be clear and convincing. It must show not mere negligence, perhaps, on the part of the defendant, but it must show an intent, a knowledge, on the part of the defendant to defraud the plaintiff. I say, under the allegations of the complaint, that the plaintiff has not proven any part of that complaint, and has not proven his cause of action.

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The Court: I think there is enough to go to the jury. The jury must pass upon the fact whether it has been established or not.

Mr. Ogust: May I note my exception?

The Court: Yes. Note your exception.

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Mr. Ogust summed up the case to the jury on behalf of the defendant.

Mr. Buffett summed up the case to the jury on behalf of the plaintiff.

The Court then charged the jury as follows:

Charge.

Berkowitz vs. Lyons.

CUTLER, J.: Members of the Jury: On the 17th of January, 1920, the plaintiff bought an automobile. The sale was consummated in New York City. The automobile so purchased by him had been stolen from the former owner, who afterwards identified it, and it was returned to him through the Police Department of New York City. 20

The fact that the plaintiff had paid someone, not the real owner for it, gave the plaintiff no right to retain it, no title to the automobile, even if he purchased it in good faith, not knowing that it was stolen.

The plaintiff contends that the present defendant, Mr. Lyons, fraudulently induced him to purchase it and should return to him the money that he paid for the car, and that is admitted to be \$1,050.00. 30

The burden of proving fraud, for this is an action based on fraud, rests upon the plaintiff, and he must satisfy you, not only that he was defrauded, but that he was defrauded by the defendant Lyons for, if he was defrauded by someone else, of course, he would have no right of action against Lyons. The law requires that a plaintiff in an action of this character, before he can recover, must satisfy you that the defendant made some representations to him meaning that he should act upon it. Second, that such representations were false, and that the defendant knew that they were false when he made them. And, third, that the plaintiff, believing such representations to be true, acted upon it and has thereby been injured. 40

There has been a motion in this case to non-suit and a motion to direct a verdict. Both of these motions have been decided adversely by the Court

Judge's Charge.

to the defendant; but that is no indication what you should do or the Court's view on the subject. It is simply the decision by the Court that this is a jury question—a question to be decided by you from the evidence which you have heard in this case. And so you are to determine this case from the evidence which you have heard. It is not what
20 counsel may contend the witnesses have sworn to which is to guide you, but you are the sole judges of what the evidence has been and what the various witnesses have testified to. You are the sole judges of the weight that you will give to the testimony of witnesses and the credibility of the various witnesses that you have heard on the witness stand, and you will have to determine not only what the witnesses have sworn to, but the weight that you will give to the testimony for, in
30 some respects, it has been conflicting.

It is not disputed, however, that a man calling himself A. J. Dolly had possession of this automobile. Whether that was his real name is immaterial; that was the name that he called himself, and that seems to be the only identification that there was in this case. No one seems to have known anything about him except what he said himself. He executed a bill of sale to the plaintiff, and that bill of sale was not delivered by Dolly to
40 the plaintiff, but was handed to Lyons, who delivered it to the plaintiff and received from the plaintiff a check payable to the order of Dolly. By this bill of sale, if Dolly had been the owner of the car, title would have passed to the plaintiff, and he would have been the owner of the car; but it appears that this man Dolly was not the owner of the car, so that no title passed when Lyons deliv-

Judge's Charge.

ered the bill of sale to this plaintiff. If Mr. Lyons at the time he delivered that bill of sale knew that the car had been stolen, that Dolly had no title to the car, and that he received a check, even if it was payable to Dolly's order, knowing that the car had been stolen, then he would have been a party to the fraud and would be liable as well as Dolly, even if Dolly received the money, or a part of the money, from Lyons afterwards. But if, on the contrary, you believe Lyons' story that he acted in good faith, that he knew nothing about the car being stolen, and that he made no false representations to the plaintiff or to anyone else, that he simply acted as a messenger and received the check and delivered it over to Dolly, and then afterwards identified—cashed the check in the bank and handed over the money to Dolly, except \$50 which he received for his trouble, why, there would be no fraud on the part of Lyons.

So, Ladies and Gentlemen, the question for you to determine from all this evidence—you have got a right to consider it all,—whether or not the plaintiff has established by a preponderance of the evidence that Lyons perpetrated a fraud on him. You cannot presume fraud; it must be proven. If you find that he did, then you are entitled and should render a verdict in favor of the plaintiff against Lyons for this amount, \$1,050.00. If, on the contrary, you are not satisfied by a preponderance of the evidence that Lyons did perpetrate a fraud on the plaintiff, then your verdict should be a verdict for the defendant; because, in cases of fraud, the burden of proof is on the plaintiff, and he must establish not only that he was defrauded, but that he was defrauded by the person whom he alleges he was defrauded by. So,

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Judge's Charge.

even if you find that the plaintiff lost his car by a fraud worked upon him by some one else you cannot hold Lyons unless he was a party to that fraud. If he was a party to that fraud, then he was responsible, even if somebody else was with him. You have to be satisfied, before you can find a verdict against Lyons, that he was a party to the fraud by which this plaintiff lost his \$1,050.00.

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Let an officer be sworn. Let the jury retire. (The jury retired.)

Exhibit P-1.

Bill of sale for motor vehicle (Individual)

Know all men by these presents, that A. J. Dolly of Bridgeport, in the county of _____ and State of Conn., party of the first part, in consideration of the sum of \$1050.00/100 dollars, paid by A. Berkowitz of New York, in the county of N. Y. and State of N. Y., party of the second part, has bargained, sold, granted and conveyed and by these presents bargain, sell, grant and convey unto the said party of the second part his heirs, executors, administrators and assigns, (motor vehicle) Five Passenger, (make of car) Buick, (model) 1920, (manufacturer's No.) 567,271, to have and to hold the same unto the said party of the second part, his heirs, executors, administrators and assigns forever, and A. J. Dolly (person sale), do for their heirs, executors, administrators or assigns, covenant and agree to and with the said party of the second part to warrant and defend the said described motor vehicle hereby sold unto the party of the second part his executors, adminis-

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Exhibit P-1.

trators and assigns against all and every person or persons whomsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this Seventh day of Jan., one thousand nine hundred and twenty.

A. J. DOLLY.

Signed, sealed and delivered)

in the presence of)

20

EDWARD LENNING,

FRANK BUCKLEY.

State of New Jersey,)
County of Bergen.) ss.:

Be it remembered, that on this seventeenth day of Jan., 1920, before me a Notary Public of the State of New Jersey, personally appeared who,

I am satisfied, is the seller mentioned in the within instrument, and I have personally made known to him the contents thereof he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

30

CHARLES VAN GELDER,

Notary Public,

Ex. Apr. 15, 1920.

N. J.

(SEAL)

Indorsed:

Individual or Firm

40

BILL OF SALE FOR MOTOR VEHICLE

A. J. Dolly

—TO—

A. Berkowitz

Dated—Jan. 17, 1920

242 Main St.,

Bridgeport,

Conn.

Exhibit P-2.

ADOLPH BERKOWITZ
 415 West 55th St. N. Y. City

P. 2

55-351

THE FIRST NATIONAL BANK
 Edgewater, N. J. January 17, 1920. No. 485

Pay to the order of A. J. Dolly \$1050.00/100
 TEN HUNDRED FIFTY DOLLARS Dollars
 ADOLPH BERKOWITZ

20 (Stamped on face of check twice) : PAY TELL
 (Stamp of Bank on face of check) :
 FIRST NATIONAL BANK
 EDGEWATER, N. J.
 PAID
 JAN 19 1920
 Check perforated with word PAID.

BACK

33 Indorsed by
 A. J. DOLLY
 HARVEY M. LYONS.

NEW JERSEY

Court of Errors and Appeals

ADOLPH BERKOWITZ,
Plaintiff-Respondent,

against

HARVEY M. LYONS,
Defendant-Appellant.

**BRIEF FOR
PLAINTIFF-RESPONDENT.**

Statement of Facts.

This is an action brought in the Circuit Court, Bergen County, by the plaintiff against the defendant on the ground of fraud, in that the defendant sold to the plaintiff an automobile which the defendant represented belonged to a person known as "A. J. Dolly."

The negotiations between the plaintiff and the defendant were carried on through one Felage, whose testimony is set forth in the state of the case (p. 94 *et seq.*).

The plaintiff is in business as an automobile painter at No. 415 West 55th Street, New York City, and has done business in Bergen County, and in connection with said business had an account

with the First National Bank of Edgewater, at Edgewater, New Jersey.

The defendant is in business in Edgewater, and during the month of January, 1920, he met a person described as "A. J. Dolly" at the Campus Restaurant at 104th Street and Columbus Avenue. Through the acquaintance of the defendant with the alleged Dolly, the defendant undertook to sell an automobile represented by him to be owned by the alleged *Dolly* and Felage was brought into the transaction through the defendant and the plaintiff was interested in the purchase of the said car through Felage.

The automobile as described in the bill of sale, Plaintiff's Exhibit 1 (Case, p. 114), was delivered to the plaintiff's place of business on Saturday afternoon, January 17, 1920.

The evidence shows that Felage saw the plaintiff on Saturday morning, described the automobile to him, gave the price as \$1,000, and the plaintiff told Felage that if he said the car was all right he would take it. Felage assured him it was. Felage telephoned to Lyons in Edgewater and the car was delivered to the plaintiff's place of business by two young fellows and not by the defendant, but the defendant appeared in the plaintiff's place of business in the afternoon with Felage and delivered the bill of sale and received a check for One thousand fifty (\$1,050) Dollars.

The plaintiff upon receiving the bill of sale, addressing the defendant as *Dolly*, asked for his address and it was given to him by the defendant as No. 242 Main Street, Bridgeport, Connecticut. A few days thereafter the plaintiff's attention was called to the fact that the car was a new one and not as represented, and he thereupon called up the Police Department of the City of New York and asked if they had the car number on their list, and

he was advised that they did. It was then turned over to the Police Department of New York City, who returned it to the owner.

The plaintiff then brought this action against the defendant Lyons to recover the amount he had paid defendant for the car, namely, One thousand fifty (\$1,050) Dollars as represented by the check which was given to defendant (Case, p. 75, line 15), who cashed it and received the money (Case, p. 77, line 38) and claims he turned it over to *Dolly*.

Argument on the Facts.

The plaintiff sues in fraud. Without doubt the alleged "A. J. Dolly," the person who was represented to have owned the automobile in question and who is alleged to have acknowledged the bill of sale in question, is a fictitious person. In this whole proceeding he has never been identified particularly by anybody. He was not described by the witness Fellage, who said he never saw him but once, and the notary public who took the acknowledgment on the bill of sale testified to such a person having appeared before him, but he never saw him before and he could not tell which of the men that came was the alleged Dolly, although one of them said he knew him (Case, pp. 63 and 64).

Dolly was not present when the bill of sale was delivered and the check received by the defendant, and, according to the witness Fellage, Dolly was not one of the two "young fellows" who delivered the car at the plaintiff's place of business (Case, p. 109, lines 20-30), although the defendant testified that when the automobile left Edgewater it was driven by Dolly's friend and that Dolly was with him (Case, p. 83, line 22).

The defendant denies that the car was ever in his possession or under his control, but the tele-

phone message to the defendant that the sale had been made and that the car was to be delivered at the plaintiff's place of business went from the witness Fellage to the defendant in Edgewater and the automobile left Edgewater on its way to New York as above stated (Case, p. 83, line 18).

The two "young fellows" who delivered the car were dismissed by Lyons when he appeared (Case, p. 109, line 10). The check for the automobile was delivered to the defendant, who says he in turn gave it to the alleged Dolly on Monday following and that he went to the bank with the alleged Dolly who endorsed the check and the defendant also endorsed it and received the money, Dolly handing him \$50 for his trouble and retaining \$1,000.

The bill of sale was in the handwriting of the notary, and the similarity between the handwriting of the notary and the name "A. J. Dolly" endorsed on the check was apparent. The jury took these exhibits to the room with them and the jury had an opportunity to pass on the similarity of the handwriting.

The plaintiff calls attention to the conversation which took place in the office of the plaintiff when the bill of sale was delivered (Case, p. 14, lines 18-35), the plaintiff assuming Lyons to be the maker of the bill of sale and, therefore, Dolly asked him for his address, whereupon the defendant said he was not Dolly but that his name was Lyons, and he thereupon again looked for assurance to the man whom he had known for years. In the transaction the witness Fellage assured the plaintiff that he knew Lyons; that he was a business man and all right, and one of the two gave the plaintiff Dolly's fictitious address, No. 242 Main Street, Bridgeport, Connecticut. Both deny having given the address. The address was a fictitious one (Case, p. 15, line 33; p. 16, lines 10-50).

The appellant's brief contains eight headings or points, seven of which cover the grounds of appeal and exceptions to questions asked of different witnesses on which rulings were made and exceptions taken. The respondent will answer appellant's points seriatim.

POINT I.

Answering Point I of the appellant's brief, respondent contends that the Trial Court did not err in refusing defendant's motion for a non-suit.

The appellant has attempted to show that because the plaintiff had never seen or talked with the defendant before the day of the delivery of the bill of sale by the defendant to the plaintiff and the receipt of the check, therefore the defendant made no representation whatsoever as to the automobile in question, but that the plaintiff relied entirely in the transaction upon the witness Fellage.

The defendant denies that he sold the car to the plaintiff, and the witness Fellage, in answer to questions put to him by the court (Case, p. 106, line 43), testified that he had nothing to do with it; that he had never seen the bill of sale, and again (p. 107, line 40), in answer to question by counsel for the plaintiff, his answer is as follows:

"A. I had nothing to do with the money end of it, outside of the fact that I told Mr. Berkowitz that I thought the car could be bought for \$1000."

Without question the witness Fellage was acting as an agent for the defendant Lyons and Fel-

lage's representations to the plaintiff were Lyons' representations, and especially so when made in the presence of the three in the plaintiff's office when the bill of sale was delivered and check received.

The conversation there seemed to have been mostly between Fellage and Berkowitz, but the defendant was present and acquiesced therein.

Counsel has correctly stated the rule of law and the appellant contends that this case comes within that rule of law and that fraud is legally chargeable to the defendant Lyons.

There was a representation by him that the automobile was owned by a *fictitious* individual; that he had it for sale; that these representations were false except as to the sale; that he knew it to be false when he made it; that he intended the plaintiff to act upon it, and he did; and that he suffered injury thereby to the extent of One thousand fifty (\$1,050) Dollars.

The cases cited by counsel therefore do not apply to this case and the trial court therefore was right in refusing a non-suit to the defendant.

POINT II.

Answering Point II of the appellant's brief, the respondent contends that the trial court did not err in refusing to direct a verdict for the defendant at the end of the whole case.

At the end of the whole case plaintiff's case was stronger than it was at the end of the plaintiff's case. A perusal of the record will readily disclose that fact. There was sufficient evidence upon which the court could send the case to the jury.

There is no merit in the appellant's contention that the defendant made no representations to the plaintiff; that representations were made by the witness Felage. Felage, it is true, interested the plaintiff in this car and plaintiff contends that upon the whole case there is no question but that Felage knew all of the facts that defendant knew, but the outstanding feature in this case which brands the defendant as the principal is the fact that he procured Felage to sell the car; that the car was sold to the plaintiff; that when the sale was consummated by Felage he telephoned to defendant; that defendant procured the car to be delivered at the plaintiff's place of business; that defendant dismissed the two "fellows" who brought the automobile there; that defendant went to the plaintiff's place of business with the said Felage and delivered a bill of sale, giving the *fictitious* "Dolly's" *fictitious* address as No. 242 Main Street, Bridgeport, Connecticut; that defendant heard the witness Felage assure the plaintiff upon inquiry by him that the transaction was all right; that Felage knew defendant; that the car was owned by "Dolly"; that defendant received the check; and the check was cashed by defendant at the bank in Edgewater and he received the proceeds; and there is no question but that the jury did not believe him when he said he turned the money over to "Dolly."

The preponderance of evidence sustained the plaintiff's claim and there was, therefore, sufficient evidence upon which the court could submit the case to the jury and that *fraud* was sticking out all over the transaction.

The trial court, therefore, properly submitted the case to the jury and denied the defendant's motion for the direction of a verdict.

POINT III.

Answering appellant's Point III, the respondent contends that there was an abundance of evidence to sustain the jury's verdict.

There seems to be some doubt in the minds of the appellant and his counsel as to whether his contention as set forth in Points I and II of his brief are correct, as evidenced by the only statement under Point III.

There was, of course, sufficient evidence, as even a perusal of the record will disclose, and counsel for ^{Plaintiff} ~~defendant~~ notes that there was no exception taken by the counsel to the charge of the trial judge. The charge very succinctly sets forth the evidence and the law, and there could therefore be no proper exception taken to that charge.

In addition to the hearing of the testimony, the jury had before them the attitude of the witnesses on the witness stand. Their demeanor and the way and manner in which they answered questions, and that fact, together with the evidence adduced and the charge of the trial court, was sufficient ground upon which to base their verdict, and the rule of law in this state, and almost every other state, is well laid down that where either is in evidence to sustain a verdict, or any evidence tending to sustain the verdict, it is conclusive and will not be set aside.

Vorhis v. Terhune, 15 N. J. L., 147.

Nelson v. Bock, 85 Atl., 1009.

Mahoney v. Met. Life Ins. Co., 80 N. J. L.,
136.

Waldron v. Wells, 86 Atl., 362.

3 *Cyc.*, page 348.

In this case there was purely a question of fact as to whether or not the defendant had practised a fraud upon the plaintiff, and that fact has been resolved by the jury in favor of the plaintiff, and it is a well settled law in this state that where, as in this case, it is a pure fact case, a verdict which is not palpably erroneous will not be disturbed.

Campbell v. Emslie, 72 N. J. L., 37.

Followed in *Bowel v. Pub. Ser. Cor.*, 77 N. J. L., 231.

See also:

3 *Cyc.*, pages 348 and 356.

POINT IV.

Answering Point IV of the appellant's brief, respondent contends that there was no error on the part of the court in allowing the testimony of the witness Coe to stay in evidence.

The witness Coe was called as a witness for the plaintiff for the purpose of showing that he was acquainted with the handwriting of the witness Van Gelder and that Van Gelder's signature to the acknowledgment on the bill of sale was in the same handwriting as in the body of the bill of sale, but plaintiff was unable to qualify the witness over the objection of the defendant, but the court permitted the testimony as to Van Gelder's signature to the acknowledgment to stand.

There was no legal error on the part of the Court which could properly be complained of because the testimony was immaterial and was not vitally necessary to the case, and the signature of the witness

Van Gelder to the said acknowledgment was admitted by him to be his signature (Case, p. 66, line 30).

See:

Moore-Jones Glass Co. v. West Jersey & S. R. Co., 76 N. J. L., 708.

In this case the court held that a mere overruling of a question, the answer to which may or may not be pertinent, is not a reversible error, unless the answer would have been pertinent. The converse is, of course, also true that where an answer has been given which is not pertinent or where a witness for the party objecting to the answer has answered the question fully, the allowing of the answer to stand is not a reversible error.

POINT V.

Answering Point V of the appellant's brief, respondent contends that no error was committed by the court in refusing to allow the witness Van Gelder to testify as to who, in his opinion, endorsed the name "A. J. Dolly" on the back of the check.

The check is Plaintiff's Exhibit 2. On direct examination of the witness Van Gelder defendant's counsel was attempting to show who, in his opinion, endorsed the name "A. J. Dolly" on the back of the check. Objection was made by counsel for the ~~de-~~^{Plaintiff} defendant and leave was given to said counsel to examine the said witness on his qualifications and the questions and answers are as follows:

"Examination by Mr. Buffett.

Q. How many times have you had to compare handwritings, Mr.— A. How many times have I had to compare handwriting?

Q. Yes. A. Well, I do not know as I ever had to compare them; but I knew different handwritings from people I knew.

Q. Yes, but have you ever been put in a position to compare signatures to find out whether they were genuine or not? A. I never have claimed to be an expert in that line" (Case, p. 61).

Upon receiving the last answer plaintiff's counsel objected to the testimony of the witness on the ground that he was not qualified. Counsel for the defendant was seeking to show by opinion evidence that the handwriting in the endorsement on the check was the same as the signature on the bill of sale and witness had not seen the check endorsed. It was evident that the witness was not qualified, and that his testimony did not come within the rule.

POINT VI.

Answering Point VI of the appellant's brief, respondent contends that the trial court did not err in refusing to allow the defendant to testify to conversations he had with Felage in the absence of the plaintiff.

The plaintiff in testifying at the opening of the case referred to the witness Felage (Case, p. 12, line 48).

"Q. Will you tell me what occurred on that date? A. I do. A Mr. Felage from the Stearns Company came up and asked me—

Mr. Ogust: I object, may it please your Honor, to any conversation between this witness and Mr. Fellage.

Mr. Buffett: I am asking him about the 17th of January.

The Court: That would be hearsay; conversation with someone else cannot be given.

Mr. Buffett: I consent it be stricken out" (Case, p. 13, lines 10-20).

Further down on page 13 plaintiff again referred to the witness Fellage and objection thereto was promptly taken by the defendant's counsel (Case, p. 13, line 28).

The court, therefore, in ruling as it did with reference to the testimony of the witness as to conversation which the witness had with defendant in the plaintiff's absence, was merely following out the rule which counsel for defendant had invoked at the beginning of the case and impartially and fairly treated both sides alike, so that the ruling of the court which the defendant complains of (Case, p. 69, line 10 *et seq.*) was fair and impartial and was not prejudicial to the defendant; in fact, it was not as prejudicial to the defendant as the ruling hereinabove referred to when the plaintiff was testifying. No particular reason is pointed out in Point VI of the appellant's brief why this ruling was prejudicial to the appellant.

POINT VII.

Answering Point VII of the appellant's brief, respondent contends that the court did not err in refusing to allow *alleged* conversations between the defendant and *the alleged Dolly*.

The court was again following out its rule established at the beginning of the case, which rule was invoked by the counsel for the defendant in its ruling upon alleged conversations between the defendant and Dolly.

See:

Moore-Jones Glass Co. v. West Jersey & S. R. Co.

POINT VIII.

Answering Point VIII of the appellant's brief, the verdict was in accordance with the evidence and should stand.

See Point III, *supra*, the grounds of appeal 5, 6, 7, 8, 9 and 10, upon which the appellant relies, are without merit. There is no dispute but that the plaintiff purchased a stolen car, the only question in this case is as to whether the defendant perpetrated a fraud upon the plaintiff when he and his agents procured the plaintiff to purchase it.

A cursory review of the evidence will show that the alleged Dolly was fictitious; he was never in evidence when there was somebody to identify him, and there is nothing to show that the individual which appeared before the notary Van Gelder and alleged he was Dolly was not an automobile thief

parading under a fictitious name. The whole case is so reeking with fraud that the jury could not in justice to the plaintiff reach any other verdict.

The case was squarely presented by the charge of the court to the jury. It was not excepted to; it was fair and impartial; it gave the facts as clearly as language could present it. The jury was not misled or prejudiced. The defendant was on the witness stand and the witnesses were all present in court except the owner of the automobile. His testimony was taken by deposition and he testified to nothing that was contradicted. His testimony was merely that the car purchased by plaintiff was his car and was stolen from him on a certain date, and later he recovered it through the New York Police Department.

On all the evidence, therefore, the plaintiff contends that the verdict is supported by the evidence and that no errors were committed by the court which would justify this court in directing a reversal.

The verdict, therefore, should be permitted to stand.

Respectfully submitted,

B. R. BUFFETT,
Attorney of the Plaintiff.

EDWARD A. KENNEY,
Of Counsel.

NEW JERSEY
COURT OF ERRORS AND APPEALS

ADOLPH BERKOWITZ

Plaintiff-Respondent,

VS.

HARVEY M. LYONS,

Defendant-Appellant.

**BRIEF FOR DEFENDANT-
APPELLANT.**

This is an appeal from a judgment for \$1,117.19 against the defendant entered on the verdict of a jury in the Bergen Circuit Court on September 26, 1921.

Statement.

The action is in fraud. The plaintiff in his complaint (Case, pp. 6-8) alleges that the defendant on January 17, 1920, sold plaintiff an automobile which defendant represented belonged to a person known as A. J. Dolly and relying on this representation plaintiff gave defendant a check to the order of A. J. Dolly and which was thereafter cashed. That plaintiff relied upon the representations of the defendant as to the ownership

of the car in buying it, and that the defendant, at the time he made the representation, knew that it was false and fraudulent and made it for the purpose of deceiving the plaintiff. That the automobile turned out to be a stolen car and plaintiff was thereby damaged in the amount he paid for the car.

The defendant appeals from the judgment upon the following grounds: (Case pp. 2-3).

1. Refusal by the Court to grant defendant's motion for a non-suit at the close of plaintiff's case.

2. Refusal by the Court to grant defendant's motion for a non-suit at the close of the whole case.

3. Because there is no evidence sufficient to sustain the jury's verdict.

4. Because the testimony of the witness, Elmer J. S. Coe, was allowed to stay in evidence.

5. Because the Court refused to allow the defendant to testify as to conversations he had with the witness, Raymond E. Felage in the absence of the plaintiff.

The following questions were overruled.

6. To the witness, Charles Van Gelder:

Q. Yes. But have you ever been put in a position to compare signatures to find out whether they were genuine or not. A. I never have claimed to be an expert in that line.

7. To the witness, Harvey M. Lyons:

Q. And then, what after that? A. Why, I was out to Mr. Fellages' home in Bogota.

Q. Where does Mr. Felage live? A. Bogota.

Q. Yes. A. And I was speaking to Mr. Felage about it.

Q. Yes. A. I asked him if he wanted to buy a machine.

Q. Yes. A. So he told me that he—

8. To the witness, Harvey M. Lyons:

Q. And did Mr. Felage buy the car?

9. To the witness, Harvey M. Lyons:

Q. What did Dolly tell you that Mr. Van Gelder had said?

10. To the witness, Harvey M. Lyons:

Q. Yes. And had you had any conversation with Dolly before you went to New York? A. Yes, sir—

Q. What was the conversation?

POINT 1.

(Ground of Appeal No. 1.)

The Trial Court erred in refusing to grant Defendant's motion for a non-suit at the close of plaintiff's case.

At the end of plaintiff's case, not only had the plaintiff failed to prove a single material representation on the part of the defendant as to the ownership of the automobile, or otherwise, but, on the contrary, it appeared that except for giving plaintiff Dolly's address when asked for it by the plaintiff, defendant had no conversation with the plaintiff (Case, p. 18, l. 46-49; p. 19, l. 36-42; p. 20, l. 48-50) and plaintiff had never seen or talked to the defendant before (Case, p. 20, l. 41-47). Further, that the plaintiff relied entirely in the transaction upon a Mr. Raymond Felage who was a friend of his, and had no interest in the defendant at all (Case, p. 24, l. 41-44; p. 25, l. 17-19; p. 28, l. 13-14; p. 29, l. 45-46) and that Felage asked him to make out the check to Dolly's order and the representations made, if any, were made by Felage (Case, p. 22, l. 34-39; p. 23, l. 23-25).

The general rule is that to constitute actionable fraud, it must appear (1) that the defendant made

a material representation; (2) that it was false; (3) that when defendant made it he knew that it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.

20 Cyc. 13; *Byard vs. Holmes*, 34 N. J. L. 296.

Mount vs. Loizeaux, 86 N. J. L. 511.

Lembeck vs. Gerken, 86 N. J. L. 111.

Lams vs. Fish, 86 N. J. L. 321

Counsel therefore respectfully urges that, at the end of plaintiff's case, plaintiff not having proven a single one of the essential elements of his cause of action, defendant's motion for a non-suit (Case, p. 52-55) should have been granted and that the refusal of the trial Court to grant the motion was legal error.

POINT 2.

(Ground of Appeal No. 2.)

The Trial Court erred in refusing to direct a verdict for the Defendant at the end of the whole case.

At the end of the case, not only did it appear that the defendant had made no representations to the plaintiff, but in addition that the witness Fellage had conducted the negotiations for the purchase of the car directly with Dolly, on behalf of himself—Felage—and the plaintiff, and that the car was bought in the plaintiff's name, he advancing the money, and that he, Fellage, and the plain-

tiff were to divide the profits, the car being bought as a speculation. (Case p. 94, l. 43-50; p. 95, l. 12-21; 22-33; p. 96, l. 18-24, 34-48; p. 97, l. 15-21; p. 97, l. 28-33, 34-50). At Fellage's request the bill of sale was made out in plaintiff's name (Case p. 98, l. 16-20; p. 99, l. 16-24). Fellage's testimony was not denied or rebutted by plaintiff.

The only connection that defendant had in the transaction was that Dolly, with whom he was acquainted, offered to sell the car to him (Case p. 67, l. 23-42). Not needing one he spoke to Fellage, a friend of his, about it (Case p. 81, l. 44-45, p. 15-16; p. 68; l. 37-49) and thereafter Dolly drove the car out to Fellage's home where the latter and Dolly negotiated for its sale. (Case p. 69, l. 41-48).

As a result of Dolly's conversation with Fellage the latter telephoned defendant on January 17, 1920, and Dolly executed a bill of sale for the car (Case p. 70, l. 28-50; p. 71, l. 15-34) and that afternoon, at Dolly's request, he delivered the bill of sale at plaintiff's place of business and received the check to Dolly's order (Case p. 74, l. 20-26, 38-40; p. 75, l. 15-16). The following Monday, he delivered the check to Dolly who, as the check was drawn on a bank in Edgewater, asked defendant to cash it for him as he was unknown there. This, defendant did, having Dolly endorse the check then endorsing it himself and getting the cash therefor which he turned over to Dolly (Case p. 76, l. 40-50; p. 77; p. 78, l. 12-30; p. 90, l. 14-15).

There was therefore no evidence in the case upon which it could be sent to the jury, as the plaintiff had not proven or shown a single element of fraud on the part of the defendant, letting alone all of the element as set forth in Point 1, and *all* of which elements are necessary to be proven before the case could be properly left to the jury's determination.

20 Cyc., 120-124.

27 Corpus Juris 47.

The trial Court therefore committed legal error in denying defendant's motion (Case p. 109, l. 40-50; p. 110).

POINT 3.

(Ground of Appeal No. 3.)

There was no evidence in the case to sustain the jury's verdict.

If the contention of defendant is correct as outlined under Points 1 and 2 of this brief, the jury had no legal evidence before it sufficient to base its verdict thereon, and it therefore follows that its verdict must be set aside, and the judgment reversed.

POINT 4.

(Ground of Appeal No. 4.)

The Court erred in allowing the testimony of plaintiff's witness, Coo, to stay in evidence.

Elmer J. S. Coo, a witness for the plaintiff, testified:

That the signature of Charles Van Gelder, the notary public, who took Dolly's acknowledgment to the bill of sale was in fact, Van Gelder's signature (Case p. 44, l. 41-43). Plaintiff's counsel then asked the witness to compare the endorsement of Dolly on the check and to say if that was in the same writing as Van Gelder's. (Case, p. 45, l. 43-45.) This was objected to and after considerable testimony taken as to his qualifications as a handwriting expert (Case, pp. 46-51) the Court held

he was not qualified to testify except as to Van Gelder's signature (Case, p. 51, l. 50; p. 52, l. 12) and which was an admitted fact in the case (Case, Answer, p. 9, l. 33). Counsel for defendant asked that this witness' testimony be stricken out (Case, p. 45, l. 27-30) which was consented to and which the Court refused to do and to which exception was taken by defendant's counsel (Case, p. 45, l. 31-34). Later counsel again moved to strike out the witness' testimony after he had said he could not identify the writing (Case, p. 46, l. 34-50; p. 47, l. 12-14) and finally after further attempts had been made to qualify the witness, he was withdrawn by plaintiff's counsel (Case, p. 52, l. 13-14) and defendant moved again that the witness' testimony be stricken out which motion was denied and exception taken. (Case, p. 52, l. 15-18.)

It becomes apparent what the effect of this witness' testimony, although it was entirely incompetent and so was finally held, would be on a jury, composed of men and women, the women sitting for the first time in a jury box. The innuendo raised that Dolly's name on the bill of sale and on the back of the check was written in both places by Van Gelder, the notary public, indicating to the jury a possible conspiracy between Van Gelder and the defendant and that the person calling himself Dolly was only a fiction, was most harmful to the defendant.

As the testimony of the witness Coe was manifestly and entirely incompetent counsel contends that it was the duty of the trial Court, especially in a case of this character, to strike it out, on defendant's motion and not leave with the jury the impression that the witness had testified to something of importance.

POINT 5.**(Ground of Appeal No. 6)**

The Court erred in refusing to allow the witness Van Gelder to testify as to who, in his opinion, endorsed the name "A. J. Dolly" on the back of the check.

The witness, Charles Van Gelder, testified that Dolly executed the bill of sale for the car in his office and in his presence and he took the acknowledgment (Case, p. 56, l. 12-14; 38-50; p. 57, l. 20-29, 45-50; p. 60, l. 18-22; P-1, pp. 114-115).

The witness was then asked to state from having seen Dolly sign the bill of sale and comparing the endorsement of Dolly on the back of the check (P-2) if the two signatures were written by the same person. This was objected to by plaintiff's counsel and the objection was sustained and exception duly taken (Case, p. 60, l. 35-50; p. 61, l. 10-44).

It is well settled that it is sufficient to allow a witness to testify as to the genuineness of a disputed signature, if he has seen the person write but once.

17 Cyc. 157-159.

The harm done by the trial Court's refusal to allow this testimony after the innuendo raised by plaintiff's counsel discussed under Point 4 can well be seen .

Counsel respectfully contends that this ruling by the Court constitutes reversible error.

POINT 6.**(Grounds of Appeal No. 5, 7 and 8.)****The Trial Court erred in refusing to allow the defendant to testify to conversations he had with Fellage in the absence of the plaintiff.**

From the plaintiff's own testimony, he had no conversations whatsoever with the defendant except to ask him Dolly's address. (Case, p. 20, l. 38-50.) And everything he did was according to conversations he had had with Fellage (Case, p. 22, l. 34-39; p. 23, l. 23-25) and he depended entirely in this transaction upon Fellage and had no interest in the defendant at all. (Case, p. 24, l. 41-44; p. 25, l. 17-19; p. 28, l. 13-14; p. 29, l. 45-46).

The defendant was asked to give his conversations with Fellage and this was objected to, objection sustained and exception noted (Case, p. 68, l. 44-50; p. 69, l. 10-40; p. 70, l. 40-50).

Counsel urges that the conversations between Fellage and the defendant, even though had in the absence of the plaintiff, were perfectly proper and should have been allowed in evidence. Evidently, Fellage was acting on behalf of the plaintiff and himself, and therefore the conversations should not have been excluded.

POINT 7.**(Ground of Appeal No. 10.)****The Court erred in refusing to allow conversations between the defendant and Dolly.**

The charge being fraud and the relations between the defendant and Dolly becoming of first im-

portance in order to show the innocence of the defendant, it was incumbent upon the defendant to show how it was that he went from Edgewater down to the plaintiff's place of business in New York City, to deliver the bill of sale and receive the check. The defendant testified that he went to New York as the result of a conversation with Dolly. Asked to give the conversation, it was objected to, sustained and exception noted. (Case, p. 72, l. 35-42; p. 73, l. 12-15).

Although the Court ruled that this would be hearsay testimony, counsel contends that it was error to exclude it as it was perfectly proper for the defendant to show in this way how he became a messenger for Dolly in bringing down the bill of sale and obtaining the check for him from the plaintiff.

It may well be that this conversation might not be binding on the plaintiff, but it was certainly competent for the purpose of showing defendant's relation to the transaction and how he came to the plaintiff. The charge being almost criminal in its nature, the defendant should have been allowed to give this testimony and thereby exculpate himself.

POINT 8.

Because of all of the foregoing errors committed by the Trial Court the judgment should be reversed.

Respectfully submitted,

LOUIS OGUST,

Attorney and of Counsel

with the Defendant.

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and every one of these copies of
within Appellant's brief is hereby acknowledged
this 13 day of June, 1922.

Benjamin R. Buffett
Atty for Respondent

ged

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