

1940

## Romney v. Covey Garage et al : Defendant's Abstract of Record

Utah Supreme Court

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Stewart, Stewart & Parkinson & Edwin B. Cannon; Attorneys for Defendant and Appellant; Judd, Ray, Quinney & Nebeker; Attorneys for Plaintiff and Respondent; Attorneys for American Equitable Assurance Company;

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# In the Supreme Court of the State of Utah

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E. L. ROMNEY,

*Plaintiff and Respondent,*

-vs-

COVEY GARAGE, a corporation,  
*Defendant and Appellant.*

AMERICAN EQUITABLE ASSUR-  
ANCE COMPANY, a corporation,  
*Interpleaded Defendant and  
Respondent*

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Appeal from the Third Judicial District Court,  
In and For Salt Lake County, State of Utah  
Honorable P. C. Evans, Judge

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## Defendant's Abstract of Record

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STEWART, STEWART & PARKINSON &  
EDWIN B. CANNON

*Attorneys for Defendant and  
Appellant, Covey Garage*

JUDD, RAY, QUINNEY & NEBEKER

*Attorneys for Plaintiff and  
Respondent, E. L. Romney  
Attorneys for American  
Equitable Assurance Com-  
pany, a corporation*

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# In the Supreme Court of the State of Utah

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E. L. ROMNEY,

*Plaintiff and Respondent,*

-vs-

COVEY GARAGE, a corporation,  
*Defendant and Appellant.*

AMERICAN EQUITABLE ASSUR-  
ANCE COMPANY, a corporation,  
*Interpleaded Defendant and  
Respondent*

Case  
No. 6243

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## Defendant's Abstract of Record

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(Title of Court and Cause)

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### COMPLAINT

1 Plaintiff complains of defendant and for  
cause of action alleges:

1. That defendant is a corporation organized  
and existing under the laws of the State of Utah  
with its principal place of business in Salt Lake  
City; that defendant is, and at all times herein

mentioned was, engaged in the business of operating a public garage and accepting cars for storage and safekeeping for a consideration.

2. That on April 30, 1938 the plaintiff was the owner of a certain 1937 Buick sedan automobile of the reasonable value of \$1085.00; that on the evening of said date the plaintiff took said automobile to the defendant's place of business in Salt Lake City and then and there delivered said automobile to said defendant and entered into a contract with said defendant wherein and whereby the defendant, for a consideration received by it, agreed to store said automobile and use ordinary and reasonable care under the circumstances then and there existing to safely and securely keep said automobile and to return it to the plaintiff in the same condition it was in when received by said defendant.

3. That the defendant negligently and carelessly failed to safely and securely keep said automobile but carelessly and negligently permitted the same to be taken and stolen from said garage by Albert Freeman and Brady Wayne Poulson without the consent or authority or permission of the plaintiff or anyone acting on his behalf.

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4. That as the proximate result of said negligence of the defendant, and while said automobile was in the possession of said Freeman and Poulson it was wrecked and damaged and the body, fenders, hood, windows, shock absorbers, wheels, tires, steering apparatus, headlights, radiator, engine, doors, bumpers, frame and paint were broken, bent, injured, damaged and destroyed to plaintiff's damage in the sum of \$800.00, and plaintiff was deprived of the use of said car for a period of 10 days and the reasonable value thereof is \$100.00.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of \$900.00, together with costs of court herein incurred.

BAGLEY, JUDD, RAY & NEBEKER,

*Attorneys for Plaintiff*

(Duly verified.)

Filed Nov. 17, 1938.

## (Title of Court and Cause)

## DEMURRER

Comes now the above named defendant and demurs to plaintiff's complaint and alleges:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That there is a defect of parties plaintiff in that plaintiff is not the real party in interest or the person entitled to receive the claim sued upon, as plaintiff's insurer by subrogation and assignment is a necessary and proper party to a complete determination of said cause.

3. That said complaint is indefinite and uncertain in the following particulars:

(a) That it does not appear from said complaint how or in what manner defendant was careless and negligent in permitting plaintiff's automobile to be stolen, and the acts of negligence, if any, are not set forth so as to advise defendant of the nature of the negligence relied upon by plaintiff.

(b) That it cannot be ascertained or determined from paragraph 4 of said complaint the nature of the damage to plaintiff's said automobile

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amounting to the sum of \$800.00, that is, whether said amount is on account of the cost of repair of said automobile or is on account of the difference in value of said car prior to and after said accident, and the nature of said claim is not set  
6 forth in such a manner as to enable defendant to defend against the same.

(c) That paragraph 4, and particularly that portion thereof relating to damage in the sum of \$100.00, is indefinite and uncertain in that it does not appear therefrom that ten days was the time reasonably necessarily required in order to repair the damage to said car, nor does it appear that plaintiff suffered damage by reason of any deprivation of use, nor is the reasonable rental value of the car set forth in said allegation.

STEWART, STEWART & CARTER,  
C. J. PARKINSON & E. B. CANNON

*Attorneys for Defendant*

Filed Dec. 8, 1938.

8-9 Defendant's demurrer was overruled, and  
defendant was ordered to answer.

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(Title of Court and Cause)

## ANSWER

Comes now the defendant and for its answer to plaintiff's complaint admits, denies and alleges as follows:

1. Answering paragraph 1 defendant admits that it is a corporation as in said paragraph alleged and at the times mentioned in said complaint was operating a public garage in Salt Lake City.

2. Answering paragraph 2 defendant admits that plaintiff was the owner of a certain Buick automobile which was left by plaintiff in defendant's garage for storage on or about the 30th day of April, 1938, and for the ordinary and usual care of which automobile defendant was responsible.

3. Answering paragraph 3 defendant admits that said automobile was stolen from defendant's garage but denies that defendant carelessly and negligently permitted said automobile to be stolen as in said paragraph alleged.

4. Answering paragraph 4 defendant denies that said automobile was in the possession of

Freeman and Poulson as a result of any negligence on the part of defendant, but admits and alleges that said automobile was stolen and damaged, but denies that plaintiff was damaged to the extent and in the amount alleged in said paragraph.

11           5. Denies generally and specifically each and every material allegation in plaintiff's complaint contained except as heretofore or hereafter admitted, denied or qualified.

6. Further answering said complaint, and as a first separate and affirmative defense thereto, defendant alleges that plaintiff is not the real party in interest in this proceeding and has not legal capacity to sue on account of the claim set forth in his complaint.

7. Further answering said complaint defendant alleges the fact to be that on the 30th day of April, 1938, plaintiff carried a policy of insurance with American Equitable Assurance Company whereby his said Buick sedan automobile was insured against loss by collision and theft, and after the theft and wrecking of said automobile plaintiff's said named insurance company paid to plaintiff the reasonable, fair and proper damage to said automobile and under and by

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virtue of the terms of said policy and an agreement of subrogation duly executed by plaintiff said insurance company became the owner of all claims for damages against defendant herein and the cause of action herein sued upon became the property of said insurance company, and plaintiff herein is not the owner of such claim or entitled to sue the defendant on account thereof. That said insurance company has heretofore asserted its claim against defendant and has advised defendant of its rights to recover the damage so suffered to said automobile and defendant is advised and informed and therefore alleges that said insurance company has asserted, or may hereafter assert, a claim against defendant for the same damages alleged by plaintiff to have been suffered by him. That said insurance company is a necessary and proper party to a complete determination of all claims on account of the damage to said automobile and said company should be made a party to this action either as plaintiff or defendant.

WHEREFORE, defendant prays that an order of this court be made and entered herein making American Equitable Assurance Company a party to this action and requiring said company to appear herein either as plaintiff or as a defendant in order that all rights and claims may

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be fully determined in this action. Defendant further prays that Plaintiff take nothing by reason of his complaint herein; that the same be dismissed and that defendant have and recover its costs incurred in this proceeding.

STEWART, STEWART & CARTER  
*Attorneys for Defendant*

(Duly verified.)  
Filed Jan. 13, 1939.

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(Title of Court and Cause)

## ORDER

Upon filing the verified answer of Covey Garage, a corporation, and application of said defendant, and good cause appearing,

IT IS HEREBY ORDERED that American Equitable Assurance Company, a corporation, be, and it is hereby, interpleaded herein as a defendant and ordered to appear and set forth its rights and claims, if any, against the defendant, Covey Garage, and IT IS FURTHER ORDERED that

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a copy of defendant's answer and summons be served upon said interpleaded defendant.

Dated this 13th day of January, 1939.

ALLEN G. THURMAN  
*Judge*

Filed January 13, 1939.

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15        Said order, together with a copy of defendant's answer, was served upon the interpleaded defendant, American Equitable Assurance Company, a corporation, by showing the original order and delivering a copy of said order to C. Clarence Neslen, commissioner of insurance, its process agent, together with a copy of defendant's answer.

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(Title of Court and Cause)

### BILL OF EXCEPTIONS

34        BE IT REMEMBERED that on April 19, 1939, the above-entitled cause came on regularly for trial before Hon. P. C. Evans, Judge, sitting without a jury, the respective parties being represented by counsel, as follows:

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For the Plaintiff: A. H. Nebeker, Esq.

For the Defendant: Ralph T. Stewart, Esq.

The parties announced that they were ready for trial, and thereupon the following proceedings were had:

It was stipulated that in the event it should be decided that plaintiff is entitled to recover that the damages to be recovered are \$715.00, in addition to the usual taxable costs of court.

35 It was stipulated that the American Equitable Assurance Company paid to Mr. Romney, the plaintiff, under a collision coverage policy, the amount of his loss under the policy, subject to the objection of Mr. Nebeker on the grounds of the immateriality of such stipulation.

37 MR. STEWART: \* \* \* At this time I object to the introduction of any evidence for the reason and upon the grounds that the complaint does not state facts sufficient to constitute a cause of action; for the further reason that the complaint affirmatively shows on its face that the plaintiff is not entitled to recover, because it alleges no negligence on the part of the defendant and because further it affirmatively alleges

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38 that the automobile was stolen from the defendants which automatically releases the defendants from liability. Allegation of theft shifts the burden of proof to the plaintiff to both allege and prove negligence, and in this case there is no allegation of negligence, except the conclusion that the defendant negligently permitted the car to be stolen.

MR. STEWART: I want the record to clearly show at this time that we are prepared to defend at this time on the basis of the pleadings as they now stand, and not on the basis of any testimony that might be admitted which we contend is not admissible under the pleadings.

THE COURT: Your objection may be overruled. You may proceed.

35 C. B. SQUIRES, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

38 My name is C. B. Squires and I am a resident of Ogden, Utah.

39 Q. Calling your attention to the latter part of February, 1938, did you, on or about the 26th day of February of that year, deliver your car

to the Covey Garage in Salt Lake City, Utah, for storage?

A. I did.

MR. STEWART: Just a moment. I object to that as irrelevant and immaterial, and the witness having answered before my objection was made, I move to strike the answer.

THE COURT: The answer may be stricken merely for the purpose of permitting you to make your objection.

MR. STEWART: If your honor please, I understand that the plaintiff proposes to prove that some two or three months prior to the time that this particular theft is alleged, that Mr. Squires left his car at the garage and that it was not there, or he didn't get it when he came back for it, or possibly that it was stolen, and it is my position that such testimony is irrelevant and immaterial; that it would raise a wholly collateral issue that would have to be separately tried to determine whether or not in the Squires particular case that car was stolen under certain circumstances which might be negligent, and that such issue would be so collateral and immaterial as to inject into the case a matter entirely irrele-

vant, and if your honor wishes to take the time at present moment, I will be glad to discuss that question of law.

40 THE COURT: I am not aware of what the purpose is; I am not advised as to the purpose here. It is not at all apparent.

MR. NEBEKER: I think it is more orderly to ask the questions.

MR. STEWART: Well, I make my objection at this time to any testimony of this witness relative to a possible previous theft from the defendant garage, any such evidence being wholly irrelevant and immaterial and being an attempt to raise a wholly collateral issue that would have to be fully tried in order to determine whether or not it might possibly have any bearing upon this present case.

THE COURT: The objection may be overruled. If it is not material, it will be disregarded.

MR. STEWART: So that I may not renew my objection to each and every question that is asked, may it be stipulated and the court order that that objection go to each separate question asked by counsel?

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MR. NEBEKER: Yes.

41 A. On or about February 26, 1938, at about 6:30 or seven o'clock P. M. I delivered by automobile to the Covey Garage in Salt Lake City for storage and received a claim check. I returned to claim the car Sunday, February 27th about ten A. M., presented my claim check to the attendant, who did not deliver the car to me.

Q. What was done in your presence there with respect to attempting to locate your car?

MR. STEWART: I particularly object to any such testimony on the grounds already stated and for the further reason that it could have no bearing upon the present case.

THE COURT: Well, of course, it is not apparent yet. However, the objection may be overruled.

A. When I presented the claim check I told him the kind of car and the color.

MR. STEWART: We object to that as being hearsay and there being no foundation as to whom he told, or whether he told it to anybody that would make any such statement binding upon the defendant.

MR. NEBEKER: He is talking to the attendant at the garage.

A. And the man in charge, I told him that

MR. STEWART: Then I make the further objection that anything that might have been said or done by an attendant in charge would not be binding upon the defendant.

THE COURT: If it is in the nature of an admission, of course—

MR. NEBEKER: No; it won't be in the nature of an admission.

42 THE COURT: The objection will be overruled.

Q. You may state what was done.

A. This man in charge took me all through the garage in an effort to locate my car, and then he told me I couldn't claim it.

MR. STEWART: Just a moment. I object to anything he may have told him while taking him through the garage as not in any way binding, or there being no foundation to make that binding upon the defendant corporation.

THE COURT: \* \* \* The objection will be overruled.

Q. You may answer the question—continue with your answer.

A. (Answer read) I will have to correct that. I looked through the garage and the car couldn't be located. Then he told me the car had been stolen and referred me to the manager of the garage, and told me then that the car had been driven out.

43 MR. STEWART: Just a minute. Are you talking about the same conversation?

A. Yes, sir.

MR. STEWART: With the same attendant?

A. Same attendant and the manager, that the car had been driven out—

MR. STEWART: I take it that my objection goes to all of this?

MR. NEBEKER: Yes.

A. The night before about 11:50 and that it had not been located; that they didn't know

where it was; that they had reported it to the Police Department of Salt Lake City. My car was thereafter recovered. It was not damaged from appearances but mechanically.

### CROSS EXAMINATION

44 I don't know myself, except from such statements of the employees, how my car was stolen, or how the thieves got into the garage, or anything of that nature.

MR. STEWART: Now, at this time, your honor, we move to strike all of the testimony of Mr. Squires concerning an alleged taking of his car on the ground that such testimony is wholly irrelevant and immaterial, and purports to raise a wholly collateral, does in fact raise a wholly collateral matter, that the testimony does not show any, or disclose any facts as to an occurrence due to any negligence; it does not show a condition, which the defendant might or should have remedied in any way; it does not indicate any course of conduct, or a neglect to remedy any condition, or any negligence of any employee which would have any bearing or relationship to a subsequent theft of an automobile. It is unlike the case that counsel referred to where the testimony of prior occurrences in the mind indicated a negligent con-

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dition or a condition that was likely in the future to cause an accident.

THE COURT: The motion may be denied.

45 E. L. ROMNEY, the plaintiff herein, produced as a witness on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

I am the plaintiff in this action and reside in Logan, Utah. I delivered my car to the Covey Garage in Salt Lake for storage between ten and eleven o'clock in the evening on April 30, 1938. If you know exactly the time that the owl  
46 got in the wires and turned off part of the city lights, it was probably forty-five minutes after the lights came back on. I had taken my car there for storage many times on prior occasions. I got a claim check when I delivered the car and my best recollection is that plaintiff's Exhibit "B" is such claim check. I told them to fill it with gasoline. I left the car right in front of the north  
47 part of the entrance of the garage where the office was. I would say plaintiff's Exhibit "A" fairly represents the physical lay-out of the Covey Garage in Salt Lake City.

Plaintiff's Exhibits "A" and "B" were offered and received in evidence.

48 I left my keys in the car on this occasion and on all prior occasions when I parked my car there. It was the practice of the garage to have its own attendants park my car, drive it into the garage and place it in a certain position, and also when I returned to get my car, to bring it out. During all the time that I had parked my car there, I had on no occasion taken my car in myself and taken the keys out. It was a Saturday evening that I left my car there. The pedestrian traffic on the sidewalk in front of the garage at the time I delivered my car there was heavy. A number of people were parking cars in the garage and going to the dance; young ladies with party dresses on. After I left my car at the garage, I went to the Newhouse Hotel. About two A. M. Sunday the phone rang. It was someone from police headquarters. I got dressed and went over to the garage.

51 It was admitted by the defendant that the automobile was stolen and that the bailment was for hire.

MR. STEWART: I move at this time to strike all of the testimony of this witness on the ground that it is incompetent, irrelevant and immaterial and not within any issue properly raised by the pleadings. The pleadings affirmatively

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show that the car was stolen and this testimony in no way tends to establish any liability on the part of the defendant.

THE COURT: The motion may be denied.

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## CROSS EXAMINATION

I know garages storing automobiles usually tell you to leave the keys in the car, no matter what garage you go to. Whether I parked my car in the Covey Garage or elsewhere in the state or out of the state, they always had me leave my keys in the car, although I have put my car in some garages that I insisted taking my keys with me because I didn't have faith in the garage.

53

I have been acquainted with the Covey Garage for many years. I had a very fine hello acquaintance with every one of the boys working at the garage—a fine bunch of chaps. For several years

54

I have stored my car there many times at the garage. They have always given me a check stub similar to the one I received on this occasion.

55

STEEL REMINGTON, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION

I was working at the Covey Garage on the 30th of April, 1938. I recall the occasion the evening of April 30, 1938, and the circumstances surrounding the removal from the garage of Mr. Romney's car. I went on duty at one o'clock in the afternoon. I was not the attendant who received Mr. Romney's car when he took it in, but I saw it at the time it went into the garage. It was then between ten and eleven o'clock. Kenneth Jones, Ben Baxter, and myself were on duty at that time.

MR. STEWART: So there won't be any mistake in the record, I want it understood that my objection goes to all of this testimony, particularly for the reason that there is no allegation of negligence and particularly for the reason that the complaint affirmatively shows that plaintiff is not entitled to recover, and any testimony of this nature would be irrelevant and immaterial.

THE COURT: The objection may be overruled.

Our duties were taking and receiving and delivering cars and we also have the duties of servicing, such as gas and oil. In connection with the storage garage, we have a gasoline and oil busi-

ness and also an automobile laundry, but the laundry closes at six o'clock. The garage itself never closes. It is open day and night. We were not very busy between ten and eleven-thirty P. M. on April 30th. Referring to plaintiff's Exhibit "A", there are only two doors opening from the service platform in front of the garage into the storage portion of the garage. The opening appearing to the left of these two openings (looking at the picture) is the wash rack, but there are usually cars parked on it and it is not so anybody can get out of it with an automobile without moving some others. I don't recall just how the wash rack was on the evening of April 30th, but we usually put two beer trucks on that wash rack every night.

58 There are doors that close in front of the wash rack. I don't know whether these doors were closed between ten and eleven-thirty on the evening of April 30, 1938, nor do I know whether anything was parked on the wash rack. Our practice is to drive cars coming into the garage in the north entrance and out the south entrance. The garage faces east, so the north entrance or the one we usually drove the cars in would appear on the right hand side of the picture looking at the picture. I testified about these events I am talking about and was called as a witness in the case

59 of State vs. Bud Freeman. Whenever there is anybody going in the garage, we usually stop

them and ask what they want. We usually watch for them. I don't recall anybody particularly that went in between ten and eleven-thirty on this evening. It is our practice to not let them go in the garage without knowing where they are going unless we know the person. If we don't know the person we prevent them from going in. Occasionally someone starts in and we keep them from going in. I am familiar with the storage  
60 portion of the garage itself. Other than the entrances that are shown in this picture, Exhibit "A", there is a back door on the north side of the garage about three quarters of the way back. It was closed and locked between ten and eleven. The man who takes care of the mail trucks does that and we usually check him. I don't recall whether or not I checked it on the evening of April 30th. It is the duty of one of us to do it some time in the evening, but this is not assigned to any particular man. Except this back door I have mentioned, I don't know of any other entrance into the garage, except an entrance that goes through the garage and comes out on Fifth  
61 South, but that place is always locked up. Between this door and Fifth South, there is business in there. The door between the garage and this other place of business is always padlocked. I didn't check this door on the night of April 30th, but it stands to reason that it is always locked.

- 62 When the car belonging to Mr. Romney was driven out of the garage, I was standing over by the little office on the north side of the drive, either inside or standing right in the door. It was right close there. Kenneth Jones and Ben Baxter were with me. I don't remember just what position any of us were in. We were all standing there together talking. That is the little office that is shown on the right hand side of the picture west of the two gasoline pumps. All of that office is made of glass except the north side and that is the wall. I observed Mr. Romney's car as it was driven out of the garage. Two people were in the
- 63 front seat. I had not seen these two people or any other people while I was there that evening go into the garage. That evening there were about seventy-five cars stored on the lower floor of the garage. That pretty well fills the lower floor up. We usually put all our regular storage up on the top floor. There were about forty cars up there. It is our practice with all cars that are parked on the lower floor to ask the customer who stores the car to leave his keys in the car. Unless it is requested from the owner we leave the keys in
- 64 all the cars, except dead storage that is in there for a month or so. It is the custom for the attendants to drive the cars in and park them themselves, and then go and get them and bring them out. On the evening of April 30th, I don't recall

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that any cars were standing on what we call the service platform, just east of the front doors of the garage. There was a line of cars down on the south side. That is not at the entrance to the wash rack, but to the south of the wash rack. These cars would be just south of the runway into the wash rack. Between ten and eleven-  
65 thirty P. M. on April 30th, there were about four cars there, with their noses pointing to the south. The wash rack was usually closed for the appearance of the garage. Mr. Jones, Mr. Baxter and myself all had the same duties of selling gas  
66 and oil and parking and delivering cars. Mr. Jones came on duty about the same time I did and Mr. Baxter came on duty at ten o'clock P. M.

### CROSS EXAMINATION

With respect to the handling of the cars for people attending the dance at the Coconut Grove, the crowd brings the majority or the largest number of cars for storage to the garage between 8:30 and 10:30, and then they start coming to get their cars in leaving the dance about twelve  
67 o'clock, unless it is a big holiday. On this particular night, it was very quiet and we were not busy between about ten-thirty and twelve o'clock. There were three of us on duty when this car was taken out. which was between eleven and

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eleven-thirty P. M. The office is outside of the closing doors and about right in the center of the canopy between the sidewalk and the doors. It is not any part of the building that closes up, and from that office, which is glass on three sides, you have a clear view of the entire front of the garage and can see any corner of the whole garage. The doorway that is at the right side (looking at the picture) next to the office is the door where cars drive in and the other door, which is about one-third of the way from the left side of the picture, is the exit door, and the entrance or opening, not at the extreme left of the picture, but nearly to the left side is the wash rack, where I stated that at night we usually parked two beer trucks inside. The opening that appears to be an entrance at the extreme left edge of the picture is just a little sort of room that has a door in the back that is always kept locked and no one ever goes in it and it is not used as an exit or entrance. When this car was driven out, it was driven out the south or regular exit. In looking at the picture it is the one that is below the greasing sign. The rear entrance that is about two-thirds of the way towards the back of the garage on the north side, which I mentioned to Mr. Nebeker, is the entrance that the government uses to take its mail trucks in at night. The government employee usually takes

those trucks in between seven and ten. The last truck as a rule gets in at ten. The man who takes care of them has a key to that door, and he drives them in. He takes them from the outside and drives them through the door into the garage and then he comes right back and gets another one. We met cars that came into the front of the garage under the canopy usually right by the office or near the office and it is under the canopy that we give them their claim check and take possession of the cars and then when they came back with their claim check, one of us would go and get the car for them. At the time the car was driven out, myself and the other two employees were there at the front of the garage. When I first saw it, it was about ten feet on the inside of the south entrance. It hadn't even emerged from the entrance when I first saw it moving. There wasn't much that we could do until they got clear out on the service entrance platform. Then I went to my car and went in pursuit of the Romney car. As the Romney car came out I observed it almost instantly, and even before it got through the door. At no time within an hour prior to the taking of this car had I observed anybody enter the front of the garage at all. With respect to letting people in the garage, we had been instructed to find out where they were going and why, and in the event we should

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permit them to go in and we didn't know them, we usually went with them. The lavatory at this time was just inside the north entrance. It had been moved from the rear of the garage to the front of the garage, just inside the door, so that people would not have any occasion to go to the rear of the garage. I haven't the slightest idea how Freeman and whoever was with him got inside of the garage that night. We have all been wondering and speculating as to how he got in.

73

## REDIRECT EXAMINATION

74

The dark space that appears at the extreme left hand side of the picture as you face the picture is an entrance, but it is never used. It is kept locked all the time, but it has doors. See it is open here as shown in the picture, but it has sliding doors. At the time this picture was taken they were not shut. The picture shows them open. On dance nights, particularly, it is customary for a number of people to use the rest room at the garage. A lot of them who have no cars to park go in there and use the rest room. They don't come to us and ask if they can use the rest room, but we see where they are going before they go in there. We usually watched them to see where they went and watched them to see that they came back out. We observed in a

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75        general way as permitted by the other duties  
we had to do. The rest room is about ten feet  
inside the door.

76        The man I said who has a key to the door  
on the north side of the garage that takes the  
government cars in is an employee of the gov-  
ernment. I don't remember just what his name  
is. We used to call him Slim all the time. These  
mail trucks are left by the drivers on the out-  
side of the garage in the evening. Slim is not one  
of their drivers. He is a mechanic. He worked  
on the government cars in the evening in that  
part of the same building reserved for their trucks.  
I believe it was Ben Baxter that parked Mr.  
Romney's car on the evening of the 30th. I  
wouldn't say for sure. It was parked directly  
back or directly down the ramp from the south  
door facing east. It was about a hundred feet  
from the door to the car as parked.

## RECROSS EXAMINATION

77        The front part of the garage is about the  
street level. When you get toward the back end  
of the garage, you drop about four feet  
on a ramp to a lower floor. The car was parked  
on the west side of the lower floor at the west  
wall.

## REDIRECT EXAMINATION

We had a key to the door on the north side of the garage in addition to Slim, that is, the station has a key to it. This key is kept on the register. The people who rented that part of the building that faces on Fifth South had a key to the door that communicates between the garage proper and the sales floor that faces on Fifth South. If someone had a key, he could not come through from that portion of the building that faces on Fifth South into the garage proper, as he would come to a partition and the door is padlocked from the garage or the storage side. The padlock is on the inside of the Covey Garage.

KENNETH JONES was produced as a witness on behalf of plaintiff and was duly sworn.

It was stipulated that said witness would testify substantially the same as the witness Steel Remington. That he did not see the boys go into the garage, but that they all saw Freeman bringing it out, just about the time it came through the door before it got on the front platform.

MR. NEBEKER: With that I will not call the witness, and plaintiff rests.

MR. STEWART: At this time, if your honor please, I renew my objections heretofore made to the introduction of any evidence relating or that might have a tendency to relate to any question of negligence. And particularly I move to strike the testimony of Mr. Squires on the ground that it is entirely irrelevant and immaterial and raises a wholly collateral issue, there not being any evidence that would show a similarity of facts establishing a similarity of theft to that in this particular instance.

I move to strike all of the testimony of the witnesses Remington and Jones on the ground that it is not within any issues in the case, that it is not within any allegations of negligence and the complaint itself precludes the introduction of any evidence of negligence.

And at this time, if your honor please, I also move for a dismissal of this case,

First, for the reason that the complaint does not state a cause of action;

82           Second: For the reason that the complaint excuses a failure of delivery of the car by the defendant to the plaintiff because the plaintiff affirmatively alleges that the car was stolen, and

Tr. Page

does not allege any acts of negligence on the part of the defendant in permitting it to be so negligently stolen;

Also for the reason that there is no evidence of negligence, that is, assuming such negligence was pleaded on the part of the defendant, there being no showing that the defendant conducted or operated its garage in any manner other than the ordinary and usual manner of conducting garages in this particular part of the country, particularly in the vicinity of Salt Lake City, where garages are kept open for day and night storage.

18 Defendant's motion for non-suit and dismissal was argued and submitted and taken under advisement by the court, and the further trial of the case continued without date.

19-A Defendant's motion for a non-suit and dismissal was denied June 15, 1939.

85 (Monday, Oct. 9, 1939, 10 A. M. Court Reconvened.)

MR. STEWART: Your honor, so there will be no question about my record, I want to have the reporter note an exception to the court's denial of the motion for dismissal.

84 PAT ROZELL, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

I am thirty-one years of age and have been in the garage business approximately twelve years, and I am still operating in such business. My father has been operating in the business much longer than that, and I have worked with him since I was twenty years old. During that time I have managed or served as assistant manager at the Auto Ramp Garage, the Cullen Garage, and the North Temple Garage in Salt Lake City, and at one time, a garage in Pocatello, Idaho, so that during the twelve years I have been in  
85 the garage business, I have managed some three or four or more garages and during the past twelve years, I have also had occasion to visit numerous garages throughout the country. I am familiar, particularly in Salt Lake, and in the State of Utah, with the manner in which garages are operated, particularly those garages which cater to live storage, transient storage business and remain open both day and night. At the present time, I am manager of the Cullen Garage, which remains open day and night. I know what the practice is with respect to the garages that I am familiar with, and the way substantially all of the garages in this territory operate in the

86 matter of having the keys remain in the automobile stored. The practice is that the customer leaves the keys in the car when he leaves it there. Unless the customer insists that his car be locked, we would rather have them leave the keys in the car so that it can be moved, or in case of a fire or something, or some emergency that may come up, we want to move the car in a hurry, it is ready to go, and also for the purpose of facilitating the servicing of cars, checking tires, gas and matters of that kind. That is generally the practice, not only in this city, but every place I have been. With respect to the maintenance of employees at the garage, it is practically impossible to keep an attendant at the entrance at all times. There are things that come up and business to be taken care of that would take the employees away from the entrance.

87

It was stipulated that in the operation of garages such as the one here in question, that cater particularly to live storage and transient storage business, that ordinarily sufficient employees, both day and night, are maintained to handle the ordinary run of business by meeting the cars coming in at the front entrance, taking those cars back into the garage, parking them and coming back and meeting other cars that are arriving, and similarly when persons come

88 for their cars to the garage, to take the claim  
check, if it is a claim check storage, and go and  
get the car and bring it to the front of the garage  
and turn it over to the customer, subject to  
plaintiff's objection that such a stipulation was  
immaterial and irrelevant.

89 It was further stipulated that garage at-  
tendants of garages similarly situated, during the  
times when they are not busy handling cars, also  
attend to filling up gas tanks, greasing cars that  
the customers want to have greased and perform  
those ordinary duties in such a garage, particu-  
larly garages that do servicing in the way of oil-  
ing and greasing and cleaning and so on.

91 It was stipulated that on the night that  
plaintiff's car was stolen and at the hour of 9:19  
p. m. all of the lights in the city, including inside  
residence and business lights, as well as street  
lights, were out for a period of approximately  
five minutes, and that they first went out at  
9:19 p. m.

92 It was stipulated that the car was brought  
to the garage perhaps half or three-quarters of  
an hour after the lights were off.

It was stipulated that as soon as the car  
was driven out of the garage, that one of the

three employees of the garage immediately got into his car, took after the Romney car and chased it for some twenty or so blocks all up through the east part of town, and then back down somewhere near where the car was finally apprehended, or where the collision occurred between the Romney car driven by Freeman and another car, resulting in the crash.

93           THERON COVEY, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

94           At the time of the theft I was manager and part owner of the Covey Garage. At the time the Romney car was stolen, there was a large sign inside of the garage at or near the north entrance stating that the garage was not responsible for loss by fire and theft.

Defendant rested.

96           That at the conclusion of all of the evidence, and on the 9th day of October, 1939, said cause was orally argued to the court, who took the same under advisement until the 14th day of November, 1939, when a decision was entered in favor of the plaintiff and against the defendant. That thereafter plaintiff made application to amend the prayer of his complaint to ask for the allowance

of interest. That defendant appeared, through his counsel, and made objection to such proposed amendment, which objection was denied and the amendment allowed. That thereafter plaintiff served and presented proposed findings of fact, conclusions of law and judgment to which proposals written objections were duly filed by defendant and defendant served and presented to the court proposed findings of fact and conclusions of law. That thereafter and on the 29th day of December, 1939, the defendant's objections to said proposed findings of fact and conclusions of law were duly argued and presented to the court and defendant's proposed findings of fact and conclusions of law were duly presented and on the 29th day of December, 1939, the court overruled and denied the objections of the defendant and refused to sign and file defendant's proposed findings of fact and conclusions of law, and on the 29th day of December, 1939, signed findings of fact, conclusions of law and judgment.

30           Thereafter and within the time allowed by law, and on the 30th day of December, 1939, an order was duly made and entered herein granting to the defendant to and including the 1st day of March, 1940, in which to prepare, serve, and file its bill of exceptions herein.

## CERTIFICATE OF THE COURT

STATE OF UTAH }  
COUNTY OF SALT LAKE } ss.

I, the undersigned, P. C. Evans, the judge before whom the above entitled cause was tried, do hereby certify that the foregoing Bill of Exceptions, consisting of pages 1 to 66 inclusive, contains all of the evidence, both oral and documentary, offered and received in said cause, including all exhibits, which said exhibits and documentary evidence when not attached or contained in the transcript of evidence are treated and considered as attached and a part of the Bill of Exceptions, and said proposed Bill of Exceptions contains all objections made, rulings of the Court, and exceptions taken and all proceedings in the trial of said cause, and the parties having stipulated that the same may be settled and filed as the defendant's bill of exceptions herein;

99 NOW, THEREFORE, the same is hereby settled, allowed, and approved as and for the bill of exceptions in the above entitled cause insofar as the same do not otherwise appear in the judgment roll or on record.

Dated this 29th day of February, 1940.

P. C. EVANS

*Judge*

## ORDER

On motion of Bagley, Judd, Ray & Nebeker,  
and good cause appearing therefore,

It is hereby ORDERED that the plaintiff  
may amend the prayer of his complaint to read  
as follows:

WHEREFORE, plaintiff prays judgment  
against the defendant for the sum of  
\$900.00, together with costs of court  
herein incurred and together with in-  
terest at the rate of 6% from April  
30, 1938 to the date of judgment.

Dated this 1st day of December, 1939.

P. C. EVANS,  
*Judge*

Receipt of a copy of the foregoing order  
acknowledged this 29th day of November, 1939  
and hereby consent that plaintiff's motion to  
amend the prayer of his complaint may be heard  
by the court and ruled upon without notice.

STEWART, STEWART & PARKINSON  
*Attorneys for Defendant*  
COVEY GARAGE.

Filed Dec. 1, 1939.

(Title of Court and Cause)

FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW

The above entitled action came on for trial before this court on April 19, 1939 and on October 9, 1939. The plaintiff, E. L. Romney, was represented by A. H. Nebeker of Bagley, Judd, Ray and Nebeker, and the defendant, Covey Garage, was represented by Ralph T. Stewart of Stewart, Stewart and Carter. The plaintiff introduced evidence in support of his complaint and the defendant introduced evidence in support of its answer and both parties rested. The cause being submitted and the court being fully advised now makes and enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. That defendant, Covey Garage, is a corporation organized and existing under the laws of the State of Utah with its principal place of business in Salt Lake City, Utah, and is and at all times herein mentioned was engaged in the business of operating a public garage and accepting cars for storage and safekeeping for a consideration.

25        2. That on April 30, 1938 the plaintiff was the owner of a certain Buick automobile; that between 10 and 11 o'clock P. M. the plaintiff took said automobile to the defendant's garage in Salt Lake City and delivered said automobile to said defendant and entered into a contract of storage and bailment with said defendant and the defendant agreed for a valuable consideration received by it, to store said automobile and use reasonable care to safely and securely keep said automobile and to return it to the plaintiff in the same condition it was in when received by said defendant.

3. That the defendant negligently and carelessly failed to safely and securely keep said automobile and carelessly and negligently permitted said car to be taken and stolen from said garage by Albert Freeman and Brady Wayne Poulsen without the consent or authority or permission of the plaintiff.

4. That as the proximate result of the negligence of the defendant and while said automobile was in the possession of Freeman and Poulsen it was wrecked and damaged and the plaintiff sustained loss resulting therefrom in the sum of \$715.00 together with interest thereon as provided by law.

5. That the plaintiff is the real party in interest in this proceeding and has legal capacity to sue on account of the claim alleged in his complaint.

6. That American Equitable Assurance Company has no claim against Covey Garage resulting from the damage to said automobile.

From the foregoing findings of fact the court makes the following

### CONCLUSIONS OF LAW

1. That plaintiff is entitled to judgment against the defendant for \$715.00 together with interest thereon at 6% per annum from April 30, 1938 to the date of judgment and together with his costs of court herein expended.

2. That said judgment provide that the American Equitable Assurance Company has no claim against Covey Garage on account of the damage to plaintiff's automobile.

Dated December 29, 1939.

P. C. EVANS

*Judge*

## JUDGMENT

The above entitled cause came on for trial before this court on April 19, 1939 and on October 9, 1939. The plaintiff E. L. Romney was represented by A. H. Nebeker of Bagley, Judd, Ray and Nebeker, and the defendant Covey Garage was represented by Ralph T. Stewart of Stewart, Stewart and Carter. The plaintiff having introduced evidence in support of his complaint and the defendant having introduced evidence in support of its answer and both parties having rested and the court having heretofore made and entered its findings of fact and conclusions of law,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, E. L. Romney, have and recover from the defendant, Covey Garage, the sum of \$715.00 together with interest thereon at 6% per annum from April 30, 1938 to December 29, 1939 in the sum of \$71.35 and together with costs of court herein expended.

That the American Equitable Assurance Company take nothing from the defendant, Covey Garage.

Dated this 29th day of December, 1939.

P. C. EVANS

*Judge*

Filed Dec. 29. 1939.

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99            Within the time allowed by law and the order of the court, defendant's bill of exceptions, containing all of the evidence both oral and documentary and proceedings in the trial was duly settled.

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(Title of Court and Cause)

31

## NOTICE OF APPEAL

TO THE PLAINTIFF ABOVE NAMED AND TO AMERICAN EQUITABLE ASSURANCE COMPANY, A CORPORATION, AND JUDD, RAY, QUINNEY, & NEBEKER, THEIR ATTORNEYS:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that Covey Garage, a corporation, defendant herein, hereby appeals to the Supreme Court of the State of Utah, from the decision of the court and judgment entered thereon

on the 29th day of December, 1939, and from the whole thereof.

This appeal is taken on both questions of law and fact.

Dated this 29th day of February, 1940.

STEWART, STEWART & PARKINSON  
EDWIN B. CANNON

*Attorneys for Defendant, Covey  
Garage, a corporation*

Filed March 4, 1940.

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(Title of Court and Cause)

## STIPULATION

Comes now the plaintiff by his attorneys and hereby stipulates that the filing of a statutory cost bond on appeal herein and of a supersedeas bond on appeal is hereby waived and that the defendant, Covey Garage, a corporation, may proceed on appeal with like effect as though such undertakings were filed in accordance with the statute.

It is further stipulated that pending final disposition of the appeal that execution against said defendant may be stayed.

Dated this 29th day of January, 1940.

JUDD, RAY, QUINNEY & NEBEKER  
*Attorneys for Plaintiff*

Filed March 5, 1940.

No. 6243

IN THE SUPREME COURT OF THE STATE  
OF UTAH

E. L. ROMNEY,  
*Plaintiff and Respondent*

-vs-

COVEY GARAGE, a corporation,  
*Defendant and Appellant.*  
AMERICAN EQUITABLE AS-  
SURANCE COMPANY, a cor-  
poration,  
*Interpleaded Defendant  
and Respondent.*

ASSIGNMENTS  
OF ERROR

Comes now the appellant, Covey Garage, a corporation, and upon the record heretofore transmitted to and filed in this court pursuant to the appeal herein, assigns the following errors upon which it will rely for a reversal of the decision and final judgment of the court entered on the 29th day of December, 1939.

## I.

The court erred in overruling defendant's demurrer to plaintiff's complaint on each and every ground set forth in said demurrer. (Tr. 8, 9; Ab. 5).

## II.

The court erred in overruling defendant's objection to the introduction of any evidence raised prior to the introduction of any evidence (Tr. 37-38; Ab. 11-12), during the course of the trial (Tr. 51, 56; Ab. 20, 22), and prior to final submission of the case. (Tr. 81, Ab. 32), and which objection was based on the insufficiency of plaintiff's complaint.

## III.

The court erred in overruling defendant's motion to strike all the testimony of the witness, E. L. Romney, as follows:

"MR. STEWART: I move at this time to strike all of the testimony of this witness on the ground that it is incompetent, irrelevant and immaterial and not within any issue properly raised by the pleadings. The pleadings affirmatively show that the car was stolen and this testimony in no way tends to establish any liability on the part of the defendant.

"THE COURT: The motion may be denied." (Tr. 51, Ab. 20).

#### IV.

The court erred in overruling defendant's motion to strike all of the testimony of the witnesses Remington and Jones, which motion was as follows:

"MR. STEWART: \* \* \* I move to strike all of the testimony of the witnesses Remington and Jones on the ground that it is not within any issues in the case, that it is not within any allegations of negligence and the complaint itself precludes the introduction of any evidence of negligence." (Tr. 81, Ab. 32).

#### V.

The court erred in overruling defendant's objection to the examination of the witness, C. B. Squires, as follows:

"MR. STEWART: If your honor please, I understand that the plaintiff proposes to prove that some two or three months prior to the time that this particular theft is alleged, that Mr. Squires left his car at the garage and that it was not there, or he didn't get it when he came back for it, or possibly that it was stolen, and it is my position that such testimony is irrelevant and immaterial; that it would

raise a wholly collateral issue that would have to be separately tried to determine whether or not in the Squires particular case that car was stolen under certain circumstances which might be negligent, and that such issue would be so collateral and immaterial as to inject into the case a matter entirely irrelevant, and if your honor wishes to take the time at present moment, I will be glad to discuss that question of law. \* \* \* I make my objection at this time to any testimony of this witness relative to a possible previous theft from the defendant garage, any such evidence being wholly irrelevant and immaterial and being an attempt to raise a wholly collateral issue that would have to be fully tried in order to determine whether or not it might possibly have any bearing upon this present case.

“THE COURT: The objection may be overruled.” (Tr. 39-40, Ab. 13-14).

## VI.

The court erred in overruling defendant's objection to the examination of the witness, C. B. Squires, as follows:

“Q. What was done in your presence there with respect to attempting to locate your car?

“A. When I presented the claim check I told him the kind of car and the color.

"MR. STEWART: We object to that as being hearsay and there being no foundation as to whom he told, or whether he told it to anybody that would make any such statement binding upon the defendant.

"MR. NEBEKER: He is talking to the attendant at the garage.

"A. And the man in charge, I told him that.

"MR. STEWART: Then I make the further objection that anything that might have been said or done by an attendant in charge would not be binding upon the defendant.

"THE COURT: If it is in the nature of an admission, of course—

"MR. NEBEKER: No; it won't be in the nature of an admission.

"THE COURT: The objection will be overruled.

"Q. You may state what was done.

"A. This man in charge took me all through the garage in an effort to locate my car, and then he told me I couldn't claim it.

"MR. STEWART: Just a moment. I object to anything he may have told him while taking him through the garage as not in any way binding, or there being no foundation to make that binding upon the defendant corporation. \* \* \*

"THE COURT: The objection will be overruled. You may answer the question—continue with your answer.

"A. (Answer read) I will have to correct that. I looked through the garage and the car couldn't be located. Then he told me the car had been stolen and referred me to the manager of the garage, and told me then that the car had been driven out.

"MR. STEWART: Just a minute. Are you talking about the same conversation?

"A. Yes, sir.

"MR. STEWART: With the same attendant?

"A. Same attendant and the manager, that the car had been driven out—

"MR. STEWART: I take it that my objection goes to all of this?

"MR. NEBEKER: Yes.

"A. The night before about 11:50 and that it had not been located; that they didn't know where it was; that they had reported it to the Police Department of Salt Lake City." (Tr. 41, 42, 43; Ab. 15, 18).

## VII.

The court erred in denying defendant's motion to strike all of the testimony of the witness, C. B. Squires, which motion was urged at the conclusion of the testimony of said witness, as follows:

"MR. STEWART: Now, at this time, your honor, we move to strike all of the testimony of Mr. Squires concerning an alleged taking of his car on the ground that such testimony is wholly irrelevant and immaterial, and purports to raise a wholly collateral, does in fact raise a wholly collateral matter; that the testimony does not show any, or disclose any facts as to an occurrence due to any negligence; it does not show a condition, which the defendant might or should have remedied in any way; it does not indicate any course of conduct, or a neglect to remedy any condition, or any negligence of any employee which would have any bearing or relationship to a subsequent theft of an automobile. It is unlike the case that counsel referred to where the testimony of prior occurrences in the mind indicated a negligent condition or a condition that was likely in the future to cause an accident.

"THE COURT: The motion may be denied. \* \* \*" (Tr. 44, Ab. 18).

and prior to final submission of the case as follows:

"MR. STEWART: \* \* \* Particularly I move to strike the testimony of Mr. Squires on the ground that it is entirely irrelevant and immaterial and raises a wholly collateral issue, there not being any evidence that would show a similarity of facts establishing a similarity of theft to that in this particular instance." (Tr. 81, Ab. 32).

### VIII.

The court erred in overruling defendant's motion for a non-suit or dismissal at the conclusion of plaintiff's evidence for the reason that plaintiff's complaint was insufficient and that there was no evidence of any act of negligence on the part of defendant, nor evidence of any act of negligence on the part of defendant which was the proximate cause of the damage to plaintiff's automobile. (Tr. 19-A, Ab. 33).

### IX.

The decision of the court is contrary to and against the law in that plaintiff's complaint is insufficient, and there is no evidence of any act of negligence on the part of defendant, nor evidence of any act of negligence on the part of

defendant which was the proximate cause of the damage to plaintiff's automobile. (Tr. 25, 26; Ab. 43, 44).

#### X.

That the evidence is insufficient to sustain the findings of fact numbered three and four, in that there is no evidence of any negligence on the part of defendant, nor any evidence of any negligence on the part of defendant which was the proximate cause of the damage to plaintiff's automobile. (Tr. 25, Ab. 42).

#### XI.

That the findings of fact are insufficient to sustain conclusion of law No. 1, and the judgment, in that there is no finding of any specific negligence on the part of defendant, nor any finding of any negligence on the part of defendant which was the proximate cause of the damage to plaintiff's automobile. (Tr. 25, 26; Ab. 42-44).

#### XII.

The court erred in permitting over defendant's objection plaintiff to amend his complaint subsequent to the trial, and after a decision had been entered in favor of plaintiff against defendant to ask for the allowance of interest. (Tr. 23, 96; Ab. 37-38, 40).

## XIII.

The court erred in making its findings of fact Nos. 5 and 6 as follows, to-wit:

"5. That the plaintiff is the real party in interest in this proceeding and has legal capacity to sue on account of the claim alleged in his complaint.

"6. That American Equitable Assurance Company has no claim against Covey Garage resulting from the damage to said automobile." (Tr. 25, Ab. 43).

## XIV.

The court erred in making and entering its conclusion of law No. 2, as follows:

"2. That said judgment provide that the American Equitable Assurance Company has no claim against Covey Garage on account of the damage to plaintiff's automobile." (Tr. 25, Ab. 43).

## XV.

That the findings of fact are not supported by the evidence. (Tr. 24, 25; Ab. 41-43).

## XVI.

That the judgment is not supported by, and is contrary to the evidence. (Tr. 26, Ab. 44).

## XVII.

That the evidence and findings of fact do not support the conclusion of law. (Tr. 25, Ab. 43).

## XVIII.

That the judgment is not supported by the findings of fact. (Tr. 26, Ab. 44).

## XIX.

That the judgment is contrary to and against the law. (Tr. 26, Ab. 44).

WHEREFORE, appellant prays that the decision and judgment of the District Court herein be reversed and that said court be instructed and directed to make findings of fact, conclusions of law and judgment in accordance with the evidence and the law.

STEWART, STEWART & PARKINSON  
EDWIN B. CANNON

*Attorneys for Defendant and  
Appellant*

Received copy of the foregoing Assignments  
of Error this 5th day of April, 1940.

JUDD, RAY, QUINNEY, & NEBEKER  
*Attorneys for Plaintiff and  
Respondent*

JUDD, RAY QUINNEY, & NEBEKER  
*Attorneys for American Equitable  
Assurance Company, a corporation,  
Interpleaded Defendant and  
Respondent.*

Filed ....., 1940. -