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APPENDIX

1. The first of these is the question of the right of the State to regulate the education of its citizens. This question has been the subject of much discussion and has been the cause of much litigation. The Supreme Court has held that the State has the right to regulate the education of its citizens, but that this right is not absolute and is subject to certain limitations.

2. The second of these is the question of the right of the State to regulate the property rights of its citizens. This question has also been the subject of much discussion and has been the cause of much litigation. The Supreme Court has held that the State has the right to regulate the property rights of its citizens, but that this right is not absolute and is subject to certain limitations.

3. The third of these is the question of the right of the State to regulate the contract rights of its citizens. This question has also been the subject of much discussion and has been the cause of much litigation. The Supreme Court has held that the State has the right to regulate the contract rights of its citizens, but that this right is not absolute and is subject to certain limitations.

4. The fourth of these is the question of the right of the State to regulate the labor rights of its citizens. This question has also been the subject of much discussion and has been the cause of much litigation. The Supreme Court has held that the State has the right to regulate the labor rights of its citizens, but that this right is not absolute and is subject to certain limitations.

5. The fifth of these is the question of the right of the State to regulate the business rights of its citizens. This question has also been the subject of much discussion and has been the cause of much litigation. The Supreme Court has held that the State has the right to regulate the business rights of its citizens, but that this right is not absolute and is subject to certain limitations.

Notice and Grounds of Appeal.

(Filed Nov. 12, 1919.)

NEW JERSEY SUPREME COURT.

ERNEST H. MILLER,

Plaintiff,

vs.

NEW AMSTERDAM CASUALTY CO.,

Defendant.

10

To John Bernhard, Esq.,

Attorney of Plaintiff-Appellee.

TAKE NOTICE that the appellant, the New Amsterdam Casualty Co., a corporation, appeals to the Court of Errors and Appeals in the last resort in all cases in New Jersey, from the whole of the judgment entered in this cause, on the following grounds:

20

1. That the Supreme Court affirmed the judgment of the District Court of the City of Orange although there was error in so doing.

2. Because the Supreme Court affirmed the refusal of the District Court of the City of Orange to grant a non-suit at the close of the plaintiff's case, although it was error so to do.

30

EDWARDS & SMITH,
Attorneys of Defendant-Appellant.

40

Opinion of Supreme Court.

(Filed Oct. 14, 1919.)

NEW JERSEY SUPREME COURT.

No. 423, June Term, 1919.

10

ERNEST H. MILLER,

Appellee,

vs.

NEW AMSTERDAM CASUALTY CO.,

Appellant.

20

Submitted July 3, 1919; decided October 1919.

Appeal from District Court.

Before Justices Swayze and Parker.

For the appellant, Edwards & Smith.

For the appellee, John A. Bernhard.

The opinion of the court was delivered by Parker, J.

30

The defendant was held liable below for loss under a policy insuring plaintiff against "direct loss by burglary, theft or larceny of any of the property of the assured * * * occasioned by its felonious abstraction from the interior of the apartments actually occupied by the assured * * * by any domestic servant or other employe of the assured or by any other person or persons excepting any person whose property is insured hereunder."

40

The appeal brings up two points urged against plaintiff's claim: (1) that notice of the loss was not given in the manner required by the policy; (2) that there was no evidence adduced on the trial justifying in law the finding that the prop-

III.

erty for whose loss the claim was made, had been stolen from the apartment of plaintiff.

As to notice of loss, the policy provides that upon discovery of the loss the assured shall give, at the expense of the company, immediate notice by telegraph to the company at its executive office in New York City or Baltimore, Md. or to the nearest agent of the company and shall also give immediate notice thereof to the public police authorities having jurisdiction. 10

No telegraphic notice was sent, but the proof shows that the loss being discovered in the evening, notice thereof was given personally to the nearest local agent by noon of the next day. It does not seem to be claimed that the police were not properly notified. As to notice to the company, it must be "immediate" which, in the case of the recording of a chattel mortgage under our law, has been held to mean as soon after its delivery as may be by reasonable dispatch under the circumstances of the case. *Dunham v. Cranmer*, 63 N. J. Equity, 151, and other cases. Notice to the local agents should reasonably be given in business hours; so the ultimate question would be whether it was not "immediate" because not given at nine o'clock or 9:30 A. M., but two or three hours later. "Immediate" does not mean as soon as it can be given with all possible dispatch, but only by reasonable dispatch under the circumstances; and while the reason for prompt notice growing out of the importance of discovering and apprehending the thief and recovering the property is sufficiently obvious, we think the trial judge was justified in holding that the requirement of the policy in this regard had been met. 20 30

The proof in support of the claim of loss by theft was entirely circumstantial, as in the vast majority of cases of this class it necessarily must 40

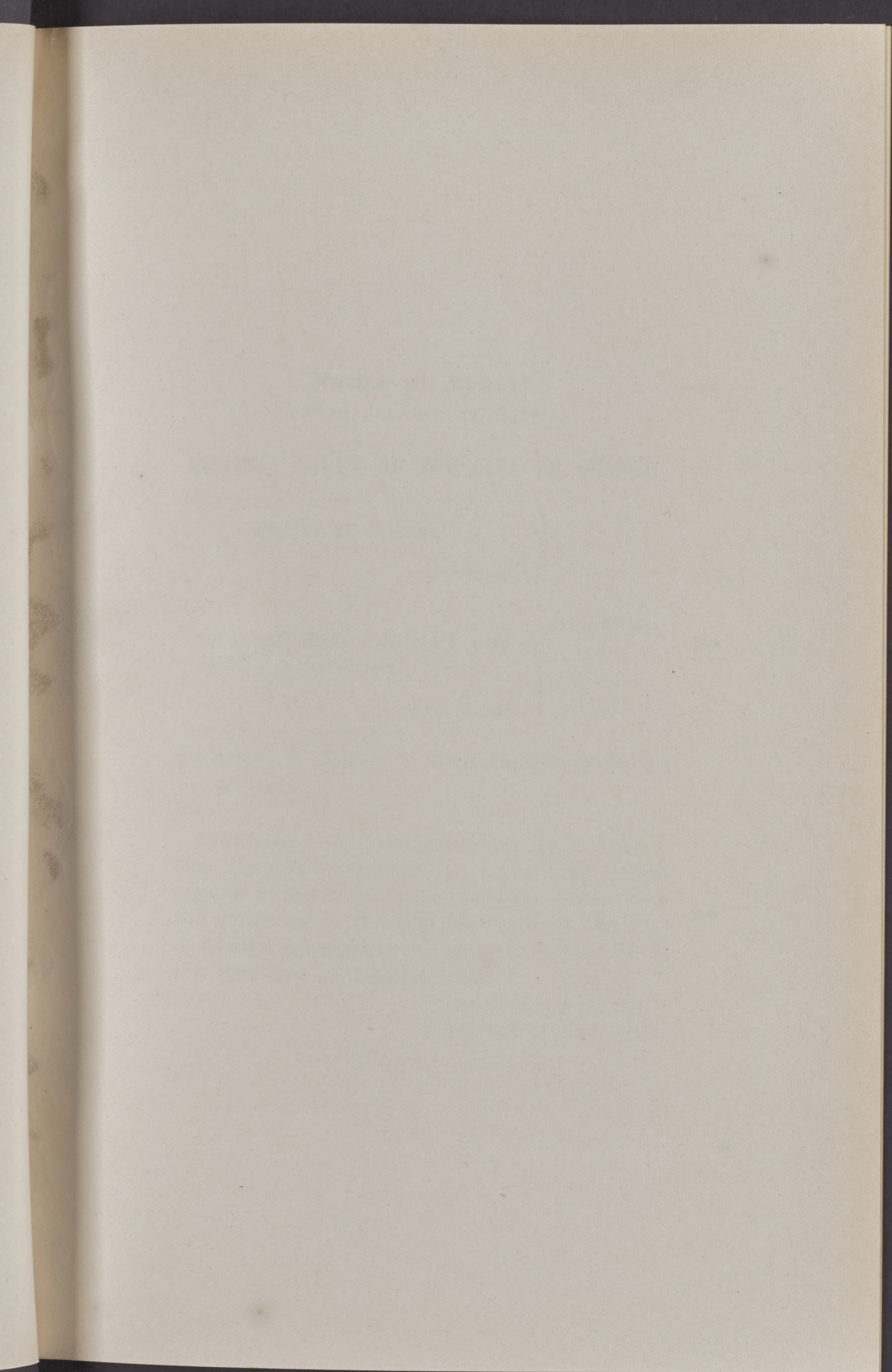
be. Sometimes the policy contains a clause requiring direct and affirmative evidence of theft as the cause of loss, but in Pennsylvania this was rigidly limited by construction, the court saying that it would be absurd to call for proof in an insurance case that would not be legally necessary to convict the thief himself. *Miller v. Mass. Bonding Co.*, 93 Atl. 320. The general rule is that proof may be made by circumstantial evidence and that a mere preponderance is sufficient 9 C. J. 1099, and cases; *Wolf v. Aetna Accident &c. Co.*, 170 N. Y. Supp. 787. In the case at bar defendant offered no evidence at all. From that adduced by plaintiff the court was justified in finding that the article lost, a platinum and diamond necklace was habitually kept by plaintiff's wife hidden away behind a picture in her room or parlor, on a small shelf connected in some way with a false window, in a bag, together with other articles of jewelry; that about two days before the loss was discovered she took it out of the bag and wore it when going out, and on returning put it back in the bag and the bag in place behind the picture. The loss was discovered when she went to get the chain out again and to put away some rings in the bag. Other articles of jewelry were found therein undisturbed. Her husband, the plaintiff, testified that when the chain was missed he examined the dress with which it had been worn previously, and the closet in which the dress was hung, but found no chain. There was no indication that the apartment had been broken into or otherwise entered.

There was also evidence to show that Mrs. Miller had employed a new servant girl about two weeks previously, taking her from an asylum or home without credentials; that the girl was of

foreign extraction, agreed to stay a month, but on the day after discovery of the loss said she must go and refused to stay longer; that this girl had full access to the room, and had visitors from time to time.

We think these facts if found were enough to justify the inference that the chain had been stolen in some way from the apartment. Of course Mrs. Miller may have put it somewhere else and forgotten the fact; any number of hypotheses can be based on the principal one that she was mistaken in her recollection of the facts. But on the assumption that her memory was correct and her story truthful, there hardly seems to be room for any other deduction than that someone stole the chain out of the room; certainly the chain did not go away of itself; and theft in such a case, when the facts are settled is the natural inference. If a man goes out with a purse in his pocket and suddenly finds it gone, he concludes, and properly, that his pocket had been picked. If he leaves money or a negotiable bond in the bureau drawer and later finds it is missing, and fails to discover it after proper search and inquiry, he naturally concludes that someone has stolen it. Sometimes this is confirmed by the finding of the empty pocketbook in an area in the one case, or of the bond in the possession of a purchaser in the other; but confirmation is not legally essential. Cases like that at bar are classed by the police as "inside jobs" and their uncertainty in concluding that a crime has been committed is ordinarily not in the deductions, but in making sure that the circumstances are correctly stated to them. That they are so stated we must in this case assume; and this settled, the inference of theft is legally justified.

The judgment is affirmed.



1841
MEXICO
1841

Notice of Appeal.

10

(Filed January 24, 1919.)

DISTRICT COURT OF THE CITY OF ORANGE.

ERNEST H. MILLER,	}	On Contract.	20
<i>Plaintiff,</i>			
<i>v.</i>			
NEW AMSTERDAM CASUALTY COM- PANY, a corporation,			
<i>Defendant.</i>			

To Ernest H. Miller, or John H. Bernhardt, his
attorney.

Sir:

Take notice that the defendant, New Amster-
dam Casualty Company, a corporation, hereby
appeals to the New Jersey Supreme Court from
the Judgment of the District Court of the City
of Orange, rendered in the above stated action on
the 17th day of January, 1919.

30

EDWARDS & SMITH,
Attorneys of Defendant.

40

Certificate of Judge.**DISTRICT COURT OF THE CITY OF ORANGE.**

ERNEST H. MILLER,

*Plaintiff,**v.*

NEW AMSTERDAM CASUALTY COM-

10 PANY, a corporation,

Defendant.

On
Contract.
On Appeal.

I, Daniel A. Dugan, Judge of the District Court of the City of Orange, before whom the above case was tried, do hereby certify the following transcript of the proceedings at the trial, as the state of the case on appeal, the same being made by William E. Davenport a stenographer designated by me on application of the defend-
20 ant, according to the statute in such case made and provided.

Dated January 24th, 1919.

DANIEL A. DUGAN,
Judge.

30

40

State of Demand.

(Filed August 9, 1918.)

ORANGE DISTRICT COURT.

ERNEST H. MILLER,	}	Action at Law.	10
<i>Plaintiff,</i>			
v.			
NEW AMSTERDAM CASUALTY Co.,			
<i>Defendant.</i>			

Plaintiff demands of the defendant the sum of five hundred dollars, being the value of certain jewelry specifically mentioned in a proof of loss filed with the defendant on February 15, 1918, which said jewelry was covered by a certain policy of insurance issued by the defendant to the plaintiff wherein and whereby the defendant agreed to indemnify the plaintiff against loss thereof by burglary, theft or larceny. 20

Plaintiff says that more than three months have expired from the date of the filing of the proof of loss and that payment for said loss has been refused although demanded by the plaintiff from the defendant.

Plaintiff claims damages for five hundred dollars. 30

Dated: August 8, 1918.

(Signed) JOHN A. BERNHARD,
Attorney for Plaintiff.

True copy.

Harold Jerabold,
Clerk.

NEW JERSEY SUPREME COURT.

Plaintiff-Appellee,

On Appeal.

Defendant-Appellant.

The appellant states the following grounds of appeal in this cause:

Because the court erred in refusing to grant a non-suit upon the evidence given at the trial, when requested so to do by the defendant, upon the following grounds:

- 20** (a) That the plaintiff has failed to establish a cause of action against the defendant.

(b) That the plaintiff has failed to prove a direct loss by burglary, theft or larceny of any property of the assured from the interior of the house, building or premises or apartments actually occupied by the assured.

(c) That the plaintiff has failed to prove that he gave the notice of loss required to be given according to the terms of the policy.

- 30** (d) That the plaintiff has failed to prove that on discovery of the loss he gave or caused to be given immediate notice by telegraph as is required to be given according to the terms of the policy.

EDWARDS & SMITH,
Attorneys of Appellant.

Testimony.**ORANGE DISTRICT COURT.**

ERNEST H. MILLER,	}	
<i>Plaintiff,</i>		
v.		
NEW AMSTERDAM CASUALTY COM-	}	
PANY,		
<i>Defendant.</i>		10

Transcript of the shorthand notes taken in the above-entitled cause, this 17th day of January, 1919, at the Orange District Court, Orange, New Jersey, before Hon. Daniel A. Dugan.

A P P E A R A N C E S :

JOHN A. BERNHARD, Esq., Attorney for Plaintiff.
EDWARDS & SMITH, Esqs. (by Norman Wynne, Esq.), Attorneys for Defendant. 20

MR. WYNNE: In this case we want to produce the servant girl employed by Mrs. Miller. We had her address—and the case has been dragging along now for some time—and in looking her up now we find she has disappeared. We discovered within the last two days or so that she has been recently married, and we have her married name. I do not want to ask for an adjournment in this case; I am perfectly satisfied that Mr. Bernhard go on with his case, and if he gets past a nonsuit, and the Court decides we must put in a defense, I would then like to have the case laid over for a week or two in order to enable us to make an exhaustive search to produce this girl at that time. It will mean but a week or two delay in the entering of judgment in the case. 30

Colloquy.

MR. BERNHARD: For seven or eight weeks I have agreed with Mr. Dawson to postpone this case for the very same reason, and two or three times it was agreed to have the case marked peremptorily, and each time Mr. Dawson has appealed to me to give him another week, and I do not see why the case should not go on. The case
10 is a concrete one, based upon a clause in the Casualty Company policy, providing for the theft of certain jewelry. It was either stolen or it was not. They do not know what the servant girl can testify to, and if they do procure her afterwards, they still will be in a position to make an application for a new trial on newly discovered evidence.

MR. WYNNE: All we ask is that Mr. Bern-
20 hard stipulate that the servant girl did not steal the jewelry.

THE COURT: Is that the point you want to bring out?

MR. BERNHARD: I don't say she did; I don't know, of course.

THE COURT: How could you say positively any particular person did not do it. Suppose she did! Is it a likelihood she would admit it? She may come on the stand and very indignantly deny
30 she had stolen it. Is that the reason you wanted it laid over?

MR. WYNNE: Yes, sir.

THE COURT: We will go on with the case, and I will reserve my decision until we get up to the point. If it appears her testimony is absolutely necessary, I would be disposed to continue it.

Beatrice N. Miller—Direct.

BEATRICE N. MILLER, sworn in behalf of plaintiff.

DIRECT EXAMINATION BY MR. BERNHARD:

MR. BERNHARD: I would ask that the policy of insurance be marked in evidence.

(Received and marked Exhibit P-1.)

It is admitted by attorney for the defendant that the policy was in force at the time of the loss of the jewelry in question. 10

Q. You reside with Mr. Ernest H. Miller, your husband? A. Yes.

Q. At what address? A. 27 Johnson Avenue, Newark.

Q. How long have you lived there? A. About three to four years.

Q. That is an apartment house, is it not? A. Yes, sir. 20

Q. Do you know how many families occupy that apartment house? A. About thirty-five, I should imagine.

Q. Have you occupied the same apartment during the three years you have lived there? A. Yes, sir.

Q. At the time Mr. Miller took out this policy of insurance, did you have a certain amount of jewelry? A. Why, yes.

Q. The policy, I think, calls for an insurance of one thousand dollars? A. Yes. 30

Q. Will you describe what jewelry you had at the time the policy was taken out? A. Well, I had an initial pin that I have on now; a diamond watch pin, and this diamond chain that was stolen.

MR. WYNNE: I object to that last statement and ask that it be stricken out.

THE COURT: "Initial pin, diamond watch 40

Beatrice N. Miller—Direct.

pin and diamond chain." The rest will be stricken out.

Q. What kind of a diamond chain was that; describe in a little more detail. A. It had about twenty diamonds, as far as I can recollect.

Q. What else did you have? A. Well several rings; about five or six rings.

10 Q. (By the Court): What kind of rings? A. Diamond rings, with various other stones in them.

Q. Did you miss any of that jewelry at any time during the continuation of this policy? A. No, nothing except the chain.

Q. And when did you last see the chain? A. About two days—well, I missed it the night before the girl left.

Q. The court would like to know what month
20 that was, Mrs. Miller? A. Well, as far as I can recollect it was in February.

Q. Of last year? A. Yes, sir.

Q. Where had you placed that bit of jewelry?
A. I always kept it behind a picture frame in my room.

Q. When you say "kept it"; what do you mean, Mrs. Miller, all you have described? A. All the jewelry that I had at home I kept there.

Q. In your own room? A. Yes.

30 Q. Where was the picture frame? A. Well, we have a sort of finished window in the room—a simulated window, and a picture standing in front of it, and that is where I had the chain and all the rest of the jewelry.

Q. How did you keep it behind there, was there a rest behind the frame? A. On a little shelf.

Q. How long had you had this servant? A. Only about two weeks.

Q. During the time you had this servant, had
40 she access to the room? A. Oh, yes; at all times.

Q. What was her nationality?

Beatrice N. Miller—Direct.

MR. WYNNE: I object to that as incompetent, irrelevant and immaterial.

MR. BERNHARD: I will withdraw the question.

A. She spoke English.

Q. What notice, if any, did you have of her leaving, Mrs. Miller? A. Well, when I engaged her I engaged her by the month, and the first few days she told me she was very satisfied; that she was going to stay her month, at least, and all at once she said, "I got to leave; I can't give you any reason, but I have to leave." 10

Q. When did she leave? A. Well, she left—I missed the chain just before she left.

Q. What do you mean by using the words "just before"? A. Well she left two weeks after I had her. 20

Q. How long before she said, "I can't give you any reason, but I've got to leave," or after that did you miss the chain? A. About the same time.

Q. You missed it about the same time she left, about? A. Yes.

Q. Where was it the last time you saw it? A. I had worn it.

Q. When? A. I had worn it about—well, I wore it out one day about two days before I missed it. 30

Q. After you had worn it out, where did you then place it? A. Behind this picture.

Q. And how was this chain, was it strung? A. It was a long chain coming to my knee, and had a gold locket with a diamond in.

Q. After you missed it, and after the servant girl left, did you make any search for it anywhere? A. I looked everywhere in the house.

Q. Did you succeed in finding it? A. No. 40

Beatrice N. Miller—Cross.

Q. What was the value of that chain?

MR. WYNNE: I object, unless Mr. Bernhard shows that this witness is qualified to testify as to its value.

THE COURT: Objection sustained.

10 MR. BERNHARD: In view of the statement of counsel, I would say to your Honor, Mr. Dawson agreed with me that if there was a verdict at all in this case, there should be a verdict for the full amount of the jurisdiction of this court, without any proof as to the value of this chain. I saw Mr. Dawson only yesterday, and I am surprised as to this objection. I desire to go ahead with the case as far as I can, and if I cannot get a stipulation, I am willing to produce other
20 proof.

MR. WYNNE: If that is the situation, I am perfectly willing to let my objection stand on the record, but afterwards, if I find this to be the fact, I will withdraw it. I have been away and did not know of it.

Q. How long had you had the chain? A. About five years; it was a wedding present.

Q. Did you do anything after you missed it, Mrs. Miller? A. I informed the police.

30 Q. How soon after did you inform the police? A. As soon as I searched around the rooms—the same day.

Q. And you informed Mr. McNally and Mr. Smith? A. Yes.

CROSS-EXAMINATION BY MR. WYNNE:

Q. Mrs. Miller, when did you say you hired this girl? A. As far as I can recollect it was
40 in February, but I have the exact date; I have the exact date in my check book.

Beatrice N. Miller—Cross.

Q. Is that your signature, Mrs. Miller (showing witness paper)? A. Yes.

Q. Now, what day do you say, Mrs. Miller, you employed this girl? A. I can't say the date exactly unless I refer to it. The detectives have the exact date. It can be referred to.

Q. Do you remember whether it was January 15th? A. I couldn't say positively without looking at the records. 10

Q. If you just look at that statement that you signed, would that refresh your memory as to the date? A. Yes. It must have been January and not February.

Q. And when did you say you last saw this chain? A. When I last saw it?

Q. Yes. A. I don't quite understand the question. 20

Q. When did you say you last wore this chain? A. I wore it—well, I must have worn it January 13th, something like that.

Q. Was that the last time you had worn it? A. I wore it and came home and put it behind this picture frame, and missed it two days later.

Q. Then you missed it on January 15th? A. Well, if that is the date that is stated there, then I did.

Q. Now, Mrs. Miller, this servant girl didn't leave you until February, did she? A. Then I could not have missed the chain January 15th. 30

Q. Just tell us when you did miss it? A. I missed the chain one day before the girl left me.

Q. Now, that was February 7th, was it not? A. I couldn't say unless I looked over the records. I am telling you the facts, not the dates.

Q. And when was the last time you saw the chain before you missed it? A. I wore it two days before I missed it. 40

Beatrice N. Miller—Cross.

Q. Do you remember making this statement, Mrs. Miller: That the last time you wore the chain was on January 29th? A. No, I don't remember that.

Q. Just look at that, and see if that letter will refresh your memory. A. I can't read the writing.

10 Q. You signed that though, didn't you? A. Possibly, but I can't read this writing; it is simply awful.

MR. WYNNE: I would like to have this statement marked for identification.

(Letter or statement marked D-1 for Id.)

Q. Now this girl came to you highly recommended? A. She did not; she had no recommendation whatever.

20 Q. Where did you get her from? A. I got her from an employment agency.

Q. And you say she became dissatisfied? A. I don't say she became dissatisfied. She told me she was going to leave.

Q. Do you remember saying this: "The girl became dissatisfied and left my employ before the month expired"? A. That's a figure of speech. She must have been dissatisfied or she wouldn't have wanted to leave.

30 Q. You paid her up until the time she left, didn't you? A. I did.

Q. And at that time you say you had missed this jewelry? A. Yes.

Q. Now, how did you come to look for it at the time you missed it? A. I wanted to put that on and I wanted to put some rings away I usually kept there.

Q. You weren't suspicious about anything? A. Not until I missed it, no.

40

Beatrice N. Miller—Cross.

Q. And you just went to this bag to get this chain out? A. Yes, and to put some rings away.

Q. And there was other jewelry in this bag with this chain? A. There was.

Q. And none of that was missing? A. No, none was as valuable; I didn't consider it as valuable.

Q. Do you know the value of that diamond horseshoe pin? A. I don't know the exact value of anything. 10

Q. Do you remember stating it was about \$900? A. Yes.

Q. And the initial pin was about \$250? A. Yes, that's the pin here.

Q. And you still say they were not valuable enough to steal? A. They were valuable enough to steal, but weren't as valuable as the chain. 20

Q. And there was nothing else missing? A. Nothing else missing.

Q. Nothing else missing in that house? A. Not as far as I know, no.

Q. When you walked into that room, everything was just as it had been? A. This was in the evening.

Q. I say, when you walked into that room, there was nothing to excite your suspicion? A. No.

Q. (By the Court): Was there any evidence of anybody having broken into the house? A. No. 30

Q. Did you have any money in that bag? A. No, I don't think I did. I am not quite sure.

Q. Just try and think. A. If you have the statement there, you ought to know.

Q. I am asking you, Mrs. Miller, was there any money in that bag? A. I couldn't say positively one way or the other, but I don't think there was. 40

Q. And you say that the girl hadn't been rec-

Beatrice N. Miller—Re-Direct.

ommended, do you? A. She had not been recommended to me, no.

Q. What did you mean when you said the girl had been recommended by Mrs. Reubin of the Hebrew Orphan Asylum? A. She never had been recommended; she came with no reference.

10 Q. Then when you signed this statement you didn't mean what you said in it, did you? A. I missed this after I became suspicious of her, and after I found the chain was missing, I rung up Mrs. Reubin of the Hebrew Asylum, and Mrs. Reubin said the girl was an absolute liar.

MR. WYNNE: I object to that, and ask that it be stricken out.

THE COURT: Strike it out.

20 Q. Now you are sure, Mrs. Miller, that is all that was stolen? A. So far as I know that is all that was stolen.

Witness: May I say something?

MR. BERNHARD: Just a moment, Mrs. Miller.

THE COURT: Just answer the questions. we will get along better.

Q. Now, you say you missed this chain on the night of the day before the girl left you? A. 30 Yes.

Q. And she didn't leave until the next day? A. No.

RE-DIRECT BY MR. BERNHARD:

Q. Now what is it that you wanted to say that is relevant to the case?

MR. WYNNE: I object; that is not the proper procedure.

40

Beatrice N. Miller—Re-Direct.

Q. I will put it this way: Did you want to elaborate or explain any answer you just made?

MR. WYNNE: I object as incompetent.

MR. BERNHARD: I will withdraw the witness.

(Witness withdrawn and confers with counsel.)

10

BEATRICE N. MILLER, resumes the stand.

CONTINUED RE-DIRECT BY MR. BERNHARD.

Q. During the time that the girl was working for you, do you know whether or not she had visitors? A. She did, frequently.

Q. (By the Court): What date did she leave? A. Well, I think it is written down.

20

Q. Do you know without referring to it? A. Well, if she was with me about two weeks, and came about the 15th, it must have been the 29th of January. I won't say that positively until I referred to my check book.

Q. (By the Court): How can you tell by your check book? A. I gave her a check the day she left.

Q. (By the Court): Have you the check book here? A. No, I haven't got it with me, but I can produce it at any time.

30

Q. When did you report it to the police? A. The same day she left.

MR. BERNHARD: The officers are here.

Q. (By Mr. Wynne): Were you in the house? A. Sometimes I was in the house and sometimes not. Usually when I came home I found two or three women sitting in the kitchen with her.

40

Ernest H. Miller—Direct.

ERNEST H. MILLER, plaintiff, sworn.

DIRECT EXAMINATION BY MR. BERNHARD:

Q. Mr. Miller, did you take out this insurance policy upon this jewelry? A. I did.

Q. Do you know where Mrs. Miller kept her jewelry at that time? A. What time?

10 Q. At the time it was missing? A. What she didn't wear she was accustomed to keeping it behind this picture frame.

Q. (By the Court): The lady preceding you is your wife? A. Yes, sir.

Q. After your attention had been called to the missing jewelry, did you help Mrs. Miller search for it? A. I did.

Q. And did you succeed in locating it anywhere? A. I did not.

Q. Who was it, you or Mrs. Miller, after talking to me about it, reported it to the Police Department? A. I think I requested you to report it to the police.

MR. WYNNE: I object, and ask to have it stricken out.

THE COURT: This witness is not testifying to any fact. I will strike it out.

30 Q. When did you make a search, Mr. Miller? A. I made the search that night it was reported missing.

Q. What time? A. I can't just recall what time.

Q. Before or after dinner, Mr. Miller? A. It was after dinner; during the evening.

Q. At that time was the servant girl in your employ or not? A. She was still in our employ.

Q. How much of a search did you make? A. 40 Well, I wanted to be real sure that it wasn't there, and—

Ernest H. Miller—Cross.

MR. WYNNE: I object to that and ask that it be stricken out.

Q. Never mind your reason, what did you do?

A. We looked in the place where it usually was, and I insisted on going through the bag myself, and then I wanted to make sure it wasn't on the evening dress, and—

10

Q. Just tell us what you did, and not your reasons for it. A. I wanted to see whether—

MR. WYNNE: I object.

THE COURT: Strike it out.

Q. (By the Court): Tell us just what you did, not what you wanted to do. Tell us what you physically did? A. Looked on the evening dress that was worn at the time the chain was worn, and it wasn't there, and then looked through the closet to see whether it might have fallen to the floor, and it wasn't there. 20

THE COURT: Strike that part out "it might have fallen to the floor."

Q. Where did you look in the closet; what part of the closet did you look in, Mr. Miller? A. On the dress and on the floor.

Q. No, then, what about the other furniture that was in there and the other rooms? A. Didn't go into any other room, because— 30

MR. WYNNE: I object.

Q. Well, you didn't do it personally? A. No.

CROSS-EXAMINATION BY MR. WYNNE:

Q. You say you looked at this dress that Mrs. Miller had worn the last time she wore the chain? A. Yes, sir.

Q. And you didn't find it there? A. I did not. 40

Theodore S. McNally—Direct.

Q. Nor you didn't find it in the closet? A. I did not.

Q. And you looked in the bag; that was the only search you made? A. Yes, sir.

Q. (By the Court): Was there any evidence of the room having been broken into, or the house having been broken into? A. No, not at all.

10

THEODORE S. McNALLY, sworn in behalf of plaintiff.

DIRECT EXAMINATION BY MR. BERNHARD:

Q. You are a lieutenant of police? A. Yes, sir.

Q. And at the time this matter was reported to you you were in the Detective Bureau of the City of Newark? A. Yes, sir.

20

Q. Did you and Officer Smith go to Mr. Miller's house? A. Yes, sir.

Q. Do you remember the day, lieutenant? A. On February 9th.

Q. Do you remember how long before that day you had received this notice? A. We were assigned to the case that morning, and we were assigned there by Captain Connolly. I don't know what time he received the complaint.

Q. When you got there, who did you find? A. We see Mrs. Miller.

30

Q. Did you do anything, lieutenant? A. Mrs. Miller told us about the loss and where it was situated, and I examined the door to see whether the door had been forced, and after the interview with Mrs. Miller in regard to the maid in her service we interviewed the maid later.

Q. Now, then, as to the door; did you find anything on the door showing it had been forced?

A. No, sir.

40

Q. Not a thing? A. No, sir.

Theodore S. McNally—Cross.

John Hummell—Direct.

Q. Did you look at the windows there to see whether they had been forced or not? A. We made a casual examination.

Q. And there was no evidence there? A. No, sir.

CROSS-EXAMINATION BY MR. WYNNE:

10

Q. Lieutenant McNally, as I understand, you couldn't find any evidence of the place having been broken into? A. No physical evidence, no, sir.

Q. And the only thing you had to work on was Mrs. Miller's statement that this jewelry was gone? A. Yes.

Q. And you didn't find anything else? A. No, sir.

20

JOHN HUMMELL, sworn in behalf of plaintiff.

DIRECT EXAMINATION BY MR. BERNHARD:

Q. Sergeant, you are a member of the police department of the City of Newark? A. Yes, sir.

Q. For how long? A. Eighteen years.

Q. Were you connected at any time with the Detective Bureau of the City of Newark? A. Yes, sir.

30

Q. For how long? A. Almost four years.

Q. During what period of time? A. 1914-1915, up to the present year.

Q. Continuously, were you not, sir? A. Yes, sir.

Q. And your duties were what, sir? A. Detective.

Q. You received assignments from your superior officer? A. Yes, sir.

40

Q. Do you know the locality of apartment houses along High and Spruce Streets? A. Yes, sir.

Colloquy.

Q. You know that neighborhood very well? A. Yes, sir.

Q. During the months of December, 1917, and January, 1918, and February, 1918, did you receive any assignments in that locality? A. I did, several of them.

Q. Did you keep a record of them? A. I did.

10 Q. Have you got the record with you? A. A copy of it.

Q. What did you receive those assignments for?

MR. WYNNE: I object to that as incompetent, irrelevant and immaterial.

20 MR. BERNHARD: If your Honor please, if you read the policy, you will see that this suit is based upon the clause relating to larceny and theft. The plaintiff must produce evidence which which your Honor can draw the inference in order to base a verdict for the plaintiff, that the necklace was stolen. In order to do that we must prove it is lost, and we must prove a search for it, and we must prove a reasonable presumption that someone stole it. Now if in this locality there was a band of latch-key thieves working and the police were assigned upon these numerous investigations that this witness

30 will tell about, it will help your Honor to determine whether or not, from Mrs. Miller's testimony and the missing of the necklace from this officer's own personal experience and the other officers, that thefts of this kind can be committed in midday by the means of a latch-key. If he tells your Honor he has investigated eleven cases within six weeks, or six cases within eleven weeks in that very neighborhood; that in every one

40 of these cases there were no marks that he

Motion for Non-Suit.

had discovered at the time the thief entered the apartments when people were away, but by means of a latch-key, and went through the drawers and dressers, that would be proof, in spite of the plaintiff's contention that this necklace was stolen by such woman. Why is it not material, your Honor?

MR. WYNNE: The point in this case is, 10
was this chain stolen in this particular instance? Now it seems to me that the fact there were numerous other robberies or thefts in the same locality within the period of several months at that time does not tend to show anything as to the theft in this case. Here you have one piece of jewelry in this bag, along with several others, very valuable, and but just one piece missing. The fact 20
that other places were robbed does not prove this chain was stolen.

THE COURT: I think your views are well taken. I will exclude that testimony. The only point is whether this diamond necklace was stolen; the other point is whether this insurance was in effect at the time the necklace was stolen; but two points.

(After Argument.)

THE COURT: I will stand on my ruling. 30

MR. BERNHARD: I pray an exception. I will withdraw the witness. Plaintiff rests.

MR. WYNNE: If your Honor please, I move for a non-suit on the following grounds:

First: The plaintiff has failed to establish a cause of action against the defendant.

Second: The plaintiff has failed to prove a direct loss by burglary, theft or larceny 40
of any property of the assured, from the in-

Ernest H. Miller—Direct.

terior of the house, building or premises or apartments actually occupied by the assured.

Third: Plaintiff has failed to prove that he gave notice of loss required to be given according to the terms of the policy.

10 Plaintiff has failed to prove that on discovery of the loss he gave or caused to be given immediate notice by telegraph as is required to be given.

Plaintiff has failed to prove that upon discovery of the loss that he gave immediate notice thereof to the police authorities having jurisdiction.

20 Plaintiff has failed to prove that he furnished affirmative proof of loss containing sufficient evidence of the commission of burglary, theft or larceny to which the loss was due, or as to the time of its loss. (Several cases cited.)

MR. BERNHARD: I ask permission of the court to reopen.

THE COURT: I will permit you to reopen your case.

ERNEST H. MILLER, plaintiff, recalled.

DIRECT EXAMINATION BY MR. BERNHARD:

30

Q. Who were the agents?

MR. WYNNE: I object:

THE COURT: Tell us what you did?

Q. What did you do after you discovered the loss? A. I notified Harry Lowy, of Lippman & Lowy, from whom I secured the policy.

Q. This policy in question? A. This policy.

40 Q. And to whom did you make payment for the premium of this policy? A. Lippman & Lowy.

Q. And Harry Lowy is a member of that firm? A. He is.

Motion for Non-Suit.

Q. When did you notify him? A. At noon the same day we notified the police.

Q. (By the Court): What day was that?

MR. BERNHARD: With reference to when you missed the jewelry?

A. The day following the missing of the jewelry.

Q. What about proof of loss?

10

Q. (By the Court): Do you know the date? A. I do not. I signed a proof of loss submitted to me by Harry Lowy, which he said would be forwarded to the company.

MR. BERNHARD: I call for the proof of loss. (Produced by Mr. Wynne.)

Q. Is that the proof of loss submitted by you to the company? A. Yes, sir.

20

Proof of loss received in evidence and marked Exhibit P-2.

THE COURT: Your first point is there is no cause of action. I will deny your motion on that ground. No proof of loss by theft. I will hear Mr. Bernhard on that. There is no proof of notice to the police. There is proof of that. You say there is no proof of loss? I deny your motion on that ground. Proofs have been presented to the nearest agent. Now here is another point. You are denied on the proof as to the value of the goods stolen. In your state of demand you claim a damage of \$500. The evidence indicates that the value is more than \$500. Mrs. Miller's testimony—and you can't take her testimony—is there might be a value of over \$500. I don't know, but we have no testimony that we can accept showing the value of this necklace.

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40

Colloquy.

MR. BERNHARD: I have Mr. Dawson's word for it, and I am satisfied he will stand by that in the event there is judgment entered.

THE COURT: If that is to be admitted I will deny the motion for a non-suit on the points raised and allow an exception. Is it to be admitted that the value is \$500?

10

BOTH COUNSEL: Yes, sir.

MR. WYNNE: Kindly note my objection to the ruling on non-suit.

MR. WYNNE: I would like to renew my motion to have this matter go over so I can produce that servant girl.

THE COURT: You base your defense upon what testimony this servant girl will give?

MR. WYNNE: I want to show by the servant girl that she did not steal this.

20

THE COURT: Well, suppose she didn't? According to the testimony she had visitors. Suppose she didn't steal it; suppose one of her friends managed to get upstairs? Suppose she said to a friend, "I don't want to have a hand in this; but that stuff is upstairs in Mrs. Miller's room, and you will find it behind a picture. Now you go up and take it, and then I can swear I didn't steal it if I was put on the stand." She may have been one of those conscientious girls, who wouldn't mind putting her friend up to it. Suppose it was done in that way?

30

MR. WYNNE: I would like to ask her that question.

THE COURT: Of course, knowing a little of human nature, you would know when she was put on the stand—unless she is very repentant—the chances are 999 to 1 that she would say no, and suppose she got on the stand and said, "No, I didn't do it"? Sup-

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Colloquy.

pose she is innocent, she is not the only one who could have stolen it. A sneak thief might have done it, and it might have been done by somebody who knew how to get into the house.

MR. WYNNE: I want the Court to pass upon whether there is sufficient evidence in this case. I hold there is no sufficient proof. 10

THE COURT: I am of the opinion, if that is your only defense, the evidence shows that the necklace was stolen, and I will deny your motion.

MR. WYNNE: I ask that the letter offered for identification be marked as an exhibit.

THE COURT: The letter will be admitted for what it may be worth.

(Letter Marked D-1 for identification, marked Exhibit D-1.) 20

MR. WYNNE: Your Honor denies my application to have the matter go over?

THE COURT: Yes, on the ground, first, this witness should have been produced, this case having been pending a long time, and the defendant having had ample time in which to prepare his defense, and now coming into court and applying for an adjournment on the ground they could not locate the witness, is why I will deny the motion for a continuance of the case. I think it is highly a matter of discretion with the court. I will render a verdict of \$500 in favor of the plaintiff. 30

Clerk's Return.
ORANGE DISTRICT COURT.

	ERNEST H. MILLER,	
	<i>Plaintiff,</i>	
	v.	
	NEW AMSTERDAM CASUALTY COM-	15401
10	PANY,	
	<i>Defendant.</i>	

Summons issued August 9, 1918.

Returnable August 16, 1918.

Demand, \$500. Demand filed August 9, 1918.

J. A. Bernhard, Plaintiff's Attorney.

Edwards & Smith, Defendant's Attorneys.

PLAINTIFF'S COSTS.

	Summons	2.10
20	Mileage	.32
	Listing fee	1.50
	Attorney's Fee	25.00
	Total Cost	28.92
	Appeal	1.00

Service accepted, Aug. 12, 1918.

LIPPAS & LEVY,
Per H. O. Levy.

30 Jan. 17, 1919. Trial had; Beatrice M. Miller, sworn and testified. Policy in evidence, marked Ex. P-1. Statement marked D-1 for identification. Ernest H. Miller, Theodore S. McNally and John Hummel sworn and testified. Admitted by defendant that the policy was in force at the time of the alleged theft. Plaintiff rests. Motion for non-suit made by defendant. Ernest H. Miller re-

called and testified. Proof of loss in evidence marked Ex. P-2. Plaintiff rests. Motion for nonsuit denied. Motion by defendant for continuance to produce additional testimony denied. Letter in evidence marked Ex. D-1. Defendant rests. Judgment was thereupon rendered for the plaintiff and against the defendant for Five hundred dollars debt, and Twenty-eight dollars ninety-two cents costs. Notice of appeal and waiver of bond filed Jan. 24, 1919.

10

HAROLD JERABOLD,
Clerk.

(Seal.)

Exhibit P-1.

No. BT 109946 A1301
Residence Burglary, Theft and Larceny Insurance
Policy.

20

NEW AMSTERDAM CASUALTY COMPANY

59 John Street Equitable Bldg.
New York Baltimore, Md.

In Consideration of the payment of the premium and of the statements contained in the schedule hereinafter set forth, which statements the Assured makes on the acceptance of this Policy and warrants to be true, the

NEW AMSTERDAM CASUALTY COMPANY

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hereinafter called the Company, does hereby agree to indemnify the person or persons designated in Statement 1 of the said Schedule, herein called the Assured:

For direct loss by burglary, theft or larceny of any of the property of the Assured described in the said schedule and stated therein to be insured hereunder, occasioned by its felonious abstrac-

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Exhibit P-1.

tion from the interior of the house, building, apartments or rooms actually occupied by the Assured, and described in the said schedule and hereinafter called the premises, by any domestic servant or other employe of the Assured or by any other person or persons excepting any person whose property is insured hereunder; and

- 10 For direct loss by damage to the said property and to the said premises caused by any person or persons while in or upon the said premises for the purposes of Burglary, Theft or Larceny.

*Subject to the Following Agreements:
Property Insured.*

- 20 1. It is understood and agreed that for the purposes of this insurance, property belonging to any permanent member of the household of the assured who does not pay board or rent except domestic servants or other employes, or property belonging to a relative of the assured permanently residing with him, is deemed to be the property of the assured. In the event of claim for loss of such property, the release of either the assured or the actual owner of the property shall relieve the Company from all further liability.

Amount of Insurance.

- 30 2. The liability of the Company is limited to the several specific amounts stated in Items I, II and III of Statement 14 of the said schedule and subject to such limits, as respects each item, the total liability of the Company hereunder is limited to the total amount of insurance as stated in Item IV of Statement 14 of said schedule.

Premises Unoccupied.

- 40 3. Subject to the conditions hereinafter stipulated in this Policy, permission is hereby granted the assured to leave the premises unoccupied not

Exhibit P-1.

exceeding four months in all during any one period of twelve consecutive months from the beginning date of this Policy.

Company Not Liable.

4. The Company shall not be liable for loss:
 (a) if the property belongs to a domestic servant
 or other employe of the Assured; (b) of jewelry, 10
 watches and precious stones in excess of One
 Hundred Dollars which shall occur during any
 period while the premises are unoccupied and af-
 ter the first eighty-four hours thereof, but any
 loss discovered and reported to the Company, as
 herein provided, not later than twenty-four hours
 after the expiration of the said period of eighty-
 four hours shall be covered by this Policy; (c)
 after the premises have been left unoccupied for 20
 more than four months whether consecutive or
 not, unless permission for a further time during
 which said premises may be left unoccupied, be
 endorsed hereon, signed by the President, Vice-
 President, Secretary or Assistant Secretary of the
 Company, or unless such loss is reported to the
 Company within fifteen days after the termina-
 tion of the said period granted by the Policy or
 such endorsement; (d) of money or securities for
 money except for an amount not exceeding five 30
 per centum of the total amount of insurance un-
 der this Policy but in no event for an amount ex-
 ceeding Fifty Dollars; (e) of any coin collection,
 stamp collection, medals, manuscripts, plans, pat-
 terns, models, molds or designs, deeds, documents
 of title to property and business books unless the
 same are specifically mentioned in the said sched-
 ule; (f) if the premises are used in whole or in
 part as a boarding or lodging house or for any
 business or professional purposes unless it is so 40
 stated in Statement 7 of the said schedule; (g)
 from or contributed to by, or occurring during, fire

Exhibit P-1.

in the building in which the premises are located; (h) from explosion except when caused by burglars; (i) from or contributed to by water, invasion, riot, war, strike or civil commotion; (j) for an amount in excess of the actual cash value of the property taken nor for any loss whatsoever unless the same shall be due to a Burglary, Theft
 10 or Larceny committed during the term of this Policy or any renewal thereof.

Mechanics on Premises.

5. While the premises are left without an occupant (or unoccupied) within the meaning of this Policy, and mechanics or other workmen are admitted into the premises for the purpose of painting, papering, renovating or making alterations or changes of any nature in the premises, the Com-
 20 pany shall not be liable under this Policy for any loss unless such loss is occasioned by a person or persons making felonious entry into the premises by force and violence, of which force and violence there shall be visible marks made by tools or explosives, upon the premises.

Storeroom.

6. If the Assured is an occupant of an apartment or flat house in which a locked storeroom is
 30 provided by the landlord for the exclusive use of the Assured, this insurance shall cover goods belonging to the Assured and contained in such storeroom, to the extent of Fifty Dollars and no more.

Notice of Loss.

7. The Assured upon the discovery of any loss on said premises shall give, at the expense of the Company, immediate notice thereof by telegraph to
 40 the Company at its Executive Office in New York City or Baltimore, Md., or to the nearest agent of the Company and shall also give immediate notice

Exhibit P-1.

thereof the the public police authorities having jurisdiction.

Proof of Loss.

8. Affirmative proof of loss under oath on forms provided by the Company must be furnished to the Company within sixty days from the date of the discovery of the same. Such proof of loss shall contain a complete inventory of all the property damaged or taken, stating the original cost and the actual cash value of each article at the time of the loss and the amount of loss thereon; a statement in detail of the damage done to the property of the Assured; a statement clearly defining the interest of the Assured in the articles or property for which indemnity is claimed; a statement containing sufficient evidence of the commission of a burglary, theft or larceny to which the loss was due and the belief of the Assured as to the time of its occurrence; a statement in detail of other concurrent or similar insurance, if any, whether valid or not, on the property insured and of the purposes for which and the persons by whom the premises described herein were occupied at the time of the loss. The delivery of any such form or its receipt or retention by the Company shall not be a waiver of any of its rights. The Assured shall facilitate the adjustment of any claim made by producing on the request of any person designated by the Company, any and all books, papers and vouchers bearing in any way upon the claim made and by submitting himself and associates in interest and his employes and the members of his household to examination and interrogation by the representatives of the Company under oath if required.

Inspection.

9. The Assured shall grant the officers or representatives of the Company the right to inspect the

Exhibit P-1.

premises at such times as they may deem needful; any such officer or representative may require the Assured to make the premises reasonably secure and shall have the right to suspend the insurance under this Policy until such requirements are complied with to the satisfaction of the Company. Notice of such suspension and the reason therefor and of reinstatement must be in writing. The Company will on demand pay to the Assured the unearned premium pro rata during the period of suspension.

Losses Paid.

10. All sums which from time to time may be paid or expended by way of indemnity to the Assured under this Policy shall be accounted in diminution of the amount of insurance hereunder. The Company may repair any damage to property and it may replace any damaged or stolen article with one of like quality and value instead of paying for the same in money. Any article for which the Assured has been indemnified by payment or replacement shall belong to the Company if recovered, but upon surrender by the Company to the Assured of such article the Assured shall pay to the Company the amount of indemnity received by him for the loss of such article. If any stolen article is returned to the Assured or recovered by the Assured, the same shall be reported to the Company immediately and the amount of indemnity received thereupon shall be returned to the Company by the Assured, unless the Company elects to receive the article so recovered.

Other Insurance.

11. If the Assured carry other insurance whether valid or not against loss for which indemnity is provided hereunder, the Company shall be liable only for its pro rata share of any such

Exhibit P-1.

loss. The Company shall be subrogated to the extent of its interests to any claims and rights of the Assured against any third party in respect to any loss that may occur hereunder and the Assured shall execute all papers necessary for this purpose.

Limit of Time for Suit.

10

12. No suit shall be brought under this Policy until three months after proof of loss as required herein has been furnished, nor at all unless commenced within two years from the date of the occurrence of the loss. If any limitation of time for notice of loss or if any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto in force in the State in which the premises of the Assured as herein described are located, such specific statutory provision shall supersede any condition in this contract inconsistent therewith.

20

Prosecution of Offenders.

13. In the event of a loss, the Assured shall take, at the expense of the Company, such legal action as may be required by the Company in the arrest and prosecution of the offenders.

Cancellation.

30

14. This Policy may be cancelled by the Company at any time by written notice delivered or mailed to the Assured at his business address or the location of the premises stated in the said schedule and such notice shall specify when the cancellation shall be effective. It may also be cancelled by the Assured by like notice in writing to the Company provided the premium shall have been paid. If cancelled by the Company, the Company shall pay or tender to the Assured the unearned premium pro rata. If cancelled at

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Exhibit P-1.

the request of the Assured, the Company shall retain the customary short rate premium and return the balance to the Assured. The check of the Company delivered or mailed to the Assured at his business address or the location of the premises stated in the said schedule shall be a sufficient tender.

10 *Policy Void.*

15. This Policy shall be void if the conditions or circumstances of the risk are so changed as to increase the hazard without the written consent of the Company or if the Assured attempts in any way to defraud the Company or if the Policy is assigned without the written consent of the Company.

20 *Power of Agent Limited.*

16. No condition or provision of this Policy shall be waived or altered by any one unless by endorsement hereon signed by the President, Vice-President, Secretary or Assistant Secretary of the Company, nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person be held to effect a waiver or change in this contract or any part of it.

30 *Agent.*

17. In any matter relating to this insurance no person shall be deemed an agent of the Company who is not duly authorized in writing.

SCHEDULE—Statements Made by the Assured.

Statement 1. The name of the Assured is Ernest H. Miller.

Statement 2. The business address of the Assured is 33 Division Pl., Newark, N. J.

Exhibit P-1.

Statement. 3. The kind of business in which the Assured is engaged is Mgr. Taxi Cab Co.

Statement 4. The location of the premises hereby insured is 27 Johnson Ave., Newark, New Jersey.

Statement 5. The building is fully described as follows: Apartment house.

Statement 6. The portion of the building occupied by the Assured is third floor front, south side, and in this Policy is called the premises.

Statement 7. The Assured is tenant of the premises, and said premises are occupied for residential purposes only, except as follows: No exceptions.

Statement 8. The premises shall be deemed to be unoccupied when neither the Assured nor a member of his household is actually in the premises.

Statement 9. There is a regular front door or hall or elevator attendant, except as follows: Elevator attendant.

Statement 10. The Assured has not sustained any loss nor received indemnity for any loss by burglary, theft or larceny within the last five years, except as follows: April, 1916.

Statement 11. The Assured has never been declined Burglary or Burglary, Theft and Larceny insurance on this or any other risk, except as follows: No exceptions.

Statement 12. The Assured has no other similar insurance except as follows: No exceptions.

Statement 13. The total value of all the property described hereinafter does not exceed: Not stated.

Statement 14. The insurance granted by this

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Exhibit P-1.

Policy and the premium thereon shall apply specifically as follows:

		Insurance. Premium.	
10	Item I. On articles of Gold and Sterling Silver, Plated Ware, Watches, Precious Stones, Jewelry, Wearing Apparel, Furs, Laces, Rugs, Tapestries, Paintings, Etchings, Engravings, Pictures, Books, Clocks, Bronzes, Statuary, Musical and Professional Instruments, Sporting Outfit, Bicycles, Electric Light, Plumbing, Gas and Water Fixtures, Houshold Goods, Houshold Stores and		
	Personal Effects common in residences generally, including money as provided in section (d) of Agreement 4 but excluding articles insured under Item III hereof	\$1000	\$15.00
30	Item II. On Automobiles, Tools, Fittings and appurtenances thereof, Horses, Vehicles, Harness, Saddles, Robes, Blankets and other like articles while contained in the private stable building or garage of the Assured situate contiguous to the said premises	nil	nil
	Item III. On articles in the said premises separately insured as follows:	nil	nil
40	Item IV. Total	\$1000	\$15.00

Statement 15. The period of time for which this insurance shall be in force is 12 months, beginning on the 29th day of January, 1918, noon, and ending on the 29th day of January, 1919, noon standard time at the place where this Policy has been countersigned.

Statement 16. The premium for this Policy is Fifteen and no-100 dollars (\$15.00).

In Witness Whereof the New Amsterdam Casualty Company has caused this Policy to be executed by its President and Secretary, but the same shall not be binding upon the Company until countersigned by a duly authorized representative of the Company. 10

J. ARTHUR NELSON,
President.

GEO. E. TAYLOR,
Secretary.

Countersigned by 20
LIPPMAN & LOWY, Inc.,
By Louis Lippman.

Exhibit P-2.

B. No. 1484

Reg, 5490

Miller

Feb. 13, 1918.

PROOF OF LOSS

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TO THE

NEW AMSTERDAM CASUALTY COMPANY

No. 59 John Street, New York

1. I hereby make claim for \$850 by reason of a Theft committed at or about 8th day of Feb. 1918, in the premises decribed as Number 27 Johnson Ave. City of Newark State of N. J., occupied by me as an apartment house.

40

Exhibit P-2.

2. The loss was first known to me on the 8th day of February, 1918 at o'clock P. M., and I notified the police authorities at the station in Police Headquarters on the 8th day of Feb., 1918.

3. The manner in which the loss was incurred is fully given as follows: Took jewelry bag from
10 behind picture frame and noticed platinum chain and locket were missing.

4. There were visible marks on the premises of the actual force and violence used in making entry therein or exit therefrom as follows: None.

5. The reason for my belief that the loss was occasioned by thieves on or entering the premises, without force or violence are as follows: Had bag of jewelry out on Jan. 29th, wore chain and
20 replaced in bag behind picture frame on evening of Jan. 29th. Took bag out on Feb. 8th and noticed chain was missing.

6. The names of all persons known or suspected to have been implicated therein are as follows: Rose Koehler c/o Mrs. Solomon, 42 Jones St., Newark, N. J.

7. No repairs, renovation or alterations had been made or were being made on the premises when the loss occurred, except as follows: None.

8. The property when stolen belonged to
30 Mrs. E. H. Miller, and no other person or persons had any interest therein except as follows: None.

9. The total value of all the property covered by this policy contained in the premises immediately before the loss was \$1,000.

10. The amount of burglary, theft or larceny insurance, whether valid or otherwise, held by the Assured at the time of the loss was as follows:
40 New Amsterdam Company, Policy No. 109946; Amount \$1,000.

Exhibit P-2.

12. I have not filed claim for loss by burglary, theft or larceny with any insurance company, except as follows: None.

13. The following is a complete description of all the articles stolen and the amount of loss thereon for which I claim indemnity under the policy, and agree to furnish on demand, which shall become a part of this proof of loss, any further information or evidence required by the policy contract. 10

Item No. 1, Platinun chain with diamonds; purchase price, \$600; where and from whom purchased? If a present the name and address of the giver, Schwartz & Son, 37th St. & B'way, N. Y.; when purchased or if a present date of gift, 1911 or '12; amount claimed under this policy \$700. 20

Item No. 2, Gold locket with diamond; purchase price \$150, where and from whom purchased? If a present the name and address of the giver, Schwartz & Son, 37th St. & B'way, N. Y.; when purchased, or if a present date of gift, 1911 or '12; amount claimed under this policy, \$150. 20

14. I agree that the delivery of this form as well as its acceptance by the company, shall not be a waiver of any of its rights or defenses under the said policy. 30

Dated at Newark, this 15th day of Feb., 1918.

(L. S.)

Ernest H. Miller,
Claimant.

STATE OF NEWARK }
County of Essex } ss.:

On this 15th day of Feb. 1918, personally appeared before me a Notary Public in and for said County and State Ernest H. Miller, to me well known, who being duly sworn, stated that he 40

has carefully read the foregoing and has been fully advised regarding the same, and that the statements and each of them are full, complete and true, and that he subscribed to the same without reservation.

THOS. B. BOOTH,

P. O. Address 33 Division Place,
Newark, N. J.

(Official Seal)

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Exhibit D-1.

Newark, N. J., Mar. 1, 1918.

I, Beatrice M. Miller, declare and affirm that the diamond chain and locket missing from my apartment and for which claim is made on the New Amsterdam Casualty Co., was put in a bag containing three pieces of diamond jewelry, namely, a diamond horseshoe pin, value of about \$900, and an initial pin, valued about \$250, on January 20 29th, and that on the night of February 7, 1918, the chain and locket was found to be missing—the other articles not having been disturbed. I reported my loss to Mr. Lowy, who told me to notify the police, which I did on the day following, February 8. I had in my employ a servant by name of Rose Koehler who had entered my employ Jan. 15, 1918. The girl had been recommended by Mrs. Rueben of the Hebrew Office Asylum. The girl became dissatisfied and left my 30 employ before her month had expired, I paying her to the time of leaving, the day she left being Feb. 8, about noon. She received \$30 monthly. I therefore gave her a dollar per day. I have read the foregoing and find it correct.

BEATRICE M. MILLER.

Witness:

E. B. Summersgill.

Rule for Affirmance.

(Filed Nov. 10th, 1919.)

NEW JERSEY SUPREME COURT.

ERNEST H. MILLER,*Plaintiff-Appellee,**vs.*

NEW AMSTERDAM CASUALTY CO.,

Defendant-Appellant.

On Appeal
from Dis-
trict Court.

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The above stated case having been regularly submitted to the Court at the June Term, 1919, and the Court having considered the matter and having affirmed the judgment of the Orange District Court,

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It is this 10th day of November, A. D. 1919, ordered, on motion of John A. Bernhard, attorney for appellee, that judgment of affirmance be and hereby entered in favor of the appellee.
Entered Nov. 10th, 1919.

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REPORT OF THE

COMMISSIONER OF THE

LAND OFFICE

FOR THE YEAR

1890

AND THE

PROGRESS

OF THE

LAND OFFICE

IN THE

STATE OF

NEW YORK

FOR THE YEAR

1890

1890

AND THE

PROGRESS

OF THE

LAND OFFICE

IN THE

STATE OF

NEW YORK

1890

1890

New Jersey Court of Errors and Appeals

ERNEST H. MILLER,

Plaintiff-Appellee,

and

NEW AMSTERDAM CASUALTY COMPANY, a
corporation,

Defendant-Appellant.

On Contract.

*On Appeal from
Orange District
Court.*

BRIEF FOR PLAINTIFF-APPELLEE.

The state of case (p. 40) shows that on the night of February 7, 1918, a chain and locket were found to be missing from a bag "which was always kept behind a picture in my room" (p. 8). The picture was standing in front of a simulated window (p. 8, l. 30), on a little shelf. The loss was discovered on the night of February 7 (p. 8, ll. 15-18), and was reported to Mr. Lowy, the agent of the defendant from whom the policy had been obtained, on the following morning, February 8.

On January 15, 1918, a servant had been employed, and on February 8, about noon, she became dissatisfied and suddenly left the employment of Mrs. Miller (p. 9, l. 18). During the period of her employment the servant had access at all times to the room where the bag was located (p. 8, l. 40). The chain "was a long chain coming to my knee, and had a gold locket with a diamond in it" (p. 9, ll. 35-38). The servant became discontented, and at the time the chain was missed, said "I have got to leave, I can't give you any reason, but I have to leave" (p. 9, l. 12).

About a day or two before the chain was missed, Mrs. Miller had worn it, and had then placed it in the bag "behind this picture" (p. 9, l. 32). The servant was engaged by the month, but left two weeks after her employment (p. 9, l. 10). A complete search of the house was made by Mrs. Miller and her husband, without finding the chain (p. 9, l. 40). During the period the servant was employed she frequently had visitors (p. 15, ll. 10-12), and Mrs. Miller found these visitors upon occasions when she would return, sitting in the kitchen with the servant (p. 15, l. 40). These visitors were in the apartment between the day on which the jewelry was placed in the bag and the day of its disappearance.

I.

Plaintiff proved a direct loss by burglary, theft or larceny.

One of the provisions of the policy is as follows:

“For direct loss by burglary, theft or larceny of any other property of the assured described in said schedule and stated therein to be insured hereunder, occasioned by its felonious abstraction from the interior of the house, building, apartments or rooms actually occupied by the assured.”

Larceny involves proof of two things:

1. That the goods have been taken from the prosecutor.
2. That they were taken feloniously by someone.

A *corpus delicti* may be established by purely circumstantial evidence. 25 Cyc., 120. But evidence of felony to justify conviction need not be so strong as to prove conclusively that there was no possibility of a non-felonious taking. Cyc., *supra*.

An illustration of this principle may be found in the case of *People v. Davis*, 19 N. Y. Sup., 781, “so on trial for larceny, proof that complainant owned and had in his vest a watch; that in the presence of defendant he hung the vest up with the watch in it, and that later, after he had put on the vest, he missed the watch, is sufficient evidence to establish a *corpus delicti*.”

It has been long settled in this state, that an Appellate Court will not review the determination of a District Court on a finding of fact where there was any evidence to sustain the finding.

There was evidence in this case to sustain the Trial Judge.

There can be no doubt about the rule.

“In every case before the evidence is left to the jury (and here the Judge sat as a jury), there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed.”

Baldwin v. Shannon, 14 Vr., 603.

And again, if upon the whole case there is evidence

“which in any way tends to establish the plaintiff’s cause of action or the defense, it is erroneous for the Court to direct a verdict, and it is only when the facts proved clearly fail either to establish a cause of action or a

sufficient defense, that the Court can properly direct the jury as to their verdict."

D., L. & W. v. Shelton, 26 Vr., 344.

Nugent v. Suburban Elec. Co., 29 Vr., 658.

There was evidence in this case tending to prove that there had been a direct loss by larceny.

This evidence is set out at length at the beginning of this brief. It was undisputed and supplied sufficient basis from which an inference could be legitimately drawn upon which the Trial Judge found for the plaintiff. It appeared conclusively:

1. That the chain had been placed in the bag.
2. That a complete search had been made without finding it.
3. That the servant had full access to the bedroom where the bag was hidden.
4. That strangers to the plaintiff, but acquaintances of the servant, were in the apartment after the chain had been put away and before its loss was discovered.
5. That the servant had been engaged for a month and left immediately upon a disclosure that the chain could not be found.

There was consequently:

- a. Evidence of the disappearance of the chain, and
- b. Evidence of which a fair inference could be drawn of its felonious taking.

These constitute larceny within the intent of the contract.

On this point our Supreme Court held:

"Sometimes the policy contains a clause requiring direct and affirmative evidence of theft as the cause of loss, but in Pennsylvania this was rigidly limited by construction, the Court saying that it would be absurd to call for proof in an insurance case that would not be legally necessary to convict the thief himself." *Miller v. Mass. Bonding Co.*, 93 Atl. 320.

Reade v. American Bonding Co., 166 N. W., 196, is exactly in point.

No more or no less facts appeared in that case than in the present case. Substantially in the absence of any decision in this state, I depend upon the Reade case for an affirmance of this judgment, and I respectfully refer this Court to the decision in that case.

The Reade case, in a measure, is based upon the decision of the Supreme Court of Pennsylvania in *Miller v. Massachusetts Bonding Co.*, 93 Atl., 321.

The words "direct loss and affirmative proof" were incorporated in the form of the contract of insurance, and contain identically the same provisions as the contract between Mr. Miller and the New Amsterdam Casualty Company. I hope the Court will read the Miller case in its entirety, but I desire to quote part of the opinion:

"Theft may not be described as a deed of darkness; yet it is notoriously one which is rarely, if ever, attempted except as the thief has reason to believe that he will be undiscovered in the act. He never invites anyone, unless it be a confederate, to witness the operation. To limit the assured's right to recover to cases where the *corpus delicti* can be proved by direct testimony—that is, by testimony of witnesses who saw the actual taking, would make the policy next to valueless;" and again, "technical terms are ordinarily but not always to be given their technical meaning. Where they are obviously used in a different sense, it is the intention that governs. Just what the parties understood by direct and affirmative evidence may not be clear, but of this we feel very clear. They did not employ these words with a view to rendering the policy frivolous and ineffective. And it would be both were it enforceable only as someone could be produced who had seen the thief at work.

"A reasonable construction of the words would ascribe to the parties the single purpose to require something more than the mere fact of loss to entitle the assured to recover on the policy."

As has been already set out, "Something more has been shown in this case than the mere disappearance of a chain."

The contract between the parties was for the purpose of insuring the insured from loss by larceny, or theft, and the company "did not employ these words with a view of rendering the policy frivolous and ineffective. And it would be both were it enforceable only as someone could be produced who had seen the thief at work." *Miller v. Massachusetts Bonding Co., supra.*

That this is the view adopted by the Supreme Court is apparent when it says "cases like that at bar are classed by the police as 'inside jobs,' and the only inference which can be drawn is that the chain was stolen by some one living in the apartment or employed there, or *having access to the apartment.*"

I do not know whether Justice Shearn in writing the opinion in *Wolf v. Aetna Accident & Liability Co.*, 174 N. Y. Supp., 787,

had the Miller case in his mind, but his line of reasoning is based upon a similar contract and almost identical state of facts. He said:

“Of course, it is not sufficient merely to show a loss or disappearance of an article insured, but it is sufficient in my opinion to show a loss under circumstances, which not only support an inference of theft, but which if not excluding the possibility of mistake, points strongly and comprehensively to the conclusion that theft was committed. The inference of fact is one to be drawn by a jury, and while the burden of proof of larceny is on the plaintiff, that burden does not have to be sustained beyond a reasonable doubt, as in criminal cases, but requires only the support of a preponderance of evidence. To my mind it is a reasonable deduction that some unauthorized person opened the receptacle and abstracted the diamond with felonious intent.”

The diamond in this case, had been placed in a glass jar in the kitchen and there was no visible signs of entry or breaking of any kind.

I do not see how a more analogous situation could appear. In reaching a decision in the case, Justice Shearn wrote the opinion for the Court of Appeals, after the case had come to that Court from the Trial Court through the Appellate division. He reached this conclusion after considering the case of *Stitch v. Fidelity & Casualty Company*, 159 N. Y. Supp., 712, where the jewelry had been abstracted from the box in which it had been placed without any evidence of any indication of forcible entry, and without any more substantial proof than was produced in this case.

The Wolf case was decided in 1918, which was after the decision in the cases cited by the appellant.

Moreover, the principle is well settled that plaintiffs are “not required to show by direct evidence a felonious abstraction of the property; it was enough if they showed circumstances sufficient to raise inference that the property was feloniously abstracted.”

Haas v. Fidelity & Deposit Co. of Maryland, 160 N. Y., 1101.

And again, in *Orlando v. Great Eastern Casualty Co.*, 155 N. Y. Sup., 20, the Court said:

“There was direct testimony that the articles claimed to have been stolen were in a bureau drawer in plaintiff’s apartment when he and his wife left, and that two days

later, when the wife returned, the drawers in the bureau and sideboard were found opened, the draw in question being 'mussed up' and the articles missing."

That is absolutely all the evidence that was produced. There was not the least bit of testimony of any marks on the doors or windows or drawers. The sole additional circumstances beyond the absence of the articles stolen, was that the drawers were mussed up, which is not nearly so strong as the evidence in this case.

The argument here, as in the Supreme Court, rests entirely upon the following cases:

Schindler v. U. S. Fidelity & Guaranty Co., 109 N. Y. Supp. 723;

Gordon v. Aetna Indemnity Co. of Hartford, 116 N. Y. Supp. 558;

Hart v. American Fidelity Co., 121 N. Y. Supp. 605;

Duschenes v. National Surety Co., 139 N. Y. Supp. 881.

The brief for plaintiff-in-error states that the case of *Fidelity & Casualty Co. v. Dulany*, 91 Atl. 574, "expressly held that these cases laid down the correct rule of law," and intimates that the case is controlled by the above decisions. That statement is unwarranted. The Dulany case expresses no such opinion. In support of my contention I quote the exact words of that case:

"These cases announce the correct rule of the law applicable to cases of this kind, but *if we were disposed to concur that the conclusions reached by the courts upon the facts in each of these cases, we should not regard them as controlling in this case, because in addition to the fact of the disappearance of the articles, there are facts, in our opinion, which tend to show that the articles were stolen.*"

What the Court said was "these cases announce the correct rule of the law *applicable to cases of this kind.*" The case sub-judice does not come within the cases cited, because, as was stated in the Dulany opinion, "*in addition to the fact of the disappearance of the articles, there are facts, in our opinion, which tend to show that the articles were stolen.*"

Reliance is placed also upon the opinion in the case of *National Surety v. Redmon*, 190 S. W. 1081. It requires merely a casual reading of those facts to determine that the gravaman of that action was that burglary had been committed, and that the Court held that

"Any conclusion that the loss occurred by burglary would be mere conjecture, and conjecture affords no sound basis for a verdict."

There is no contention in this case that the loss was the result of a burglary, but as the result of larceny or theft. And while we are upon the subject of larceny, I respectfully call the attention of the Court to the argument addressed by the plaintiff-in-error on pp. 15 and 16 in his brief.

"The only inference which can be drawn was that the chain was stolen by someone living in the apartment or employed there."

Of course, this is not an exact statement of the actual facts. There were other persons in the apartment besides Mr. and Mrs. Miller and the servant. These persons were the visitors to the servant, to whom Mrs. Miller referred in her testimony, and they were in the apartment at about the time the loss of the chain was discovered. It is worthy of note that counsel has not mentioned them in his argument, and it is also worthy of note that this action was not instituted until a considerable length of time after the loss had occurred. In the intervening space of time the stolen articles had not been recovered, although the Millers continued to occupy the apartment. Practically the same circumstances as to the servant existed in this case as in the Dulany case (*supra*), where the Court said:

"We have set out the facts and circumstances attending the loss of the articles sued for, and we are of opinion that the jury might have reasonably concluded that they were lost by larceny or theft. Indeed, when the number and character of the goods and the circumstances under which they disappeared are considered, it is difficult to account for their loss upon any other hypothesis."

I note again that counsel says (such a conclusion of the Supreme Court that there hardly seems to be room for any other deduction than that some one stole the chain). It is absolutely in conflict with the various decisions and with the great weight of authority. The fact is that the statement of counsel is absolutely in conflict with the various decisions and with a great weight of authority. The case of *Reade v. American Bonding Co.*, 166 N. W. 196; *Miller v. Massachusetts Bonding Co.*, 93 Atl. 321; *Wolf v. Aetna Accident & Liability Co.*, 174 N. Y. Supp. 787; *Haas v. Fidelity & Deposit Co.*, 160 N. Y. 1101, and *Orlando v. Great Eastern Casualty Co.*, 155 N. Y. Supp. 20, are decisions of a more recent date interpreting the contract in the light of the present day conditions and were decided many years after the cases cited by the plaintiff, and it is fair to assume, as stated by

Judge Thomas, in the case of *Bakhaus v. Caldeonian Ins. Co.*, 77 Atl. 310 (Md.).

"The business in which insurance companies are engaged is one of which the security and protection of the insured are largely intrusted to the honesty and fairness of the insurer, and this Court has frequently said that good faith demands of them frank and open dealing with their policy holders."

II.

The cases cited by the appellant are clearly different from the case at bar.

The Schindler case was decided in 1908 by an opinion of the Court containing only sixteen printed lines. There the servant of the plaintiff was out during the afternoon at a time when the plaintiff was also out of the room. Here the servant left at about the time of the loss of the jewelry was discovered. There the servant remained in the employ of the plaintiff. Here the servant entertained visitors at the time of the loss of the jewelry. There were no visitors there.

In the Gordon case the clear inference was that in making up the bed the jewelry might have been lost. Moreover, there were no visitors to the servant, nor did the servant leave the employ of the plaintiff unexpectedly.

With reference to these two cases the Appellate Court (N. Y.), in 1916 (seven years later), said in the *Stitch* case that

"The evidence there presented was not sufficient to show such felonious abstraction. The evidence there showed a loss or disappearance, but that loss or disappearance was not shown to have occurred under circumstances so inconsistent with an innocent disappearance as to fairly raise the inference that the loss was due to felonious abstraction."

The Court did not there hold that proof of disappearance might not be sufficient to show felonious abstraction, "if the circumstances surrounding the disappearance were not reasonably consistent with disappearance through an innocent cause," and concluded, "*It follows with reasonable probability that some unauthorized person opened the box, and extracted only the articles of value. No unauthorized person would have taken the jewelry except for felonious intent.*" In this case

"various employees of the hotel had access to the rooms." Just as in our case, various visitors had access to Mrs. Miller's rooms.

The distinction in the Hart case is palpably obvious. There the diamond might easily have disappeared through a sewer pipe.

The Katzenstein case was decided upon a question of notice. There six months elapsed from the time the jewelry was put away until its loss was discovered.

In order to be more specific, the following parallel shows the difference between the case at bar and the Gordon case:

Gordon Case.

(a) Mrs. Gordon stated that she placed the locket under a pillow in her bedroom.

(b) House occupied solely by plaintiff's family and two servants.

(c) Last saw locket the morning of the day it disappeared.

(d) Searched the rooms for an hour.

(e) Next morning police were notified, came and searched the servants and their belongings.

(f) Locket still missing.

Case at Bar.

Mrs. Miller stated she placed the chain in a bag in her bedroom.

Apartment occupied by plaintiff's family and one servant.

Last saw chain two days before it was discovered missing.

Searched the apartment. Mr. Miller searched also.

Next day police were notified; came and searched premises. Later interviewed the servant girl.

Chain still missing.

Additional Facts.

Servant employed for month left before expiration of month.

Servant left unexpectedly.

Visitors to servant had access to room where jewelry was kept.

On the strength of the *Stitch* decision, I submit that the cases cited by the appellant do not control.

Therefore, we urge that we are justified in asserting that the Trial Judge properly based his verdict upon a fair inference to be drawn from the testimony that the chain had been taken with felonious intent, and that larceny had been committed.

III.

Plaintiff proved that notice of loss had been given as required by the terms of the policy.

The policy provides, among other requirements:

“Immediate notice to the nearest agent of the company, and shall also give immediate notice thereof to the public police authorities having jurisdiction.”

Mr. Miller, the assured, reported the loss to Mr. Lowy, the agent through whom he negotiated the policy, on the morning following the discovery of the abstraction of the chain. The loss was discovered on the night of February 7, and reported to Mr. Lowy on the morning of February 8 (p. 18, ll. 20-22), and subsequently to the police, who called on Mrs. Miller on February 9th. The contention is made, quoting from the appellant's brief, that “The plaintiff did not give the notice by telegraph, as required by the policy, nor did he give any notice until the day following the discovery of the loss.”

I am unwilling to pass over in this connection a clear misstatement of fact. I quote p. 21 of the brief of plaintiff-in-error under the heading “Error of the Supreme Court.” The point urged is “that the notice by *telegraph* which the policy required was not given. The Supreme Court seems to have passed over this point * * * no other notice would be a compliance with the terms of the policy and, therefore, plaintiff should have been nonsuited.”

It is inconceivable how any such statement could be made in support of an alleged oversight of the Supreme Court, in a matter of such supreme importance, when it concisely and positively appears that “immediate notice thereof by telegraph to the company, at its executive office in New York or Baltimore, Md., *or to the nearest agent* of the company, etc.,” is all that is required. In spite of the use of the disjunctive “or,” counsel insists that “notice by telegraph” was not given. Notice was immediately given “nearest agent of the company, Mr. Lowy,” and by the

very terms of the policy, it was not then necessary to give notice by telegraph. It is suggested that Mr. Lowy was not the agent of the company. The only answer necessary is a reference to p. 37 of the printed case where it appears that the policy was countersigned by Mr. Lowy's firm.

It is submitted without further argument, that the evidence in this case showed that the assured acted immediately within the interpretation of the terms of the policy, and it is insisted that he was not obligated to telegraph the company of the loss as he adopted the other alternative and notified the agent.

In the *Orlando* case, *supra*, five days elapsed before the matter was reported, and the Court held "immediate notice" had been given as contemplated by the terms of the contract.

For the reasons above stated it is respectfully urged that judgment of the Trial Court should be affirmed.

March term, 1920.

JOHN A. BERNHARD,
Counsel for Appellee.

New Jersey Court of Errors and Appeals.

ERNEST H. MILLER,	} On Con- tract. 10 On Appeal from Judg- ment of Su- preme Court.
<i>Plaintiff-Appellee,</i>	
<i>vs.</i>	
NEW AMSTERDAM CASUALTY COM- PANY, a corporation,	
<i>Defendant-Appellant.</i>	

BRIEF FOR DEFENDANT-APPELLANT.

Statement.

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This appeal brings before this Court a judgment of the New Jersey Supreme Court affirming a judgment of the District Court of the City of Orange entered upon the verdict of the judge of that court in favor of the plaintiff in the sum of \$500. Defendant appealed to the New Jersey Supreme Court and that Court affirmed the judgment.

Facts.

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This action was based on a policy of insurance issued by the defendant to the plaintiff covering "direct loss by burglary, theft or larceny from the interior of the apartment of the plaintiff". A certain piece of jewelry was found to be missing from the bag where it had been kept along with other jewelry. Only the one article, a diamond chain, disappeared. The plaintiff claims it was stolen; defendant contends there was no proof that it was stolen.

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Evidence.

Beatrice N. Miller, called on behalf of the plaintiff, testified that she resided with the plaintiff, her husband, at 27 Johnson Avenue, Newark, for the past 3 or 4 years; that the place they reside in is an apartment house occupied by about 35 families that
 10 at the time her husband took out the insurance she possessed certain jewelry, among which was the diamond chain and locket for which the claim was made in this case; that she had a servant girl for a few weeks; that she kept all of her jewelry in a bag, on a little shelf behind a picture in her room, and that the servant girl had access to this room at all times (p. 8); that the servant girl left on very short notice, having only stayed about two weeks (p. 9); that she missed the diamond chain
 20 about the same time the girl told her she was leaving (p. 9) and that this was the night before the girl left, which was in February (p. 8); that the last time she saw the chain was about two days before she missed it, when she wore it out; that at that time she placed it behind the picture and after missing it, she searched for it and, being unable to find it, notified the police.

On cross-examination her memory was very hazy on dates. After looking at her signed statement Exhibit D-1, she changed the dates; she was not
 30 sure when she last wore the chain, first saying it was January 13th and then February. She repeated that the last time she wore the chain was two days before she missed it, that she did not remember saying in her signed statement that the last time she wore it was January 29th and then upon being shown her statement, stated she could not read the writing.

She testified that the girl did not come to her recommended; that she got her from an employment agency. She denied saying that the girl be-
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came dissatisfied and then, when questioned about her statement, said the girl must have been dissatisfied or she would not have wanted to leave (p. 12); that she paid the girl up until the time she left, and this was after she had missed the jewelry. She testified that she went to put some rings away and missed the chain; that there was other jewelry in the bag with the chain, but none of that was missing; that one of the pieces was worth \$900, and another \$250; that there was nothing to excite suspicion when she entered the room; that there was no evidence of the house having been broken into (p. 13); she further stated that she missed the chain the night of the day before the girl left (p. 14). 10

On re-direct examination she testified the girl frequently had visitors and that she found them in the kitchen. In answer to questions by the court as to when the girl left she again was hazy about the date and placed it about January 29th. She stated she reported the loss to the police the day the girl left (p. 15). 20

Ernest H. Miller testified that he took out this insurance policy; that his wife kept all her jewelry behind this picture frame; that he helped his wife search for the chain but could not find it; that it was after dinner in the evening and the servant girl was still in their employ (p. 16); that there was no evidence that the house had been broken into (p. 18). 30

Theodore S. McNally testified that he was connected with the detective bureau of the City of Newark and, on February 9th, went to the plaintiff's house; that he examined the door and later on interviewed the maid; that there was nothing on the door or windows showing they had been forced (p. 18-19).

On cross-examination he stated that there was

no physical evidence of the place having been broken into; that the only thing they had to work on was Mrs. Miller's statement that the jewelry was gone and that they did not find anything else (p. 19).

Ernest H. Miller, recalled, testified that the day after the loss was discovered he notified the firm from whom he received the policy and signed a proof of loss (p. 22-23).

ARGUMENT.

A non-suit should have been granted by the Trial Court and the Supreme Court erred in affirming the refusal of the District Court of City of Orange so to do.

POINT I.

Plaintiff has failed to prove a direct loss by burglary, theft or larceny.

Plaintiff has failed to prove a direct loss by burglary, theft or larceny.

The policy contains the following provision:

"In consideration of the payment of the premium and of the statements contained in the schedule hereinafter set forth, which statements the assured makes on the acceptance of this policy and warrant to be true, the New Amsterdam Casualty Company hereinafter called the Company, does hereby agree to indemnify the person or persons designated in Statement 1 of the said Schedule herein called the assured.

*"For direct loss by burglary, theft, or larceny of any of the property of the Assured described in the said Schedule and stated therein to be insured hereunder, occasioned by its felonious abstraction from the interior of the house building, apartments or rooms actually occupied by the assured. * * * *"*

The plaintiff therefore had the burden of establishing that the loss was *occasioned by burglary, theft or larceny occasioned by its felonious abstraction from the interior of the apartment or rooms actually occupied by the assured*. Let us examine the evidence produced at the trial to ascertain whether or not there was such proof.

Plaintiff's wife testified that she placed the diamond chain in a bag, together with other valuable jewelry, and placed it behind a picture frame (p. 8); that she had worn it two days before she missed it, and had then placed it in the bag; that none of the other jewelry was missing and that one piece was worth \$900. and another \$250.; that there were no signs of the house having been broken into, and nothing about the room to excite suspicion (p. 13). She further testified that the servant girl sometimes had visitors and that she left the day following the discovery of the loss, but admitted on cross-examination the girl must have been dissatisfied (p. 12).

The plaintiff also testified that there was no evidence of the house having been broken into.

Witness McNally testified that there was no physical evidence of a burglary or theft; that all they had to work on was the statement of Mrs. Miller that the jewelry was missing; that they afterwards interviewed the maid but found nothing.

Mrs. Miller's testimony is exceedingly vague and uncertain. She stated on direct examination that she missed the chain the night before the servant left her (p. 8) and that this was in February; that she had worn it last a day or two before she missed it (p. 9). In a statement signed by her and duly witnessed and dated March 1, 1918, she stated that the chain was put in a bag with other jewelry on *January 29th* and that on *February*

7th, 1918, the chain was found to be missing. Upon being shown the statement she immediately begins to change her testimony as to dates, but insists that she last saw the chain a day or two before she found it to be missing (p. 11) and when asked to read her statement says she cannot read the writing (p. 12). In her statement she states
 10 the girl was recommended to her by the Hebrew Orphan Asylum (p. 14); in her testimony she says the girl came unrecommended.

The proof of loss shows that the jewelry was worn on January 29th, was placed in the bag on the evening of *January 29th* and the bag was next opened *February 8th* and the chain found to be missing (p. 38).

The testimony most favorable to plaintiff would simply show that plaintiff had a servant girl; that
 20 plaintiff's wife placed the diamond chain in a bag, together with other jewelry, behind the picture in her room; that two days later she missed the diamond chain from the bag and that the servant girl left the day following the discovery that the chain was missing; that no evidence was shown in any way connecting the girl with the jewelry or that she even knew plaintiff had the same; that the girl was examined by police officials but no evidence secured justifying the making of a charge
 30 shown that the house had been unlawfully entered; that no charge was made against the girl.

The evidence was insufficient to establish a loss by burglary, theft or larceny. The burden of showing a loss due to one of such causes rests upon the plaintiff and he must prove the same by a preponderance of the evidence. It is not sufficient to show merely an unaccounted-for disappearance of the article; facts must be shown from which the inference that it was stolen can be legitimately
 40 drawn. The evidence in this case merely proved

a disappearance. This is not enough, more must be shown than that the article has disappeared from the place where it was last seen.

Schindler v. U. S. Fidelity & Guaranty Co., 109 N. Y. Supp. 723;

Gordon v. Aetna Indemnity Co. of Hartford, 116 N. Y. Supp. 558;

Hart v. American Fidelity Co., 121 N. Y. Supp. 605;

Duschenes v. National Surety Co., 139 N. Y. Supp. 881.

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The burden of proving facts connected with the disappearance from which a theft could be inferred rested on the plaintiff and unless he proved such facts he has failed to show a loss for which the defendant would be liable.

In order to prove such a loss plaintiff seems to rely upon the fact, and the trial judge took the same view, that the servant girl sometimes had visitors and that she left the plaintiff's employ upon short notice the day after the loss was discovered. In this connection we call the attention of the court to the fact that Mrs. Miller did not testify as to *when the girl last* had the visitors or that she *ever* had any visitors *after the last time the missing jewelry was worn*. Therefore, from this evidence no inference that one of the visitors stole the chain could be legitimately drawn. Nor could the jury or the court sitting as a jury, find that the mere fact that the servant girl left the following day raised an inference that she stole the missing chain. The servant girl did not disappear; she left the day after the loss was discovered and plaintiff's wife admits she left because she was dissatisfied. Plaintiff must have known where she went, for he gave her address in the proof of loss, Exhibit P-2. The police did not call until after she had left, but had no diffi-

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culty in finding and interviewing her, yet they could find nothing. The fact that this chain was in the bag with other valuable jewelry and that none of it was missing would tend, if anything to prove that the chain was not stolen but that it was misplaced or lost, and Mrs. Miller was mistaken when she said she put it in the bag. An
 10 examination of her whole testimony will show her memory to be rather faulty. She could not remember

- (a) when she hired the girl,
- (b) when the jewelry was found to be missing,
- (c) what date the girl left, or
- (d) how much she had paid her.

Again in her written statement, signed by her she stated the chain was last placed in the bag on January 29th while in her testimony she asserts
 20 it was worn by her two days before it was discovered missing; she also states in her proof of loss that the chain was placed in the bag January 29th and discovered to be missing February 8th, while her testimony is as above set out. In her signed statement she alleges that the servant *was recommended to her* by the Hebrew Orphan Asylum, while in her testimony she says the girl came un-recommended. The fact of this loss would tend to impress these matters on her mind, and, if she
 30 could not remember them at this time, how readily it can be seen that she might be mistaken as to just what she did with the chain after she last wore it. An examination of all the evidence fails to show anything from which a reasonable inference could be drawn that this chain was stolen.

It was incumbent upon the plaintiff to establish that the loss was due to a theft by direct evidence, or by establishing such circumstances as would justify the inference that the loss was caused by a theft for which the defendant would
 40 be liable. He was bound to do more than show that *it was possible* that this chain was stolen.

The rule is well settled in negligence cases that a mere scintilla of evidence is not sufficient to support a verdict.

"In matters of proof we are not justified in inferring from mere possibilities the existence of facts. There must be proof of the essential facts to fix liability upon a party charged with the commission of a wrongful act; and even a scintilla of evidence or a mere surmise that there may have been negligence on the part of the defendant will not justify the court in submitting the case to the jury." 10

Balt. & O. R.R. Co. v. State, 18 Atl. 969 at 971.

As was said in *Bond v. Smith*, 113 N. Y. 378.

"She simply furnished them food for speculation, and that will not do for the basis of a verdict. The law demands proof and not mere surmise.

"A mere conjective built upon bare possibility, will not suffice to transfer the money or property of one man to the possession and profit of another." 20

Pauley v. Steam Gauge & Lantern Co., 15 L. R. A. 194.

"Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. But this inference must, after all, be a legitimate inference, and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstance proved and the conclusion sought to be adduced from them. The principle is never departed from and, in the very nature of things, it never can be disregarded." 30

Benedick v. Potts, 41 L. R. A. 579.

"The power of a court to order a non-suit or direct a verdict does not depend upon the absence of all testimony in opposition to the case in which the direction is given. The view that a mere scintilla of evidence was sufficient to carry a case to the jury is completely exploded in the English courts." 40

Baldwin v. Shannon, 14 Vr. 60.

10 "It is not enough to say that there was some evidence; a mere scintilla of evidence or a mere surmise that there may have been negligence on the part of the defendant clearly would not justify the judge in leaving the case to the jury; there must be evidence on which they might reasonably and properly conclude there was negligence."

Dodson v. Erie R. R., 68 N. J. L. 679-686.

So an examination of the cases dealing with the question of losses by burglary, larceny or theft shows clearly that the evidence in this case was insufficient to establish a loss due to those causes.

The syllabus in the case of *Schindler v. U. S. Fidelity & Guaranty Co.*, 109 N. Y. Supp. 723, says:

20 "In an action to recover on a policy insuring plaintiff against 'direct loss by burglary, larceny or theft', the evidence showed that plaintiff's wife placed a bag containing jewelry in a closet, the door of which she locked, leaving the key therein, and that she was not in the house in the afternoon of that day until 4:30 or 5 o'clock. It also showed that plaintiff's servant was out during the afternoon, and returned about half an hour before plaintiff's wife, and that the wife again went out at about 8 o'clock in the evening and on her return found the bag of jewelry missing.
30 *Held*, that such evidence, standing alone, was not sufficient to sustain a recovery under the terms of the policy."

In *Gordon v. Aetna Indemnity Co. of Hartford*, 116 N. Y. Supp. 558, the syllabus says:

"Where the evidence merely showed that the property had disappeared from beneath the owner's pillow, she cannot recover the value of such property in an action on a burglary insurance policy."

The facts of this case are very similar to the one

under consideration and the opinion is set forth in full:

"Per Curiam. The action was brought upon a burglary insurance policy for the loss of a diamond locket belonging to the plaintiff's wife. The facts, briefly stated, are that in the morning of the day on which the loss occurred, Mrs. Gordon states that she placed the locket under a pillow in her bedroom on an upper floor of the dwelling house, which was occupied solely by plaintiff's family and two servants; that she then went downstairs and did not have occasion to return to the upper floor again during the entire day; that when she was about to retire she looked under the pillow and found the locket missing; that she advised her husband of the fact, and he said it would probably turn up somewhere that she then went downstairs and searched the rooms for an hour. The next morning the police were notified, detectives came to the house, the two servants and their belongings were searched; but the locket was not found and is still missing.

"It may further be noted that Mrs. Gordon testified that she did not leave the house that day. All this constitutes mere proof of a disappearance. We have already held that such evidence is not sufficient to warrant bringing an action on a policy of this nature."

It will be observed how closely the facts in the above case fit the case at bar.

Gordon Case.

Case at Bar.

(a) Mrs. Gordon stated that she placed the locket under a pillow in her bedroom.

Mrs. Miller stated she placed the chain in a bag in her bedroom.

(b) House occupied solely by plaintiff's family and two servants.

Apartment occupied by plaintiff's family and one servant.

(c) Last saw locket the morning of the day it disappeared.

Last saw chain two days before it was discovered missing.

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(d) Searched the rooms for an hour. Searched the apartment.

(e) Next morning police were notified Mr. Miller searched also.

came and searched the servants and their belongings. Next day police were notified; came and searched premises. Later interviewed the servant girl.

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(f) Locket still missing. Chain still missing.

See also

Katzenstein v. Fidelity & Casualty Co. of New York, 96 N. Y. Supp. 183;

Hart v. American Fidelity Co., 121 N. Y. Supp. 605.

20 The decision of the District Court, in this case as set forth on pages 24 and 25 of the printed case, shows that such decision is founded, not upon evidence, but surmise and conjecture. No evidence had been produced directly establishing a theft, and no facts had been produced from which a reasonable inference of theft could be drawn. Upon being asked for a continuance, in order to enable defendant to produce the servant and examine her as to the matter, the following took place:

30 "Mr. Wynne: I would like to renew my motion to have this matter go over so I can produce the servant girl.

"The Court: You base your defense upon what testimony this servant girl will give?

"Mr. Wynne: I want to show by the servant girl that she did not steal this.

40 "The Court: Well, suppose she didn't? According to the testimony she had visitors. Suppose she didn't steal it; suppose one of her friends managed to get upstairs? Suppose she said to a friend, 'I don't want to have a hand in this; but that stuff is up-

stairs in Mrs. Miller's room, and you will find it behind a picture. Now you go up and take it, and then I can swear I didn't steal it if I was put on the stand? She may have been one of those conscientious girls, who wouldn't mind putting her friend up to it. Suppose it was done in that way?

"Mr. Wynne: I would like to ask her that question.

"The Court: Of course, knowing a little of human nature you would know when she was put on the stand—unless she is very repentant—that chances are 999 to 1 that she would say no and suppose she had gone on the stand and said, 'No, I didn't do it'? Suppose she is innocent, she is not the only one who could have stolen it. A sneak thief might have done it, and it might have been done by somebody who knew how to get into the house.

"Mr. Wynne: I want the Court to pass upon whether there is sufficient evidence in this case. I hold there is no sufficient proof.

"The Court: I am of the opinion, if that is your only defense, the evidence shows that the necklace was stolen, and I will deny your motion."

We submit there was no proof justifying the decision of the District Court, and that the Supreme Court, in affirming the judgment entered upon such decision was in error.

Error of the Supreme Court.

The evidence as stated by the Supreme Court, as far as it went, is for the most part accurate. We submit however that the court erred in stating that there hardly seems to be room for any other deduction than that someone stole the chain out of the room. Such a conclusion is absolutely in conflict with the various decisions and with the great weight of authority. It has been held repeatedly that such facts merely constitute proof of a disappearance and that such proof is insuffi-

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cient to sustain an action on a policy insuring against loss by burglary, larceny or theft.

Schindler vs. U. S. Fidelity & Guarantee Co. supra;

Gordon vs. Aetna Indemnity Co. supra;

Hart vs. American Fidelity Co. supra;

Duschenes vs. National Surety Co. supra.

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The reasoning of the opinion of the Supreme Court is fallacious. The court said:

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"If a man goes out with a purse in his pocket and suddenly finds it gone, he concludes, and properly, that his pocket has been picked. If he leaves money or a negotiable bond in the bureau drawer and later finds it is missing, and fails to discover it after proper search and inquiry, he naturally concludes that some one has stolen it. Sometimes this is confirmed by the finding of the empty pocketbook in an area in the one case, or of the bond in the possession of a purchaser in the other; but confirmation is not legally essential. Cases like that at bar are classed by the police as 'inside jobs' and their uncertainty in concluding that a crime has been committed is ordinarily not in the deductions, but in making sure that the circumstances are correctly stated to them."

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An examination of this reasoning we feel will lead to its rejection. If this is sound reasoning and to be the law in this state, then all that need ever be shown to recover upon a policy of insurance against loss by burglary, larceny or theft, is simply that the articles disappeared from the dwelling. We do not contend that it is incumbent upon the plaintiff to produce direct evidence, but it is necessary to establish circumstances which indicate a theft, such as marks of entry, the room or some articles therein disarranged, etc.

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In the illustration relative to the lost pocket-book given by the Supreme Court, there is no more justification for concluding that the pocket-

book was stolen than that it was lost. There have been numerous incidents of people losing pocketbooks while on the street. It might work out of the pocket through the movements of the body or it might work out when some other article is removed from the pocket, or many other conjectures may be given. We venture to say without fear of contradiction that in cases of disappearance of a pocketbook as described by the court in its opinion the vast majority of them have been pure losses and not due to theft. 10

The layman may infer from the fact that his pocketbook was missing, that it was stolen but there is a vast difference between such a strained inference and proof of the fact in a court of law. The plaintiff had the burden of proving the theft as a fact. We agree with the Supreme Court that if the pocketbook was found in an area or a bond which had been placed in a drawer in a house, was afterwards found in the hands of a purchaser that this confirming evidence would be sufficient to make out a prima facie case. We venture to say that the Justice writing the opinion has frequently in his home and in his office gone to a receptacle where he has been positive he has placed an article or paper and found to his dismay that it was not there and even after an arduous search been unable to find the same, and yet long afterwards found the same in an entirely different receptacle yet he would not say that from its apparent disappearance from the place he *thought* he put was sufficient justification for him to say that it was stolen. 20 30

If as the Court says "cases like that at bar are classed by the police as "inside jobs" then the only inference which can be drawn is that the chain was stolen by some one living in the apartment or employed there. Now the only persons living or employed in the apartment were Mr. 40

and Mrs. Miller (plaintiff and wife) and the servant. Of course, one would not say that plaintiff or his wife stole the chain. This leaves only the servant. It is shown that detectives interviewed the servant and acquired no information which in anyway connected the girl with the loss of the chain. It would seem monstrous upon
 10 such evidence to charge the servant with theft and the opinion of the Supreme Court leaves no room for any other conclusion than that the servant stole the chain.

We disagree, however, with the Court when it says confirmation is not legally essential. We believe the true rule to be similar to the rule in negligence cases wherein it is held that "mere proof of an accident is not sufficient to charge a defendant with negligence." So in cases like
 20 the case at bar "mere proof of loss does not establish a theft, burglary or larceny. The law on this point as laid down in the cases of *Schindler vs. U. S. Fidelity & Guarantee Co.* and *Gordon vs. Aetna Indemnity Co.*, supra, has been affirmed and approved. We call the attention of the Court to the case of *Fidelity & Casualty Co. vs. Dulaney*, 123 Md., 486; 91 Atl., 574, in which it was expressly held that those cases laid down the correct rule of law. In that case the Court allowed a recovery but only on the ground that there was
 30 confirmation, such as the finding of some of the stolen goods.

We submit that the Supreme Court erred in holding that the evidence in this case was sufficient to justify the inference of theft. We think the rule was admirably stated in *National Surety Co. vs. Redmon*, 173 Ky., 294; 190 S. W., 1081. The evidence in that case was held insufficient to take the case to the jury, there being testimony that the insured left the stone on the dresser at night, and did not miss it until the next day
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while engaged in his business, and the only proof of burglary consisted in marks on a screen, and footprints on the roof of a shed connected with the insured's house, which it appeared were made between the time the house was painted, about 2 weeks before the loss occurred, and the time they were discovered, about three weeks after the loss. The Court here said:

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"While it may be true that a loss followed by physical evidence of an entrance from the outside of the premises on the occasion of the loss may be sufficient to justify the inference of loss by burglary; and, therefore, to take the case to the jury, we are not prepared to say that marks on a window screen and footprints on a roof, discovered three weeks after the loss, are sufficient for that purpose. The law requires an open visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made upon remote inferences. Where it is sought to base an inference on alleged facts, the fact itself must be clearly established. If the existence of such a fact depends on a prior inference no subsequent inference can legitimately be based upon it. Here no reasonable connection between the established facts and the loss itself is shown. The evidence merely presents a few circumstances about which one might theorize as to the cause of the loss. Any conclusion that the loss occurred by burglary would be mere conjecture, and conjecture affords no sound basis for a verdict."

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POINT II.

Plaintiff failed to prove that he gave notice of loss required to be given according to the terms of the policy.

10 The policy upon which this suit was brought contained the following clause.

"Notice of Loss.

"7. The assured upon the discovery of any loss on said premises shall give, at the expense of the company, immediate notice thereof by telegraph to the company at its executive office in New York City or Baltimore, Md., or to the nearest agent of the company, and shall also give immediate notice thereof to the public police authorities having jurisdiction."

20 The policy represents the contract between the parties and they should be held to its terms. Nowhere in the case does it appear that the plaintiff gave the required notice. When recalled to the stand he did say he notified a Mr. Lowy (p. 22) :

"Q. What did you do after you discovered the loss? A. I notified Harry Lowy, of Lippman & Lowy, from whom I secured the policy.

"Q. This policy in question? A. This policy.

30 "Q. And to whom did you make payment for the premium of this policy? A. Lippman & Lowy.

"Q. And Harry Lowy is a member of that firm? A. He is.

"Q. When did you notify him? A. At noon the same day we notified the police.

"Q. (By the Court.) What day was that?

"Q. (By Mr. Bernhard.) With reference to when you missed the jewelry? A. The day following the missing of the jewelry."

The loss was discovered in the evening after
40 dinner (p. 16) and nothing was done until noon

of the following day. It does not appear that any notice was ever given by telegraph and at the trial such fact was conceded. The burden of proving a compliance with the terms of the policy rested on the plaintiff, and until he does so he cannot recover.

“Where a policy of burglary insurance provided that the assured, on the occurrence of a burglary, should give immediate notice to the company’s agent, or to the home office, and police authorities, and that a claim of loss should be forthwith made in writing, etc., such provisions were conditions precedent, and a compliance therewith was essential to insured’s right to recover on the policy unless waived.” 10

Fidelity and Casualty Co. of New York vs. Sanders (Ind.), 70 N. E., 167.

In *Orr Trucking &c. Co. vs. Metropolitan &c. Co.*, 77 N. J. L., 749, the syllabus reads: 20

“In a policy of indemnity against loss by theft, it was provided that the assured, upon discovery of loss, should give immediate notice thereof by letter to the home office of the company, and also by telegram to the company at the city where the policy was countersigned, and also immediate notice thereof to the company’s local authorized agent, and the nearest public police authorities having jurisdiction. Held, that such notices were distinct from the formal proofs of loss provided for in the policy to be made out on the company’s blanks that, in case of theft where it is for the interest of the insurer to apprehend and punish the criminal, a requirement for immediate notice is a reasonable regulation and valid, making it incumbent upon the assured in a suit on the policy to prove the performance of these conditions.” 30

The Court, in its opinion in that case, at page 152, said:

10 "In a case of theft where it is for the interest of the company to apprehend and punish the criminal, a requirement for immediate notice is a reasonable regulation, and whether the failure to give it technically amounts to the nonperformance of the conditions precedent, or whether we call it a forfeiture, is immaterial. In either case, it is a reasonable provision and valid, and of the essence of the contract."

Conditions in a fire insurance contract requiring the insured in case of loss to furnish the company with immediate notice of the same and proofs of loss within a certain time are conditions precedent to the right of recovery thereon; and performance of such stipulations according to their tenor, or a waiver of performance must be alleged.

20 Encyclopedia of Pleading and Practice,
Vol. IV, p. 640.

citing *Wellcome vs. Peoples' Equitable Mut. F. Ins. Co.*, 2 Gray (Mass.), 480, in which it was held that:

"When particular notice of loss was made essential by the by-laws of the company and the policy was made expressly 'subject to the provisions and conditions of the charter and by-laws', such notice was a prerequisite to the right of recovery of the insurance."

30 "The immateriality of a condition precedent made by agreement of the parties and the harmlessness of a failure to perform does not mitigate the fatal effect of a breach of such condition."

National Surety Co. vs. Long, 125 F.,
887.

40 "Where a contractor's liability policy provided that insured should give immediate written notice of an accident and a policy holder failed to give written notice for more than three weeks after he knew of the accident, and the only thing he did prior to that

was to go to the office of one from whom he received the policy, and tell him there had been an accident, there was no evidence to show a compliance with the policy."

Rooney vs. Maryland Cas. Co., 184 Mass., 2667 N. E., 882.

"If the condition requires notice of the loss to be given in writing, notice by parol is insufficient." 10

Patrick vs. Farmers' Ins. Co., 43 N. H., 621.

In the case under consideration the plaintiff did not give the notice by telegraph as required by the policy, nor did he give any notice until the day following the discovery of the loss. He had, therefore, failed to comply with the terms of the policy.

On the whole case the Trial Court should have granted a nonsuit. 20

Error of the Supreme Court.

The question of the time in which the notice was given was not raised. The point argued is that the notice by *telegraph* which the policy required was not given. The Supreme Court seems to have passed over this point. It is established in this State by the case of *Orr Trucking &c. Co. vs. Metropolitan &c. Co.*, 77 N. J. L., 749, that such a provision is a reasonable regulation and valid, making it incumbent upon the assured in a suit on a policy to prove the performance of those conditions. If that be so, and our Court has laid it down as law, then necessarily the plaintiff failed in his proof. No other notice would be a compliance with the terms of the policy and therefore plaintiff should have been nonsuited. 30

We respectfully submit, therefore, that the 40

Supreme Court erred in affirming the judgment of the Orange District Court, and that the judgment of the Supreme Court should be reversed, the verdict of the Trial Court set aside, and a new trial granted.

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10 EDWIN F. SMITH,
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MISS JOYCE