

I N D E X

	PAGE
Summons.	1
Complaint.	2
Answer.	17
Postea.	18
Notice and Grounds of Appeal.	19
PLAINTIFF'S TESTIMONY:	
Louis D. Champion—Direct.	21
Cross.	26
Recalled—Direct.	39
Walter Reed—Direct	28, 32
Cross.	30, 35
George S. Ruhland—Direct.	39
Cross.	46
Re-direct.	52
Defendant's Motion for Non-suit.	53
Motion for Direction of Verdict.	54
Exhibit P2, Check.	54

SUMMONS.

THE STATE OF NEW JERSEY, to CHICAGO FIRE AND
MARINE INSURANCE COMPANY, Chicago, Illinois,
a corporation of the State of Illinois:

You are summoned to answer the an- 10
nexed complaint of Louis D. Champion
(Seal) in an action at law in the Supreme Court.

And take notice that unless you file
your answer to said complaint with the
Clerk of the Supreme Court at Trenton, within
twenty days after service upon you of this writ and
the annexed complaint, the plaintiff proceed in the
suit and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of
the Supreme Court at Trenton, this third day of 20
July, 1926.

EDWARD J. KELLEHER,
Clerk.

BABCOCK & CHAMPION,
Attorneys for Plaintiff.

5. Plaintiff's loss thereby was twelve hundred and fifty dollars.

6. On October 13, 1925, plaintiff furnished the defendant with proof of his loss and interest in the said property and otherwise duly performed all of the conditions of said policy on his part.

Defendant has not paid the said loss.

10 Plaintiff demands as damages the sum of twelve hundred and fifty dollars, besides costs of suit to be taxed.

BABCOCK & CHAMPION,
Attorney for Plaintiff.

Non-Valued Fire, Theft and Transportation
Automobile Policy
Form No. 2

20 No. A. 12088 CHICAGO Stock Company
FIRE AND MARINE INSURANCE COMPANY
OF
CHICAGO, ILLINOIS

30 IN CONSIDERATION OF THE PREMIUM
HEREINAFTER MENTIONED DOES INSURE
the Assured named herein, and legal representatives,
for the term herein specified, to an amount not ex-
ceeding the amount of insurance herein specified,
against direct loss or damage, from the perils in-
sured against, to the body, machinery and equip-
ment of the automobile described herein while with-
in the limits of the United States (exclusive of
Alaska, the Hawaiian and Philippine Islands and
Porto Rico) and Canada, including while in build-
ing, on road, on railroad car or other conveyance,
ferry or inland steamer, or coastwise steamer be-

tween ports within said limits. The following are
the perils insured against:

PERILS INSURED AGAINST.

(a) Fire, arising from any cause whatsoever;
and lightning;

(b) While being transported in any conveyance
by land or water, the stranding, sinking, collision,
burning or derailment of such conveyance, includ-
ing general average and salvage charges for which
the Assured is legally liable. 10

(c) Theft, robbery or pilferage, excepting by any
person or persons in the Assured's household or in
the Assured's service or employment, whether the
theft, robbery or pilferage occur during the hours
of such service or employment or not, and except-
ing also the wrongful conversion, embezzlement, or
secretion by a mortgagor or vendee in possession
under mortgage, conditional sale or lease agree-
ment, and excepting in any case, other than in case
of the theft of the entire automobile described here- 20
in, the theft, robbery or pilferage of tools and repair
equipment.

Amount \$1500.00

.50 less 15% Fire

Rate .80 less 20%

Premium \$15.97

Name of Assured LOUIS D. CHAMPION
Address of Assured 232-234 West Washington
Avenue, Pleasantville, New Jersey.

The term of this policy begins at noon on the 8th 30
day of December 1924, and ends at noon on the 8th
day of December, 1925, Standard Time.

Amount of insurance ONE THOUSAND, FIVE
HUNDREDand no/100 Dollars
(\$1500.00)

Warranties

- 1. Assured's occupation or business is Attorney
- 2. The following is the description of the automobile:

YEAR	MODEL	TRADE NAME	TYPE OF BODY (if truck state tonnage)
1924		Rickenbacker	Sedan
FACT. OR			ADVERTISED
10 SER. NO.		MOTOR No.	HORSE POWER
F-11625		11788	
	No. OF CYL.		LIST PRICE
	6		

- 3. The facts with respect to the purchase of the automobile described are as follows:

PURCHASED BY THE ASSURED		
Mo.	YEAR	NEW OR SECOND HAND
Dec.	1923	New
ACTUAL COST TO ASSURED including equipment		
20 \$2335		

THE AUTO DESCRIBED, IS FULLY PAID FOR BY THE ASSURED AND IS NOT MORTGAGED OR OTHERWISE ENCUMBERED EXCEPT AS FOLLOWS

No exceptions

- 4. The uses to which the automobile described is and will be put, are business and pleasure.
- 5. The automobile described is usually kept in Private garage, located 234-232 W. Washington 30 Avenue, Pleasantville, New Jersey.

Countersigned at Pleasantville-
N. J. 7-57 this 8th day of Dec.
1924.

Bassett Brothers
By M. E. Bassett, Jr.
Agent

This Policy is subject to the ADDITIONAL CONDITIONS Printed on reverse hereof.

WARRANTIES BY THE ASSURED.

The Assured's occupation or business where the subject of this insurance is used in connection therewith, the description of the automobile insured, the facts with respect to the purchase of same, the uses to which it is and will be put, and the place where it is usually kept, as set forth and contained in this policy, are statements of facts known to and warranted by the Assured to be true, and this policy is issued by the Company relying upon the truth thereof.

PROPERTY EXCLUDED.

This Company shall not be liable for:

- (a) Loss or damage to robes, wearing apparel, person effects, or extra bodies; WAR RIOTS, ETC. 20
- (b) Loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, military, naval or usurped power, or by order of any civil authority.

OTHER INSURANCE.

No recovery shall be had under this policy, if at the time a loss occurs there be any other insurance covering such loss, which would attach if this insurance had not been effected.

CANCELLATION.

This policy shall be cancelled at any time at the request of the Assured, in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rate premium for the expired term. This policy may be cancelled at any time by the Company 30

by giving to the Assured a five (5) days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired term, which excess (if not tendered) shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand. Notice of cancellation mailed to the address of the Assured stated in the policy shall be a sufficient notice.

10 **LIMITATION OF LIABILITY AND METHOD OF DETERMINING SAME.**

This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated accordingly, with proper deduction for depreciation however caused (and without compensation for the loss of use of the property), and shall in no event exceed what it would then cost to repair or replace the automobile or such 20 parts thereof as may be damaged with other of like kind and quality; such ascertainment or estimate shall be made by the Assured and this Company, or if they differ, then by appraisal as hereinafter provided.

ABANDONMENT.

It shall be optional with this Company to take all or any part of the property at the appraised value where appraisal is had as hereinafter provided, but there can be no abandonment thereof to this Company; and where theft is insured against the Com- 30 pany shall have the right to return a stolen automobile or other property with compensation for physical damage, at any time before actual payment hereunder.

LOSS FOR WHICH BAILEE FOR HIRE IS LIABLE.

This Company shall not be liable for loss or damage to any property insured hereunder while in the possession of a bailee for hire under a contract, stipulation or assignment whereby the benefit of this insurance is sought to be made available to such bailee. Where loss or damage occurs for which a bailee may be liable and which would otherwise be covered hereunder, this Company will advance to the assured by way of loan the money equivalent of such loss or damage, which loan shall in no circum- 40 stances affect the question of the Company's liability hereunder and shall be repaid to the extent of the net amount collected by or for account of the Assured from the bailee after deducting cost and expense of collection.

NOON.

The word "Noon" herein means noon of standard time at the place the contract was made.

MISREPRESENTATION AND FRAUD.

This entire policy shall be void if the Assured has 20 concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud, attempted fraud, or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy shall be void unless otherwise provided by agreement in writing added hereto:

TITLE AND OWNERSHIP.

(a) If the interest of the Assured is the subject 30 of this insurance be other than unconditional and sole ownership; or in case of transfer or termination of the interest of the Assured other than by death of the Assured or in case of any change in the nature of the insurable interest of the Assured in the property described herein either by sale or otherwise; or

(b) If this policy or any part thereof shall be assigned before loss.

ENCUMBRANCE.

Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage to any property insured hereunder,

(a) While encumbered by any lien or mortgage.

10 (b) While the automobile described herein is frequently or habitually used as a public or livery conveyance for carrying passengers for compensation, and for one week after the termination of said use; or while being rented under contract or leased, or operated in any race or speed contest.

PROTECTION OF SALVAGE.

20 In the event of loss or damage occasioned by a peril insured against herein the Assured shall protect the property from further loss or damage and any such further loss or damage occurring directly or indirectly from a failure to protect shall not be recoverable under this policy. Any such act of the Assured or this Company or its agents in recovering, saving and preserving the property described herein, shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party, and all reasonable expenses thus incurred shall constitute a claim under this policy; provided however that this Company shall not be 30 responsible for the payment of a reward offered for the recovery of the insured property unless authorized by the Company.

NOTICE AND PROOF OF LOSS.

In the event of loss or damage the Assured shall give forthwith notice thereof in writing to this Company; and within sixty (60) days after such loss,

unless such time is extended in writing by this Company, shall render a statement to this Company signed and sworn to by the Assured, stating the place, time and cause of the loss or damage, the interest of the Assured and of all others in the property, and sound value thereof and the amount of loss or damage thereon, all encumbrances thereon, and all other insurance whether valid or not covering said property; and the Assured, as often as required, shall exhibit to any person designated by this Com- 10 pany all that remains of the property insured and submit to examinations under oath by any person named by this Company, and subscribe the same; and as often as required, shall produce for examination all books of accounts, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

APPRAISAL.

20 In case the Assured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraiser shall first select a competent and disinterested umpire; and failing for fifteen (15) days to agree upon such umpire then, on request of the Assured or this Company, such umpire shall be selected by a judge of a court of record in the County and State in which the property insured was located at time of loss. 30 The appraisers shall then appraise the loss and damage stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of sound

value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

PAYMENT OF LOSS.

This Company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal, or to any
10 examination herein provided for; and the loss shall in no event become payable until sixty (60) days after the notice ascertainment, estimate and verified proof of loss herein required have been received by this Company, and if appraisal is demanded, then not until sixty days after an award has been made by the appraisers.

SUBROGATION.

This Company may require from the Assured an assignment of all right of recovery against any party
20 for loss or damage to the extent that payment therefor is made by this Company.

SUIT AGAINST COMPANY.

No suit or action on this policy for the recovery of any claim hereunder shall be sustainable in any court of law or equity unless the Assured shall have fully complied with all the foregoing requirements, nor unless commenced within twelve (12) months next after the happening of the loss; provided that
30 where such limitation of time is prohibited by the laws of the State wherein this policy is issued, then and in that event no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE PROVISIONS, EXCLUSIONS, CONDITIONS AND WARRANTIES SET FORTH HEREIN OR ENDORSED HEREON, and upon acceptance of this policy the Assured agrees that its terms embody all agreements then existing between himself and the Company or any of its agents relating to the insurance described herein, and no officer, agent or other representative of this Company shall have power to waive any of
10 the terms of this policy unless such waiver be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached.

PROVISIONS REQUIRED BY LAW TO BE STATED IN THIS POLICY:—This policy is in a stock corporation.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy
20 shall not be valid unless countersigned by a duly authorized agent of the Company.

Frederick O'Brien

Secretary

Harold M. O'Brien

President

CHICAGO

Fire and Marine Ins. Co.

FIRE EXTINGUISHER ENDORSEMENT

In consideration of the reduction in premium
30 granted under this policy, it is made a condition thereof that the assured will at all times during the life of this policy carry on the automobile insured, in a readily accessible place, at least one Fire Extinguisher approved by the Underwriters' Laboratories, Inc., and bearing their label; and that the assured will use due diligence to maintain the said

Fire Extinguisher in full and complete working order during the life of this policy.

All other terms and conditions of this policy remaining unchanged.

Attached to and forming a part of Policy No. 12088 of the CHICAGO FIRE AND MARINE INSURANCE COMPANY, of Chicago, Ill. issued at its Pleasantville, New Jersey Agency.

BASSETT BROTHERS

10 By M. E. Bassett, Jr., Agent

Dated December 8th, 1924

CHICAGO

Fire and Marine Ins. Co.

AUTOMOBILE LOCKING DEVICE

ENDORSEMENT

In consideration of a reduction in premium, it is warranted by the insured that the automobile insured under this policy will be continuously equipped with a locking device known as Rickenbacker (approved) by the Underwriters Laboratories of the National board of Fire Underwriters and bearing their label.)

20

The insured undertakes during the currency of this policy to use all diligence and care in maintaining the efficiency of said locking device in locking the automobile when leaving same unattended.

All other terms, conditions and warranties of this policy remain unchanged.

30 Attached to and forming a part of Policy No. 12088 of the CHICAGO FIRE AND MARINE INSURANCE COMPANY, of Chicago, Illinois, issued at its Pleasantville, N. J. Agency.

BASSETT BROTHERS

By M. E. Bassett, Jr., Agent

Dated December 8th, 1924

CHICAGO

Fire and Marine Ins. Co.

ENDORSEMENT (Illicit Traffic)

It is distinctly understood and agreed that the policy to which this endorsement is attached shall be null and void if the Automobile or Automobiles insured thereunder are used in illicit traffic in violation of the National Prohibition Act of Oct., 1919, by or with knowledge or consent of the assured or anyone in the Assured's household service or employment.

Attached to and forming part of Policy No. 12088 10 of the CHICAGO FIRE AND MARINE INSURANCE COMPANY, of Chicago, Ill., issued at its Pleasantville, N. J. Agency.

BASSETT BROTHERS

By M. E. Bassett, Jr., Agent

Dated December 8, 1924

HAROLD M. O'BRIEN, President

FREDERICK O'BRIEN, Vice-President and Secretary

WILLETT M. POTTER, Treasurer

20

WILLIAM J. NOLAN, Secretary

CHAS. R. McCABE, Jr., Secretary

HENRY HOFFMAN, Ass't Secretary

Non-Valued

Fire, Theft and Transportation

AUTOMOBILE POLICY

Form No. 2

Expires December 8th, 1925

Property-Rickenbacker

Amount, - - - - - \$1500.00

30

Premium - - - - - \$ 15.97

Louis D. Champion

No. A. 12088

CHICAGO
 FIRE AND MARINE
 INSURANCE COMPANY
 of
 CHICAGO, ILLINOIS
 CASH CAPITAL \$1,000,000
 PLEASE READ YOUR POLICY

10

No. of Policy _____
 No. of Renewal _____
 Amount Insured _____

YEAR MO. DAY
 Date of Cancel _____

“ Policy, _____

Time in force, _____

20

Premium paid, - - - \$ _____
 “ earned at rate \$ _____
 “ returned - - - \$ _____
 If pro rata, state
 reason why: _____

30

RECEIPT FOR RETURN PREMIUM
 To Be Signed by the Assured
 _____ Agency _____ 19 _____
 IN CONSIDERATION OF _____ Dollars
 return premium, receipt of which is
 hereby acknowledged this Policy is
 hereby cancelled and surrendered to the
 Company.

Assured.

ANSWER.

NEW JERSEY SUPREME COURT.
 ATLANTIC COUNTY.

LOUIS D. CHAMPION,
Plaintiff,

10

v.

CHICAGO FIRE AND MARINE
 INSURANCE COMPANY OF
 CHICAGO, ILLINOIS, a cor-
 poration of the State of
 Illinois,

Action at Law.
 Answer.

Defendant.

20

The defendant, Chicago Fire & Marine Insurance
 Company of Chicago, Illinois, answering the com-
 plaint in the above matter says:

1. The allegation that the plaintiff was the owner
 of an automobile on December eighth, 1924, is ad-
 mitted. The allegations that the plaintiff was the
 owner of said automobile on August twenty-second,
 1925, is denied.

30

2. The allegations of paragraph two are admitted.

3. The allegations of paragraph three are ad-
 mitted.

- 4. The allegations of paragraph four are denied.
- 5. The allegations of paragraph five are denied.
- 6. The allegations of paragraph six are denied.

JOSEPH BECK TYLER,
Attorney for Defendant.

10

POSTEA.

NEW JERSEY SUPREME COURT.

LOUIS D. CHAMPION,
Plaintiff,

v.

CHICAGO FIRE & MARINE
INSURANCE COMPANY,
Defendant.

Action at Law.
Postea.

20

This case was tried before Judge William F. Sooy, without a jury, at the Atlantic Circuit on Friday, November 18, 1927.

30 The Judge directed a general verdict against the defendant and in favor of the plaintiff for twelve hundred (\$1,200) dollars.

W. F. Sooy,
C. C. J.

NOTICE AND GROUNDS OF APPEAL.
NEW JERSEY SUPREME COURT.

LOUIS D. CHAMPION,
Plaintiff,

v.

CHICAGO FIRE AND MARINE
INSURANCE COMPANY OF
CHICAGO, ILLINOIS,
Defendant.

Notice and Grounds
of Appeal. 10

To Babcock and Champion, Esqs., attorneys for plaintiff:

Take notice that the defendant appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals of New Jersey on the following grounds: 20

1. The defendant's motion for a non-suit should have been granted by the trial Court.

2. The facts proven by the plaintiff did not constitute a larceny or theft under the terms of the defendant's policy of insurance.

3. The facts proven by the plaintiff constituted an embezzlement of the plaintiff's car and was excepted from the defendant's insurance policy. 30

4. The facts proven by the plaintiff and the fair inference to be drawn therefrom did not warrant the trial Court in directing a verdict for the plaintiff.

JOSEPH BECK TYLER,
Attorney for Appellant.

TESTIMONY.

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

10 LOUIS D. CHAMPION, }
 Plaintiff, }
 v. }
 CHICAGO FIRE AND MARINE }
 INSURANCE COMPANY OF }
 CHICAGO, ILLINOIS, a cor- }
 poration of the State of }
 Illinois, }
 Defendant. }

20

The above-entitled case was tried November 18, 1927, before HONORABLE WILLIAM FRANK SOOY, Judge, and without a jury by consent of counsel for the plaintiff and counsel for the defendant.

APPEARANCES:

30 MESSRS. BABCOCK & CHAMPION, by MR. BABCOCK,
 for the plaintiff.
 JOSEPH BECK TYLER, Esq., for the defendant.

(Mr. Babcock opens the plaintiff's case to the Court.)

(Mr. Tyler opens the defendant's case to the Court.)

LOUIS D. CHAMPION, the plaintiff, called as a witness in his own behalf, being sworn, was examined and testified as follows:

Direct examination. 10

By Mr. Babcock:

Q. Mr. Champion, you are the plaintiff in this suit, are you not?

A. I am.

Q. Were you on August 22, 1925, the owner of a Rickenbacker car?

A. I was.

Q. How long had you owned that car? 20

A. I purchased it from the G. S. Ruhland & Company in December, 1923.

Q. Model what?

A. 1924 model.

Q. And price what?

A. The price was \$2335 delivered.

Q. Had you the car insured against theft?

A. I had. And other things.

Mr. Tyler: Witness says 1923. Which is correct? 30

The Witness: I purchased it in 1923, but it was a 1924 model.

Q. Have you the policy here?

A. Yes. The policy is there with the papers.

Q. Will you produce it, please?

(Witness produces a paper purporting to be the policy in question.)

Mr. Babcock: I offer the policy in evidence. It is admitted by the pleadings.

10 Mr. Tyler: No objection.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff, P1.)

Q. Mr. Champion, what do you say as to whether or not the Rickenbacker car to which you have referred is or is not the car specified in this policy which has just been offered in evidence?

A. It is the same car.

20 Q. Did you compare the numbers yourself?

A. Yes, sir. I compared the numbers with the numbers in the bill of sale at the time I received this policy.

Q. Did you in 1925 purchase a new car, another car, from Mr. Ruhland?

A. I did.

Q. What kind of car was that?

A. That was a Rickenbacker car, 1925 model, eight cylinders.

30 Q. In a very brief way, did you have an accident with the car that you first mentioned?

A. I did.

Mr. Tyler: I do not think that is material.

Q. When did you purchase the other car?

A. In April of 1925.

Q. And upon the purchase of that car what did you do with the car which is specified in this insurance policy?

A. On the purchase of the new car, I placed the old car with Mr. Ruhland with instructions to sell at a price not less than \$1,250. That was in April of 1925.

Q. Was that car involved in any way with the purchase of the new car? 10

A. Not in any way at all. I paid cash for the new car. The check for it is in the file.

Mr. Babcock: Is there any dispute about that?

Mr. Tyler: I would like to have proof of the check.

Q. Is that the check? (Paper shown to and examined by the witness.)

A. This is the check by which payment was made. 20

Mr. Babcock: I offer this in evidence.

(The check offered is received in evidence and marked as an exhibit for the plaintiff, P2.)

Q. What was the price of the new car?

A. The price of the new car delivered was \$2,595.

Q. How does it happen that your check is for \$2,125 instead of the amount which you stated? 30

A. As was developed a moment ago, I had an accident with the old car, and the accident was due to a defect in the steering apparatus. After the accident none of the family wanted to ride in the old car because every time we rode it brought up visions of the accident. So we wanted to trade it in. I spoke

to Mr. Ruhland about it, and Mr. Ruhland was a very good friend of mine, and he said if I wanted to purchase a new car in view of the trouble I had with the old car being due to the defect in the steering apparatus, he would sell me a new car at the exact cost to him, which meant that he would deduct his commission, and he told me that price was \$2,125, and that is the reason I paid him \$2,125.

Q. Did your son work in the office of Mr. Ruhland?

10 A. He did in the summer of 1925, prior to the time I left for my vacation.

Q. Were you able to make sale of your old car?

A. No; that is, it had not been sold up to the time I left for my vacation, which was about the 10th of August, 1925.

Q. Upon your return from your vacation, what did you discover?

A. When I came back from my vacation, which was about the first or second of September, I think, 20 1925, I was anxious to know whether the car had been sold. So my first day in the office I called Mr. Ruhland by telephone and received the shock that the car had been stolen.

Mr. Tyler: I object to that. It is hearsay evidence.

The Court: Yes. I will strike that.

30 Q. Well, you telephoned to Mr. Ruhland, did you?

A. I telephoned to Mr. Ruhland.

Q. As the result of your telephone conversation with Mr. Ruhland, what did you do?

A. I immediately got in touch with George Basset, who is a member of the firm of Basset Brothers, agents in Pleasantville, who had placed the insurance for me with the defendant company.

Q. And their names are on the policy as agents?

A. Their names are on the policy as agents.

Q. What notice did you give?

A. I notified Basset Brothers of the theft of the car, as I had been advised by Mr. Ruhland, and my understanding was that Mr. Basset immediately called the Philadelphia office, and on September 4th of the same year the adjuster for the defendant company called to see me at my home in Pleasantville, and I told him all the details as I had been advised 10 of the theft of the car.

Q. Was that as the result of your notice to Mr. Bassét?

A. It was.

Q. Subsequently did you write a letter to the Basset agency?

A. I did, on September 17th, I think it was the date.

Q. Have you a copy of that letter?

A. I have a copy in the file, yes, sir. 20

Mr. Tyler: There is no question that the company denied liability.

Mr. Babcock: There is no question that we made our proof, and it may be stipulated that we are not required to go to proof of loss if the company denies liability.

The Court: Yes. 30

Q. Were you ever able to discover the car?

A. I was not Mr. Babcock. I made inquiries of the Police Department. I understand —

Mr. Tyler: I object to the understanding.

Q. Were you ever able to get any clue to the person who was supposed to have taken it or locate the car or the person?

A. I was not. I have watched every Rickenbacker I saw on the road to see if that was my old car.

Q. What was the condition at the time you left it for sale with Mr. Ruhland?

A. Well, mechanically the car was in first class condition. I had just had it just shortly prior to the time I left it with Mr. Ruhland, thoroughly overhauled. I had new piston rings put in, valves ground, and all necessary repairs made. I cannot tell all the repairs that were made. I had had the car painted and I had had new cord tires placed on it all the way around; because I fully intended to keep the car another year, it was such a good car and in such good shape that I intended to keep it.

Cross-examination.

20

By Mr. Tyler:

Q. Mr. Champion, the check for \$500 that was given at the time the car was turned over to this prospective purchaser, where is that?

A. I don't know where that is, unless it be in the Prosecutor's hands.

Q. Have you had it?

A. I have not had it, and I have not seen it.

30

Q. You never saw it?

A. I never saw it myself.

Q. Now, the difference between the purchase price of the new car and the amount you paid for it was \$475?

A. \$470.

Q. \$470 correct. And you delivered this car to

Mr. Ruhland in April and he had it until August of 1925?

A. Well, that is his statement to me. I delivered it to him in April of 1925, and it was still in his possession when I left for my vacation.

Q. It was not there when you came back?

A. It was not there when I came back.

Q. And you delivered it to him for the purpose of it being sold?

A. With instructions that it be sold. 10

Q. And Mr. Ruhland was acting as your agent to sell the car, is that correct?

A. As my agent to sell the car, yes, sir.

Q. Now, was the car used at all?

A. Pardon me?

Q. Was the car used from April to August?

A. Not by me.

Q. Well, now, I am not asking that. Was it used? Did your son use it?

A. Oh, no. 20

Q. Was it used by Mr. Ruhland or any of his employees?

A. Not that I know of. They had no authority to use it if they did.

Q. And the repairs, or whatever was done to the car to put it in condition, was done prior to the time that you delivered it to Mr. Ruhland?

A. Exactly.

Q. That was after April 8th, 1925, when you bought your new car, you made no repairs on it at all? 30

A. No, sir.

Q. You paid no storage bills or anything of that kind while it was there?

A. No.

Mr. Tyler: That is all.

Mr. Babcock: That is all.

(Witness excused.)

WALTER REED, called as a witness on behalf of the
10 plaintiff, being sworn, was examined and testified as
follows:

Direct examination.

By Mr. Babcock:

Q. What is your business?

A. Automobile salesman.

Q. How long have you been engaged in that busi-
20 ness?

A. Oh, about fourteen years.

Q. In the conduct of that business, do you have
occasion to pass upon cars that have been used, cars
that you may take in trade, and to determine the
value of used cars?

A. Yes, sir.

Q. Do you know the value of used cars?

A. Yes, sir.

Q. Are you acquainted with Mr. Champion?

30 A. Slightly.

Q. Did you know him in 1925?

A. Yes, sir.

Q. Did you know that he had purchased a Ricken-
backer car, 1924 model?

A. Did I know that he had purchased a Ricken-
backer car, 1924 model? Yes, sir.

Q. Do you remember that car?

A. Yes, sir.

Q. In 1925, did you know that Mr. Champion
bought a new car from Mr. Ruhland?

A. Yes, sir.

Q. Were you sales agent under Mr. Ruhland at
that time?

A. Not at the time of his purchase, no, sir.

Q. How about the second purchase?

A. Not at the time of the second purchase. 10

Q. You were there later?

A. Later.

Q. When did you become an agent of Mr. Ruh-
land?

A. I don't know the exact time. I judge it was
around June, June of 1925.

Q. Was there a Rickenbacker car in your show
room, a used car, when you went there?

A. Yes, sir.

Q. Do you know whose car that was? 20

A. Yes, sir.

Q. Whose was it?

A. Mr. Champion's.

Q. The plaintiff in this suit?

A. Yes, sir.

Q. Did you know what the car was there for?

A. Yes, sir.

Q. What?

A. To be sold.

Q. Did you know the price of it? 30

A. Yes, sir.

Q. What was the price of it?

Mr. Tyler: I object to that.

The Court: I presume the value of the car has to
be proved. The asking price I do not believe is an
element of proof.

Q. Were you familiar with the car, familiar with that particular car?

A. Familiar with that particular car?

Q. Yes.

A. Why, yes.

Q. Did you then, and do you now know what its value was then?

A. Yes, sir.

Q. What was its value?

10

Mr. Tyler: May I examine as to his qualifications?

The Court: Yes.

Cross-examination as to witness' qualifications.

By Mr. Tyler:

Q. Had you ever bought or sold a Rickenbacker
20 car before?

A. Personally bought?

Q. Yes.

A. I never bought, but I sold.

Q. Did you ever sell a second-hand Rickenbacker
car?

A. Yes.

Q. When was that?

A. Well, I sold one that same year, more than one
that same year, while I was employed with Mr.
30 Ruhland.

Q. With Mr. Ruhland?

A. While I was employed there.

Q. How many second-hand Rickenbackers had you
ever sold?

A. Well, that I don't know, how many I had sold.

Q. Did you or Mr. Ruhland fix the value of the
sale?

A. Well, if I was out trading in a car from you, I
would give you a price myself. Of course, that would
be subject to Mr. Ruhland's approval possibly.

Q. That would be a trade-in on another car?

A. If I was trading in, yes.

Q. But did you ever fix the price for the sale of
a second-hand Rickenbacker car yourself?

A. No.

Q. You never did?

A. No.

Q. You never appraised a second-hand Ricken-
backer car for sale in the market aside from trade-in
on another car?

A. While I was in his employ, no.

Q. Well, you never did with a Rickenbacker while
you were in anyone's employ, did you?

A. Yes; I have given values, and sell and set
values on them.

Q. On Rickenbacker cars?

A. Yes.

Q. When was that?

A. Why, I would not say exactly. After I left
Mr. Ruhland I handled the used car department of

Q. I mean before?

A. Before that time?

Q. Yes.

A. Well, it is pretty hard to say. I sold hun-
dreds of cars in my time. Just when I have I
wouldn't say. I have sold all makes of cars.

Q. When did you ever sell a second-hand Ricken-
backer car prior to your going with Mr. Ruhland?

A. I wouldn't say just when it was.

Q. Well, did you?

A. Yes.

Q. To whom?

A. That would be hard to say.

Q. Can't you place a single sale either by name or date?

A. No, I couldn't by name or date.

Q. And when was it you last saw the Rickenbacker car in question?

A. After—that I last saw the Rickenbacker car?

Q. Of Champion?

A. The Champion Rickenbacker car?

10 Q. The Champion Rickenbacker car.

A. When the man drove it away from the place.

Q. When the man drove it away from your place?

A. Yes.

Q. Were you the one sold it to him?

Mr. Babcock: I object to that. We are only cross-examining as to his qualifications.

The Court: Yes.

20 Mr. Tyler: That is all.

Direct examination resumed.

By Mr. Babcock:

Q. You said that you sometimes engaged in dealing in used cars, is that right?

A. Yes, sir.

30 Q. And in the conduct of your business, are you or are you not required to be able to determine the value of cars offered in exchange?

A. Absolutely.

Q. Of different makes?

A. Yes, sir.

Q. What in your opinion was the value of the Champion car in question on August 22, 1925?

A. Why, the way we value a second-hand car, naturally a second-hand car is worth all you can get for it; but we always have a low mark on it. Now, you take the car in the condition his was in, I estimated the lowest value of it would be around twelve to thirteen hundred dollars.

The Court: Twelve to what?

The Witness: Twelve to thirteen hundred dollars. 10

Q. What was the condition of that particular car?

A. That particular car was in very good condition.

Q. The price of twelve to thirteen hundred dollars, would that be a cash figure or trade-in figure?

A. That would be a cash figure. We would not trade in a car on that figure.

Q. Will you please explain what happened with respect to that car on August 22, 1925?

A. On August 22, 1925, I was left in charge of the 20 floor of the show room at 3303 Atlantic Avenue.

Q. In Atlantic City?

A. In Atlantic City. Mr. Ruhland went out of town. Some time around noon or thereabouts, as near as I can remember, there was a stout man, not quite as tall as I, came in and said that he had been in before and had seen Mr. Ruhland about this particular car that we have talked about, and he wanted to take the car out and show it to his family and ride in it, and I told him I had no authority to let 30 him have that car; that Mr. Ruhland was out of town; that there was no way possible I could let him do it. Well, he said he wanted it; that he was going to show it to his people; that he was going to buy the car and that he wanted to buy it. "Well," I said, "I can't let you do it. You will have to get

authority from Mrs. Ruhland," who was up at the Garden Pier, and I told him where he could find her, and he went up there and in about half an hour or three-quarters, along about that, he came back with a note saying that—in the note telling me to let him have the car to show his people, and he said he would return it in about half an hour and let us know what he decided to do, and I never seen him from that day to this.

- 10 Q. What kind of looking man was he?
 A. He was a stout man not quite as tall as I.
 Q. Light or dark?
 A. I would not say. I do not remember.
 Q. And about what age?
 A. I judge a middle-aged man—well, from forty-three to forty-six, along about that.
 Q. Had you ever seen him there before?
 A. No; I don't think I ever saw him there.
 Q. Smooth-faced?
 20 A. Smooth-faced.
 Q. Have you seen the car since that time?
 A. No, sir.
 Q. Have you seen the man since that time?
 A. No, sir.
 Q. Did he come back with the car in half an hour or at any other time?
 A. No, sir.
 Q. When he didn't return, what did you do?
 A. When he didn't return I kept trying to get in
 30 touch with Mrs. Ruhland up at the Pier, and finally we did get in touch with each other. We were both worried.
 Q. You tried to get in touch with Mrs. Ruhland, did you?
 A. Yes.
 Q. And did Mr. Ruhland come back that day?

- A. Mr. Ruhland came back later on that day.
 Q. Did you make any report to him about it?
 A. I didn't see him any more that day.
 Q. You didn't see him?
 A. No.
 Q. And that was all your connection with it, was it?
 A. Yes.
 Q. Won't you please state in a general way what was the appearance of the car? 10
 A. The appearance of the car was a maroon car. The paint looked like new on it, and it was a disc wheel car, and it had new rubber on it. Its general condition was a car that had been well taken care of, looked almost like new.
 Q. Now, how about it mechanically?
 A. Mechanically—well, I couldn't say exactly mechanically, except that the only time I heard the motor run was when the man took it out of the place. 20
 Q. Do you know how much mileage it had made?
 A. No, I do not.

Cross-examination.

By Mr. Tyler:

- Q. You say this was August 22nd, that the man took the car out?
 A. Yes, sir. 30
 Q. Did he leave a check with you?
 A. No, sir.
 Q. Wasn't there a check for five hundred dollars given to somebody?
 A. I believe that there was. I don't know that there was.

Q. Did you ever see that check?

A. No, sir.

Q. Do you know what that check was given for?

A. No, sir.

Q. Did you have any conversation with this man about the check at all?

A. No, sir.

Q. The man got the car to show to his family, didn't he?

10 A. Yes, sir.

Q. You had fixed a price on the car?

A. I had not.

Q. Hadn't he talked to you about how much he was to pay for it?

A. No, sir.

Q. He wanted to show the car to his wife, didn't he?

A. That is what he told me.

20 Q. And he took the car away from the place to show to his wife?

A. Yes,

Q. You were there when he took it?

A. Yes, sir.

Q. Took it with your consent?

A. Yes, sir, after I had been notified by Mrs. Ruhland to let him have it.

Q. If he liked it he was going to buy it, and if he didn't like it, he was going to return it?

30 A. I don't know what he was going to do, whether he was going to buy it—I didn't know what he was going to do because I didn't handle the sale, had no connection with it.

Q. You didn't handle the sale?

A. No, if there was a sale.

Q. Did he drive the car himself?

A. Yes, he drove the car himself.

Q. Who handled the sale?

A. What did you say?

Q. Who handled the sale?

A. If there was any sale, I said. I don't know who handled it.

Q. You don't know who handled it?

A. No.

Q. But you understood he was a prospective buyer?

A. Yes. He led me —

Q. And he was going to take it to show to his 10 family?

A. Yes.

Q. He was going to take it to show to his wife?

A. Yes.

Q. And one of the conditions of his buying it was that his wife should approve it, wasn't it?

A. As far as I know.

Q. As far as you know, his wife did approve of it?

A. Beg pardon?

Q. As far as you know, his wife did approve of it? 20

A. No, not as far as I know.

Q. You never heard anything to the contrary?

A. I never heard anything either way.

Q. In other words, you delivered the car to this prospective buyer?

A. No, sir; I did not deliver it to him.

Q. I thought you said that you refused to deliver it until he got consent of Mrs. Ruhland?

A. I didn't say that. I didn't say that I delivered the car to him. I said I let him take the car. When 30 we deliver a car we get cash, and I didn't get no cash. So therefore I didn't deliver it.

Q. Well, he came there and took the car with your consent?

A. Yes, he drove the car.

Q. That is true?

A. Yes.

Q. You would not call that a delivery?

A. Absolutely not.

Q. Well, anyway, he took the car with your consent?

A. Yes.

Q. As a prospective buyer to show to his wife; that is true, isn't it?

A. Yes, sir.

10 Q. And that was one of the conditions—that his wife should approve the car before he bought it?

A. I don't know anything about it.

Q. What?

A. I don't understand it the way you put it there.

Q. Well, you understood he was showing it to his wife?

A. That is all.

Q. And she was to approve it before he bought it?

20 A. Not that part at all; just that he was to show it to his wife is where I ended.

Q. You understood he was a prospective purchaser?

A. I did not. I understood he was taking it to show to his wife.

Q. What did you think he was showing it to his wife for?

A. It was not my business —

30 Mr. Babcock: Does that make any difference? He simply let him take it out on the strength of the note he got from Mrs. Ruhland. The man got in the car and said he was going to show it to his wife.

The Court: I do not suppose it makes any difference what he thought about it, anyhow.

Mr. Tyler: I think we ought to be able to show all the circumstances under which he let this man take the car away from the place.

The Court: Yes, but I do not think what he thought about it is at all controlling.

Mr. Tyler: That is all.

(Witness excused.)

10

LOUIS D. CHAMPION, recalled.

By Mr. Babcock:

Q. What mileage had the lost car made?

A. Between thirteen and fourteen thousand actual miles. 20

Q. Driven by you?

A. Yes, sir.

(Witness excused.)

GEORGE S. RUHLAND, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows: 30

Direct examination.

By Mr. Babcock:

Q. In 1923, 1924 and 1925, did you have a Kickenbacker automobile agency in Atlantic City?

- A. I did.
- Q. Were you acquainted with Mr. Champion during those years?
- A. Very well.
- Q. In December of 1923, did you sell him a Rick-enbacker car?
- A. I did.
- Q. What model was that?
- A. 1924 sedan.
- 10 Q. In or about the month of April or some time in the spring of 1925, did you sell him another car?
- A. I did.
- Q. What about that time happened to the car which you had previously sold him? I don't want to lead you, but was it left with you for any purpose?
- A. Yes; it was left with me.
- Q. What was the purpose—what was the price of the first car which he bought, the car which is in
- 20 question here?
- A. I think it was \$2335 delivered.
- Q. What was the price of the new car which you sold him in the spring of 1925?
- A. I think that delivered for \$2,850 or \$2,650. I have really lost track of what those prices are—or were, rather.
- Q. Mr. Champion testified it was \$2595.
- A. \$2595? Well, now, he is correct about that.
- Q. Are you uncertain in your recollection about
- 30 that?
- A. Yes.
- Q. Are you out of the automobile business now?
- A. I am, yes.
- Q. There has been offered in evidence a check made by Mr. Champion to your order, bearing date April 8th, 1925, for \$2,125 purporting to bear your

endorsement. Did you receive that check from Mr. Champion?

A. Yes.

Q. What does it represent?

A. That represents the cost price on the eight-cylinder brougham that I delivered to Mr. Champion.

Q. That is the second car?

A. Yes, that is the second car.

Q. Why was it at the cost price?

10

A. Mr. Champion's first car, he was unfortunate enough to have an accident with that through an automobile steering knuckle, through a defective steering knuckle, and, of course, that was after the three months guarantee, the manufacturer's guarantee of the car —

Q. Without going into any detail about it, was that why you sold him the second car at what the car cost you?

A. Yes, because the factory would not make any adjustment and I had been very friendly with Mr. Champion, and naturally I wanted to favor him.

Q. What would have been your commission on the second car?

A. About \$400.

Q. Well, what happened, you say, to Mr. Champion's old car, we will call it, after he bought the new car from you in 1925?

A. Well, he left the car with us to sell.

Q. Any figure placed upon it?

30

A. A minimum figure of \$1250.

Q. In what condition was the car?

A. In excellent condition.

Q. As to appearance, what?

A. Excellent.

Q. And mechanically?

A. Excellent also.

Q. Were you to receive anything for making a sale of it?

A. No; it was through a friendly proposition.

Q. Where was the car kept?

A. 3303 Atlantic Avenue.

Q. In what?

A. In the show room.

Q. Was the show room kept locked nights or when
10 there were no attendants there?

A. Oh, yes.

Q. And when the show room was opened, were there or were there not any attendants there?

A. There were always attendants there when the show room was opened.

Q. Do you remember August 22, 1925?

A. Yes.

Q. Were you at the show room that day?

A. I was not.

20 Q. Where were you?

A. I was up in Philadelphia.

Q. Prior to that time, had you had any persons who appeared to be prospective purchasers for Mr. Champion's car?

A. Yes; we had quite a few.

Q. The witness who was just upon the stand has described a man who pretended to be interested in the car as a man about forty-five or forty-six years of age, heavy set, smooth face. Do you remember

30 any person of that general description?

A. Yes, I do.

Q. Being interested. When had you seen such a person?

A. Well, he had been in our show room probably three or four different times.

Q. Had he manifested any interest as a prospective purchaser?

A. He was—we really figured he was a prospective purchaser.

Q. Was he there the day before you went to Philadelphia?

A. Yes, he was.

Q. Now, on that occasion was there anything said about whether you would or would not be home the following day?

A. Yes. I had tried to sew up the deal that particular day, and he told me—well, he said, "I am
10 unable to do anything just today, but positively tomorrow we will talk business." "Well," I said, "I am sorry but I have to go to Philadelphia tomorrow."

Q. You were the agent who represented the Rickenbacker people in Atlantic City?

A. Yes, sir.

Q. And was the office there in your charge and control?

A. Yes.

Q. Did anybody have authority from you, any of your attendants there, this gentleman who was just on the stand or any other person—have any authority from you to allow that car to go out of the place?

A. No, sir.

Q. Did your wife or any person have authority from you to allow that car to be taken from the premises?

A. No, sir.

Q. Or to make a sale of it?

A. Well, they were allowed to make a sale of it, but they could not deliver the car because the bill of sale would have to be signed by me before a notary.

Q. Would anybody have the right—I mean did you give anybody the authority at all to remove the car from the show room?

A. Oh, not at all.

Q. For just what purpose did Mr. Champion leave that car with you?

A. Well, he left it for me to sell.

Q. Is that all?

A. Yes.

Q. When did you get back from Philadelphia after you had been away on the 22nd?

A. The following day.

10 Q. Did you discover anything about this Champion car then?

A. Yes, I did.

Q. From whom?

A. From Mrs. Ruhland.

Q. And did you make inquiry at the show room?

A. I did.

Q. As the result of what you learned both at the show room and from Mrs. Ruhland, what did you do?

20 A. Well, I immediately came down to your office to report the fact that I had —

Mr. Tyler: That is objected to.

Q. Well, you came down to my office and made some report?

A. Yes.

Q. What did we do?

30 Mr. Tyler: That is objected to, and it is after the occasion.

The Court: Well, it is admitted that the police were notified.

Mr. Babcock: If you make all those admissions I will say very frankly it is to show that he was diligent, notified the Police Department.

The Court: There is no question or controversy between you that the car was stolen, and no controversy in so far as Mr. Champion is concerned; that he did the things that were required of him to be done under the terms of the policy.

Mr. Tyler: That is not my understanding, if your Honor uses the word "stolen," because that is a question under the circumstances related —

The Court: That is it. Under the circumstances 10 related.

Q. Was there any check given by this party who got the car?

A. Well, there was a check for \$500.

Q. What was that for?

A. That was, as I understood, a guarantee for the return of the car?

Q. Was the check good or bad?

A. The check was bad. There was no account in 20 the bank at all.

Q. Do you know where the check is now?

A. It is in the Prosecutor's office.

Q. Were you before the Grand Jury?

A. Yes, I was before the Grand Jury.

Q. In your dealings as automobile sales-agent, did you have occasion to pass upon the value of used cars?

A. Yes, quite frequently.

Q. Did you know the value of a used Ricken- 30 backer car on August 22, 1925?

A. Yes.

Q. What in your judgment was the cash value of Mr. Champion's car on that date?

A. Well, the minimum value would be twelve hundred dollars.

Q. Is that a greater or lesser value for trade purposes?

A. Well, it would have greater value for trade purposes.

Q. Greater value?

A. Yes.

Q. Was the value you have given the cash value?

A. That is the cash value.

10 Mr. Babcock: That is all.

Cross-examination.

By Mr. Tyler:

Q. You say this car had been in an accident?

A. Yes.

Q. What happened to the car?

A. The steering knuckle had developed a flaw.

20 Q. And as the result of the accident, what damage was done to the car?

A. One of the wheels had to be replaced and a new set of steering knuckles installed.

Q. Any damage to the fenders?

A. Not that I remember.

Q. Any damage to the body?

A. No.

Q. Repairs were made?

A. Yes.

30 Q. How much did they cost?

A. I don't recall.

Q. You don't recall. Did you make the repairs?

A. I don't even recall that, whether we made them or not.

Q. Who signed this check for \$500?

A. If I remember right the man's name was Williams, but I can't swear that that was his name.

Q. Who was the check made to?

A. It was made to G. S. Ruhland Company.

Q. What did the check have on it?

A. Pay to the order of G. S. Ruhland Company, \$500.

Q. Anything else on the check?

A. That is all.

Q. Whom did he leave that check with?

A. I don't know. I found the check on my desk. Now, understand, we have two offices. 10

Q. I understand. But here was a check that was left for \$500, Mr. Ruhland, and you don't know to this day who received that check?

A. I don't really.

Q. Did you receive it?

A. No; I was away.

Q. Then you don't know what was said or the circumstances under which it was left, do you?

A. Only through the report that I had.

Q. From whom? 20

A. From Mr. Reed and from Mrs. Ruhland.

Q. From Mrs. Ruhland?

A. Yes.

Q. Well, Mr. Reed said he didn't get the check. Did Mrs. Ruhland get it?

A. Must have gotten it.

Q. Mrs. Ruhland must have gotten the check?

A. Yes.

Q. So that there is no significance in the fact that the difference between what Mr. Champion paid for 30 the car and the amount of the check was just about the same, is there?

A. What Mr. Champion paid for the car?

Q. Yes. Mr. Champion paid \$470 less than the list price. Is there any significance between the \$470 which he got off the new car and the \$500 check which was left for the old car?

A. I don't see that that has anything to do with it.

Q. You don't think it has anything to do with it?

A. No. I don't see where it has anything to do with it.

Q. If you had gotten the check cashed for \$500 you would have then received a total of \$2125 plus \$500 making \$2625 all together, wouldn't you?

A. The only way I could have sold that car —

10 Q. I am not asking you that. That would have been the total amount you would have received?

Mr. Babcock: I object to that.

Mr. Tyler: Well, all right. It is immaterial.

Mr. Champion: I thought that this witness wanted to answer that question.

20 Q. Now, you say your salesman was allowed to sell cars. That is what they were there for, weren't they?

A. Yes.

Q. And Mr. Reed was one of your automobile salesmen?

A. Yes.

Q. And in selling the car they could take it out and demonstrate it?

A. Only with my permission.

30 Q. Well, they could take it out and demonstrate it?

A. Oh, yes.

Q. And you permitted your salesmen to take cars out to demonstrate them, didn't you?

A. Yes.

Q. That was understood?

A. Yes.

Q. In other words, if some one came in and paid \$1,250 for this car, the salesman could have sold it for that?

A. Yes.

Q. And all that would have been done would be to get you to sign a bill of sale, that is true, isn't it?

A. That is true.

Q. Now, did this prospective purchaser whose name you say you think was Williams, who signed 10 the check, talk to you about buying this car?

A. Yes.

Q. Did he say he was coming back the next day?

A. Yes—no, the following day when I returned.

Q. Now, as a matter of fact, didn't he say he was coming back the next day and that you spoke to Mr. Reed about taking care of him when he came back?

A. No, no.

Q. Did he speak to you about showing the car to his wife; that he wanted to have her approve it? 20

A. No.

Q. Now, if the check for \$500 which was left had been good, how much would have been the balance to pay on the car?

Mr. Babcock: I object, if your Honor please.

Q. I will put it this way: He talked to you about buying the car?

A. Yes. 30

Q. What price had you put on it?

A. \$1300.

Q. If the check had been good, it would have left a balance of \$800 to be paid?

A. Yes.

Mr. Babcock: I object to that. Under the testimony of this case there was not any sale of the car to this man, and whether the difference—what the difference is between five and thirteen hundred dollars is a mere matter of calculation. The witness cannot help us any on that. The car was not in fact sold to this man.

The Court: I will admit it, but it does not have
10 any probative force, as I see it, at all.

Mr. Tyler: The witness has answered the question.

Q. If the check for \$500 had been paid, and an additional \$800 been paid, there would have been a sale of the car?

A. Yes.

20 Mr. Babcock: I object.

The Court: He has answered it. It is clear there would have been a sale for \$1300.

The Witness: If a man buys a car and pays the price and closes the transaction, there is a sale.

Mr. Tyler: I think I ought to be permitted to proceed without argument.

30 The Court: Yes. Proceed, Mr. Tyler.

Q. Upon what bank was the check for \$500 drawn? On what bank?

A. I believe it was the Seaside Trust.

Q. In Atlantic City?

A. Yes.

Q. Did you deposit the check for payment?

A. No, I did not.

Q. Did you take it to the bank?

A. Yes, immediately upon my return.

Q. When?

A. Immediately upon my return.

Q. That was on the 23rd?

A. Well, I assume it was the 23rd.

Q. You presented the check for payment? 10

A. I went up to the bank to find out whether his account was good.

Q. You found out it was not?

A. Yes.

Q. And you took the check up to get the money?

A. I took the check up to present it to the bank to find out whether he had an account.

Q. But assuming that it was good, you took it up to get the money?

A. No, because I would have deposited it in my
own bank. 20

Q. You would have deposited it in your own bank?

A. Yes, I would have deposited it in my own bank.

Q. If you got a favorable report on the check you then would have deposited it to your own account?

A. Yes.

Q. When had this man Williams been in to see about this car before, how many times?

A. At least three or four times. 30

Q. When was that?

A. Most any time during the day.

Q. Well, I mean what days as regards August 22? Fix the days if you can?

A. Oh, it is impossible.

Q. Would you say the day before? That would be August 21st.

A. It might have been two or three days prior to that; but he was in that number of times at least.

Q. Within the week or ten days or two weeks prior to that?

A. Within two weeks.

Q. Within two weeks prior to that?

A. Yes.

Mr. Tyler: That is all.

10

Re-direct examination.

By Mr. Babcock:

Q. In answer to Mr. Tyler's question you said that your salesmen demonstrated cars. In your business I suppose you had to demonstrate a car?

A. Oh, yes.

Q. Now, with respect to Mr. Champion, did anybody have any authority to take that car out for any purpose?

A. No. I gave orders that that car was not to be removed unless I sanctioned the removal of it.

Q. When your agents completed the sale of a car—I mean negotiated the sale of a car, by whom was the final consummation of the car conducted?

A. Well, it was all made through me, because I had to draw up the New Jersey bills of sale to make the sale legal.

Q. And after that followed the delivery of the car?

A. Then the car was delivered after the bill of sale was executed.

(Witness excused.)

PLAINTIFF RESTS.

DEFENDANT'S MOTION FOR NON-SUIT.

Mr. Tyler: I move for a non-suit on the following grounds:

First, the policy which has been offered in evidence in Paragraph C on the first page, provides for payment from the theft, robbery or pilferage, excepting by any person or persons in the insured's household or in the insured's service or employment, whether the theft, robbery or pilferage took place during the hours of employment or not, and excepting also for wrongful conversion, embezzlement or secretion by mortgagor, etc. 10

Second, there must have been a felonious taking.

Third, that the facts in this case constitute not a felonious taking in the sense necessary, but a wrongful conversion or embezzlement of a car that had been delivered to the alleged thief. (Citing *Stewart v. Home Fire Insurance Company of California*, 124 Atlantic, page 773.) 20

The Court: I will deny the motion for a non-suit and allow an exception, of course.

Mr. Tyler: Exception.

30

DEFENDANT RESTS.

*Motion for Direction of Verdict
Plaintiff's Exhibit*

Mr. Babcock: I think we are entitled to a direction.

The Court: The plaintiff moves for a direction of verdict, and the Court grants that motion, directing a verdict in the sum of \$1200.

EXHIBIT P2.

LOUIS D. CHAMPION
COUNSELLOR-AT-LAW
Suite 511, Guarantee Trust Bldg.
Atlantic City, N. J.

Pleasantville, N. J. Apr. 8 1925

55-429 THE FIRST NATIONAL BANK 55-429

20 Pay to the
order of G. S. Ruhland Co. \$2125.00/100
Twenty-one hundred twenty-five 00/100 Dollars
No. 3071 L. D. Champion

ENDORSED:

G. S. Ruhland Co.
Pleasantville Trust Co. of Pleasantville, N. J.
Guarantee Trust Co. of Atlantic City, N. J.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

LOUIS D. CHAMPION,
Appellee,

v.
CHICAGO FIRE & MARINE INSURANCE COMPANY OF
CHICAGO, ILLINOIS,
Appellant.

BRIEF FOR APPELLEE.

This case was tried in the Atlantic County Circuit Court before W. Frank Sooy, Judge, without a jury. It is a suit upon a fire and theft policy covering an automobile which is alleged to have been stolen under the circumstances hereinafter set forth. A copy of the fire insurance policy is attached to the complaint (S. of C., page 4) and covers the plaintiff in terms as follows:

“(c) Theft, robbery or pilferage, excepting by any person or persons in the assured’s household or in the assured’s service or employment, whether the theft, robbery or pilferage occur during the hours of such service or employment or not, and excepting also the wrongful conversion, embezzlement, or secretion by a mortgagor or vendee in possession, under mortgage, conditional sale or lease agreement, and excepting in

any case, other than in case of the theft of the entire automobile described herein, the theft, robbery or pilferage of tools and repair equipment."

After proofs were taken the defendant moved for a non-suit (S. of C., page 53) as follows:

"First, the policy which has been offered in evidence in paragraph C on the first page, provides for payment from the theft, robbery or pilferage, excepting by any person or person in the insured's household or in the insured's service or employment, whether the theft, robbery or pilferage took place during the hours of employment or not, and excepting also for wrongful conversion, embezzlement or secretion by mortgagor, etc.

Second, there must have been a felonious taking.

Third, that the facts in this case constitute not a felonious taking in the sense necessary, but a wrongful conversion or embezzlement of a car that had been delivered to the alleged thief."

The motion for a non-suit was denied and the plaintiff moved for direction of a verdict and the Court directed a verdict in favor of the plaintiff in the sum of \$1,200.00.

The facts are that the plaintiff purchased a car from George S. Ruhland, the Atlantic City Rickenbacker agent, in December, 1923. The alleged theft of which car took place on August 22nd, 1925, while the car was in the possession of said Ruhland. In April, 1925, the plaintiff had purchased a new Rickenbacker car from said George S. Ruhland and claims to have left the old car with George S. Ruh-

land as a second-hand car for sale. The price of the new car delivered was \$2,595.00 (S. of C., page 23) and a check was produced showing a payment of \$2,125.00. This check is Exhibit P2. (S. of C., page 54.) A difference of \$470.00.

The plaintiff claims that Mr. Ruhland (S. of C., pages 23-24) allowed him \$470.00 off of the price of the new car for the reason that "Mr. Ruhland was a very good friend of mine," and because of an accident with the old car "It brought up visions of the accident," and then adds these significant words "So we wanted to trade it in."

Also, Mr. Ruhland testified that the car belonged to Mr. Champion and was held by him merely for the purpose of a sale but added (S. of C., page 52):

"Q. When your agents completed the sale of a car—I mean negotiated the sale of a car, by whom was the final consummation of the car conducted?

A. Well, it was all made through me, because I had to draw up the New Jersey bills of sale to make the sale legal."

Mr. Champion, by his testimony, speaks of trading in the car and Mr. Ruhland speaks of his giving the bill of sale therefor. Further than this there is a difference of \$470.00 between the amount paid for the new car and the price thereof which is only accounted for by friendship. The car traded in was about two years old and had had a slight accident. In addition to this, the car apparently was sold for \$500.00, which is about the difference between the price paid for the new car and the amount of the check, Exhibit P2.

The sale took place under the following circumstances:

Ruhland had the car in his shop or show-room since April, 1925, for sale, and on August 22nd, 1925, a man by the name of Williams came in to buy it. (S. of C., page 33.) The witness, Walter Reed, a salesman employed by Ruhland, was in charge at that time. Mr. Ruhland was away and the salesman refused to deliver the car without the authority of Mrs. Ruhland. (S. of C., page 33.) The purchaser then got in touch with Mrs. Ruhland and came back with a note authorizing the delivery of the car. (S. of C., page 34.) It also appears that he had left a check for \$500.00 with Mrs. Ruhland. (S. of C., page 47.) The purchaser then took the authority from Mrs. Ruhland to the salesman, Reed, and obtained possession of the car. When Mr. Ruhland returned the following day, he presented the check which had been made payable to the order of G. S. Ruhland Company to the bank for payment. (S. of C., page 50.) The check was drawn on the Seaside Trust Company of Atlantic City and was presented for payment on August 23rd, 1925. Ruhland testified as follows:

“Q. You presented the check for payment?

A. I went up to the bank to find out whether his account was good.

Q. You found out it was not?

A. Yes.

Q. And you took the check up to get the money?

A. I took the check up to present it to the bank to find out whether he had an account.

Q. But assuming that it was good, you took it up to get the money?

A. No, because I would have deposited it in my own bank.

Q. You would have deposited it in your own bank?

A. Yes, I would have deposited it in my own bank.

Q. If you got a favorable report on the check you then would have deposited it to your own account.

A. Yes”

Also, Ruhland testified (S. of C., page 50): If the check for \$500.00 had been paid and an additional \$800.00 had been paid there would have been a sale of the car.

It thus appears clearly that there was a voluntary delivery of the possession of the car and a conditional sale thereof by Ruhland, either for himself or as the duly authorized agent of the plaintiff. There appears to be no question as to the authority of Ruhland to sell the car in question.

As to the delivery of the car, the salesman testified (S. of C., page 36) as follows:

“Q. He wanted to show the car to his wife, didn't he?

A. That is what he told me.

Q. And he took the car away from the place to show to his wife?

A. Yes.

Q. You were there when he took it?

A. Yes, sir.

Q. Took it with your consent?

A. Yes, sir, after I had been notified by Mrs. Ruhland to let him have it.

Q. If he liked it he was going to buy it, and if he didn't like it, he was going to return it?

A. I don't know what he was going to do, whether he was going to buy it—I didn't know what he was going to do because I didn't handle the sale, had no connection with it.

- Q. You didn't handle the sale?
 A. No, if there was a sale.
 Q. Did he drive the car himself?
 A. Yes, he drove the car himself.
 Q. Who handled the sale?
 A. What did you say?
 Q. Who handled the sale?
 A. If there was any sale, I said. I don't know who handled it.
 Q. You don't know who handled it?
 A. No.
 Q. But you understood he was a prospective buyer?
 A. Yes. He led me —
 Q. And he was going to take it to show to his family?
 A. Yes.
 Q. He was going to take it to show to his wife?
 A. Yes.
 Q. And one of the conditions of his buying it was that his wife should approve it, wasn't it?
 A. As far as I know."

And again (S. of C., page 38):

- "Q. Well, anyway, he took the car with your consent?
 A. Yes.
 Q. As a prospective buyer to show to his wife; that is true, isn't it?
 A. Yes, sir."

Again, the witness, Walter Reed, refers to the fact that there was a sale of the car. He says (S. of C., page 36):

- "I didn't know what he was going to do because I didn't handle the sale."

It is hard to escape the conclusion from the testimony of all three witnesses that there was a sale of the car. Champion speaks of trading in the car. The salesman speaks of a sale of the car and Ruhland speaks of his giving a bill of sale therefor and, in addition to this, there is the poorly explained difference between the purchase price of the new car and the amount paid therefor unless it is covered by the trade-in value of the old car and again the trade-in value of the old car corresponds very closely with the sale of the second-hand car for \$500.00.

ARGUMENT.

The policy of insurance expressly excepts wrongful conversion, embezzlement or secretion by a mortgagor or vendee in possession under a mortgage, conditional sale or lease agreement. This makes the case on a civil suit to recover on an insurance policy of this kind different from the ordinary criminal proceeding where a car is obtained by fraud or trickery.

The defendant company, by its contract, has expressly provided against a conversion by a conditional vendee or embezzlement by one who has obtained possession of the car peacefully. It is apparent that the insurance company is endeavoring to protect itself against just such a transaction as this. They have a right to rely upon the protection of insured property by force, if necessary. In other words, the theft or larceny should contain the element of trespass.

CITATIONS.

In *Stewart v. Home Fire & Marine Ins. Co. of California*, 124 Atl. page 773 (not yet reported in State reports), the Supreme Court held:

"The policy was issued in the names of Stewart and Straus, as their respective interests might appear; and one of the perils insured against was theft, robbery or pilferage, excepting, however, the wrongful conversion or embezzlement by the vendee in possession under a conditional sale agreement. The trial resulted in a verdict in favor of the plaintiff and the present rule to show cause was thereupon allowed to the defendant."

And at page 774:

"In our opinion, this verdict is without legal justification, for the reason that the facts above recited will not support the conclusion that there had been a theft of the automobile. Theft, or larceny, involved the idea of a knowingly unlawful acquisition of property; that is, a felonious taking of it from one who has both the actual possession and the apparent right of possession. There was no such taking in this case, either by Straus or Schane. The latter acquired the car in good faith from the lawful possessor thereof, so far as the proofs indicate; and, if it be assumed that the transaction involves criminality on the part of Straus, what he did amounted to an embezzlement, which is a fraudulent conversion of property by the possessor after its possession has been lawfully acquired. 9 R. C. L. p. 126, item 4. Justice Depue, in the

case of *Gardner v. State*, 55 N. J. Law, 24, 26 Atl. 33, says that:

'The natural—import of the word "steal" is that of a felonious taking of property, or larceny.'

And that the parties to this litigation recognized this distinction is made plain by the excerpt from the policy which we have above recited, namely, that the embezzlement or secretion by the vendee in possession under a conditional sale shall not render the company liable under the clause of the policy insuring against theft."

A similar situation arose in the Court of Errors and Appeals in the State of New York in the case of *VanVichten v. Insurance Co.*, 239 N. Y. 303, January 21st, 1925:

"Defendant's policy of insurance covering plaintiff's automobile insures against stated perils, among them 'theft, robbery or pilferage' with exceptions not now material.

Plaintiff left his automobile at a garage and repair shop with instructions to the proprietor to make specified repairs. The proprietor took the car on a trip for his own purposes, and on the homeward journey ran it against a pole. Plaintiff returning to the garage and receiving back his damaged car, makes claim against the insurance company that it reimburse him for his loss. The question is whether there was 'theft' within the meaning of the policy.

By Penal Law, section 1293 a (as it stood when this loss was suffered), 'Any chauffeur or other person who, without the consent of the owner, shall take, use, operate or remove, or

cause to be taken, used, operated or removed from a garage, stable or other building or place—an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use or purpose, steals the same and is guilty of larceny and shall be punishable accordingly.' (L 1910, ch. 621.) Apart from this Statute, the misuse of plaintiff's car by the proprietor of the garage would not constitute a larceny, since there was lacking the felonious intent to appropriate another's property permanently and wholly. (Parr v. Loder, 97 App. Div. 218, 220; Ledvinka v. Home Ins. Co., 139 Md. 434; Mich. Ins. Co. v. Wills, 57 Ind. Appl. 256; Phoenix Ins. Co. v. Epstein, 73 Fla. 991; Valley Mercantile Co. v. St. Paul Ins. Co., 49 Mont. 430; State v. South, 28 N. J. L. 28; Regina v. Tribelcock, 7 Cox Cr. Cas. 408; Pollock & Wright on Possession, p. 225.) Indeed, the very purpose of the Statute was to bring within the definition acts outside of it before. The courts below have held that, however great the innovation, what is now larceny under the Statute is also theft under the policy. We hold another view.

The problem before us is not one of statutory construction. It is one of the meaning of a contract. The Legislature may affix to new combinations of events the name of an old crime. The conclusion does not follow that the same word, and still less another word which once was an equivalent, must suffer a like extension in the thought of parties to a contract. The way is thus pointed to the decision of the case before us. 'Theft' though often used as synonymous with 'larceny,' the proper term of art in the

Penal Statutes of New York, is none the less a looser term, and one more colloquial or popular. (People, *ex rel.*, Jourdan v. Donohue, 84 N. Y. 438, 442.) Neither has a single meaning at all times in all contexts, nor is either always and in every setting the full equivalent of the other. (cf. Holmes, J., in Towne v. Eisner, 245 U. S. 418, 424.) Larceny, in our law of crimes, includes the offense of obtaining property by false pretenses. (Penal Law, 1290; People v. Dumar, 106 N. Y. 502; People v. Miller, 169 N. Y. 339, 351.) If the plaintiff has sold his car on a credit fraudulently procured, he would be the victim of a larceny; yet manifestly the sale would not be theft under the provisions of this contract. Larceny under the Statute was, therefore, something different from theft under the contract even before larceny had been extended to include misuse of motor vehicles. We have no reason to believe that the statutory definition, if inapplicable before, has become applicable now. On the other hand, we do not say that theft is to be limited to what was larceny at common law. We assume that larceny by a bailee or a fiduciary would be theft within the policy though at common law it would be classified under the heading of embezzlement. (Pollock & Wright on Possession, pp. 134, 135, 157, 191.) The distinction now largely obsolete, did not ever correspond to any essential difference in the character of the acts or in their effect upon the victim. The crimes are one today in the common speech of men as they are in moral quality. When we have recourse to these standards for the solution of our problem, the conclusion is not doubtful. The very heading of the new

Statute, 'unauthorized use of motor vehicles,' prefigures an offense that is something less than theft as theft has commonly been known. We read on with a deepening impression of movement from the ancient moorings. Operation of a car without the consent of the owner will be a crime and larceny if it continues for a month or for a day, but so also will it be if it continues for an hour or even a few minutes. Innovations such as these may persist and become general. In course of time, they may sink into common thought and common speech. They have not done so yet. Theft under this contract is theft as common thought and common speech would not image and describe it. One other consideration emphasizes the need for uniformity of meaning. The policy does not limit its protection to casualties suffered while the car is in New York. Theft, robbery and pilferage in any other State are equally within its terms. This without more is sufficient to forbid a reading that would cause the risks to vary with the accidents of local laws. Neither insured nor insurer can have believed that the same act would be theft within the purview of the contract if committed in New York, and a mere trespass or conversion if committed in Massachusetts or New Jersey. They spoke in terms so common, so responsive to realities, as to have a meaning everywhere. By this they must abide.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

Hiscock, Ch. J. Pound, McLaughlin, Crane, Andrews and Lehman, JJ. concur."

This case arose and similar cases have arisen where the owner has delivered lawful possession of the car without transferring title in which cases there is an unlawful use or embezzlement of the car.

The Court held that there is no theft or larceny within the meaning of the policy read in connection with the limitations attached thereto.

In *Hartford Fire Ins Co. v. Wimbish*, 12 Ga. App. 712; *Valley Mercantile Co. v. St. Paul F. & M. Ins. Co.*, 49 Montana 43; and in *Michigan Commercial Co. v. Wills*, 57 Ind. App. 256, the same conclusions were reached. All of these cases were decided in accordance with the decision of the New York Court of Appeals which has been set forth above at some length. And, so far as I have been able to ascertain, there are no cases to the contrary. Therefore, so far as the adjudicated cases control, it may be asserted that they are uniform and that they uniformly hold that there can be no recovery for theft or larceny where there is merely an unlawful conversion after possession peacefully delivered.

The plaintiff in this case relied upon *Gardner v. State*, 55 N. J. L. 17 (26 Atl. 30); and *State v. Deutsch*, 77 Law, 292 (72 Atl. 5).

Both of these were criminal cases and have no bearing in view of the exception in the insurance contract.

While it is true that the defendant is at the mercy of the plaintiff as to what actually took place in regard to this sale it is also true that the plaintiff has not proved the *animo furandi* of the alleged theft. The plaintiff has proven that the car was peacefully delivered and a check for \$500.00 accepted, presented for payment and found to be no good. Even if title did not pass, nevertheless, the purchaser thereby became a vendee in possession. The plain-

tiff cannot infer from this that there was an intent to steal as he never got in touch with the purchaser and cannot, of course, prove why the check was not paid. The proofs are lacking as to the intent of the purchaser.

In *Downs v. New Jersey Fidelity & Plate Glass Ins. Co. of Newark*, 91 Law, 523, 103 Atl. 205, this Court said:

"Theft is defined to be a popular term for larceny. Bouv. Law Dic. (Rawle's Rev.) Vol. 2, p. 1115. Larceny is the felonious taking and carrying away of the personal goods of another. 4 Bl. Com. 229. And this *animo furandi*, that is, with intent to steal. Id. 232. See, also, *Gardner v. State*, 55 N. J. Law. 26, 26 Atl. 30."

In *Gardner v. State*, *supra*, Chief Justice Depue, in syllabus, says:

"3. The word 'steal,' or 'stealing' in a criminal Statute, when unqualified by the context, signifies a taking which at common law would have been denominated 'felonious,' and imports the common-law offense of larceny."

In *State v. McDonald*, 99 Atl. 128; 89 Law, 421, it was said:

"4. Coming now to the present case, 'robbery' is larceny with the element of force or fear entering into it; that is, robbery is larceny plus."

Under all these cases it appears that theft or larceny as used in an insurance contract is meant to cover cases where there was no intention to deliver possession. That where possession is peacefully and lawfully delivered the insurance company is to

be eliminated from the transaction by the exception in its policy.

It is plain that in the present case possession was peacefully and lawfully delivered and only upon finding that the check for \$500.00 was no good was the theft asserted.

It is respectfully submitted that the judgment should be reversed.

JOSEPH BECK TYLER,

Attorney for Plaintiff.

Appellant

New Jersey Court of Errors and Appeals

LOUIS D. CHAMPION,

Appellee

VS.

CHICAGO FIRE & MARINE
INSURANCE COMPANY OF
CHICAGO, ILLINOIS,

Appellant

ON APPEAL

BRIEF

BRIEF FOR APPELLEE

This is an appeal from a judgment recovered in the Atlantic County Circuit Court, for the sum of \$1200.00. Suit was brought by plaintiff upon an insurance policy issued by defendant Company, insuring the plaintiff in the sum of \$1500.00, against loss occasioned by:

“ (a) Fire, arising from any cause whatsoever; and lightning;

“ (b) While being transported in any conveyance by land or water, the stranding, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the Assured is legally liable.

“ (c) Theft, robbery or pilferage, excepting by any person or persons in the Assured's household or in the Assured's service or employment, whether the theft, robbery or pilferage occur during the hours of such service or employment or not, and excepting also the wrongful conversion, embezzlement, or secretion by a mortgagor or vendee in possession under mortgage,

conditional sale or lease agreement, and excepting in any case, other than in case of the theft of the entire automobile described herein, the theft, robbery or pilferage of tools and repair equipment."

The term of the policy commenced at noon December 8, 1924, and ended at noon December 8, 1925. The plaintiff's automobile covered by the insurance policy, was stolen during the life of the policy and the only point raised by the defendant is that there was not a "theft" within the meaning of the terms of the policy.

The facts are: Plaintiff purchased a Rickenbacker car in December of 1923 from G. S. Ruhland & Company, the local Agents, for \$2335.00. Insurance against theft, etc., was promptly obtained by the plaintiff as represented by the policy in this case, a copy of which policy appears on page 4 of the State of the Case. Plaintiff had an accident with the car in March of 1925. He promptly had the car repaired, and put in first class condition, but as the car was a constant reminder of the accident, he determined to trade it in for a new car (pp 23 and 24). The Agent, Mr. Ruhland, who was a close friend of the plaintiff, suggested that as the accident had resulted from a defect in the steering apparatus and as the time of guaranty had expired so that no allowance could be obtained from the factory, he would sell the plaintiff a new car at the actual cost to him and that he would make sale of the plaintiff's old car without any charge (pp 24 and 41).

The plaintiff, acting on the suggestion of Mr. Ruhland, purchased in April of 1925, a new eight cylinder Rickenbacker for \$2125.00 (p. 24) and gave his check for that amount (p. 23). The check was offered in evidence and appears at p. 54. The list price of the car delivered was \$2595.00 (p. 23) and the allowance made to the plaintiff was therefore \$470.00, which was the full amount of the Agent's commission.

The car covered by the insurance policy was, upon the purchase of the new car, placed by the plaintiff in the show-room of the Agent, with the view of the Agent securing a purchaser (p. 40).

The plaintiff gave no one authority to use the car or to remove it from the show-room and it was understood that the minimum price should be \$1250.00 (p. 41).

A few days prior to August 22, 1925, a man purporting to be a prospective purchaser saw Mr. Ruhland and appeared to be interested in the purchase of the machine. The last time he saw Mr. Ruhland was on August 21, 1925.

Mr. Ruhland, who intended to be out of the City the following day, endeavored to consummate a sale. The man then said he had not fully made up his mind, but would come around the following day and he was then told by Mr. Ruhland, that he, Ruhland, would be out of the City and that he should not come then, but should come later (p. 43).

The thief, having obtained information that Mr. Ruhland would be away on the 22nd, came that day and endeavored to get possession of the car from the salesman, Walter Reed, upon the pretense that he wanted to show it to his people (p. 33). He was informed by Mr. Reed that he, Mr. Reed, had no authority to allow the car to be removed; that he could not let him have the car; that Mr. Ruhland was out of town. Later the man came back with a note purporting to be signed by the wife of Mr. Ruhland and the sales agent, Reed, believing that the note was genuine, and that Mrs. Ruhland had a right to act, permitted the thief to remove the car from the show-room and to drive it away, at which time the thief said he would return in about a half hour and let Mr. Reed know what he decided to do. (p. 34). To secure the permission of

Mrs. Ruhland, the thief gave her a check for \$500.00 as a guaranty for the return of the car (p.45). Upon the return of Mr. Ruhland to Atlantic City the day following the theft, he was informed that the car had been stolen. He immediately made inquiry at the local Bank where the check was made payable and learned that there was no account in the name of the maker (p.45) and the check was later turned over to the Prosecutor in connection with criminal proceedings. The thief, who gave his name as Williams, never returned the car and the police authorities have never been able to find him.

Mr. Ruhland had given strict instructions that the car of the plaintiff, was not to be taken out of the showroom, without his, Ruhland's, direction, and that neither Mrs. Ruhland nor any other person had any authority from him to remove the car or to permit its removal (p. 43).

The minimum market value of the car at the time of the theft was \$1200.00 (pp. 33 and 45).

It has been admitted that all of the requirements of the policy respecting proof of claim, etc., have been complied with and the single question is as to whether there has been a theft within the meaning of the policy (p. 45). No testimony was offered in behalf of the defendant and the evidence being uncontradicted and clearly showing the plaintiff's right to a recovery, the Court, sitting without a jury, found a verdict for the plaintiff in the sum of \$1200.00.

ARGUMENT.

The motion for non-suit appears upon page 53 and raises the single question that the facts in the case constitute not a theft or felonious taking, but a wrongful conversion or embezzlement of a car that had been lawfully delivered to the alleged thief, which motion

was denied. For the purposes of the motion, all of plaintiff's evidence must be considered as true.

THE CONTENTION IN BRIEF OF DEFENDANT THAT THERE HAD BEEN A SALE OR EXCHANGE OF THE INSURED CAR IS NOT SUPPORTED BY ANY EVIDENCE IN THE CASE.

Counsel for the defendant, in discussing the facts contends that the plaintiff traded in the old car upon account of the purchase of the new car and was allowed a credit of \$470.00 and in support he refers to the plaintiff's testimony on pages 23 and 24 and says that the words "so we wanted to trade it in" used by the plaintiff are very significant. Reference to the testimony of plaintiff indicates that after the accident, none of the family of plaintiff wanted to ride in the old car, because of the accident and wanted to trade it in and that afterward plaintiff spoke to Mr. Ruhland about it and that Mr. Ruhland said that in view of the accident being due to a defect in the steering apparatus, he would sell him a new car at the cost to him, Mr. Ruhland, which was \$2125.00. Both plaintiff and Mr. Ruhland testified that the car belonged to plaintiff and was held by Mr. Ruhland merely for sale, which testimony Counsel for the defendant quotes, and then quotes from page 52: "Q. When your agents completed the sale of a car—I mean negotiated the sale of a car, by whom was the final consummation of the car conducted? A. Well, it was all made through me, because I had to draw up the New Jersey bills of sale to make the sale legal," which testimony Counsel says refers to the specific sale of plaintiff's car, while the language itself clearly shows that Mr. Ruhland had reference to his general custom. Counsel for defendant further urges

that the old car was apparently sold for \$500.00, which is slightly more than the difference between the amount paid for the new car and the amount of the check Exhibit P2.

It seems unnecessary to argue concerning this contention of the defendant, since it was not included as a ground in the motion for non-suit and was not raised in the Court below; the Court passed upon the facts submitted and having found for the plaintiff, resolved the facts in his favor and the defendant should not now be held in this Court to question the sufficiency of the facts upon which the judgment is founded.

It is well settled that upon an appeal of this kind, this Court will consider only the question presented to the Court below. But, assuming for the sake of argument, that the defendant may raise said contention in this Court, it has no merit. It is established in the case that plaintiff paid \$2125.00 for the new car as shown by his check in evidence; that the difference between the list price delivered of the new car \$2595.00 and the amount paid, \$2125.00, represented the commission of Mr. Ruhland; that the old car cost \$2335.00 and at the time it was left with Mr. Ruhland for sale, it was left with specific instruction that it be sold for not less than \$1350.00; and that the value of the old car at the time it was stolen was \$1200.00. It is very unreasonable to suppose that plaintiff would have traded in a car worth \$1200.00 for an allowance of \$470.00. Furthermore, it is reasonable to suppose that if plaintiff's car had actually been conveyed to Mr. Ruhland, the insurance policy upon which suit is brought would have been assigned to him. Moreover, there is no proof in the case that the old car was sold or that the figure of \$500.00 was referred to as the purchase price. * The testimony is that the figure quoted to the thief was \$1300.00 (p. 49). It is clearly settled by the testimony and the decision of the Court

below, that there was no sale of plaintiff's old car by plaintiff to Mr. Ruhland for \$470.00, as claimed by the defendant.

THERE WAS A THEFT WITHIN THE MEANING OF THE POLICY.

Obtaining possession by artifice or misrepresentation constitutes "theft" within the meaning of the law and of the policy of insurance.

Gardner vs. State, 55 Law, 26; 26 Atl. Rep. 30.

Counsel for appellant recognizing the weakness of the contention above referred to, next contends that there was a sale of the car made by Mr. Ruhland to a man by the name of Williams, the thief. The facts show that said thief had called at Mr. Ruhland's showroom three or four different times and was interested in the purchase of plaintiff's old car for \$1300.00; that the last occasion he spoke with Mr. Ruhland was on August 21, 1925, the day prior to the theft, at which time, he stated that he would call the next day and "talk business", whereupon Mr. Ruhland told him he was obliged to be in Philadelphia the following day. The next day, said Williams called and spoke with the salesman in charge, Mr. Walter Reed, stating that he had been in before and had talked with Mr. Ruhland about plaintiff's old car; that he wanted to show it to his people; that said Reed told him that he could not let him have it; that he had no authority to permit the car out of his possession unless Mrs. Ruhland, the wife of Mr. Ruhland, authorized it; that the said Williams saw Mrs. Ruhland at the Garden Pier in Atlantic City; gave her a check for \$500.00 as a guaranty for the return of the car and she gave said Williams a note instructing said Reed to let said Williams have the car

to show his people, (which note Mrs. Ruhland had no authority to give); that the said Williams thereupon took the car, stating that he would return with it in half an hour and let said Reed know what he had decided to do and that said Williams did not return as promised, nor did he either bring or send the car back. There is not a scintilla of evidence about a sale of the car to said Williams. It is true that he said he was interested in the purchase of the car, but it is urged that the fact is that his interest in the plaintiff's old car was of a criminal character from the very inception of the transaction with him and that at the time he first saw the car he had already formed a criminal intent to steal it, which intent he afterwards successfully carried out by criminal misrepresentation and subterfuge as evidenced by the fraudulent check which he gave to Mrs. Ruhland, which check was drawn upon the Seaside Trust Company of Atlantic City, in which Bank said Williams had no account and which check was turned over to the Prosecutor. The criminal conduct of the said Williams is further manifested in the fact that the car has never been found, although diligent effort was made to recover it.

The appellant contends that the facts referred to show that there was a sale of the car by Mr. Ruhland and a lawful and peaceable delivery thereof under the sale and that therefore, the plaintiff's old car being lawfully in the possession of said Williams, the said Williams did not steal it, but unlawfully converted it or embezzled it.

Theft is defined to be a popular term for larceny.

Bouvier Law Dictionary (Rawle's Rev.) Vol. 2, page 1115.

Larceny is the felonious taking and carrying away of the personal goods of another.

4 Blackstone Commentaries, p. 229.

And this animo furandi, that is with intent to steal, *ibid*, page 232.

In the case of Gardner vs. State, *supra*, decided in the Supreme Court, "the defendant bought a lot of jewelry at the store of S. Bros., to be delivered at her residence, to be paid for on delivery. The jewelry was delivered at the defendant's residence by a messenger, in a covered box, with a C. O. D. bill. The box was handed to a servant who opened the door. The defendant met the servant in the hall, and took the box, and carried it upstairs. In a short time she returned with the box opened, and told the messenger there was no jewelry in it; that there was nothing in the box except a piece of lace trimming, which she exhibited. If the jewelry was in fact in the box, the defendant kept it, and converted it to her own use. The bill for the jewelry was not paid, the defendant insisting that she had not received it. The court charged the jury, that, *if the defendant received the jewelry from the agent of S. Bros., and by a trick or device removed the jewelry from the package in which it was delivered, and substituted other goods for the purpose of converting the jewelry to her own use, and depriving S. Bros. of their property, the defendant was guilty of larceny.* Held, that these instructions, as applied to the facts of the case, were correct, and that the refusal of the court to incorporate in these instructions the words, "with felonious intent," was not error."

The doctrine enunciated in the case of Gardner vs. State, *Supra*, was approved by this Court in the case of Downs vs. New Jersey Fidelity & Plate Glass Insurance Company of Newark, reported in 91 Law, 523, 103 Atl. Rep. 205. The defendant cites the case of Gardner vs. State and urges that it is a criminal case and has no bearing upon the case before the Court. The case of Downs vs. New Jersey Fidelity & Plate Glass Insurance Company, above cited, is a civil case, based upon an

action upon a policy of burglary insurance and this Court in the latter case clearly settled the definition of theft insofar as an action upon a policy of theft insurance is concerned.

In the case of *State vs. Deutsch*, decided in the Supreme Court of this State, reported in 77 Law, 292; 72 Atl. Rep., p. 5, the Court held in an opinion by Mr. Justice Swayze, at page 8, "a man may be found guilty of larceny who obtains property fraudulently, even though the intent of the parties is to pass the title; for, upon ordinary principles of law, the fraud prevents the title from passing.

2 Russell on Crimes, 214ff.

There could be no sale of plaintiff's old car without a compliance of the laws of 1919 at page 357, which requires that in all sales of automobiles, there shall be issued to the purchaser, a bill of sale, witnessed by two persons and acknowledged before a Notary Public.

The Supreme Court, in the case of *Security Credit Corporation vs. Whiting Co.*, reported in 96 Law, p. 86, 118 Atl. Rep., p. 695, held: "The Statute (referring to act of 1919 above cited) makes it unlawful to sell or purchase any motor vehicle except in the manner and subject to the conditions contained in the act."

In the case of *VanHoughton vs. Gizang*, reported in Volume 3, N. J. Mis. Rep., p. 233, which was decided in the New Jersey Supreme Court, the plaintiff, desiring to sell his automobile, had his chauffeur take defendant for a demonstration ride. The defendant, satisfied with the car, directed the chauffeur to drive it to the defendant's garage, where it was left. Defendant then returned to plaintiff, and closed the bargain at \$500. The defendant gave, in payment, \$25 cash, a check for \$75, dated ahead, but later honored and two undated checks for \$200 each, the dates to be inserted later. A week later the defendant requested a bill of sale for

the car, and plaintiff replied that he had no bill of sale, but sent his vendor's receipt. The defendant, after again requesting the bill of sale without result, offered to return the car, but plaintiff refused the tender, and brought action for the unpaid purchase money. Judgment was given for defendant for the return of the deposit, among other things, of \$239.75, which judgment was affirmed and in the opinion of the Court held "the intent of the Legislature by this Act (referring to the Act of 1919 above cited) was to secure the owners of automobiles against theft or robbery by requiring the title papers to accompany the sale of the machine."

In *Gauver vs. Mosher*, 3 Mis. Reports, 605, Vice Chancellor Buchanan, referring to the said Statute held, "without the bill of sale, complainant cannot obtain a license so that he can operate the car in this State and cannot sell it because of the Statute."

The appellant relies upon the case of *Stewart vs. Home Fire & Marine Insurance Company of California*, 124 Atl., p. 173, decided in the Supreme Court. A careful examination of that case discloses that it has no application to the facts in the case before the Court. In that case, the action was brought to recover upon a policy of insurance covering an automobile, the title to which was in the plaintiff and which he had sold under a conditional bill of sale to one Straus, so that Straus was a conditional vendee in possession under the conditional sale agreement. Straus, the conditional vendee, sold the car, without any right so to do, to one Schane. Plaintiff contended that as inasmuch as under the conditional sales contract, title was reserved in him, the sale of the car by Straus was a theft within the meaning of the policy. The Court very properly held that there was no theft since Straus was a conditional vendee and was within the exception to the policy.

In the case in hand, it is clear that there was no delivery of title or possession to Williams. The most that could be said, was that there was an unauthorized delivery so far as plaintiff or his Agent, Mr. Ruhland, was concerned, of the automobile to said Williams, upon the fraudulent representation that he would return within a half hour and advise Mr. Reed, the salesman as to whether he would or would not purchase the car.

The case of *Vichten vs. Insurance Company*, 239 N. Y., 303, January 21, 1925, decided in the Court of Errors and Appeals, in the State of New York, cited by Counsel for appellant in his brief, has no application, it is submitted to the case now before the Court.

Plaintiff in that case left his automobile at a garage and repair shop for repairs. The proprietor then took the car for a trip and on the return journey ran it against a pole, but ultimately returned the car to the garage. Plaintiff, returning to the garage and receiving back his damaged car, brought suit against the Insurance Company, claiming that there had been a theft within the meaning of the policy. The Court very properly held that the misuse of the plaintiff's car by the proprietor of the garage, did not constitute a larceny since there was lacking the felonious intent to appropriate another's property permanently and wholly.

There can be no question that Williams had the felonious intent to appropriate the car of plaintiff in this suit permanently and wholly, as evidenced by the fact that he never returned it.

In the case of *Wieson vs. Automobile Insurance Company of Hartford, Connecticut*, decided in the Supreme Court, reported in 126 Atl., p. 652, (yet unreported in Law Reports) and affirmed in this Court in 130 Atl., p. 921, the Court held that whether

two persons who secretly took plaintiff's car from his garage within policy insuring against theft or whether they merely intended to go joy-riding and return the car was a question for the jury to determine.

In the case now before the Court, the question as to whether said Williams intended to steal the plaintiff's car was a question for the determination of the trial Judge, sitting as a jury and was determined by him in favor of the plaintiff, namely that said Williams did steal plaintiff's car, and there is no exception to his finding, the sole exception being directed to the Court's refusal to nonsuit.

IT IS RESPECTFULLY SUBMITTED that under the facts and cases above referred to, plaintiff's car was stolen and that the theft was a theft within the meaning of the policy and the judgment under review should be affirmed.

BABCOCK & CHAMPION,
Attorneys for Appellee.

