

START

1378

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COURT OF GENERAL SESSIONS OF THE PEACE
CITY AND COUNTY OF NEW YORK. PART IV.

.....
THE PEOPLE OF THE STATE OF NEW YORK:

-against-

JOHN CUSH.

:BEFORE:

: HON. WARREN W. FOSTER,
Judge,

and a Jury.

#1482
.....
New York May 16, 1911.

Indicted for grand larceny in the first degree.

Indictment filed March 30, 1911.

A p p e a r a n c e s :

For People: Robert E. Manley, Esq., Assistant District
Attorney.

For Defendant: A. E. Kaldenberg and Mann Trice, Esqrs.

A Jury is duly empanelled and sworn.

Mr. Manley proceeds to open to the jury on behalf
of the People.

During the opening of Mr. Manley to the jury Mr. Man
ley says "He sees the car and upon examination of the
crank shaft it was found to be broken."

MR. KALDENBERG: Objected to; no damage plays any
part in this.

THE COURT: Objection overruled. Bring that up later. This is merely the opening.

MR. KALDENBERG: Exception.

MR. KALDENBERG: Before the taking of testimony I should like noted on the record an exception to so much of the Assistant District Attorney's remarks wherein he alludes to the fact that some one was arrested in connection with this alleged ride. I would like to have an exception noted on the record, as it plays no part in this case whatsoever and is not germane to the issue here.

THE COURT: Of course, your objection is made to the opening. If you will make your objection to the testimony I will decide whether the testimony is to be received or not. If it is received you may then note an exception. Proceed, swear the witness.

MR. KALDENBERG: I except to your Honor's ruling.

J E R E M I A H J. C O N C A N N O N, called as a witness on behalf of the people, being first duly sworn, testifies as follows:

MR. MANLEY: In view of what defendant's counsel said and which was taken down by the stenographer and appears in the record, I want also to appear what I said in my opening. I stated substantially as follows:

at the time when the defendant drove the car in front of the Garage on 101 Street, the defendant was there placed under arrest, and he was intoxicated; that another man who was in the car---there were at that time five or six people in the car---was also placed under arrest, because he attempted to take the defendant away from the police officer, and that that person was arrested for disorderly conduct. That is what I stated.

MR. TRICE: That is objected to. It is outside of any legitimate issue in this case. It states and substantiates a separate offense from that with which the defendant is charged, it is calculated to prejudice the rights of the defendant and is manifestly improper, and for those very statements the Court of Appeals and the Appellate Division have repeatedly reversed cases as your Honor well knows. The opening is unfair.

THE COURT: I will instruct the jury to pay no attention to it at all. That suits you, doesn't it?

MR. TRICE: If it is possible to correct an error of that kind.

THE COURT: Well, we will try. This jury have sworn to determine the case from the evidence. Now, go on, please, and put in the evidence.

MR. TRICE: We reserve our exception to the intemperate and foreign remarks of the Assistant District

Attorney.

THE COURT: Yes sir.

DIRECT EXAMINATION BY MR. MANLEY:

Q You are a member of the Police Force of the City of New York? A Yes sir.

Q And you were, I suppose, upon the 22nd of March of this year? A Yes.

Q On that date you were attached to what precinct in this City? A 32nd Precinct.

Q Some time on the morning of the 22nd of March 1911 were you on duty in the City and County of New York? A I was.

Q Whereabouts at that time was your post? A From 95th to 101st Street and Amsterdam Avenue and Broadway.

Q Did you some time on the morning of that day see an automobile upon Broadway which attracted your attention? A I did.

Q At that time where were you? A Standing at the corner of 101st Street on the west side of Broadway.

Q On what corner? A On the southwest corner.

Q From which direction was this automobile coming? A Coming from a southerly direction, going north.

Q Just tell us what you saw? A The automobile attracted my attention when it was a little south of 100th Street; it was coming at a furious rate--

MR. KLIDENBERG: I move to strike that out.

MR. MANLEY: Consented to.

A (Witness continuing) He was coming up Broadway.

BY MR. KALDENBERG:

Q Whom do you mean by "he".

MR. MANLEY: Are you examining?

MR. KALDENBERG: Well, I have a right to know.

MR. MANLEY: Well, go ahead and make your objection and we will get a ruling.

THE COURT: I will allow the question, whom do you mean by "he".

MR. MANLEY: At this time the officer doesn't know who is in the car, he sees it far away.

THE COURT: Then he may say the man in the car. Testimony must be made intelligible to the jury and if it is not intelligible to counsel it is fair to assume that it is not to the jury, therefore, I allow the question.

MR. MANLEY: But I am going to connect it in a short time.

THE COURT: Do it right now and then go on.

BY MR. MANLEY:

Q Who was it that was in the automobile that you saw as you stood at that corner at that time? A I couldn't tell at that distance.

Q What did you see? A I saw the car coming up Broadway.

Q Tell what it did? A It was going very fast and zig-zagging.

MR. TRICE: Objected to, this man is not charged with speeding, he is not charged with intoxication, he is charged here with feloniously taking a certain automobile from a certain point at 111th Street---he charged with the larceny of an automobile.

THE COURT: Now, the rule of the court is that one counsel only must try the case. I cannot have several, though where you came from and where I have had the pleasure of trying cases, both counsel may make speeches. Only one at a time now. Objection overruled.

Exception.

MR. TRICE: The defendant intended both of us to act as counsel and I came over to assist my friend.

THE COURT: That is all right, but we must not have the record unduly encumbered. If you wish to make objections, do it, or if your associate wishes to do it, let him do it.

MR. TRICE: Well, your Honor, he started in with the case and I will let him conclude the case?

A (Witness continuing) I saw the car pass 101st Street, go to 102nd Street and turn to Amsterdam Avenue on 102nd Street, and the next thing I saw was a car coming around the corner

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from Amsterdam Avenue towards Broadway and stop in front
of 211---it is the corner house, as near as I can recollect.

Q That was on what street? A 101st Street.

Q Had you remained on the same corner all the time? A
Yes sir.

Q The car then had gone around in a circle, right around
the block? A Yes sir.

Q After the car stopped did you do anything? A I went
over, the men were talking loudly and I went over and asked
them to stop the noise.

Q What men were talking loudly? A The men that were
in the car, inside the car.

MR. KALDENBERG: Objected to, if your Honor please,
as to any noise or boisterous talk or anything else.

Objection overruled; exception.

MR. KALDENBERG: Unless it was this defendant.

Q Well, what did you do? A I spoke to the chauffeur.

Q Did you walk over to where they were? A I did, right
through the side of the car.

Q That car had stopped at about what point in the block?

A It was about fifteen or twenty feet east of Broadway---
probably 25 feet east of Broadway.

Q On which side of the street? A On the north side
of the street.

Q Ho ahead, what happened when you got there? A I asked them to stop the noise.

BY MR. KALDENBERG:

Q Asked whom?

MR. MANLEY: I object to counsel propounding a question now.

MR. KALDENBERG: That is very important. He says the men in the car.

MR. MANLEY: Question withdrawn.

BY MR. MANLEY:

Q When you got over there did you see any one whom you now see in the Court Room? A I did.

Q Whom did you see? A Thomas Cush.

Q This defendant? A Yes sir, John Cush.

Q Where was he when you saw him? A He was sitting at the wheel in the front of the automobile where the driver sits.

Q Did you say anything to him? A I did.

Q What did you say to him? A I asked him what was the cause of all this noise---couldn't they behave themselves a little better than what they did.

Q What did he say if anything? A And he made an attempt---he didn't answer me then. The fellers in the car opened the door and one of them jumped out.

Q Was it a closed car? A Yes sir.

Q How many were in there besides the defendant? A I should say six or seven entirely.

Q Was any one sitting on the front seat with him? A There was.

Q How many? A I think it was one.

Q How many were inside in the closed part? A Probably five or six, I wouldn't be sure.

Q At the time you got over there was the doors of the closed portion of the car closed. A It was closed.

Q Go ahead, what happened next? A And I asked why they didn't make less noise.

MR. KALDENBERG: Objected to as incompetent, immaterial and irrelevant, as to the noise.

Q Was that in the presence of the defendant? A Yes sir.

Objection overruled; exception.

A I told him we had received complains from the owners---

MR. KALDENBERG: Objected to as being wholly immaterial.

Objection overruled; exception.

Q Go ahead? A And I asked him if he wouldn't stop this noise, and he says "We will stop it".

Objected to; objection overruled.

THE COURT: The res gestae, what happened, is what

the District Attorney is entitled to prove.

Exception.

A (Witness continuing) And about that time the engine of the machine stopped running---she had been going a little prior to that, but very easy, and she stopped. Well, he got out of the car.

Q Did you see the defendant here do anything to the levers while you were there? A I saw him get out of the car and attempt to crank her up.

Q Did you see the defendant do anything? A Yes, I saw him push---

MR. KALDENBERG: Objected to on the ground that there is no charge here against the defendant for disorderly conduct, for injury or for any other cause than of taking this automobile feloniously.

THE COURT: Objection overruled. Now, note an exception. You have now several objections to that particular line of testimony. It being a part of the res gestae I am going to receive it. Let us get the facts and then we will try to instruct the jury what is germane to the inquiry.

Exception.

Q Did you see the defendant do anything with the levers of the machine as he sat there holding the wheel? A Yes, I did; I saw him attempt to drive the car---push the brake back

and forth like that (Indicating).

Q One of the brakes, upon which side, right or left? A On the right side.

Q Did he do anything else about the car while you were there? A He got out of the car when she wouldn't work, that is, when he couldn't get her to go and he tempted to crank her.

MR. KALDENBERG: I object to that.

Objection overruled; exception.

Q When you saw him attempt to crank it up, will you tell the jury---I suppose they all know---but what part of the machine did he go to? A To the front.

Q When you say crank it up do you mean turn a crank which is in front? A Yes.

Q What happened after he done that? A As he attempted to crank the machine up I saw him go like that (Witness making a motion with his head as towards the front of the machine), as though intoxicated---falling towards it. So I said "You had better not crank that up any more, the best thing to do is put that machine in the garage, you are in no condition to run this car." He said "I will do just as I like". He said "I work for Judge McLean a Judge who lives in 86th Street near West End Avenue---Judge McCall," and he says "If you interfere with me I will have you broke tomorrow".

Q Anything else? A So I says "Well, now, I don't

whether you do or not. " I went to the rear of the machine and the rear light was not lit, and I says "Now if you attempt to take this machine out of her---unless you put her in the garage I will lock you up, because you are not in any condition to drive this case, and get rid of those men."

MR. KALDENBERG: I move to strike that out, as to his condition.

Motion denied; exception.

Q Any further conversation you had with the defendant

A So I went to the rear of the car and took the number from the rear running plate---the license number and while I was doing so he went across the street.

Q Who did, the defendant? A The defendant; and went in the side door of the saloon that is on the corner.

Q This is about what time in the night? A About 3:20, 3:15 or 3:10 A. M.--3:20 when I got in the station house. So my side partner, the other officer that followed the machine around from Amsterdam Avenue, officer Flick---

Q When was it that officer Flick appeared upon the scene?

A Almost as soon as I did.

Q And he came from what direction? A From Amsterdam Avenue. He says "That chauffeur is"---

Q Did he say that in the presence of the defendant?

Was the defendant there at the time? A No, he was not.

Q Did you have a talk with him? Did Flick say something to you, yes or no? A He did.

Q What happened next? A I followed the defendant over into the saloon where he went and told him he was under arrest, that I was going to lock him up.

Q Did you state to him the charge? A I did, I told him he was intoxicated and unfit to run the automobile.

MR. KAIDENBERG: I move to strike that out.

Motion denied; exception.

Q That is you arrested him on the charge of intoxication? A Yes sir.

Q What did he say when you placed him under arrest on the charge of intoxication? A He didn't answer me.

Q Did you take him anywhere from the saloon? A I did, taking I took him out of the saloon, before him out a young man came in whom I also arrested, by the Adams.

Q Where had you seen that young man first that day? A In the machine.

Q Was he on the seat with the defendant or in the covered portion of the car? A No, he was inside in the car.

Q What took place in the presence of the defendant, as far as that young man was concerned? A When I told the defendant Cush that he was under arrest this Adams just come in the door and he says "If you arrest this man I demand that you make an excise in this place." I says "Well, I will tell

I am doing this, now you attend to your own business and if you don't will place you under arrest too. This man is a prisoner and you have no right to interfere with me." So I was just about to go out the door when Adams pushed me back--

MR. KALDENBERG: I object to anything further that transpired between this officer and Adams.

THE COURT: There is no question pending, go on, Mr. District Attorney.

Q Go on, what else took place? A I let loose of Cush and I pushed Adams one side while I got Cush at the door, and I took Adams out with me. When I got outside the place I placed the both under arrest on the street and told the officer who was with me to take charge of Adams while I had charge of Cush.

Q That was officer Flick? A That was officer Flick. So Adams said "you don't"---

MR. KALDENBERG: Objected to.

Q Was that in the presence of the defendant? A Yes sir.

MR. KALDENBERG: I object to what Adams said, and I except.

A He said "I will go with you, you don't need any help, I will go with you to the Station House".

Q Did you then take them right to the station house?

A I did.

BY THE COURT:

Q Did Cush say anything when Adams made this remark?

A No, he did not.

THE COURT: Then it is of no importance, strike it out.

Q At that time when you took those defendants to the station house where was the machine when you left? A I left it in the same place where it was stopped, by the defendant.

Q The charge at that time against the defendant was intoxication? A Yes sir.

Q Did you at that time know who the owner of the car was, when you placed the defendant under arrest? A I did not.

Q Did you have any talk with the defendant that night as to ~~xxx~~ his connection with the car, as to the ownership of the car and so forth? A No, I did not.

Q When was it that you first found out that the owner of the car was? A When the lieutenant asked him at the desk who the owner of the car was.

Q Was that a short time after you had gotten the defendant to the station house? A Almost immediately after.

Q Will you state what conversation the lieutenant in the station house had with the defendant. A He took his pedigree, asked him his name, age, business, and asked him

who the car belonged to that he was operating.

Q What did he say? A He said it belonged to a Mr. Klee at 89th Street.

Q Did he say anything else? A The lieutenant ask him if he would inform Mr. Klee and he says "Yes".

Q If who would notify Mr. Klee? A The lieutenant. He said "Yes".

Q Did you see the lieutenant do anything then at that time? A I did, I saw him telephone to Mr. Klee.

Q When was the first time that you saw Mr. Klee? A The next morning in 54th Street Court.

Q Was that the first time Mr. Klee had appeared in the presence of the defendant after the arrest of the defendant
A I believe it was.

Q What precinct was that? A 7th District court.

Q Did you there have any further talk with the defendant about the operation of this machine? A I did.

Q What did you say and what did he say? A He told me that I was not justified in making the arrest, told me he thought I was a little bit too officious.

Q What other conversation did you have with the defendant? A I had nothing more whatsoever.

Q At the time when you had that conversation had you seen Mr. Klee? A Yes, I had.

Q Had you and Mr. Klee had a talk together? A Yes, we had.

Q Up to that time then the charge against the defendant was intoxication was it? A Yes sir.

Q Any other charge up to that time besides intoxication? A No sir.

Q After you had seen Mr. Klee and had a talk with Mr. Klee was any further charge made against the defendant? A There was.

Q What charge was that? A The charge was the larceny of the car.

Q Now after Mr. Klee made the charge against the defendant about the larceny of the car did you have any further talk with the defendant about the running of the automobile? A No.

Q Was anything said by the defendant as to consent to the running of the automobile by anybody? A He told me that he had the put and he left Mrs. Klee home and after that he proceeded to the garage and had to remain there and couldn't get in the garage from the time he had left Mrs. Klee home until I had arrested him.

Q Did he tell you what time it was he got Mrs. Klee home. A If I can remember, he said about 10:20.

Q Did he tell you for what period of time he had waited

in front of the Garage with the machine. A From the time it took him, from eleven o'clock until 3 in the morning.

Q Did he state anything else to you about the operation of that machine, about consent to operate it? A No.

CROSS EXAMINATION BY MR. KALDENBERG:

Q You don't know whether he got consent to operate it or not, do you? A No, I don't know anything about it.

Q At this time of the night, 3:15, Traffic is not heavy is it, in the streets of the City of New York? A No.

Q Now it is the rule of the police department, or the consent, rather, of the police officers, if I am use that term, that cars can go at a greater rate of speed than when traffic is heavy? A Usually.

Q They are not interfered with, are they? A No.

Q They are not generally interfered with at that hour of the night? A No.

Q So they go at a rapid rate of speed, don't they? A They do.

Q Now you don't know, officer, do you, anything about the operation of an automobile? A No.

Q You don't know anything about the speed of a car, do you? A No.

Q You never gauged one---the speed of a car? A No,

I have not.

Q From the time you first saw the car until you saw it again, about how many blocks had been covered? A About two blocks.

Q How many? A About two blocks.

Q So that when he went up Amsterdam Avenue from 101st Street and came back again he was not out of your sight at all, was he, at any time? A Oh yes, he was.

Q Well, for about how long. A About a minute.

Q And then came right back again? A Yes sir.

Q Down Amsterdam Avenue to 101st Street? A Yes sir.

Q And then to the garage where the car stood? A Yes sir.

Q And you arrested him at that point? A Yes sir.

Q Was that the place where he applied the brakes that you speak of? A Exactly.

Q Now he couldn't get the car to stop, could he, very well unless he had applied the brakes? A No, he couldn't.

Q He was not going fast then, was he? A He was.

Q What? A He was.

Q When he came to the garage the car stopped there? A It did not.

Q Where did it stop? A It went past the Garage.

Q How far past it? A About fifty or seventy five feet.

Q And then was the car taken back to the garage? A
No.

Q It stood there? A Not then.

Q How did it get back, if you know? A They pushed
it back.

Q Did these men push it back? A No. The washers and
cleaners in the garage.

Q This defendant was placed under arrest then just a
little bit below the garage? A Yes, nearer to Broadway
than to the garage.

Q You didn't arrest anybody else, did you? A I
did.

Q Well, with the exception of Adams? A I did.

Q What? A I did.

Q You did? A Not at that particular time.

Q The other men were let go? A No, not that. At
5 o'clock that morning I arrested another man in connection
with the case.

Q You cannot swear whether or not this defendant was
making a noise? All you know is, isn't it, that ~~when~~ somebody
in the car was making a noise? A Yes.

Q You can't say whether this defendant made it or not?
A No.

Q You spoke of the defendant being intoxicated, officer.

You didn't have to drag him to the station house, did you? A No, no, he walked with me.

Q And when you got to the station house you had a conversation with him, didn't you? A I did.

Q And a very intelligible one too, didn't you? A I don't know that it was so much about that.

Q About how long did you speak together? A I hadn't spoken to him in the station house---the lieutenant spoke to him.

Q Well, how long did that conversation last? A Probably two or three minutes.

Q And it was very sensible so far as this man was concerned? A Oh yes, it was sensible enough.

Q What kind of a car was this? A It was a large closed car.

Q What time did you say you first saw Mr. Klee? A I saw him about 8:30 on the morning of March 22nd, in 54th Street Court, 7th District Court.

Q You had the defendant there then? A I had.

Q Was Mr. Klee there too? A Mr. Klee was there.

Q Then this charge was made against him about taking the automobile? A Yes sir.

RE-DIRECT EXAMINATION BY MR. MANLEY:

Q Was there a garage near the place where the defend-

ant stopped the automobile that night? A There was.

Q Did you see the people come out of the garage and push the car back to the garage? A I did.

Q How much intoxicated was the defendant, would you say.

— Objected to. Question withdrawn.

RE-CROSS EXAMINATION BY MR. KALDENBERG:

Q You arrested the defendant there, didn't you, by the car? A Yes sir.

Q And you didn't give him time, did you, to assist in pushing the car back? A He wasn't in any condition to push it back.

Q Notwithstanding the fact that you say you didn't have to drag him to the station house? A No, but he was unsteady.

Q But yet he walked there alone? A He was unsteady.

Q And yet you had a very intelligent conversation with him in the station house---or the sergeant did? A He only had to tell him his name, age, and that he was a chauffeur.

Q And he also told you, didn't he, that he didn't think you were justified in arresting him? A I said the next morning in court he told me that.

F E R D I N A N D C. F L I C K, called as a witness on behalf of the people, being first duly sworn, testifies

as follows:

DIRECT EXAMINATION BY MR. MANLEY:

Q You are a member of the Police Force of the City of New York? A Yes sir (32nd Precinct).

Q And upon the 22nd of March you were attached to the 32nd Precinct? A Yes sir.

Q Were you on post on the morning of that day? A Yes sir.

Q Whereabouts were you on post that morning. A Well, I was on post at Amsterdam Avenue.

Q At what street? A 102nd Street.

Q Did you see an automobile that attracted your attention that morning? A Yes sir.

Q What was it about the automobile that attracted your attention? A I see him zig-zagging coming up through the side street.

Q At that time you were standing on that corner? A On the northwest corner.

Q Of 102nd Street and Amsterdam Avenue? A Yes sir.

Q Tell us when you first saw the machine where it was? A Well, it was coming up from Broadway, coming east.

Q Coming east on what street? A Through 102nd Street.

Q Just tell us what you saw and what you did? A As I was crossing the street, not thinking the fellow was going at this rate of speed, within about 18 inches the car

passed me.

Q What do you mean by that? A The car came around the curve on two wheels, on Amsterdam Avenue, and almost knocked me down.

Q What else did you see? A It went down Amsterdam Avenue and went through 101st Street, west.

Q Did you at that time when you saw that car see officer Concannon? A No sir I did not.

Q After you had seen the car go down Amsterdam Avenue what if anything did you do? A I went right after him and after I went after him, I went right down through 101st Street and just I got there I seen officer Concannon.

Q Did the car turn in at 101st Street West? A Yes sir.

Q Where did it stop, if anywhere? A It stopped--- well, about fifty feet off Broadway.

Q What did you do? A Well, I went right down there and as I got there officer Concannon was there.

Q When you got down there did you see this defendant Cush? A Yes sir, I did.

Q Where was it that you saw Cush? A He was sitting in the seat.

Q Where was the seat in which he was sitting? A Well he was sitting on the right hand side.

Q Where with reference to the wheel which steers the machine? A On the right hand side.

Q How close to the wheel was he---in the same seat where the wheel was.

Objected to : Question withdrawn.

Q State if you can where the defendant sat with reference to the steering wheel of the machine? A Well, he had hold of the steering gear as I got there.

Q How long had that machine stopped when you got there? A That I can't exactly say.

Q Did you walk around to where it was, or did you go fast? A No, I walked all around.

Q What did you see the defendant do after you got there, if anything. A Well, I see him come out of the car and try to crank it up.

Q Did he crank it up? A He did, yes. He tried two or three times.

Q What happened next? A Well, then after that I see him bobbing over. I didn't know what was the matter with him, and all of a sudden I see him walk away from the car and walk back again.

Q Did you have any talk with him, or did you at that time here officer Concannon have any talk with him? A No sir.

Q Well, ^{where} did officer Concannon go after the defendant went away? A He came up to ^{him} ~~me~~ and told ^{him} ~~me~~ "You had better out the noise out"---he said "You had better stop that noise."

Well, he says, "I won't stop the noise at all, I can do as I like".

Q Did you hear anything else said by the defendant?

A No sir, I did not.

Q Did you see the defendant go anywhere? A I did.

Q Where did he go? A He went across the way into a saloon.

Q Did you see the other officer, Concannon, go in there? A Yes sir, he followed him.

Q Where did you stay? A By the car.

Q How many did you see in the back part of the car?

A Well, I guess about five or six.

Q What was the condition as to sobriety of the others?

Objected to. Objection withdrawn.

Q Did you see officer Concannon go out of the saloon with the defendant? A Yes sir.

Q Did you hear any further talk in which the defendant engaged? A No sir.

Q Did you go to the station house with the prisoner?

A No sir, I did not.

Q Did you see anybody in the garage do anything to the machine? A No sir, I did not.

Q Did you remain there at all, or did you go right back on post? A No, I remained there until he come back

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from the station house and after he come back from the station house they moved the car to the garage.

Q That was after everybody had come back from the station house? A Yes sir.

Q That was about how long afterwards? A Well, I guess about 3:20 I guess.

Q Then who was it that put the car into the garage? A I couldn't tell you the names.

Q Was it anybody in connection with the garage? A Yes sir, it was with the garage.

Q Did you know a man named Gallagher? A No sir.

MR. MANLEY: Is Mr. Gallagher in Court.

(A man arises in the body of the court room)

Q Did you see that man who arises and says his name is Gallagher? A Yes.

Q Was he there that night? A Yes sir.

Q Did you see him have anything to do with getting the machine into the Garage? A Yes sir, he was one of the men that helped getting the car into the garage.

CROSS EXAMINATION BY MR. KALDENBERG:

Q You don't know, do you, whether or not consent to run this automobile had been obtained from the owner?

MR. MANLEY: Certainly not; no claim he knows anything about it.

A No sir, I did not.

Q You didn't take part in the arrest of this defendant?

A No sir.

Q Do you know anything at all about the operation of an automobile? A No sir, I do not.

Q You don't know whether it was necessary to crank the machine or not, do you? A No, I don't think it was.

Q Do you know as a matter of fact? A No.

Q How long was this defendant out of your sight altogether from the time you first saw him? About how long--- a minute? A Yes, about a minute.

Q And then came back? A Then came back, yes.

Q To the Garage? A Yes.

Q And that is the extent of it? A He didn't go to the garage, no. He went to the car first, he come back to the car.

Q Where was the car then? A The car was standing about twenty five or fifty feet off Broadway.

Q Was that east of the Garage or west of it? A It was west of the garage.

Q Nearer Broadway? A Nearer Broadway.

Q How far away from the garage itself---the entrance to it? A Well, about seventy five feet.

S I M O N J. K L E E, called as a witness on behalf of

the people, being first duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. MANLEY:

Q You live at number 2 West 89th Street. A I do.

Q And you have lived there how long? A About five years.

Q Your business is what? A Merchant.

Q And your place of business is where? A 40 and 42 Leonard Street.

Q Your business is what? A Well, manufacturing patroloon

Q You have been in that business how long? A 20 years.

Q Upon the 22nd day of March of this year were you the owner of a car, an automobile? A Yes.

Q Were you at that time acquainted with this defendant John Cush? A Yes sir.

Q Was he in your employ? A Yes sir.

Q In what capacity? A Chauffeur?

Q And he had been a chauffeur for you for how long?

A About a year.

Q Did you have more than one car at that time? A No.

Q Was he the chauffeur who was running that car for you under your direction? A Yes sir.

Q How long had you had that car? A Since the first day of October, 1910.

Q What was its make? A Benz.

Q What did you pay for it?

MR. KALDENBERG: Objected to, as to what he paid for it.

THE COURT: Is that important here?

MR. MANLEY: Will you concede the value of this car is over \$500.?

MR. KALDENBERG: I don't know, it might not be worth \$150.

THE COURT: Very good, if that is the question then it is competent evidence.

A \$5,350.

MR. KALDENBERG: Exception.

BY THE COURT:

Q Was it a Benz Limousine? A Yes sir.

BY MR. MANLEY:

Q That is a foreign car? A Yes sir.

Q One of these closed cars?

THE COURT: Limousine explains all that.

Q Did you see the defendant upon that day, the 22nd of March? A Yes.

Q Did you see him on the evening of that day? A No.

Q When was the last time that you saw the defendant that day, the 22nd? A I saw the defendant on the 22nd at the West Side Police Court.

Q That is the first time you saw him on that day? A

Yes sir.

Q When was the last time that you saw him on the 21st ---the day before? A Probably around 6:30 in the evening is about the only time. I would like to say---

Q Had you issued any orders to the defendant in regard to the operation of that car? A For any particular time?

Q Did you have any standing orders which you had given to him with regard to the operation of that car? A Yes sir.

Q What were those standing orders? A He was to be in the garage at 8 o'clock in the morning and in case of rain to call at the house at 8:30 to take our daughter to school. That was a standing order excepting when he was out late at night we may cancel it by saying "You wouldn't need to be in the garage before 10 or half past 10".

Q Did you have any other standing orders besides those? A The other standing order was after he was finished with his work he was supposed to go back to the garage.

Q The garage where you at that time kept the machine was where? A Riverside Garage on 101st between Broadway and Amsterdam Avenue.

Q Do you remember whether was 202 West 101st Street? A I can't recall the number.

Q How long had you been keeping your machine in that garage? A Early in October, up to March that time, to March 22nd.

Q About six months? A Yes.

Q Continuously all the time? A Yes.

Q It was supposed to be taken there every night for storage when you had finished with it? A Yes sir.

Q When was it you first heard of the arrest of the defendant? A On March 22nd, about 3:30 in the morning, by telephone.

Q You were at that time at your home, 2 West 89th Street
A Yes sir.

Q And that telephonic communication came from where?

MR. KALDENBERG: I object to any telephonic communication whatsoever.

MR. MANLEY: I am not asking for the contents of it.

THE COURT: He may say where it came from, if he knows? A I was told; the party who called me up said he was the lieutenant or sergeant.

MR. KALDENBERG: Objected to.

MR. MANLEY: Question withdrawn.

Q You say the next place you saw the defendant was in the police court? A West side police court, west 54th Street.

Q When you got there he had been arrested on what charge? A Drunkenness and reckless driving.

Q Did you have a talk with the police officer-- Officer

Concannon? A I did.

Q After you had talked with officer Concannon did you prepare an additional charge against the defendant? A I wanted to prefer that charge before I had seen the officer.

Q Did you finally prefer a charge? A Yes sir.

Q And the charge you preferred was what? A Grand larceny.

MR. KALDENBERG: Objected to.

BY MR. KALDENBERG:

Q Did you make the charge in writing?

MR. MANLEY: I am examining this witness; I object.

THE COURT: I allow the question.

A I didn't embody it in writing, no; I made it before a clerk in the court.

BY MR. MANLEY:

Q Well, did you subsequently do it? A I subsequently signed a paper which he had made out.

MR. KALDENBERG: Objected to on the ground that the best evidence is the original paper.

Objection overruled; exception.

MR. KALDENBERG: I move to strike out the answer on the same grounds.

Motion denied; exception.

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Q Had you yourself, Mr. Klee, given any orders to the defendant the evening or during the day of the 21st of March as to the operation of that car during the evening of the 21st of March? A No.

Q Did you personally know anything as to his getting Mrs. Klee that night, the night of the 21st? A Yes.

Q What is it that you know personally of your own knowledge about that? A I simply know that Mrs. Klee left the house around 8 o'clock and the machine called for her.

Q Were you in the house at the time? A Yes sir.

Q That was about 8 o'clock on the evening of the 21st? A 21st.

Q When was it that you next saw Mrs. Klee after that? A About 10:15 or thereabouts the same evening, having returned.

Q You saw her at that time where? A At our house.

Q Did you see the machine deliver her at the house at that time? A I did not.

Q Well, you were there when she came in? A Yes sir.

Q And she came in about that time? A Yes sir.

Q Did you give any permission to this defendant John Cush to operate that car for his own use and benefit and pleasure after 10 o'clock P. M. of the 21st and up to half past 3 on the morning of the 22nd? A No sir.

Q Did you have any talk with the defendant in the police

court upon the morning of the 22nd with regard to the operation of that car? A Not particularly, no. I asked him for his keys.

Q Did you see your car on that day, the 22nd? A I did not.

Q When was it that you saw it next? A I believe I saw it on the 23rd, the day after.

Q Where was it when you saw it on the 23rd? A At the shop, Bentz Auto and Import Shop.

Q Can you state how it got from the Garage 202 West 121st Street to the Bentz shop? Was it under your direction? A I instructed the Benz people to send a man up to bring it from the garage and take it to the shop.

Q For what reason was it that you gave that order to the Benz people.

MR. KALDENBERG: I object to it.

THE COURT: Objection sustained.

Q You say you yourself had not seen the machine in the garage after the arrest of the defendant upon the 22nd. Had you instructed any one else to inspect it for you, yes or no?

MR. KALDENBERG: Objected to as to whether he instructed anybody.

THE COURT: Objection sustained.

Q When was it that you finally saw your car? A On the morning of the 23rd.

Q Will you state its condition when you saw it at that time on the 23rd?

MR. KALDENBERG: Objected to unless the District Attorney can show that it was ---

THE COURT: Objection overruled.

MR. KALDENBERG: Will your Honor hear me on that?

THE COURT: No. If I was going to hear all the argument I would never get through with the cases.

MR. KALDENBERG: Exception.

A Well, technically, I could not state the condition of the car. It wouldn't run for us and all. They had to take it "down" like and find out what the trouble was.

Q I don't suppose you are an expert in the construction of automobiles? A No.

Q Did you have to pay any bill for the repairs? A \$458.

Q Had the car been in running order prior to the morning of the 22nd of March? A Yes, sir.

THE COURT: I will strike out the characterization of the charge of grandlarceny. The motion made by Counsel, which was denied, is now granted. Pay no attention to that answer, gentlemen.

Q Did the defendant have any orders as to what to do with your car when he brought in one of your family to your home at night? A Yes, a standing order.

Q. What was the standing order? A To go back to the

garage.

Q At 2 02 West 101st Street? A Yes, sir.

BY THE COURT:

Q Do you mean you told him that immediately after delivering the family he was to go back and not do any joy riding?

A That was the understanding at all times.

Q Did you say it to him? A That was the standing order originally given. There was never any permission given to use the car at any time.

Q I don't think you quite understand the question, I am asking; you say it was a standing order given to the defendant. Now, what did you ever say to the defendant in respect to it?

A Well, I can't very well ---

Q If it was an order how was it communicated? Did you communicate a written order? A No, no, no; that's all.

Q Well now, you gave a verbal order? A A verbal order.

Q An order by word of mouth? A Yes, sir.

Q I suppose a written order would be verbal. Now when you gave this order by word of mouth what was said? A Well, I simply said that it was an understanding that he was to go back to the garage.

Q Was the understanding communicated to the defendant? Did you ever say anything to him? A I couldn't recall that I did.

Q Then how were there any orders given to him, if there was nothing said to him? A Well, he had a standing order to call in the morning.

Q Yes, I am not inquiring as to that; what I want to know about is whether or not you told him after leaving the family to go back to the garage? A Specifically I couldn't say that I did.

Q Then how is it that there was a standing order if you never sent it to him? A He is supposed to go back to the garage because there was nothing else to do after he had discharged the family; he was supposed to go back to the garage.

Q You thought he would do that? A Absolutely.

Q But did you ever say anything to him concerning it?

A I can't recall the date nor the time.

BY MR. MANLEY:

Q Did the defendant Cush say anything to you about his being permitted to use the car during the 22nd of March? A No sir.

Q Had you given him any permission to use the car upon the evening of the 21st of March and the morning of the 22nd?

A No, sir.

MR. MANLEY: The law says "without consent."

THE COURT: I am quite aware of that, but the answer of the witness was such that I thought I ought to find out about it.

BY MR. KALDENBERG:

Q Mr. Manley asked you if you had given the defendant permission on the 21st or the 22nd days of March, 1911, to use the car and you answered no. Now will you please tell us whether or not you had forbidden him the use of the car on the 21st or the 22nd. A He had never asked for the permission of it.

Q He never did. Did you ever forbid him at that time or any other time? A No.

Q Now, you were away in the country last summer, were you not? A Yes, sir.

Q And during the time that you were away did the defendant use your car? A For our use, yes.

BY THE COURT:

Q No, did you give the defendant the use of the car?

A No.

BY MR. KALDENBERG:

Q He came over to your place two or three times, didn't he, where you were? A Our garage was on our grounds.

Q And the car was there sometimes, wasn't it? A It was there all the time.

Q And he drove to that place, didn't he, several times?

A He naturally would.

Q And he used the car also at times, didn't he? When you didn't give him express permission to do so? A Not that

we knew about.

Q Now you have testified that you supposed the defendant understood standing orders. Do you know whether he did or not? A I think he did.

MR. KALDENBERG: I move to strike that out as irresponsible.

THE COURT: I won't strike it out. You may inquire what he means by his answer if you wish. I think it is responsive.

Q What do you mean by that? A Well, as long as you bring up last summer, whenever we were finished he went back to the garage with the car.

Q The practice of using cars is common, isn't it, among chauffeurs? A Not that I know of.

Q Now did I understand you to say today that you had given a standing order? A It was so understood.

MR. KALDENBERG: I move to strike it out.

MR. MANLEY: A standing order for what?

THE COURT: Strike it out.

(Question repeated)

MR. MANLEY: I object to it as indefinite; it doesn't say a standing order for what.

THE COURT: The objection is well taken. Let us know what you mean by your question.

(Question withdrawn.)

Q Now, Mr. Klee, when you say you gave the standing order what did you mean by that, or what were the words used?

A Well, as you say, what do I mean? I simply meant after the use of the car.

Q Now, what words did you use? A As I stated before, I don't remember specifically of giving a standing order.

Q At any time? A No.

BY THE SECOND JUROR:

Q I would like you should explain to me, when you said before that you paid \$450 to the Benz Company for repairing the machine -- was it for repairs which was broken during the time when the chauffer used it without your permission? I would like to know if this was some part -- may be you bought some equipment or something like that.

MR. KALDENBERG: With all due respect to the second juror, I object to the question.

THE COURT: Objection sustained. Mr. Juror, your question calls for evidence that the law does not regard as competent, relevant and material to this inquiry, therefore I must sustain the objection. The testimony, as I recall it -- and if I am wrong, Mr. Klee, you set me right -- is that before this incident of the defendant's

taking the car the car was in working order. Immediately after it was found not to be in working order you sent it to the Benz Company for repairs and paid \$456 for it, is that your testimony?

THE WITNESS: Their bill was \$458. It was in perfect working order before.

BY THE NINTH JUROR:

Q. In the employment of that chauffeur did you have any understanding with him as to his duties and when he was to go home, and his regular routine -- was it specified in any conversation?

THE COURT: Your question, Mr. Juror, is open to the criticism of asking for an understanding. You may inquire, Mr. Juror, what was said to this defendant when he hired him, or at a subsequent time.

Q. I ask him for that conversation.

BY MR. MANLEY:

Q. The Juror wants to know what conversation you had with the defendant when you hired him as to his duty as a chauffeur and what he should do and what he should not do. A. It is possible I went on the presumption that the duties ---

BY THE COURT:

Q. All we want to know is what you said to the defendant and what the defendant said to you. A. I can't recall the specific instructions.

Q Were there any instructions for him not to use your car after you were through with it? Did you make him understand that -- was that agreed? A Absolutely, in my mind.

Q No, no --- A I made no specific -- I gave no specific instructions to that effect, if that is what you are after.

BY MR. MANLEY:

Q Did the defendant ever ask you during the time he worked for you to be allowed to use that car at night? A No, sir.

Q Did you ever give him any permission to use that car at night? A No, sir.

Q Or at any time for his own use and benefit? A Never.

BY MR. KALDENBERG:

Q Was this car of yours insured?

THE COURT: Now, I sustained an objection to that. This is not a civil action.

MR. KALDENBERG: Then, if your Honor please --

THE COURT: I have ruled against you. Have you any further questions?

MR. KALDENBERG: If your Honor please, this is a motion to strike out all testimony regarding damage and injury to the car on the ground that it has not been shown by the District Attorney yet that the car was in any way damaged or injured while in the defendant's possession.

THE COURT: The Court reserves that motion until the close of the case. Call your next witness.

MR. MANLEY: Mrs. Klee.

MR. KALDENBERG: What do you expect to prove by her?

MR. MANLEY: I expect to prove by Mrs. Klee that the defendant called for her at her house, 2 West 89th Street, on the evening of the 21st of March, that he took her in the car to the Ansonia, that he called for her at the Ansonia about ten o'clock that night on the 21st and took her to her home at 2 West 89th Street and received no permission to use the car at that time or thereafter; that he did not at that time ask for any permission to use the car.

MR. KALDENBERG: Well, with the latter part of the hypothesis stricken out, I will concede it. It does not appear that Mrs. Klee was the owner of the car or that she could give permission or forbid the defendant to use the car: I will concede the defendant took this lady (Mrs. Klee) from her home to the Ansonia Hotel that evening and that they came back about half past ten or eleven o'clock.

THE COURT: And that she gave no permission?

MR. KALDENBERG: I will concede that.

MR. MANLEY: That she gave no permission for the use of the car that night, and the defendant did not ask to use the car that night.

MR. KALDENBERG: Well, we will let it go at that.

THE COURT: Very well, that is all conceded. Now you do not require to call Mrs. Klee.

MR. MANLEY: I call Mr. Gallagher.

MR. KALDENBERG: May be I will concede what he will testify to.

MR. MANLEY: All right. I expect to prove by Mr. Andrew Gallagher, 202 West 101st Street --

MR. KALDENBERG: You had better examine him. There might be one or two points I want to inquire about.

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A N D R E W G A L L A G H E R, called as a witness on behalf of the People, being first duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. MANLEY:

Q Where do you live? A 370 West 58th Street.

Q What is your business? A Night foreman of a garage.

Q Where is the garage of which you are night foreman?

A 202 West 101st Street.

Q How long have you been foreman there? A Since the place opened.

Q How long ago is that? A A year ago last December.

Q Were you the foreman there upon the 21st -- the 22nd of March of this year? A Yes, sir.

Q Did Mr. Simon J. Clay of 2 West 89th Street at that time have a car which he sent to the garage? A Yes, sir.

Q Do you know this defendant, John Cush? A Yes, sir.

Q Did you know him as a chauffeur of Mr. Klee? A Yes, sir.

Q How long have you known Mr. Cush? A Since the man brought the car in there in the fall of the year.

Q What were your hours of work there? A From 7 at night to 7 in the morning.

Q What time was it upon the evening of the 21st of March that you went on duty as night foreman? A Seven o'clock.

Q You remained on duty how long that night? A Until seven in the morning. That is, with the exception of my luncheon hour.

Q Your luncheon hour came when? A Well, any time I could make it convenient.

Q Did you carry your lunch there? A No, I went outside to eat and I carried it with me occasionally.

Q Did you see the defendant on the evening of the 21st, the defendant Cush? A Yes, sir, I did.

Q What time was it when he took out Mr. Klee's car?

A Well, I wouldn't be exact to the minute.

Q Well, about? A Somewhere between 8 and half past.

Q In the evening of the 21st? A Yes.

Q Do you have charge of this car there as night foreman?

A Yes.

Q Were you on duty continuously that night all the time?

A Well, except I would go out for a cup of coffee or a drink.

Q Did you go out for a cup of coffee that night? A I did.

Q How long were you gone? A Well, probably not more than fifteen or twenty minutes -- ten or fifteen minutes.

Q The rest of the time, all the time from seven in the evening of the 21st until seven the following morning you were in the garage, were you? A Yes, sir.

Q When was the next time that you saw this defendant and Mr. Klee's car, after taken out about half past eight on the evening of the 21st? A Well, the next time I seen the car I seen the officer and the defendant on the street.

Q About what time of the night? A Somewhere around three o'clock.

Q In the morning of the 22nd? A Yes, sir.

Q Had you at any time from the time Cush took the car out about half past eight until you saw him in the hands of the Officer on the street, seen the defendant with the car? A No.

Q Where was the defendant and the car when you saw him and the officer on the street? A Right across from the garage.

Q On the other side of the street? A Yes.

Q The garage is on one side of the street? A On the south side.

Q That would bring the car on the north side? A Yes, sir.

Q What was it that attracted your attention when you happened to see Cush and the car out on the street? A Well, the officer asked me to take the car in.

Q Did the officer come to you in the garage? A Yes, sir.

Q Was the door of the garage at that time open or closed? A It was closed.

Q What kind of a door is it -- one that swings in or out or one that slides? A It is one that opens in the center.

Q Open in or out? A In.

Q Did the officer knock on the door? A He opened the door partly.

Q Was the door unlocked at that time? A Yes.

Q Then you went out and saw the car, did you? A Yes.

Q Was the car, do you remember, in front of the garage or to the right or to the left? A Well, it was a little west of the entrance to the garage.

Q Did you have to have any assistance to push the car into the garage? A I couldn't push it in myself.

Q Did you try to put it in on its own power, or did you push it in? A No, I pushed it in.

Q Are you able to state its condition at that time? A appeared
The car to be all right to me. I am not acquainted at all

with the cars.

Q You didn't try to move it with its own power? A No.

Q Did you see anybody take that car away on the following day? A No, because I left there at seven o'clock in the morning.

Q When you came back the following night was the car there? A No.

Q How long was it before you again saw the car? A Not until Mr. Klee came back from some repair shop with it.

Q How long was it -- two or three days? A Oh yes, it was more than that.

CROSS EXAMINATION BY MR. KALIENBERG:

Q What time was it that you saw the car on the 22nd?

A In the evening?

Q On the morning when the police came there with the defendant. A About three o'clock.

Q Did you say you were in charge of that garage? A I am in charge of the garage.

Q Do you know how long this defendant has been chauffeur for Mr. Klee? A Well, he is the man brought the car in there when it came to be stored there.

Q Do you know how long he has been working for Mr. Klee?

A No, I wouldn't be sure in saying I did.

Q How long has the car been there? A Oh, probably since September or October.

Q This last September or October? A Yes, sir.

Q And you say so far as you observed there was nothing the matter with the car? A Not outside of what I noticed or could see.

Q Do you know anything about the mechanism of an automobile?

A Well, I do, a little.

Q You have worked, have you, repairing automobiles?

A Well, yes.

Q And you would have been quick, I suppose, to detect -- is that part of your business? A To do what?

Q To detect imperfections or damages to automobiles?

A Well, not altogether.

Q Well, if there had been any damage, you would have noticed it, would you not? A Well, any outward damages, I would, that be noticeable.

Q It is one of your duties there, isn't it? A Yes.

RE-DIRECT EXAMINATION BY MR. MANLEY:

Q Take a car that has a crank shaft which is broken, I suppose it can be pushed into the garage from the street?

MR. KALDENBERG: Objected to; no evidence here that any crank shaft was broken.

MR. MANLEY: No, not yet. In view of the questions you have asked, I have asked that, that's all.

THE COURT: Answer the question. I will strike

it out if not connected.

BY THE COURT:

Q Was the crank shaft of this car broken or not? A I couldn't say, sir.

MR. MANLEY: I am going to show that it was. He says it could be pushed.

BY MR. MANLEY:

Q The question is, could a car whose crank shaft is broken be pushed into the garage from the street?

(Objected to; objection sustained.)

Q Could a car whose front axle was bent be pushed into the garage from the street?

(Same objection; objection sustained.)

WALTER VON GIENAUH, called as a witness on behalf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MANLEY:

Q Where do you live? A 223 Central Park West.

Q What is your business? A Mechanical engineer; assistant manager of the Benz Company.

Q Did you some time after the 22nd of March see the Benz car belonging to Simon J. Klee? A I saw the car of Mr. Klee the 21st and the 23rd.

Q What was its condition on the 21st when you saw it?

A Mr. Klee sent the car in to have one of the rear rims ---

MR. KALDENBERG: Objected to.

MR. MANLEY: Question withdrawn.

Q You say you saw the car upon the 23rd of March?

A Yes, sir.

Q What was its condition at that time?

MR. KALDENBERG: The reason I object to this testimony is that it does not appear from the testimony thus far that the car was in any way damaged or injured while in the defendant's custody.

THE COURT: I think that is true. I do not recall any such testimony.

MR. KALDENBERG: It is incompetent, on the 23rd, unless the defendant is in some way connected with the damage.

MR. MANLEY: I will withdraw the witness at this time.

B L A N C H E K L E E, called as a witness on behalf of the People, being first duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. MANLEY:

Q What is your address? A 2 West 89th Street.

Q You are the wife of the complaining witness, Simon J.

Klee? A I am.

conceded

Q It has been said today or at the trial that the defend-

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ant Cush took you from your home, No. 2 West 89th Street, to the Ansonia, at about eight o'clock upon the evening of the 21st, is that right? A Yes, sir.

Q Did you give him any instructions as to when to return after he came to your home that evening? A He remained there.

Q waiting for you? A I think he did, I am not sure. I said I was going to leave there about ten o'clock.

Q And then it has been conceded that he took you to your home at about twenty minutes of ten or ten o'clock? A He left the Ansonia at about ten o'clock.

Q And that would bring you to your house at 2 West 89th Street in about what time? A About ten fifteen or ten twenty.

MR. MANLEY: The People rest.

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MR. KALDENBERG: Now, I move to strike out all testimony of Mr. Klee upon the ground that it is not affirmatively shown that if he did not give permission to this defendant to use the automobile in question he did not forbid its use. The charge here is that the defendant took it.

THE COURT: Would you argue if a thief took a watch out of my pocket that he was entitled to exemption because I did not forbid his taking it?

MR. KALDENBERG: It does not appear here that Mr. Klee gave this defendant any standing order; he cannot state it.

THE COURT: Well, I am against you on that contention.

MR. KALDENBERG: May I state to the Court that it nowhere appears in the testimony here that Mr. Klee ever gave this defendant any standing order at any time.

THE COURT: Well, it is not necessary, Counselor, to do that, in my judgment. I do not like to argue these things with Counsel. I will deny your motion.

MR. KALDENBERG: Then your Honor decides the motion against me to strike out all the testimony of Mr. Klee? The testimony of Mr. Klee regarding the standing orders. He wouldn't state on the witness stand whether or not they were given.

THE COURT: Yes, I will strike it out, if you wish. My recollection is that it appears that there was no standing order.

MR. MANLEY: No objection.

THE COURT: Certainly, strike it out, if you wish. I did strike it out pretty effectually by my questions, but I will strike it out formally, if you wish.

MR. KALDENBERG: I move to strike out all the

testimony here offered with regard to damage or injury to the automobile on the ground that it does not appear that the defendant ---

THE COURT: I think I must grant that motion.

MR. MANLEY: May we not reserve that?

THE COURT: Your case is concluded. I will grant the motion to strike out the testimony touching the condition of the car.

MR. MANLEY: No objection.

MR. KALDENBERG: I move for a direction of a verdict in favor of the defendant, on the ground that it does not affirmatively appear that the defendant feloniously and wrongfully appropriated this property to his own use without the knowledge or permission of the owner and with intent to appropriate it to his own use.

THE COURT: I will deny your motion.

MR. KALDENBERG: Which motion, if the Court please?

THE COURT: I do not want to argue with you, because what I say in answer may be deemed hostile to your client. I do not want to argue it; I will deny your motion.

MR. KALDENBERG: Exception.

MR. PRICE: May I make a supplemental motion to dismiss this case?

THE COURT: If your associate did not cover what you wish to include I will give you the broadest hearing to protect all the defendant's rights.

MR. TRICE: I move to dismiss the case and to direct a verdict because the People have wholly failed to affirmatively show all the constituent elements of larceny in this case.

THE COURT: What have they failed to show, Mr. Trice?

MR. TRICE: They have failed to show the basic principle that he intended to steal, that he intended to deprive the owner.

THE COURT: The People claim, Mr. Trice, to have shown that the defendant took this car home with Mrs. Klee at ten o'clock, that he was found joy riding at three o'clock in the morning in this car; those are the facts. Now, those are the facts from which the jury are to answer the question whether he intended ---

MR. TRICE: Joy riding? The facts show that he probably went around the block and stopped at a saloon to get a drink and returned to the very place where the car is going to stop, showing upon its face that he did not intend to deprive the owner of the use of that car or to appropriate it to his own use, which is necessary; and

the most that can be said is that it perhaps was a joy ride, innocent within itself.

THE COURT: Joy riding is larceny under our law today.

MR. TRICE: But the Court says that you cannot prove larceny unless the circumstances indicate a felonious intent, that the mere fact that joy riding is not sufficient. Larceny is defined by the law of the State: It is to take, it is to appropriate property with the intent to deprive the owner of the use and to appropriate it to the benefit of the person taking it. Now, when the facts --

THE COURT: Now, Mr. Trice, I raised my hand and I wanted you to stop -- I wanted to ask you a question then and there. You say the Courts have said touching this statute, something. Have you any authority?

MR. TRICE: Well, if your Honor please --

THE COURT: Have you anything the courts have said on this statute?

MR. TRICE: As I remember, in construing this specific statute -- I don't remember the case ---

THE COURT: I think there has been no case under this particular law --

MR. TRICE: Under this particular law? There was one under the preceding law, which went to the extent, and

it is a basic principle, if your Honor please, that has existed since civilization, that you cannot convict a man of larceny or theft unless he intended to deprive the owner of the use of the property and unless he intended to appropriate it for his own use and benefit. Now, if the testimony shows a mere joy ride -- a riding around the block -- and if he and his companions were drunk and if perchance they broke the automobile he might be guilty of disorderly conduct, he might be guilty of malicious mischief, but he would not be guilty of larceny.

THE COURT: I don't want to hear any argument on that point; the Legislature declared against you.

MR. TRICE: It is beyond the scope and power of the Legislature.

THE COURT: You argue that to the Court of Appeals, not with me, Mr. Trice.

MR. TRICE: I am simply making my motion, with all due deference to the Court.

THE COURT: I deny your motion.

MR. TRICE: Furthermore, upon the ground that the testimony shows -- that even if it should show that the car was injured and even though it should show that it was injured while in the possession of the defendant, that would not establish the offense of larceny -- it might establish another offense.

THE COURT: True enough, but I have denied your motion. I will hear the defendant's story now.

MR. TRICE: I respectfully except to the ruling of the Court.

J O H N C U S H, the defendant herein, called in his own behalf, being first duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. KALDENBERG:

Q Where do you live? A 844 Amsterdam Avenue.

Q What is your business? A Chaueffer.

Q How long have you been a chaueffer? A About nine years.

Q How long have you been in the employ of Mr. Klee?

A A little over a year, I guess.

Q Now, were you in his employ on the 21st day of March?

A Yes.

Q 1911? A Yes, sir.

Q Up to the time of your arrest? A Yes.

Q Now it is charged in this indictment against you that you feloniously appropriated to your own use without the consent of Mr. Klee the automobile which you had in your custody. Now, did Mr. Klee ever give you positive instructions not to use that automobile for your own use and benefit? A No, never did.

Q Was Mr. Klee in the country last summer? A Yes, sir.

Q During his absence did you use that automobile?

A Yes, sir, he gave me permission one day to use it.

BY THE COURT:

Q One day? A Yes, sir.

Q And you used it one day with his permission? A Yes, sir.

BY MR. KALDENBERG:

Q Did you use it after that with his permission? A No, sir, I did not.

Q What time was it that you took Mrs. Klee home to her house? A It was around ten-thirty.

Q Did Mr. Klee then tell you to go anywhere with that car or not? A No, he told me to call up in the morning.

Q Now, what did you do with this car after you left Mrs. Klee? A I went up to the garage, stopped there.

Q Was anybody there at the time? A Well, there was cars coming out of the garage and I couldn't get in, so I stopped on the other side of the street.

Q Now then, did you go away? A Well, I left the car standing there while I went to the restaurant.

Q What time did you return to the garage? A Well, about -- I didn't go near the garage, I went back to the car about 2:30 to take it in, about two o'clock or two thirty.

Q Were the doors closed then? A Yes, sir, the doors were closed.

Q Then what did you go and how far did you go with the car? A Just went around the block to save the trouble of turning around.

Q Before you left there, the garage, did I understand you to say that the doors were closed? A The doors were closed.

Q And then you went around the block and came right back again, and were the doors of the garage open then? A No, the doors were still closed.

Q Did you see Mr. Gallagher there? A No, Mr. Gallagher was inside.

Q Well, he came out, did he, shortly after? A Well, he was in the garage there, I didn't see him personally.

Q Were you there when the car was put back into the garage? A No, I was arrested in the mean time.

Q And you were taken to the station house? A Yes, sir.

Q Have you ever been arrested or convicted of any crime? A No.

Q Have you ever been arrested for speeding or disorderly conduct? A No.

THE COURT: You are opening the door now to a wide range of inquiry.

Q About how many blocks did you go with this car? A Two

blocks, just around the block.

Q And then came right back to the garage? A Came right back on it.

Q You didn't make any profit on it, did you? A No, sir.

Q Hire it to anyone? A No, sir.

Q Take any compensation for taking these people around the block? A No, sir.

BY THE COURT:

Q Whom did you take around? A Just some chaueffers that belonged around the garage

Q You took some chaueffers from around the garage?

A Yes, sir, instead of turning around in the side street we ran around the block.

Q Do you mean that these chaueffers got in merely for the purpose of riding around one single block? A That's all.

Q One single block? A Just around the block.

Q And their business was riding in automobiles, was it?

A No, some of them wasn't chaueffers.

Q But they were those to whom the novelty of an automobile ride wouldn't appeal, were they? A Well, the boys often do that -- get in just to ---

BY MR. KALDENBERG:

Q Was this automobile used in Mr. Klee's business? A Yes, his family used it.

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Q And you took them all over the city, didn't you?

A Yes, sir.

Q At all hours of the day and night? A Yes, sir.

Q Wherever they wanted to go? A Yes, sir.

Q Early and late? A Yes, sir.

Q At all times? A Yes, sir.

Q When you got back to the garage do I understand you to say that Mr. Gallagher wasn't there then? A I didn't see him.

Q Was he in charge of that garage? A Yes, he is always in charge at nights.

Q And at that hour of the night there is some one in charge, isn't there? A Yes, sir, there is a doorman.

Q And what do you have to do? A Well, if there is any cars coming out you have to wait outside until they come out-- they block the floor.

Q When you want to put the car up and there is nobody there what do you do? A There is always somebody there, there is a doorman there.

Q What do you do to notify them, to inform them? A They just give you the signal to come in.

CROSS EXAMINATION BY MR. MANLEY:

Q You say there is always some man on duty at the garage?

A Yes, sir.

Q So that a man can get his car in at any time he wants

by waiting perhaps till one or two cars come out? A Yes, wait there -- sometimes the floor is blocked up for some time.

Q They are not blocked up for any great length of time, are they? A They are at night when they are pulling around-- want to put them on the wash stands.

Q You do not claim to have gotten any orders to use the car that night? A I had orders when I went out, I had orders to take the car out around eight o'clock.

Q What other orders did you have that night? A Well, that was all. I went down to the house and took Mrs. Klee out.

Q That was at what time? A At eight o'clock, around eight o'clock.

Q And you took her where? A To the Ansonia Hotel.

Q What other orders did you have as to where to take her that night? A To wait there.

Q To wait at the Ansonia? A Yes.

Q And you took her home at what time? A About ten thirty.

Q And you had orders to take her from the Ansonia home about ten thirty? A Yes.

Q Did you have any further orders that night? A No, just to call up the next morning.

Q Who gave you that order? A Mrs. Klee.

Q What time? A Around ten thirty when she went home.

Q That is the night you took her home at ten or ten thirty?

A Yes.

Q Did you ask for any permission to use the car upon the morning of the 22nd? A No.

Q You had not received any permission to use the car that morning, had you? A Next morning or that morning?

Q That night after ten o'clock, on the 21st, at the time you left Mrs. Klee at her house, 2 West 89th Street, after taking her from the Ansonia? A Well, they didn't say anything to me, they told me to call up the next morning, that's all she said to me.

Q And you were to take the car from Mrs. Klee's house back to the garage, is that it? A Yes, sir.

Q You didn't have any permission to use it after ten o'clock on that night, did you? A Well, I had permission to take it up to the garage.

Q Well, I mean, to use it yourself, to go out and take a joy ride --- to go and have a little pleasure trip of your own? A Well, I didn't take any trip.

Q Well, did you have permission to? A No, sir.

Q And you didn't have to? A No.

Q Because you didn't want to, so you don't claim you had any permission to use the car for your own pleasure, for your own profit, for yourself, after you had deposited Mrs. Klee home?

at ten thirty that night? Do you understand that question?

A Well, there was nothing said about permission or anything like that.

Q And you didn't ask her for permission to use it? A No.

Q But your directions were to take it back to the garage about around ten o'clock? A That was all.

Q You think you left Mrs. Klee home that night at half past ten? A Yes.

Q Were you alone at the time? A I was.

Q Did you go right around to the garage at West 101st Street? A Yes, sir.

Q You must have got there at what time? A About twenty minutes or quarter to eleven, somewhere around that.

Q Did you try to get it into the garage? A Well, a man told me to stand outside, and while the cars were coming out they have to make room for the theatre cars.

Q What man was it told you, that? A The man on the door.

Q You are positive it was twenty minutes to eleven?

A I wouldn't say the exact time.

Q Was it any later than that? A No, it was around that time.

Q It wouldn't take any more than two minutes to go from 2 W. 89th Street around to the garage, would it? A About ten minutes.

Q Will you tell me through what streets you went?

A Through 89th Street.

Q 2 West 89th street is right near Central Park West?

A Yes, and there is an entrance on Central Park west. I went west through 89th Street to Amsterdam Avenue, north on Amsterdam Avenue.

Q North on Amsterdam Avenue to 101st Street? A Yes.

Q And west on 101st street through the garage? A Yes, sir.

Q Now we are at twenty minutes to eleven. Who was that man who told you to wait until the theatre cars had come in?

Q Who was that man who told you to wait until the theatre cars had come in? A The doorman.

Q What is his name? A James McCabe.

Q Was the door of the garage open at that time? A Well, there was cars coming out, they were going to come right out.

Q Was the door of the garage open at that time? A I don't recollect what was in the entrance of the door. Yes, I think they were.

Q And cars were coming out-- other cars coming right out, not going in but coming out? A Coming out.

Q Where did you put your machine at that time? A Stood it across the street.

Q On the north side of the street? A On the north side

of the street, yes.

Q How long did it take for those cars to come out that were coming out when you got there? A I didn't wait to see. I stopped my car and went down to the restaurant a couple of doors away.

Q Where was that restaurant where you went? A Two doors from the garage.

Q On the south side of the street? A On the south side of the street, towards Broadway.

Q How long did you stay in the restaurant? A Oh, I stayed there for a couple of hours, I guess.

Q You stayed there a couple of hours? A Yes.

Q Is it an eating restaurant? A Yes.

Q It is not a saloon? A Well, there is a saloon next door to it -- there is a cafe next door to it.

Q Is there an entrance from the restaurant into the saloon?

A Well, no.

Q You have to go out onto the street then? A Yes.

Q Did you spend all your time in the restaurant? A I think there were some fellows in there and we sat talking.

Q After you stayed there two hours, that would bring it what time when you got out of the restaurant? A Around one o'clock, or say about half past twelve or so.

Q Is it your best estimate that it was half past twelve?

A Yes.

Q Your car then was at the same spot where you left it?

A Yes.

Q Right in the street near the curb on the north side?

A Yes.

Q Why didn't you put that car into a garage before you waited two hours in that restaurant?

A The men in the garage generally take the cars in.

Q You expected that the men in the garage would do it?

A They have often done it.

Q Did you expect they would do it that night? A Yes, sir.

Q That is their custom, is it? A Yes, sir.

Q When you went into the restaurant were the cars still coming out of the garage? A Well, I think they was, yes. There was a car backing out then, just as I was walking in the restaurant.

Q When you got out of the restaurant your car is in the same spot where you had left it? A I was in the cafe next door.

Q How long did you stay in the saloon? A I stayed in there and I come out to take my car in.

Q How long did you stay in the saloon? A Well, about a quarter after two, half past two.

Q That would be about an hour and three quarters in the saloon, would it? A Yes.

Q You got there about half past twelve. Now, did any of the men you had met in the restaurant go into the saloon with you? A Yes, they did.

Q Had you taken any drinks while still in the restaurant before you came out? A No, didn't drink anything in there.

Q Did you drink in the saloon during that one and three quarter hours? A Yes, we had a couple of drinks.

Q You had only two drinks? A I wouldn't say only two.

Q Did you have any more than a couple? A I may have had a couple more, I couldn't remember.

Q What did you drink? A Beer.

Q How many were with you at that time? A Five, I believe.

Q All chauffeurs? A No, they werenot all chaueffers.

Q When you came out then at quarter past two where did you go? A I went over to take my car.

Q Your car is still in the same spot? A Yes, sir; starts it up.

Q Did you crank it up? A Yes, sir.

Q And you got in and who else gets in? A The other boys got in with me, they got in as I was going to take my car in.

Q The question is how many others got in. A I think there was about four.

Q Did they go into the limousine part, the part that is covered over? A Yes, three of them sat in side.

Q One of them sat on the seat with you? A Yes, sir.

Q Where did you drive? A Just around the block.

Q Just went around the block? You went west on 101st Street to Broadway; you are positive as to that? A Yes.

Q Went up Broadway to 102nd? A Yes.

Q East on 102nd Street to Amsterdam Avenue? A Yes, sir.

Q Around Amsterdam Avenue to 101st Street and back to the garage? A Yes.

Q Did you stop on the south side of the street, in front of the garage? A No, stopped just opposite the garage.

Q Why did you? A Because the doors were closed.

Q Did you run by the garage on the north side of the street? A Yes, my brakes wouldn't hold good and I did slide a little past the door.

Q And your only object in going around the block was to prevent turning at the spot where your machine was standing and yet you ran beyond it? A Yes, sir.

Q That must have taken you about five minutes to go around the block? A No, about three to five minutes.

Q You say it is about twenty minutes past two at that time, is it? A Yes.

Q You got out of your machine at that time, I suppose. Did you go to the garage? A I no sooner pulled up at the door than the officer comes over.

Q You didn't have time to go to the garage? A No, he said I was under arrest.

Q Were you making any noise, any of you? A No, sir.

Q Were you intoxicated at the time? A No, sir.

Q Not intoxicated at all? A No, sir.

Q Is that your only object in riding around the block, so you wouldn't have to turn around in the street? A Yes, sir.

Q Is that the only reason you went right around the block?

A That's all.

Q Did you go very fast around the block? A We might have went a little fast, yes, because it was late.

BY THE COURT:

Q If they pushed this car in the garage why did you start to crank it? A Why, I was going to take the car into the garage.

Q Why didn't you let them push it? A They wasn't there at that time.

Q Well, you left it two hours for them to get, didn't you-- to put it in? A Yes, sir, but they were busy in the garage and they were pretty near all through washing the cars inside.

Q Then you got tired of waiting and cranked it? A I was going to take it in myself.

BY MR. MANLEY:

Q Was the car in working order that day? A It was, when I left it.

Q No difficulty whatever in running it? A No, sir, in good order.

Q Was the crank shaft broken on that day? A No, sir, not to my knowledge.

Q The crank shaft, so far as you know, was imperfect condition on the 21st of March? A Yes, sir.

Q How about the front axle, was that bent on that day? A The front axle had been bent for two months.

Q How about the bumper? A The bumper had nothing the matter with it, to my knowledge.

Q Nothing the matter with the bumper? You hadn't discovered anything the matter with that? A No, sir.

RE-DIRECT EXAMINATION BY MR. KALDENBERG:

Q Did you intend at this time or any other time to steal that automobile? A No, sir, I did not.

Q When you got to the garage at 11 o'clock was some one there? A Yes, the doorman was there.

Q And you left the automobile standing in the street? A Yes.

THE COURT: Do not repeat; if it is in once it is in for all time.

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Q Mrs. Klee did not forbid you to use the car that night, did she? A No, sir, she did not.

Q And all you did was to go around the block and come back? A That's all.

THE COURT: You argued a moment ago that she had no authority in the premises.

MR. KALDENBERG: Well, the District Attorney asked if he got permission so I thought I would ask if he had been denied permission.

Q Who were the people in the neighborhood?

THE COURT: They were chauffeurs, he said.

Q Did they keep their cars in this garage? A Yes, two of them.

Q It very frequently happens, does it not, that chauffeurs leave their cars in front of the garage? A Very often.

Q And the hands in the garage shove them into the garage? A Yes, sir.

Q ,On the morning of the 22nd of March did the police officer who has testified here, the first police officer, notify you that the car was outside? A Yes, he did.

Q Was that the first witness on the stand? A Yes.

Q The doors were closed at that time, were they not? A Yes.

Q And they had been closed for some time? A (No answer)

RE-CROSS EXAMINATION BY MR. MANLEY:

Q You say some time when chauffeurs leave their cars outside the people in the garage take them in? A Yes.

Q Do they do that without any notification by the chauffeurs running the cars that the cars are outside? A Sometimes.

Q When the cars are taken in by employees I suppose they are lying right in front of the garage; isn't that it? A Well some are and some are taken inside.

Q Is that the duty of anyone to take cars inside when they are discovered outside upon the street, cars that belong in the garage? A Not always.

Q Would they be left standing there all night -- cars that are supposed to be taken in? A Not, not always, they generally get through with their work about six or seven, and if anything is not in at that time we take it in.

Q Would a car be left standing from eleven o'clock at night until half past three in the morning without taking it in?

Objected to. Objection sustained.

BY MR. KALDENBERG:

Q The 22nd of March, do you know what the weather condition was; was it cold? A Well, it was kind of cold.

BY THE COURT:

Q Have you any particular recollection of the weather on

the 22nd day of March? A I haven't exactly. If I am not mistaken, it was dry.

Q Well, do you remember anything about it or do you argue or reason on general principles that it ought to have been dry? Do you have any memory; if you have any memory we are glad to have your testimony, and if you haven't any memory say so frankly? A No, I have not.

BY MR. KALDENBERG:

Q Do you remember whether the doors were closed or not?

A I know the doors were closed.

Q How long were they closed? When did you see them close them? A In that weather they would be closed night and day.

Q What time, if any, would you close them -- any particular time in the evening? A (No answer).

BY MR. MANLEY:

Q And if I understand you, you say they were closed on that night? A Yes, sir.

J A M E S M c C A B E, called as a witness on behalf of defendant, being first duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. KALDENBERG:

Q Where do you live? A 143 West 100th Street.

Q What is your business? A I am the doorman at the Riverside Garage.

Q Is that the place where Mr. Klee's car was kept?

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A Yes, sir.

Q How long have you been a doorman there ? (Question withdrawn.)

BY THE COURT:

Q Were you there on the 22nd of March, McCabe? A Yes, sir.

BY MR. KALDENBERG:

Q You remember when the defendant brought the car there?

A Do I know what time he brought it there?

Q Yes, about? A Well, I saw the car outside the door, say, between half past ten and eleven, something like that.

Q Did you say anything to him with reference to taking in the car or leaving it where it was? A Well, there were some cars coming out.

THE COURT: Strike out the answer.

BY THE COURT:

Q You are asked a question, answer it yes or no. A Yes, I did, yes, sir.

BY MR. KALDENBERG:

Q What was it? A I said "if you wait a few minutes out there we will get you in, if we get these cars out."

BY THE COURT:

Q Do you remember distinctly saying that, or are you stating what you think you ought to have said? Have you any memory of what you said to the defendant? A Well,

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it was the way, you know, your Honor, every night.

Q Yes, but what I want to know and what Counsel wants to know is this: Have you at this moment any personal memory of having had a conversation with the defendant touching the car? A Yes, sir, your Honor, I have.

Q Now give us the best memory you have of what you said?

A Why, I told him to stay outside for a while until we got room to get him in.

BY MR. KALDENBERG:

Q Did you see where the defendant went? (Question withdrawn.)

Q He let the car stand there, did he? A Yes, sir.

Q And went away? A Yes, sir.

CROSS EXAMINATION BY MR. MANLEY:

Q What time did you go to work that night? A Seven o'clock.

Q How long did you work? A Until about five or half past five in the morning.

Q You think it was about half past ten or eleven when he came out with the car? A Yes.

Q And you said to him "We will get you in in a few minutes, John"? A Yes.

Q Did you get him in? A We said "We will try and get you in in a few minutes."

Q Well, did he bring the car in in a few minutes? A No, sir, he did not.

Q Did you stay inside the garage that night? A I was at the door the whole time.

Q You were at the door during that time? A Yes, sir.

D E F E N D A N T R E S T S .

MR. TRICE: I want to add another ground to the motion.

THE COURT: Have you the ground written out there?

MR. TRICE: No, sir; this is the indictment; I am using this indictment as the basis of the motion.

THE COURT: Well, I think you had perhaps better wait until the case is closed.

W. J. C O N C A N N O N, recalled by the People in rebuttal, having been previously duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. MANLEY:

Q Officer, I understand that you have testified that you stood on the corner of Broadway and 101st Street when your attention was drawn to this car? A I did.

Q Upon what street was the car when you first saw it?

A On Broadway, south of 101st street.

Q How far south of 101st street and Broadway was it when

you first saw it? A On Broadway, south of 101st Street.

Q How far south of 101st Street on Broadway was it when you first saw it? A Oh, it was more than a block and a half, between 99th and 100th Street, coming north.

BY THE COURT:

Q Where is this Riverside garage? A In 101st Street, between Amsterdam Avenue and Broadway.

Q How many blocks from the garage was it when you first saw it? A About two blocks, a little more, if anything.

Q Was it standing? A No, sir, it was running.

BY MR. KALDENBERG:

Q Is that south of the garage? A Yes, sir.

Q Then did the auto come back? A It went north a block past 101st Street where the garage is and then turned towards Amsterdam Avenue, and then it came back through the block from Amsterdam Avenue to Broadway again, or within twenty-five or thirty feet of it.

THE PEOPLE REST.

CASE CLOSED.

Mr. TRICE: If your Honor please, this is an indictment, which, after reading it, seems really to charge two offenses in one count. In other words, it charges felonious taking of an automobile of the value of five thousand dollars, and in the same count includes under this new law that he did

operate and use the same and cause the same to be used for his own profit, use and purpose.

THE COURT: Now, state your motion.

MR. TRICE: Now, I move to dismiss, if your Honor please, upon the ground that the testimony does not show affirmatively any felonious intent.

THE COURT: I think you have done that once.

MR. TRICE: On the second phase of the case, the testimony does not affirmatively show that the defendant operated and used this car for his own profit, use or purpose. Now, there is no testimony affirmatively establishing that element of the offense, but on the contrary the testimony of the defendant shows that if the car was used it was not for his profit, not for his benefit, and those facts negative an assumption of larceny in any phase.

Motion denied.

Exception.

(The Court now declares a recess until two p. m., first duly admonishing the Jury as usual.)

AFTER RECESS -- Trial Resumed.

Mr. Trice now closes to the Jury on behalf of the defendant.

Mr. Manley now proceeds with his summation to the jury on behalf of the People.

During the course of Mr. Manley's closing remarks to the Jury, Mr. Manley says: "I say the reason the Legislature passed this act probably -- and one of the reasons -- was that it was getting dangerous in the County of New York, that chaeffers without the consent of their owners were driving cars at night and getting intoxicated."

MR. TRICE: Objected to as absolutely unfair; no such evidence.

THE COURT: The Assistant District Attorney did not interrupt you, Counsellor.

Mr. TRICE: No, sir, but if I went outside of the record I would want him to. There is no evidence, sir, that it was dangerous in New York County owing to the way chaeffers were acting.

Mr. Manley now concludes his summation.

The Court now charges the Jury.

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C H A R G E O F T H E C O U R T .

F O S T E R , J .

THE COURT: Gentlemen, you and each of you have taken an oath a true verdict to find in accordance with the evidence. Remember that. You are not here to answer the question, shall the defendant be punished? Nor to answer the question whether or not the defendant was right or was wrong in doing what he did. You are here to answer the question whether or not the law as I bring it to your attention has been violated.

If you entertain a reasonable doubt the defendant is entitled to the benefit of it, because the law presumes him innocent and requires the people to prove his guilt by competent, legal evidence, beyond any reasonable doubt. If the People have proved the defendant guilty, under the law, no matter what your sympathies may be, your duty is to render a verdict accordingly.

The question submitted to you is a very simple one. I will read this law, stripped of those provisions which are necessary to make the law exact and technical and to fit beyond peradventure every case, retaining the essentials of the law so far as they apply to this case, and I ask you to listen attentatively while I read it. The law has recently been changed. The old law defining

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larceny provided that whosoever, with the intent of depriving the owner of his property, or of the use and benefit thereof, took such personal property, was guilty of larceny. At one time I had a case involving the use of property before me and I charged the jury that the use of property might be the subject of larceny. I made that charge to the end that we ^{might} have the law reviewed. The jury convicted and then I induced certain charitably inclined people to furnish the money to appeal the case and submit it to the Appellate Division. That tribunal following an old authority of which I was well aware, reversed that case ~~and then~~ ^{but} refused permission to carry it to the Court of Appeals, so that we have no decision of our real Supreme Court---our Court of Appeals, the highest Court that we have---on that subject. But the unsettled condition of the law was brought to the attention of the Legislature, through this decision, I am informed, and they enacted the law under which this prosecution is had. So far as I know this is the first case that has arisen under this new law, which law provides as follows:

"Any chauffeur who without the consent of the owner shall take, use or operate an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use or purpose, steals the same and is guilty of larceny"

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In other words, if the defendant, who admits that he was a chauffeur employed by Mr. Klee, the complaining witness, took that car, used it and operated it, or caused the same to be used and operated, for his own use or purpose, he stole it and is guilty of larceny. There is no proof here that he took it for profit. It is not necessary under the law to prove that. If he took it for his own use or for his own purpose, whatever his use or purpose was, if it was not the purpose of his master, and if he took it without the consent of the master and operated and drove it he stole it under the law. And whether he did so and is guilty of larceny is the question submitted to you for your determination and decision. If he took this car and in the course of his duty was bound to take it to the garage but instead took his friends and drove them about the streets, then under the law, that being his own purpose, and that being done without the consent of the owner, he stole that car and is guilty of larceny. And that is the first question for you to determine.

The kind and degree of larceny is dependant, so far as this case is concerned, upon the value of the property stolen. In view of the condition of the proof here I believe the ends of justice will be best sub-

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served if you find the defendant guilty, by finding him guilty of petty larceny. Whether he is so guilty is the precise and only question then that I submit to you. You may retire to answer the question.

MR. TRICE: If your Honor please: I came into the case rather late. I understand about the time that I came in there was some question as to whether or not the complaining witness testified as to some injury for which he paid about \$458. I don't know whether that stands in the record or not. My impression is that it was stricken out.

THE COURT: What is your request?

MR. TRICE: My request is to instruct this jury that they cannot consider that testimony for any purpose in this case.

THE COURT: Gentlemen, under my charge I have withdrawn from your consideration the stealing of property worth more than \$25. Whether the machine was injured or not is not of importance to your inquiry. Did the defendant take and operate for his own use and for his own purpose this machine? If he did he is guilty of larceny under the law. Whether he is so guilty is the question you are to determine, and, if guilty, find him guilty of petty larceny. I do not deem the proof as to

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the value of the thing stolen sufficiently clear to justify me in submitting grand larceny to you. Whether or not the property was injured is not a question for you to consider at all. Therefore, you may disregard the proof touching that.

MR. TRICE: I ask your Honor to tell the jury to disregard that testimony.

THE COURT: I have said that to them.

MR. TRICE: I except to that portion of your Honor's charge that assumes that the defendant invited certain persons into the car and rode around the block.

THE COURT: Did I charge that?

MR. TRICE: Yes. I infer from the language that your Honor used that you assumed that that was proven.

THE COURT: Oh, no. Whether it is proved or not is for you gentlemen to determine for yourselves. I do not think I said that.

MR. TRICE: That they must determine from the proof of the case as to whether or not he invited any persons into that car, that it is a question of fact for them.

THE COURT: Certainly, and I have so charged this jury. I have said nothing by way of fact. All facts, gentlemen, are for you to determine. Do not consider

anything I may say or may have said as having any bearing upon any question of fact.

MR. TRICE: I ask your Honor to instruct the jury that if the defendant took this car, rode around the block, or several blocks, with an innocent purpose, that he could not be found guilty of larceny and he is not guilty of larceny.

THE COURT: If he took this car for his own use and purpose it was under the law not innocent and without purpose. I do not see how I can charge the request that you request me to charge.

MR. TRICE: I ask your Honor to instruct the jury that the proof must affirmatively show that the defendant appropriated this property to his own benefit---to his own use and for his own benefit, and that unless it does show that they cannot find the defendant guilty.

THE COURT: I think I have already covered that fully.

MR. TRICE: I ask your Honor to instruct the jury that the mere riding around the block of itself, or with friends, does not in law constitute a taking or a using of the property for himself, or for his benefit or for his private use under the meaning of the statute defining larceny.

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THE COURT: I think I have already covered that quite fully in my charge.

MR. TRICE: In other words, if it is a mere joy ride there is no larceny and can be no larceny.

THE COURT: I think I have covered that point very fully and very completely. You may retire, gentlemen.

MR. TRICE: I except to your Honor's refusal to affirmatively charge the element that if it was a joy ride that there can be no larceny.

The Jury now retires and upon its return renders a verdict of guilty of petty larceny.

MR. KALDENBERG: May I reserve any motions that we may have to make until next Friday?

THE COURT: You may. The defendant will be remanded until Friday, and I wish Mr. Kimball would investigate and report to me in respect of this case, and I will then hear whatever you may have to say in behalf of the defendant. Remanded to the 19th.

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COURT OF GENERAL SESSIONS OF THE PEACE
CITY AND COUNTY OF NEW YORK, PART IV

.....
THE PEOPLE OF THE STATE OF NEW YORK:

-against-

JOHN CUSH:
.....

New York May 19, 1911.

Indictment filed March 30th, 1911.

The defendant is arraigned for sentence before

HON. WARREN W. FOSTER, Judge.

MR. TRICE: If your Honor please in this case I
desire to make a motion for a new trial. I move the
Court to grant the defendant a new trial upon the
ground that the verdict is contrary to the law and to
the evidence, against the weight of the evidence and
upon all the grounds mentioned in Section 465 of the
Code of Criminal Procedure, and upon the ground of certain
errors of the court in the admission of testimony as in the
rejection of testimony, and upon the ground of

certain errors of the court in the charge to the jury and its refusal to charge the jury, to give the requested instructions to the jury; on the ground, in reference to the admission of the testimony, because the Court erred in admitting the proof before the jury of the fact and the circumstances that the complainant in this case paid \$68. in order to have the automobile repaired.

THE COURT: That testimony was withdrawn from the jury.

MR. TRICE: In so far as the court could withdraw it in its charge.

THE COURT: Certainly. You asked me to do it and I did it, therefore it could not have prejudiced you.

MR. TRICE: Upon the further ground that after this testimony was introduced before the jury the counsel for the defendant sought to elicit from the complainant the fact that his automobile was insured and that he actually lost nothing; that testimony was very promptly excluded from the consideration of the jury. Now, it is our contention that the fact or circumstance that the complainant had paid out \$68., which fact and circumstance was before the jury, that it was a right of the defendant to have the fullest circumstances adduced, that it did not cost the complainant

anything, that it would go for what is was worth and, if possible, neutraliz~~e~~ the damaging effect, if any, that this illegal testimony must have had upon the mind of the jury.

THE COURT: Any other point that you wish to bring to my attention?

MR. TRICE: Yes sir, I want to enumerate my point and, with all due respect, present them to the Court.

THE COURT: I do not think it is necessary to argue tha point because I am perfectly clear that having granted your request that matter---

MR. TRICE: (Interrupting) And upon the further ground that the court refused to permit the defendant to prove that the automobile was insured and that the complainant had not been damaged.

Now then again, if your Honor please, I move the court to grant a new trial upon the ground of the intemperate, improper opening of the Assistant District Attorney in this case to the jury, stating that the defendant, in effect, with others, was drunk, disorderly--- stating that the defendant was guilty of another separate crime ~~than that~~ for which he was charged in the indictment.

THE COURT: I sh~~in~~k I cured that in my charge.

MR. TRICE: That that considered in connection with the frequent reference during the trial of this case to the drunken, disorderly conduct of the defendant and his companions on that occasion, was illegal testimony that went into that jury box, for the admission of which the defendant should have a new trial, and for the admission of which under all the authorities the Appellate Division has very rarely ever failed to reverse a case where illegal testimony is introduced and illegal statements made.

Motions denied; exception.

MR. TRICE: I move the Court to set aside the verdict and for an arrest of judgment in this case because of the errors of law committed, which appear upon the face of the record, and because the verdict was contrary to the law and the evidence and because the law under which this defendant was prosecuted is null and void and unconstitutional, it is class legislation--discriminates against a class.

THE COURT: Well, it discriminates against thieves, that is about all there is to it; I deny your motion. Exception.

THE COURT: Have you any other ground?

MR. TRICE: Well, upon the ground that the conviction is null and void, for the matters I have urged,

and as apparent upon the face of the record, and I respectfully ask your Honor to arrest this judgment.

Motion denied.

MR. TRICE: We respectfully except to the denial of the motion for a new trial, to the denial of the motion in arrest of judgment.

(The Court sentences the defendant to the Penitentiary for one year.)

Stewart Liddell,
Official Stenographer.

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