EXPORT INSURANCE COMPANY *v.* ROYSTER.

Opinion delivered July 9, 1928.

TRIAL—INSTRUCTION EXPRESSING OPINION AS TO FACTS.—It was error to instruct, in an action on a policy insuring an automobile against theft, that proof that the car was delivered to a garage and was missing when called for, constituted *prima facie* evidence that it was stolen; such instruction being in effect an expression of opinion of the trial judge as to the weight to be given to certain proved facts.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; reversed.

STATEMENT OF FACTS.

Appellees sued appellant to recover an amount alleged to be due upon a policy insuring an automobile against loss or damage by reason of theft. The suit was defended on the ground that the automobile had not sustained any damage by reason of theft.

According to the testimony of L. E. Royster, he owned the car in question, but it had not been wholly paid for, and on the policy sued on the Mercantile Acceptance Company was a beneficiary to the extent of its interest in the car. On March 18, 1926, Royster stored his automobile with the Smith Auto Livery Company of Little Rock, Arkansas. When he went to get his car, it was not in the garage, and was found in the city of Little Rock, badly damaged and almost worthless from a collision with some object.

According to the testimony of other witnesses, the police department of the city of Little Rock was notified that an automobile had been wrecked at Ninth and Broadway Streets, in the city. They proceeded to the scene of the accident, and found that an automobile had run into an iron pole that was set in concrete, and that the car was pretty badly torn up. No one was in the car. The next morning the manager of the Smith Auto Livery Company brought a peglegged negro to the municipal court and charged him with stealing an automobile. Finally, the negro was allowed to plead guilty to driving

a car without the owner's consent and to driving at a too high rate of speed. The charge against the negro was preferred against him on account of driving the car in question when it smashed against the iron pole at Ninth and Broadway Streets. The negro at the time was employed at the garage of the Smith Auto Livery Company.

The part of the insurance policy under which liability is claimed reads as follows:

"Equipment theft exclusion indorsement. It is a further condition of the policy that clause C of the perils insured against is hereby amended to read as follows: 'Theft, robbery or pilferage, excepting by any person or persons in the assured's household or in the assured's service or employment, whether the theft, robbery or pilferage occur during the hours of such service or employment or not, and excepting also the wrongful conversion, embezzlement or secretion by a mortgagor or vendee in possession under mortgage, conditional sale or lease agreement, and excepting in any case, other than in case of theft of the entire automobile described herein, the theft, robbery or pilferage of tools, repair equipment, motometers, extra tires and/ or tubes and/ or wheels and/ or extra or ornamental fittings'."

The jury returned a verdict in favor of appellees, plaintiffs in the court below, in the sum of $987; and from the judgment rendered appellant, defendant in the court below, has duly prosecuted an appeal to this court.

Price Shofner, for appellant.

Edward B. Dillon and *Louis Tarlowski,* for appellee.

HART, C. J., (after stating the facts). Counsel for appellant assign as error the action of the court in instructing the jury as follows:

"Now, gentlemen, when the plaintiff proves that his car was delivered to the garage and that he went back for it and that it was missing, without his knowledge or consent, then that would be *prima facie* evidence of the fact that the car was stolen."

We think counsel for appellant are correct in their contention. The policy insures the owner against loss or damage to the automobile by reason of theft, robbery or pilferage. Liability is claimed for loss suffered by reason of the automobile being stolen by one of the servants of the Smith Auto Livery Company while it was stored in the garage of that company. There is nothing in the policy that indicates that the word "theft" was used in other than its legal signification.

There is a conflict in the authorities as to whether or not, to constitute larceny, it is necessary to show that there was an intent to convert the property to the use of the taker. On the one hand it is held that, to constitute the offense of larceny, it is not necessary that the taking should have been with an intent to appropriate the property to the use or benefit of the taker. The felonious intent consists in the purpose of depriving the owner of his property, and no benefit to the guilty agent may be sought, but only injury to the owner. On the other hand, this court has held, in common with other courts, that, to constitute larceny, there must be an intent to convert the property to the taker's own use. *Dove* v. *State*, 37 Ark. 261. The reason for so holding has been tersely given by the Court of Appeals of Kentucky in *Ford* v. *Commonwealth*, 175 Ky. 126, 193 S. W. 1026, where the court said:

"To constitute the crime of larceny, the intent with which the property was taken must be felonious. In the language of the common law, it must be done *animo furandi*. To take property in the absence of an intention to steal, that is, an intention to convert the same to the use of the taker and permanently to deprive the owner thereof, is not larceny, though under proper conditions it may constitute a trespass."

The authorities on both sides of the question may be found annotated in 12 A. L. R. 804-809. In the case-note referred to, it is said that the weight of authority is against the view taken by this court in the Dove case, but we can perceive no good reason for overruling the rule laid down in that case, for it seems to have been fol-

lowed by the court ever since. At the least, it has not been expressly overruled, and our attention has not been called to any case where the doctrine there announced has been impliedly overruled.

Therefore we adhere to the rule announced in that case, and it necessarily follows that the instruction complained of was erroneous. Where, to constitute larceny, the taking must have been with an intent to appropriate the same to the taker's own use and benefit, an instruction which defines larceny merely as a taking with an intent to deprive the owner thereof is erroneous. Such is the effect of the instruction complained of.

Moreover, we think the instruction is erroneous because it, in effect, is an expression of the opinion of the trial judge as to the weight to be given to certain proved facts, and this, under our Constitution, can never be done.

It is also earnestly insisted by counsel for appellant that the evidence is not legally sufficient to sustain the conviction. We cannot agree with counsel in this contention. While the jury might have found that the servant of the Smith Auto Livery Company took the car out of the garage for a drive and intended to return it to the garage, and was prevented from doing so because of the wreck of the car, still, on the other hand, the jury might have found that the servant intended to appropriate the car to his own use, and was prevented from doing so because it was so badly wrecked when it collided with the iron pole at Ninth and Broadway Streets.

Because the court erred in instructing the jury as above set forth, the judgment will be reversed, and the cause remanded for a new trial.

SMITH, J., concurs.