INDEX.

Summons.

(Served March 2, 1926.)

STATE OF NEW JERSEY

To: North American Accident Insurance Company, a corporation. YOU ARE SUMMONED to answer the annexed complaint of Beulah E. Perry, Administratrix of the Estate of Mortimer L. Perry, deceased, in an action at law in the New Jersey 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 (20) days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

(L. S.)

WITNESS, William S. Gummere, Esquire, Chief Justice of the Supreme Court, at Trenton, N. J., this 26th day of February, 1926.

EDWARD J. KELLEHER,
Clerk.

HOBART & MINARD,
Attorneys.

Complaint.

(Served March 2, 1926. Filed March 3, 1926.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

BEULAH E. PERRY, Administratrix of the Estate of Mortimer L. Perry, deceased, Plaintiff, vs. NORTH AMERICAN ACCIDENT INSURANCE COMPANY, a corporation, Defendant.	Action at Law.

1. Plaintiff is the administratrix of the Estate of Mortimer L. Perry, deceased, duly appointed as such on November 18th, 1925, by the Surrogate of Essex County, New Jersey, and resides in the Township of Millburn in said County and State.

2. On January 30, 1925, defendant was, and still is, a foreign insurance company of the State of Illinois, engaged in the business of insuring against loss of life or personal injury through accidents, &c., and had complied and still complies with the conditions imposed by, and had been and still is admitted under, the laws of the State of New Jersey, to transact therein the class of insurance business above mentioned as authorized by law.

3. On January 30, 1925, in consideration of the payment to defendant by one Mortimer L. Perry,

deceased, late of the Township of Millburn, in the County of Essex and State of New Jersey, of a premium of fifty cents ($0.50), defendant made its policy of insurance in writing, a copy of which is annexed hereto, and thereby insuring the life of said Mortimer L. Perry, against accident, for the term of one year beginning at noon, Standard time, of the place where said Perry resided, of the date of said policy, in the sum of one thousand dollars ($1,000.00).

4. In and by the terms of said policy of insurance the defendant insured the said Mortimer L. Perry against death or disability resulting directly and independently of all other causes from bodily injury sustained through external, violent, and accidental means, if the said Perry shall, by the wrecking or disablement of any private horse-drawn vehicle or motor-driven car in which the said Mortimer L. Perry is riding, or, driving, or by being accidentally thrown from such vehicle or car, suffer the loss of his life, the defendant will pay the sum of One thousand dollars ($1,000.00) payable to the estate of the said Perry.

5. On November 6, 1925, and while said policy of insurance was in full force and effect, the said Mortimer L. Perry suffered instant death, resulting directly, and independently of all other causes, from bodily injury sustained through external, violent and accidental means, by the wrecking or disablement of a motor-driven car, to wit, a motor operated vehicle of the bicycle type, commonly called a "motorcycle," in which he was riding or driving, and by being accidentally thrown from such vehicle or car by coming into collision with a motor truck on a certain street or highawy, known

as Millburn Avenue, in the Township of Millburn, Essex County, New Jersey.

6. Immediately upon the event of the accidental death of said Perry, or as soon as it was reasonably possible to do so, written notice thereof was given, on behalf of the beneficiary under said policy of insurance, to the defendant at its home office, 209 South La Salle Street, Chicago, Illinois, with particulars sufficient to identify the said Perry.

7. Upon receipt of such notice the defendant furnished the usual form for filing proof of loss, which form was filled out, covering the occurrence, character and extent of the loss or injury, and, on the 19th day of November, 1925, was filed with the defendant as required by the terms of said policy of insurance.

8. This action is brought to recover on said policy after the expiration of sixty days after proof of loss was filed in accordance with the requirements of said policy, and this action is brought within two years from the expiration of the time within which proof of loss is required by said policy.

9. In and by the terms of said policy it is provided that all indemnities provided therein for loss of life will be paid sixty days after receipt of due proof thereof, but notwithstanding the full compliance with and performance of all the terms and requirements of said policy by the plaintiff, though often requested so to do, the defendant has failed and refused, and still refuses to pay the said indemnity of one thousand dollars ($1,000.00).

WHEREFORE, plaintiff, as executrix of the estate of the said Mortimer L. Perry, deceased, demands as damages one thousand dollars ($1,000.00) with interest from January 19, 1926.

HOBART & MINARD,
Attorneys for Plaintiff.

Policy of Insurance.

This policy provides indemnity for loss of life, limb, sight or time by accidental means, as herein limited and provided.

No. 3645427

NORTH AMERICAN
ACCIDENT INSURANCE COMPANY

CHICAGO, ILLINOIS

(A Stock Company and hereinafter called the Company)

DOES HEREBY INSURE Mortimer L. Perry, age 33, of Milburn, N. J. (hereinafter referred to as the Insured), against Death or Disability resulting directly and independently of all other causes from bodily injury sustained through external, violent, and accidental means, subject to the limitations and conditions herein contained, as follows:

PART I.

If the Insured shall, by the wrecking or disablement of any railroad passenger car or passenger steamship or steamboat, in or on which such Insured is traveling as a fare-paying passenger; or, by the wrecking or disablement of any public

omnibus, street railway car, taxicab, or automobile stage, which is being driven or operated, at the time of such wrecking or disablement, by a licensed driver plying for public hire, and in which such Insured is traveling as a fare-paying passenger; or, by the wrecking or disablement of any private horse-drawn vehicle, or motor-driven car in which Insured is riding or driving, or, by being accidentally thrown from such vehicle or car, suffer any of the specific losses set forth below in this part I, the Company will pay the sum set opposite such loss:

FOR LOSS OF—

Life.....One Thousand Dollars $(1000.00)
Both Hands...One Thousand Dollars ($1000.00)
Both Feet.....One Thousand Dollars ($1000.00)
Sight of Both eyes.....One Thousand Dollars ($1000.00)
One Hand and One Foot...One Thousand Dollars ($1000.00)
One Hand and Sight of One Eye.....One Thousand Dollars ($1000.00)
One Foot and Sight of One Eye.....One Thousand Dollars ($1000.00)
Either Hand....Five Hundred Dollars ($500.00)
Either Foot.....Five Hundred Dollars ($500.00)
Sight of Either Eye.....Five Hundred Dollars ($500.00)

PART II.

OR FOR LOSS OF—

Life.....Two Hundred Fifty Dollars ($250.00) provided the bodily injury effected as stated herein shall be the sole cause of death of the Insured and such injury occurs:

By being struck or knocked down or run over while walking or standing on a public highway by a vehicle propelled by steam, cable, electricity, naphtha, gasoline, horse, compressed air or liquid power, excluding injuries sustained while on a railroad right of way in violation of any statute or of any regulation of the railroad company.

Indemnity for loss of life as above set forth shall be payable to the Estate of the Insured.

PART III.

If the Insured sustains injuries in any manner specified in part I which shall not prove fatal or cause loss as aforesaid but shall immediately, continuously, and wholly disable and prevent the Insured from performing each and every duty pertaining to any and every kind of business, labor or occupation during the time of such disablement but not exceeding three consecutive months, the Company will pay indemnity at the rate of Ten Dollars ($10.00) per week.

PART IV.

EMERGENCY BENEFIT.

REGISTRATION. IDENTIFICATION AND FINANCIAL AID.

The Company will register the person insured hereunder, and if he shall, by reason of injury or sickness, be physically unable to communicate with

relatives or friends will, upon receipt of a message giving this policy number, immediately transmit to such relatives or friends as may be known to it any information respecting the Insured and will defray all expenses necessary to put the Insured in communication with and in the care of relatives or friends provided such expense shall not exceed the sum of One Hundred Dollars ($100.00).

STANDARD PROVISIONS.

(1) This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the Insured or by reason of his duty any act or thing pertaining to any other occupation.

(2) No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.

(3) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the policy, but only to cover loss resulting from accidental injury thereafter sustained.

(4) Written notice of injury on which claim may be based must be given to the Company within twenty days after the date of the accident causing

such injury. In event of accidental death immediate notice thereof must be given to the Company.

(5) Such notice given by or in behalf of the Insured or Beneficiary, as the case may be, to the Company at its Home Office 209, So. La Salle St., Chicago, Ill., or to any authorized agent of the Company, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

(6) The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

(7) Affirmative proof of loss must be furnished to the Company at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Company is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

(8) The Company shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require

during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

(9) All indemnities provided in this policy for loss other than that of time on account of disability will be paid sixty days after receipt of due proof.

(10) Upon request of the Insured and subject to due proof of loss all accrued indemnity for loss of time on account of disability will be paid at the expiration of each thirty days during the continuance of the period for which the Company is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

(11) All the indemnities of this policy are payable to the Insured.

(12) If the Insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the Insured and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

(14) No action at law or in equity shall be brought to cover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

(15) If any time limitation of this policy with respect to giving notice of claim for furnishing

proof of loss is less than that permitted by the law of the state in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

(16) The Company may cancel this policy at any time by written notice delivered to the Insured or mailed to his last address, as shown by the records of the Company, together with cash or the Company's check for the unearned portion of the premiums actually paid by the Insured, and such cancellation shall be without prejudice to any claim originating prior thereto.

(19) If a like policy or policies previously issued by the Company to the Insured be in force concurrently herewith, making the aggregate indemnity for loss other than that of time on account of disability in excess of $1,000.00, or the aggregate indemnity for loss of time on account of disability in excess of $10.00 weekly, the excess insurance of either kind shall be void and all premiums paid for such excess shall be returned to the Insured.

(20) The insurance under this policy shall not cover any person under the age of sixteen years nor over the age of seventy years. Any premium paid to the Company for any period not covered by this policy will be returned upon request.

GENERAL PROVISIONS.

(1) In every case referred to in this policy, the loss of any member or members shall mean loss by severance at or above the ankle or wrist joints; and the loss of sight of eye or eyes shall mean the

total and irrecoverable loss of the entire sight thereof.

(2) Not more than one of the indemnities specified above shall be payable as the result of any one accident.

(3) This policy shall not cover injuries, fatal or non-fatal, suffered without the territorial limits of the continental United States of America.

(4) No indemnity will be paid for death caused by other means or other conditions than those set forth in part I or II, nor will indemnity be paid for loss of limb or sight caused by other means or under other conditions than those set forth in part I, nor in any case where death or such other loss does not occur within thirty days from the date of accident. No indemnity will be paid for disability caused by any other means or under other conditions than those specified in part III. In event of specified loss no indemnity shall be paid for loss of time.

(5) The occurrence of any of the losses mentioned in part I or II shall at once terminate the insurance effected by this policy, and indemnity for more than one of such losses will not be paid under any circumstances other than as provided by part IV.

(6) No provision of the charter or by-laws of the Company not incorporated in full herein shall avoid the policy or be used in evidence in any legal proceeding.

This policy is issued in consideration of the payment of the premium of Fifty Cents ($0.50), for

the term of one year beginning at noon, Standard time, of the place where Insured resides, of the date hereof; and this policy may be renewed only with the consent of the Company for the same premium and for the same period of time, as provided herein, by the payment of such premium, in advance, and a receipt signed by the Secretary and countersigned by a licensed agent of the Company shall be the only evidence binding upon the Company of the payment of a renewal premium.

In Witness Whereof, the said Company has caused this policy to be signed by its President and Secretary, but the same shall not be effective until properly dated and countersigned by duly commissioned authority of the Company.

Dated this 30 day of January, 1925.

Examined and Countersigned by

Karl F. Hall — Secretary. — A. E. West — President. — E. C. Waller

[North American Accident
Insurance Company.
Corporate
Seal
Chicago, Ill.]

READER SERVICE

Travel Accident Policy

NORTH AMERICAN
ACCIDENT INSURANCE
COMPANY
CHICAGO, ILLINOIS.

No. 3645427

Issued to
MORTIMER L. PERRY

This policy provides indemnity for Loss of Life, Limb, Sight or Time by Accidental Means, as herein limited and provided.

Read Your Policy.
Series 229.

A true copy.

EDWARD J. KELLEHER,
Clerk.

To the within-named Defendant:

PLEASE TAKE NOTICE that the plaintiff demands that the said defendant shall file a written specification of defenses intended to be made to this action, on or before the time specified in the within Summons, for the appearance of the defendant.

HOBART & MINARD,
Attorneys for Plaintiff.

Service of within Summons and Complaint acknowledged this 2nd day of March, 1926.

PHILIP J. SCHOTLAND,
Attorney for Defendant.

Filed Mar. 3, 1926.

Notice of Motion to Strike Out Complaint.

(Served March 15, 1926. Filed March 9, 1927.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

BEULAH E. PERRY, Administratrix of the Estate of Mortimer L. Perry, deceased, Plaintiff, vs. NORTH AMERICAN ACCIDENT INSURANCE COMPANY, a corporation, Defendant.	Action at Law.

To
HOBART & MINARD, Esqs.,
Attorneys for Plaintiff.

PLEASE TAKE NOTICE, that on Saturday, March 20, 1926, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall move before his Honor, William S. Gummere, Chief Justice of the New Jersey Supreme Court, or such Justice as shall attend and act in his stead or behalf, at the Court House, in the City of Newark, to strike out the complaint in the above-entitled cause, on the ground that it does not set forth a

cause of action against the defendant in the following particulars:

(a) It states that the deceased, Mortimer L. Perry, was killed while he was riding or driving a motorcycle, by being accidentally thrown from it when it came into collision with a motor truck on a certain stret or highway, known as Millburn Avenue, in the Township of Millburn, Essex County, New Jersey.

(b) The copy of the policy annexed to and made a part of the complaint, and the provisions of which are referred to in paragraph 4 of the complaint do not show any undertaking on the part of the defendant to indemnify in case of death while riding or driving a motorcycle.

(c) The copy of the policy of insurance annexed to and made a part of the complaint, and referred to in paragraph 4 of the complaint, insured the said Mortimer L. Perry against death by the wrecking or disablement of any private horse-drawn vehicle, or motor-driven car, in which he is riding or driving, and the complaint does not allege or show that the said Mortimer L. Perry, when he was accidentally killed, was driving or riding in a private horse-drawn vehicle, or motor-driven car.

Dated March 12, 1926.

Respectfully yours,

PHILIP J. SCHOTLAND,
Attorney for Defendant.

Service acknowledged, March 15, 1926.

HOBART & MINARD,
D. E. M.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Answer.

(Served and Filed April 19, 1925.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

BEULAH E. PERRY, Administratrix of the Estate of Mortimer L. Perry, deceased, Plaintiff, vs. NORTH AMERICAN ACCIDENT INSURANCE COMPANY, a corp., Defendant.	Action at Law.

The answer of North American Accident Insurance Company, a corporation duly organized under the laws of the State of Illinois, and licensed to do business in the State of New Jersey, answering the complaint, says:

1. It admits paragraphs 1, 2, 3 and 4 of the complaint.

2. It denies paragraph 5 of the complaint.

3. It admits paragraphs 6, 7, 8 and 9 of the complaint.

By way of affirmative defense, defendant says:

1. The plaintiff intestate, Mortimer L. Perry, did not die as a result of any accident incurred against and covered by the terms of said policy of insurance, a copy of which is annexed to the complaint.

2. The said Mortimer L. Perry was not riding in or driving a motor-driven car at the time that he met with the accident resulting in his death.

PHILIP J. SCHOTLAND,
Attorney for Defendant.

Answer.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

PHILIP J. SCHOTLAND, of full age, being duly sworn, according to law, on his oath, deposes and says, that he is the attorney for the defendant in the above-stated cause, and has been authorized by the corporation to make this affidavit; and that the above answer is not filed for the purpose of delay, but in truth and in good faith, and that he believes that the North American Accident Insurance Company, a corporation, has a just and legal defense on the merits of the case.

PHILIP J. SCHOTLAND.

Sworn and subscribed to before me
this 19th day of April, 1926.

HELEN JEDELL,
Notary Public
of N. J.

Consent is hereby given to the filing of the within answer as of time, Apr. 19, 1926.

HOBART & MINARD,
Attorneys for Plaintiff.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Notice of Motion to Strike Out Answer and for Final Judgment.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

(Served April 21, 1926. Filed March 9, 1927.)

BEULAH E. PERRY, Administratrix of the Estate of Mortimer L. Perry, deceased, Plaintiff, vs. NORTH AMERICAN ACCIDENT INSURANCE COMPANY, a corporation, Defendant.	Action at Law. Notice.

To:
PHILIP J. SCHOTLAND, Esq.,
Attorney for Defendant.

Dear Sir:

PLEASE TAKE NOTICE that on Monday, April 26, 1926, at ten o'clock in the forenoon, or as soon thereafter as we can be heard, we shall apply to his honor, Samuel Kalish, Justice of the Supreme Court, at his Chambers, Room 910, 738 Broad Street, Newark, N. J., for a rule striking out paragraphs 1 and 2 of the "affirmative defense" set up in the defendant's answer filed herein on the ground that they are sham, and frivolous, and fail to state a just and legal defense to the cause of action alleged in the complaint.

If the above mentioned rule is granted, we will, at the same time and place, move to strike out the above mentioned answer and enter judgment final

in favor of the plaintiff and against the defendant on the annexed affidavit.

Dated, April 21, 1926.

HOBART & MINARD,
Attorneys for Plaintiff.

Affidavit.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

BEULAH E. PERRY, Administratrix of the Estate of Mortimer L. Perry, deceased, Plaintiff, vs. NORTH AMERICAN ACCIDENT INSURANCE COMPANY, a corporation, Defendant.	Action at law. Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

BEULAH E. PERRY, of full age, being duly sworn on her oath, deposes and says:

1. She is the widow of Mortimer L. Perry. And, on November 18, 1925, was appointed administratrix of his estate. An original certificate thereof signed and sealed by the Surrogate of Essex County is attached hereto as Schedule "A."

2. Said Mortimer L. Perry, at the time of his death was insured against accident, of the character from which he suffered death, by the North

American Accident Insurance Company by its policy #3645427, issued and executed January 30, 1925, in the sum of one thousand dollars ($1,000.00).

3. On November 6, 1925, and while said policy of insurance was in full force and effect, the said Mortimer L. Perry suffered instant death, resulting directly, and independently of all other causes, from bodily injury sustained through external, violent and accidental means, by the wrecking or disablement of a motor-driven car, to wit, a motor operated vehicle of the bicycle type, commonly called a "motorcycle," in which he was riding or driving, and by being accidentally thrown from such vehicle or car by coming into collision with a motor truck on a certain street or highway, known as Millburn Avenue, in the Township of Millburn, Essex County, New Jersey.

4. Said sum of one thousand dollars, together with interest thereon from January 19, 1926, is due and unpaid.

5. This action is brought to recover a liquidated demand arising upon contract express, sealed.

6. She believes that there is no defense to this action.

BEULAH E. PERRY.

Sworn and subscribed before me
this 21st day of April, 1926.

B. M. ALBRIGHT,
Notary Public,
(Seal) of New Jersey.
My Commission expires Apr. 22, 1929.

Service of within notice, &c., acknowledged this 21st day of April, 1926.

P. J. SCHOTLAND,
Atty. of Deft.

Schedule "A."

STATE OF NEW JERSEY

ESSEX COUNTY SURROGATE'S COURT

I, E. GARFIELD GIFFORD, Surrogate of the County of Essex, do hereby certify that on the 18th day of November in the year of our Lord, one thousand nine hundred and twenty-five administration of all and singular the goods and chattels, rights and credits which were of Mortimer L. Perry late of the County of Essex, who died intestate, was granted by me to Beulah E. Perry of the County of Essex who is duly authorized to administer the same agreeably to law.

WITNESS MY HAND AND SEAL OF OFFICE, this 18th day of November, in the year of our Lord, one thousand nine hundred and twenty-five.

E. GARFIELD GIFFORD,
Surrogate.

(Seal)

Reply.

(Filed May 4, 1926.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

BEULAH E. PERRY, Administratrix of the Estate of Mortimer L. Perry, deceased, Plaintiff, vs. NORTH AMERICAN ACCIDENT INSURANCE COMPANY, a corp., Defendant.	Action at law. Reply.

The reply of Beulah E. Perry, Administratrix of the Etate of Mortimer L. Perry, deceased, replying to the answer filed herein, says:

1. She denies the allegations of paragraphs 1 and 2 of the affirmative defense therein set forth.

HOBART & MINARD,
Attorneys for Plaintiff.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Testimony.

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT.

BEULAH E. PERRY,
Administratrix,

vs.

NORTH AMERICAN ACCIDENT
INSURANCE COMPANY.

Action at Law.

Friday, January 28, 1927.

Before HON. WILLIAM A. SMITH, J.

For the plaintiff appear HOBART & MINARD (by DUANE E. MINARD).
For the defendant appears PHILIP J. SCHOTLAND.

The Court: Suppose you state what the stipulated facts are so that those will be facts found, and then we can get down to the unstipulated facts. Mr. Schotland can object as you make the statements, Mr. Minard.

Mr. Minard: Subject to Mr. Schotland's criticism about this statement, it is stipulated and agreed that the plaintiff is the administratrix of the estate of Mortimer L. Perry, appointed November 18, 1925, by the Surrogate of Essex County. On January 30, 1925, the defendant insurance company was, and still is, an insurance company of the State of Illinois engaged in the business of insuring against loss of life or personal injury

through accident and had complied, and still complies, with the conditions imposed by, and had been and still is conducted under the laws of the State of New Jersey to transact therein the class of insurance business above authorized. On January 30, 1925, Mortimer L. Perry procured an insurance policy from the defendant company and the original is offered in evidence as Exhibit P-1.

(The same is received in evidence and marked Exhibit P-1.)

Mr. Minard (continuing): By that policy the company agreed to insure Mortimer L. Perry in accordance with the terms of the policy. The premium was fifty cents. Due notice of the death of Mortimer L. Perry was given to the insurance company and proper and timely proofs of loss were filed as required by the terms of the policy.

The Court: Suppose you mark the proof of loss in evidence.

Mr. Schotland: It is admitted by the answer. In fact, the whole stipulation is admitted by the pleadings. The only thing denied is that a death occurred which made the defendant liable.

The Court: What is the dispute?

Mr. Minard: The dispute is whether a motorcycle is a "motor-driven car" as that term is used in the policy. This man was killed while riding a motorcycle. We contend that the term "motor-driven car" includes a motorcycle.

HAROLD R. SMITH sworn in behalf of the plaintiff.

The Court: Is there anything else that bears on the question of interpretation other than that one sentence?

Mr. Schotland: No, that is all there is to it. It says either a "private horse-drawn vehicle" or a "motor-driven car." It is our contention that a motorcycle is not a "motor-driven car." That has been decided by the courts of last resort of Massachusetts and Louisiana.

Direct examination by Mr. Minard.

Q. What is your business? A. Police Sergeant.

Q. Where? A. Millburn.

Q. Were you acquainted with Mortimer L. Perry? A. I was.

Q. Was he connected with the police department? A. Yes, sir.

Q. Are you acquainted with the circumstances surrounding his death? A. I am.

Q. When did it occur? A. November 6th, 1925.

Q. How long had you known the deceased before that? A. Two years—three years previous.

Q. Were you an eyewitness to the accident which caused his death? A. Yes.

Q. Will you explain to the court exactly what happened? A. The whole story?

By the Court.

Q. Did you see him when he was alive just before his death? A. Yes.

Q. Just proceed with the whole story. A. I was standing at the front of headquarters on the steps. He passed me as he was going west on Millburn Avenue. As he passed he saluted—he waved his arm as if signalling he was about to turn.

Q. He was on a motorcycle? A. A motorcycle.

Q. With a side car? A. Without. He continued on for some distance and then proceeded to turn left and he had about turned halfway when I noticed a truck which came in a direct line with him and myself, coming toward him, and this truck continued on at a speed, I should judge, of about thirty miles an hour. About the time he got straight in his turn, the truck struck him; the cycle seemed to leave the road and the officer was thrown up in the air. The officer fell facing the car and the truck continued along. It dragged the officer, I should say, approximately for a distance of 50 feet. About that time I was in front of the truck and I proceeded to pick up the officer from under the truck, but I was unable to do so until assistance arrived. He was under the truck and the motorcycle.

Q. Was he alive or dead? A. I couldn't say that. We proceeded to extricate him from under the truck and took him to the hospital. There the doctor pronounced him dead.

Mr. Minard: If that is all that you require to be proved, it is our case.

PLAINTIFF RESTS.
DEFENDANT RESTS.

Mr. Schotland: If your Honor please, I move for a judgment for the defendant by the court on the ground that this death did not occur under the circumstances against which this policy insured.

(Argument.)

The Court: I will reserve decision.

(Exhibit P-1, which is the policy of insurance, is printed in full at pages 5-14 of this State of the Case.)

Findings and Postea.

(Filed March 4, 1927.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY CIRCUIT.

BEULAH E. PERRY, Admr.,
vs.
NORTH AMERICAN ACCIDENT INSURANCE COMPANY.
Action at Law.

HOBART & MINARD, attorneys for the plaintiff.
PHILIP J. SCHOTLAND, attorney for the defendant.

SMITH, J.:

This case was tried before the Court by consent without a jury, on a stipulation of facts and testimony having been duly referred for trial. The action is based on an accident insurance policy and is brought by the administratrix of the insured to recover one thousand dollars, the face amount of the policy, for the accidental death of the deceased.

The contingencies insured against are stated in the policy as follows: "If the Insured shall, by the wrecking or disablement of any railroad passenger car or passenger steamship or steamboat, in or on which such Insured is travelling as a fare-paying passenger; or, by the wrecking or disablement of any public omnibus, street railway car, taxicab, or automobile stage, which is being driven or operated, at the time of such wrecking or disablement, by a licensed driver plying for public hire, and in which such insured is travelling as a fare-paying passenger; or, *by the wrecking or disablement of any private horse-drawn vehicle, or motor-driven car in which insured is riding or driving, or, by being accidentally thrown from such vehicle or car,* suffer any of the specific losses set forth below in this part 1." (The pertinent parts of the provisions of the policy are underscored.)

The Court finds as facts, in addition to the stipulated facts, that the deceased came to his death during the life of the policy by accidentally being thrown to the ground from a motorcycle which he was riding, such accident being the result of a collision between the motorcycle and a motor truck. The sharp question presented is as to whether or not a motorcycle is a "motor-driven car" within the meaning of the terms of the policy.

The conclusion of the Court is that a motorcycle is not a motor-driven car; that the term "motor-driven car" has a general, present day accepted meaning, is not indefinite, and must be construed in the light of its general use and acceptance. It does not signify a motorcycle and it is therefore unnecessary to appeal to rules of construction to determine the meaning of the words used in the policy. The derivative of the word "car" is not a safe criterion of its meaning. We must take the word as it is used today and not construe it by the word that it is derived from.

The conclusions of the Court are supported by the Superior Court of Massachusetts in the case of *Salo* v. *North American Accident Insurance Company,* 153 N. E. 557, which is on a policy for all practical purposes identical with the one in suit and against the same company, and the reasoning stated in the opinion in that case is approved by this Court. See also *Laporte* v. *North American Accident Insurance Company,* La. 109 S. Rep. 767.

Findings and Postea.

The Court therefore finds as a matter of fact that the deceased came to his death during the life of the policy by being thrown to the ground from a motorcycle which he was riding as a result of a collision with a motor truck, and that the deceased did not come to his death while riding in or driving a motor-driven car or by being accidentally thrown from a motor-driven car; that as a matter of law the reference in said policy to a "motor-driven car" does not apply to or include a motorcycle. The finding of the Court is that there shall be a verdict for the defendant.

WILLIAM A. SMITH,
Circuit Court Judge.

February 23, 1927.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Rule for Judgment.

(Entered March 4, 1927.)

NEW JERSEY SUPREME COURT.

NORTH AMERICAN ACCIDENT INSURANCE COMPANY, a corporation, Defendant, ads. BEULAH E. PERRY, Administratrix of the Estate of Mortimer L. Perry, deceased, Plaintiff.	Action at Law on Postea.

It is ordered that judgment be and hereby is entered in favor of defendant and against the plaintiff without costs.

Entered March 4, 1927.

On motion of

PHILIP J. SCHOTLAND,
Atty.

No Costs.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Judgment.

(Entered March 4, 1927.)

NEW JERSEY SUPREME COURT.

BEULAH E. PERRY, Administratrix of the Estate of Mortimer L. Perry, deceased, Plaintiff, vs. NORTH AMERICAN ACCIDENT INSURANCE COMPANY, a corporation, Defendant.	

Whereupon it is adjudged that the complaint of the plaintiff be dismissed, without costs.

No Costs.

Judgment entered March 4, 1927.

WM. J. GUMMERE,
C. J.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Notice and Grounds of Appeal.

(Served March 11, 1927. Filed March 26, 1927.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

BEULAH E. PERRY, administratrix of the estate of Mortimer L. Perry, deceased, Plaintiff, vs. NORTH AMERICAN ACCIDENT INSURANCE COMPANY, a corporation, Defendant.	Action at Law.

To PHILIP J. SCHOTLAND, Esquire,
Attorney for Defendant.

Dear Sir:

PLEASE TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered March 4, 1927, for the defendant, on the following grounds:

1. The Supreme Court erred in finding a verdict for the defendant.

2. The Supreme Court erred in its refusal to find a verdict in favor of the plaintiff and against the defendant.

3. The Supreme Court erred in its interpretation of the provisions of the policy of insurance upon which the action was brought.

4. The Supreme Court erred in its finding that a motorcycle is not a "motor-driven car" within

the meaning of the language of said policy of insurance.

5. The Supreme Court erred in its finding that deceased did not come to his death while riding in or driving a motor-driven car, or by being accidentally thrown from a motor-driven car.

6. The Supreme Court erred in its finding that as a matter of law the reference in said policy to a "motor-driven car" does not apply to or include a motorcycle.

7. The Supreme Court erred in giving final judgment for the defendant.

8. The Supreme Court erred in refusing to give final judgment for the plaintiff.

Dated March 10, 1927.

Yours respectfully,

HOBART & MINARD,
Attorneys for Plaintiff.

Service of a true copy of the within notice and grounds is hereby acknowledged this 11th day of March, 1927.

PHILIP J. SCHOTLAND,
Attorney for Defendant.

A true copy.

EDWARD J. KELLEHER,
Clerk.

NEW JERSEY

Court of Errors and Appeals

BEULAH E. PERRY, Administratrix of the Estate of Mortimer L. Perry, deceased, Plaintiff-Appellant, vs. NORTH AMERICAN ACCIDENT INSURANCE COMPANY, a corporation, Defendant-Respondent.	On Appeal from the Supreme Court.

BRIEF FOR PLAINTIFF-APPELLANT.

1.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court entered March 4, 1927 (p. 32), upon findings and postea filed the same day (p. 28).

On November 6, 1925, Mortimer L. Perry was killed by being thrown from the motorcycle upon which he was riding, in the performance of his duties as a traffic police officer of the Township of Millburn, by coming into collision with a motor truck on Millburn Avenue in said township.

At the time of his death, Perry was insured, under an accident insurance policy issued by the defendant on January 30, 1925, which was still in full

force and effect, for $1,000 against death resulting directly and independently of all other causes from bodily injury sustained through external, violent and accidental means, by the wrecking or disablement of any private horse-drawn vehicle or motor-driven car in which he was riding, or driving, or by being accidentally thrown from such vehicle or car.

Suit brought by his administratrix was tried January 28, 1927, before his Honor, William A. Smith, Circuit Court Judge, without a jury, on stipulated facts and testimony, who found a verdict for the defendant (p. 30).

2.

The Question Before This Court.

The single question before this Court is whether a motorcycle is a "car" within the meaning of the provisions of the policy of insurance (Exhibit P-1, p. 5).

Grounds of Appeal.

The grounds of appeal (p. 33) are as follows:

1. The Supreme Court erred in finding a verdict for the defendant.

2. The Supreme Court erred in its refusal to find a verdict in favor of the plaintiff and against the defendant.

3. The Supreme Court erred in its interpretation of the provisions of the policy of insurance upon which the action was brought.

4. The Supreme Court erred in its finding that a motorcycle is not a "motor-driven car" within the meaning of the language of said policy of insurance.

5. The Supreme Court erred in its finding that deceased did not come to his death while riding in or driving a motor-driven car, or by being accidentally thrown from a motor-driven car.

6. The Supreme Court erred in its finding that as a matter of law the reference in said policy to a "motor-driven car" does not apply to or include a motorcycle.

7. The Supreme Court erred in giving final judgment for the defendant.

8. The Supreme Court erred in refusing to give final judgment for the plaintiff.

Designation of Parties.

For convenience, the parties are referred to in this brief as plaintiff and defendant, as they appeared before the trial judge.

Italics.

Except as otherwise indicated, where italics are used, they are ours.

Preliminary Motions.

On March 15, 1926, defendant's attorney served upon the plaintiff's attorneys a notice of a motion to strike out the complaint on the ground that it

did not set forth a cause of action, in that it did not allege that the deceased was driving or riding in a "motor-driven car," i. e., that a motorcycle is not a "motor-driven car" (p. 15).

This motion was argued before Mr. Justice Kalisch on April 10, 1926, and was denied. No order was entered.

After the defendant had filed its answer, setting up the same defense, plaintiff's attorneys, on April 21, 1926, served upon the defendant's attorney a notice of motion to strike out the answer and for final judgment in favor of the plaintiff, on the ground that the defenses set up in the answer were sham and frivolous, and failed to state a just and legal defense to the cause of action alleged in the complaint (p. 19).

This motion was argued before Mr. Justice Kalisch on April 26, 1926, again on the single question of whether a motorcycle was a "motor-driven car." During the argument the attorney for the defendant disputed the fact of accidental death as set up in the affidavit supporting the motion, and the Court thereupon denied the motion on the ground that this denial of accidental death raised a jury question. No order was entered on this motion.

The fact of accidental death having been proven at the trial, the same sole question of the interpretation of the word "car" was the only question before the trial judge.

3.

Brief of the Argument.

The Stipulated Facts.

It was stipulated at the trial that—

(a) The policy of insurance was issued by the defendant and was in full force at the time of the death of the insured (p. 25).

(b) The plaintiff was duly appointed administratrix of the decedent's estate (p. 24).

(c) The defendant was at the time of the issuance of said policy and still is an insurance company of the State of Illinois and was authorized to do business in the State of New Jersey (p. 24).

(d) Due notice of the death of the insured was given to the defendant and proper and timely proof of loss was filed as required by the terms of the policy (p. 25).

The Testimony.

The testimony of an eyewitness of the accident was offered, who testified to the accidental death of the decedent by being thrown from his motorcycle as the result of a collision with a motor truck. (pp. 26, 27).

The Conclusions of the Trial Court.

Following are the conclusions of the Trial Court on the question of whether a motorcycle is a "car":

> "The conclusion of the Court is that a motorcycle is not a motor-driven car; that

the term 'motor-driven car' has a general, present day accepted meaning, is not indefinite, and must be construed in the light of its general use and acceptance. It does not signify a motorcycle and it is therefore unnecessary to appeal to rules of construction to determine the meaning of the words used in the policy. The derivative of the word 'car' is not a safe criterion of its meaning. We must take the word as it is used today and not construe it by the word that it is derived from.

The conclusions of the Court are supported by the Superior Court of Massachusetts in the case of *Salo* v. *North American Accident Insurance Company,* 153 N. E. 557, which is on a policy for all practical purposes identical with the one in suit and against the same company, and the reasoning stated in the opinion in that case is approved by this Court. See also *Laporte* v. *North American Accident Insurance Company,* La. 109 S. Rep. 767" (p. 29).

THE FINDINGS OF THE COURT.

"The Court finds as facts, in addition to the stipulated facts, that the deceased came to his death during the life of the policy by accidentally being thrown to the ground from a motorcycle which he was riding, such accident being the result of a collision between the motorcycle and a motor truck. The sharp question presented is as to whether or not a motorcycle is a 'motor-driven car' within the meaning of the terms of the policy" (p. 29).

"The Court therefore finds as a matter of fact that the deceased came to his death during the life of the policy by being thrown to the ground from a motorcycle which he was riding as a result of a collision with a motor truck, and that the deceased did not come to his death while riding in or driving a motor-driven car or by being accidentally

thrown from a motor-driven car; that as a matter of law the reference in said policy to a 'motor-driven car' does not apply to or include a motorcycle. The finding of the Court is that there shall be a verdict for the defendant" (p. 30).

THE QUESTION.

The sole question for determination is whether a motorcycle is a "car" (it is not disputed that a motorcycle is motor-driven). The discussion of this question is divided into and considered under the following headings, and in connection with the grounds of appeal thereunder referred to, respectively:

1.

The Construction or Interpretation of the Word "Car."

Here we consider grounds of appeal—

4. The Supreme Court erred in its finding that a motorcycle is not a "motor-driven car" within the meaning of the language of said policy of insurance.

5. The Supreme Court erred in its finding that the deceased did not come to his death while riding in or driving a motor-driven car, or by being accidentally thrown from a motor-driven car.

6. The Supreme Court erred in its finding that as a matter of law the reference in said policy to a "motor-driven car" does not apply to or include a motorcycle.

Definitions.

The Statute.

The statute defines a "motor vehicle" as including all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks (Chap. 208, Laws 1921, as amended by P. L. 1924, p. 445). It therefore appears that a motorcycle is a motor vehicle within that definition.

In defining "motor-drawn vehicles" (par. 6, Sec. 1), the statute "includes trailers, semi-trailers, and any other type or vehicle drawn by a motor-driven vehicle." The expression "motor-driven vehicle" is used again in paragraph 8 as drawing a "trailer" (which is defined as a vehicle of more than two wheels designed to carry a load wholly on its own structure), and, again, in paragraph 9, as drawing a "semi-trailer" (which is defined as a two-wheeled vehicle). Still there are, in paragraph 6, other types or vehicles that may be drawn by a "motor-driven vehicle," and, since those having two wheels and those having more than two wheels have already been disposed of in the definitions of "trailers" and "semi-trailers," respectively, it must be supposed that the words "or any other type or vehicle" (which must be given some meaning) relate to a "type" or a "vehicle" having less than two wheels. This must apply to side-cars or to attachments such as are used in the city as "cozy-cabs," which are drawn by "motor-driven vehicles" known as motorcycles.

The statute does not define or mention a "motor-driven car" but the definition therein of a "motor vehicle" is comprehensive of all motor-driven vehicles, including a motorcycle. Hence, within the

meaning of the statute, the terms "motor vehicle," "motor-driven car" and "motorcycle" are synonymous and equal.

In an act to punish the distribution of stolen motor vehicles in interstate or foreign commerce (Act of October 29, 1919, Chap. 89, 41 Stat. L. 324; Fed. Stat. Anno., 2nd Ed., Supplement 1919, p. 37), known as the "National Motor Vehicle Theft Act," Congress, in Section 2, gave the following definition:

> "(a) The term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails; * * *."

Berry on Automobiles (5th Ed., 1926).

(Sec. 2) "The automobile has been variously defined as a 'self-acting or self-regulating road wagon,' 'self-propelling, self-moving, applied especially to motor vehicles, such as carriages and cycles of the types usually formerly propelled by horse or man'; * * * and 'as a self-moving carriage propelled by electric or other power.'

Automobile is the generic name which has been adopted by popular approval for all forms of self-propelling vehicles for use upon highways and streets for general freight and passenger service" (except steam rollers, traction engines or vehicles on tracks) (p. 1).

"An automobile may be defined as a wheeled vehicle, propelled by steam, electricity, or gasoline, and used for the transportation of persons or merchandise. The courts without making a clear distinction, have generally used the terms automobile, motor cycle, motor car, and in the earlier

cases, horseless carriage, as being synonymous with each other. Except where special provision is made to the contrary, a motor cycle is being considered as falling within the statutes which use such terms" (p. 2).

(Sec. 3) "The term automobile as used in this work may be defined as a self-propelled vehicle or carriage for the transportation of persons or property and whose operation is not confined to a fixed track * * * this definition includes the automobile bi-cycle and automobile tri-cycle.

This definition is in accordance with both the popular and statutory acceptation of the term. Moreover so far as it has been judicially defined it is in harmony with the decisions."

(Sec. 4) "The automobile is variously referred to as auto, autocar, car, machine, motor, motor car, and other terms equally as common, but neither complimentary nor endearing. However, these are merely popular terms and inaccurate" (p. 3).

"Unless expressly excluded, the motorcycle falls within the definition of the automobile as the term has been used by the various state legislatures, and also within the general definition as heretofore given" (p. 5).

"Motor car; a car which carries its own propelling mechanism, as an electric motor, pneumatic engine, steam engine, &c., and is therefore a locomotive" (p. 4).

"A motorcycle is a vehicle of 'like character' with an automobile" (citing *Bonds* v. *State*, 85 S. E. 629, and *Knight* v. *Savannah El.*, 93 S. E. 17) (p. 6).

(Sec. 19) "The word 'vehicle' means any carriage moving on wheels or runners used, or capable of being used, as a means of transportation on land."

"The automobile comes within this definition; in fact, the courts have unhesitatingly declared the automobile to be a vehicle" (p. 16).

A carriage means anything that carries a load (*Abbott's Law Dictionary; Century Dictionary; Berry*, p. 17).

The automobile is a carriage in both the broad and restricted sense in which the word is used (*Berry*, p. 17, citing many cases in the note).

> "When used to describe a vehicle it is not always confined to one class of vehicle, but is often used as a generic term for that which carries" (*Ibid*).

That motorcycles and automobiles are synonymous in meaning and regulation is indicated by the fact that in Berry's fifth edition on automobiles he gives no separate classification to motorcycles, although he does give a separate classification to bicycles. Motorcycles are treated exclusively along with automobiles and he says that a motorcycle is an automobile.

In Berry's book the term "car" is given no significance whatever, not even as the common expression describing an automobile. His definition of a motor car includes a motorcycle (p. 4) and is distinguished not by type or number of wheels, but only by the fact that it "carries its own propelling mechanism." He says a motor car and a motor vehicle are synonymous terms except where the statute otherwise provides; both of these words include a motorcycle. Since the word "motor" is merely definitive of the propelling force, and is common to all three of these words, it follows that vehicle, car and cycle are synonymous terms.

"Motorcycle."

New Century Dictionary & Cyclopedia defines a motorcycle as follows:

> "A bicycle driven by an electric or other motor; *an automobile bicycle.*"

In *Encyclopedia Britannica* (11th Ed., Vol. III, p. 917) a motorcycle is defined as "a motor-driven bicycle."

The conviction of the rider of a motorcycle was sustained as a violation of an act for the punishment of the driving of a "motor car on a public highway, recklessly or negligently," at a prohibited speed, in

> *In re Divisional Justices* (1904), 2 Ir. K. B. 698; 21 L. R. A. (N. S.) 41, Note.

A motorcycle was held to be a *vehicle* in

> *Myers* v. *Hinds,* 110 Mich. 300; 33 L. R. A. 356; 64 Am. St. Rep. 345; 68 N. W. 156.
> *Thompson* v. *Dodge,* (Minn.) 28 L. R. A. 608.
> *Lacey* v. *Winn,* 3 Pa. Dist. R. 811; 4 Pa. Dist. R. 409.
> *State* v. *Collins,* 16 R. I. 371; 3 L. R. A. 394.
> *Holland* v. *Bartch,* 120 Ind. 46.
> *Taylor* v. *Goodwin,* L. R. 4 Q. B. Div. 228.
> *Berry on Automobiles* (5th Ed.), p. 6.
> *Bonds* v. *State,* 16 Ga. App. 401; 85 S. E. 629.
> *Knight* v. *Savannah El.,* 93 S. E. 17.

The New Jersey Motor Vehicle Act defines a "motorcycle" as including all *"motor-operated vehi-*

cles" of the bicycle or tricycle type, whether the motive power be a part thereof or attached thereto, and having pedals and saddle with driver sitting astride, or a platform on which said driver stands (Sec. 1).

In *Dunkelbarger* v. *McFarren* (149 Ill. App. 630) the Supreme Court of Illinois held:

> "The term 'motorcycle' is within the meaning of a statute relating to the driving of automobiles or other conveyances of a similar kind or type."

In *Scott* v. *Dow* (162 Mich. 636; 127 N. W. 712) the Supreme Court held:

> "A motorcycle is a motor vehicle."

Same in

> *Hopkins* v. *Sweeny Auto School,* 196 S. W. 722.
> *People* v. *Smith,* 156 Mich. 173.
> *Huddy on Automobile* (7th Ed.), Sec. 18.
> *Berry on Automobiles* (5th Ed.), p. 5.
> *Whittaker* v. *Hitt,* 285 Fed. 797; 27 A. L. R. 951.

A motorcycle is an automobile.

> *Berry on Automobiles* (5th Ed.), p. 2.

> "A regulation of lights on 'motor cars,' excepting bicycles and tricycles, is applicable to motorcycles."
>
> *Webster* v. *Terry,* King's Bench Div., Oct. 21, 1913; 1 K. B. 51; Ann. Cases 1917-A, p. 226.

In the notes to *Switzer* v. *Sherwood* (80 Wash. 19; 141 Pac. 181; Ann. Cas. 1917-A, p. 218) are to be found numerous cases holding:

> "A motorcycle is generally held to be within the terms of a statute regulating motor vehicles, automobiles and the like."

In *O'Donohue* v. *Moon* (68 J. P. [Eng.] 340; 90 L. T. [N. S.] 843; 22 Times L. P. 495) the High Court of Justice, King's Bench Division, held, in a case arising under the Customs and Revenue Act of 1888, that a motorcycle was a carriage, within a statute requiring carriages to be licensed. In delivering the opinion of the Court, Lord Alverstone said:

> "The definition of 'carriage' in the act includes any carriage drawn or propelled upon a road or tramway or elsewhere than upon a railway, by steam or electricity, or any other mechanical power; and having regard to the gradual extension of this act and common knowledge of what is going on, it seems to me that a machine which carries a person along a road is none the less a carriage, because it is a very uncomfortable thing, and because the persons on it are shaken up very much when it is going along."

If the term "carriage" is broad enough to include a motorcycle, certainly the term "car" must be.

"Automobile."

An automobile is defined as "a vehicle for carriage of passengers or freight, propelled by its own motor."

1 *Bouvier Dictionary* (3rd Rev.), 294.

> "All forms of self-propelling vehicles for use upon highways and streets for general freight and passenger service."
>
> *New International Encyclopedia* (Vol. 2), p. 303.

Webster's New International Dictionary defines "automobile" as follows:

> "An automobile, vehicle or mechanism, especially a self-propelled vehicle suitable for use on a street or roadway."

In citing this definition the Georgia Supreme Court (in *Bonds* v. *State,* 16 Ga. App. 401; 85 S. E. 629, 630) added:

> "In contemplation of law, it matters not whether the machine had two, three or four wheels."

In *Dunkelbarger* v. *McFarren* (149 Ill. App. 630) the Court considered an Illinois act applying to "any automobile or any other conveyance of a similar type or kind" was held to apply to a motorcycle. In holding that a motorcycle was an "automobile," the Court said:

> "A motor cycle is propelled by the same power as an automobile, the use of which power causes the same loud and rapid explosion. It moves with kindred speed, and, when not propelled by human power, has many of the general features of an automobile; the main difference being that it runs on two wheels, instead of four. If two motor cycles should be fastened and operated together, side by side, for the purpose of carrying passengers, there would be no question that the vehicle so constructed would be of a type or kind similar to an automobile, and yet if defendant in error's contention be cor-

rect, such contrivance ceases to be of such kind or type when separated into two distinct conveyances."

"'Automobile' is the general name which has been adopted by popular approval for all forms of self-propelling vehicles for use on highways and streets for general freight and passenger service. * * * In the plural, all motor traction vehicles capable of being propelled on ordinary roads; wheeled vehicles used for the conveyance of persons."

Citing 6 *C. J.* 867.

The term "automobile" held to be sufficiently comprehensive to cover auto trucks.

Kelleher v. *Portland,* 112 Pac. 1076.
1 *Words and Phrases* (2nd Ser.), 375.

Mr. Huddy, in his law of automobiles (p. 3), speaking of machines which he calls "automobiles," or self-propelling carriages, says the only definition he has been able to find of them is in English's Law Dictionary (p. 78), which states that the term means all motor traction vehicles capable of being propelled on ordinary roads.

In *Bonds* v. *State* (16 Ga. App. 401; 85 S. E. 629) it was held:

"The terms 'automobile,' 'motor vehicle,' 'motor car,' and in the earlier cases 'horseless carriage' are synonymous with each other. *Except where special provision is made to the contrary, a motorcycle* is considered as falling within the statutes which use such terms."

Also in

Ruling Case Law, 1167.

"Vehicle."

Century Dictionary and Cyclopedia:

"Carriage, conveyance.

1. Any carriage moving on land, either on wheels or on runners, a conveyance.

2. That which is used as an instrument of conveyance, transmission or communication."

New English Dictionary:

"Vehicle—L. vehiculum, f. vehere to carry.

(6) A means of conveyance provided with wheels or runners and used for the carriage of persons or goods; a carriage, cart, wagon, sledge, or similar contrivance.

(7) Any means of carriage, conveyance or transport."

Standard Dictionary:

"Vehicle—(1) That in or on which anything is or may be carried; especially, a contrivance with wheels or runners for carrying something; a conveyance, as a carriage, wagon, or *car;* specifically in law, any artificial contrivance used or capable of being used as a means of transportation on land."

Webster's New International Dictionary:

"Vehicle—L. vehiculum, fr. vehere to carry.

(1) That in or on which any person or thing is or may be carried, especially on land, as a coach, wagon, *car,* bicycle, etc., a means of conveyance."

"Motor Car."

"The terms motor car, *automobile,* motor vehicle and *motor cycles* are synonymous."

2 *Ruling Case Law,* 1167.
Bonds v. *State,* 16 Ga. App. 401; 85 S. E. 629.
Dunkelbarger v. *McFarren,* 149 Ill. App. 630.
Scott v. *Dow,* 162 Mich. 636; 127 N. W. 712.
Hopkins v. *Sweeny Auto School,* 196 S. W. 722.
People v. *Smith,* 156 Mich. 173; 120 N. W. 581; 21 L. R. A. (N. S.) 41.
Berry on Automobiles (5th Ed.), p. 2.
Huddy on Automobiles (7th Ed.), Secs. 2 and 3.

The case of *People* v. *Smith, supra,* involved a criminal statute.

In *Webster* v. *Terry* (K. B. Div., Oct. 21, 1913; 1 K. B. 51; Anno. Cas. 1917-A, 226) the Court held:

> "A regulation of lights on motor cars, excepting bicycles and tricycles, is applicable to motor cycles."

"Car."

The *Century Dictionary and Cyclopedia* defines "car" as follows:

> A wheeled vehicle.
> "Car—chariot.
> L. *carrus*—A two-wheeled vehicle, for transportation of burdens.
> Cart, wagon.

> Charriot, move, carry.
>
> 1. A wheeled vehicle or conveyance, especially one having only two wheels.
>
> * * * * * *
>
> 3. A vehicle running on rails, horse car, railway car.
>
> 4. The basket of a balloon in which the aeronaut sits."

From the same origin come the English words "chariot," "carriage," "cart" and "carry." The word "car" does not denote the type, but the function of a vehicle—a vehicle whose function is to carry, to carry burdens, and "especially one having only two wheels."

Century Dictionary:

> "*Car*—(1) A *wheeled vehicle* or conveyance, *especially one having only two wheels.* (a) The two-wheeled passenger-conveyance much used in Ireland and especially called a jaunting-car. (b) The low-set two-wheeled *vehicle* of burden used in many parts of Great Britain, especially for hogshead and the like. * * *
> (3) A *vehicle* running upon rails."

New English Dictionary:

> "Car—A kind of a *two-wheeled wagon* for transporting burdens.
>
> (1) A *wheeled vehicle* or conveyance. (a) Generally—a carriage, chariot, cart, wagon, truck, etc."

Standard Dictionary:

> "Car—A wheeled *vehicle* of conveyance of either one of several kinds. * * *
>
> (2) An automobile.

(3) A *two-wheeled or four-wheeled vehicle* of various local forms and uses."

1. Vehicle for use on a railroad.

2. Wheeled vehicle, as an automobile, chariot.

3. The cage of an elevator.

4. The basket of a balloon or the like.

5. A floating box of live fish, etc.

6. A constellation—the Northern Car.

Webster's New International Dictionary:

> "Car—(1) A *vehicle moved on wheels;* a. In general, a carriage, cart, wagon, truck, etc. * * * Some particular *vehicle* so called, as an automobile, * * *."

Funk & Wagnalls Standard Dictionary defines "car" as:

> "Car. A wheeled vehicle or conveyance, including carriages, chariots, wagons, trucks, etc., a vehicle that turns, or that runs by turning on wheels, a vehicle running on rails; a vehicle adapted to the rails of a railroad; a carriage for running on the rails of a railway; any wheeled carriage used for carrying goods or passengers on a railroad, whether the road is a tramway over the streets of a city, to be operated by horses, or a more extended road to be worked by steam tractors. The words 'car,' 'coach,' 'stage,' and 'stage coach' have been used synonymously. The speed of a car, or the manner in which it is propelled, does not determine whether it can properly be classified as a car."

9 *C. J.*, p. 1283.

> "Any vehicle adapted to rails of a railroad."
>
> *Perez* v. *St. Antonio etc. R. Co.*, 67 S. W. 137.

> "Any kind of a vehicle other than a locomotive or tender used by a railroad company for the transportation of passengers, employees or property upon or along its tracks * * * all kinds of cars."
>
> 3 *Elliott on Railroads* (3rd Ed.), Sec. 1947, p. 254.

Numerous decisions hold that a hand car is a "car" (9 *Cyc.* 1283, Note). Likewise a push car (6 *Cyc.* 1284, Note). Likewise a tram car (*Mo. etc. R. Co.* v. *Smith,* 99 S. W. 743).

> "The term 'car' is generally used in this country for any wheeled vehicle used for carrying goods or passengers on a railroad."
> *State* v. *Laing,* 14 Mo. App. 247, 249.

In *O'Hara* v. *E. St. L. Connecting R. R.* (150 Ill. 587) it was held:

> "The term 'car' in its proper significance includes many if not all classes of vehicles on wheels, and we see no reason why in its proper generic sense it may not be held to embrace locomotive engines as a species of car."

In *U. S.* v. *Chi. & N. W. Ry. Co.,* 157 Fed. 615, 619, the United States District Court (Nebraska) held that a steam shovel car was a "car" within the meaning of the Federal Safety Appliance Act.

The same conclusion was reached by the United States Supreme Court with respect to the same kind of a car in *Schlemmer* v. *B. R. & P. Ry. Co.,* 205 U. S. 1; 51 L. Ed. 681.

A locomotive engine was held to be a "car" under the Federal Safety Appliance Act in *U. S.* v. *P. & R. Ry. Co.,* 223 Fed. 215.

In New York a "car" was defined as a "vehicle that turns, or that runs by turning on wheels" (*N. Y.* v. *Third Ave. R. R.,* 32 N. E. 755).

Under the Federal Employers Liability Act a "car" means any kind of a vehicle (except locomotive and tender) used by a railroad company for the transportation of passengers, employees or property upon and along its tracks, including a flat car (*M. K. & T. Ry. Co.* v. *Smith,* 99 S. W. 743).

Under the Federal Safety Appliance Act an engine was held to be a "car" (*U. S.* v. *C. & N. W. Ry. Co.,* 157 Fed. 616, 619).

A hand car is a "car" (*Boyd* v. *M. P. Ry. Co.,* 139 S. W. 561, and many other cases). Likewise a push car, which is but a platform on wheels (*Seery* v. *G. C. & S. F. R. Co.,* 77 S. W. 950).

In *Maine* v. *Tardiff* (111 Me. 551; 90 Atl. 424) the question was whether a railroad hand car was a "car" within the meaning of that word in a Maine statute. The court said:

> "The *broadest possible definition should be given* to the words 'railroad car.' It should include any and every *vehicle* constructed and calculated for operation over railroad tracks."

Other decisions supporting the general proposition that the broadest possible definition should be given to the word "car," as applied to railroad or railway cars, are:

Woodward Iron Co. v. *Lewis,* 171 Ala. 233.
West. Industrial Co. v. *Wasco Land & Stock Co.,* 197 Pa. 390.
Davis v. *Maury,* 117 S. E. 283.
Corpus Juris, Vol. 9, "Car."

In *Woodward Iron Co.* v. *Lewis* (171 Ala. 233) a motor car on tracks in an underground mine was held to be a "car" within a statute allowing recovery for negligent operation of a "car" or train upon a railroad.

Same holding in

Boyd v. *Mo. Pac. Ry. Co.,* 236 Mo. 54; 249 Mo. 127.
Tex. & Pac. Ry. Co. v. *Webb,* 31 Tex. App. 498.

In *Johnson* v. *S. P. Co.* (196 U. S. 1; 49 L. Ed. 362) the United States Supreme Court held a railroad locomotive was a "car" within the meaning of the Federal Safety Appliance Act. In that case Chief Justice Fuller said (p. 369):

> "Moreover, it is settled that 'though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; yet they are not to be construed so strictly as to defeat the obvious intention of the legislature." Citing cases, including a portion of a decision of Mr. Justice Storey, reading as follows:
>
> "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport, *but where the words are general and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation,* where the mischief to be redressed by the statute is equally applicable to all of them."

This is significant as applied to the interpretation of an insurance policy in a civil case, since the Federal Employers Liability Act was a penal statute, and under the rule should be construed more strictly than the terms of a contract. Yet, under a penal statute the United States Supreme Court has held that the general word *"car,"* standing alone and unqualified, included a steam shovel and a steam locomotive.

If such a latitude is permissible in the construction of a penal statute, a much wider latitude should be allowed in construing the same word in an insurance policy, where the rule requires the adoption of the construction most favorable to the insured.

"Bicycle."

> "A bicycle is a vehicle and governed by the same rules as that governing the use of vehicles."
>
> *Myers* v. *Hinds,* 110 Mich. 300; 67 N. W. 156, 157; 33 L. R. A. 356.

In commenting upon this case, the Michigan Supreme Court (in *People* v. *Smith,* 156 Mich. 173) said:

> "The distinction between bicycles and motorcycles is that one is propelled by muscular and the other by mechanical power."

Webster's Dictionary defines a bicycle as a "car."

In *Diocese of Trenton* v. *Toman* (74 N. J. Eq. 702, 711) Chancellor Walker (then Vice-Chancellor) held that an easement for a "carriageway" was sufficient to include such use by automobiles. In support of that conclusion he cited and discussed a number of cases which involved bicycles, viz., *Taylor* v. *Goodwin* (4 Q. B. Div. 228), which he termed "a case entirely in point, on principle," and *Richards* v. *Danvers* (176 Mass. 413), which held:

> "We have no doubt that for many purposes a bicycle may be considered a vehicle or a carriage."

"Carriage."

"Carriage" means whatever carries the load, whether on wheels or runners, and also that which is carried, whether on wheels or runners or on horseback (*Conway* v. *Town of Jefferson,* 46 N. H. 521, 526). "Carriage" includes stages, coaches, wagons, carts, sleighs, sleds and every other carriage or vehicle used for the transportation of passengers and goods or either of them (*Cobly's Ann. St. Neb.* 1903, Sec. 6064). The word "carriage" was held to include a bicycle in

Davis v. *Petrinovich,* 21 So. 344; 36 L. R. A. 615.
Jones v. *City of Williamsburg,* 34 S. E. 883; 47 L. R. A. 294.
Swift v. *City of Topeka,* 23 Pac. 1075; 8 L. R. A. 772.
Shadewald v. *Phillips,* 75 N. W. 717.

Also numerous cases cited in

1 *Words and Phrases* 977.

This also applies to the locomotive machine known as a bicycle (motorcycle) which belongs to the genus vehicle or carriage (same reference).

Also in

O'Donohue v. *Moon,* 68 J. P. (Eng.) 340; 90 L. T. (N. S.) 843; 22 Times R. P. 495.

"Car" and "Vehicle."

Not only in a technical, but also in the most actual and proper sense, these two words are synonymous in their meanings. This fact cannot be denied on the authority of any published dictionary. By reference to *The Century Dictionary and Cyclopedia,* let us observe the parallelism of the two words.

Vehicle.	*Car.*
Latin noun—Vehiculum.	Carrus.
Verb—Vehere, to carry.	To carry.
Carriage, conveyance.	Chariot, conveyance.
Wagon.	Wagon.
Move.	Move.
1. Any carriage moving on land, either on wheels or runners.	A wheeled *vehicle,* a two-wheeled *vehicle,* a wheeled *vehicle* for transportation of burdens, a wheeled *vehicle* or conveyance, especially one having only two wheels.

Hence, it appears that the words "vehicle" and "car" mean the same thing, except that a "car" is any kind of a "vehicle" moving on wheels, whether on two wheels, as a cart, or on four wheels, as a carriage, chariot or wagon, but especially "one having only two wheels."

The inevitable conclusion seems to be that a car is a vehicle and must be considered as meaning any vehicle moving on wheels, "especially one (as a motorcycle) having two wheels."

Correctly speaking, the word "car" applies more truly to a motorcycle than to an automobile. To exclude a motorcycle from the classification of vehicles covered by the word "car" is to sacrifice correct language upon the altar of the vernacular and pure speech on the altar of slang.

Summary of Definitions.

Amid this multiplicity of definitions and the total absence of any definition of a "motor-driven car" there stands in unbroken and unchallenged unanimity the conspicuous and important fact that the terms "automobile" and "motorcycle" are equivalent and synonymous, and both comprehended within the statutory, dictionary and legal definitions of a "vehicle," which, in turn, is but one of the various constituent definitive elements of the more general term (or genus) "car." To say that a "car" is an automobile, and nothing else, is to deny the long and illustrious list of ancestry intervening between the two terms. It is common in this country to make a verb of every popular or much used noun. For instance, we go "automobiling" or "motoring." We "taxi" to the station, we "motorcycle" here and there. But, do we ever "car" or go "carring" anywhere? If not, why not? For this very simple reason: There are not two guesses what an automobile, a motorcycle or motor is. In the parlance of the day, any noun that indicates a species rather than a genus is transformed into and used as a verb. "Car" is not so used because it has a general and comprehensive meaning. It

is a word denoting genus rather than species. "Automobile" has a definition, "motorcycle" has a definition, yet both are included in the same definition in the Motor Vehicle Act, in *Berry on Automobiles, Huddy on Automobiles,* and in all the decisions. If things that are equal to the same thing are equal to each other, why say an "automobile" is a motor-driven car and deny the same to its equivalent, a motorcycle that is driven or propelled by a motor? Confining ourselves to a *motor-driven* car, we find quite a variety of motor-driven cars that are not automobiles. There is the trolley car, the motorized passenger cars on electrified railroads, tram cars, cable cars, elevator cars and railroad motorcycles.

The "car" involved in this case is one that is "motor-driven." This does not relate to the kind of a car; it is merely the adjective describing its manner of propulsion. The noun is a "car"—any kind of a car that is driven or propelled by a motor.

Private Vehicle.

No mention is made of the word "private," hence there is probably no question raised as to whether the motorcycle upon which the deceased was riding at the time of the accident was a private vehicle. He was a police officer of the Township of Millburn and was riding a motorcycle owned by the township and assigned to him for the purposes of his duties. An examination of the context of the policy indicates that it was intended to apply to two classes of conveyances, namely:

1. A passenger car, passenger steamship or steamboat, public omnibus, street railway car, taxicab or automobile stage carrying fare-paying passengers, or a vehicle operated for hire. In other words, a common carrier.

2. A private vehicle or motor-driven car.

It, therefore, appears that the two classes referred to in the policy are *common carriers* and other than common carriers, and the word "private" is used to distinguish from common carriers. The vehicle upon which the deceased was riding at the time was a *private* vehicle since it was not a common carrier.

"In."

In the *LaPorte* case (hereinafter referred to) the word "in" seems to have played an important part in reaching the court's conclusion. The interpretation of that word is not directly involved in our case, since the trial court found that Perry suffered death by being *thrown from* his motorcycle.

In the *Salo* case (hereinafter referred to) the word "in" is referred to, but not dwelt upon, for the reason that in that case, as in ours, the findings were that the insured was *thrown from* his motorcycle.

However, in both cases, as in ours, this word was used in the argument, to indicate that a motorcycle could not have been meant by the word "car" because one cannot ride *in* a motorcycle.

In our case the trial court expressly found that the decedent came to his death by being thrown to the ground from a motorcycle which he was riding, hence there is no question in this case of whether the insured was riding *"in"* or *"on"* a car. We discuss the word here only because of the contention of the defendant that the use of the word "in" indicates that a motorcycle could not have been intended by the policy.

The Meaning of the Word "In."

The terms of the policy make it applicable to two separate and distinct situations respecting motor-driven cars:

1. By the wrecking or disablement of any car *in* which the insured is riding or driving.

2. By being thrown accidentally *from* such car.

The court found that Perry lost his life by being *thrown from* a motorcycle.

Dictionarial Definition.

In *The New Century Dictionary and Cyclopedia* (Vol. IV, pp. 3024-3025) the word "in" is defined:

> "In early use the preposition 'in' was often interchangeable with the related 'on.'
>
> * * * * * *
>
> On; upon: as, *in* the whole; *in* guard.
>
> * * * * * *
>
> The notion of rest or existence in, * * * to, or upon."

In the Latin, whence cometh the word, it was either "in" or "un," used interchangeably. From it we get both words "in" and "on."

That the words "in" and "on" are interchangeable appears from many daily experiences. Idioms are as truly part of the English language as accurate orthodox words or phrases.

"On hand" does not mean that the subject is actually "on" something. The Louisiana Court assumed that a motor-driven car must have a body

within which the rider might be protected from the dangers of congested traffic.

This is more than a literal interpretation of the word "in." It is perfectly proper and very common to say a person is "in the saddle." There is no enclosure in that case. We say "on the train" when we mean we are in a car of a train, yet when we are in a house we do not say we are *on* the house. The landsman says "on a ship," but the sailor says "in a ship." A train "in the station" is by no means literally so.

The same policy insures against accident by the wrecking or disablement of any public omnibus or automobile stage or passenger steamship or steamboat "*in* which such insured is travelling." Suppose he was injured while riding on the upper deck of a Fifth Avenue bus, or while standing on the deck of a steamship or steamboat, would he forfeit the protection of his policy in such a situation? What would be his chances of recovery if he was riding on the Pike's Peak Railroad, where the cars have only flat platforms with seats on them? Or if he was riding on a load of hay or on a buckboard wagon, or on the running gears of a log wagon, either of the last of which are "horse-drawn vehicles," as described in the policy. If a man is "in the saddle" while riding a horse he is *in* the saddle while riding a motorcycle.

But it is contrary to all the rules of interpretation of insurance policies to rest a decision on such a narrow question of whether the insured is *in* or *on* a car.

If a recovery under the policy in question depends strictly upon the insured being *in,* or in the interior of the car, then it could apply, strictly speaking, only when the insured was riding in an *enclosed* car, of the sedan or similar type. If the

language used means that the insured must be riding *in the seat* of the car, then a person riding *in the saddle* of a motorcycle complies with the requirement.

In the case of *Depue* v. *Travelers Ins. Co.* (166 Fed. 183) the United States Circuit Court (E. D., Pa.) considered the liability of the insurance company upon a policy which covered bodily injury sustained (among other places) "while in a passenger elevator," in a case where it could not be determined whether the insured was actually *in* the elevator at the time of the accident. In reaching a decision that the policy applied, the court relied upon a line of (very numerous) cases construing policies covering bodily injury sustained "while actually traveling in a public conveyance," to apply

> (a) Where the insured had left a railway car temporarily at a station, and was injured in the effort *to board* the train after it had started to pursue the journey (p. 186);
>
> (b) Where the insured fell upon a slippery sidewalk *while passing from a steamboat landing to a railway station,* during a continuous journey;
>
> (c) Where the insured was injured by being thrown *from the platform* of a rapidly moving car (p. 189);
>
> (d) Where the insured were injured *getting on or off* a train, bus or street car,

and many other decisions therein reviewed, in which the word "in" was held to mean "on" as well.

In *Andrews* v. *State* (8 Ga. 700; 70 S. E. 111) it was held that where the indictment charged that

the accused unlawfully shot a pistol "while in a passenger car" and the evidence showed that he discharged the pistol *while on the steps of the car,* the variance was held not material, the words "in the car," as used in the statute, being equivalent to "on the car."

2 *Words and Phrases* (2nd Ser.), 983.

The court said:

> "The preposition 'in,' as a prefix to the article 'the' and a noun—as 'in the house,' or 'in the car,' or 'in the ship'—means not only inside the house or ship, but also 'on the house,' 'on the car,' or 'on the ship.'"

Other authorities holding that "in" means (even in criminal cases) "on" or "near to," or "in the close vicinity of" an object, are:

> *Woods* v. *State,* 67 Mass. 575.
> *Northrup* v. *Railway Passenger Assurance Co.,* 43 N. Y. 516.
> *Theobold* v. *Railway Passenger Assurance Co.,* 26 Eng. L. & Eq. 432.
> *May on Insurance,* Sec. 524.
> *Bush Bros. M. & L. Co.* v. *Eastwood,* 132 S. W. 389, 392.
> *Nash* v. *Webber,* 204 Mass. 419.
> *Blake* v. *Ex. Ins. Co.,* 12 Gray 264.
> *People* v. *Klommer,* 137 Mich. 399.

In *Wright* v. *Aetna Life Ins. Co.* (10 Fed. [2nd] 281) the Circuit Court of Appeals of the Third Circuit had before it a case arising under an accident insurance policy in which the question in dispute was whether the insured was "riding in" an automobile at the time of his injury. The facts indicated that while a car was descending a steep hill

at a high rate of speed and out of control of the driver, the insured either jumped or was thrown from the car and suffered fatal injuries as a result of contact with the ground. The insurance company contended that at the time of his injury he was *out of* the car and not *in* it. The court held (p. 283) as follows:

> "If this company did not intend that one who jumps from a machine was to be protected, it could have made that unambiguous in a few words. It considered the matter of exceptions for it inserted four. If by its omission to do so it has couched the policy in such terms that reasonable men could reasonably contend, it applied to and covered a situation such as is now before us, we are justified under the settled rule of construction in resolving that ambiguity against the company in giving the policy such construction."

In *King* v. *Travelers Ins. Co.* (101 Ga. 64) the insured was held to have been "traveling in a conveyance" even while he was traveling afoot from the steamboat wharf to the railroad station during the prosecution of his journey.

It therefore appears from the foregoing decisions that the courts have *interpreted* the word "in" rather than construed it, and that when they use the word "in" or "on" interchangeably, they are using both words according to their original and proper meaning.

Hence, we say that one who is riding *"in"* is also riding *on* a motor-driven car. In fact, it is very common to say one is riding *on* a wagon, or *on* a street car, or *on* a boat, or *on* a train, or *on* a motor truck, when he is in fact within the enclosure of any of them, or that one is *on time* or *in time*.

So, the word "in" as used in (or on) this policy simply means that one was being carried by (whether *in* or *on*) a motor-driven vehicle.

But, aside from that, recovery can be had if the insured was *thrown from* a motor-driven car, whether he was riding *in* or *on* it at the time he was thrown.

The question of "in" or "on" is important in this case only in determining whether a motorcycle is a car.

If a motorcycle is a "motor-driven car," he can recover as a result of being "thrown from" the same, independent of the fact whether he was riding "in" or "on" the motorcycle.

2.

The Rules Governing the Construction or Interpretation of Insurance Policies.

Here we consider ground of appeal—

> "3. The Supreme Court erred in its interpretation of the provisions of the policy of insurance upon which the action was brought."

Forfeitures Not Favored.

To hold that a motorcycle is not a "car" (it is admittedly motor-driven) is to work a forfeiture of the policy and totally defeat a recovery in this case. Of such a result the courts invariably disapprove.

In *Wright* v. *Aetna Life Ins. Co.* (10 Fed. [2nd] 281, 283) the United States Circuit Court (Third Circuit) held:

> "* * * When the words of a policy are, without violence, susceptible of two interpre-

tations, that which will sustain the indemnity it was the object of the assured to obtain should be preferred" (citing *Insurance Company* v. *Boon,* 95 U. S. 128; 24 L. Ed. 395).

"In case there is any ambiguity in the policy the rule is that all provisions, conditions or exceptions which in any way tend to work a forfeiture of the policy or limit or defeat liability thereunder should be construed most strongly against those for whose benefit they are inserted, and most favorably toward those against whom they are meant to operate."

1 *C. J.* 414.

In *Wilkinson* v. *Aetna Life Ins. Co.* (88 N. E. 550; 25 L. R. A. [N. S.] 1256, 1260) it was held that:

"It has been repeatedly held that a contract of insurance like the one upon which this suit is based, if there is any ambiguity in the language used in the policy, as the language found in the policy is that of the insurance company and not of the insured, should be favorably construed on behalf of the insured and so as not to defeat a recovery in favor of the insured."

In *Depue* v. *Travelers Ins. Co.* (166 Fed. 183, 187) the United States Circuit Court (E. D., Pa.) held:

"It will be observed that the foregoing decisions were all made in suits brought to enforce the single liability which was the limit of the company's obligation under the older forms of the policy. *If this obligation could not be enforced, the company would escape altogether, and, therefore, in furtherance of its presumed intent to afford indem-*

nity unless such intent was clearly excluded by the words of the policy, every ambiguous phrase was construed in favor of the insured, and the circumstances surrounding the injury were looked upon with a similar disposition."

In *Snyder* v. *Dwelling-House Ins. Co.* (59 N. J. L. 544, 549) Mr. Justice Depue, in delivering the opinion of the Court of Errors and Appeals, said:

"It is a settled rule in the construction of contracts of insurance that policies of insurance will be liberally construed to uphold the contract and conditions contained in them which create forfeitures will be construed most strongly against the insurer and will never be extended beyond the strict words of the policy. *Carson* v. *Jersey City Insurance Co., supra* (43 N. J. L. 300). In *Stone's Administrators* v. *United States Casualty Co.,* 5 Vroom 371, 375, Chief Justice Beasley said: 'A qualification of the agreement so restrictive of the rights of the party insured ought not to be admitted unless the terms of the endorsement will bear no other rational interpretation. *If the terms used are imperfect, it is the fault of the defendants.* It is their contract, and the construction of it must be most strongly against them.'"

In *Primrose* v. *Casualty Co.* (232 Pa. St. 210; 81 Atl. 212) the Pennsylvania Supreme Court considered a case where suit was brought on an accident insurance policy for death caused by the collision of a taxicab, in which the insured was riding, with a telephone pole. The policy provided double indemnity for injuries received while the insured was riding as a passenger in or on a public conveyance provided for passenger service and propelled by steam, compressed air, gasoline, naphtha, elec-

tricity or cable. The insurance company contended that the double indemnity applied only to the case of a person occupying a place for which he pays his fare in a railway car or conveyance operated for the common use of himself and such promiscuous persons as may happen to take passage en route, over which conveyance he exercises no control. In delivering the opinion of the court, Justice Brown said (p. 213):

> "It is to be noted that the clause was inserted by the insurer itself in the policy of insurance which it issued to the insured, and, if it intended that the same should have the restricted meaning for which its counsel now contend, it could have readily so worded the clause. The insurance company could have so framed it that there would now be no doubt that the appellee could not insist that it was intended to extend to her claim. It is next to be remembered that, as the words used in the clause are the language of the insurer, a salutary rule of construction requires them to be construed most favorably to the insured (*Hughes* v. *Central Accident Insurance Co.*, 222 Pa. 462, 71 Atl. 923; *May on Insurance*, Sec. 175); and, for the same reason, if the clause is capable of two interpretations equally reasonable, that is to be adopted which is most favorable to the insured (citing cases). * * * A contract of insurance must have a reasonable interpretation, such as was probably in the contemplation of the parties when it was made; and, when the words of a policy are, without violence, susceptible of two interpretations, that which will sustain a claim to the indemnity it was the object of the assured to obtain should be preferred."

The court held that the double indemnity applied and affirmed a judgment below in favor of the plaintiff.

In *Railway Mail Ass'n* v. *Moore* (15 Fed. [2nd] 547, 551) the United States Circuit Court of Appeals, Fourth Circuit, held:

> "The rule is that courts do not favor forfeiture and where doubts arise as to the proper construction of an insurance contract, that view should be adopted which is most favorable to the insured *and will prevent an annulment of the policy.*"

Citing:

> *Mutual Life Ins. Co.* v. *Hurni Co.,* 263 U. S. 167; 68 L. Ed. 235; 31 A. R. L. 102.
>
> *Hartford Life Ins. Co.* v. *Unsell,* 144 U. S. 439; 36 L. Ed. 496.
>
> *Pleasants* v. *L. E. Mutual Ins. Ass'n,* 70 W. Va. 389; 73 S. E. 976; Ann. Cas. 1913-E, 490.

In *Silverstein* v. *Commercial Casualty Ins. Co.* (143 N. E. 231) the New York Court of Appeals considered a case in which the plaintiff was a passenger in a side car attached to the motorcycle. He was killed, and suit was brought on an accident insurance policy which excused the company from liability for injuries received while riding a motorcycle. In the answer filed by the insurance company, it alleged that the deceased was killed not while riding, but "while riding in or upon a motorcycle." Judge Andrews, in delivering the opinion of the court (p. 232), says:

> "The insured, therefore, might fairly give this interpretation to the contract. The result in the courts below was erroneous. Especially is it so when in no sense did Silverstein mount the machine. He sat not on, but in the car. As no other defense is suggested,

> the verdict reached by the jury at Trial Term under direction of the judge should be reinstated and judgment granted to the plaintiff thereon."

This decision serves to indicate to what lengths a court is justified in going to avoid a forfeiture of the policy and the denial of recovery thereunder.

Unless the word "car" is given the broad meaning which the definitions and interpretations of the courts fully warrant and require, the door is opened for the avoidance by the insurance company of its liability under its policy, in contravention of the foregoing rules, as to a large variety of (motor-driven) vehicles falling properly within those definitions. It also lays the foundation for a widespread deception of the public, who would naturally suppose, as Perry did, that this policy afforded protection against injury sustained while riding or in being thrown from a motorcycle.

Interpreting the Policy.

The rule governing the interpretation of insurance policies is familiar and well settled. If there are any doubts, uncertainties or ambiguities in the language of the policy, they are to be resolved in favor of the insured and against the insurance company.

The defendant insurance company prepared this policy, and made its own selection and arrangement of words, presumably with great care and deliberation, by experts and legal advisors employed by and acting exclusively in its interest; yet, in using the term "motor-driven car," it selected a term which is not common and is not defined in any motor vehicle act, in *Berry* or *Huddy on Automobiles* (the

two leading text books on the subject), *Bouvier's Dictionary,* or in *Words and Phrases.* In fact, an express definition cannot be found for the term. That an ambiguity and uncertainty, which requires construction, is indicated by the term itself, which has no definition to be found anywhere, as well as the fact that in two different states (Louisiana and Massachusetts) the question has gone, and now in New Jersey goes, to the highest court for interpretation. The length to which the Massachusetts and Louisiana Courts felt called upon to go in arguing the question in their decisions (both of which decisions are discussed at length later in this brief), shows conclusively, notwithstanding the conclusions to the contrary, that there was some question about the meaning of the word "car" which has so many and different meanings in everyday use. We contend that there is a manifest uncertainty or ambiguity in the term as applied to modern vehicles. To say that the word "car" means only a certain kind of an automobile is drawing too fine a distinction for either reason or justice.

The rule of construction is given as follows:

> "It is a cardinal principle of insurance law that a policy or contract of insurance is to be construed liberally in favor of insured and strictly as against the company. Stated more fully, the rule is that where, by reason of ambiguity in the language employed in the policy or contract of insurance, *there is doubt or uncertainty as to its meaning and it is fairly susceptible of two interpretations, one favorable to the insured and the other favorable to the company, the former will be adopted.*"
>
> 32 *Cyc.* 1152, Sec. 265.

"* * * Thus it has been frequently held in cases in which questions arose that all ambiguities and obscurities in the language of a contract of insurance and all doubts and uncertainties as to its meaning or construction are to be resolved against the company and in favor of the insured; that, where the policy is so drawn as to require construction, it will be construed in favor of the insured; that the policy will be so construed as to permit a recovery by insured where it is fairly susceptible of such a construction; *and that where two interpretations equally fair may be made that which allows the greater indemnity will prevail.*"

32 *C. J.* 1154, Sec. 265.

"The rule requiring a strict construction against the company and a liberal construction in favor of the insured applies where the contract of insurance is written or prepared by the company as it usually is and indeed the reason for the rule is that insured has no voice in the selection or arrangement of the words employed and that the language of the contract is selected with great care and deliberation by experts and legal advisors employed by, and acting exclusively in the interest of the company, and therefore it is at fault for any ambiguity or uncertainty therein. *The rule is applicable to all kinds of insurance contracts and to all parts of each contract, including words, phrases, sentences, or clauses of doubtful meaning or susceptible of more than one construction.*"

32 *C. J.* 1155, Sec. 266.

Joyce on Insurance (Sec. 221) says:

> "It has long been determined with an almost unwavering unanimity that insurance contracts, when susceptible of more than one interpretation, shall be construed in favor of the assured.

> This rule is imperative and undoubted, *since to hold otherwise without an absolute necessity therefor would tend to subvert the very object and purpose of insurance,* which is that of indemnity to the assured in case of loss, or the payment of money on the happening of a contingency, *and this indemnity should be effectuated rather than defeated.*"

Again, in Section 222:

> "It is a settled rule of construction that in cases of doubt policies of assurance shall be construed strictly against the insurer. * * * So of two interpretations equally reasonable that construction most favorable to the assured must be adopted, for the language is that of the insurers, and if the terms of the policy are such that reasonable and intelligent men would honestly differ as to its meaning it would be construed against the insurer."

In *Harris* v. *American Casualty Co.* (83 N. J. L. 641) the Court of Errors and Appeals considered a case involving the construction of an insurance policy. The Chancellor, in delivering the opinion of the court, said (p. 646):

> "But, assuming that there is such ambiguity in the terms of the policy that would make it at least doubtful as to whether collision with water and land, horizontal objects, was within the terms of the policy, still it is a familiar rule that the words used in a policy of insurance should be interpreted most strongly against the insurer where the policy is so framed as to leave room for two constructions. *Liverpool &c. Insurance Co.* v. *Kearney,* 180 U. S. 132.
>
> Therefore, if there be any doubt as to whether moving water or the surface of the land under it, being horizontal objects, are

within the terms of the policy, which doubt is not conceded to exist, still the law governing the construction of the sort of contract under consideration comes in aid of the plaintiff's contention, and makes the defendant's liability plain."

In the case of *Banta* v. *Continental Gas Co.* (113 S. W. 1140) it was held:

> *"The policy should be interpreted so as to extend its protection over as wide a field of accidental injury as is consistent with its language,* but its natural meaning must not be violated. If the effect of an insurance contract is clear, it must be enforced, as written, without adding an increased liability by construction; but as its terms are prescribed by the company, if they are of doubtful meaning, they will be construed most strongly against the company."

In the case of *Lowenstein* v. *Fidelity & Casualty Co.* (88 Fed. 474, 479) the United States Circuit Court considered an insurance policy which contained the words "or otherwise" in connection with an exception in the policy against death caused by inhaling gas. The insured had met his death by asphyxiation, and the exception in the policy read, "this insurance does not cover injuries resulting from poison or anything accidentally *or otherwise* taken, administered, absorbed or inhaled."

The insurance company defended on the ground that the words "or otherwise" were intended to except it from liability for death from inhaling gas, accidentally or otherwise. Judge Phillips, in writing the opinion, said:

> "If it was the purpose of the company as suggested by its counsel in argument at the bar, in inserting the word 'otherwise,' to

> avoid the effect of the ruling in the Paul Case, it is a sufficient answer to say that the court in that case suggested to the company the apt and direct words which would accomplish that end, whereas, if it employed the words 'or otherwise' for such purpose, *it was a concealed purpose, not apparent to the ordinary mind, and not at all calculated to carry to the insured, like Lowenstein, even a suggestion that it was intended to say by the policy that the company would not answer for liability resulting from inhaling gas, or other poisonous substances, whether taken voluntarily and consciously, or involuntarily and unconsciously."*
>
> * * * * * *
>
> "The language of Judge Taft in Indemnity Co. v. Dorgan, 7 C. C. A. 592, 58 Fed. 956, may be aptly applied as a conclusion to this discussion:
>
> 'It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all the language used to limit the liability of the company strictly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as nearly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured, and against the insurer.' "

This decision indicates that where a company in writing its insurance policy uses words which are not specific, or attempts to limit its liability by words so general as to conceal its purpose in a manner not apparent to the ordinary mind, the words will not limit the liability or extend the exception beyond the specific words actually used.

Hence, in our case, the courts will not permit the insurance company, by the use of the word "car," to excuse itself from liability on the theory that a particular species or kind of car was intended, but in construing such a policy the court will apply the indemnity to any class or kind of object falling within the most general classification which the word indicates.

While it is true that words should be given and understood in their plain, ordinary and popular sense, there is, nevertheless, a limit to be placed on that.

When we are called upon to interpret a solemn contract, like an insurance policy, upon which so much depends for the survivors of the insured, we cannot ignore the dictionaries entirely and subject an important question to the caprice of individual interpretation of words. People who speak correctly and who frame important contracts are discriminating in the selection of words. They would not say "hot dogs" in referring to frankfurters, even if that commodity is commonly known by the former term.

Our view is that if it had been the intention to limit the application of the word "car" to automobiles, the latter word would have been used. If it had been the intention to discriminate against motorcycles, they would have been expressly excepted, as was the case in the policy involved in the case of *Silverstein* v. *Commercial Casualty Ins. Co.* (143 N. E. 231), recently decided by the New York Court of Appeals.

We think that the policy, by expressly providing in paragraph (1) of the "Standard Provisions" (p. 8) that no reduction in the indemnity would be made if the insured increased the hazards of his occupation, as well as by the use of the word "car,"

which is a word of broader scope than the word "automobile," for instance, was intended to have a broad scope, so as to cover virtually any vehicle that was motor-driven, whether operated on the streets or on rails. To give the policy as broad an application as possible, without doing violence to the terms, has been the invariable rule of the courts, and where two interpretations equally fair may be made, that which allows the greater benefit to the insured will prevail (32 *Cyc.* 1154). This court, in *Harris* v. *Am. Cas. Co.* (83 N. J. L. 641, 646), considered this rule as applicable "where the policy is so framed as to leave room for two constructions."

It is a fine spun theory which holds that the word "car" means an automobile and nothing else, and that that automobile must have a body of such a nature that the rider must be *enclosed within* it. Such an interpretation makes the words "car" and "automobile" exclusively synonymous. That being so, by substituting the latter for the former in the policy, it would read "motor-driven automobile," and thus the adjective would be superfluous, since an automobile is motor-driven or it is not an automobile.

It must be presumed that the adjective has some significance, and the only theory upon which any significance can be given to it is that it was the intention to give the policy a broader application than to an automobile, namely, to any and all classes of (motor-driven) vehicles that would come under the broad and general term "car."

Let us see where the limited definition contended for by the insurance company would lead us.

The policy covers injury sustained by the wrecking or disablement of "a passenger steamship or steamboat." Suppose the insured under such a

policy should be injured by the wrecking or disablement of a passenger motorboat or a modern trans-Atlantic liner operated by Diesel engines, or a modern ferryboat operated electrically. None of these is a *steam*ship or *steam*boat. Would the court say that he could not recover?

The policy applies if the insured is injured while riding in or by being thrown from a horse-drawn vehicle. Suppose the insured suffered injury while riding in (or on) or by being thrown from a farm wagon drawn by a team of mules, or while the wagon was standing at the roadside with a team of horses hitched thereto, and was run into by some other moving object. Would the court, in either case, deny recovery? We think the test is not whether the vehicle was actually being drawn by *horses,* or was actually in motion. The words *"horse-drawn"* serve only to identify the class of vehicles intended.

So with the car, any *"motor-driven"* car was intended. Suppose the insured was a railroad trackman who traveled back and forth on a motor-driven hand car, or a railroad lineman who traveled on a railroad motorcycle, or a coal miner who rides in and out of the mine on a motor-driven coal car (all of these have been held to be cars), or a farmer who plows with a tractor, or the operator of a motor-driven baggage truck such as we see in practically all large railroad stations, or the operator of the little motor-driven trucks that haul strings of freight trucks on the steamship piers, or by the operator of the motor-driven tractor which hauls the Pennsylvania Railroad freight cars through the streets of Jersey City, or the operator of a motor-driven road scraper. If this policy had been issued to anyone of these persons, and he was injured while riding in (or on) such a motor-driven vehicle,

would recovery be denied because he was not riding *in* or thrown from an "automobile"? All of these classes of vehicles fall within the accepted definition of a car, and many of them fall within the accepted definition of an "automobile," yet the types of construction and mechanism differ as widely from the popular conception of an automobile as does a motorcycle, which also falls within the general definition of an "automobile."

It seems like a distortion, and a forced limitation, of the meaning of the word "car," to limit it to an automobile, as popularly so called. The word "car" existed and had a well-defined meaning for centuries before an automobile was thought of. Can we now limit its meaning to a comparatively new vehicle and entirely ignore its past history and meaning, and limit the application of an insurance policy to a particular species when the words used indicates a genus of vehicles?

This is in direct conflict with all the well-settled rules, established for a century, for the construction and interpretation of contracts of insurance or otherwise.

At the time this policy was written the New Jersey Motor Vehicle Law was in effect, defining motor vehicles, automobiles and motorcycles. There was at that time, also, a vast body of judicial decisions defining such vehicles. It must be assumed that the insurance company was acquainted with all these and that the language of the policy was framed subject thereto and in conformity therewith. Those definitions must be read into the policy and be used to interpret its provisions.

3.

THE PRECEDENTS RELIED UPON BY THE SUPREME COURT.

The trial court rested its decision upon the cases of—

> *Salo* v. *North American Accident Ins. Co.*, 153 N. E. 557, decided by the Supreme Judicial Court of Massachusetts, October 19, 1926 (printed in full as Appendix "A" of this brief), and
>
> *LaPorte* v. *North American Accident Ins. Co.*, 109 So. Rep. 767, decided by the Supreme Court of Louisiana, October 5, 1926 (printed in full as Appendix "B" of this brief),

and assumed that the policy involved in the *Salo* case was

> "for all practical purposes identical with the one in suit and against the same company, and the reasoning stated in the opinion in that case is approved by this court."

Of course, the fact that either of those cases was against the same company has no relevancy or pertinence to this case.

In the absence of precedents in our own jurisdiction on the same question, we realize that the decisions of the courts of sister states might, if well reasoned, be persuasive, but, of course, they are not controlling in this court, since there may be principles of construction established by this court or by statute that are different from those prevailing in the foreign jurisdictions, which would render

a different conclusion necessary even on an identical contract or the same state of facts.

Our purpose is to distinguish this case from those cited, in several respects, and to show that they are not reliable precedents.

THE SALO CASE.

Differences in Policies.

The trial court erroneously assumed (without any evidence whatever on the subject) that "for all practical purposes" the provisions of the policy involved in the *Salo* case were "identical" with those of the policy in suit. The policy in question in this suit is designated as "Series 229." The policy involved in the *Salo* case was "Series 249." We have procured and print an exemplified copy of the Salo policy in Appendix "C" of this brief and will offer the original exemplified copy at the argument. It will appear from a comparison of the two policies that they are different in a number of essential provisions. Even the portion of the Salo policy quoted in the Massachusetts decision is not the same as the corresponding provision in our policy.

The decedent, Perry, was at the time of the issuance of our policy (as well as at the time of his death) a motorcycle traffic officer of the Township of Millburn, and his occupation was undoubtedly so stated in his application for the issuance of this policy, which called for a statement of his "occupation." The Salo policy was issued March 19, 1924. Our policy was issued January 30, 1925. At that time this company issued two different kinds of policies, "Series 229" and "Series 249." Series 249, under which Salo was insured, provided in its "General Provisions" as follows (p. 90 of this

brief): "(1) Employees of City Police and Fire Departments will not be covered while on duty." The Salo policy also expressly excluded injuries sustained while working on a public highway (p. 88 of this brief. Series 229 (our policy) contained no such provisions. In many other important respects, such as coverage, indemnities, premiums, persons to which they are applicable, excluded occupations, conditions, general provisions, etc., the two policies are so radically different as to render them totally different types of policies. Doubtless it was for these reasons, considering the occupation shown on Perry's application, that the company issued to Perry a policy of Series 229 instead of Series 249, which, by several important provisions, was totally inapplicable to his place and character of employment.

The object of Perry in obtaining this insurance was to obtain coverage for injury and death. Obviously, for at least two major reasons, Series 249 was not appropriate for him, unless it was the intention of the parties to provide coverage only for the time when Perry was off duty. The risk of injury at such times is negligible. It was the dangers incident to Perry's occupation, and to the duties of his daily life which exposed him to danger, that prompted him to purchase accident insurance. It is only the presence of danger that prompts anyone to apply for, or enables the insurance company to sell, accident insurance. The company recognized this, since it provided in this policy as follows:

> "(12) If the insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the insured and surrender of the policy, will cancel the same and will return to the insured the unearned premium" (p. 10).

In another place the policy provides:

> "(1) * * * No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the insured or by reason of his doing any act or thing pertaining to any other occupation" (p. 8).

Paragraph (1), last above quoted, permits the insured to increase the hazards of his employment without limit, and paragraph (12) permits him to cancel the insurance if, by change of employment, the hazards of employment decrease or disappear. Since no occupation is stated in the policy, it is assumed these paragraphs refer to that stated in the application.

Obviously, the Salo policy would have been of no benefit to Perry and, by its express terms, would not have applied to Perry's accident, since it occurred while he was (a) on duty as a traffic policeman and (b) while he was working on a public highway.

On the other hand, Salo was not a police officer, but was engaged in personal pursuits and used his motorcycle for personal purposes and did not work on the public highway.

Thus, we observe that these two policies were totally and radically different in their terms, coverage, the class of persons and employments to which they were intended to apply, and in other irreconcilable respects. Salo's policy expressly excluded policemen and firemen while on duty and injuries sustained while working on the public highway. Perry's policy, by not excluding them, presumably

included policemen and fireman, whether on duty or not, and employment on public highways. Surely such an obvious and express difference in the terms, nature and purpose of the two policies should be helpful in interpreting the meaning of and applying the terms of the policy in question, and in distinguishing our case, for the purposes of this insured, from the *Salo* case.

Difference in Definitions.

There is another important difference between our case and the *Salo* case, arising from the definition of the comprehensive term "motor vehicle," which is defined in the Massachusetts statute as follows (Mass. G. L., Chap. 90, Sec. 1):

> "'Motor vehicles,' automobiles, motorcycles and all other vehicles propelled by power other than muscular power, except railroad and railway cars and motor vehicles running only upon rail or tracks, ambulances, fire engines and apparatus, police patrol wagons and other vehicles used by the police department of any city or town or park board solely for the official business of such department or board, road rollers and street sprinklers.
>
> 'Motorcycle,' any motor vehicle having but two or three wheels in contact with the ground, and a saddle on which the driver sits astride, or a platform on which he stands, or any bicycle having a motor attached thereto and a driving wheel or wheels in contact with the ground in addition to the wheels of the bicycle itself.
>
> 'Automobile,' any motor vehicle except a motorcycle."

The definitions of the same terms in our Motor Vehicle Act (1 Cum. Supp. 1979, Sec. 1) are as follows:

> "(1) The term 'motor vehicle' includes all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks.
>
> (2) The term 'motor cycle' shall include all motor operated vehicles of the bicycle or tricycle type, whether the motive power be a part thereof or attached thereto, and having pedals and saddle with driver sitting astride, or a platform on which said driver stands.
>
> (3) The term 'automobile' includes all motor vehicles except motor cycles."

Under the definition of a "motor vehicle" in the Massachusetts statute, Perry could not have recovered under his policy in that state no matter how the court should construe the term "motor-driven car." If he had been riding in an enclosed automobile instead of on a motorcycle, the result would have been the same, since the statute expressly excluded from the definition "police patrol wagons and *other vehicles* used by the police department of any city or town or park board solely for the official business of such department or board." Under the Massachusetts definition, Perry's motorcycle was not even a motor vehicle, since it was one of the "other vehicles" used by a police department. Under the New Jersey definition it *was* a motor vehicle.

It seems clear, therefore, that the decision of a court upon a policy essentially different in terms and purpose, and limited by a statutory definition that would have excluded Perry entirely, could not constitute even a persuasive precedent in a case on

a different policy, under a different statutory definition of a term which included the vehicle upon which Perry was riding and from which he was thrown at the time of his death.

The Decision of the Court.

After admitting that the term "motor vehicle" included a "motor cycle," the Massachusetts court states:

> "While every motor cycle is a motor vehicle, it is plain that every motor vehicle is not a motor cycle."

This reasoning applies equally to an automobile. Obviously, under the statutory definition in Massachusetts (and New Jersey), while every automobile is a motor vehicle, it is equally plain (from the definitions themselves) that every motor vehicle is not an automobile.

Under both definitions the term "automobile" includes a motor truck of any size, character or description. Hence, it is equally true that while every motor truck is a motor vehicle, it is equally plain that every motor vehicle is not a motor truck.

Applying the same logic to a "horse-drawn vehicle" (also referred to in the policy), of course a horse-drawn vehicle is any vehicle drawn by a horse or horses. Under all the definitions, a "vehicle" is "any carriage or conveyance moving on land, either on wheels or runners." This would include a stone-sled and the most luxuriant limousine or ponderous motor bus. All stone-sleds are vehicles, but all vehicles are not stone-sleds.

This is saying, only, that a part is less than the whole. It is in no way conclusive or determinative on the question involved in the case. Then the

Massachusetts court assumes that because an automobile is a "motor-driven car," and the statute makes a distinction (for the purposes of license fees, but not for the application of the statute) between an automobile and a motorcycle, that it necessarily follows that if an automobile is a "motor-driven car," a motorcycle is *not* a "motor-driven car." Since the purpose of the statute was to regulate the use of motor vehicles, and that term, as defined therein, includes, with equal regard, an automobile and a motorcycle, it would seem that "things which are equal to the same thing are equal to each other." In this respect we think the Massachusetts court merely begged the question.

But that court goes on to say:

> "The word 'car' is ordinarily used in speaking of an automobile. It is a common expression describing an automobile. It is a matter of common knowledge that in ordinary conversation a motorcycle is not referred to as a car, but spoken of as a motorcycle."

This argument is not conclusive because the Massachusetts (and our) definition of an automobile includes all motor vehicles except motorcycles. Hence, it includes motor trucks, yet in speaking of an automobile we do not think of a motor truck, nor is a motor truck referred to as a "car."

It may be true that the word "car" is ordinarily used in speaking of an automobile, but (to use the argument of the court) every car is not an automobile.

The meaning of the word "car" is discussed at length elsewhere in this brief.

The Massachusetts court also says:

> "The difference in the mechanical construction of automobiles and motor cycles does not indicate that a common designation would naturally apply to both."

Yet the statutory definition of an automobile includes every other conceivable type of vehicle propelled by other than muscular power, whether it be a Ford two-passenger type, an interstate bus, a ten-ton truck, a tractor, a private armored car, a self-moving concrete mixer or a steam shovel.

We take it that the true distinction lies in the motive power (whether the vehicle is propelled by other than muscular power) and not in its mechanical construction. Is there any greater difference in mechanical construction between a passenger automobile and a motorcycle than there is between an automobile and a farm tractor, or a private armored car, or a steam shovel, or a self-propelling road mixer, all of which are equally automobiles under that definition? The court assumed that every automobile is a motor-driven car. Perhaps so, but is a farm tractor, a steam shovel, an armored car, or a road mixer any more of a motor-driven car than a motorcycle?

It is true that—

> "A motorcycle having ordinarily two wheels is a machine more in the nature of a bicycle equipped with motor power";

but what of that, they are both children of the full blood of the parent idea of a "motor vehicle," and both of them were three wheeled vehicles—two behind and one in front—when they first came into the world.

In 1769, Cugnot, a Frenchman, built a three-wheeled automobile which carried two passengers.

An automobile built by Walter Hancock in 1824 had three wheels. In 1885 Gottlieb Daimler put a single-cylinder engine in a bicycle. The year following, Carl Benz invented his three-wheeled automobile. In our own experience we have seen the motorcycle develop from a three-wheeled "velocipede," which the Century Dictionary and Cyclopedia (p. 6714) defines as "a light vehicle or carriage with two or three wheels, impelled by the rider." The whole family came from the three-wheeled ancestor, and now we are going back to that idea in the ultra-modern three-wheeled "cozy-cab" which we see on our streets to-day.

As we see from the discussion of the word "car" elsewhere in this brief, the whole wheeled family descended from a two-wheeled cart, from which the very word "car" has its origin. Why, then, is the term "motor-driven car" "applicable to an automobile" and "not appropriate to describe a motorcycle"?

Of course, as the court says, "the statutory definitions above referred to make it apparent that there is a distinction between an automobile and a motorcycle." That is obvious, but the statute defines neither of them as a "car." The court's difficulty here arises from its unwarranted assumption, at the outset, that an automobile is a car and a motorcycle is not.

The court then discusses the use of the word "in" and concludes that the decedent did not ride "in" his motorcycle, overlooking entirely the fact that the policy covered a case where the insured is "thrown from" (not "out of") a motor-driven car.

The Massachusetts court cites a number of cases. It does not say they support its interpretation, for

they don't. It merely says they "are not at variance with the conclusions here reached." We think they are at variance with those conclusions.

In *People* v. *Smith* (120 N. W. 581; 21 L. R. A. [N. S.] 41), the Michigan Supreme Court held that a motorcycle, like an automobile, was a "motor car" within the meaning of a criminal statute of Michigan. We fail to see the difference between a "motor car" and a "motor-driven car."

The case of *Maine* v. *Tardiff* (90 Atl. 424; L. R. A. 1915-A 817) involved neither an automobile or a motorcycle, but a railroad hand car, and held it was a "car."

So much argument to show that a motorcycle is not a "motor-driven car," indicates clearly that there was, at least, some question about it. Otherwise "methinketh thou protesteth too much." Yet, the Massachusetts court ignored, entirely (without so much as a reference to), the well known rules of construction applicable to insurance policies, namely, if there is any doubt whatever about the meaning of the terms of such a policy, it must be resolved in favor of the insured. This subject is discussed and authorities cited elsewhere in this brief. If it was the intention to exclude motorcycles from the vehicular definition in the policy, why did not the skilled draftsman of the policy say "automobile" instead of "motor-driven car" (a term for which an express definition cannot be found anywhere)? If they had said "automobile," that term would, by the definition of the statute, have excluded motorcycles while including every other form of motor vehicle. In some policies airplanes are expressly excluded. In others, motorcycles are expressly excluded, as in the policy involved in the case of *Silverstein* v. *Commercial Casualty Ins. Co.*

(142 N. E. 321), recently decided by the New York Court of Appeals and heretofore cited.

For these reasons, we think, the Massachusetts decision is erroneous and should be disregarded by this court.

The LaPorte Case.

The *LaPorte* case involved a policy of "Series 229," identical in all respects with ours. In deciding that case the Louisiana Supreme Court seems to have been influenced in its opinion by a statement printed at the top, but not included within, the policy, which it quotes as follows:

> "This policy provides indemnity for loss of life, limb, sight or time by accidental means, *as herein limited and provided.*"

From this the court concludes that

> "the policy in question is not one covering accidents generally, but that the liability of the insurance company issuing the same is a restricted one, to be incurred only under the particular circumstances and conditions stated in the policy."

If this statement on the policy had been within the policy itself it would have been meaningless. With or without it, there could be no difference in the matter of construction. What the court takes the pains to say about it is too obvious to require statement. There was no alternative under the well established rules. In any event, it could have no influence on the interpretation of a word or provision in the policy.

The next observation of the court is that the policy was issued "for the *small* premium of 50 cents. The reason for the limitation contained in

the present policy is apparent." What had that to do with the interpretation of its provisions? The insurance company framed the provisions of the policy and fixed the premium to suit itself. Whether it charged 50 cents or $50 made no difference in the meaning of its provisions. Neither in that case nor in ours was inadequacy of consideration pleaded or urged. If the policy was as limited in its application as the defendant contended in that case, and contends in this one, we should say the price was excessive.

We are all familiar with the little sign at every railroad ticket office window by which the Travelers Insurance Company offers to insure the traveler for $2,500 against accident for the *small* premium of 25 cents. Unless inadequacy or failure of consideration is in issue, the court will not even consider the amount of the premium, and, in any event, the question goes to the entire contract itself and not to the construction of its provisions.

As a basis for its decision, the Louisiana court assumed as "obvious" (but apparently without any evidence to support it) that all the streets in which motorcyclists ride are "congested"; that the rider is "wholly exposed to accidents from collisions of all kinds"; that the motorcycle is (but an automobile is not) "on a level with the traffic"; that a motorcycle is (but an automobile is not) "without protection, either by front or rear bumpers, or by a body *in* which the motorcyclist may ride." What has congested streets, or the exposure of the driver to accidents, or that the vehicle is "on a level with the traffic," or the absence of protection from bumpers or a body, to do with the question of determining the meaning of a word describing a particular vehicle or class of vehicles? We think none.

An automobile chassis (which is only the running gears) would be a "motor-driven car" and would have no body to protect the driver. Moreover, all automobiles do *not* have bumpers front and rear.

The court also assumed that the rider of a motorcycle assumed "unusual risk" and, therefore, "it is plain that these machines were excluded intentionally from the policy, not in terms, it is true, but by restricting recovery only to cases of accidents" described in the policy. Judging from every-day occurrences there is a high degree of risk in operating an automobile under present-day conditions. If the policy was not intended to cover risks, why "choke at a gnat and swallow a camel?" The purpose of the policy was to insure against risk, and under paragraph (1) of the "Standard Provisions" of the policy the insured was at liberty to assume additional risks or more hazardous employment without limit and without diminution of indemnity. Under such latitude how could any risk be "unusual"? If motorcycles were to be "intentionally" excluded, it would have been simple enough to have expressed such an intention by using a more specific word, like "automobile," or "except motorcycles," as was done in the policy involved in *Silverstein* v. *Commercial Casualty Ins. Co.* (142 N. E. 231).

In *Wright* v. *Aetna Life Ins. Co.* (10 F. [2nd] 281, 395) the United States Circuit Court of Appeals said:

> "If this company did not intend that one who jumps from a machine was to be protected, it could have made that unambiguous in a few words. It considered the matter of exceptions for it inserted four. If by its omission to do so it has couched the policy in such terms that reasonable men could rea-

> sonably contend it applied to and covered a situation such as is now before us, we are justified under the settled rule of construction in resolving that ambiguity against the company in giving the policy such construction."

Although the *Wright* case was recently decided, it declares no new rule of law. The Louisiana court is in error in thus assuming an intentional exclusion of motorcycles because of what it assumes to be the "unusual risk" of riding a motorcycle. As a matter of fact, common knowledge indicates quite the contrary of this assumption of "unusual risk." Motorcycle accidents are comparatively rare even in congested traffic areas. The ease with which they can be handled and the small space required for their operation enables them to get about with less difficulty or danger of collision than with an automobile.

That court also assumed, without justification, that a "motor-driven car" must have a body and more than two wheels "as a support, and as a protection to the driver against accidents." Where is there any such protection in an automobile, or an automobile chassis, which has no body? Is there any particular security against accidents in a body or in more than two wheels? The very purpose of the policy was to insure against risks and accidents, else it would not have been purchased or sold.

Then the court says:

> "So there is every reason, from the standpoint of risk and liability, why defendant insurance company should *exclude* motorcycles from its policy and none whatever to induce it to include *such dangerous machines,* upon payment of the *negligent* sum of 50 cents per year for an indemnity risk of $1,000."

Here are three erroneous assumptions:

1. That the company *excluded* a motorcycle. They could have done so but did not.

2. That motorcycles are "such dangerous machines." There is no fact to support this assumption.

3. That the sum of 50 cents is a "negligent" consideration for the indemnity provided. Assuming that the court means "negligible," we have already pointed out the irrelevancy of the amount of the consideration.

The suggestion that a garage owner would not "send a motorcycle to a customer to ride in when he had ordered a 'motor *car*'" is beside the point. No such question was involved in the case. A garage owner would not, under such circumstances, send a motor truck, or a motor hearse, both of which are indisputably "motor-driven cars," but he might, with perfect propriety, have sent a "cozy cab," which is a motorcycle.

The court also assumed that the policy was a contract that "is the special law of the case." This implies that a policy of insurance is above the law and is not subject to the legal rules of construction applicable to such contracts. This, of course, is not true.

The definition from *Encyclopedia Britannica* cited by the court does not bear out its contention. In the first place, it defines a "motor car" and not a "motor-driven car," but that definition includes an electric tram car, a train of railroad cars, and expressly says that "of late years it has been more usually applied *in Great Britain* to light automobiles *or* mechanically propelled carriages running on common roads. On the continent of Europe and

in the United States the usual expression for these vehicles is 'automobile'; the term 'autocar' has also been employed."

Berry on Automobiles (5th Ed., p. 2), giving the definition of the American courts, says:

> "The courts, without making clear distinctions, have generally used the terms automobile, motor vehicle, motor car, and in the earlier cases, horseless carriage, as being synonymous with each other. Except where special provision is made to the contrary, a motor-cycle is considered as falling within statutes which use such terms."

After all this argument to construe an ambiguity, the court, "putting its blind eye to the telescope," says, "There is no ambiguity as to the language of the policy," and by this simple statement brushes aside the rules of construction established by the courts that a policy should be liberally construed in favor of the insured and against the insurer.

The court disposed of decisions to the contrary by finding that those cases "rest upon the definition contained in such statutes, or upon language in them broad enough to include motorcycles, under the terms of 'motor-driven vehicles,' or some other similar term." "A Daniel come to judgment!" Our contention is that if there is a statute (as there is in New Jersey) defining such things, all contracts effective in that jurisdiction are presumed to be made subject to, and are governed by such definitions. Since the Louisiana court referred to no statute, it may be assumed it was not limited by any statutory definition. We also contend that a "vehicle" includes a motorcycle, both under the dictionary and the statutory definition.

Then the court quotes from 2 *Ruling Case Law* (p. 1167):

> "The term motor car, automobile, motor vehicle and motor cycle are synonymous,"

and admits that the case of *People* v. *Smith* (120 N. W. 581; 21 L. R. A. [N. S] 41) held that a motorcycle was a "motor vehicle," and after quoting the Michigan statute in question in that case, says:

> "Necessarily, a motorcycle is included in the comprehensive terms of that statute, as it is not found in the exceptions enumerated."

If that is true, why not apply the same rule of construction to a policy of insurance?

The court disposes of the case of *R.* v. *Div. Justices* (2 Ir. K. B. 698), cited in the note in 21 L. R. A. (N. S.) 41, holding that a motorcycle is a "motor car," by saying that "the question was not raised as to the exemption of defendant from prosecution on the ground that the act did not include motorcycles." Such an inference cannot be drawn from the citation referred to, but the fact remains that the rider of a motorcycle was convicted in that case under the English Motor Car Act of 1903. The fact also remains that under a Michigan statute relating to "motor vehicles," the case of *People* v. *Smith* expressly held that the term "motor vehicle" included motorcycles.

The court admits that under a statute defining a "motor car," construed in *Webster* v. *Terry* (King's Bench Div., Oct. 21, 1913, 1 K. B. 51; reported in Ann. Cases 1917-A, p. 226), "motorcycles clearly came within the provisions of that act," yet it says a motorcycle is not a "motor car."

The court also says:

> "It is not difficult to see that a motorcycle would come within that statute,"

referring to a Georgia statute relating to "automobiles, locomobiles and other vehicles and conveyances of like character." Under the well known rules of statutory construction, where a statute, after making mention of specific things, extends its operation by general words, if, as the court admits, a motorcycle was included in the general terms, it must have been because it was an object of the same character as those specifically mentioned. This would imply (and was in fact held in *Bonds* v. *State,* 16 Ga. App. 401; 85 S. E. 629) that "motorcycle" and "automobile" were synonymous terms. Where does this leave the Louisiana court with its decision to the contrary?

This question must have occurred to the court, for it hastens to answer, as follows:

> "The policy before us, however, is the special law of the case, which we are called upon to interpret, independently of the provisions of other statutes dealing with the regulation of the speed, licensing and registration of motor cars and automobiles, &c."

With this conclusion we disagree. As we have already said, we think the statutory definitions of motor vehicles, automobiles and motorcycles in the Motor Vehicle Act govern the interpretation of the policy in question.

For the foregoing reasons we think the LaPorte decision is an unreliable precedent and should be disregarded by this court in the instant case.

The Louisiana court referred to, but did not discuss, the point that one could not ride *in* a motorcycle. We discuss this feature of the case elsewhere in the brief.

These two cases were decided (almost simultaneously) in October, 1926, without any precedent or authority whatever, and in the face of a great weight of authority to the contrary. They are contrary to the principle of *stare decisis* and should not have been approved by the trial judge.

4.

The Verdict and Judgment of the Supreme Court.

Here we consider grounds—

> "1. The Supreme Court erred in finding a verdict for the defendant.
>
> 2. The Supreme Court erred in its refusal to find a verdict in favor of the plaintiff and against the defendant.
>
> * * * * * *
>
> 7. The Supreme Court erred in giving final judgment for the defendant.
>
> 8. The Supreme Court erred in refusing to give final judgment for the plaintiff."

These grounds of appeal are covered by the foregoing argument, and, with that argument in view, it is unnecessary to say more here than to state these grounds of appeal.

Conclusion.

A decision in this case in favor of the plaintiff is entirely consonant with the definitions in the statute and the many decisions of the courts.

A construction of the policy in favor of the plaintiff is necessary to give effect to the long established rules of construction which not only abhor the forfeiture of an insurance contract but require its construction in favor of the insured if there is any doubt about the meaning of the provisions as written by the insurance company itself. This is a sound and beneficent rule, without which the insurance business would not long survive. Unless the terms of a policy were construed most strongly against the company, whose experts have taken such pains to confine its liability within the narrowest possible limits, no one could safely purchase insurance without the advice of counsel particularly skilled in insurance law. The only alternative would be to prescribe the terms by statute, as it has been necessary to do in this state respecting fire insurance contracts.

The rules of construction and the decisions of the courts above discussed render it just and fair that this court hold that if motorcycle riders were not intended to be included in the protective terms of the policy, the defendant should have done one of two things—it should have

(a) Used a more specific term than the word "car," or

(b) Expressly excluded motorcycles from its meaning.

We respectfully submit that the application of the policy to the facts in this case should be sustained and the judgment below reversed and that the Supreme Court be instructed to enter judgment for the plaintiff, with costs.

Respectfully submitted,

HOBART & MINARD,
Attorneys for Plaintiff.

GEORGE S. HOBART,
DUANE E. MINARD,
of Counsel.

APPENDIX A.

SALO v. NORTH AMERICAN ACC. INS. CO.

(153 N. E. 557)

(Supreme Judicial Court of Massachusetts. Worcester. Oct. 19, 1926.)

1. INSURANCE.

Where policy sued on insured against injury or death by wrecking or disablement of private motor-driven car, burden was on plaintiff to show that motorcycle on which deceased rode was "motor-driven car" within policy.

2. AUTOMOBILES.

Under G. L. c. 90, § 1, defining automobile and motorcycle, term "motor vehicle" includes both automobiles and motorcycles, and, while every motorcycle is motor vehicle, not every motor vehicle is motorcycle.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Motor Vehicle.]

3. EVIDENCE.

It is common knowledge that in ordinary conversation motorcycle is not referred to as car, but is spoken of as a motorcycle.

4. INSURANCE—Accident insurance policy, covering death in wreck of "motor driven car," held not to include motorcycle.

Accident insurance policy, covering death caused by wrecking or disablement of private "motor-driven car" in which insured was riding or driving, *held* not to include a motorcycle, especially as deceased did not ride in his motorcycle but on it.

Exceptions from Superior Court, Worcester County; L. S. Cox, Judge.

Action of contract by John J. Salo, administrator of the estate of William Salo, deceased, against the North American Accident Insurance Company, to recover on an accident insurance policy. Finding for defendant, and plaintiff excepts. Exceptions overruled.

M. M. Taylor, of Worcester, for plaintiff.

J. F. McGrath, of Fitchburg, and J. J. MacCarthy, of Worcester, for defendant.

CROSBY, J. This action of contract is brought by the plaintiff as administrator of the estate of his son, William Salo, who died on May 29, 1924, as the result of injuries received by being thrown from his motorcycle on that day. The intestate at the time of his death was insured by an accident insurance policy issued to him by the defendant. The case was heard by a judge of the superior court without a jury upon an agreed statement of facts. The plaintiff seasonably requested the trial judge to make the following rulings:

> "(1) Upon the agreed statement of facts the plaintiff is entitled, as a matter of law, to a verdict for $1,000 and interest according to law.
>
> "(2) Upon the pleadings and the agreed statement of facts the plaintiff is entitled, as a matter of law, to a verdict for $1,000 and interest according to law."

The judge refused to rule as requested and found for the defendant.

[1, 2] The pertinent provisions of the policy are embodied in that portion entitled "Part I," which provides in substance that if the insured shall be

killed the company will pay $1,000 if such death is caused "by the wrecking or disablement of any private horse-drawn vehicle, or private motor-driven car in which insured is riding or driving, or, by being accidentally thrown from such vehicle or car. * * *" The sole question presented is whether a motorcycle is a "motor-driven car" within the meaning of those words as used in the policy. The burden rested upon the plaintiff to prove the affirmative of that proposition to entitle him to recover. It is earnestly argued in his behalf that, as a motorcycle is driven by a motor, it is a motor vehicle; that the term "motor vehicle" includes motorcycles and automobiles; and that, therefore, a motorcycle is equally with an automobile "a motor-driven car." G. L. c. 90, § 1, contains the following definitions:

> "'Automobile,' any motor vehicle except a motorcycle."
>
> "'Motorcycle,' any motor vehicle having but two or three wheels in contact with the ground, and a saddle on which the driver sits astride, or a platform on which he stands, or any bicycle having a motor attached thereto and a driving wheel or wheels in contact with the ground in addition to the wheels of the bicycle itself."
>
> "'Motor vehicles,' automobiles, motorcycles and all other vehicles propelled by power other than muscular power, except railroad and railway cars and motor vehicles running only upon rails or tracks, ambulances, fire engines and apparatus, police patrol wagons and other vehicles used by the police department of any city or town or park board solely for the official business of such department or board, road rollers and street sprinklers."

[3, 4] It is apparent from the language of the statute last quoted that the term "motor vehicle" includes both automobiles and motorcycles. While every motorcycle is a motor vehicle, it is plain that every motor vehicle is not a motorcycle. The statute makes a clear distinction between an automobile (which manifestly is a "motor-driven car" as used in the policy) and a motorcycle. The word "car" is ordinarily used in speaking of an automobile. It is a common expression describing an automobile. It is a matter of common knowledge that in ordinary conversation a motorcycle is not referred to as a car, but is spoken of as a motorcycle. The difference in the mechanical construction of automobiles and motorcycles does not indicate that a common designation would naturally apply to both. A motorcycle having ordinarily two wheels is a machine more in the nature of a bicycle equipped with motor power. The statutory definitions above referred to make it apparent that there is a distinction between an automobile and a motorcycle. The term "motor-driven car," as used in the policy, while applicable to an automobile is not appropriate to describe a motorcycle.

The provision in question in part I of the policy refers to a private motor-driven car "in" which the insured is riding or driving, while the provision in part I relating to an injury sustained by the policy holder by the wrecking or disablement of a railroad car or passenger steamship or steamboat "in or on" which he is traveling as a fare-paying passenger indicates that a distinction was intended to be made between the prepositions in and on. The insured did not ride "in" his motorcycle; he rode "on" it. Cases decided under statutes which make no distinction between automobiles and motorcycles are not at variance with the conclusion here reached.

See People v. Smith, 156 Mich. 173, 120 N. W. 581, 21 L. R. A. (N. S.) 41, 16 Ann. Cas. 607; State of Maine v. Tardiff, 111 Me. 552, 90 A. 424, L. R. A. 1915A, 817. Obviously a bicycle equipped with a motor would not be a "motor-driven car," although it would be a motor-driven vehicle.

As the policy properly construed does not cover an accident occurring while the insured is riding on a motorcycle, it follows that the plaintiff's requests could not properly have been given, and that he cannot recover.

Exceptions overruled.

APPENDIX B.

(161 La.)

No. 27501.

LAPORTE v. NORTH AMERICAN ACC. INS. CO.

(109 So. Rep. 767)

(Supreme Court of Louisiana. May 31, 1926. Rehearing Denied Oct. 5, 1926.)

(*Syllabus by Editorial Staff.*)

1. INSURANCE.

Policy covering accidents to insured "while walking or standing on public highway" *held* not to indemnify insured, where he was run over after being thrown from motorcycle.

2. INSURANCE—Policy covering accidents in which insured was thrown from "motor-driven car" held not to cover injury, where he was thrown from motorcycle (Rev. Civ. Code, arts. 13, 14).

Insurer under policy covering accidents in which insured was thrown from "horse-drawn vehicle or motor-driven car in which" he was riding *held* not liable, where he was thrown from motorcycle, in view of restrictive liability stated in policy and Rev. Civ. Code, arts. 13, 14, since policy is special law of case, and motorcycle is not "motor-driven car."

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Mrs. Emily M. Laporte, widow of Albert Major, against the North American Accident Insurance Company. Judgment for defendant, and plaintiffs appeals. Affirmed.

Titche, Kiam & Titche, of New Orleans, for appellant.

Dart & Dart, Louis C. Guidry, and Robert Ewing, Jr., all of New Orleans, for appellee.

LAND, J. The widow of Albert Major, administering his estate in the capacity of natural tutrix of her minor children, has instituted this suit on an accident policy of insurance issued to decedent by the North American Accident Insurance Company.

While said policy was in force, the insured was thrown from a motorcycle, knocked down, and run over by a Ford automobile at the corner of Prytania and St. Andrew streets in the city of New Orleans, and died later at the Touro Infirmary in said city.

The sole defense urged by defendant company is that the accident was not covered by the policy, as a motorcycle is not such a motor-driven car as is covered by the policy issued herein.

Under part 1 of the policy, an indemnity of $1,000 is provided in case of loss of life. Plaintiff demands double that sum as a penalty for failure

on the part of defendant company to make settlement within six months after proof of death, and, in the alternative, double the amount of insurance; i. e., the sum of $500, under part 2 of the policy, providing for loss of life "by being struck or knocked down or run over, *while walking or standing on a public highway,* by a vehicle propelled by steam, cable, electricity, naphtha, gasoline, horse, compressed air, or liquid power."

From a judgment rejecting her demands, plaintiff has appealed.

1. It is admitted in the stipulation as to the facts "that at the time of the accident the said Albert Major *was riding on what is known as a motorcycle,* and he was by said Ford automobile thrown therefrom, knocked down, run over, and killed."

[1] As the provisions of part 2 of the policy apply to loss of life occasioned only by accidents happening to the insured *"while walking* or standing on a public highway," it is clear that the dismissal of plaintiff's suit as to the alternative demand is correct.

While part 2 of the policy limits the right of the estate of the insured to recover for accidents to one who is "standing or walking on a public highway," there is little or no restriction as to the kind of vehicle by which the insured may be struck or knocked down or run over; it being immaterial whether he is killed "by a vehicle propelled by steam, cable, electricity, naphtha, gasoline, horse, compressed air, or liquid power."

[2] While it is manifest that the heirs of the insured, under part 2 of the policy, might recover for the loss of his life had he been killed while

"standing or walking on a public highway" by being struck, knocked down, or run over by a motorcycle, yet recovery can be had, in this particular case, under part 1 of the policy, only "by the wrecking or disablement of any private *horse-drawn vehicle, or motor-driven car, in which* insured is riding or driving, *or by being accidentally thrown from such vehicle or car.*"

It is admitted in the statement of facts that deceased was riding on a motorcycle at the time of the accident, and "that by motorcycle is meant a two-wheeled, motor-driven *machine,* substantially as shown by the cut marked Exhibit 1, except that the motorcycle ridden or driven by decedent, Albert Major, was equipped with a seat at the rear, *upon* which another person could ride, and Mrs. Emily Laporte Major, now widow, often rode *upon* it behind her husband." (Italics ours.)

We fail to see wherein the above admission is of any benefit to plaintiff in this case, as the insured must be killed by being accidentally thrown from "a private *horse-drawn vehicle or motor-driven car," in which* he is riding or driving, in order that recovery may be had. The word "motor-driven *machine*" is not used in the policy at all. It must be conceded that a motorcycle is not "a horse-drawn vehicle"; and while the word "vehicle" is broad enough when used in connection with the word "motor-driven," to include a motorcycle, yet in the policy sued on the word "vehicle" is qualified by and limited to "horse-drawn vehicles." The sole question, therefore, left for decision is whether a motorcycle is a "motor-driven *car" in which* the insured was riding or driving at the time of the accident.

The policy issued in this case is headed with the following statement in large type letters:

> "This policy provides indemnity for loss of life, limb, sight or time by accidental means, *as herein limited and provided.*" (Italics ours.)

In other words, it is made plain to the public that the policy in question is not one covering accidents generally, but that the liability of the insurance company issuing the same is a restricted one, to be incurred only under the particular circumstances and conditions stated in the policy.

In this case the policy covers an indemnity of $1,000 for loss of life, and is issued to the insured for the term of one year, upon the payment of the small premium of 50 cents. The reason for the limitations contained in the present policy is apparent. It is obvious that one riding on a motorcycle in a public street, which may be congested with automobiles and other vehicles, is wholly exposed to accidents from collisions of all kinds. In the first place, his machine is on a level with the traffic, is supported by only two wheels, and is without protection, either by front or rear bumpers, or by a body in which the motorcyclist may drive or ride.

Because of the unusual risk assumed by those riding upon motorcycles, it is plain that these machines were excluded intentionally from the policy, not in express terms, it is true, but by restricting recovery only to cases of accidents to the insured arising by being thrown from "any private *horse-driven vehicle,* or motor-driven *car, in which* such insured *is riding or driving,*" thereby clearly indicating a motor-driven car with a body, and having more than two wheels as a support, and as a protection to the driver against accidents.

So there is every reason, from the standpoint of risk and liability, why defendant insurance company should exclude motorcycles from its policy, and none whatever to induce it to include such dangerous machines, upon the payment of the negligent sum of 50 cents per year for an indemnity risk of $1,000.

A motorcyclist may ride *upon* his machine, but he cannot ride *in* it.

A motorcycle is not known as a "motor-driven *car*," or as a motor*car*," in the general and popular sense of that term.

It would be difficult to conceive that a garage owner would send a motorcycle to a customer to ride in when he had ordered a "motor*car*."

It would be more difficult to conceive that such customer would accept such a machine as a "motorcar" if sent.

A policy of insurance is a contract between the parties and is the special law of the case as far as they are concerned.

The words of a law are generally to be understood in their most usual signification. R. C. C. art. 14.

Motorcycles are not expressly included within the terms of the policy, nor are they embraced therein by implication. "Motorcar" or "motor-driven car" has a definite and well-understood meaning in the United States.

In the Eleventh Edition of Encyclopædia Britannica, vol. 18, p. 914, we find the following:

> "The term 'motorcar' is one which was primarily employed in America to denote the car or carriage containing the electromotor used for propelling an electric tramcar or train of carriages on rails, but of late years it has been more usually applied in Great Britain to light automobiles or mechanically-propelled carriages running on common roads. On the continent of Europe and in the United States the usual expression for these vehicles is 'automobile'; the term 'autocar' has also been employed."

There is no ambiguity as to the language of the policy. The present case therefore is not one to which should be applied the principle of law that policies of insurance should be liberally construed in favor of the insured and against the insurer.

Courts will not disregard the clear letter of the law under the pretext of pursuing its spirit. R. C. C. art. 13; 14 R. C. L. p. 931.

We have been cited to no case holding, under the terms of the policy now before us, that a motorcycle is a "motor-driven car" or a "motorcar."

It is true that plaintiff has laid before us decisions of the courts of other jurisdictions construing special statutes, and holding that, under those particular statutes, a motorcycle is a motorcar; but, upon analysis, these cases are found to rest upon the definition contained in such statutes, or upon language in them broad enough to include motorcycles, under the terms of "motor-driven vehicles," or some other similar term. We shall not attempt to review all of the cases cited, but shall content ourselves with the following:

In 2 Ruling Case Law, p. 1167, it is stated that:

> "The terms motorcar, automobile, motor vehicle, and motorcycle are synonymous."

The case of People v. Smith, 156 Mich. 173, 120 N. W. 581, 21 L. R. A. (N. S.) 41, 16 Ann. Cas. 607, is cited in support of the general rule thus stated.

An examination of the Smith Case discloses that the defendant in that case was convicted for operating a motorcycle in violation of a statute (Pub. Acts Mich., 1905, No. 196), entitled:

> "An act to provide for the registration and identification of *motor vehicles,* etc."

Section 1 of this act contains the following definition:

> "The term and word 'motor vehicles' * * * shall be construed to mean *all vehicles propelled by power, other than muscular power, except* traction engines and such motor vehicles as run only upon rails or track."

Necessarily, a motorcycle is included in the comprehensive terms of that statute, as it is not found in the exceptions enumerated.

The case of R. v. Div. Justices, [1904] 2 Ir. K. B. 698, cited in note in 21 L. R. A. (N. S.) p. 41, is not authority for holding that a motorcycle is a motorcar. It is true that the note citing this case states that:

> "The conviction of the rider of a motorcycle was sustained as a violation of an act punishing the driving of 'a motorcar on a public highway,' * * * at a prohibited speed."

The conviction was sustained, as stated, but the question was not raised as to the exemption of defendant from prosecution on the ground that the act did not include motorcycles.

The points made in the case were that the order and conviction were bad in form, and that there was no evidence to justify a conviction under section 1 of the Motorcar Act of 1903.

In the case of Webster v. Terry, King's Bench Div. Oct. 21, 1913, 1 K. B. 51, reported in Ann. Cas. 1917A, p. 226, the statute specifically defined "motorcar" to mean "a vehicle propelled *by mechanical power.*" Motorcycles clearly come within the provisions of that act. No such issue was raised in that case, the only question before the court being whether a motorcycle came within the provisions of an exception to the effect that the regulations should not apply to "any bicycle, tricycle or other machine to which section 85 Local Government Act 188 applies."

In Bonds v. State, 16 Ga. App. 401, 85 S. E. 629, the statute covered "automobiles, locomobiles *and other vehicles and conveyances of like character* propelled by steam, *gas, gasoline,* electricity, *and any power other than muscular power,* upon the public and private roads of the state of Georgia." It is not difficult to see that a motorcycle would come within that statute.

The policy before us, however, is the special law of the case, which we are called upon to interpret, independently of the provisions of other statutes dealing with the regulation of the speed, licensing, and registration of motorcars, automobiles, etc.

For this reason, these and other decisions cited by able counsel for plaintiff are neither persuasive nor applicable to the case at bar.

We are of the opinion, for the reasons assigned, that "motorcycle" is not included in the term "motor-driven car," as used and intended in the policy in this case.

Judgment affirmed.

APPENDIX C.

COMMONWEALTH OF MASSACHUSETTS.

WORCESTER, ss. SUPERIOR COURT.

March 24, 1927.

I, FRANK L. DEAN, Clerk of the Superior Court for the County of Worcester, hereby certify that, with the exception of the words "THIS IS A SAMPLE POLICY" printed in large type diagonally across the face of the first page and these words do not appear on the original policy, the following is an exact copy of policy No. 3325480, issued by the North American Accident Insurance Company of Chicago, Illinois, to William Salo, dated March 19, 1924, which original policy was submitted to the Supreme Judicial Court of Massachusetts at the argument of case No. 67, John J. Salo, Admr. vs. North American Accident Insurance Company, at the September Sitting of the Full Bench of said court at Worcester, Massachusetts, in September, 1926. I cannot be sure of the Secretary's name printed twice on the third page of the policy, but it seems to be "A. E. Genest."

WITNESS my hand and seal of the Superior Court this 24th day of March, 1927.

FRANK L. DEAN,
(Seal) Clerk of the Superior Court.

THIS POLICY PROVIDES INDEMNITY FOR LOSS OF LIFE, LIMB, SIGHT OF TIME BY ACCIDENTAL MEANS, AS HEREIN LIMITED AND PROVIDED.

No. 3325480

NORTH AMERICAN ACCIDENT INSURANCE COMPANY

CHICAGO, ILLINOIS.

(A Stock Company and hereinafter called the Company)

DOES HEREBY INSURE

William Salo,

age 19 of 32 Trumbull St., Worcester, Mass. (hereinafter referred to as the Insured) against Death or Disability resulting directly and independently of all other causes from bodily injury sustained through external, violent, and accidental means during the term of this policy, subject to the limitations and conditions herein contained, as follows:

PART I.

If the Insured shall, by the wrecking or disablement of any railroad passenger car or passenger steamship or steamboat, in or on which such Insured is traveling as a fare-paying passenger; or, by the wrecking or disablement of any public omnibus, street railway car, taxicab, or automobile stage, which is being driven or operated, at the time of such wrecking or disablement, by a licensed driver plying for public hire, and in which such Insured is traveling as a fare-paying passenger; or, by the wrecking or disablement of any private horse-drawn vehicle, or private motor-driven car in which Insured is riding or driving, or, by being accidentally thrown from such vehicle or car, suffer any of the specific losses set forth below in this

Part I, the Company will pay the sum set opposite such loss:

SPECIFIC LOSSES	*Value First Year Under Part I*	*Annual Increase Under Part I*	*Value After 5th Year Under Part I*
For Loss of Life	$1,000.00	$100.00	$1,500.00
For Loss of Both Hands	1,000.00	100.00	1,500.00
For Loss of Both Feet	1,000.00	100.00	1,500.00
For Loss of Sight of Both Eyes	1,000.00	100.00	1,500.00
For Loss of One Hand and One Foot	1,000.00	100.00	1,500.00
For Loss of One Hand and Sight of One Eye	1,000.00	100.00	1,500.00
For Loss of One Foot and Sight of One Eye	1,000.00	100.00	1,500.00
For Loss of Either Hand	500.00	50.00	750.00
For Loss of Either Foot	500.00	50.00	750.00
For Loss of Sight of Either Eye	500.00	50.00	750.00

PART II.

Or, if the Insured shall, by being struck or knocked down or run over while riding a bicycle or while walking or standing on a public highway by a vehicle propelled by steam, cable, electricity, naphtha, gasoline, horse, compressed air or liquid power (excluding injuries sustained while working on a public highway or a railroad right of way or while on a railroad right of way in violation of law), suffer any of the specific losses set forth below in this Part II, the Company will pay the sum set opposite such loss:

SPECIFIC LOSSES	*Value First Year Under Part II*	*Annual Increase Under Part II*	*Value After 5th Year Under Part II*
For Loss of Life	$250.00	$25.00	$375.00
For Loss of Both Hands	250.00	25.00	375.00
For Loss of Both Feet	250.00	25.00	375.00
For Loss of Sight of Both Eyes	250.00	25.00	375.00
For Loss of One Hand and One Foot	250.00	25.00	375.00
For Loss of One Hand and Sight of One Eye	250.00	25.00	375.00
For Loss of One Foot and Sight of One Eye	250.00	25.00	375.00
For Loss of Either Hand	125.00	12.50	187.50
For Loss of Either Foot	125.00	12.50	187.50
For Loss of Sight of Either Eye	125.00	12.50	187.50

Indemnity for loss of life as above set forth shall be payable to the Estate of the Insured.

Series 249
Mass.

PART III.

If the Insured sustains injuries in any manner specified in Part I which shall not prove fatal or cause loss as aforesaid but shall immediately, continuously, and wholly disable and prevent the Insured from performing each and every duty pertaining to any and every kind of business, labor or occupation during the time of such disablement but not exceeding three consecutive months, the Company will pay indemnity at the rate of

Ten Dollars ($10.00) Per Week.

PART IV.

Or, if the Insured sustains injuries in any manner specified in Part II which shall not prove fatal or cause loss as aforesaid but shall immediately, continuously, and wholly disable and prevent the Insured from performing each and every duty pertaining to any and every kind of business, labor or occupation during the time of such disablement but not exceeding seven consecutive weeks, the Company will pay indemnity at the rate of

Seven and 50/100 Dollars ($7.50) Per Week.

PART V.

FIFTY PER CENT. ACCUMULATION

Each consecutive renewal hereof will increase the amount of benefits herein provided for Death, Dismemberment, or Loss of Sight of the Insured in-

curred under conditions as described in Part I or II, at the rate of ten per cent. (10%) of the original amounts until fifty per cent. (50%) is thus added, and thereafter so long as this policy shall remain in force the insurance will be for the said original amounts in addition to the accumulations.

GENERAL PROVISIONS.

(1) Employes of City Police and Fire Departments will not be covered while on duty.

(2) Employes riding on passes regularly issued by any of the common carriers mentioned in Part I and in such conveyances as are provided for passengers only will be covered as fare-paying passengers.

(3) In every case referred to in this policy, the loss of any member or members shall mean loss by severance at or above the ankle or wrist joints; and the loss of sight of eye or eyes shall mean the total and irrecoverable loss of the entire sight thereof.

(4) Not more than one of the indemnities specified above shall be payable as the result of any one accident.

(5) This policy shall not cover injuries, fatal or non-fatal, suffered without the territorial limits of the continental United States of America.

(6) No indemnity will be paid for loss of life, limb or sight caused by other means or under other conditions than those set forth in Part I or II, nor in any case where such loss does not occur within thirty days from the date of the accident. No indemnity will be paid for disability caused by any other means or under other conditions than those

specified in Part III or IV and where the disability does not occur within five days from the date of the accident. In event of specific loss no indemnity shall be paid for loss of time.

(7) The occurrence of any of the losses mentioned in Part I or II shall at once terminate the insurance effected by this policy, and indemnity for more than one of such losses will not be paid under any circumstances.

(8) No provision of the charter or by-laws of the Company not incorporated in full herein shall avoid the policy or be used in evidence in any legal proceeding. It is understood and agreed that the application is no part of this contract and shall not be admitted in evidence on behalf of the Company for any purpose whatsoever.

(9) This policy is issued in consideration of the payment of the premium of Seventy-five Cents ($0.75), for the term of one year beginning at noon, Standard time, of the place where Insured resides, of the date hereof; and this policy may be renewed only with the consent of the Company for the same premium and for the same period of time, as provided herein, by the payment of such premium, in advance, and a receipt signed by the Secretary and countersigned by a licensed agent of the Company shall be the only evidence binding upon the Company of the payment of a renewal premium.

STANDARD PROVISIONS.

(1) This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of

change in the occupation of the Insured or by reason of his doing any act or thing pertaining to any other occupation.

(2) No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.

(3) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the policy, but only to cover loss resulting from accidental injury thereafter sustained.

(4) Written notice of injury on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury. In event of accidental death immediate notice thereof must be given to the Company.

Series 249
Mass.

(5) Such notice given by or in behalf of the Insured or Beneficiary, as the case may be, to the Company at its Home Office, 209 So. La Salle St., Chicago, Ill., or to any authorized agent of the Company with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to

give such notice and that notice was given as soon as was reasonably possible.

(6) The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

(7) Affirmative proof of loss must be furnished to the Company at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Company is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

(8) The Company shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

(9) All indemnities provided in this policy for loss other than that of time on account of disability will be paid sixty days after receipt of due proof.

(10) Upon request of the Insured and subject to due proof of loss all accrued indemnity for loss of time on account of disability will be paid at the expiration of each thirty days during the continuance of the period for which the Company is liable,

and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

(11) All the indemnities of this policy are payable to the Insured.

(12) If the Insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the Insured and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

(14) No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

(15) If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

(16) The Company may cancel this policy at any time by written notice delivered to the Insured or mailed to his last address, as shown by the records of the Company, together with cash or the Company's check for the unearned portion of the premiums actually paid by the Insured, and such cancellation shall be without prejudice to any claim originating prior thereto.

(20) The insurance under this policy shall not cover any person under the age of fifteen years nor over the age of seventy years. Any premium paid to the Company for any period not covered by this policy will be returned upon request.

IN WITNESS WHEREOF, the said Company has caused this policy to be signed by its President and Secretary, but the same shall not be effective until properly dated and countersigned by duly commissioned authority of the Company.

Dated Mar 19 1924

A. E. GENEST
Secretary.

E. C. WALLER
President.

Examined and Countersigned by
JOHN M KEARNS

[CORPORATE
SEAL]

Series 249
Mass.

Notwithstanding anything in this policy to the contrary subject to due proof of loss all accrued indemnity for loss of time on account of disability will be paid at the expiration of each thirty days, during the continuance of the period for which the Company is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

A E GENEST
Secretary.

Form 31—Mass.

TELEGRAM-GAZETTE
Accident Insurance Dept.
20-22 Franklin St.,
Worcester, Mass.

ADVANCE
READER SERVICE
TRAVEL ACCIDENT POLICY
NORTH AMERICAN
ACCIDENT INSURANCE
COMPANY
CHICAGO, ILLINOIS.

No. 3325480

ISSUED TO

.....

This Policy provides indemnity for Loss of Life, Limb, Sight or Time by Accidental Means, as herein limited and provided.

READ YOUR POLICY
Series 249
Mass.

COMMONWEALTH OF MASSACHUSETTS.

I, WEBSTER THAYER, Justice of the Superior Court, of the Commonwealth of Massachusetts, do Certify that FRANK L. DEAN, Esq., whose signature is affixed to the paper hereunto annexed, is Clerk of said Superior Court, for the County of Worcester, and hath the keeping of the files, records and proceedings of said Court, holden within and for said County, and is, by law, the proper person to make out and certify copies thereof, and that full faith and credit are and ought to be given to his acts and attestations done as aforesaid, and that his attestation to the paper hereunto annexed, is in due form.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the said Court to be hereunto affixed, this twenty-fourth day of March in the year of our Lord one thousand nine hundred and twenty-seven.

WEBSTER THAYER
Justice of Superior Court.

(Seal)

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

BEULAH E. PERRY, Administratrix of the Estate of Mortimer L. Perry, deceased,
Plaintiff-Appellant,

vs.

NORTH AMERICAN ACCIDENT INSURANCE COMPANY,
Defendant-Respondent.

On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-RESPONDENT.

Facts.

This is an action brought by the plaintiff, as administratrix *ad prosequendum* to recover an indemnity of $1,000, payable upon the accidental death of Mortimer L. Perry, if caused in a special limited way. The policy in question is printed in full, on pages 5-14 of the State of the Case, and is one for which a premium of fifty cents was charged for a whole year, and contains in large, bold, black type, at the very top, the words "This policy provides indemnity for loss of life, limb, sight or time by accidental means, as herein limited and provided." This sentence is printed in italics, page 5 of the State of the Case. The back of the policy contains the same sentence, even more prominently as appears on page 14 of the State of the Case. The accidental death insured against, and for which the Company agrees to pay $1,000, for the small premium of fifty cents for a whole year, is set forth in Part I of the policy appearing on bot-

tom of page 5, and top of page 6, of the State of the Case, as follows:

> "If the Insured shall, by the wrecking or disablement of any railroad passenger car or passenger steamship or steamboat, in or on which such Insured is traveling as a fare-paying passenger; or, by the wrecking or disablement of any public omnibus, street railway car, taxicab, or automobile stage, which is being driven or operated, at the time of such wrecking or disablement, by a licensed driver plying for public hire, and in which such Insured is traveling as a fare-paying passenger; or, by the wrecking or disablement of any private horse-drawn vehicle, or motor-driven car in which Insured is riding or driving, or, by being accidentally thrown from such vehicle or car, suffer any of the specific losses set forth below in this Part I, the Company will pay the sum set opposite such loss:
> FOR LOSS OF—
> Life....One Thousand Dollars ($1,000.00)"

The other provisions and parts of the policy are not material to the issue here involved.

The case was tried on an agreed State of Facts, together with some oral testimony, before the Honorable William A. Smith, Circuit Court Judge, sitting in Essex County, and trying the cases on the Supreme Court list, of which the instant case was one at the time. The undisputed facts are, that the deceased came to his death while he was operating a motorcycle, which came into collision with a motor truck.

Under the circumstances, the court found in favor of the defendant, on the ground that the accident which caused the death was not one

insured against by the terms of the policy. The opinion and reasoning of the learned Judge appears in full on pages 28-30 of the State of the Case and is part of the Postea, as the case was tried without a jury. From the judgment in favor of the defendant, the plaintiff has brought this appeal.

ARGUMENT.

The only question involved in this case is: Does the manner in which the plaintiff's husband met his death, that is, by collision with a truck while he was driving a motorcycle, come within the provision of the policy wherein the defendant agrees to pay $1,000, if the death occurs through external violent and accidental means, by the wrecking or disablement of any private horse-drawn vehicle, **or motor-driven car in which insured is riding, or driving, or by being accidentally thrown from such vehicle or car?** The learned trial Judge decided that the policy of insurance in the instant case did not cover such an accident. The particular language used in the instant policy, as indicated by the findings of the Circuit Court Judge, has been construed by at least two courts of last resort in our sister States against the plaintiff, and in favor of the defendant. The cases are *Salo v. North American Accident Ins. Co.,* reported in 153 N. E. 557, and decided by the Supreme Judicial Court of Massachusetts, on appeal from the Superior Court. (Judge Smith's opinion, in error, calls this a Superior Court decision; it is, however, a unanimous decision of the Court of last resort, the Supreme Judicial Court of Massachusetts, participated in by five justices, constituting that Court), and the case of *La-Porte v. North American Accident Ins. Co.,* re-

ported in 161 Louisiana and 109 Southern Reporter, page 767. These decisions are both very well considered, and carefully prepared by the courts, and deal fully and accurately with all the questions that can be raised on the policy in question, and are very convincing that the judgment in favor of the defendant should stand.

Respondent has evidently, for the convenience of the Court, attached copies of these decisions as appendices to the brief.

Appellant, in an elaborate argument in the brief, tries to distinguish the policy which is the subject of the decision in the Massachusetts case, from the instant policy and the one considered in the Louisiana case, but aside from the fact that in matters which are not material to the question here involved, the policy considered in the Massachusetts case is identical with the instant policy, and the one considered in the Louisiana case. A comparison of the language with which the policy starts, and of Part I, which appears on pages 5-6 of the State of the Case, in the instant policy, and of the beginning of the policy and Part I, as it appears on page 87 of Appellant's Brief, and which appellant vouches is a true copy of the policy considered by the Massachusetts court, shows that the language is identical in every respect, in the provisions necessary to determine the question at issue, and that the learned Circuit Court Judge is absolutely correct when he says, in his opinion, referring to the Massachusetts decision, "which is on a policy for all practical purposes, identical with the one in suit and against the same Company."

It is clear from these decisions, that an elaborate legal argument is not required to convince

anyone that the ordinary person, in speaking of a motor car, does not mean a motorcycle, and does not so understand it to mean. The decisions, construing the instant policy above referred to, do not stand alone in support of the construction they put upon the policy. By analogy, the case of *National Life Ins. Co. of U. S.* v. *Fleming, et al.,* 96 Atl. Rep. 281, supports the same conclusions in passing upon a policy which provides for insurance against death, resulting within thirty days from date of accident, from accidental bodily injuries solely and independently of all other causes while actually riding as a passenger in a place regularly provided for the transportation of passengers, within a surface, underground or elevated railroad, car, steamboat, etc., provided by a common carrier for passenger services, wherein it held that a person injured while attempting to alight from the platform of a street car, or while on the street car, was not covered by the policy, because not within the language of the provisions as above set forth.

The Court of Appeals of Maryland, in the opinion written by Judge Thomas, quotes with approval, from the case of *Aetna Life Insurance Co.* v. *Vandecar,* 86 Fed. 282, 30 C. C. A. 48, as follows:

> "The words 'in a passenger conveyance' were doubtless used advisedly, and for the express purpose of limiting the defendant's liability. The reason for so doing is * * * apparent. The place specified in the contract, 'in a passenger conveyance', is a place of little or no danger, and the risk assumed is slight, while on the platform of a conveyance using the motive power described in the contract (of insurance), and especially, as in this case, on the platform of a railway car, is an exceedingly dangerous place when

> the train to which the car is attached is in motion. * * * We think the words used in the contract clearly indicate the intention of the parties."

The same Court also quotes with approval from *Mitchell* v. *German Commercial Acc. Ins. Co.,* 179 Mo. App. 1, 161 S. W. 362, the following:

> "The language of the policy is entirely clear to the effect that insurance * * * for accidental death is vouchsafed only in those cases where the injuries received which result in death occur while riding as a passenger in a place regularly provided for the transportation of passengers by a common carrier. * * * The courts are not authorized to seize upon certain and definite covenants, expressed in plain English, with violent hands, and distort them so as to include a risk clearly excluded by the insurance contract."

This Court, in *Anable* v. *Fidelity & Casualty Co. of New York,* 74 N. J. L. 686, unanimously affirmed the Supreme Court, on an opinion written by Justice Reed, reported in 73 N. J. L. 320, wherein this Court held that a person who had boarded a train, surrendered his ticket and got off at the next station to buy a newspaper, and was killed while attempting to board the train again to continue his journey, as it was pulling out, not covered by the provision in the policy "riding as a passenger *in or on* a public conveyance."

Justice Reed, in his opinion, cites with approval *Van Bokkelen* v. *Travelers' Insurance Co.,* 34 App. Div. 399, 54 N. Y. Supp. 307, and says the following about that case:

> "The court dealt with a clause in a policy which doubly insured a person injured while riding as a passenger in a passenger conveyance, using steam, from which injury death resulted. The word 'on' was not used. The court held that the clause *did not cover an injury to a passenger* who was standing upon the platform of a car, and who, while so standing, was *thrown therefrom and killed.* This case was affirmed and the affirmance reported in 167 N. Y. 590, 60 N. E. 1121."

Justice Reed also cites the *Aetna Life Insurance Co.* v. *Vandecar* case with approval.

In *Bew* v. *Travelers' Ins. Co.,* 112 Atl. 859 (not officially reported), this Court affirmed the Supreme Court on an opinion written by Circuit Court Judge Donges, which lays down the rule:

> "Courts are averse to forfeiture, and in case of doubt or ambiguity in a life policy will adopt that construction which will defeat it if such construction is reasonably deducible from the words or terms used; but, where it becomes necessary to construe words and phrases, the ordinary and usual meaning of the words must be sought and given to them, *and where the words are used to express the meaning of the party using them the court will not adopt a strained and improbable construction in order to defeat a forfeiture."*

Respondent therefore respectfully submits that there is no error in the judgment of the Supreme Court, and that the same should be affirmed.

Respectfully submitted,

PHILIP J. SCHOTLAND,
Attorney and of Counsel with
Defendant-Respondent.

INDEX