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Notice of Appeal.

New Jersey Supreme Court.

EDWARD R. MCGLYNN, Trustee, etc.,
Plaintiff-Appellee,

—against—

10

ALFRED R. ELLIS,
Defendant-Appellant.

To William F. Delaney, Esq., Attorney of Plaintiff:

Dear Sir:

20

TAKE NOTICE that the defendant appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals, on the following grounds:

1. The said Supreme Court affirmed the action of the Trial Court in directing the jury to find a verdict in favor of the plaintiff and against the defendant with an assessment of damages.

30

2. The Supreme Court affirmed the Trial Court in overruling the following questions, to wit:

1. To the witness John Joseph Foley.

Q. And that account showed an indebtedness of the company to Ellis of Twenty-six hundred dollars, didn't it?

2. To the witness Alfred J. Ellis.

Q. For whom were you going to purchase that car?

40

Notice of Appeal.

3. To the witness Alfred J. Ellis.

Q. When you went to buy this car, did you go with the intention in your mind of buying the car for the company?

4. To the witness Alfred J. Ellis.

10

Q. What stockholders were there?

5. To the witness Alfred J. Ellis.

Q. What time was that meeting?

6. To the witness Alfred J. Ellis.

Q. Were you at the Director's meeting on the seventh day of February, 1921?

WARREN DIXON,
Attorney of Defendant-Appellant.

20

Dated, March 27th, 1923.

30

40

HUDSON COUNTY CIRCUIT COURT.

Action at Law.

10

EDWARD R. MCGLYNN, Trustee, etc.,
Plaintiff,
—against—

ALFRED R. ELLIS,
Defendant.

Notice of Appeal.

20

*To William F. Delaney, Esquire, Attorney of
Plaintiff:*

Sir:

TAKE NOTICE that the defendant appeals from the whole of the judgment entered in this cause to the Supreme Court of Judicature of the State of New Jersey.

30

Dated, September 22nd, 1922.

WARREN DIXON,
Attorney of Defendant.

40

On Appeal.

HUDSON COUNTY CIRCUIT COURT.

Action at Law.

10	<hr style="width: 50%; margin: 0 auto;"/> EDWARD R. MCGLYNN, etc.,	Plaintiff,
	—against—	
	ALFRED J. ELLIS,	Defendant.
	<hr style="width: 50%; margin: 0 auto;"/>	

*To William F. Delaney, Esquire, Attorney of
Plaintiff:*

20 *Sir:*

TAKE NOTICE that the appeal of the defendant from the whole of the judgment entered in this cause is taken on the following grounds:

1. The Bill of Sale marked "Exhibit P-1" was improperly admitted in evidence.

The following questions were overruled:

- | | |
|----|---|
| 30 | 2. To the witness John Joseph Foley.
Q. And that account showed an indebtedness of the company to Ellis of Twenty-six Hundred Dollars, didn't it? |
| | 3. To the witness Alfred J. Ellis.
Q. For whom were you going to purchase that car? |
| 40 | 4. To the witness Alfred J. Ellis.
Q. When you went to buy this car, did you go with the intention in your mind of buying the car for the company? |

Writ of Replevin.

5. To the witness Alfred J. Ellis.
Q. What stockholders were there?
6. To the witness Alfred J. Ellis.
Q. What time was that meeting?
7. To the witness Alfred J. Ellis. 10
Q. Were you at the Directors' meeting on the seventh day of February, 1921?
8. The Court directed the jury to find a verdict in favor of the plaintiff and against the defendant, with an assessment of damages.

Dated, October 3rd, 1922.

WARREN DIXON,
Attorney of Defendant-Appellant. 20

Writ of Replevin.

*The State of New Jersey, to the Sheriff of the
County of Hudson:*

(Seal)

GREETING, we command you that if A. L. Kirby Company, a New Jersey corporation, shall make you secure, you cause to be taken and delivered to 30
it a certain automobile known as Peerless Coupe, Number 264878, which said Alfred J. Ellis took and unjustly detains as is said: and that you summon the said Alfred J. Ellis to answer the annexed complaint of A. L. Kirby Company, in an action at law in the Hudson County Circuit Court. And that you notify him that unless he file his answer to said complaint with the Clerk of the Hudson County Circuit Court, at Jersey City, New Jersey, within twenty days after ser- 40

Demand.

vice upon him of this writ and the annexed complaint the plaintiff may proceed in the suit and judgment may be entered against him.

10 WITNESS, HONORABLE LUTHER CAMPBELL, a judge of our said Circuit Court, at Jersey City aforesaid this day of February, Nineteen hundred and twenty-one.

JOHN J. MCGOVERN,
Clerk.

LINTOTT, KAHR & YOUNG,
Attorneys.

Demand.

20 HUDSON COUNTY CIRCUIT COURT.

A. L. KIRBY COMPANY, A Corp. of New Jersey,
Plaintiff,

—against—

ALFRED J. ELLIS,
Defendant.

30 *To Thomas Madigan, Esquire, Sheriff of Hudson County:*

The defendant, Alfred J. Ellis, hereby makes claim of property, to wit:

One automobile, described as Peerless Coupe, No. 264,878, taken by you under Writ of Replevin, in the above entitled cause.

Dated, February 17th, 1921.

40 ALFRED J. ELLIS.

Complaint.

HUDSON COUNTY CIRCUIT COURT.

In Replevin.

A. L. KIRBY COMPANY, A Corp. of New Jersey,
 Plaintiff, 10

—against—

ALFRED J. ELLIS,
 Defendant.

Plaintiff, A. L. Kirby Company, a New Jersey Corporation, with its principal office in the City of Newark, New Jersey, says:

1. That on or about the 7th day of February, 1921, at Newark, Essex County, New Jersey, plaintiff was, and ever since, has been the owner of a certain automobile known as Peerless Coupe, number 264878. 20

2. On the aforesaid date was, and ever since has been lawfully entitled to the possession of same.

3. On the aforesaid date at Newark, New Jersey, the defendant did wrongfully take said goods and chattels in the possession of the plaintiff and have ever since wrongfully detained and still detain the same. 30

4. Plaintiff demands possession of the said goods and chattels and damages for unlawfully retaining same.

Dated, February 15th, 1921.

LINTOTT, KAHRS & YOUNG,
 Attorneys of Plaintiff. 40

Answer.**HUDSON COUNTY CIRCUIT COURT.***In Replevin.*

10

A. L. KIRBY COMPANY, A Corp. of New Jersey,
Plaintiff,

—against—

ALFRED J. ELLIS,

Defendant.

20

The defendant, residing at Jersey City, Hudson
County, New Jersey, say that:

1. He denies the truth of the matters con-
tained in the complaint.

WARREN DIXON,
Attorney for Defendant.

30

40

Order for Substitution.

HUDSON COUNTY CIRCUIT COURT.

A. L. KIRBY COMPANY,

Plaintiff,

—against—

10

ALFRED J. ELLIS,

Defendant.

On the subjoined consent, it is

ORDERED that Edward R. McGlynn as trustee in bankruptcy of A. L. Kirby Company be and he hereby is substituted as plaintiff in the above entitled action in the place and stead of the said A. L. Kirby Company, and that William F. Delaney be hereupon substituted as attorney for said trustee as the plaintiff herein, in the place and stead of Messrs. Lintott, Kahrs & Young, the present attorneys for the plaintiff, A. L. Kirby Company, such substitution to be without prejudice to any of the proceedings heretofore had in this action.

20

LUTHER A. CAMPBELL,

Judge. 30

We hereby consent to the making of the foregoing order.

LINTOTT, KAHR & YOUNG,
Attorneys for A. L. Kirby Company,
Plaintiff.

WARREN DIXON,
Attorney for Defendant. 40

Case and Exceptions.

HUDSON COUNTY CIRCUIT COURT.

EDWARD R. MCGLYNN, etc.

10

—against—

ALFRED J. ELLIS.

Tried September 21, 1922, before Cutler, J. and
a jury.

WILLIAM F. DELANEY, for the plaintiff.

WARREN DIXON, for the defendant.

20

SAMUEL E. OPLINGER, sworn.

Direct examination by Mr. McGlynn:

Q. Where do you live? A. 27 Johnson Avenue,
Newark, New Jersey.

Q. What is your business? A. Automobile
salesman.

30 Q. With whom are you associated? A. J. W.
Mason and Sons, 1005 Broad Street, Newark.

Q. Is that a corporation? A. Yes.

Q. How long have you been associated with
them? A. Four years.

Q. What car do they sell? A. Peerless.

Q. Were they selling it in 1920, in August?
A. Yes, sir.

Q. Were they what is known as manufacturer's
agents? A. Yes, sir.

40 Q. What has been your experience with Peer-

Samuel E. Oplinger—for Plaintiff—Direct.

less cars since your association with the Mason firm; what is your chief duty? A. Selling.

Q. In connection with the selling of new or used cars? A. Both new and used.

Q. Can you give us in a general way any idea how many cars you have sold during that time? A. The whole period? 10

Q. During the last four years? A. On an average of about a hundred thousand dollars worth a year.

Q. Do you recall making the sale of a Peerless Coupe No. 264878? A. I do.

Q. Do you recall about when that sale was made? A. Around August 7 or 9, 1920.

Q. Do you remember whether or not a bill of sale was delivered at the time the car was sold? A. I presume there was, because we deliver a bill of sale with every car that we do sell. 20

Mr. Dixon: Did you deliver it—the bill of sale?

The Witness: I could not swear to that.

Q. I show you what purports to be a bill of sale and ask you if you recall having seen that bill of sale before? A. I have.

Q. And where? A. At our showroom. 30

Q. Before it was delivered to the purchaser of the car?

Mr. Dixon: I object to that as calling for a conclusion of the witness, as to whom it was delivered.

The Court: Yes. I do not suppose there is any evidence so far of delivery.

Q. Did you see the bill of sale before or after 40

Samuel E. Oplinger—for Plaintiff—Direct.

the automobile left your place of business? A.
After the car was delivered.

(Paper marked P-1 for identification.)

10 Q. I show you what purports to be a bill from
J. W. Mason and ask you if you have ever seen
that bill? A. That is our customary bill.

The Court: No; that is not the ques-
tion.

(Question repeated.)

A. Yes, sir.

20 Q. Can you tell me from an examination of
that bill what automobile was covered by the
transaction set forth on it? A. A Peerless coupe
No. 264878.

(Paper marked P-2 for identification.)

30 Q. I show you what purports to be two
promissory notes, dated August 9th, 1920, to the
order of J. W. Mason and Sons, made by A. L.
Kirby Company, and ask you if you have ever
seen those promissory notes before? A. No; I
have nothing to do with that.

Q. You sell and do not collect? A. Yes, sir.

Q. Do you know who, in the Mason organiza-
tion, sold this Peerless coupe, in question? A.
I sold it.

Q. And to whom did you sell the automobile?

40 Mr. Dixon: I object to that in that
form. If he does not mean the witness to
give the legal interpretation of the word
"sale" I do not object to it. I presume

Samuel E. Oplinger—for Plaintiff—Direct.

he means the individual with whom he had the transaction.

(Question withdrawn.)

Q. Where were your negotiations leading up to the sale of this car held? A. If I remember correctly, at our showroom. 10

Q. And with whom? A. Mr. Ellis.

Q. Do you recall who delivered the car in question? A. If I remember correctly, I delivered it.

Q. Did you have any conversations with Mr. Ellis either at that time or within a short period preceding it, with reference to his connection with the A. L. Kirby Company? A. As regards his position? 20

Q. Yes. A. Well, I knew that Mr. Ellis—

The Court: No. Answer the question.

Q. Do you recall any conversation either at the time of the negotiations which led up to the sale of this car or within a very short time previous, with regard to Mr. Ellis' position with the A. L. Kirby Company? A. I do not. 30

Mr. Dixon: I object to any conversation previous.

The Court: He says he does not know anything.

Q. Did you know whether or not Mr. Ellis was connected with the A. L. Kirby Company? A. I did.

Q. And did you know in what capacity? A. Yes, sir. 40

Samuel E. Oplinger—for Plaintiff—Direct.

Q. What capacity? A. As treasurer of A. L. Kirby Company.

Q. Had you had any previous transactions with this company? A. I did.

10 Q. With reference to what? A. The purchase of an automobile.

Q. Do you recall with what officer of officers of the company you dealt at that time? A. Mr. Ellis.

Q. With reference to February 7 or 8, 1921, when did you last see the automobile prior to that time? A. This coupe in question?

Q. Yes. A. I had seen it off and on during the year.

20 Q. Can you tell me to the best of your recollection whether or not you saw this coupe in question on or about February 7, 1921? A. I did.

Q. Were you familiar with the condition of the car at that time? A. I was.

Q. Had it ever been brought to your place of business during that time? A. Frequently.

Q. Did you see it there during its visits to your place of business? A. I did, within a period of a week or ten days.

30 Q. Were you familiar with the value of Peerless coupes of that same model on or about February 7, 1921? A. I was.

Q. Will you state in your opinion what was the fair market value of Peerless coupe No. 264878 on or about February 7, 1921. A. We sold cars—

Q. No. A. I should value the car at that time at from approximately three thousand to thirty-two hundred dollars.

40 Mr. McGlynn: That is all. Take the witness.

Samuel E. Oplinger—for Plaintiff—Cross.

Cross examination by Mr. Dixon:

Q. You say the negotiations concerning the sale of this car were held with Mr. Ellis at your place of business in Newark about when? A. During the week previous to the sale of August 7 to 9. 10

Q. You mean the week previous to the delivery? A. Yes.

Q. And Mr. Ellis was the only person that you had any communication with in regard to the negotiation for sale? A. The sale of the car, yes, sir.

Q. Did you know where Mr. Ellis lived at that time? A. I believe at the Robert Treat.

Q. The Robert Treat Hotel? A. Yes, sir. 20

Q. Where did you deliver it? A. If I remember correctly, at the Robert Treat Hotel.

Q. And to whom did you deliver it? A. To Mr. Ellis.

Q. About how long after the negotiations, a week or ten days you say? A. I think it was two or three days after.

Q. You had a little dinner there with him at that time? A. Yes, sir.

Q. And you remember that occasion very well? A. Yes, sir. 30

Q. How long after that car was delivered to Ellis at the Robert Treat Hotel was it that you saw this so-called bill of sale in your show-room—a week or two after that, was it? A. After the delivery.

Q. Yes. A. I probably saw that bill of sale before the delivery because that bill of sale goes with every car as it is delivered.

Q. You said you saw it in your place after the 40

Clyde W. Mason—for Plaintiff—Direct.

delivery. A. This car was delivered before the money was paid for it.

Q. Yes; and therefore the bill of sale was in your office after the delivery, wasn't it? A. Yes, as I remember it.

10 Q. How long after the delivery was it in your office? A. I think it was probably mailed out on the following Monday.

Q. And was it mailed to the person to whom it is made out? A. To the A. L. Kirby Company.

Q. To the Kirby Company? A. Yes, sir.

CLYDE W. MASON, sworn.

20 *Direct examination by Mr. McGlynn:*

Q. Mr. Mason, are you connected with the firm of J. W. Mason & Sons, a corporation of New Jersey? A. I am.

Q. Engaged in the automobile business on Broad Street, Newark? A. Yes, sir.

Q. What is your official connection with that corporation? A. Secretary.

30 Q. Were you secretary on August 9, 1920? A. I was.

Q. Were you familiar on August 9, 1920, with the corporate seal of that corporation? A. I was.

Q. I show you what purports to be a bill of sale dated August 9, 1920, marked P-1 for identification, and ask you what seal is affixed to that bill of sale—the seal of what corporation? A. J. W. Mason and Sons, New Jersey.

40 Q. Whose signature is this as the attesting witness, C. W. Mason, Secretary? A. That is mine.

Clyde W. Mason—for Plaintiff—Direct.

(Bill of sale offered in evidence and marked Exhibit P-1.)

Mr. Dixon: I object to it as being a muniment of title at this time because there is no evidence to support it. It seems that this paper was made out in the office of the seller and mailed to a party who has at the present time no interest in or connection with the transaction, and it was mailed after the transaction was completed, and not mailed to this defendant; and I take it it is hearsay against this defendant as far as proving title is concerned. It appears the goods were delivered and the bill of sale mailed to somebody to whom the goods had not been delivered, so far as the present status goes, and after delivery. 10 20

The Court: I think it is competent to go into. Of course its effect is another matter.

Mr. Dixon: Your Honor will allow me an exception?

The Court: Yes; you may have it.

Q. I show you P-2 for identification, and ask you what that paper is. A. It is the bill for the car—Peerless coupe. 30

Q. Is that bill for the same car as the car described in bill of sale marked P-1 in evidence?
A. It is.

Q. And does the bill show how the purchase price of this car was paid?

Mr. Dixon: I object to that as calling for a conclusion. 40

Clyde W. Mason—for Plaintiff—Direct.

The Court: I suppose the bill speaks for itself.

Mr. McGlynn: I offer the bill.

Mr. Dixon: I object as immaterial, irrelevant and incompetent and hearsay.

10 The Court: I do not think it ought to be offered in evidence.

Mr. McGlynn: I will just leave it marked for identification.

Q. I show you two promissory notes and ask you whether those notes were paid to your corporation? A. They are marked "Paid."

20 Q. Do you know whether they were paid, whether the proceeds of those notes were paid to your corporation? A. Yes, sir; they were paid.

(Notes marked for identification P-3 and P-4.)

Q. Have you with you any records of your corporation other than the bill of sale which you have identified that in any way deals with the transaction involving the sale of this Peerless coupe No. 264,878? A. I have.

30 Q. What records have you? A. In my ledger there.

Q. What records are they? A. That is the daily ledger.

Q. Is this a book of original entry? A. Yes.

Q. Is this the book in which the first entry of any sale is made? A. Yes.

Q. Will you turn to the entry showing the sale of this Peerless coupe—not the sedan—the coupe?

40 (Witness indicates.)

Clyde W. Mason—for Plaintiff—Direct.

Q. Under what date is the record that you are now looking at? A. August the 9th, 1920.

Q. Is the bill which is marked P-2 for identification an exact copy of the record you are now looking at?

Mr. Dixon: I object as immaterial, irrelevant and incompetent. 10

The Court: I think he may identify it as that for a matter of convenience.

A. It is.

Mr. Dixon: I object to the record, if he offers the record.

The Court: He has not offered the record yet.

Mr. Dixon: I object to getting it in in this way. 20

The Court: I think a man may testify to a copy instead of having the jury take the book out.

Mr. Dixon: I will object to it going into evidence.

The Court: I have not admitted it in evidence.

Q. What is this book? A. This is the ledger. That is the daily cash book, and this is the ledger. 30

Q. Is this the book in which the entries from this are posted by the bookkeeper? A. Yes, sir, from there to here.

Q. So that the ledger entries are merely posted in this other book? A. Yes, sir.

By the Court: Let me see how you do that. Where is your entry in that? You enter it in which one first? 40

Clyde W. Mason—for Plaintiff—Cross.

The Witness: This one first—the sales book. These are the notes. We used a car that was turned in on part payment. It is not shown in this. This is the cash sales. Here is the ledger.

10 By the Court: In your ledger you give him credit for what you——

The Witness: Yes, sir.

The Court: Where is the “Dr” there?

The Witness: Here (indicating).

Q. One column is a charge and the other column is a credit? A. Yes, sir.

Q. So that notes receivable were credited, that canceled the transaction and left you in possession of the two notes? A. Yes.

20 Q. And the same with the second hand car? A. Yes.

Q. And the same with the interest on the two notes, which was added to the first amount? A. Yes.

Mr. McGlynn: I offer the record in evidence.

The Court: Now, Mr. Dixon, I will hear you on why they cannot offer that.

30 Mr. Dixon: I would like to ask him a few questions.

The Court: You may cross-examine him on it.

Cross examination by Mr. Dixon:

Q. Are those entries in your handwriting? A. No, sir, the bookkeeper's.

Q. Who was the bookkeeper at that time? A. 40 Miss Ellis.

Alfred L. Kirby—for Plaintiff—Direct.

Q. You did not do anything with this transaction yourself, this was a regular transaction in your office between Mr. Ellis and Mr. Oplinger, as far as you knew? A. Yes.

Q. That is all you did know about it? A. Yes.

Mr. Dixon: I object to the books as immaterial, irrelevant and incompetent and hearsay and not provable on this issue. 10

By Mr. McGlynn:

Q. The books were kept under your supervision as secretary of the company? A. No, sir.

Q. Under whose supervision? A. The book-keeper has entire charge of it. 20

The Court: The offer is refused as it stands now.

Mr. McGlynn: I do not think it is very important. I will not press it.

That is all.

ALFRED L. KIRBY, SWORN.

Direct examination by Mr. McGlynn:

Q. In August, 1920, what was your connection with the corporation known as A. L. Kirby Company? A. I was president. 30

Q. Who was the treasurer? A. Alfred J. Ellis.

Q. And was that a New Jersey corporation? A. Yes.

Q. Where was your office located? A. 828 Broad Street, Newark.

Q. On or about August 9, 1920 were you re- 40

Alfred L. Kirby—for Plaintiff—Direct.

quested by Mr. Ellis to execute two promissory notes? A. Yes.

10 Q. I show you two promissory notes, marked P-3 and P-4, for identification, and ask you if those are the notes in question? A. Yes, they are.

Q. Were those two notes paid on their due date by the corporation? A. Yes.

(Notes offered in evidence and marked Exhibits P-3 and P-4.)

20 Q. I show you Exhibit P-2 for identification, purporting to be a bill from J. W. Mason and Sons to the A. L. Kirby Company, for an automobile. Was that bill shown to you at the time you executed these notes? A. I could not swear whether it was at that very moment.

Q. Subsequently did that bill reach the office of the corporation? A. Yes.

30 Q. What, if anything, were you told by Mr. Ellis with reference to what that bill purported to be? A. He said he had gone to the Mason Company either Friday or Saturday before this Monday, August the 9th and had purchased a Peerless coupe, and I immediately asked him if it was for himself or for the company. He said it was purchased for the company.

(Bill offered in evidence and marked Exhibit P-2.)

40 Q. Now, on the bill marked P-2 there seems to be a credit on account of the purchase price of this Peerless coupe—"Allowance on used Peerless touring car, \$1,400." A. Yes.

Alfred L. Kirby—for Plaintiff—Direct.

Q. Did the corporation on August 9, 1920 own the Peerless touring car in question? A. No, sir, I did.

Q. What arrangements, if any, did the corporation make either at that time or subsequent with reference to the allowance which had been given to them the corporation, by the Mason Company for \$1,400? A. What arrangement had been made with the Mason Company? 10

Q. No, what arrangement, if any, did the corporation, the A. L. Kirby Company, make with you with reference to the \$1,400 which they had been allowed by the Mason Company on this touring car? A. I insisted that I get a check immediately.

Q. Well, did you get it? A. Yes. 20

Q. I show you Exhibit P-1 and ask you if that bill of sale was in the records of the corporation? A. It was.

Q. In whose name was the automobile, this Peerless coupe, licensed from August 9, 1920? A. A. L. Kirby.

Mr. Dixon: I object as hearsay.

The Court: Yes, I presume the license will speak for itself. 30

Q. Did Mr. Ellis ever tell you in whose name he had licensed the car in question? A. I am the one who licensed it in the name of the company.

Q. Who paid the license fee? A. The company.

Q. In whose name was the car insured? A. A. L. Kirby Company.

Q. I show you what purports to be an insurance policy covering Peerless coupe No. 264878, date August 10, 1920, expiring August 10, 1921, 40

Alfred L. Kirby—for Plaintiff—Direct.

and ask you if that is the insurance policy in question—fire and theft? A. It is.

10 Q. I show you what purports to be another insurance policy insuring A. L. Kirby Company against public liability for accident, covering Peerless coupe No. 264878, and ask you who paid the insurance premium on that policy. A. A. L. Kirby Company.

(Two policies offered in evidence and marked P-5 and P-6.)

20 Q. On January 1, 1921, when the 1921 licenses on automobiles were issued, what arrangement, if any, did Mr. Ellis make with you with regard to licensing this Peerless coupe for the year 1921? A. He did not make any arrangement with me. I simply ordered the two sets of licenses for the company.

Q. Did the company own another car at that time? A. Owned a Peerless sedan.

Q. Licenses for both the Peerless sedan and this coupe for 1921 were issued in whose name? A. A. L. Kirby Company. And that is the time that I referred to that I licensed it.

30

(Recess to 2 P. M.)

Q. I show you what purports to be a demand under date of February 7, 1921, or at least a copy of a demand. Will you look at that and tell me whether you served the original of which that is a true copy on anyone? A. Yes, I served the original on Mr. Ellis.

40 Q. Where was it served? A. In our office at 828 Broad Street.

Alfred L. Kirby—for Plaintiff—Direct.

Q. And was the automobile described in the demand returned to the corporation? A. No.

Mr. McGlynn: I offer the demand in evidence.

(Paper marked Exhibit P-7.)

10

Q. Now, Mr. Kirby, after the conversation which you have testified about which occurred, as I understand it, on Monday morning, August 9th, 1920, did you have any conversation with Mr. Ellis concerning any entries in the books of the corporation with respect to the purchase of this automobile, this Peerless coupe? A. Yes; I asked him how the account was going to be handled and he said in the usual manner, as an asset of the company.

20

Q. Do you know whether or not—or did the corporation at that time have any accounts outside of their regular bookkeeper audit their books? A. We had certified accountants—Puder & Puder of Newark.

Q. Did these accountants at any time subsequent to the purchase of this Peerless coupe make up a statement of the affairs of the company from its books of record? A. Yes, sir.

30

Q. Do you know whether or not a copy of that report was given to Mr. Ellis? A. Yes.

Q. Do you know what that report had in it with respect to the automobile in question?

Mr. Dixon: I object as incompetent.

Mr. McGlynn: I will ask you to produce the report which you had at the last trial.

40

Alfred L. Kirby—for Plaintiff—Cross.

Mr. Dixon: I have not had any notice to produce it.

Q. Were you present at the last trial of this case? A. Yes.

10 Q. Do you know whether or not a financial report filed by Puder & Puder, certified accountants, was produced by Mr. Ellis.

Mr. Dixon: I object as immaterial.

Mr. McGlynn: I will not press it.

Q. Was anyone else present on August 9, 1920 when Mr. Ellis requested you to sign these notes as president of the corporation? A. Yes; Mr. Foley, the bookkeeper.

20

Mr. McGlynn: That is all.

Cross examination by Mr. Dixon:

Q. Mr. Kirby, at the time of the transaction in question you were president of the company, were you? A. Yes.

Q. How long had you been president of the Kirby Company? A. Since the previous April.

30

The Court: Do you mean April of the same year?

The Witness: Yes.

Q. 1920? A. Yes.

Q. How long had your company been in business—been incorporated? A. About April 6 or 9, 1920.

40 Q. So that you had been president from its incorporation? A. Yes, sir.

Alfred L. Kirby—for Plaintiff—Cross.

Q. And the stockholders were you and Mr. Ellis and one other? A. Yes.

Q. What was the other man's name? A. Thomas F. Bryce.

Q. You owned fifty per cent. of the stock with the exception of one share, did you not? 10

(Objected to as immaterial and irrelevant.)

The Court: I will permit the examination now to a certain extent.

(Question repeated.)

A. Yes.

Q. And Ellis owned the other fifty per cent.?

A. Yes. 20

Q. Now up to the meeting of February 7th had there been any change in the officers?

(Objected to as not cross examination. Objection overruled. Plaintiff's counsel notes an objection to the ruling.)

A. No.

Q. When was the change made?

(Objected to. Objection sustained.) 30

Q. Before or after? A. Before what—before the 7th?

Q. Yes. A. It was made on the 7th; that was the annual meeting.

Q. That is what I asked you, whether on that date there was a change of officers. That is the fact? A. Yes.

Q. When was the change made? 40

Alfred L. Kirby—for Plaintiff—Cross.

(Objected to as immaterial and not cross examination. Objection overruled. Plaintiff's counsel notes an objection to the ruling.)

10 A. That change was that——

Q. No, when was——

The Court: Let him answer the question.

A. The change was that I became president and secretary, and Mr. Bryce became treasurer and vice-president, whereas Mr. Ellis had been treasurer and secretary when we incorporated, or

20

Q. And had been up to that time? (No answer.)

Q. On that date you had two stockholders meetings, did you not? A. Yes.

Mr. McGlynn: I object.

The Court: I do not think that makes any difference.

30 Q. When was this change effected, at the stockholder's meeting or at the director's meeting? A. At the director's meeting.

Q. How long after you effected that change of officers did you serve Mr. Ellis with this notice? A. The next day.

Q. You served it on the 7th, didn't you? A. No, sir.

Q. It is dated the 7th. A. The demand is made on the 7th, but I served it on the 8th.

40

Q. You did not actually serve it on him on the

Alfred L. Kirby—for Plaintiff—Cross.

7th? A. No, I mailed him one copy on the 7th to his address, and the next day he came into the office and I served a separate demand on him.

Q. Oh, I see. Now, the demand you mailed to him on the 7th was mailed at what time of day?

A. Really I could not say. In the evening at the close of the office. 10

Q. That was then after the meeting of change of officers? A. Yes.

Q. And for fear he might not get it when he came in you served him with another copy? A. Yes, sir.

Q. When did you actually have this typewritten? A. I said on the 7th.

Q. When on the 7th? A. In the evening, or possibly—no, I will say about, well, about noon time. 20

Q. Where did you have that drawn? A. In our office, 828 Broad Street.

Q. Who drew it? A. I dictated it and Mr. Foley typed it.

Q. Was that before or after the director's meeting? A. After the director's meeting.

Q. What time was the director's meeting? A. I think about eleven o'clock.

Q. What time was the director's meeting finished? A. Around half past eleven. 30

Q. Had Ellis gone then when you drafted this? A. Yes.

Q. He had left? A. Yes.

Q. The company did own an automobile, didn't it? A. Yes, it owned this coupe.

Q. Not this one, but another. A. Yes, it did.

Q. What kind of a car was that?

(Objected to as immaterial. Objection 40 sustained.)

Alfred L. Kirby—for Plaintiff—Cross.

Q. Well, the company never owned, so far as you are concerned, the automobile that you referred to in your direct testimony, which you said you had delivered to the Mason Company, did it? A. If you are referring to the seven
10 passenger Peerless touring car, that was my personal property. The company did not own it.

Q. How long had you owned that car? A. About two years.

Q. And before the company was formed? A. Yes.

Q. And you had placed that with Mason for sale? A. Yes.

Q. When did you place it with them for sale? A. Some time in the month of July.

20 Q. And had it remained at Mason's place from the time in July until after this transaction took place in August? A. Yes.

Q. That never belonged to the company and never was in the possession of the company, was it? A. No, sir.

Q. And never has been since in the possession of the company? A. No, sir.

Q. Your company? A. No, sir.

30 Q. And you drew from the company's treasury \$1400, did you, for that car? A. Yes.

Mr. Dixon: Have you the check for that?

Mr. McGlynn: I do not believe I have, I have not heard of any notice to produce.

Q. Do you know when that check was paid? A. When it was made out?

Q. When you got the money out of the treasury?

40 Mr. McGlynn: I object. The records of the plaintiff company speak for themselves.

Alfred L. Kirby—for Plaintiff—Cross.

I think they are the best evidence of the time of payment.

The Court: No, I think he may testify when he got money.

A. The date of the check is August 9, 1920.

10

The Court: The question asked you was not when the check was dated, but when you got the money on the check.

A. I presume I deposited it immediately.

Q. You spoke of a conversation between you and Ellis in which you asked Ellis whether in the purchase of this car he had acted for the company or had purchased it for his own use, or for himself, I understood you to say. Is that correct?

20

A. Quite correct.

Q. When did that conversation take place? A. On Monday morning as soon as I arrived in the office.

Q. On what date? A. August 9th.

Q. Did you have also a conversation with him as to how the books were to be kept with respect to this transaction? A. Not particularly as to just how the books were to be kept, but what was to be done with the account.

30

Q. When was that conversation? A. The same time, that is the same conversation.

Q. You have been acting with the trustee in this case, have you not, ever since its inception?

A. In just what respect?

Q. In every respect, to enforce the return of this car to the trustee? A. Certainly, as president of the company in bankruptcy I think it is entirely proper.

40

Alfred L. Kirby—for Plaintiff—Cross.

Q. You have been giving him every assistance you knew how, haven't you? A. Every assistance and time.

Q. And you were witness at the last trial, were you not? A. Yes.

10 Q. Have you seen your testimony since the last trial? A. Not all of it.

Q. Not all of it? A. No.

Q. You knew the record had been made up, did you not? A. Yes, sir.

Q. Haven't you read your testimony since that trial? A. No, I started to read it this morning and Mr. McGlynn took it away from me.

Q. Why? Did he say? A. Because he wished it, I presume.

20 Q. You knew you testified in great detail and quite voluminously at the last trial, did you not? A. I believe so.

Q. You were cross examined at some length, were you not? A. Yes, sir.

Q. And Mr. McGlynn went pretty thoroughly into your testimony, did he not?

(Objected to as not cross examination.
Question withdrawn.)

30 Q. Why didn't you at that trial relate these two very important facts that you now for the first time relate, with respect to this conversation with Mr. Ellis regarding the purchase of this car and with respect to the entries in the books regarding the car? A. Probably it was objected to or something like that?

Q. Not "probably," but why didn't you do it? A. Well, I cannot remember why I did not tell you everything that happened in all this month
40 of August.

Alfred L. Kirby—for Plaintiff—Cross.

Q. Don't you appreciate the great importance of that part of your testimony if you are believed by this jury; don't you appreciate how important was that statement that Ellis told you on the 9th that he had bought the car for the company? A. Do I appreciate it now, or did I appreciate it then? 10

Q. Yes, do you appreciate it? A. I appreciate the full importance of this entire proceeding.

Q. Do you appreciate the importance of your testimony as bearing on the issue of ownership of this car, as to what Ellis said to you about the entries in the books? A. Well, to my mind that is trifling compared with the rest of it.

Q. Why didn't you tell about that at the last trial? A. Why didn't you ask me? 20

Q. I did not ask you at all. I did not ask you this time, did I? A. I could not certainly answer it if you did not ask me.

Q. Why didn't you tell about it at the last trial? A. Well, there are certain modes of procedure I suppose in Court when a man has to keep quiet or talk. Maybe that was one of the times.

Q. Is that your reason? A. Yes.

Q. Hadn't you consulted with Mr. Delaney, counsel, and the trustee in bankruptcy in regard to your testimony before you went on the stand the last time? A. Did I discuss it prior to the last trial? 30

Q. Yes? A. Certainly we went over the case most fully.

Q. And you told him all you knew about it, didn't you? A. Yes.

Q. And everything you thought was of the slightest importance you told him about, didn't you? A. Yes. 40

Alfred L. Kirby—for Plaintiff—Cross.

Q. Did you tell him about that? A. I guess I did.

Q. You guess you did? A. Well, I am sure I did.

Q. You are sure you did? A. Yes.

10 Q. And he did not ask you about it? A. I do not know whether he did or not, he may have.

Q. And if he did he did not want you to tell about it, then?

(Objected to. Question withdrawn.)

Mr. Dixon: Now, I wanted to ask about this other car that did belong to the company, if your Honor please.

20 The Court: I do not see how that could throw any light on the subject at all—a car that could not figure in this case. Of course the car that was sold and the proceeds of which went to the plaintiff is competent, I am allowing that; but some other car, it cannot make any more difference than if they sold a barrel of sugar or a barrel of flour.

30 Mr. Dixon: Ordinarily it would not make any difference, but in a corporation where there are only two people, this is like a partnership, where there are only two people in control, where all the profits of the company go to those two individuals, they are the controllers, they act together as a board of directors, they dispose of the assets, they manage the company, it seems to me it is material in the light of the evidence in this case.

40 The Court: I do not think so. If the directors have improperly arranged it, im-

Alfred L. Kirby—for Plaintiff—Cross.

properly disposed of the assets, I suppose the trustee in bankruptcy would be after them to return the funds.

Mr. Dixon: That depends on how it is done and why it is done.

The Court: Yes. I do not think it is competent. 10

Q. On August 8, do you know what day of the week that was? A. Sunday.

Q. And weren't you down at your summer home at that time—

Mr. McGlynn: I object as immaterial and not proper cross examination.

Mr. Dixon: Wait until I ask the question. 20

Q. Weren't you down at your summer home at Asbury Park? A. No, in Belmar.

Mr. McGlynn: Just a minute. I object.

Q. In Belmar? A. Yes.

The Court: That, standing alone, would have no bearing on this case. I do not know what counsel intends to follow it up with. I have to rely on counsel not asking questions that are immaterial? 30

Q. Did you go down on the 7th or on the 6th?

Mr. McGlynn: I object as immaterial.

The Court: I will allow the question.

(Objection noted.)

Q. Do you remember when you went down there? A. Yes. 40

Alfred L. Kirby—for Plaintiff—Re-direct.

Q. When did you go down there? A. Friday evening.

Q. How long did you stay down there? A. I came up the following Monday, about half past nine I got in the office.

10 Q. Do you remember when you went back again? A. That evening, I presume.

Q. Did you do that every Saturday during that August? A. I think I was commuting that year.

Q. You commuted, went up and down every day? A. Yes.

Re-direct examination by Mr. McGlynn:

20 Q. Mr. Kirby, the issuance to you of this check of \$1400 in payment of your car which Mr. Ellis had used as part-payment in the purchase of this coupe—was the issuance of that check and were those signatures by the officers of the corporation the subject matter of a conversation between you and Mr. Ellis when the check was drawn? A. Yes, sir.

30 Mr. Dixon: I object to the form of the question. It supposes all the facts it contains to have been proved.

The Court: The question ended up in such a way that I do not think it is objectionable.

Q. Mr. Ellis' signature was on the check? A. Yes.

Q. As treasurer? A. Yes.

Mr. McGlynn: That is all.

40 Mr. McGlynn: I would like to offer at

John J. Foley—for Plaintiff—Direct.

this time certified copy of the order appointing trustee in bankruptcy in the matter of A. L. Kirby Company, and a certified copy of the order approving the trustee's bond, to show the trustee had qualified.

The date of the appointment was June 3, 1921. The Bond was filed June 7, 1921. (Papers marked P-8 and P-9.) 10

JOHN JOSEPH FOLEY, SWORN.

Direct examination by Mr. McGlynn:

Q. You were the bookkeeper for the A. L. Kirby Company? A. Yes, sir.

Q. In the year 1920 and the early part of 1921? A. Yes. 20

Q. Do you recall who drew these two promissory notes which were given to the Mason Company, P-3 and P-4 in evidence, who did the type-writing part of them? A. I did.

Q. At whose direction? A. At Mr. A. J. Ellis' direction.

Q. Did you ever hear Mr. Kirby and Mr. Ellis talk about this Peerless coupe? A. Yes. 30

Q. When was the first time you heard them talk about it? A. On the morning Mr. Ellis came in and said he had purchased a new car. That was a Monday morning in August, about the 7th or 9th, I think the 9th, to be exact.

Q. Was that the same date you drew those notes? A. Yes.

Q. Were they drawn before or after Mr. Kirby came in? A. Before he came in.

Q. Was the office of the Kirby Company in one 40

John J. Foley—for Plaintiff—Direct.

room or more than one room? A. There were two rooms.

Q. Connecting? A. Right next to each other; there were no connecting rooms.

10 Q. Do you recall whether or not at that time this bill from J. W. Mason, marked P-2, was in the office? A. As I recall, I think it was.

Q. You think it was? A. Yes.

Q. What did you hear Mr. Ellis say to Mr. Kirby? A. When he came in he had me draw these notes and he put them over at his side of the desk, Mr. Kirby's side of the desk.

20 Q. This is Ellis you are talking about? A. Yes. Mr. Ellis threw them on Mr. Kirby's desk, and as soon as Mr. Kirby came in he asked what it was about, and Mr. Kirby said he did not know they owed Mason Company any money, and he informed him then that he had purchased a new Peerless coupe car that morning, and they went ahead and signed the notes, and I think I took them down—I am positive of that I took them down to Mason's, I am sure about it.

Q. Did you keep the books of account of the corporation at that time? A. Yes.

30 Q. Was any ledger entry ever made with reference to the purchase of this Peerless coupe? A. Yes.

Q. At whose direction did you make these entries? A. Mr. Ellis's.

Q. How did he tell you to make them? A. Enter them as automobile account.

Q. What is that? A. Open them up as automobile account.

Q. Have you the book in which you made that entry? A. Yes.

John J. Folcy—for Plaintiff—Direct.

Q. What page was it in? A. Page 31. There it is, the second two items.

Q. What is the first entry on this account? A. It is called "Automobiles," on page 31. On top is for a sedan automobile.

Q. What date was that purchased? A. May 31st. 10

Q. What is the next entry? A. For the coupe, made up of \$1400 the old car swapped in, a touring car, and \$2900 balance—\$4155 balance.

Q. These two entries represent the total purchase price of this coupe car? A. Yes.

Q. Looking down a little further on that page, who closed the books on December 31, 1920? A. I did.

Q. In what way was the automobile account closed at that time? A. Closed as capital asset, total amount \$8819. 20

Q. This entry (indicating) when was that made, do you remember, was it entered before February 7, 1921? A. Yes, made before.

Mr. McGlynn: I offer the book in evidence, or so much of it as has been used.

(Marked P-9.)

The Court: Was that car of May 31 the one that was traded in for \$1400. 30

The Witness: No, sir.

Q. This book that this entry is in, was that in the office of the company all the time? A. All the time.

Q. Do you know whether Mr. Ellis ever looked at them? A. Occasionally.

Q. Do you know to whom the records of the 40

John J. Foley—for Plaintiff—Cross.

company charged the license fees, insurance and upkeep of this Peerless coupe from August 9, 1920 on? A. To an account called "Automobile Expense Account."

10 Q. Was it a corporation account or an individual account? A. A corporation account, certainly.

Cross examination by Mr. Dixon:

Q. How long had you been bookkeeper for this company? A. I should say about a year and a quarter or probably a year and a half.

Q. You had an account with Ellis in the books, didn't you? A. Yes.

20 Q. And that account showed an indebtedness of the compny to Ellis of \$2600, didn't it?

Mr. McGlynn: I object to any cross-examination of this witness on the part of the defendant as to any entries in this book which show an account with Ellis as immaterial and incompetent.

The Court: Yes, it is not cross examination. You will have to make him your own witness if you want to go into that.

30 Mr. McGlynn: I have all the books here if they want to go into them.

Mr. Dixon: Haven't I a right to test his capacity as a bookkeeper and the correctness of his account?

The Court: I do not think you can do it by going into another account.

Mr. Dixon: To show that if he makes mistakes in one matter he might in another?

40 The Court: I do not think so.

(Objection noted by Mr. Dixon.)

John J. Foley—for Plaintiff—Cross.

Q. You testified in this case before, didn't you?
A. Yes.

Q. Quite elaborately, as to all you knew? A.
To the best of my knowledge and belief.

Q. To the best of your knowledge and belief.
You told about the conversation you had with
Kirby and Ellis? A. Yes. 10

Q. You failed to tell about any conversation in
which Ellis said he had bought this car, didn't
you? A. I was not asked about that this time.

Q. You did not think it was necessary to say
it? A. No.

Q. You have told it this time for the first time?
A. I do not quite understand you.

Q. You have told us about that matter of his
conversation for the first time today, haven't you?
A. Probably so. 20

Q. Don't you know it is so? A. Not to my
knowledge and belief. I have not seen the testi-
mony of the last case. I have not looked at it.

Q. Don't you know you did not testify to it
the last time? A. I cannot recall, sir.

Q. Didn't you testify as to what did happen,
at the last trial, when Ellis and Kirby drew the
check? A. Yes, I was asked for that.

Q. Did you hear Kirby say to Ellis "You and I
are now at the parting of the ways"? A. Yes. 30

Q. "We are not going to do any more busi-
ness"? A. Yes.

Q. "Come right down to the facts," and that is
all you heard, wasn't it? A. I heard a lot of
other stuff that I could not recall probably.

Q. And you cannot remember now? A. A lot
of things, if you ask me a direct question I can
answer you. 40

John J. Foley—for Plaintiff—Cross.

Q. Well, at this time the notes had been made out, hadn't they? A. At what time?

Q. When you heard this conversation? A. What conversation?

10 Q. When Kirby said to you "You and I are at the parting of the ways," etc.? A. Yes.

Q. When was that conversation? A. That was after Mr. Kirby came in on the morning of the 9th of August, 1920.

Q. How do you remember it was the 9th of August, 1920? A. To my best knowledge and belief.

20 Q. How do you remember and fix it as of the 20th of August, 1920? A. I didn't say the 20th of August, I said the 9th of August, 1920. It was a Monday morning, and I recall it.

Q. That was not the only August Monday morning, was it? A. No.

Q. How do you know it was not the 10th? A. I know the 9th was Monday.

Q. How do you know? A. By looking at the calendar.

Q. How about the 16th, wasn't that on a Monday? A. Surely.

30 Q. How do you remember it was the 9th; what fixes that in your mind? A. Nothing out of the ordinary; only that they purchased the automobile; I saw the bill—and numerous other things.

Q. You had the bills there for quite a while? A. Numerous bills.

Q. How do you fix it as the 9th? A. I recall making the entry in the book, and I recall the 9th.

Q. Did you make the entry on the 9th? A. I cannot just recall. I made numerous entries on the 9th.

40 Q. I want to find out if you can tell us some

John J. Foley—for Plaintiff—Cross.

way by which you fix this as having been on the 9th rather than on the 16th. A. I know it was in August, the second week in August.

Q. I know you know it is, but you do not satisfy me as to how you know it is. A. That bill of Mason and Company states it is the 9th. 10

Q. Did you get that on the 9th? A. I think so.

Q. Was it mailed on the 9th? A. I think it was delivered in person on the 9th.

Q. Don't you know? A. To the best of my knowledge and belief, yes.

Q. Who delivered it? A. All I know, Mr. Ellis had it in the office when I came in.

Q. He had a bill in his hand some time you know? A. Yes, sir.

Q. Do you mean to testify Mr. Ellis delivered this bill on the 9th of August? A. I imagine he did. 20

Q. You imagine it? A. To the best of my knowledge and belief, yes.

Q. What else did Ellis have on the 9th of August? A. What do you mean? He had lots of things.

Q. With regard to this transaction? A. If you will state your question more thoroughly I will try to answer it. 30

Q. You do not understand that question? A. No, I do not know what you are driving at.

Q. You are afraid you do not understand it, aren't you?

Mr. McGlynn: I object to the question; it is unintelligible.

Q. Don't you understand it? A. What are you driving at? 40

John J. Foley—for Plaintiff—Rè-direct.

Q. You said he had a bill, what else did he have with respect to this transaction at that time? A. I had made out notes at his instruction and put them on Mr. Kirby's desk.

10 Q. I ask you what else he had in his hands. A. That is pretty hard to think. If you will ask me just what he had in his hand I can tell you if he had or did not have it. That is a year and a half or two years ago.

Q. Your recollection is not as clear now as when you testified at the former trial, is it? A. Certainly not.

20 Q. Do you remember being asked this question by Mr. McGlynn: "After that"—he is referring to the conversation in which Mr. Kirby said that they had come to the parting of the ways, as you testified—"After that did you hear any other conversation between them in reference to this coupe car"—to which you replied: "Only that I used to see bills come in from J. W. Mason and Company, and which I think are in evidence here today." Do you remember giving that testimony? A. I do recall it.

30 Q. So that when he asked you if you had heard anything else on that day you failed to remember that Ellis had talked about this car with Kirby and failed to give the testimony you have given today, didn't you? (No answer.)

Q. I think that is all.

Re-direct examination by Mr. Glynn:

40 Q. Do you also remember being asked at that time, at the time of the first trial: "Q. Was any ledger entry ever made with reference to the purchase of these automobiles? A. Yes.

Thomas Bryce—for Plaintiff—Direct.

Q. Where is that shown in here? A. Automobile account, as an asset—page 31.” A. Yes.

“Q. Are these books in the office all the time? A. Yes.

Q. Did Mr. Ellis ever look at them? A. Yes, quite frequently.” A. Yes

10

“Q. Now, did you enter up the automobiles at the actual cost? A. Actual cost, yes.” A. Yes.

“Q. And the figure of \$8819 is that combined price of the sedan and the coupe? A. Correct.” A. Yes.

THOMAS F. BRYCE, SWORN.

Direct examination by Mr. McGlynn:

20

Q. What is your business? A. Insurance broker.

Q. Were you engaged as such in August, 1920? A. Yes, sir.

Q. Are you the broker who issued the two policies, P-5 and P-6 in evidence covering a Peerless coupe? A. Yes, I wrote one and was broker on the other.

Q. What is your recollection with reference to who ordered the insurance on this car? A. My recollection of it is that Mr. Ellis telephoned me on Saturday morning, I should think it was ten o'clock and said that he had purchased a Peerless car and that Mr. Oplinger, who had sold him the car, asked him about letting him handle the insurance, and he told him no, that he insisted on my handling it, and he wanted me to do the insurance, and I asked him where the car was, and he said it was outside and if I looked out of the window I could see it. I of course asked him

30

40

Thomas Bryce—for Plaintiff—Cross.

how the car was to be insured, in whose name, and the uses of the car and all that, which he told me, and I wrote his policies.

Q. Who paid the premium? A. The A. L. Kirby Company paid it.

10

Cross examination by Mr. Dixon:

Q. You say you saw the car? A. My recollection is Mr. Ellis told me if I looked out of the window I could see the car, that it was delivered I think on Saturday morning but was not paid for until Monday morning. I remember only that it was a Saturday morning.

Q. Do you remember the month? A. I can verify the date from the policies of course.

20

Q. Can you verify it? A. Yes.

Q. Will you do so? A. (After referring to policies) The policies were written and dated August 10. They were written on Tuesday morning and bound from Saturday. I had the original memorandum in my hand before I came over here.

The Court: When you bind that way does your policy run from the 9th?

30

The Witness: It does ordinarily, but we wanted this to run from the 10th for statement reasons—on account of the accounts.

Q. Did you attend at the last trial? A. I was here the last time I should say as long as I have been here today.

Q. Are you related to Mr. Kirby? A. A cousin.

Q. You were in the insurance business at that time? A. I have been in the insurance business for a number of years.

40

Thomas Bryce—for Plaintiff—Re-direct.

Q. You were a stockholder of the company? A. I owned one share on the books of the company.

Q. You never participated in the management of the company? A. Absolutely not, except at the meetings of the corporation.

Q. You attended one stockholders' meeting and one directors' meeting a year, did you not? A. I think so, if there was one a year or two. 10

Q. Were you in Court when Mr. Kirby testified at the last trial? A. I cannot say to that.

Q. You do not recall his testimony? A. Absolutely not.

Q. Were you in Court when he testified at this trial? A. Yes, I was, that is I dare say that is all the testimony he gave. I came at two o'clock.

The Court: He was on the stand before lunch. 20

The Witness: I did not hear him.

Q. Did you hear him testify that he was the one who gave you the insurance on this car? A. No, sir, I did not.

Re-direct examination by Mr. McGlynn:

Q. You said something about you looked out of the window, what do you mean by that? A. That was what recalled it to me. I think Mr. Ellis told me the actual delivery of the car had been made and it was then on Broad Street. My office was say three hundred feet from the Kirby company's office. 30

Q. Yours is 810 and his 828? A. Yes, just the church in between. It is my recollection Mr. Ellis told me the delivery of the car had been 40

Alfred J. Ellis—Defendant—Direct.

made and it was on Broad Street then and if I looked out of the window I could see it. That is my recollection.

(Plaintiff rests.)

10

ALFRED J. ELLIS, SWORN.

Direct examination by Mr. Dixon:

Q. You are the defendant in this case? A. Yes, sir.

Q. And live where? A. 115 15th Street, West New York.

20 Q. How long have you been a resident here? A. Twenty-five years.

Q. What is your business? A. Deal in machinery.

Q. How long have you been in that kind of business? A. This last three years.

Q. You were a stockholder in the Kirby company? A. Yes, sir.

Q. Do you recall about when that was organized? A. Some time early in 1920.

30 Q. How much did you own of the stock? A. Fifty per cent.

Q. Who were the owners of the other fifty per cent? A. Mr. Kirby and Mr. Bryce.

Q. Bryce had what? A. One share.

Q. Were you such owners of the stock up to February 7th, 1921? A. Yes, sir.

Q. In that proportion? A. Yes.

40 Q. Prior to the formation of the Kirby Company, did you know Mr. Kirby? A. Yes, sir.

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Q. Had you been in business with him? A. Yes, I was in business with him.

Q. What kind of business? A. Same business.

Q. What was that business? A. Machinery business. We dealt in machinery, buying and selling machinery.

10

Q. What kind of machinery? A. Principally sheet metal working machinery.

Q. When the company was organized and up to February 7, 1921, who were the officers of the company? A. Mr. Kirby and myself.

Q. Well, any other? A. That is all.

Q. What was your office? A. I was the treasurer.

Q. And what was Kirby? A. Manager.

Q. And who was president? A. We did not have any president, it was a co-partnership agreement up to that time.

20

Q. No, I say after the incorporation? A. Mr. Kirby was president, and then I was treasurer.

Q. Up to February 7th, 1921? A. Yes.

Q. Who were the board of directors? A. Mr. Kirby, Mr. Bryce and myself.

Q. And those were all of the stockholders? A. Yes, sir.

Q. Did Mr. Bryce ever attend any meeting of the board of directors? A. No, there were just two meetings I recall Mr. Bryce, the organization meeting and the meeting called February 7, 1921.

30

Q. Did you purchase a car—

Mr. McGlynn: I object as calling for a conclusion.

The Court: Yes, he can tell what he did.

Q. Did you go to the Mason Company in August, 1920 to have a transaction with respect to the

40

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purchase and sale of the car in question in this suit? A. Yes, sir, I did.

10 Q. Do you remember just what date it was you went there? A. I do not recall the exact date now, it was the first week in August, the latter part of the first week in August—Friday or Saturday.

Q. Was it before the 7th, or on the 7th, or the 6th? A. I believe it was the 6th—Friday or Saturday.

Q. Whom did you see? A. Mr. Oplinger. I saw several of the other salesmen there, but—

Q. Did you make any inquiry about the purchase of a car? A. Yes, I looked over several cars they had there and selected a coupe.

20 Q. For whom were you going to purchase that car?

Mr. McGlynn: I object as calling for a conclusion. What was done is the thing that we must have.

The Court: Yes, tell us what took place.

Mr. Dixon: I submit he has a right to tell us whether he went there to purchase a car for himself or for somebody else.

The Court: I overrule the question.

30 (Objection noted by Mr. Dixon.)

Q. What did you do and what did you say?

A. I purchased a Peerless coupe.

Q. Whom did you see? A. Mr. Oplinger.

Mr. McGlynn: The witness, disregarding your Honor's ruling, starts to answer the question—"I purchased a car," giving an absolute conclusion.

40

The Court: Yes. Tell us what you did there.

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A. I looked over the cars the Mason Company had on the floor there and selected one, a Peerless coupe.

Q. What did you tell them? A. I told them to get it ready and I will take it out.

Q. Did you have any discussion about the price and who was buying it or anything of that sort? 10

A. No, I asked them the price, naturally.

Q. Tell us all that was said there? A. I arranged on the price and told them to get it ready and I would take it out.

Q. Did you tell them where to deliver it and to whom and when? A. I asked him when I could get delivery and he told me he would deliver it when he could get it ready. He had to polish it and tune it up. 20

Q. What arrangement did you make about price and how it was to be paid for? A. I knew Kirby had a car in the Mason warerooms for sale and I knew the price that was agreed on and I asked him if he would take that in exchange and allow \$1,400, and they assured me they would after Mr. Oplinger took it up with Mr. Mason, and I agreed to give them notes, if I recall correctly I gave them a check in addition to two notes for the balance. 30

Q. When was the car delivered to you? A. That Saturday, that would be the 8th, or the 7th, August the 7th.

Q. Where was it delivered? A. Robert Treat Hotel.

Q. Where did you live then? A. Robert Treat Hotel.

Q. What did you do with the car when you got it? A. I had Mr. Oplinger drive me to some restaurant for dinner. 40

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Q. What? A. I had Mr. Oplinger drive me to some restaurant for dinner; out in Orange, I believe it was.

Q. Where did you keep the car? A. At the Robert Treat garage.

10 Q. Had you had cars before of your own? A. Yes.

Q. Had you kept them anywhere? A. I kept them at various places, wherever I lived.

Q. When you went to purchase this car, and prior to going down to buy it, had you any talk with Kirby or any other officer or director of the company respecting the purchase of a car for the company? A. No, sir.

20 Q. What kind of a car was this? A. A closed car, a coupe.

Q. What is the use to which it is devoted?

Mr. McGlynn: I object.

A. A pleasure car.

Mr. McGlynn: That is absolutely a conclusion and should be stricken from the record.

(Objection overruled.)

30

Q. It is a pleasure car, that is for private use, you cannot carry machinery in it? A. No, sir, private use.

Q. Did you have anybody in the employ of the company for whom that car was or could be purchased? A. No, sir.

Q. Did anybody know you intended to purchase this car before you purchased it? A. No, sir.

40 Q. Did you have any authority from the company to purchase any car for the company? A. No, sir.

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Mr. McGlynn: I object as immaterial. The purchase of this car was ratified by the president of this corporation and by the corporation after the event, and it is immaterial whether he had any authority.

The Court: I do not think it makes any difference what his intention was. The question is what was done. 10

Q. When you went to buy this car did you go with the intention in your mind of buying the car for the company?

Mr. McGlynn: I object to what intention he had in his mind when he went to buy the car. We are not concerned with his mental operations; we want facts. 20

The Court: I will sustain the objection. (Objection noted by Mr. Dixon.)

Q. Did you at the time you bought the car buy it with any purpose of delivering it to the company or having it used by the company or having it sold to the company either by you or the original seller? A. No, sir.

Mr. McGlynn: I object. It is the same question another way around. Besides that, it is leading. 30

The Court: I will permit the answer to stand.

Q. Was the car ever turned over to the company by you? A. No, sir.

Q. Did anybody ever use the car? A. No, sir.

Q. Now, it appears that the company gave two notes to the Mason concern which it is said were 40

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paid on account of the price of this car. Will you state your knowledge as to the facts concerning those notes and how they came to be given and paid? A. Well, I offered these notes to Mason rather than pay cash for the car. The
 10 company could use the money to better advantage. Monday morning I authorized Foley to draw these notes after arranging with Mason.

Q. Now, is it the company's notes which went to pay for this car? A. The company was indebted to me for considerably more than the face of these notes amounted to.

Q. They owed you more for what? A. Salary.

Q. What was your salary? A. Two hundred dollars a week.

20 Q. And what else? A. And half the profit.

Q. And what else? A. That is all.

Q. Was there any anterior indebtedness to you? A. Why there was an overdraft of Mr. Kirby's.

Q. What do you mean by that? A. Mr. Kirby had drawn considerably more money out of the company than I had. I had a balance to my credit.

Q. How much was that balance to your credit?

30 (Objected to as immaterial, irrelevant and incompetent. Objection overruled. Plaintiff's counsel notes an objection to the ruling.)

A. Twenty-three or twenty-four hundred dollars at that time.

Q. And were these notes given on account of that balance?

40 (Objected to as leading. Objection sustained.)

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Q. Did you have any conversation about that with the other officers? A. No, sir.

Q. What conversation did you have with Kirby respecting this matter? A. I just asked him to countersign these notes.

Q. What was said? A. I simply told Mr. Kirby I bought this coupe and this was the way I was going to pay it. 10

Q. Tell the court and jury all you said regarding that. He says you told him you bought it for the company. A. No, there was not anything said about the company. I bought it for myself.

Q. What did you say to him? A. I said, "I have just bought myself a new car."

Q. And what else? A. "And this is how I am going to pay for it." 20

Q. Kirby's car went into a part of that price, did it? A. Well, yes, one of Kirby's cars. Kirby had two cars.

Q. What is that? A. Mr. Kirby had two cars.

Q. I mean this car that Kirby owned, that never belonged to the company at all? A. Yes, that was at Mason's for sale.

Q. Did Kirby get the money for that? A. Yes, sir.

Q. The company did not get the car or the money for that? A. No, sir. 30

Mr. McGlynn: Which one?

Q. Kirby's car, that never did belong to the company, did it? A. No, sir, that was Kirby's property.

Q. With respect to the insurance policy, Mr. Ellis, who was it that put the insurance policies on this car? A. Mr. Kirby—Mr. Kirby ordered it. 40

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Q. Do you know when he did that? A. We gave all our insurance to Mr. Bryce—the company did. I do today.

Q. What is that? A. We gave all our insurance to Mr. Bryce.

10 Q. Because he was a member of the firm?

Mr. McGlynn: I object to the reason.
(Objection sustained.)

Q. Did you put the insurance on, or did Mr. Kirby? A. Mr. Kirby notified Mr. Bryce.

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

Q. You heard the testimony of Mr. Bryce respecting that? A. Yes.

Q. Is he mistaken about that?

20 (Objected to on the ground the witness cannot characterize another witness's testimony. Objection sustained.)

Q. It is true you called up Bryce and told him to place the insurance, that the car was outside and he could look at it, or anything to that effect? A. No, sir. The car was not there when Mr. Bryce said he thought it was there.

30 Q. Did you give him the insurance, or tell him to place it? A. No, sir.

Q. When did you know he had placed it? A. Several days after.

Q. With regard to licenses from the State—driver's and owner's licenses—who procured those licenses? A. Mr. Kirby.

Q. Through whom did he procure them? A. Through Mr. Bryce.

40 Q. Did you know anything about them at the time? A. Not until he asked me to sign an application for them.

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Q. It has been stated that the company paid for repairs on the car. Did you pay for repairs and garage charges? A. After August 9 I did, yes.

Q. What? A. After August 9, yes.

Q. Do you remember how long a time you paid? 10
A. I paid up to the present time.

Q. From what time? A. I believe the last the company paid was for the month of August. I paid from September first to the present time.

Q. Was there any other car in which Kirby was interested about that time?

(Objected to as immaterial.)

The Court: What bearing do you think it has on this case, Mr. Dixon? 20

Mr. Dixon: As to whether Kirby took that car himself.

The Court: I do not think it has any bearing.

Mr. Dixon: Do I understand your Honor holds these two men could not get together and agree as to the disposition of the car?

The Court: They had no right to do that. How about creditors? 30

Mr. Dixon: There were no creditors; this was a solvent corporation.

The Court: How did they get into bankruptcy if they were solvent?

Mr. Dixon: They went into bankruptcy six or eight months afterward. They were solvent at that time and had a perfect right to do everything they did do.

Mr. McGlynn: There is no proof of it except what Mr. Dixon says. 40

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Mr. Dixon: Yes, there is—your order of appointment.

Q. Now, in February, 1921, you were served with a demand, were you not, for possession of which this P-7 is a copy? A. Yes.

10 Q. Do you recall what day of the week you were served with that? A. I do not recall exactly.

Q. Where were you served? A. In the office, put on my desk.

Q. Did you receive a copy through the mail? A. I believe I did.

Q. That is dated February 7, 1921? A. Yes.

Q. On that day was there a stockholders' meeting? A. Yes.

20 Q. What stockholders were there?

(Objected to as immaterial. Objection sustained.)

Q. What time was that meeting?

(Objected to as immaterial. Objection sustained.)

30 Mr. Dixon: I want to ask when the directors' meeting was held.

Mr. McGlynn: I object as immaterial.

The Court: Same ruling.

Mr. Dixon: I ask that my objection be noted to both propositions.

Q. Were you at this directors' meeting on the 7th of February, 1921?

Mr. McGlynn: I object.

40 The Court: Objection sustained.

(Objection noted by Mr. Dixon.)

*Alfred J. Ellis—Defendant—Cross.**Cross examination by Mr. McGlynn:*

Q. Between August 9, 1920, and February 7, 1921, what business were you in? A. Machinery business.

Q. For yourself? A. Yes, sir.

Q. Not connected with the A. L. Kirby Company? A. Liquidating the business of A. L. Kirby Company.

Q. Did you actually make sales of assets belonging to the A. L. Kirby Company between those dates? A. Yes.

Q. In making those sales did you make them from the office of the company or go out in the field and see people with regard to the purchases and sales? A. Outside.

Q. When you went to make those visits did you walk or ride? A. Sometimes I walked and sometimes I ride.

Q. When you rode what car did you use? A. My own car.

Q. Did you use this Peerless coupe? A. Yes.

Q. This pleasure car? A. Yes.

Q. You used that on trips for the purpose of selling machinery belonging to the A. L. Kirby Company? A. Yes, sometimes.

Q. And before this Peerless coupe was purchased in August you had used a Peerless sedan occasionally in making trips to call on customers from whom you wanted to purchase machinery or to whom you wanted to sell machinery? A. Sometimes, yes.

Q. Between August, 1920, and February, 1921, you drew a salary during part of that time? A. Yes.

Q. You did not mean to pay all the expense

Alfred J. Ellis—Defendant—Cross.

incidental to the operation of this Peerless coupe between those dates was paid by you? A. After September it was, I think.

10 Q. You mean to say every cent of expense that was paid for repairs of this Peerless coupe after September first was paid by you? A. Yes.

Q. Positive of that? A. Yes.

Q. Just as positive as you are of the other facts you have testified to? A. There was a little question in my mind until Mason showed me a bill several months ago for a balance that was paid by the company.

Q. You have testified several times in proceedings with regard to this car? A. Yes.

20 Q. Do you recall your testimony in those proceedings? A. To a considerable extent.

Q. Do you recall testifying in the bankruptcy court in Newark with regard to this automobile in June, 1921? A. I do.

Q. Do you recall this question being asked you: "Did the corporation also buy another? A. Yes.

Q. What make? A. Peerless coupe? A. Peerless coupe? A. Yes, sir. Q. And in whose possession was that at the time you filed the bill?

30 A. My possession. Q. And is that the automobile against which there is now a replevin suit pending? A. Yes. Q. In Hudson County? A.

Yes, sir. Q. Instituted by the company against you? A. Yes, sir. Q. And that machine as I

understand was taken by you when you were discharged as treasurer or this act of the corporation discharging you as treasurer was put

through? A. Yes, sir. Q. And this Peerless also was purchased by the money of the corporation?

A. Yes, sir. Q. Licensed in the name of the corporation?

40 A. Yes, sir. Q. Insured in the name

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of the corporation? A. Yes, sir. Q. Has there been any change in the license? A. No. Q. License still in the name of the company? A. Yes, sir. Q. Well, how is it that you have possession of it? A. Because Mr. Kirby and I, before he voted me out as treasurer, had an agreement that we would each take a car. The car was originally intended for my private use but paid for by the company. It was originally intended that the purchase price of the car was to be charged to my personal account. Q. Was the purchase price of the car charged to your personal account? A. Not originally, no." Do you recall that testimony? A. Yes. 10

Q. Why didn't you tell me then when I examined you in June, 1921, that you had purchased the car and not the corporation? A. Well, I do not know just why I did not. 20

Q. You do not know why you did not? A. No, I was still friendly with Mr. Kirby at that time.

Q. Is it the unfriendliness with Mr. Kirby that has created the change in your testimony? A. No, it is the change in Mr. Kirby's attitude.

Q. It is the change in Mr. Kirby's attitude that has made the change in your testimony? A. I do not mean that, no. 30

Q. What do you mean? A. I mean that I trusted Mr. Kirby implicitly until the meeting of February 7, 1921.

Q. What I am asking you now is this: In June, 1921, in an examination at Newark you were asked, as I have just repeated to you, why you took the car away, and you told me then, as I have just read over to you, that you took it because there was an arrangement between you and Kirby that you should take a car? A. Yes. 40

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Q. Now, I ask you why you did not tell me then, as you tell us here today, that you purchased this car yourself from Mason, and not the corporation? A. I do not know just why I did not tell you that at that time, but——

10 Q. As a matter of fact, let me ask you about the transaction in Mason's showroom in August, 1920, you went and looked at a coupe, as I understand it? A. Yes.

Q. You picked out the car you wanted and asked the price of it? A. Yes, sir.

20 Q. And you say you went there with the intention of buying it for yourself. How, sir, if you intended to buy this car for yourself, does it come that you used an automobile belonging to an individual to be used as part payment for the car? A. Well, I was perfectly satisfied to help Mr. Kirby dispose of his car, for one reason.

Q. Had you ever said a single word to Mr. Kirby?

Mr. Dixon: I object to asking a very long question that way and interrupting the witness as soon as he starts to answer it.

30 (Answer repeated by the stenographer.)

The Court: Was there anything further you intended to answer?

The Witness: That is all.

Q. Had you said one single word to Mr. Kirby before you went to the Mason showroom to the effect that you were going to take his car off his hands for \$1,400? A. No, but I did know he had his car there for sale at \$1,400.

40 Q. Did you say anything to Mr. Kirby? A. No, sir.

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Q. You knew the corporation had no interest in that car? A. Absolutely.

Q. Did you say anything to Mr. Mason about how you were going to pay the balance between \$1,400 and the purchase price of the car? A. I told him I would give him notes.

10

Q. Did you tell him whose notes you would give him? A. I do not know that I did.

Q. Was anything said about the term of the note? A. Well, I had the privilege of giving him one note for the balance or dividing it up in two or three notes.

Q. Was it discussed with him? A. I believe it was, yes.

Q. And anything said about whose notes were to be given? A. I may have discussed that, I may have told him I would give him the company notes.

20

Q. Don't you know as a matter of fact you did tell him you would give him the company's notes? A. I do not know that to be a fact, no.

Q. Then on the Monday morning following this Friday or Saturday at Mason's you reached the office of the Kirby Company before Mr. Kirby? A. I did on every morning.

Q. Then you did on this morning? A. Yes, sir.

30

Q. Then you told Mr. Foley to draw up two notes? A. Yes.

Q. And he drew them up? A. Yes, sir.

Q. They were corporation notes? A. Yes, sir.

Q. Did you tell him at that time to draw the check of \$1400? A. No, sir.

Q. Why didn't you have that check drawn that time? A. I did not think it would have to be drawn at that time.

Q. How much did you say the corporation owed you at that time? A. \$2300 or \$2400.

40

Alfred J. Ellis—Defendant—Cross.

Q. If they owed you the \$2300 or \$2400 what was to become of the difference between that and the \$1400 you were spending? A. Out of my salary.

10 Q. Did you make any arrangement to take it out of your salary after that? A. No.

Q. You drew your salary just as long as you could after that? A. Yes, sir.

Q. You knew when you bought this car that you had to have a license to run it? A. I did have the license, the drivers license.

Q. No, I do not mean that. You knew you could not drive a car without an owner's license? A. No, sir.

20 Q. In whose name did you think the car was licensed that you were driving after August 9th? A. The same as the other—the company's name.

Q. And you knew that on the following January another license was issued in the name of the company? A. Absolutely, because there was another car operating and the company paid for that; why shouldn't they pay for mine?

30 Q. I am not discussing it with you? Just answer the question. You knew that on January first, 1921 a license for 1921 was issued on this coupe in the name of the corporation? A. Yes.

Q. And you knew that within a couple of days after you purchased it an insurance policy was issued in the name of the corporation? A. Yes.

Q. And you knew the company paid some three hundred dollars for an insurance premium? A. Yes.

Q. You knew when that policy expired a second one was issued and paid for by the corporation? A. Not on my car.

40 Q. Are you sure of that? A. Yes.

Alfred J. Ellis—Defendant—Cross.

Q. Do you recall at the last trial of this case producing a financial statement of the affairs of this company prepared by Puder and Puder of Newark? A. Yes, sir.

Q. Do you recall questions discussing the fact that in that report there was an item listed under the assets of this corporation amounting to something like \$8800? A. Yes. 10

Q. You knew this automobile was being carried as an asset on the books of the corporation? A. Yes, after I got that report.

Q. When did you get that report? A. Whenever the public accountants got through with it.

Q. When was it? A. I do not know that date.

Q. You had two, didn't you? A. Yes. 20

Q. One was December 31, 1920? A. Something like that.

Q. You knew that at the end of 1920 on the books and records of the corporation, of which you were then treasurer, there was an item under capital assets on which you were asking credit for this purchased for yourself, as you say? A. Yes.

Q. And you knew that? A. Yes.

Q. And you make no objection to it? A. No, 30
sir.

Q. And your only explanation is they owed you \$2,300? A. Yes, and Mr. Kirby had a similar car.

By the Court:

Q. When those notes were given were they charged up against your account? A. No.

Q. So far as the books of the company show, 40
they already owed you \$2,300? A. Yes.

Alfred J. Ellis—Defendant—Re-direct.

Q. Did you ever get a bill of sale for this car?

A. No, sir.

Q. Never? A. No, sir.

Q. You knew there was a bill of sale issued?

A. Yes, sir.

10 Q. And you knew it was issued to the corporation? A. Yes, sir, I would not insist on a bill of sale because——

Q. I say you knew it was issued to the corporation? A. Yes.

20 Q. At the time you testified in the bankruptcy proceeding, the testimony of which I have just read to you, in June, 1921, you knew at that time that this replevin suit was pending, didn't you? The replevin suit had been started before you filed the bill in chancery for the appointment of a receiver, hadn't it? A. I believe it had, yes, sir.

Re-direct examination by Mr. Dixon:

30 Q. When did you first ascertain that these automobiles were carried on the books of the company as assets of the company? A. As a matter of fact, it was after—well, I did not pay much attention to it. I probably knew it, but I trusted so implicitly in Mr. Kirby that I gave him a free hand until I noticed his attitude February 7. Then I began to prick up my ears and saw I had been trapped.

Q. When, with reference to the time of the transaction, was it that you first had any knowledge at all with respect to the matter? A. I could not say that.

40 Q. Was it some time after? A. Yes, some time after.

Alfred J. Ellis—Defendant—Re-direct.

Q. Why did you permit it at that time to continue? A. In that same way, I trusted Mr. Kirby.

Q. I want you to explain fully why that was.

A. Well, Mr. Kirby had a similar kind of a car.

Q. Explain about it.

10

(Objected to as immaterial and irrelevant. Objection overruled.)

A. This was the second car I purchased. I purchased a sedan car before for my own personal use, and Mr. Kirby persuaded me to turn that in to the company—which I did. I let Mr. Kirby persuade me in the first transaction, and we used the car together. He would use it for a certain length of time and I would use it for a certain length of time, until Mr. Kirby monopolized the car, and that was why I bought this coupe for myself.

20

Q. I want you to explain why, when you found this car you had purchased carried as an asset on the books of the company, which some time after its purchase, you did not make any fuss at that time; why didn't you have it changed? A. It balanced itself, if Mr. Kirby had his car and I had mine, we each had a car, that was all there was about it. I was satisfied to let it go on that way.

30

Q. What car did he have? A. Peerless sedan, a more expensive car than a coupe.

Q. When this car was purchased—

Mr. McGlynn: Which car?

Q. When the car in question was purchased was the company solvent? A. Yes, sir.

40

Alfred J. Ellis—Defendant—Re-cross.

Mr. McGlynn: I object. That is absolutely a conclusion.

10 The Court: I do not think you can prove solvency in that way. I suppose he can tell us whether in his opinion he had any idea that the company was solvent. I do not suppose he can go farther than that.

Q. Did you have any intimation of any insolvency of the company during the year of 1921?

A. No, sir, not until I saw Mr. Kirby was dissipating the assets.

Q. When was that? A. After February 7.

20 Q. I did not mean 1921, I meant 1920. A. Oh, no.

Q. Did you file a bill in chancery against the company? A. Yes.

(Objected to as immaterial.)

The Court: I do not think it is material unless you are going to produce the bill in chancery. I will sustain the objection.

Re-cross examination by Mr. McGlynn:

30 Q. You have just said something about a sedan car that Mr. Kirby had. Now, as a matter of fact that sedan car that Mr. Kirby had was purchased after this corporation was organized, by the corporation, with the corporation's money, and listed in the books of the corporation as a corporation asset? A. But I purchased that car.

40 Q. I do not care who purchased the car, the corporation's money paid for it, did it not? A. Yes.

Edward R. McGlynn—for Defendant—Direct.

Q. And you knew that car was listed as a corporation asset? A. Yes, sir.

Q. You knew what use Kirby made of it in Newark, or what use you made of it in Newark, outside of your personal use of it, was for calling on the trade? A. No, sir, that car was at Belmar with Mr. Kirby's family. 10

Q. That car was not at Belmar when he came back from out west? A. No, that week I had it, but it went to Belmar that evening.

Q. That is why you went on and purchased with this corporation's money another car? A. I just told you that.

Q. So that the assets of this corporation included from August 9, 1920, two automobiles, one Peerless sedan and one Peerless coupe, both of which cars had been paid for with money out of the treasury of this corporation? A. Yes. 20

Q. Did you answer that? A. Yes.

EDWARD R. MCGLYNN, sworn.

Direct examination by Mr. Dixon:

Q. You are a practising lawyer of New Jersey? A. Yes, sir. 30

Q. An attorney and counsellor? A. Yes, sir.

Q. And are the trustee in bankruptcy in the suit of Kirby and Company? A. Yes, sir.

Q. And have been substituted as the plaintiff in this case? A. Yes.

Q. You are not the original plaintiff? A. No, sir.

Q. This suit was begun before you were appointed trustee? A. Yes, sir. 40

Edward R. McGlynn—for Defendant—Direct.

Q. Do you know how long before? A. No, sir, not exactly, not very long.

Q. When were you appointed? A. I was appointed trustee in June. I must have been receiver probably thirty days or so before that.

10 Q. June of 1921? A. Yes, 1921.

Q. So probably in May you were made receiver? A. April or May, I do not remember just when.

Q. Was that at the time of the filing of the petition in bankruptcy? A. There was an involuntary petition filed against the company by three creditors and I think Judge Lynch appointed me some time in April.

20 Q. Were you the attorney for the company before that? A. No, sir, I never represented them. I think I have a copy of the order appointing the receiver.

Q. I do not think it is important, except the date of the filing of the petition. A. Some time in April.

Q. Did you know of the filing of the bill in chancery? A. At the time of my appointment, no, sir.

30 Q. Did you learn of it within a few days after? A. Yes.

Q. Do you know how many days after the filing of the bill in chancery the filing of the petition was? A. No, sir, all about the same time. One suit preceded the other. I think there was an adjournment taken of the order to show cause and the petition was filed between the two dates.

Q. Among the assets of this corporation did you find some patents?

40 Mr. Delaney: I object to that question as immaterial.

Motion for Direction of a Verdict.

The Court: I do not think it is competent.

(Defendant Rests.)

(Plaintiff moves for the direction of a verdict against the defendant for \$3,000, with interest, on the ground: 10

First: That Chapter 168 of the Laws of 1919 provides the manner in which an automobile may be sold in the State of New Jersey, and states that "it shall be unlawful to sell or purchase any motor vehicle except in the manner and subject to the conditions hereinafter provided"; and the provisions of that act are that a bill of sale must be issued. 20

Second: That there are no facts introduced in evidence in this case by the defendant which, standing by themselves or giving them the benefit of any inference that the jury might draw from them, sustain the contention that he purchased this automobile.)

(Adjourned to September 22, 1922.)

30

September 22, 1922.

The Court (after argument): I do not like to take the case away from the jury, but it seems to me that is the only thing for me to do in this case.

The undisputed evidence in this case is that the automobile in question was conveyed by a bill of sale to A. L. Kirby and Company, the 40

Remarks by the Court.

10 bill of sale bearing date the 9th day of August, 1920, and that conveyance was made in compliance with Chapter 168 of the Laws of 1919, entitled, "An act relating to the regulating and sale and purchase of motor vehicles, requiring presence of manufacturer's number on same, requiring
15 issuance of bill of sale and assignment of same, and providing penalties therefor." That act was amended in 1920, but simply so far as related to the person before whom an acknowledgment might be taken. The bill of sale of this automobile that is claimed by Mr. Ellis, who was treasurer of the corporation, was sent to the company, although the automobile was delivered by the sales agent to Mr. Ellis and it appears from this
20 evidence that Mr. Ellis, as Treasurer of the Company, used the automobile partly for himself and partly in his business on behalf of the company. The automobile was paid for by two notes of the company, signed by the president and treasurer of the company, and the notes afterwards, paid by the company, and also paid for by a car owned by the president of the company, which was taken in part payment for the automobile in question at \$1,400, and this car so traded in or paid on
30 account of the automobile in question was paid for by the company to the president of the company after this machine had been purchased.

After Mr. Ellis obtained possession of the car it was licensed in the name of the company, it was insured in the name of the company, the license fee and the premiums on the insurance policies were paid for by the company, all of which facts were known to this defendant. The defendant now claims that he purchased this
40 automobile for himself and that it belongs to him,

Remarks by the Court.

but he did not obtain a bill of sale for it, he did not obtain any license in his own name for this car, he did not take out any insurance in his own name. He says the notes were given in payment because the company owed him money at that time, but he admits at the time the notes were given he never entered into any agreement that the notes were to be charged against his account. The notes do not appear to have been charged to his account, and he knew that the automobile was carried on the books of the company as an asset. 10

Now, even if Mr. Ellis became the owner of this car as he claims, he did not obtain the legal title to it under the act of 1919 as amended in 1920. That act provides that "it shall be unlawful to sell or purchase any motor vehicle except in the manner and subject to the conditions hereinafter provided," and one of those provisions is that "in all sales or purchases of a motor vehicle directly from the manufacturer or through an agent or agencies of such manufacturers there shall be issued to the purchaser a manufacturer's bill of sale, which bill of sale shall contain the manufacturer's number on the engine or motor of the motor vehicle so sold." That act was construed to a certain extent in the case of *Stein v. Scarpa*, reported in 114 Atlantic, 245, in which Justice Minturn, in an opinion delivered by the Supreme Court in that case, said: "The manifest purpose of this act was to prevent the sales of automobiles to innocent purchasers by one having no legal title thereto. This the act seeks to accomplish by requiring the vendor to transmit the delivery of the car the original bill of sale, as evidence of title, very much 20 30 40

Remarks by the Court.

10 upon the same principle as title to land was evidenced and transmitted in Great Britain, and in this country prior to the enactment of the recording registration acts. Such an act is not only consistent with early traditional practice, but would seem to be a reasonable regulation as an exercise of the police power in the interest and protection of the purchasing public, though the exercise of the power may incidentally affect existing contracts."

20 Now, as it appears undisputed in this case that Mr. Ellis has no bill of sale for this automobile and the company has the bill of sale required by the statute, and as against Mr. Ellis the company has a right to recover this machine, I find there is nothing that I can submit to the jury except the question of damages.

30 In this case the defendant re-replevined. That requires under our statute a verdict for damages. There is evidence that the automobile was worth at the time the company demanded it from Mr. Ellis from three thousand to thirty-two hundred dollars, and there is no question of special damages. Under the law as I understand it to be the damages will therefore be interest on whatever sum the jury find this car to be worth from that time until the time they render their verdict.

If counsel desire to say anything to the jury on the question of damages they may do so now. If not, I shall submit the case to them on the question of damages only, directing them to find a verdict for such sum as they may find the automobile to have been worth at the time the company demanded it from Mr. Ellis.

40 (Objection noted by defendant's counsel.)

Charge.

Gentlemen of the Jury: In this case as it has been presented to you the court finds as a question of law that the title of the property in question vested in the company to whom the bill of sale was given. That company having gone into bankruptcy and a trustee having been appointed and made a party to this suit, the trustee will take and be entitled to the interest of the company in this automobile. As the title vests, under the law as the court construes it, in the plaintiff, your duty is very much simplified, because the court instructs you that you will find a verdict for the plaintiff, and if the court is wrong that will be reversed by the trial, of the exceptions which Mr. Dixon has taken to the court's ruling.

The question for you then to determine is the question of damages. The plaintiff is entitled to the value of the car at the time Mr. Ellis was notified to return it to the plaintiff and deliver it to the plaintiff, which was in February, 1921. You have heard the evidence on the subject. One witness testified that in his opinion the automobile at that time was worth from three thousand to thirty-two hundred dollars, but you are to determine the question of value. In addition to the value of the car you should find the damages that the plaintiff has suffered by reason of the detention of this machine. There is no special damage shown, and so the law presumes in cases of that kind that damages are interest on the value of the car from the time the demand was made in February, 1921, until the present time. So in this case you will find from this evidence the value of the car and then add to that the

Charge.

amount of damages, which would be the interest on that sum from February 8, 1921, until the present time at six per cent. That, gentlemen, is the duty which you have to perform.

10 (Defendant's counsel notes an objection to so much of the court's charge as directs a verdict in favor of the plaintiff.)

This action was tried before Judge Willard W. Cutler with a jury at the Hudson Circuit, September 21, 1922.

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

20 They say, they find for the plaintiff and against the defendant and they assess the damages of the plaintiff on occasion of the premises at the sum of Two Thousand Seven Hundred Forty-three Dollars and Seventy-five Cents (\$2,743.75).

30 WHEREUPON it is adjudged that the plaintiff recover of the defendant the sum of Two Thousand Seven Hundred Forty-three Dollars and Seventy-five Cents and his costs amounting to Sixty-two Dollars, Seventy-three Cents, making in the whole the sum of Two Thousand Eight Hundred and Six Dollars and Forty-eight Cents (\$2,806.48).

Judgment entered this September 21st, 1922.

WILLARD W. CUTLER,
Judge.

Exhibit P-1.

KNOW ALL MEN BY THESE PRESENTS that J. W. Mason & Sons, of Newark, in the County of Essex, and State of New Jersey, party of the first part, in consideration of the sum of \$4,180 paid by A. L. Kirby Co. of Newark, in the County of Essex and State of New Jersey, party of the second part, has bargained, sold, granted and conveyed and by these presents do bargain, sell, grant and convey unto the said party of the second part, his heirs, executors, administrators and assigns, Peerless Coupe, 56, 264878, to have and to hold the same unto the said party of the second part, his heirs, executors, administrators and assigns, forever, and J. W. Mason & Sons do for themselves or 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, administrators and assigns against all and every person or persons whatsoever.

IN WITNESS WHEREOF, J. W. Mason & Sons have hereunto set their hands and seal this ninth day of August, one thousand nine hundred and twenty.

J. W. MASON & SONS,
 J. W. MASON,
 Pres.

Signed, sealed and delivered
 in the presence of
 C. W. MASON,
 Secy.

10

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Exhibit P-3.

State of New Jersey,
County of Essex—ss.:

10 BE IT REMEMBERED that on this 9th day of August, 1920, before me, a Notary Public of the State of New Jersey, personally appeared J. W. Mason & Sons, who I am satisfied are the sellers mentioned in the within instrument, and I having personally made known to them the contents thereof they did thereupon acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

20 GRACE M. ELLIS,
Notary Public.

Exhibit P-3.

\$1485.53 Newark, N. J., August 9th, 1920.

30 Sixty days after date we promise to pay to the order of J. W. Mason & Sons, Fourteen hundred and eighty-five 53/100 Dollars at Federal Trust Company, Newark, N. J.

Value received.

Due Oct. 8/20.

A. L. KIRBY CO.,
A. J. ELLIS, Treas.
A. L. KIRBY, Pres't.

40 Stamp:—Federal Trust Company Note Teller
Paid Oct. 8, 1920, Newark, N. J.

Exhibit P-4.

\$1,492.89 Newark, N. J., August 9th, 1920.

Ninety days after date we promise to pay to
the order of J. W. Mason & Sons,
Fourteen hundred and ninety-two 89/100 Dollars
at Federal Trust Company, Newark, N. J. 10

Value received.

Due Nov. 7/20.

Check \$492.89

Renewal 1000.00

Stamp:—Federal Trust Company Note Teller 20
Paid Nov. 8, 1920, Newark, N. J.

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Clerk's Certificate.

State of New Jersey,
Hudson County—ss.:

10 I, JOHN J. MCGOVERN, Clerk of the County of
Hudson, aforesaid, and also Clerk of the Circuit
Court holden therein,

20 DO HEREBY CERTIFY, That the foregoing is a true
and correct copy of Writ of Replevin, Answer,
Order for Substitution, Notice of Appeal,
Grounds for Appeal, Rule for Judgment in the
case of Edward R. McGlynn as Trustee in bank-
ruptcy, of A. L. Kirby Company, a Corporation
of New Jersey, Plaintiff, and against the said De-
fendant Alfred J. Ellis, as the same is taken
from and compared with the original as filed and
recorded in my office.

IN TESTIMONY WHEREOF, I have hereunto set my
hand and affixed the seal of said Courts and
County, at Jersey City, this twentieth day of
October, 1922.

30 (L.S.) JOHN J. MCGOVERN,
Clerk.

Judgment of Affirmance.

NEW JERSEY SUPREME COURT.

ON APPEAL.

EDWARD R. MCGLYNN, as Trustee in bankruptcy 10
of A. L. Kirby Company,
Plaintiff-Appellee,
—against—
ALFRED J. ELLIS,
Defendant-Appellant.

This cause having been duly submitted on briefs
at November Term, 1922, of this Court, by the 20
counsel of the respective parties, and the Court
having considered the same, and finding no error
in the record or judgment below in the Hudson
County Circuit Court;

It is, therefore, on this 16th day of March,
1923, ordered and adjudged that the judgment of
the Hudson County Circuit Court from which an
appeal was taken by the defendant in this cause,
be and the same is hereby affirmed with costs; 30
and that the record be remitted to the said Hud-
son County Circuit Court to be proceeded with
in accordance with this judgment and the prac-
tice of said Court.

Entered March 16, 1923.

On motion of William F. Delaney, Attorney
for Plaintiff-Appellee.

A true copy. 40

EDWARD J. KELLEHER,
Clerk.

Opinion of Supreme Court.

quired that the original bill of sale shall be assigned by the seller to the purchaser by an assignment witnessed by two persons and acknowledged by the seller before a Notary Public, and all such assignments shall at all times be kept and attached to the original manufacturer's bill of sale. These provisions are obviously intended to assist in protecting automobiles from the danger of theft.

10

We see no reason to doubt their validity. The Kirby Company had a bill of sale in compliance with the statute. The defendant never had. Of course the bill of sale for the automobile was properly admitted in evidence. It was a necessary document of title. We think the questions objected to in grounds of appeal No. 2-3-4-5-6-7 were properly overruled. We are unable to see what relevancy the proffered evidence had to the case.

20

We find no error in the record. The judgment must be affirmed.

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Opinion of the Court
The Court is divided 5-4

...that the original bill of sale shall be
...to the original bill of sale...
...and all such assignments shall at all times be
...and attached to the original bill of sale...
...of the bill of sale...
...the danger of their...
...We are no longer to doubt their validity. The
...Every Company's bill of sale is compliant
...with the statute. The defendant never had a
...copy of the bill of sale for the automobile was
...properly attached to it. It was a car
...which document of title. We think the question
...posed to the court is simply, "No, 1887-1888
...were properly attached to the bill of sale for the
...what relation the printed evidence had to the
...case."

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New Jersey Court of Errors and Appeals

EDWARD R. MCGLYNN, as Trustee
in bankruptcy of A. L. Kirby
Company,

Plaintiff-Appellee,

against

ALFRED J. ELLIS,
Defendant-Appellant.

BRIEF OF APPELLEE.

Statement.

This is an appeal by the defendant after an affirmance by the Supreme Court of the judgment entered in the Hudson County Circuit Court in favor of plaintiff.

The opinion of the Supreme Court appears at page 80 of the state of the case.

A. L. Kirby Company, a corporation, brought this action in replevin against the defendant to recover possession of a Peerless coupe automobile. The defendant gave a bond to the sheriff, and so retained the possession of the car.

During the pendency of the action the corporation plaintiff was adjudicated a bankrupt, and thereupon Edward R. McGlynn, its trustee, was substituted as the plaintiff herein.

The car was purchased about August 7, 1920, at Newark, N. J., from the manufacturer's agent, J. W. Mason & Sons, and the purchase was negotiated by the defendant, the treasurer of the A. L. Kirby Company (pp. 8-12). The salesman knew Ellis was the treasurer of the A. L. Kirby Company and had previously dealt with Ellis as treasurer in the purchase of another car by the Company (pp. 11-12).

The purchase price was \$4,378.42, paid for by two notes of the corporation for \$1,485.53 and \$1,492.89 respectively and by an allowance by the seller of \$1,400 for a Peerless touring car owned by A. L. Kirby, personally, and in the possession of the agents at the time for sale by them (pp. 16, 20, 21).

These notes of the corporation were drawn by the bookkeeper at the direction of the defendant, and were signed by A. L. Kirby, the president, and the defendant, its treasurer. The trading in of the Kirby car was at the suggestion of the defendant and the \$1,400 allowed therefor on the purchase price of the coupe was subsequently paid by the corporation to Kirby (pp. 35, 21, 61).

At the time of the purchase the agents executed and delivered to the A. L. Kirby Company a bill of sale to the Company of the coupe, and also issued to the Company a receipted bill for the sale of the car to the corporation (pp. 9, 10, 15, 20).

Mr. Ellis stated that the car was driven for his personal use and also in his travelling around on the business of the Company (p. 57).

The car was licensed in the name of the corporation for the year 1920, upon its purchase; and again for the year 1921, and was insured both years in the name of the corporation, which paid the license fees and the insurance premiums (pp. 21, 22, 58, 59).

The defendant never received a bill of sale to him covering this coupe although he knew one had been issued to the corporation (p. 64).

The defendant in no way questioned the foregoing statement, and yet against the unassailable conclusion therefrom of the corporation's ownership in the coupe the appellant asserts that he personally purchased the car for himself and that the company's notes were used to pay for it because it owed him money at the time. This claim is made in spite of the fact that defendant knew of the licensing and insurance of the car in behalf of the corporation, that he knew of the payment of same by the corporation, that there was no agreement to charge the notes to his account, that they were never so charged and that he knew the coupe was carried as a corporation asset on the corporation's books (pp. 59, 62, 63).

Upon the conclusion of the trial, the Court found as a question of law that the title to the coupe vested in the corporation to which was given the bill of sale required by Chapter 168 of the Laws of 1919, upon the sale of automobiles, and directed a verdict for the plaintiff, and left it to the jury to determine the question of damage (p. 73).

Accordingly, a verdict was rendered finding the property in the plaintiff and awarding plaintiff damages in the sum of \$2,743.75.

On a prior trial of this action where the evidence was the same as presented in the trial now under review, a verdict in favor of defendant was set aside by the Trial Judge (Hon. Luther A. Campbell), upon rule to show cause. In the opinion handed down on such application the Court said:

“With but two exceptions there is a clear line of testimony fixing both title and right of

possession in plaintiff. Those two exceptions are that defendant personally negotiated the purchase of the car and the same was actually delivered to him personally.

"From all the other testimony it would seem almost perfectly clear and perhaps convincing that these acts of defendant were acts by him for the plaintiff."

POINT I.

The corporation's right of possession to the coupe was established beyond dispute by the bill of sale issued to the corporation in compliance with Chapter 168 of the Laws of 1919.

The above mentioned Act is entitled, "An Act relating to the regulating and sale and purchase of motor vehicles, requiring presence of manufacturer's number on same, requiring issuance of bill of sale and assignment of same, and providing penalties therefor."

Section 4 of the Act requires that a bill of sale shall be issued to the purchaser in all sales or purchases of a motor vehicle directly from the manufacturer or through an agent or agency of the manufacturer.

Section 2 provides:

"It shall be unlawful to sell or purchase any motor vehicle except in the manner and subject to the conditions hereinafter provided."

Section 6 states:

"Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine not to exceed two thou-

sand dollars or by imprisonment not to exceed two years or both, at the discretion of the Court."

As the Court found that the title to the coupe vested in the A. L. Kirby Co. by the issue of the bill of sale in compliance with the above stated Act (p. 73), the only question that remained was as to the damages, which was decided by the jury.

The issue of the bill of sale to the A. L. Kirby Company was not questioned so that there is no controversy before this Court as to such finding of the Trial Judge.

The legal effect of the bill of sale was to convey the title to the coupe from the seller to A. L. Kirby Company, and with the title went the right of possession.

POINT II.

Defendant failed to prove any right of possession as against the corporation's established right of possession.

Defendant's claim of a personal purchase of the coupe cannot be sustained, as defendant failed to show the issue to him of any bill of sale, in compliance with the Statute of 1919.

This failure is not mentioned here as a fact that proves plaintiff's cause of action, but such failure establishes that defendant has not overthrown plaintiff's right of possession and shows that he had no right of possession as against the corporation.

We contend that plaintiff has established his right of possession and defendant has failed to show any right of possession that defeats such right of the plaintiff.

The Statute expressly provides that it shall be unlawful to sell or purchase any motor vehicle except in the manner and subject to the conditions provided in said Act.

The effect of such provision is to render ineffectual and illegal any alleged or attempted sale not complying with the Act.

This Statute is a reasonable regulation as an exercise of the police power in the interest and protection of the purchasing public.

Stein v. Scarpa, 114 Atl. Rep., 245.

In the last cited case, the purchaser was held to be entitled to recover the purchase price on account of the illegality of the sale, due to failure on vendor's part to give the bill of sale required by the Statute.

POINT III.

Apart from the Statute, the direction of the verdict was proper.

Under this point, we wish to refer to the undisputed evidence as set forth in our statement; and the conclusive establishment therefrom of the plaintiff's right of possession to the car, advertent again also to the fact that a prior verdict in defendant's favor was set aside as against the clear weight of the evidence.

Furthermore, the ledger entries on the corporation's books as to the purchase were made by the bookkeeper at defendant's direction (p. 36), and defendant looked at the books frequently (pp. 37, 43). Defendant knew about the insurance and license (pp. 54, 63). He admitted he used the car in making sales for the company (p. 57), and that

he had testified in the bankruptcy examination that the corporation had bought the coupe, and that the purchase price of the car had not been charged to him (pp. 58, 59); he knew that the car was carried as an asset on the books of the corporation, he saw the auditor's report and he made no objection (pp. 63, 67), and he knew the bill of sale was issued to the corporation (p. 64).

POINT IV.

No error was committed in excluding testimony.

Appellant complains of the exclusion of questions attempting to elicit the defendant's intention in purchasing the car.

We submit that the witness' statement of his intention was incompetent.

The question as to the stockholders present at the meeting was immaterial.

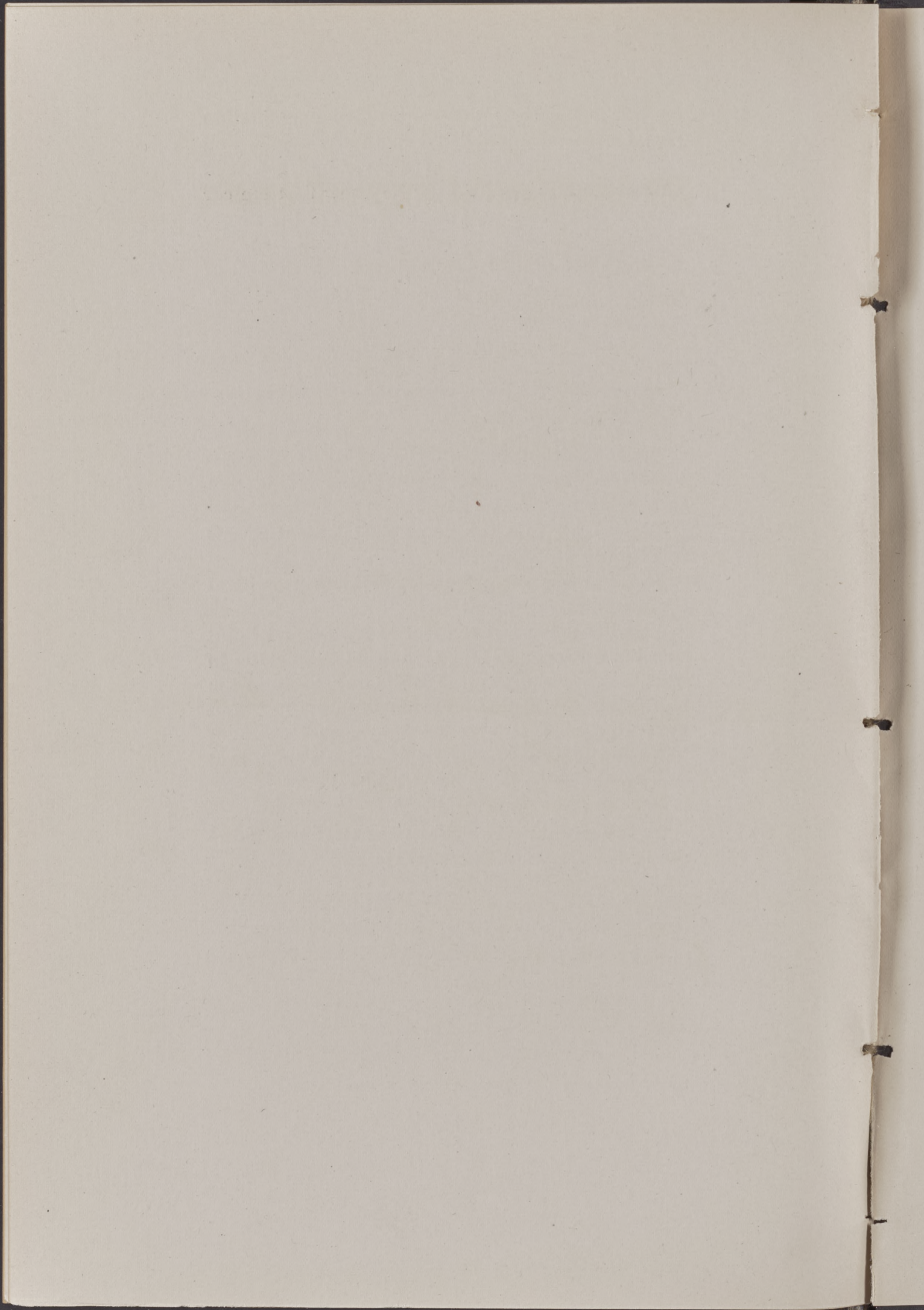
Appellant states at the end of his Second Point that the corporation had never made any claim to Ellis that it was interested in the ownership of the automobile. There is no proof to that effect, and on the contrary it is shown that such ownership had been asserted in the corporation's book and that to the knowledge of defendant.

It is respectfully submitted that the judgment be affirmed, with costs to appellee.

WILLIAM F. DELANEY,
Attorney for Plaintiff-Appellee.

EDWARD R. MCGLYNN,
Of Counsel.

[9860]



New Jersey Court of Errors and Appeals

EDWARD R. MCGLYNN, Trustee,
etc.,
Plaintiff-Appellee,

against

ALFRED J. ELLIS,
Defendant-Appellant.

BRIEF OF APPELLANT.

Statement.

The plaintiff issued a writ of replevin against defendant to recover possession of an automobile purchased from a concern in Newark, New Jersey, known as Mason & Sons, agents for the sale of Peerless motor cars.

The sale was made on or about August 7th, 1920, at the salesroom of the selling company, and the transaction was negotiated between one Samuel E. Oplinger, sales agent of Mason & Sons, and defendant Ellis. Price was agreed upon between them, and delivery of car was made to Ellis at the Robert Treat Hotel, where he was living.

The car was always retained by Ellis, in his personal possession, and used by no other person than himself.

At the conclusion of the testimony, the Trial Judge, Willard W. Cutler, Esquire, directed the jury to return a verdict in favor of the plaintiff, and in stating his reason for making this ruling, among other things, the learned Judge said:

“The undisputed evidence in this case is that the automobile in question was conveyed by a Bill of Sale to A. L. Kirby Company, the bill of sale bearing date, the 9th day of August, 1920, and that conveyance was made in compliance with Chapter 168 of the Laws of 1919, entitled An Act relating to the regulating and sale and purchase of motor vehicles, requiring presence of manufacturer's number on same, requiring issuance of bill of sale and assignment of same, and providing penalties therefor.”

On appeal to the Supreme Court, the judgment of the Circuit Court was affirmed in a *per curiam* opinion, wherein the Court said:

“The Kirby Company bought the automobile and had a bill of sale for it in compliance with the Act of 1919, Chapter 168” (Case, p. 80, line 27).

This declaration of the Supreme Court is a mere restatement of the fact which the Judge at Circuit made, upon which his direction of a verdict was predicated, and which fact was the sole controverted fact in the case, upon which the appellant bases his claim of error, in that it was determined by the Judge, and not by the jury.

POINT I.

The claim of defendant, both by his pleading and his testimony, was to the effect that this automobile was not purchased by the A. L. Kirby Company and never belonged to the A. L. Kirby Company, but, on the contrary, was purchased by the plaintiff for himself, as his own property and was delivered to him under such contract of purchase, and the possession of same was always retained by him as his own property.

If the testimony, either directly or by reasonable inferences, supports such contention, then the Judge was in error in saying that the "undisputed evidence" was as stated by him.

On this question, in his testimony, Ellis said:

"I purchased a Peerless Coupe." (Page 48, line 32.) * * * "I looked over the cars the Mason Company had on the floor there and selected one, a Peerless Coupe. * * * I told them to get it ready and I would take it out. * * * I arranged on the price and I told them to get it ready and I would take it out. * * * I asked him when I could get delivery and he told me he would deliver it when he could get it ready. He had to polish it and tune it up." (Page 49, line 1, etc.)

"Q. Did you at the time you bought the car buy it with any purpose of delivering it to the company or having it used by the company or having it sold to the company either by you or the original seller? A. No, sir." (Page 51, line 24, etc.)

"Q. Was the car ever turned over to the company by you? A. No, sir.

"Q. Did anybody ever use the car? A. No, sir." (Page 51, line 35, etc.)

This testimony is in no way contradicted by Mr. Oplinger, who was the other party to the transaction, and with whom the conversation was held.

Although at the time of the transaction, Mr. Ellis was an officer of the A. L. Kirby Company, he *positively denies* that in the purchase of this car he was in any manner acting as an agent of said company, or that any of the officers of said company other than himself, had any knowledge or previous information of the intended purchase of the car or that he had received any authority to purchase any car on behalf of the company, or that there was any company necessity for acquiring such a car. (See Ellis' testimony, p. 50, line 14; p. 50, line 30, etc.)

Nor was this testimony controverted by the plaintiff.

The plaintiff sought to establish his title to this car through inferences, which, he claimed, should be drawn from certain facts put in evidence by him.

These facts may be summarized as follows:

After delivery of car to Ellis, Ellis gave two notes of A. L. Kirby Company, drawn to Mason & Sons for part payment; after delivery of car to Ellis, A. L. Kirby, the president of the company, procured insurance to be taken out and a policy written in the name of the A. L. Kirby Company through Kirby's cousin, who was the third director of the company; after delivery of car, Kirby likewise had motor vehicle license taken out in name of company; after delivery of car, Mason & Sons sent bill to A. L. Kirby Company, and also bill of sale.

From this set of circumstances, and perhaps from some others, the plaintiff claimed, and the

Court, as matter of law, held, that the car belonged to plaintiff.

On the other hand, defendant testified that he paid for repairs to this car, and explains the other circumstances with regard to issuance of notes, insurance, etc.

His explanation, in part, is as follows:

At the time of the purchase of this car by Ellis, for himself, the A. L. Kirby Company was a solvent corporation, of which Ellis owned fifty per cent. (50%) of the stock, and the remaining fifty per cent. was owned by A. L. Kirby, with the exception of one (1) share, which was owned by Thomas F. Bryce, a cousin of A. L. Kirby. These three men constituted the Board of Directors—although all business was transacted by Ellis and Kirby, and Bryce never participated until he and Kirby, on February 7th, 1921, after procuring Ellis to vote for them for officers, deposed Ellis and prevented him from taking any further part in the management of the company. (See Case, p. 22, *et seq.*)

At the time of the purchase of the car by Ellis, the corporation was indebted to Ellis for salary, etc., for about the amount of the notes. Ellis, therefore, concluded to get Kirby to give the company notes on account of the payment of the car, and, when paid, this money should be charged against the indebtedness of the company to Ellis.

On this point, Ellis testified as follows:

“Q. What conversation did you have with Kirby respecting this matter? A. I just asked him to countersign these notes.

“Q. What was said? A. I simply told Mr. Kirby I bought this coupe and this was the way I was going to pay it.

“Q. Tell the Court and jury all you said regarding that. He says you told him you bought it for the company. A. No, there was nothing said about the company. I bought it for myself.

“Q. What did you say to him? A. I said, ‘I have just bought myself a new car.’ * * * ‘And this is how I am going to pay for it.’”
(Page 53, line 3, etc.)

With regard to placing insurance and the license, Ellis testified that he did not know that it was placed until several days after it had been placed by Kirby (p. 54, line 31).

So with regard to the appearance of this car among the assets upon the books of the company.

Mr. Ellis knew nothing about this item appearing on the books of the company until some time after he purchased the car (Case, p. 64).

His explanation in regard to his action in not at once protesting appears in Case, page 65.

At best, all of these circumstances were matters from which the jury might possibly infer that the car had been purchased for the company, but as against that inference, **THEY HAD THE RIGHT TO CONSIDER THE DIRECT AND POSITIVE TESTIMONY OF MR. ELLIS HIMSELF**; and, likewise, the facts that **THE COMPANY HAD NEITHER INSTRUCTED NOR EMPOWERED ELLIS TO PURCHASE ANY CAR FOR IT, AND THAT IT HAD NO USE FOR SUCH A CAR.**

The rule seems to be well established in this State that a Judge cannot direct a verdict when the testimony that the parties have been permitted to introduce leaves any fact, material to the issue, in substantial dispute.

Piver v. P. R. R., 76 N. J. L., 713;

Newark Passenger Ry. Co. v. Block, 55 N. J. L., 605;

Consolidated Tr. Co. v. Chenowitz, 61
N. J. L., 554;
Ferguson v. Central R. R. Co., 71 N. J.
L., 647;
McCoy v. Millville Tr. Co., 83 N. J. L., 508.

POINT II.

The Trial Judge committed harmful error in refusing to permit defendant to answer certain questions tending to elicit competent testimony relevant to the issue.

The issue to be determined was the ownership of the automobile, and a material fact in connection therewith was as to who purchased it from the sales company and for whom it was purchased.

As the plaintiff failed to show any direction or authorization from the plaintiff company to Ellis to purchase the automobile for the company, and as the clear testimony was that Ellis acted in the transaction of purchase without any prior consultation with any officer of the company, he was asked on direct examination, the following questions:

“Q. For whom were you going to purchase that car?”

“Q. When you went to buy this car, did you go with the intention in your mind of buying the car for the company?”

These questions were overruled (Case, p. 48, line 20, etc.; p. 51, line 13, etc.).

In order to determine the question of existence of a contract of sale, the intention of the parties is an essential fact to be considered.

In *Hires v. Hurff*, 39 N. J. L., page 4, at page 6, Mr. Justice Scudder says:

"The ordinary rule, is that the property in a chattel passes according to the intention of the parties. In determining such intention in a contract of sale, it is admitted that it is a question of fact for the jury, under proper instructions, and must be submitted to them, unless it is plain, as a matter of law, that the evidence will justify a finding but one way." *Merchants' Nat. Bank v. Bangs*, 102 Mass., 291; *De Ridder v. McKnight*, 13 Johns., 294.

The judgment in this case was reversed by the Court of Errors and Appeals, as reported in 40 N. J. L., 581, but the above principle was not only recognized but restated.

In his opinion, Mr. Justice Depue says:

"It is the general rule that the property in goods and chattels passes under the contract of sale according to the intention of the parties. The difficulty in the application of this rule is in determining under what circumstances the parties shall be considered as having evinced an intention that property in the subject matter of sale should pass from the vendor to the purchaser [p. 584]. * * * The tendency of the modern decisions is to give effect to contracts of sale according to the intention of the parties, to a greater extent than is found in older cases, and to engraft upon the rule that the property passes by the contract of sale, if such be the intention, fewer exceptions, and those only which are founded on substantial considerations affecting the interests of parties" (at p. 586).

In that case, the question under discussion was whether the title to the goods had passed to the vendee notwithstanding the fact that physical possession had not been acquired by him.

In the case, *sub judice*, the possession of the property had actually been delivered to the de-

fendant, and at the time of the institution of this suit, by replevin, purchase price had been fully paid.

As the question of the intention in the purchase of the automobile was relevant, his statement of his intent in making such purchase and for whom purchased, was admissible.

“Whenever evidence of the motive or intent with which an act was done is relevant, the direct testimony of the actors is admissible, although of course not conclusive evidence of such motive or intent.”

This rule applies to civil as well as criminal cases. (11 *Cyc.*, Sec. Ed., p. 507; and cases cited in note.)

The other questions put to Mr. Ellis and overruled by the Court (Case, p. 56, line 21, etc.) were also pertinent to the issue.

They tended to explain the conduct of the parties with reference to the circumstances from which the plaintiff expected that the jury might find title in the defendant, namely: the relation of all of the directors and stockholders towards the transaction.

The first claim of ownership of the automobile made by the written demand of the President immediately succeeded the meeting of February 7th, 1921, at which meeting the two directors, Kirby and his cousin Bryce, took from Ellis all his rights in the management of the corporation, of which Ellis owned fifty per cent. of the stock, and these two men the remaining fifty per cent., and after they had procured the vote of his stock, by him, in their favor, as officers of the corporation, and before he became aware that they would refuse him election as an officer.

Up to that time, the corporation had never made any claim to Ellis that it was interested in the ownership of the automobile.

POINT III.

The Trial Judge erroneously held that the title to the property vested in the Kirby Company, because the defendant did not receive from the sales company a bill of sale as provided by Chapter 168 of the Laws of 1919, and the said Kirby Company did receive such bill of sale, although it was sent to the company without defendant's knowledge, after the sale had been made and the property delivered to the defendant.

Assuming the Act to be constitutional, and assuming that it was the intention of the seller to sell to Ellis and the intention of Ellis to buy the automobile for himself, and that pursuant to said purpose, the automobile was delivered to Ellis and was paid for; and assuming that by virtue of the statute such sale was unlawful because no manufacturers' bill of sale was issued to Ellis, in compliance with the statute, nevertheless, it would not follow that the right of possession of said automobile vested in the plaintiff.

It was incumbent upon the plaintiff to prove that he had the right to possession, and under the proofs of the case, and the issues tendered, such right of possession was based solely upon his title to the property.

Such title could not be based upon the mere lack of title or right of possession in the defendant.

IF THE PLAINTIFF FAILED TO PROVE A RIGHT OF POSSESSION TO THE PROPERTY IN HIMSELF, HE WAS NOT ENTITLED TO A VERDICT AGAINST THE DEFENDANT, REGARDLESS OF THE QUESTION OF TITLE OR RIGHT OF POSSESSION IN THE DEFENDANT.

It is respectfully submitted that this judgment should be reversed.

WARREN DIXON,
Counsel of Defendant-Appellant.

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Appeal Printing Co., 22 Thames St., N. Y. City

