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Notice of Appeal.

Served—Dec. 31, 1918.

Filed—Jan. 2, 1919.

New Jersey Supreme Court.

JACOB KATCHER,
Plaintiff-appellee,

VS.

AMERICAN EXPRESS COMPANY,
Defendant-appellant.

On Appeal from First 10
District Court of
the City of Newark.

NOTICE OF APPEAL.

To PHILIP J. SCHOTLAND, Esq.,
Attorney of Plaintiff-appellee:

20

SIR:

PLEASE TAKE NOTICE that the defendant-appellant in the above stated cause, hereby appeals from the whole of the judgment entered therein to the New Jersey Court of Errors and Appeals in the last resort in all causes.

Dated, December 30, 1918.

LINDABURY, DEPUE & FAULKS,
Attorneys of Defendant-appellant.

30

40

Grounds of Appeal.

Served—Jan. 24, 1919.

Filed—Jan. 25, 1919.

10 NEW JERSEY COURT OF ERRORS AND
APPEALS.

JACOB KATCHER,
Plaintiff-Appellee,

v.

20 AMERICAN EXPRESS COMPANY,
Defendant-Appellant.

On Appeal from
the Supreme
Court

Grounds of
Appeal.

The appellant states the following grounds of appeal:

1. The Supreme Court sustained the action of the trial court in denying the appellant's motion for non-suit, which motion was based upon the ground that the appellee had failed to prove the contract alleged in the state of demand.

30

2. The Supreme Court sustained the finding of the trial court that appellant agreed to deliver the rubles sold to appellee, to one Pese Kazsur, the person named by appellee, which finding was not supported by any evidence.

3. The Supreme Court sustained the construction placed upon the contract between appellant and appellee, by which construction the appellant was
40 obligated to deliver the rubles purchased by appellee,

Grounds of Appeal.

whereas the undisputed evidence showed that said contract was a contract to remit said rubles to the person named by the appellee, through the Russian Post Office, and in accordance with the rules and regulations of said post office.

4. The Supreme Court sustained the action of the trial court in denying the application of appellant to take the deposition of R. Jacobsen, which denial was based upon the ground that the questions which appellant proposed to ask said R. Jacobsen were irrelevant and immaterial. 10

5. The Supreme Court sustained the action of the trial court in overruling the tender of proof made by appellant of the facts proposed to be proven by R. Jacobsen, which tender was made by appellant and permitted by said trial court to the same effect as though a witness competent to answer the questions annexed to the notice of application to take the deposition of said R. Jacobsen, and each of them, had been sworn in behalf of appellant and each of said questions had been asked and overruled by the court as immaterial and exception duly taken. 20

6. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial: 30

“Did the American Express Company have a credit with your Bank on September 13, 1917?”

7. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“If so, for what amount?”

Grounds of Appeal.

8. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

10 “On September 13, 1917, or thereabouts, did you receive instructions from the American Express Company to remit one thousand rubles to one Pete Kaczur, at Berezhnica, Luck Wolyn?”

9. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“If such instructions were received on any other day than September 13, 1917, state the date on which they were received?”

20 10. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“How did you receive these instructions? by cable, mail, telegraph or otherwise?”

11. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

30 “If you received them by mail, cable, telegraph or in any other written form, have you the original message?”

12. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

40 “If you have not the original message explain why it is impossible to produce it?”

Grounds of Appeal.

13. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“ If you have the original message please produce it and read its contents or such part thereof as gives directions with reference to the remission of rubles to Pete Kaczur.” 10

14. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“ If you have not the original message, have you a copy of it?” 20

15. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“ If you have neither the original nor a copy of the message, and have explained why it cannot be produced, state what instructions it contained as to the transmission of rubles to Pete Kaczur?” 30

16. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“ After this message was received by your Bank what was done in order to carry out the instructions and when was it done?” 40

Grounds of Appeal.

17. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

10 “ In what manner was the transaction entered upon the books of your Bank when these instructions were received?”

18. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

20 “ Did your bank send to Pete Kaczur the sum of one thousand rubles as directed by the American Express Company?”

19. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“ In what manner were the rubles sent?”

20. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

30 “ Were they sent in specie, by check, money order, draft or otherwise?”

21. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

40 “ If they were sent, do you know whether they were received by Pete Kaczur?”

Grounds of Appeal.

22. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“ Were they received by him?”

10

23. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“ If they were not received by Pete Kaczur how do you know that fact?”

24. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“ If they were not received by Pete Kaczur, were they returned to you?”

25. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“ If you were unable to send the one thousand rubles as instructed explain why? (in detail).”

30

26. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

“ If you were unable to send them, was your inability due to any of the rules or regulations of the Russian Post Office through which they would have to be sent?”

40

Grounds of Appeal.

27. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

10 “ Was the Russian Post Office accepting rubles for remittance to Berczhnica, Luck Wolyn at the time you received instructions from the American Express Company to remit one thousand rubles to Pete Kaczur?”

28. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

20 “ Are you familiar with the rules and regulations of the Russian Post Office through which these rubles would have to be sent which were in effect at the time you received these instructions from the American Express Company?”

29. The Supreme Court sustained the action of the trial court in overruling the following question, upon the ground that such question was immaterial:

 “ What particular rules or regulations prevented your Bank from sending these rubles to Pete Kaczur?”

30 30. The Supreme Court sustained the action of the trial court in declining to make the following finding of fact, numbered 1, requested by appellant, although the uncontradicted evidence in the case supported such finding of fact:

40 “ That the plaintiff purchased from the defendant its agent, a credit available in Russia for one thousand rubles, and that the defendant agreed to remit through its Russian correspondent, the sum of one thousand rubles to Pete

Grounds of Appeal.

Kaczur at Berezhnica, Luck Woln, said remittance to be made by postal money order obtained from the Russian post-office at Petrograd, Russia, and sent by mail through the Russian post-office to said Pete Kaczur at Berezhnica, Luck Wolyn."

31. The Supreme Court sustained the action of 10 the trial court in declining to make the following finding of fact, numbered 2, requested by appellant, although the uncontradicted evidence in the case supported such finding of fact:

"That the agreement made by the defendant to remit one thousand rubles to Pete Kaczur, was made subject to the rules and regulations of the Russian post-office."

32. The Supreme Court sustained the action of 20 the trial court in declining to make the following finding of fact, numbered 4, requested by appellant, although the uncontradicted evidence in the case supported such finding of fact:

"That the usual and ordinary method of making a cable remittance of money from the United States to Russia is as follows:

The remittur purchases a credit for rubles available in Russia, paying therefor the price 30 fixed by the seller. The seller undertakes to remit through his correspondent in Russia, the amount of rubles represented by the credit purchased by the remitter, to the person named by the remitter at the address given. This remittance is accomplished by means of a communication sent by cable from the seller to the correspondent in Russia, instructing him to make the remittance as above stated. Upon the receipt of this communication, the Russian cor- 40

Grounds of Appeal.

respondent purchases a money order at the Russian post-office and mails the same, postage prepaid, to the person designated by the remitter at the address given."

10 33. The Supreme Court sustained the action of the trial court in declining to make the following finding of fact, numbered 6, requested by appellant, although the uncontradicted evidence in the case supported such finding of fact:

"There is no evidence in the case which will support the inference that the defendant failed in any way to make the remittance of one thousand rubles to Pete Kaczur at Berezhnica Luck Wolyn, in accordance with its contract."

20 34. The Supreme Court sustained the action of the trial court in declining to make the following finding of law requested by the appellant, numbered 1:

"The sale by the defendant to the plaintiff of a credit for one thousand rubles available in Russia, was a completed transaction on the date the receipt was issued by the defendant under which the plaintiff became the owner of the credit in Russia and the defendant became the owner of the money paid for such credit."

30

35. The Supreme Court sustained the action of the trial court in declining to make the following finding of law requested by the appellant, numbered 2:

"The defendant's agreement to remit the rubles represented by the credit, cannot be construed to obligate the defendant to deliver such rubles. The only duty of the defendant was to remit in accordance with the usual practice

40

Grounds of Appeal.

covering the remittance of money by cable from the eastern part of the United States to Russia."

36. The Supreme Court sustained the action of the trial court in declining to make the following finding of law requested by the appellant, numbered 3:

"If the defendant's Russian correspondent, upon the receipt in due course of the cable message advising him to make the remittance to Pete Kaczur, purchased a money order for said one thousand rubles at the Russian post-office, enclosed the same in an envelope with postage prepaid, addressed to Pete Kaczur at the address given, this constituted a remittance of the money in the manner contemplated by the contract, whether or not Pete Kaczur ever received the money order."

37. The Supreme Court sustained the action of the trial court in declining to make the following finding of law requested by the appellant, numbered 4:

"If, after the Russian postal money order had been sent by the defendant's Russian correspondent to Pete Kaczur at the address given, it was returned by the post-office authorities to the defendant's Russian correspondent as undeliverable, it became the duty of the defendant to hold to the plaintiff's account and subject to his order, the credit purchased by him for one thousand rubles or at the plaintiff's request to return to the plaintiff the equivalent of the said credit in American money."

38. The Supreme Court sustained the action of the trial court in declining to make the following

Grounds of Appeal.

finding of law requested by the appellant, numbered 5:

10 “ The purchase of a credit available in Russia for one thousand rubles was complete when made, and if, because of a depreciation of rubles pending the time which elapsed between the time of purchase and the return of the same to the defendant’s correspondent as undeliverable, said credit became of less value when measured in terms of American money than the sum paid therefor by plaintiff, the loss occasioned by such depreciation upon the re-conversion of such credit into American money must be borne by the plaintiff.”

20 39. The Supreme Court sustained the action of the trial court in declining to make the findings of fact, numbered 1, 2, 4 and 6 inclusive, requested by appellant, although the uncontradicted evidence in the case supported such findings of fact.

40. The Supreme Court sustained the action of the trial court in declining to make the findings of law requested by the appellant, numbered 1 to 5 inclusive.

LINDABURY, DEPUE & FAULKS,
Attorneys of appellant.

30

40

State of Demand.

(Filed April 26/18.)

First District Court of the City of Newark. 10

JACOB KATCHER, Plaintiff	}	On Contract.
vs.		STATE OF DEMAND.
AMERICAN EXPRESS COMPANY, a corporation of New Jersey, Defendant.	}	20

The Plaintiff demands of the Defendant the sum of Four hundred dollars, for that, on the Eighth day of September, 1917, plaintiff delivered to the defendant the sum of One hundred and ninety-four dollars and fifty cents, which the defendant undertook to deliver to Tese Kaczier at Baveznica Lucking Wolyack, Russia. And for that, the Defendant has not delivered said money as it undertook to do, and although often so requested, has refused to return said money to the plaintiff. 30

Judgment will be asked for the sum of One hundred and ninety-four dollars and fifty cents, together with lawful interest from September 8, 1917, and the costs of this suit to be taxed.

PHILIP J. SCHOTLAND
Attorney for Plaintiff. 40

Notice.

(Ack'd June 13/18.)

FIRST DISTRICT COURT OF THE CITY OF
NEWARK.

10	JACOB KATCHER, Plaintiff, vs. AMERICAN EXPRESS COMPANY, a corporation of New Jersey, Defendant.	}	Notice.
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To PHILIP J. SCHOTLAND, Esq.,
 Attorney of Plaintiff.

20 SIR:

TAKE NOTICE that we shall apply to the First District Court of the City of Newark, at the City Hall, on Friday, the 21st day of June, 1918, at 10 o'clock in the forenoon or as soon thereafter as the Court can attend to the same for a commission to examine R. Jacobsen, a material witness in this action who resides in the City of Petrograd, in the Country of Russia, and the defendant intends to nominate
 30 Roger C. Tredwell, American Consul at Petrograd, as the commissioner to whom the said commission shall be directed. Annexed hereto and marked Schedule "A" is a copy of the interrogatories intended to be annexed to said commission on the part of the defendant.

Yours respectfully,

LINDABURY, DEPUE & FAULKS,
 Attorneys for Defendant.

40 Dated, June 12th, 1918.

Notice—Schedule “ A ”.

Schedule “ A ”.

FIRST DISTRICT COURT OF THE CITY OF
NEWARK.

<p style="text-align: center;">JACOB KATCHER, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">AMERICAN EXPRESS COMPANY, a corporation of New Jersey, Defendant.</p>	}	<p>Interrogatories to be Propounded to R. Jacobsen.</p>	10
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1. Where do you reside?
2. Are you connected with the Russo-Asiatic Bank? 20
3. If so, in what capacity?
4. As such have you anything to do with the remission of money or credit from America to Russia?
5. Did the American Express Company have a credit with your Bank on September 13, 1917?
6. If so, for what amount?
7. On September 13, 1917, or thereabouts, did you receive instructions from the American Express Company to remit one thousand rubles to one Pete Kaczur, at Berezhnica, Luck Wolyn? 30
8. If such instructions were received on any other day than September 13, 1917, state the date on which they were received?
9. How did you receive these instructions? by cable, mail, telegraph or otherwise?
10. If you received them by mail, cable, telegraph or in any other written form, have you the original message?
11. If you have not the original message explain why it is impossible to produce it? 40

Notice—Schedule "A".

12. If you have the original message please produce it and read its contents or such part thereof as gives directions with reference to the remission of rubles to Pete Kaczur.

13. If you have not the original message, have you a copy of it?

14. If you have neither the original nor a copy of the message, and have explained why it cannot be
10 produced, state what instructions it contained as to the transmission of rubles to Pete Kaczur?

15. After this message was received by your Bank what was done in order to carry out the instructions and when was it done?

16. In what manner was the transaction entered upon the books of your Bank when these instructions were received?

17. Did your bank send to Pete Kaczur the sum of one thousand rubles as directed by the American
20 Express Company?

18. In what manner were the rubles sent?

19. Were they sent in specie, by check, money order, draft or otherwise?

20. If they were sent, do you know whether they were received by Pete Kaczur?

21. Were they received by him?

22. If they were not received by Pete Kaczur how do you know that fact?

23. If they were not received by Pete Kaczur,
30 were they returned to you?

24. If you were unable to send the one thousand rubles as instructed explain why? (in detail)

25. If you were unable to send them, was your inability due to any of the rules or regulations of the Russian Post Office through which they would have to be sent?

26. Was the Russian Post Office accepting rubles for remittance to Berczhnica, Luck Wolyn at the
40 time you received instructions from the American

Affidavit for Commission.

Express Company to remit one thousand rubles to Pete Kaczur?

27. Are you familiar with the rules and regulations of the Russian Post Office through which these rubles would have to be sent which were in effect at the time you received these instructions from the American Express Company?

28. What particular rules or regulations prevented your Bank from sending these rubles to Pete Kaczur? 10

Affidavit for Commission.

(Filed .)

FIRST DISTRICT COURT OF THE CITY OF
NEWARK.

<p style="text-align: center;">JACOB KATCHER, Plaintiff, vs. AMERICAN EXPRESS COMPANY, Defendant.</p>	}	<p style="text-align: center;">On Contract 20 AFFIDAVIT FOR COMMISSION</p>
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STATE OF NEW JERSEY }
County of Essex } ss.:

JOSIAH STRYKER, of full age being duly sworn according to law on his oath says: I am a member of 30
the firm of Lindabury, Depue & Faulks, attorneys for the defendant in the above entitled cause. I have been in charge of the preparation of the defense of the said action and have advised the defendant that R. Jacobsen, who resides in Petrograd, Russia, is a material witness for such defense and that it cannot safely go to trial without his testimony. In September, 1917, the said R. Jacobsen was manager of the foreign money order department of the Russo-Asiatic Bank, agent of the de- 40

Affidavit for Commission.

fendant at Petrograd, Russia, through which it
 made remittances to persons in Russia. In this ca-
 pacity the said R. Jacobsen had charge of the re-
 mittance of 1000 rubles to Pete Katcher under
 instructions from the defendant herein and to the
 best of my knowledge and belief is the person who
 knows whether or not the cablegram sent by de-
 fendant to the Russo-Asiatic Bank instructing said
 Bank to remit 1000 rubles to Pete Katcher was re-
 10 ceived by said Bank and whether or not such remit-
 tance was made in accordance with said instructions,
 and if such remittance was not made what steps if
 any were taken by said Bank in compliance with
 said instructions and further if said remittance was
 not made whether or not said Bank was unable to
 make said remittance because of the fact that the
 Russian Post Office was at the time of the receipt of
 said instructions by said Bank or subsequent thereto
 accepting rubles for remittance to Berezhnica, Luck
 20 Wolyn, and whether or not any rule or regulation
 in force at said time in the Russian Post Office pre-
 vented the remittance of said rubles in accordance
 with said instructions and whether or not the Rus-
 sian Postal Department was operating in Berezhnica,
 Luck Wolyn at the time of the receipt of said in-
 structions by said Bank or subsequent thereto and
 whether or not said Postal Department was accept-
 ing mail at Petrograd for delivery in Berezhnica,
 Luck Wolyn at said time or subsequent thereto.

30 The defendant cannot secure the attendance of
 the said witness at the trial of this cause because he
 is a non-resident of this State and country and de-
 fendant desires that a commission be issued to take
 his testimony.

JOSIAH STRYKER

Subscribed and sworn to be-
 fore me this 21st day of }
 June, A. D. 1918.

G. L. FERGUSON

Notary Public

of New Jersey.

Docket.

(Dated July 11/18.)

FIRST DISTRICT COURT,

NEWARK, N. J.

<p style="text-align: center;">JACOB KATCHER, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">AMERICAN EXPRESS COMPANY, a corporation of New Jersey, Defendant.</p>	}	<p style="text-align: right;">10</p> <p>Plaintiff's Costs.</p> <p>Summons.... 2.10</p> <p>Listing..... 1.50</p> <p>Atty. fee....10.16</p> <hr style="width: 50px; margin-left: auto; margin-right: 0;"/> <p style="text-align: right;">13.76</p>
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A summons was issued in the above stated cause 20 on the twenty-sixth day of April 1918, returnable on the seventh day of May 1918, wherein the plaintiff demands of the Defendant the sum of one hundred and ninety-four dollars.

The plaintiff filed his state of demand April 26 1918.

The summons was served and returned as follows:

"I served the within summons April 29 1918 on Ernest Williams, he being the clerk in charge of said American Express Co., (inc) by reading it to him and giving him a copy thereof." 30

EDGAR A. HARTDORN, Sergeant at Arms
First District Court."

May 7 This cause was adjourned to May 10;
31; June 21; 27.

June 21 Notice of motion for commission to examine witnesses returnable Jun 21. 40

Docket.

June 27/18 The plaintiff and defendant appearing the cause was tried partly at this time.

June 28/18 The plaintiff and defendant appearing the cause was tried and determined at this time.

10 Plaintiff, William H. Kennelly, Emil Germanus, John O. Dennin, William A. Reilly and William A. Metcalf were sworn.

The evidence being closed, the Court rendered judgment in favor of the Plaintiff and against the Defendant in the sum of two hundred and three dollars and thirty-seven cents, damages with costs; whereupon judgment is entered in favor of the Plaintiff and against the Defendant in the sum of two hundred and three dollars and thirty-seven cents damages with costs.

20

July 2/18 Notice of appeal filed.

I, CHARLES R. BALDWIN, Clerk of the First District Court of the City of Newark, do hereby certify that the foregoing is a true copy of the record and proceedings had in the above stated cause as taken from the Docket of the Court Docket No. 133, page
30 61164, together with the papers filed in said cause.

July 11 1918.

[SEAL]

CHARLES R. BALDWIN,
Clerk, First District Court,
Newark, N. J.

Notice of Appeal.

(Filed July 2/18.)

FIRST DISTRICT COURT OF THE CITY OF
NEWARK.

JACOB KATCHER, Plaintiff,	} On Contract. 10 NOTICE OF AP- PEAL.
VS.	
AMERICAN EXPRESS COMPANY, Defendant.	

To PHILIP J. SCHOTLAND, Esq.,
Attorney of Plaintiff. 20

SIR:

TAKE NOTICE that the defendant, American Ex-
press Company, hereby appeals to the New Jersey
Supreme Court from the judgment of the First Dis-
trict Court of the City of Newark entered in the
above stated action on the 28th day of June, Nine-
teen Hundred and Eighteen.

LINDABURY, DEPUE & FAULKS,
Attorneys of Defendant. 30

Dated July 1st, 1918.

Specification.

(Filed Oct. /18.)

NEW JERSEY SUPREME COURT.

	JACOB KATCHER,	}	
	Plaintiff,		On Appeal.
10	v.	}	SPECIFICATION.
	AMERICAN EXPRESS COMPANY,		Defendant.

The following is a specification of the determinations of the First District Court of the City of Newark, with which appellant is dissatisfied in point of law:

20 1. The court denied appellant's motion for a non-suit, based on the following grounds: (a) That plaintiff had failed to prove the contract alleged in the State of Demand. (b) That plaintiff had failed in making *prima facie* proof of any breach of the contract made between plaintiff and defendant, upon which the suit was based.

30 2. The court ruled that exhibit P-I was not evidential of the terms of the contract between the plaintiff and defendant for the alleged breach of which, suit was brought.

3. The court found that defendant agreed to deliver the rubles sold to plaintiff, to one Pese Kazsur, the person named by the plaintiff. This finding was not supported by any evidence.

40 4. The court erroneously construed the contract between the plaintiff and defendant, as a contract to deliver to the person named by plaintiff, the rubles purchased by plaintiff, whereas the undisputed evi-

Specification.

dence in the case showed that the said contract was a contract to remit said rubles to the person so named, through the Russian Post Office, and in accordance with the regulations of such Post Office.

5. The court excluded from evidence, the statement received by defendant from the Russo-Asiatic Bank, advising it that the remittance sent by plaintiff through defendant, had not been delivered to the person named by plaintiff. 10

6. The court denied the application of defendant to take the deposition of one R. Jacobson, upon the ground that the questions which the defendant proposed to ask the said R. Jacobson were irrelevant and immaterial. 20

7. The defendant tendered proof of the facts proposed to be proven by R. Jacobson, to the same effect as though a witness competent to answer the questions annexed to such notice of application, had, after having been duly sworn in behalf of defendant, been asked such questions, and each of such questions had been overruled by the court as immaterial, and exception duly taken. The court permitted such tender, but overruled each of such questions as irrelevant and immaterial. 30

8. The court refused to make the findings of fact, numbers 1-6 inclusive, requested by defendant, although the uncontradicted evidence in the case supported such findings of fact.

9. The court declined to make the findings of law requested by the defendant, numbers 1-5 inclusive.

LINDABURY, DEPUE & FAULKS,
Attorneys of Appellant. 40

Evidence.

FIRST DISTRICT COURT.

10

JACOB KATCHER,
Plaintiff,

vs.

AMERICAN EXPRESS COMPANY,
a corporation of New Jersey,
Defendant.

20

JUNE 28, 1918.

Before his Honor, CECIL H. MACMAHON, *J.*,

Mr. PHILIP SCHOTLAND for Plaintiff.

Mr. STRYKER, (LINDABURY, DEPUE & FAULKS for
Defendant)

30

The Court: If I think at the end of the taking of testimony before me it is material to take the evidence that Mr. Stryker has asked permission for to take on the depositions that are on file, then I will give him that leave at that time; if I don't think it is material I will decide the case and he may now take exception or file objection to the manner of proceeding.

Mr. Stryker prays an exception to the ruling of the Court.

40

Exception allowed.

Emil Germanus—Direct—Cross.

EMIL GERMANUS called by plaintiff, sworn.

DIRECT-EXAMINATION BY MR. SCHOTLAND.

Q. Are you the Newark agent of the American Express Company?

A. Yes.

Q. As such agent of the American Express Company did you issue this receipt I now show you, to Mr. Katcher? 10

A. Yes.

Q. When you issued this receipt did you receive from Mr. Katcher \$194.50?

A. The amount it states there.

Q. You wrote that amount?

A. Yes, \$194.50.

Mr. Schotland: I offer the receipt in evidence Marked P 1.

Q. Some time after the issuance of that receipt, 20 Mr. Germanus, did you receive any complaint from Mr. Katcher that the money had not been delivered?

A. Yes.

Q. You got that information from your company?

A. Yes.

Q. So the money has never been delivered?

Mr. Stryker: We concede the money has never been delivered.

Q. Did Mr. Katcher demand the \$194.50 back from 30 you?

A. Yes.

Q. Have you ever delivered it to him?

A. No, sir.

CROSS-EXAMINATION BY MR. STRYKER.

Q. When Mr. Katcher came into your office at that time what did Mr. Katcher say?

Objected to as improper Cross-Examination.

Objection overruled. 40

Emil Germanus—Cross.

The Court: This receipt states "Received from Mr. Katcher \$194.50" and in another place, it states "Not exceeding \$50." This receipt is susceptible of explanation.

A. How much it cost, 100 rubles." Everyone says that.

10 By the Court:

Q. What did he say?

A. How much would it cost, 100 rubles?

FURTHER CROSS:

Q. What did you tell him?

Same objection.

Same ruling.

20 By the Court:

Q. Did you tell him, do you recall what you told him the price was at that time?

A. Yes.

Q. Can you tell by reference to the receipt?

A. It was about \$19.30.

FURTHER CROSS:

30 Q. How did you ascertain that price?

Objected to as not proper Cross Examination and entirely incompetent.

A. It was the rate on that day.

Q. How was the rate fixed, did you have anything to do with fixing the rate?

A. We got it from the American Express Company.

Q. Is that the rate you got from the American Express Company?

40 A. No.

Emil Germanus—Cross.

Q. You did nothing to the rate?

A. We put something to it.

Q. You added something to the rate you got from the American Express Company?

Objected to.

Q. What was your purpose of adding that additional rate?

10

Objected to as not Cross Examination, because the witness was called for a different purpose altogether.

The Court: It will be admitted subject to your objection.

Q. For what purpose was this addition you made to the rate, what did that represent?

A. That was my profit.

Q. Then what followed, what did he say and what did you say?

A. He said to me "I want to send 1000 rubles," and I said so much is the price of 1000 rubles, and I sold it to him.

Q. Did he tell you where it was to be sent?

A. Yes.

Q. Did he tell you how?

A. I cabled it.

Q. And then he paid you the American money named in that receipt?

30

A. Yes, \$194.50.

Q. What did you do with that money?

A. I advised the American Express Company and they forwarded it.

The Court: That is a conclusion.

Q. How did you send that advice to the American Express Company?

Objected to as immaterial.

Objection sustained.

40

Emil Germanus—Cross.

Q. Now when you said on Direct Examination that you notified the plaintiff that this money had not been delivered and that he demanded a return of the money, did you offer to make a return of some money to him at that time?

A. Yes, sir, certainly.

Q. Do you recall what that amount was?

A. No I don't recall.

10

By the Court:

Q. Do you recall how much you offered him?

A. No, sir.

FURTHER CROSS:

Q. I show you a paper and ask you if you ever saw this paper before?

A. Yes, sir.

20 Q. When did you first see it?

A. When I got advice from the Company that the money did not reach there.

Q. Is there anything on that paper which enables you to say how much money you offered to Katcher?

Objected to as improper as he did not make the memorandum.

Q. Did you have this paper before you at the time you made the offer to Katcher?

30 A. Yes, I showed him that paper.

Q. That paper you say is the advice you received from the company?

A. Yes, how much I can offer him.

Mr. Schotland: I object, and I ask that the question and answer be stricken out.

The Court: I will not allow it to go in.

Q. Do you know whether or not you offered Katcher to return to him the amount stated on that
40 paper?

Jacob Katcher—Direct.

A. Yes.

Q. Did you offer to return to him the amount stated on that paper?

A. Yes.

Q. Where has that paper been since that time?

A. It was always in my office; about 2 or 3 weeks ago I gave that to the company.

Mr. Stryker: Now I submit he can refresh his memory and state the sum. 10

Mr. Schotland: I object as incompetent. It is an attempt to get in the entire defendant's case on the plaintiff's case.

Objection sustained.

Exception granted to Mr. Stryker.

JACOB KATCHER, plaintiff, sworn.

20

DIRECT-EXAMINATION BY MR. SCHOTLAND:

Q. Mr. Katcher, how much money did Mr. Germanus offer to give you back?

A. \$125.

By the Court:

Q. When did he offer to give it back?

A. After the fight.

30

FURTHER DIRECT:

Q. What month or year?

A. I don't know the time, about 2 months ago.

By Mr. Stryker:

Q. What did he tell you at the time he made you that offer, what \$125. represented?

Objected to as not proper Cross Examination. 40

Case.

By the Court:

Q. What did Mr. Germanus say to you when he offered you \$125?

A. After the fight he would deliver 1,000 rubles to Europe.

PLAINTIFF RESTS.

10 Mr. Stryker: I move for a non-suit on the ground that there is a variance between the allegation and proof. The allegation in the State of Demand says that the plaintiff delivered to the defendant \$194.50 and that the defendant undertook to deliver to Katcher, at some place in Russia, and that defendant has not delivered said moneys he undertook to deliver.

20 The proof in this case is that the plaintiff in this case came to Germanus, and asked him what was the price of 100 rubles; that he then told Germanus that he wanted to send 1,000 rubles to this place in Russia; that Germanus then undertook to send these rubles, and that the receipt which he issued, says that these rubles are for a remittance to this place. The word remit has a definite meaning, and it does not mean deliver, and there was nothing said at the time this transaction occurred, by anybody, as to the delivery of these rubles,
30 nothing said about the delivery at all; the only language used was to send and the receipt uses the word remit. That is a very material variance. We have made an effort to find some judicial construction of the word remit, but we have not been able to find a single case in which remit has been construed to include delivery.

(After further argument.)

40 The Court: So far as the case stands now, according to your own argument the plaintiff in

Case.

this case bought 1,000 rubles for remittance to somewhere in Russia; the express company acknowledges that it did not deliver these 1,000 rubles to this person in Russia and thereupon offered to the plaintiff a sum in dollars. It cannot prevail unless it is shown that he was offered back 1,000 rubles.

Mr. Stryker: We fully concede we owe the defendant 1,000 rubles in Russian money or 10 1,000 in American money, and are willing to pay it right now.

The Court: It is too late now.

Mr. Stryker: But that is not the point of my motion to non-suit. The point of my motion for non-suit is that under this State of Demand we are entitled to a non-suit in this case because the allegation is of one contract and the proof is of another. If the plaintiff wishes to amend his State of Demand, and if it be arranged so 20 as not to prejudice us in any way, we have no objection to that

The Court: I will rule now that the receipt cannot be regarded by this Court, so far as it has anything to do with this contract. It is evidently all wrong.

The agent of the defendant company has testified that he received \$194.50 to buy 1,000 rubles. What word he used as to the disposition of the rubles I will not discuss just now. 30 You have stated the non-delivery was the result of regulations of the post office in Europe. This written receipt cannot be received because it distinctly limits—not to exceed \$50. It states it must not be issued or accepted for more than the sum of \$50. I will have to rely entirely upon what these people said, one to the other. The written receipt will have to be uniform.

Mr. Stryker: The receipt is in evidence, and notwithstanding the inaccuracy of the receipt, 40

10 it is evidence of a contract; it is evidence to the benefit of which both parties are entitled, but it does not seem to me that my motion for a non-suit is at all affected whether it is disregarded or regarded. The language used by Mr. Germanus was to be forwarded, certainly nothing said about delivery; there is nothing from which delivery can be implied. The contract is simply a contract to forward and send, which they have proven but they failed to prove a breach of the contract.

My two grounds for a non-suit are these, one based upon the ground of variance between the allegation and proof, and the other is that they have proved a contract but no breach of it.

20 The Court: I decline the motion for non-suit, because although the receipt was offered in evidence by the plaintiff and not objected to by defendant, yet upon examining the receipt, in my opinion I find that it cannot control the disposition of this case.

30 The testimony given by the agent of the Express Company is that he received \$194.50 on September 28, 1917, to purchase 1,000 rubles which were to be disposed of by being sent or remitted or delivered to one Katcher, in a town, of Russia. Now then, the agent of the Express Company comes to the plaintiff and says we have not been able to deliver your money and I will now offer to pay you \$125 in settlement of the breach of contract. That I think is a disposition of the wording of the contract by other parties than the parties to the contract themselves. The motion is denied.

40 Exception granted to Mr. Stryker.

John J. O'Dennin—Direct.

JOHN J. O'DENNIN called by defendant, sworn.

DIRECT-EXAMINATION BY MR. STRYKER:

Q. What is your business?

A. Superintendent American Express Company.

Q. What are your duties?

A. Supervising and forwarding of money orders.

Q. Have you any recollection of the purchase of 1,000 rubles made through Emil Germanus, to be forwarded to Russia, concerning which this suit was brought? 10

A. Yes, according to the advice on our records.

By Mr. Schotland:

Q. Have you any recollection of it?

A. I have a recollection of it passing through the office.

FURTHER DIRECT: 20

Q. What are these papers I show you?

A. Advices of cabled money orders.

Q. Received from whom?

A. From Emil Germanus, Newark, New Jersey.

Mr. Schotland: I would like to cross-examine on them.

Q. Does that contain any statement with regard to the purchase of 1,000 rubles by the plaintiff? 30

Objected to as the paper speaks for itself.
Objection sustained.

Mr. Stryker: I offer the paper in evidence.

The Court: Did the witness make it himself?

Mr. Stryker: No.

The Court: Then it can be marked D1 for Identification until Mr. Germanus is recalled.

Q. When did you receive this paper D1?

A. September 11, 1917. 40

John J. O'Dennin—Direct.

Q. Do you know what was done upon receipt of that paper in your department?

A. It was turned into the cable department.

Q. What experience have you had, Mr. Dennin in making remittances from this country to Europe?

A. I have had 18 years experience in the business.

Q. Do you know what the ordinary course of business is in making remittances of money from
10 this country to Russia by cable?

Objected to as immaterial.

The Court: The defendant will have to prove his case step by step and not all at once. The thing is to find out why the contract was not carried out; the defendant may be able to satisfy the Court he has a legal defence.

Mr. Schotland: I only want to say one word, if this were an action for negligence against the
20 defendant company and damages sought to be recovered for their negligence, this proof would be entirely competent, but that is not this case, this is purely and simply an action to recover back the money that they were unable to deliver, and which they admitted they were unable to deliver and are willing to return but not the full amount. The only question in the case is this, when they made a contract which without their fault they are unable to carry out,
30 must they return the consideration or are they entitled to keep part of it. I will admit for the sake of argument that it is without their fault, without any neglect on their part that they did not remit or deliver this money to this person at this address, that they were unable to do it and did not do it, and we are entitled to our money back. They cannot keep our money if they cannot carry out their contract.

The Court: They are entitled to put in their
40 defense and I will permit them to put in their

John J. O'Dennin—Direct.

testimony. It may be necessary to amend the State of Demand before judgment is entered in this case.

We will adjourn now until 10 o'clock tomorrow morning.

FRIDAY, JUNE 28, 1918.

MR. DENNIN resumes the stand.

10

By Mr. Stryker:

Q. Are you familiar with the usual method in use in transmitting money from the United States to Russia?

A. Yes.

The Court: By the American Express Company.

Mr. Stryker: I will confine it to the American Express Company.

Q. What is that method?

Objected to as entirely immaterial and incompetent. Objection overruled. Exception granted to Mr. Schotland.

Q. Are you familiar with the method employed by the American Express Company in transmitting money by cable from the United States to Russia?

A. Yes.

30

The Court: Why do you say by cable?

Mr. Stryker: This was all cabled. Mr. Germanus so stated and the receipt so stated.

The Court: The receipt is immaterial.

Q. What is that method?

Objected to as immaterial.

The Court: This is taken subject to the objection of Mr. Schotland.

40

John J. O'Dennin—Direct.

A. On receipt of the advice of the issue of money order received, we prepare a cable giving the amount of the sum in rubles and the name and address of the payee indicated, and afterward we cable to our correspondent at Petrograd; and on receipt of that in Petrograd, they forward a sum in rubles. On receipt of the cable at Petrograd, our correspondent forwards the money in the shape of a money order
10 to the payee.

Q. Where do they obtain the money order?

A. From the Russia Post Office.

Q. How do they forward this money order to the payee?

A. By registered mail.

Q. Through the Post Office?

A. Yes, by registered mail.

Q. In case a money order is not delivered in Russia what occurs then?

20 A. The bank upon receipt of our correspondence at Petrograd cancels the order and advises the company of the non-delivery.

Q. That is the correspondent at Petrograd advises your company of the non-delivery?

A. Yes.

Q. My question was intended to be addressed to the stage just prior to that, what happens to this money order if it is not delivered?

A. The money order is returned; I believe I said
30 the money order was cancelled.

Q. Who cancels it?

A. The Post Office cancels it, the money order is cancelled right away.

Q. If the money order is not delivered it is cancelled at the Post Office and the money returned to your correspondent?

A. Yes.

Q. And your correspondent advises you?

A. Yes, of the cancellation or nondelivery, as the
40 case might be.

John J. O'Dennin—Direct.

Q. What do you do?

A. That is not in my department.

Q. What is the usual method of communicating by cable with your Russian correspondent, how do you send the cable?

A. Via England.

By the Court:

Q. By what company? 10

A. Generally the Western Union.

FURTHER DIRECT:

Q. What is the method employed by your Russian correspondent to advise you concerning the receipt of the cable?

A. On receipt of the cable they cable the American Express Company at London, and the American Express Company informs us—it is acknowledged 20 by cable.

Q. You are advised of the receipt by cable?

A. Yes.

Q. Do you handle personally the reports of sales of rubles made by your various agents which come to your office, the reports which come to our office?

A. In case of cable reports they pass through my hands.

Q. I do not mean correspondence, I mean your sales here by agents such as Germanus? 30

A. Yes.

Q. I ask you what this paper is which is marked D 1 for Identification, if you know what that paper is?

A. Advice of cable money orders.

Q. Received from who?

A. Germanus, Newark, New Jersey.

Q. Now what is the name of your Russian correspondent?

A. Russo-Asiatic Bank. 40

John J. O'Dennin—Cross.

Q. Do you know the name of the man who has charge of remittances which you make to Russia in that bank, the name of the man?

A. No.

CROSS-EXAMINATION BY MR. SCHOTLAND:

Q. How long does it take for money to be cabled
10 from here to Russia?

A. Generally 4 or 5 days.

Q. If money that is cabled cannot be delivered how long does it take for you to be notified by cable of that fact?

A. We are not notified by cable of nondeliveries, we are notified by mail.

Q. Is that so?

A. Of nondeliveries.

Q. Didn't you testify on Direct Examination that
20 the method used by the American Express Company in cabling money, was to cable by way of London to your correspondent, the Russo-Asiatic Bank at Petrograd, and that the bank would send by registered mail a money order to the person to whom the money is addressed: you testified to that, didn't you?

A. Yes.

Q. And didn't you testify that if the money
30 order cannot be delivered, it is cancelled by the Post Office, the money returned to your correspondent bank, that they notify the American Express Company at London, and the American Express Company cables to your office here?

A. I understood that question to be an acknowledgement of the original cable, not of the cancellation.

Q. Not of the cancellation?

A. Absolutely not; every cable we send over we
40 we have a check on is by getting an acknowledged receipt. That is the only way we have a check on is by getting an acknowledged-

John J. O'Dennin—Cross.

ment of the number tag; that is the way we operate the system.

The Court:

Q. You used the word correspondent in referring to the Russo-Asiatic Bank, is that the agent of the American Express Company in Russia?

A. Yes, we term it correspondent as we keep our 10 bank there.

Q. You maintain an account for the Russian Bank to use for the purpose of transmitting money to whom it is sent from this country?

A. Yes.

By Mr. Stryker:

Q. Do you know whether or not a cable containing the directions for a remittance to Tessie Kachur was sent in this case, was sent in this case in the 20 usual way?

A. I know that that cable in which that particular cable was included was forwarded in the usual way to the Western Union Cable Company

Q. Do you know whether you received advices of its receipt coming by way of London in the manner in which you have testified?

A. We have the cable on file advising us of the receipt of that cable in Russia.

Q. I understand that that cable and this method 30 advising you by cable of the receipt of this cable, does not include any advice as to what has been done in pursuance of the directions contained in the cable?

A. No, simply advice as to the number.

By Mr. Schotland:

Q. In what department are you?

A. Foreign money department.

John J. O'Dennin—Cross.

- Q. You are not the auditor?
 A. No, sir, that is another department.
- Q. Did you personally handle the transmission of this cable?
 A. That particular list passed through my hands.
- Q. What did you do with it?
 A. Passed it through the clerks that had to handle it.
- 10 Q. You gave it to other clerks?
 A. Yes.
- Q. Did you do anything else with it?
 A. I tested that cable and took down the amount of remittance.
- Q. What do you mean by testing it?
 A. Checking against the amounts in the cable.
- Q. Did you see the cable?
 A. Yes, I am the one authorized to test the cables, at that time at least.
- 20 Q. What do you mean by testing the cables?
 A. To authenticate the message, that is, in order to pay.
- Q. In what form is this order you test?
 A. We simply order a check.
- Q. What I want to find out is, you write out some sort of memorandum addressed to the Western Union Telegraph Company?
 A. Yes.
- Q. Who writes that out?
 30 A. Another clerk in my company.
- Q. Did you personally do any part of that?
 A. No.
- Q. Did you personally send off any cable?
 A. No.
- Q. Then all you know has been reported to you?
 A. Except I saw the cable before it left the office; I had this test put on the cable and it was shown to me.
- Q. What do you mean by a test, do you mean
 40 checking up the account?

W. A. Reilly—Direct.

A. We give the total of the amounts in that cable.

Q. Your test does not deal with any inquiry by you personally as to whether that particular cable has been sent or not?

A. Has been sent? It deals with the sending of it.

Q. You haven't any personal knowledge of the sending of that or any other cable, any personal direct knowledge? 10

A. I have personal knowledge as it cannot be sent out unless I send it.

By the Court:

Q. Did you see it sent to the Western Union or take it there?

A. No, sir.

Q. Did you see it taken? 20

A. No, sir, in other words, I authorized the checking up of that cable.

W. A. REILLY called by defendant, sworn:

DIRECT-EXAMINATION BY MR. STRYKER:

Q. Mr. Reilly, what is your position?

A. Deputy Chief Clerk.

Q. What are your duties?

A. Supervise the clerks under my control. 30

Q. What do they do?

A. Keep the record of post remittances and mail transmission account.

Q. When a remittance is made by your company from here to Russia, what entries do you make on your books?

A. Of cable remittances.

Q. Yes.

A. We enter the number contained on the receipt, the receipt number showing the receipt which is 40

W. A. Reilly—Direct.

given to the buyer; that number is entered on our record, also the name of the payee and the agent who issues it, the amount of foreign money and its dollar equivalent.

Q. When do make that entry?

A. Upon receipt of the transaction from the division downstairs.

10 Q. Do you know whether that is before or after the cable is sent?

A. After.

Q. What are these sheets I show you?

Objected to.

The Court: This is taken subject to objection.

A. Cable remittance records which are passed through our account and the balance figures of the day.

20 Q. Is that your original entry of cable remittances?

A. Yes.

Q. Made in your department?

A. Yes.

Q. By whom are they made?

A. A Miss Schmidt who is no longer employed there.

Q. Where is she now?

30 A. With the Federal Reserve Bank, Wall street, New York.

Q. You are unable to secure her attendance?

A. I didn't request her to make an appearance.

Q. Is there any entrance on these books with regard to the remittance of money in behalf of the plaintiff in this case?

Same objection as heretofore stated.

Same ruling.

40 Q. Will you state whether there is any entry there and point it out if there is any, and read it?

W. A. Reilly—Direct.

A. This was incorporated in our account under date of September 13, 1917, in a cable remittance list which is No. 626442 addressed to Tese Kacjur and issued by Emil Germanus, Newark, N. J. for 1,000 rubles, the total dollar equivalent.

By the Court:

Q. You have just stated in answers to questions 10 by Mr. Stryker that this sheet should contain the receipt number, name of the payee, agent who issued the receipt, and the amount of foreign money and its dollar equivalent. You have just given us the remittance number, date of receipt, addressed to Katcher, and issued by Emil Germanus, Newark, N. J. for 1,000 rubles. Where is the dollar equivalent?

A. It is contained in the total amount written on the sheet in which it embraced 11 payments amounting to \$359.66—1970 rubles. 20

Q. This dollar equivalent is a dollar equivalent as of what date?

A. All payments which are advices under date of September 11.

Q. You say you entered there the dollar equivalent of the rubles, the price of rubles fluctuates from time to time?

A. Yes.

Q. On what date was that entry of \$1.00 equivalent of the rubles? 30

A. I can't say without looking over the sheets.

By Mr. Stryker:

Q. What relation would the date on which that was a dollar equivalent of the rubles compare to the date upon which the receipt was issued?

A. Approximately about two days later.

Q. Later than when the receipt was issued.

A. No, this day here which is incorporated in our 40

W. A. Reilly—Cross.

account would show approximately that the payments had been sold prior to the incorporation of this item in our account.

Q. What I want to know is this dollar equivalent of the rubles on the day the rubles was sold or on some other day.

10 A. No, on some other day.

Q. What date is that?

A. You would have to show—in other words, we incorporate in a daily item here many items which come from different sections of the country, so unless we depended entirely upon the receipt or advice of sale from the agent, we would not be in a position and I could not answer offhand without referring to advices of sale just what date it is or what particular rate would apply on that date.

20 Q. Mr. Reilly, do you know what balance you had with the Russo-Asiatic Bank on the 8th of September 1917, whether or not it included the sum of 1,000 rubles or more?

A. The date set forth in our record is September 13, the cable remittance in the Asiatic Bank on this particular date 35,668 rubles.

Q. That was your balance at what time?

A. September 13, that particular date; that outstanding I would not be prepared to give you.

30 CROSS-EXAMINATION BY MR. SCHOTLAND:

Q. What knowledge have you as to the balance you had, this official balance which you checked up, have you any personal knowledge of it?

A. Absolutely so.

Q. What do you mean by that being the balance that day, where did you get that information that day?

40 A. By checking up the advices this is the official balance?

W. A. Reilly—Cross.

Q. Who wrote the balance down here on the sheet?

A. That was by a young lady who is no longer with us.

Q. Where did she get the information?

A. From the various statements that were sent upstairs, advices sent up from downstairs.

Q. And when you say that you have personal knowledge that that balance is correct—

A. (Interrupting) I will withdraw that. 10

Q. You mean when you look at this receipt you get that information?

A. Yes, I withdraw that information.

Q. Your only source of information is this receipt?

A. Yes, but I may further amend it by this, our accounts are so constituted in the office, if the accounts did not balance my attention would be personally called to it, so I may practically say officially, I know it to be correct.

Q. Officially, but legally you have no knowledge 20 of it and had nothing to do with the personal withdrawal or deposit of any of the funds.

A. Yes.

Q. All you know is when you look at this receipt—

A. I certify to this that it is an official record of the transactions.

Q. Suppose your company through its agents enters into agreements to cable money to Russia some time before the agent turns in the order to your 30 home office, at what rate do you pay for the rubles that you buy; do you pay the rate that is current at the time when you actually send your cable or do you pay the rate that is current at the time when the receipt is issued by your sub-agent?

A. I did not come here to answer for the company in that respect, I came here to certify to the official record here.

The Court: Answer the question.

The Witness: I don't know.

William A. Metcalf—Direct.

Q. Can you tell from the sheet from which you have testified exactly what the dollar equivalent is of the 1,000 rubles as it appears upon that sheet?

A. Yes.

Q. What was it?

A. According to the sheets \$192.70. I make this statement but I cannot determine positively without reference to the advices; it may perhaps contain an error which from time to time frequently occurs and necessary to adjustment, but according to this it is \$192.70.

Mr. Stryker: I offer these sheets which contain a record of the transaction in evidence.

Mr. Schotland: I make the same objection to the sheets as to the evidence itself.

The Court: I will admit them and reserve my decision on Mr. Schotland's motion.

20 These are records made by the party itself, and while in transactions with large corporations, railroad or express companies, employees are allowed to read from the record, I will only mark in evidence on the sheets for identification, the particular items to which the witness has referred.

WILLIAM A. METCALF called by defendant, sworn.

30 DIRECT-EXAMINATION BY MR. STRYKER:

Q. What is your business?

A. Deputy chief clerk in foreign money order claims of the American Express Company.

Q. Are you familiar with the method generally employed in transmitting money from America to Russia?

A. Yes.

Q. What is that method?

40 Same objection. Same ruling.

William A. Metcalf—Direct.

A. Agencies are established and they are furnished with our foreign money orders. Cable remittances are forwarded by cable to our correspondent in Europe and mail remittances by mail.

Q. When you forward a cable remittance by cable, what is done on the other side?

A. Our correspondent purchases—

Mr. Schotland: Even though you admit evidence of the general system, it is certainly apparent that his knowledge of what is done on the other side is merely hearsay.

The Court: This is not taken as proof, only as practice of the company with these people.

Q. (Last question repeated.)

A. Our correspondent for Russia, the Russo-Asiatic Bank purchases a money order in the name of the payee, taking one particular remittance, and it is forwarded through the Russian Post Office to the destination by registered mail. The letter is accompanied by a card receipt when the remittance is delivered to the person to whom it is intended, and follows the same course in the opposite direction until it arrives in the hands of the remitter. In the event of a remittance not being paid for any reason, not being able to be found at the destination or any other reason, the letter is returned by the Post Office and comes back to our correspondent in Petrograd who got the money on the money order and they advise us that the money has not been paid, which places us in a position to refund to the remitter.

Q. Advise you how?

A. By mail.

Q. You say "purchase a money order", what kind and where is it purchased?

A. Post Office money order at the Post Office in Petrograd.

William A. Metcalf—Direct.

Q. Did you receive advice from your correspondent in Russia as to whether or not the remittance made at the request of the plaintiff in this case had been delivered?

A. Yes.

Q. I show you a paper and ask you if you know what that paper is?

A. Yes.

10 Q. What is it?

A. A letter from the Russo-Asiatic bank advising us of the remittance effective and charged to our account.

Objected to unless offered in evidence.

Objection sustained.

Q. Do you know when this was received.

A. I don't know, my recollection is that it was received some time in February.

20

Mr. Stryker: I offer this in evidence.

Mr. Schotland: I object to it as it has not been proven in any way and the plaintiff is not connected with it, and it is not in the English language.

The Court: It cannot be admitted without translation.

Mr. Stryker: Part of it is in the English language.

30 Q. Were these check marks on the letter when received or put on later?

A. Put on later. All of the red marks were put on in our office.

Q. Was there anything else beside the red ink put on in your office?

A. The remittance numbers were put on in our office, they are the black ink numbers to the left of the row of numbers.

Q. Headed uneffected orders, they were put on?

40 A. Yes.

William A. Metcalf—Cross.

Q. Anything else?

A. (Indicating same.) All of these notations were put on in our office.

The Court: I understand that the only object for which this letter is offered is to show notice from the Russo-Asiatic bank to the American Express Company that the item No. 626442 to Pete Kaczur had not been delivered. 10

Mr. Schotland: That is an admitted fact.

Mr. Stryker: And the date upon which notice was received.

Q. Do you recollect when that order was received?

A. Not exactly; to the best of my recollection it was in February.

Q. Can you tell from that date?

20

A. Our date stamp is February 28; that was put on in our office; that is our receipt date stamp.

Marked D3 for identification.

CROSS-EXAMINATION BY MR. SCHOTLAND:

Q. Who put that date stamp on?

A. Mail clerk who receives the mail.

Q. You don't receive the mail?

A. I don't.

30

Q. When was the money represented by the unaffected remittances described in D3 for Identification, credited to the account of the American Express Company, their account at Petrograd?

A. It is governed by the date of the letter.

Q. What is the date?

A. 13th of November Russian date, 26th of November American date?

Q. 1917?

A. Yes, sir.

40

Emil Germanus—Direct—Cross.

EMIL GERMANUS resumes the stand.

DIRECT-EXAMINATION BY MR. STRYKER:

Q. You testified yesterday about making a tender of money to the plaintiff in this case?

10 Objected to as not according to the testimony.

 The Court: That is immaterial.

Q. At the time you made this tender, at the time referred to in your testimony, what did you do?

A. I told him that the money came back and I showed him that paper.

Q. What paper?

A. The one in your hand, that was notifying me how much I can pay back to the man.

Q. You showed him that paper?

20 A. Yes.

Q. What did you say to him?

A. That he can get \$127.50 or 1,000 rubles.

Q. And you say you showed him that paper?

A. I couldn't pay him without signing it.

 The paper referred to is marked D4 for Identification.

Q. What did the plaintiff say when you told him he could have the amount shown on that paper, or 1,000 rubles?

80 A. He wanted the whole amount.

By the Court:

Q. The question is what did he say?

A. I don't want that, I want all the money I paid in.

CROSS-EXAMINATION BY MR. SCHOTLAND:

Q. Do you know whether Mr. Katcher can read 40 or not.

Emil Germanus—Cross.

A. I don't know that.

Q. Why did you show him this paper?

A. He said the money was not enough and I said that is all I will get back and I showed him.

Q. \$127.50?

A. Yes.

Q. Did you count it out and tender it to him?

A. I didn't count it; he was not willing to accept it. 10

Q. Just exactly what did you say and what did he say, and when was that?

A. I don't remember the date when he was by me. I wrote him the letter that the money could not be delivered and he came in my office and I said "The money could not be delivered and I will pay you back \$127.50" and I showed him that paper, or 1,000 rubles, and he said "I don't want that".

Q. Did you say or 1,000 rubles. 20

A. Yes.

Q. Did you have 1,000 rubles in your place?

A. I don't need to pay it back right away.

By the Court:

Q. Answer the question. Did you have 1,000 rubles?

A. I have got it always.

FURTHER CROSS:

30

Q. What do you mean by saying you did not have to have 1,000 rubles in the place?

Objected to as not the evidence.

Q. Why did you first answer you don't need to have it, and now you say you always have it?

A. I always have Russian money and foreign money on my hands.

Q. Did you at that time when you talked with Katcher have 1,000 Russian rubles in your place? 40

Wm. H. Kennelly—Direct.

A. I have 10,000; sure I have.

Q. You did have?

A. Yes I have to-day.

Q. Did you have?

A. Yes, I had always thousands of rubles, always on hand.

Q. Did you sell him any rubles?

10 A. Not at any time, I sell other people.

By the Court:

Q. What authority did you have to offer him 1,000?

A. I sold him 1,000 rubles.

Q. What authority did you have to offer him 1,000 rubles or \$127.50?

A. The company notified me.

Q. Is that paper D4 your authority?

A. Yes.

20 Q. Do you know whether \$127.50 was the balance of the value of 1,000 rubles after deducting the commission and charges of the American Express Company and the Russian Asiatic Bank or not, do you know that?

A. No.

WM. H. KENNELLY called by defendant:

DIRECT-EXAMINATION BY MR. STRYKER:

30 Q. What is your position?

A. Assistant manager of the Foreign Exchange Department.

Q. How long have you been assistant manager?

A. 5 months.

Q. Prior to that did you have any knowledge of the rates of foreign exchange particularly foreign exchange?

A. I have been employed by the American Express Company 17 years, and more or less been en-
40 gaged with foreign exchange.

Wm. H. Kennelly—Direct.

Q. Can you say what the rate of foreign exchange in rubles was on February 28, 1918?

Objected to.

The Court: It will be taken subject to objection.

A. The Russian banks suspended business—

By the Court:

10

Q. You are asked if you know what the foreign exchange of rubles was on February 28, 1918?

A. Only a nominal rate.

Q. There was no market for them?

A. No.

FURTHER DIRECT:

Q. What at that time was the value of 1,000 rubles stated in American money?

Same objection, and also based on the previous answer in which he said there was no foreign exchange; and secondly, the date on which he is asked to give the value is not the date on which the money was received or reccredited to the defendant's account, being an arbitrary date and immaterial.

20

Same ruling as heretofore stated.

A. 12-3/4 cents was the value of a ruble at that time.

30

Q. Will you make the calculation for 1,000 rubles?

A. \$127.50.

Q. Now you say the value with you at that time was \$127.50?

A. What do you mean by the value with you?

Q. How was that sum fixed as the value of 1,000 rubles at that time?

A. We were buying rubles, and that is all we would pay for them, that is all they were worth to us at that time.

40

Wm. H. Kennelly—Direct.

Q. From whom?

A. From the remitter, from the plaintiff.

By the Court:

Q. You were buying rubles from the plaintiff at that time?

10 A. Yes.

Q. Where did you get the order from?

A. We sold rubles, and when the payment was not effective, it was up to us to effect a refund.

FURTHER DIRECT:

Q. How did you reach that sum is the question, how did you arrive at the sum of \$127.50 as the value of the rubles,—what was the condition of the market, what was it based upon?

20 A. 13 cents since the 1st of January; that is the quotation you can find in the newspaper; there is no exchange in rubles as nobody is handling them; there is no exchange because the banks have suspended, all Russian banks in Petrograd after January 1, 1918. Since then there has been no exchange in rubles and it would be ridiculous to try to sell them as there would be no way of trying to effect an exchange on the other side. Rubles have diminished so that really there is no market for them
30 at all, it would be entirely upon speculation; ruble notes are a different proposition.

Q. You say the newspaper quotations of cable remittances at that time was 13 cents?

A. From that time up to the present time, but not at that time.

Q. You made this figure at 12 1/2 to reach the sum of \$127.50?

A. 12 3/4.

Q. What would be the value at 13 cents?

40 A. That would be \$130.

Wm. H. Kennelly—Cross.

CROSS-EXAMINATION BY MR. SCHOTLAND:

Q. This price you have put upon these ruble remittances, as you call them, distinguishing it from ruble notes, is just an arbitrary price fixed by yourself, is it not?

A. No, sir, it is based upon the market.

Q. What market?

A. Foreign exchange market.

10

Q. I thought you said there was no exchange?

A. No exchange.

Q. Is there a market then?

A. No market strictly speaking.

Q. What is it based upon?

A. What we consider the rubles are worth.

Q. Your own personal opinion?

A. That has been confirmed by all the people in the foreign exchange business.

Q. As a matter of fact, Mr. Kennelly, did you actually purchase and actually sell any rubles on this particular remittance?

A. Yes.

Q. Who did you purchase rubles from?

A. Out in the open market; we would not purchase 1,000 rubles to cover this particular remittance, we would get a report from—

By the Court:

Q. You don't know about this particular transaction?

A. No.

Q. Didn't you hear your own witness state this morning that your company maintained a balance at the bank in Petrograd?

A. Yes.

Q. And you maintained a balance there and the purchase of rubles is made at the Post Office in Petrograd?

A. Yes, that does not apply to this particular 40

Wm. H. Kennelly—Cross.

case; rubles covering at the Post Office was to cover this payment to the payee, and what we used to cover the account is purchased in the New York market.

By Mr. Schotland:

Q. If the price of rubles had gone up would you
10 offer this man more money?

A. Yes.

Q. Would you give it to him?

A. To him.

Q. To anybody?

A. Yes, we are doing it to everybody. Every sale of rubles is based on the market price.

By the Court:

Q. What was the price of rubles on November 28,
20 1917?

A. I couldn't tell that offhand; it would be impossible to tell without our records.

By Mr. Schotland:

Q. Do you know of any difference in the value of rubles between those dates, between September 8, 1917 and November 26, 1917?

A. All I know from past experience is that there would be a difference but I could not tell you with-
30 out referring to the records; the value of rubles fluctuates from time to time, I don't know positively that there was a difference.

Q. Do you know what the fluctuation was between those dates?

A. No, I could not tell that without referring to my records.

By the Court:

Q. What are they?

40 A. The market as we found it in New York, it is

William A. Metcalf—Direct.

based upon that and the advices received from abroad.

Q. Those are the prices the American Express Company charge?

A. No, this is the actual market rate as we find it, the selling rates higher and buying rates lower so as to make to make a profit on the transaction.

MR. METCALF, recalled:

By Mr. Stryker:

10

Q. In the transaction of remittances of money from this country to Russia, as conducted by the American Express Company, do you charge or does the Russo-Asiatic Bank charge any commissions?

A. For their remittances of money?

Q. Yes?

A. Yes, sir.

Q. What are their commissions?

A. I could not say offhand.

20

Q. Is that a separate thing from the price received for the rubles?

A. Yes, a matter between the American Express Company and the Russo-Asiatic Bank, the Russo-Asiatic bank charge us a commission for effecting our remittances, which is a charge to us.

Q. Do you charge the remitter any commission is what I intended to ask?

A. No, sir.

Q. Do you make any profit on the transaction? 30

A. Our profit is a certain number of points beyond the rate of exchange which we give to the agent; we add a certain number of points and that is the rate upon which we furnish him money to transmit abroad.

Q. Then neither you or the Russo-Asiatic bank charge the remitter anything by way of commission except as that charge is contained in the price admitted in the rubles?

A. Yes.

40

William A. Metcalf—Direct.

By the Court:

Q. The rise and fall of rubles is a matter taken care of between the Russo-Asiatic bank and the American Express Company?

A. We are only interested here in the rise and fall of exchange but not the Russo-Asiatic bank. We are only interested here in the dollar equivalent.

By Mr. Stryker:

Q. Your dealings with the Russo-Asiatic bank is in what money?

A. Russian money.

Q. You have no dealings with them in money of any other country?

A. No, sir.

Q. How do you replenish from time to time your account with the Russo-Asiatic bank, how is that done?

A. It is replenished in bulk; there is always a respectable balance there, and when it gets down to a certain point we go into the market and buy some more.

Mr. Stryker: I renew my motion to take depositions in this case. We have produced all the evidence available. My motion to take depositions is based upon our view of the contract and upon our view of the evidence, which it may be advisable to show that the contract was complied with. Our view of the contract is that it was a sale of a credit available in Russia for 1,000 rubles, a completed transaction when made, and that part of the consideration for the sale the defendant undertook to remit, not deliver, but remit this credit or the money represented by this credit from the Russo-Asiatic Bank, its correspondent, to a man named by the plaintiff.

Case.

The Court: The receipt marked P 1 in my opinion is not evidential; it is limited to \$50 whereas it is admitted by the American Express Company was \$194. The express conditions are also limited to the sum of \$50 so until that receipt is reformed I cannot consider it.

It seems to me this transaction is a sale of merchandise by the American Express Company to Katcher, and under the evidence in the case 10 the agreement was to deliver to the consignee. It is admitted this was not done. As to why it was not done under my view of the case, if this paper receipt is excluded it does not make any difference. I do not believe Emil Germanus when he says he offered 1,000 rubles back to the plaintiff, he was asked about it yesterday when the trial came on and made no suggestion, and it was only to-day after the suggestion was made about a refund, that he comes back on the stand 20 and says he offered 1,000 rubles. The authority he produces does not authorize him to return any money whatever but only \$127.50. There having been a breach of the contract, no point having been made as to the right of the consignor to issue it seems to me the consignor is entitled to be paid on the contract.

Mr. Stryker: My position is this, we stated at the outset we desired to have a review, and we are entirely clear as to the method of review 30 to be followed. We desire to make a formal tender of such evidence to the same effect as though a witness competent to answer the questions annexed to such notice of application had, after having been duly sworn in behalf of the defendant, been asked such questions and each of such questions had been overruled by the Court as immaterial and exception duly taken.

The Court: Such a tender has been made 40

and refused as immaterial, under my view of the contract, and exception allowed.

Mr. Stryker: The tender of proof of all the evidence that might be elicited by the interrogatories having been made, and the Court having refused to receive it, I will offer some findings of law and fact and rest.

10 The defendant requests the Court to find as a fact:

1. That the plaintiff purchased from the defendant its agent, a credit available in Russia for one thousand rubles, and that the defendant agreed to remit through its Russian correspondent, the sum of one thousand rubles to Pete Kaczur at Berezhnica, Luck Woln, said remittance to be made by postal money order obtained from the Russian post-office at Petrograd, Russia, and sent by mail through the
20 Russian post-office to said Pete Kaczur at Berezhnica, Luck Wolyn.

2. That the agreement made by the defendant to remit one thousand rubles to Pete Kaczur, was made subject to the rules and regulations of the Russian post-office.

3. That an agreement of the kind above mentioned is known among persons engaged in that
30 business as a cable remittance.

4. That the usual and ordinary method of making a cable remittance of money from the United States to Russia is as follows:

The remitter purchases a credit for rubles available in Russia, paying therefor the price fixed by the seller. The seller undertakes to remit through his correspondent in Russia, the amount of rubles represented by the credit purchased by the remitter, to the person named by the
40 remitter at the address given. This remittance

Case.

is accomplished by means of a communication sent by cable from the seller to the correspondent in Russia, instructing him to make the remittance as above stated. Upon the receipt of this communication, the Russian correspondent purchases a money order at the Russian post-office and mails the same, postage prepaid, to the person designated by the remitter at the address given.

5. The defendant, at the time it made the agreement above mentioned, had on deposit with the Russo-Asiatic Bank at Petrograd, a sum of money largely in excess of one thousand rubles, one thousand rubles of which was available for remittance to Pete Kaczur under the contract in question. 10

6. There is no evidence in the case which will support the inference that the defendant failed in any way to make the remittance of one thousand rubles to Pete Kaczur at Berezhnica Luck Wolyn, in accordance with its contract. 20

The defendant requests the Court to find as a matter of law, the following:

1. The sale by the defendant to the plaintiff of a credit for one thousand rubles available in Russia, was a completed transaction on the date the receipt was issued by the defendant under which the plaintiff became the owner of the credit in Russia and the defendant became the owner of the money paid for such credit. 30

2. The defendant's agreement to remit the rubles represented by the credit, cannot be construed to obligate the defendant to deliver such rubles. The only duty of the defendant was to remit in accordance with the usual practice covering the remittance of money by cable from the eastern part of the United States to Russia. 40

10 3. If the defendant's Russian correspondent, upon the receipt in due course of the cable message advising him to make the remittance to Pete Kaczur, purchased a money order for said one thousand rubles at the Russian post-office, enclosed the same in an envelope with postage prepaid, addressed to Pete Kaczur at the address given, this constituted a remittance of the money in the manner contemplated by the contract, whether or not Pete Kaczur ever received the money order.

20 4. If, after the Russian postal money order had been sent by the defendant's Russian correspondent to Pete Kaczur at the address given, it was returned by the post-office authorities to the defendant's Russian correspondent as undeliverable, it became the duty of the defendant to hold to the plaintiff's account and subject to his order, the credit purchased by him for one thousand rubles or at the plaintiff's request to return to the plaintiff the equivalent of the said credit in American money.

30 5. The purchase of a credit available in Russia for one thousand rubles was complete when made, and if, because of a depreciation of rubles pending the time which elapsed between the time of purchase and the return of the same to the defendant's correspondent as undeliverable, said credit became of less value when measured in terms of American money than the sum paid therefor by plaintiff, the loss occasioned by such depreciation upon the re-conversion of such credit into American money must be borne by the plaintiff.

The Court: I decline to find as requested either on law or on the facts.

Mr. Stryker prays an exception to the ruling of the Court.

40

Exception allowed.

Exhibit P-1. C. H. McM.

Receipt for Foreign Money Order. No. 626442.

CABEL State of..... Sept. 8, 1917.

Received from Mr. Jack Katshur
Address 172 Prince St.

One hundred ninety four.....Dollars
not exceeding Fifty Dollars

Equivalent of 10

One thousand.....1000 Rubel

not exceeding 250 Kronen, 250 lire finmarks, 240
marks 185 kroner or 100 Roubles.

For remittance to Tese Kacjur
At Bereznie, Luckiy, Wolynek

AMERICAN EXPRESS COMPANY,
\$194.50 EMIL GERMANUS,
Branch Agent.

(5264. Aug. 1915)

This receipt is issued subject to the following ex-²⁰
press conditions:

It is understood and agreed by and between the person who accepts this receipt and the American Express Company that the acceptance of this receipt by such person shall bind him to the following provisions: 1. This receipt is not negotiable. 2. This receipt must not be issued or accepted for more than the sum of \$50. or its equivalent, and is not valid for more than said sum or its equivalent. 30
3. The sum of money if covered by this receipt, if duly issued as aforesaid, will be forwarded to the payee named herein, subject to the rules and regulations of the various post offices used in making the remittance; 4. Any alteration or mutilation of this receipt, or any attempt to alter or amend the printed provisions of this receipt renders it void.

Written across the face of the receipt are the words:

" NOT NEGOTIABLE, NOT EXCEEDING \$50.00." 40

Exhibit D-1 for Identification.

AMERICAN EXPRESS COMPANY
ADVICE OF FOREIGN MONEY ORDERS

SEPTEMBER 10 1917

FROM Emil Germanus, 97 Mercer St. Newark, N. J.
LIST No.

10 To Russia by Cable.

Number	Please Forward the Following Remittances to Destination as per Details Given Below	Foreign Money	U. S. Money
SEPT 13 1917			
	1		
6209970	Leje Silberg. Ilince. Gub. Kiew.	25.00	
	2		
20 6209980	Berku Gellerman. Teofipol. Ujezd Staro Konstantinowsk. Gub. Wolynsk.....	60.00	
	3		
6209981	Jacub Rubenstein. Petrograd, Szlisselsburskij Prospect 35....	50.00	
	4		
6209983	Berko Bajdman. Polonne. Gub. Wolynsk.....	50.00	
	5		
30 6209985	Sura Gerszman. Iskorost, Kladbischzenskaja. Gub Wolynsk.	80.00	
	6		
6262441	Szendla Gorbaty. Monasteryszcze Ujezd Lipowec. Gub. Kiew ..	100.00	
	7		
6262442	Pese Kaczur. Bereznica. Ujezd Luck. Gub. Wolynsk.....	1000.00	
	8		
40 6262444	Icko Bielajew. Welisz, Wtoroj Czasti. Gub. Witebsk.....	50.00	

Exhibit D-1 for Identification.

			9		
6262445	Mali Szwarc. Briczan. Ujezd Ho-				
	tinsk. Gub. Bezsarabsk	400.00			
			10		
6262446	Szejne Copikowoj. Czausy. Gub.				
	Mogilew	130.00			
			11		
6262440	Srul Wolewicz Gitis. Tulczyn.				10
	Gubernia Podolsk.....	25.00			
	Ro. 1970 a 17.95.....	\$353.61		1970.00	
	Cable.....	33.—			
	Post	6.05			
		<u>392.66</u>			

SETTLED
 SEP 11 1917
 Treas Office
 Am Ex Co.

			E. M.		
Rub.	1970.00 @ 17.95	\$362.61			
11 Cable	@ 3.00	33.00			
2 post	@ 25c	0.50			
6 :	@ 40c	2.40			
1 :	@ 55c	0.55			
1 post	@ 85c	0.85			
1 :	al. 75c	1.75			30
		<u>\$401.66</u>			
Check No. 5168					

Exhibit D-3 for Identification.

RUSSO-ASIATIC BANK
Lubau Branch.

PETROGRAD, the 13/26 Nov 1917
Financial

ACCOUNTING DEPARTMENT
Feb 28 1918

65 Broadway, N. Y.

In your reply please quote
St 1149

STATEMENT

for Messrs. American Express Company " New York
We have effected report—lists:

No Cables N1047, 949, 1058, 1059, 1048

		Uneffect. orders		
Ro.	7907.—	Cop.,	Cable N1047	Chaje G. Goldental, Chotin, 10
				Bess, on a/c of war Ro... 300.—
Ro.	4502.—	Cop.,	" "	Szprince Goller Sofiswka,
				Wol on a/c of war Ro.... 430.—
Ro.	6899.—	Cop.,	" "	Marjam Potasyz Soliawka,
				Wol on a/c of war Ro.... 605.—
			" "	Rochlja Feldman Orynin
				Pod on a/c of war Ro.... 300.—
Ro.	8187.—	Cop.,	" 949	Pese Kaczur Bereznica Wol
				on a/c of war Ro.....1000.—
Ro.		Cop.,	" "	Mran Szmil Jessler, Wisz-
				newez, Wol on a/c of war
				Ro..... 100.—
Ro.	35488.—	Cop.,	" "	Mecha Szwarc, Gowdak,
				Pod on a/c of war Ro... 100.—
Ro.	4920.—	Cop.,	unexecuted orders as	Ro. 2835.—
			per statement enclosed	
Ro.	30.568.—	Cop.	plus postage for:	
Ro.	0.45	Cop.	3 orders at 15 Cop.,	
Ro.	35.—	Cop.	20 orders at 25 Cop., 50	30
Ro.	27.—	Cop.	27 orders at 40 Cop., 1—	
Ro.	15.—	Cop.	10 orders at 50 Cop. 150	
Ro.	6.—	Cop.	3 orders at 65 Cop. 250	
Ro.	22.50	Cop.	9 orders at 75 Cop. 250	
Ro.	3.—	Cop.	1 orders at 90 Cop. 3—	
Ro.	3.50	Cop.	1 orders at Re. 4. 250	
Ro.		Cop.	orders at Ro 4.15 7—	
Ro.		Cop.	orders at Ro. 4.25 750	
Ro.	20.—	Cop.	4 orders at Ro. 4.40 5—	40

Exhibit D-3 for Identification.

Ro.		Cop.	orders at Ro. 4.50 5.50
Ro.	13.50	Cop.	2 orders at Ro. 1/2.-1/750
Ro.	19.—	Cop.	2 orders at Ro. 1/9-1/10.—
			132
Ro.		Cop.	orders at Ro.....
Ro.		Cop.	orders at Ro.....
Ro.		Cop.	orders at Ro.....
Ro.		Cop.	orders at Ro.....
Ro.	197.95	33.—	Cop. 132 return receipts at 25 Cop.,
10 Ro.	105.00		Cop. Commission 132 orders at 80 Cop.,
Ro.			Cop. charges for corrections
Ro.			Cop. charges for amount claimed from the Post Office
Ro.			Cop. charges for orders reeffected
Ro.	30.871.55		Cop. Val 11/24 Nov.
to your debit—plus 15.43 com. 1/2 o.00			

yours faithfully

RUSO-ASIATIC BANK

Libau Branch

pp RussuS

pp Weranso

20

Uneffected orders:

		Ro. 2835.—		Ro.... 3520.—					
Cable	949	Toihe Sitnik	}	Cable	1059	Rose Kazan,	}		
		Luck. Wol.. 137.—						Nowoselica,	
"	"	Andros Kumm			"	"		Bess..... 200.—	
		Arenshourz.. 248.—			"	"		8 Flama Rosen-	
		Loff						bojm, Yuchi	
"	1058	Sura Bovmau,						to mcy?? Nar-	
		Orynin.. ... 100.—						kiew?? Pod	
30		Pod		On				mutilated.... 500.—	On
"	"	Szamszon Ka-		a/c	"	"		Udja Feldman,	a/c
		liko, Liany		of				Nowoselica,	of
		Koum 100.—	war			Bess..... 100.—	war		
		Pod		"	1048	Cipe Gurwicz			
"	"	Riwka Kirzner,				Safiewka Wol 500.—			
		Zwanec..... 100.—		"	"	Riwka Nu dil-			
		Pod				man Luck			
						Wol..... 100.—			
						Ro. 4920.—			

40

Exhibit D-4 for Identification.

AMERICAN EXPRESS COMPANY

Office of

AUDITOR, FINANCIAL ACCOUNTING DEPT.,

65 Broadway,

NEW YORK, March 4, 1918

TL.

To EMIL GERMANUS,
Newark, N. J.

10

DEAR SIR:

We beg to advise that our Agent at Petrograd has been unable to deliver your Foreign Remittance

Cable No 949/7

No. 6262442 for Ro. 1000.—
a/c war.

You may therefore refund the sum of \$127.50 to remitter, taking receipt for same on form below, and return to us for check.

REMITTERS RECEIPT MUST BE ATTACHED TO VOUCHER
WHEN RETURNED

Yours truly,

J. W. SCOTT
Auditor

EMIL GERMANUS, Newark, N. J.

30

RECEIPT FOR REFUND OF FOREIGN REMITTANCE.

Received the sum of \$127.50, being refund of Foreign Remittance No. 6262442

Cable 949/7

Remitter.....

Dated.....191..

Witness.....Agent.

File No. 39000

Amount Ro. 1000.— 40

office

On
a/c
of
war

Certificate.

FIRST DISTRICT COURT OF THE CITY OF
NEWARK.

JACOB KATCHER,
Plaintiff,

10

v.

AMERICAN EXPRESS COMPANY, a
corporation of New Jersey,
Defendant.

CERTIFICATE.

I hereby certify the within transcript as the State
of the Case on appeal in the above-named action,
which was tried before me on June 27th and June
20 28th, 1918, and I do further certify that the exhibits
therein referred to and marked for identification
D-1, D-3 and D-4 respectively were offered in evi-
dence on behalf of the defendant and were excluded
by me and an exception allowed.

Dated July 9th, 1918.

CECIL H. MACMAHON,
Judge.

80

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|B-3955|

Opinion of Supreme Court.

Filed—Dec. 18, 1918.

NEW JERSEY SUPREME COURT.

JACOB KATCHER,
Plaintiff-Appellee,

v.

AMERICAN EXPRESS COMPANY,
Defendant-Appellant.

Appeal from First 10
District Court of
Newark.

Argued November term 1918, before Justices
BERGEN, KALISCH and BLACK.

The plaintiff paid to the defendant \$194.50 for
which the latter agreed to forward for the plaintiff
\$194.50 or its equivalent, 1000 rubles, to plaintiff's 20
wife in Russia.

The agreement was manifested by a written re-
ceipt in which the defendant acknowledged that it
had received from the plaintiff \$194., equivalent of
1000 rubel for remittance to plaintiff's wife in
Russia. Delivery could not be made through the
Russian postal service, due to conditions created by
the war, and four months after a failure to deliver,
the defendant offered to refund to the plaintiff \$127.50
which it claimed was the then present value of 1000 30
rubles in American money.

This the plaintiff refused and brought suit to re-
cover the \$194.50 deposited with the defendant for
remittance.

On proof of these facts defendant moved for a
non-suit on the ground that its liability ceased when
it cabled to its agent in Russia a direction to pay to
plaintiff's payee the 1000 rubles. Held: That the
contract to forward the money or its equivalent was
not performed until delivery, even though the failure 40

Opinion of Supreme Court.

was not the fault of the defendant, and that plaintiff was entitled to recover at least the value of the ruble, if not the money paid as a consideration for the contract, and as something was due plaintiff, the refusal to non-suit was not error.

PHILIP J. SCHOTLAND, for Appellee.

10 LINDABURY, DEPUE & FAULKS, for Appellant.

The opinion of the court was delivered by BERGEN, J:

The defendant was engaged in the business of transmitting money from one person to another and in furtherance of that business it had a duly accredited agent in the city of Newark and another in the city of Petrograd, Russia, the latter being a banking house at which the defendant kept a de-
20 posit, out of which the agent paid such sums as the defendant might request to any person named.

While it is not perhaps important what method the defendant pursued in transmitting money from this country to a person in Russia, it was proven that in most cases the defendant would cable to the Russian bank the amount to be paid in Russian currency and the name of the payee, on receipt of which the Russian bank would procure a post office order and mail it to the address of the payee, and if
30 for any reason the bank was unable to do this, the amount directed to be paid remained to the credit of the defendant in the Russian bank, and the defendant was notified that the order was not "effected".

The facts in this case are, that the plaintiff called on the defendant's agent in the city of Newark in this state and said, as the agent testified, "I want to send 1000 rubles," giving the agent the name of the payee and her address with request that it be
40 cabled; that the plaintiff asked what it would

Opinion of Supreme Court.

cost, and the agent informed him that the entire cost, including the commission of the defendant and the charge for the agent's service would be \$194.50 which sum the plaintiff paid to the agent for which he was given a receipt dated September 8th, 1917, which acknowledged that the defendant had received from the plaintiff "One hundred ninety-four dollars not exceeding \$50. equivalent of One thousand (1000) rubel * * * for remit- 10
tance to Tese Kacjur, at Bereznier, Luckiy, Wolynck," and following this the amount in figures, \$194.50, but while the written part of the receipt acknowledges only the receipt of \$194., it is not denied that the amount actually paid was \$194.50.

The receipt was issued subject to certain express conditions the only one material to the present case being "The sum of money if covered by this receipt, if duly issued as aforesaid, will be forwarded 20
to the payee named herein, subject to the rules and regulations of the various post offices used in making the remittance."

There is another condition which is "This receipt must not be issued or accepted for more than the sum of \$50. or its equivalent and is not valid for more than said sum or its equivalent."

The trial court refused to give any effect to this receipt because it was issued for more than \$50., but manifestly that is not sound, for the defendant 30
by its subsequent action ratified it as a receipt for \$194.50. The inferences to be drawn from the testimony and the exhibits, are, that the plaintiff applied to the defendant to have it forward to the payee named, residing in Russia, \$194.50 which he was told was the equivalent of 1000 rubles; that the defendant accepted the money, and by the condition above set out, agreed to forward it to the payee named therein; that for some reason, for which the defendant was not responsible, the money was not 40

Opinion of Supreme Court.

paid to the payee out of defendant's money on deposit in the Russian bank; that the defendant was notified by its Russian agent that the payment could not be made to the payee because of conditions existing in Russia due to the war, and therefore the defendant was not able to do what it had agreed to do and for which it had accepted from the plaintiff \$194.50; that when the defendant learned
10 that its agreement could not be carried out, it offered to refund to the plaintiff only \$127.50, for the reason that at the time the refund was offered the value of rubles had depreciated in the United States to the extent that 1000 rubles could be purchased here for \$127.50. This offer the plaintiff refused and brought his suit to recover the amount of the money paid to the defendant which, or its equivalent, was to be forwarded to the payee named, and for that sum he recovered his judgment from which
20 the defendant has appealed.

The defendant moved for a non-suit which was refused, and in support of such motion argues that the remittance was completed when defendant cabled instructions to its agent in Russia whether the fund came to the payee or not, upon the theory that plaintiff purchased only a credit for the payee to the extent of 1000 rubles, and if for any reason defendant could not make delivery to the payee, the plaintiff was not entitled to have refunded the
30 cost of the credit but only its present value.

We do not think this is a proper construction of the contract, which was to remit to the payee \$194.50 or its equivalent of 1000 rubles. The contract manifested by the receipt is an agreement to remit \$194.50 or its equivalent of 1000 rubles, which requires a tender to the payee of at least 1000 rubles in Russia and would not have been complied with by tendering anything else, and that not having been done because of impossibility of performance because of
40 the war, the parties are in this position; that defend-

Opinion of Supreme Court.

ant accepted \$194.50 from the plaintiff upon an agreement to perform a certain contract which, through no fault of the defendant, the latter could not perform and therefore he was bound to refund the consideration paid by the plaintiff. The authority of the Newark agent to make a refund was limited to the sum of \$127.50, which is to be found in a letter dated March 4th 1918, written by the defendant to its Newark agent, which recited that their agent in Russia had been unable to deliver the 10 foreign remittance in question and directing him as follows: "You may therefore refund the sum of \$127.50 to remitter taking receipt for same on form below and return to us for check." The agent therefore had no authority to tender the plaintiff 1000 rubles even if plaintiff was bound to accept it, his authority being limited to refund \$127.50.

There is no proof in the case showing the value of the rubles in Russia at the time the Russian agent attempted to make delivery and failed. 20

The defendant in support of its appeal also argues that the trial court was in error in denying the motion for non-suit, because, as the agreement was to remit through the Russian post office, and in accordance with its rules and regulations, "All that the defendant agreed to have its Russian correspondent do was to mail the rubles through the post office in the manner provided by that post office for remitting money, it did not agree to become responsible for the defaults of the post office, 30 all it could do was to put the money in the way of being delivered by that governmental agency in the due course of business." This is rested upon the condition attached to the receipt, that the money will be forwarded to the payee "Subject to the rules and regulations of the various post offices used in making the remittance."

This argument is specious, for the condition manifestly refers to the efficiency of the post office which the defendant proposed to use in making the remit- 40

Opinion of Supreme Court.

tance, and the defendant would not be relieved from all responsibility simply because conditions existed in Russia which prevented the efficient use of one of its selected agencies.

It should be remembered that the defendant did not buy rubles for the plaintiff, for it appears in the case that they had at least 1000 rubles deposited in the Russian bank, and it lost nothing through its
10 inability to tender delivery of the 1000 rubles.

The situation seems to be this; the defendant took from the plaintiff \$194.50 for which it agreed to deliver to a person named as payee \$194.50, or its equivalent of 1000 rubles, which it was not able to comply with, and its agent in Russia knew on the 13th of November 1917 that no delivery could be made, and yet by the tender to refund, the defendant charges the plaintiff with all depreciation which
20 occurred between that date and March 4th, 1918, without any proof that there had been any depreciation on the 13th of November 1917. We are of opinion that the non-suit was properly refused.

The next point argued is that the trial court refused permission to take the testimony of a material witness in Petrograd by a commission, and the defendant also offered to prove the facts inquired about in the interrogatories. These interrogatories all relate, except as to those which are admitted, to what steps were taken by the Russian bank to make de-
30 livery.

According to the view which we take of this case it is quite immaterial what efforts were made to make delivery, and have assumed that all proper steps were taken to make delivery and that the failure to do so was not the fault of the defendant or its representative.

The third point is that the court erred in declining to find the facts in accordance with certain requests. These requests are all based on the proofs
40 in the case and we have assumed them to be found

Opinion of Supreme Court.

as requested in the consideration of the questions raised.

The fourth point is that the court erred in refusing to find the law in accordance with the defendant's requests. The first is that the sale to the plaintiff of a credit for 1000 rubles, was a completed transaction on the date of the receipt and that the defendant became the owner of the money paid for such credit. We think the ruling of the court was 10 correct.

The second request is that the agreement to remit does not obligate the defendant to deliver the rubles and that its only duty was to remit in accordance with the usual practice covering remittance of money by cable. This we think was properly refused.

The third and fourth requests are in substance, that purchasing a money order at a Russian post office and enclosing the same, in an envelope addressed to the payee, constituted a remittance in the manner contemplated by the contract, and that if the money order had been sent to the payee addressed and returned by the post office to the Russian bank, it became the duty of the defendant to hold to the plaintiff's account the credit for 1000 rubles. This we do not agree to and its refusal was correct, nor, in this case, did the defendant's agent hold anything to plaintiff's credit. 20

The fifth request is that the purchase of a credit 30 available in Russia was complete when made, and if a depreciation of rubles between the time of purchase and the return of the same to the defendant's correspondent as undeliverable, the credit became of less value when measured in terms of American money, the loss falls upon the plaintiff. This we do not consider to be the rule of law to be applied to the facts in this case, and was therefore properly refused.

The judgment will be affirmed with costs.

**Rule for Judgment in Supreme
Court.**

Filed—December 24, 1918.

NEW JERSEY SUPREME COURT

10	<p style="text-align: center;">JACOB KATCHER, Plaintiff-Appellee,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">AMERICAN EXPRESS COMPANY, a corporation of New Jersey, Defendant-Appellant.</p>	<p style="text-align: center;">} On Appeal. Order Affirming Judgment.</p>
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This cause having been argued at the November Term, 1918, of this Court, by Philip J. Schotland, of Counsel for the Plaintiff-Appellee, and Lindabury, Depue & Faulks, of Counsel for the Defendant-Appellant, and the Court having considered the same, and finding no error in the judgment of the First District Court of the City of Newark:

It is thereupon ORDERED and ADJUDGED that the judgment of the First District Court of the City of Newark in this cause be affirmed with Costs.

Dated December 21, 1918.

Entered December 24, 1918.

30 On motion of

PHILIP J. SCHOTLAND,
Attorney for Plaintiff.

A true copy

ENOCH L. JOHNSON,
Clerk.

New Jersey Court of Errors and Appeals.

JACOB KATCHER,
Plaintiff-appellee

v.

AMERICAN EXPRESS COMPANY,
Defendant-appellant

On Appeal 10

The stipulation below recited was signed by the attorneys of both parties for the purpose of correcting a clerical error which appears in the State of the Case, to which attention was called by the Chief Justice during the oral argument. 20

LINDABURY, DEPUE & FAULKS,
Attorneys of Appellant.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

<p style="text-align: center;">JACOB KATCHER, Plaintiff-appellee</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">AMERICAN EXPRESS COMPANY, Defendant-appellant</p>	}	<p>On Appeal</p> <p>Stipulation.</p>
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10 It appearing that a clerical error appears in the State of the Case in the above mentioned cause in that the interrogatories to be propounded to R. Jacobsen, appearing in Schedule "A" on pages 3 to 5 of the State of the Case, referred to "Pete Kaczur" instead of "Tese Kaczier" and that the same mistake is repeated in the repetition of said questions

20 in Grounds of Appeal Nos. 8, 13, 15, 18, 21, 23, 24, 27, 29, 30 and 31.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys of the respective parties hereto that the State of the Case be amended by inserting therein the name "Tese Kaczier" in place of the words "Pete Kaczur" wherever in said State of the Case the said words "Pete Kaczur" appear.

30 PHILIP J. SCHOTLAND,
Attorney for Plaintiff-appellee.
LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant-appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JACOB KATCHER,
Plaintiff-Appellee,

VS.

AMERICAN EXPRESS COMPANY, a
corporation of New Jersey,
Defendant-Appellant.

On Appeal
from First
District Court
of Newark.

10

BRIEF OF PLAINTIFF-APPELLEE.

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Facts.

On September 8th, 1917, plaintiff went to the office of The American Express Co. at Newark, and there paid the sum of \$194.50 for the purpose of having delivered by cable to Tese Kacjur, at Bereziner, Luckiy, Wolyneck, Russia, one thousand rubles, and received from the agent in charge of said office, EMIL GERMANUS, the receipt for his money which has been marked Exhibit P.I. and appears on page 51 of the State of the Case. The American Express Co. failed to deliver said money, and sometime after the 4th of March, 1918, or more than six months after the contract was made, the plaintiff was notified that the money was not delivered and the defendant's agent offered to return to him \$125.00, or to deliver the one thousand rubles after the war is over.

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Plaintiff demanded the return of his \$194.50, and upon being refused, brought this suit, and re-

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covered judgment for said amount with interest. Defendant brings this appeal from said judgment.

Argument.

I.

The motion for non-suit was properly denied. When the motion was made the only evidence before the Court was that the plaintiff had paid
 10 to the defendant \$194.50 to have its equivalent in Russian money, which the defendant asserted to be one thousand rubles, delivered to the consignee in Russia by cable. That more than six months after the contract was made the defendant admitted to the plaintiff that it was unable to carry out its contract, and offered to return an arbitrary sum of \$125.00, instead of the amount it had received. The defendant argues
 20 in support of its motion that the language of the receipt which appears on page 51 of the State of the Case provides that it received said money "for remittance" and claims that while remittance is defined as the act of transferring bills or the like to another place, this does not include delivery. Plaintiff contends however, that the cases cited by the defendant defining remittance, have no application but that this being a case of remittance by cable, the cases which
 30 construe the duty of a Telegraph Company that accepts money to transfer its equivalent to another person at another place, do apply, and the law is well settled that a Telegraph Company is bound to deliver.

Western Union Telegraph Co. vs. Braxton,
 74 N. E. 985.

also 37 Cyc, 1775.

The receipt which plaintiff received is purely and simply a receipt for the money that he paid, and showing that it is to be sent by cable to his wife in Russia. The printed conditions do not apply, because, by their terms, they are only to apply as attached to a receipt for not more than \$50., and the defendant having issued this receipt to plaintiff for more than \$50. it only applies as a receipt to him for his money. The defendant on the plaintiff's case at page 13, lines 28 and 29 admitted that the money had never been delivered.

10

Under these circumstances plaintiff respectfully submits that the motion for non-suit was properly denied.

II.

The Court properly denied the application to take the deposition of R. JACOBSON.

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The Contract in question was made September 8th, 1917, when it was known to both parties that the War involving practically all Europe as well as the United States was on, but the defendant did not either orally or by any provision on its receipt, stipulate as to what should be done in the event that it is unable to deliver the money on account of the War, but on the contrary undertook to deliver the money with full knowledge that the War was on, and the plaintiff therefore had a right to assume that the defendant had special means of being able to deliver the moneys, otherwise it would not have undertaken to do so. Furthermore this is an action to recover the money paid for a failure on the part of the defendant to carry out its contract. No negligence is alleged and no damages asked for any negligence; it is therefore entirely

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immaterial as to why the defendant was unable to make delivery, because for the purpose of this suit it would neither add to nor diminish defendant's liability. The testimony sought to be introduced therefore by means of the deposition, would have been entirely immaterial, and the Court therefore properly denied the motion, rather than to have the trial of this case delayed until the deposition could be procured from
10 Russia in its present chaotic condition, and the plaintiff of small means deprived of his money.

III.

The Court properly refused to find the facts which defendant asked it to find because the evidence did not support such findings of fact.

(a) Defendant asked the Court to find that the plaintiff purchased a credit to be remitted through defendant's Russian correspondent by means of a postal money order. There is absolutely no evidence to show that plaintiff did any such thing. On the contrary the evidence is that plaintiff purchased a credit to be remitted by the defendant by cable with no mention of any Russian correspondent, and no mention of any post office money order or ratifying any post office money order.
20

(b) The Court could not find as a fact an agreement to remit the one thousand rubles subject to the rules and regulations of the Russian Post Office when no such agreement was made, but on the contrary the agreement made was to remit by cable, with no reference whatsoever to any Post Office at the time the remittance was arranged for.
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See Evidence case pages 13 to 18.

The printed clause on the receipt referring to Post Office does not apply in this case because this money was to be remitted by cable, and, furthermore, by the terms of the receipt itself does not apply because this was a case involving more than \$50.

(c) The Court was asked to find the usual and ordinary method of making a cable remittance based on the testimony of a witness for the defendant, whose knowledge was mainly hearsay, as to the method adopted by this particular defendant in remitting money by cable, but there is not one iota of evidence that the defendant or any of its agents called the attention of the plaintiff to the manner in which it intended to remit the money for him. Furthermore, the manner of remitting is entirely immaterial as the defendant did not succeed in delivering the money, and, therefore, parted with nothing.

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IV.

The contract in this case between plaintiff and defendant was that the defendant would deliver to plaintiff's consignee one thousand rubles by cable. If there were any doubt as to the terms of the contract and as to what the parties between themselves understood the contract to be, that doubt is removed by the language of D-4 for identification, which appears on page 57 of the State of the Case in which the defendant advised its agent at Newark under date of March 4th, 1918, as follows:

30

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"American Express Company,
Office of
Auditor, Financial Accounting Dept.,
65 Broadway, New York, March 4, 1918.

TL

To Emil Germanus,
Newark, N. J.

Dear Sir:-

10 We beg to advise that our agent at Petrograd *has been unable to deliver your foreign remittance*, Cable No. 949-7, No. 6262442 for Ro 1000- A/C War.

You may therefore refund the sum of \$127.50 to remitter, taking receipt for same on form below, and return to us for check.

Remitter's receipt must be attached to voucher when returned.

Yours truly,
J. W. Scott,
Auditor."

20 The only question in the case is therefore: the defendant undertook to deliver; having failed to deliver should it return the amount of money received from the plaintiff or no? The defendant's real position is simply this: it had, as was its usual custom, on deposit with its correspondent bank in Russia, thousands of rubles, and it notified its correspondent to deliver to plaintiff's consignee, one thousand rubles. Its correspondent
30 sometime later, under date of Nov. 26th, 1917, wrote to defendant that it had been unable to carry out this particular order, as well as others on account of the War.

The defendant's balance was therefore in no way affected by this order, but remained in the same condition as if no such order had been given. The defendant did not change its position in the least, yet after more than six months had elapsed, the defendant offered to return to plain-

tiff an arbitrary sum of \$125 in American money; which offer under its instructions to its agent should have been \$127.50, and which arbitrary sum defendant fixes by itself by setting its own value on rubles at said time, because there was no foreign exchange by means of which the real value could be determined.

Defendant has cited two cases:

Strohineyer & Arpe Co. vs. Guarantee Trust Co., 157 N. Y., Supp. 956. **10**

and *Hiker v. State Bank*, 159 N. Y. Supp., 730,

neither of which throws any light on the question involved here because in the first case cited the defendant carries out its contract, and the plaintiff sought damages for delay but was denied the right to recover; the contract was carried out exactly as made, and the delay was not the fault of the defendant. **20**

In the latter case which is a case decided in the Municipal Court of the City of New York, the receipt contained the stipulation, "subject to delay on account of foreign war," and the return of the rubles was tendered. In the case at bar the return of the rubles was not tendered, but an arbitrary sum in American money instead. Plaintiff is willing to concede for the sake of argument that if the defendant had shown that when money is sent by cable it should be delivered within a certain number of days, and had offered to return to plaintiff either the one thousand rubles or their equivalent in American money, according to the rate on foreign exchange at the time when delivery should have been made, but could not be made, then plaintiff might have been required to take such a sum; but the defendant did not seek to introduce, nor did it introduce any **30**

such proof nor any such offer, but on the contrary the only offer it made was an arbitrary sum, more than six months after the contract was entered into, which would under no circumstances measure the amount that plaintiff was entitled to receive back unless the Court would be willing to hold as a matter of law that six months is a reasonable time within which to apprise plaintiff of defendant's inability to deliver money which was to be remitted by cable. The proof being it undertook to deliver said money, and failed to do so, the judgment for the return of said money, with interest, was properly entered, and plaintiff respectfully submits that said judgment should be affirmed with costs.

Respectfully submitted,

PHILIP J. SCHOTLAND,

Attorney for Plaintiff-Appellee.

New Jersey Court of Errors and Appeals.

JACOB KATCHER,
Plaintiff-Appellee,

v.

AMERICAN EXPRESS COMPANY,
a corporation of New Jersey,
Defendant-Appellant.

On Appeal from
the Supreme
Court.

**BRIEF FOR
APPELLANT.**

Statement of Facts.

The appeal in this case is from the judgment of the Supreme Court, affirming the judgment rendered by the First District Court of the City of Newark in favor of the plaintiff. The amount involved in this particular case is small, but the questions are novel and the principles are of great and far reaching importance.

The defendant is an express company, which as a part of its business, deals in foreign credits and exchange and maintains for that purpose credit balances in foreign money in banks in various countries of Europe. The plaintiff, desiring to send some money to Russia, purchased a cable remittance for one thousand rubles from an agent of the defendant company doing business in Newark and instructed this agent to send the amount of such remittance, viz., one thousand rubles, to Tese Kaczier, Baveznica Lucking Wolyack, Russia. The amount paid for this remittance was \$194.50. This amount included the commission of Emil Ger-

manus, the defendant's Newark agent and also the defendant's profit on the sale of the remittance, out of which profit the defendant was obliged to pay the expense of cabling and a commission to the Russo-Asiatic Bank, its Russian agent, through which the remittance was to be made.

The remittance never reached Tese Kaczier because of the disturbed conditions then prevailing in Russia and in due course of business the defendant was advised by its Russian correspondent of this fact. It thereupon notified its Newark agent to pay to the plaintiff the equivalent of one thousand rubles in American money. During the time which had elapsed since the purchase of the remittance which occurred in September, 1917, the price of rubles in American money had depreciated and plaintiff refused to receive the then value of one thousand rubles, claiming that he was entitled to be paid the entire sum of \$194.50 which had been paid by him to the defendant's agent at the time the purchase was made.

This suit was brought to recover the above sum and resulted in a judgment for plaintiff for the full amount claimed. The state of demand, which appears on page 1 of the state of the case (being preceded by pages I to XII) discloses the theory upon which plaintiff based his action. He claims that he delivered to the defendant \$194.50 which the defendant *undertook to deliver* to Tese Kaczier at Baveznica Lucking Wolyack, Russia; that the defendant had failed to deliver said money and had refused to return it to the plaintiff.

The defendant's view of the contract is that it was a purchase by the plaintiff from the defendant of a credit for one thousand rubles available in Russia and that defendant at the time of such purchase agreed to *remit* the proceeds of this credit to Tese Kaczier at the place named, this remittance to be made by the Russo-Asiatic Bank, through the

Russian postoffice (see receipt given by defendant to plaintiff—Exhibit P 1, case, p. 51); that the purchase of the credit for one thousand rubles was a completed transaction when made; that the price paid, viz: \$194.50, became at once the property of the defendant; that in consideration of the payment of this price, the plaintiff received the transfer of the ruble credit available in Russia and the agreement of the defendant to use this ruble credit in the purchase of a money order and to remit such money order through the Russian postoffice, to Tese Kaczier at the place named (case, pp. 35 and 36).

The agreement did not obligate the defendant to *deliver* the money order or the rubles, to Tese Kaczier, but only to send it in the manner customarily employed in making a "cable remittance", which manner was by mailing in the Russian postoffice as indicated on the receipt given to the plaintiff at the time the price of the remittance was paid. If because of the inability of the Russian postoffice to make delivery of the money order it was subsequently returned to the Russo-Asiatic Bank, it became the duty of the Bank to cash the money order and advise the defendant in the customary manner that this had been done, whereupon the defendant was obliged to notify the plaintiff that the remittance had not been received by Kaczier and return to him value of the amount realized on the redemption of the money order.

A stenographer was appointed at the trial and a transcript of the testimony has been certified by the judge as the state of the case.

The evidence offered by the plaintiff was very brief and consisted merely of proof that the plaintiff went to the office of defendant's agent in Newark and asked the *price* of one hundred rubles. Upon being told the *price*, the plaintiff said that he wanted to send one thousand rubles by cable remit-

tance. Defendant's agent told plaintiff the *price* of a cable remittance for one thousand rubles, which was \$194.50 and "*sold it to him*". Plaintiff paid the price and received the receipt, which has above been referred to as Exhibit P 1, case, p. 51.

The defendant offered testimony showing that when a cable remittance is made from this country to Russia, the forwarder undertakes to cable to its correspondent in Russia with whom it has a ruble credit, directions to remit the desired amount to the person and at the place named. The Russian correspondent, upon the receipt of the cablegram, purchases a postal money order, having the same made payable to the remittee and places the money order in an envelope properly addressed and stamped and deposits such envelope in the post-office. If the envelope containing the money order is not delivered to the person to whom it is addressed but is returned to the Russian agent, the agent upon returning it to the Russian postoffice receives therefrom the amount of rubles called for by the money order and thereupon notifies its principal in the United States by mail that the money order has been returned as not delivered (case, p. 35). The principal then communicates with the person for whom the remittance was made and returns to him the proceeds of the money order (case, p. 35).

The defendant in this case proved, so far as evidence subject to its command could be produced, that it had performed its contract with the plaintiff, in the manner above stated; that upon the receipt of the communication from its Russian agent, notifying it that the money order had not been delivered, it had directed its Newark agent to tender to the plaintiff the then value in American money of the rubles received on the redemption of such money order and that the plaintiff had declined to receive this money, claiming the full amount paid

by him at the time the purchase was made (case, pp. 38, 42, 43; also case, p. 16).

Before the trial, defendant made an application to the court to take the deposition of R. Jacobsen, who was the manager of the Russo-Asiatic Bank, the defendant's Russian correspondent, at the time in question. The questions which the defendant proposed to ask Jacobsen appear on pages 3 and 4 of the state of the case.

The general purpose of these questions was to show that Jacobsen had received in due course the cablegram sent by the defendant, containing instructions to remit the plaintiff's rubles to Tese Kaczier and that upon the receipt of this cablegram a money order had been purchased by him, made payable to the order of Tese Kaczier and mailed to said Kaczier at the address given and also to show the reasons why the postoffice was unable to make delivery so far as such reasons were within Jacobsen's knowledge.

The trial court reserved decision on the application to take the deposition, stating that after the available evidence had been produced at the trial, he would grant the application, if the questions which defendant proposed to ask were in his judgment material. To this ruling an exception was duly taken. The court at the conclusion of the case held that the questions were immaterial and irrelevant and denied the application, to which ruling an exception was duly taken.

When this denial was made, counsel for the defendant made a tender of the proof which the questions annexed to the notice to take depositions were intended to elicit as though a witness competent to answer the questions had been produced and duly sworn and the questions had each been asked, each overruled and an exception allowed. The court permitted this tender to be made in this manner,

but overruled the questions on the ground that they were immaterial and allowed the exception.

At the close of the plaintiff's case, defendant moved for a nonsuit on the ground that the plaintiff had proven a very different contract from the one alleged in his state of demand, but offering, however, to consent to an amendment of the state of demand so that the allegations would correspond with the proof. Plaintiff declined to make the amendment and the court denied the motion for nonsuit.

The defendant also submitted requests to find as to law and facts, which were denied. The appeal to the Supreme Court was based upon the grounds above-mentioned and that court sustained the action of the trial court in every respect.

This appeal has been brought to question the legality of the Supreme Court's ruling.

ARGUMENT.**I.****The Supreme Court erred in sustaining the action of the trial court in denying the motion for nonsuit.**

The motion for nonsuit in this case was based solely upon the variance between the contract proved and the contract alleged. The contract alleged was a contract to *deliver \$194.50* to Tese Kaczier at the place named, in Russia. The breach alleged was the failure to deliver this sum and the refusal to return it to the plaintiff. The proof did not sustain this contract, but disclosed an entirely different contract.

When plaintiff rested his case, the evidence showed that the plaintiff went to defendant's agent in Newark in September, 1917, and asked: "*How much it cost 100 rubles?*"; that defendant's agent replied: "\$19.30". Plaintiff then said: "*I want to send 1000 rubles*". Defendant's agent told him the *price of one thousand rubles and "sold it to him"*. (case, p. 14, lines 6-26). Plaintiff then instructed defendant's agent to send the one thousand rubles as a cable remittance and told him where to send it and then received from defendant's agent the receipt which was offered in evidence (Exhibit P 1, case, p. 51). The only proof of the contract between plaintiff and defendant offered by plaintiff was this evidence and the receipt itself.

The trial court, in denying the motion for nonsuit, said that he would entirely disregard the receipt (case, p. 19, line 33); because on its face were the printed words "not exceeding \$50.00" and "not exceeding 100 rubles". The receipt was filled in by the defendant's agent for more than one hundred

rubles and it has ratified his action. It was offered in evidence by the plaintiff, without objection by the defendant, and was admitted in evidence and never stricken out.

The Supreme Court held that the receipt should be regarded as evidence of the contract, notwithstanding the printed limitation as to amount to which the trial court referred, and in this, it is submitted, the Supreme Court was entirely right.

It appears from this receipt that one thousand rubles were to be *remitted* to Tese Kaczier by *cable remittance* and forwarded through the Russian postoffice in accordance with the rules and regulations of such postoffice, the third condition of the receipt being:

“The sum of money if covered by this receipt, if duly issued as aforesaid, will be forwarded to the payee named herein, subject to the rules and regulations of the various postoffices used in making the remittance.”

The use of the words “remit” and “remittance” in the receipt is significant. The word “remit” has a definite and well understood meaning. It is defined in the Century Dictionary as follows:

“To transmit or send, as money, bills, or other things in payment for goods received”,

while “remittance” is defined as

“The act of transmitting money, bills or the like to another place.”

In *Comber v. Leyland*, 1898, App. Cases, 524 (House of Lords), the Court said:

“The only agreement was that he was to hold this money for the plaintiffs and then turn it into first-class bank bills in favour of the plaintiffs and remit those. I cannot doubt that the word ‘remit’ there means this and nothing beyond this—that the bank post bills, when obtained in favour of the plaintiffs, should be

sent in the ordinary course and the ordinary manner in which such documents are sent by commercial men, namely, by mail, and that as soon as that had been done all obligation and all liability of the defendant ceased. I think it is impossible on these words to maintain that there was an obligation and a liability incumbent upon him until those bank post bills had reached the hands of the plaintiffs in England. Therefore, what he had to do was all to be performed and could all be performed (it is enough to say that it could all be performed) in Pernambuco. There was no obligation resting on him after he had received that money of which he could not discharge himself in Pernambuco. Then, if that be the case, it is not a contract which by its terms 'ought to be performed within the jurisdiction'. My Lords, I think that is the meaning of the word 'remit'."

In *Calvin v. U. S. Mut. Acc. Ass'n of City of New York*, 21 N. Y. Supp. 734, the Supreme Court of New York said, speaking of the word "remit":

"The word 'remit' means to send back, and in the absence of any specific direction as to the mode of sending the check, there would necessarily be implied a direction to send it in the usual way, namely, by mail. The contract, as contained in this letter, was not that upon the receipt and payment of the check the company would reinstate the plaintiff to membership; but it was that if the plaintiff *would remit* to the defendant his check for four dollars, with exchange, such reinstatement should take place. *He did remit it*, and he was thereby, in our judgment, effectively, reinstated as a member. No further act by either party was required to complete the fact of *remittance*. The contract was complete upon the mailing of the letter containing the check; and hence for the injuries received while the letter was in transit, and before it reached the defendant, an action may be maintained."

In the case last cited, it was held that a notification by an accident insurance company, to a member, that his policy had lapsed, but that the company would reinstate him, and carry his policy, "if you will *remit* us your check" for a specified amount, did not make the reinstatement depend on the receipt and payment of the check, but such reinstatement became complete by the mailing of a letter containing the check on the day the notification was received; and hence the member might recover for accidental injuries sustained while the letter was in transit, and before it reached the company.

The fact that the agreement was to remit *through the Russian postoffice and in accordance with its rules and regulations*, is worthy of note. The defendant did not agree to *deliver* the rubles, but to mail them through the Russian postoffice in the manner provided by that postoffice for transmitting money. It did not undertake to utilize any other agency in the event that the machinery of the postoffice should not be effective for the delivery of the rubles. So far as the mere sending of the money was concerned, its duty was discharged when it had delivered the remittance to the postoffice in accordance with its rules and regulations.

To adopt any other construction of this contract would be to obligate the defendant, in the event of the failure of the postoffice, to make delivery in some other way which undoubtedly would involve expense far in excess of the entire amount of the remittance. The purpose of the provision of the receipt above recited was to notify the plaintiff that the defendant only undertook to deliver the rubles to the postoffice for transmission in accordance with the rules and regulations of such postoffice.

The Supreme Court, in dealing with this subject, laid some stress upon the fact that the receipt contains the word "received \$194.50 equivalent of 1000

rubles". This language, however, in view of the testimony and of the situation of the parties can be given but one construction. The sum of \$194.50 was the equivalent of one thousand rubles in the sense that the price of an article purchased, is the equivalent of the article and in no other sense.

The Court said in part:

"We do not think this is a proper construction of the contract which was to remit to the payee \$194.50 or its equivalent of 1000 rubles. The contract manifested by the receipt is an agreement to remit \$194.50 or its equivalent of 1000 rubles, which requires a tender to the payee of at least 1000 rubles in Russia and would not have been complied with by tendering anything else and that not having been done because of impossibility of performance because of the war, the parties are in this position: that defendant accepted \$194.50 from the plaintiff upon an agreement to perform a certain contract which, through no fault of the defendant the latter could not perform, and therefore was bound to refund the consideration paid by the plaintiff."

It is submitted that this is no answer to the contention made by the defendant, for the following reasons: (1) It assumes that "remit" is equivalent to "deliver"; that by agreeing to remit, the defendant obligated itself to make tender of the sum to be remitted, whereas, the ordinary definition of the word "remit" as above shown, and the construction which has been repeatedly placed upon it by the courts, are both contrary to this view; (2) It ignores the fact that the agreement was to remit *through the Russian postoffice*. If this condition is to be given effect it means that the defendant only agreed to send the money through the postoffice in the manner provided by the postoffice for mailing money; (3) Because it disregards the evidence of the plaintiff's witness which shows that the transaction was a purchase and sale of a credit.

It will be noted that the plaintiff asked the *price* of one hundred rubles; that he said that he wanted to send "one thousand rubles"; that defendant's agent who testified as plaintiff's witness then "*sold* it to him" (case, p. 15, line 20); that it in no way appears from any evidence that the plaintiff wanted to send \$194.50. That sum was fixed because it was the *price* of the thing which the plaintiff desired to purchase and send; (4) Furthermore, it appears from the testimony of the defendant's agent Germanus while testifying as the plaintiff's witness that he added something to the rate or price given him by the defendant for his profit (case, p. 15, lines 10-20). Clearly, neither party intended that the defendant should remit its agent's profit to the plaintiff's nominee in Russia.

The plaintiff either intended to send dollars or to send rubles to Russia. The evidence all shows that he intended to send rubles and the fact that the remittance was to be made by cable, shows that he intended to acquire a ruble credit available in Russia.

The Supreme Court in dealing with the defendant's argument that it was not obliged to remit in any manner except that stated in the receipt, namely, through the Russian postoffice, further said:

"This argument is specious for the condition manifestly refers to the efficiency of the post-office which the defendant proposed to use in making the remittance, and the defendant would not be relieved from all responsibility simply because conditions existed in Russia which prevented the efficient use of one of its selected agencies."

We are not certain that we understand what the Supreme Court meant by this language. It seems reasonably clear that defendant's obligation to mail a money order in the Russian postoffice could

not be changed into an obligation requiring it to do an entirely different thing, namely, to deliver by some other means which might prove much more burdensome and expensive, merely because the Russian postoffice was not performing its accustomed functions.

The character of the agreement between the plaintiff and defendant was fixed when the agreement was made, and its terms and provisions could not be changed by subsequent events. The Russian postoffice was not "one of the agencies selected by the defendant" for making the remittance from its Russian correspondent to plaintiff's nominee, but was the *only agency* for that purpose contemplated by either party at the time the contract was made.

There is no claim that the defendant was relieved from all responsibility because of the failure of the Russian postoffice. When its agent had purchased the money order and deposited it in the postoffice it had *remitted* in the manner which it had agreed to do, but if the remittance was subsequently returned to it, it would hold it for the benefit of the plaintiff and would be obliged to account for it to him to the extent of the amount received and to that extent only. If, however, all that it agreed to do was to deposit a letter containing a postal money order in the postoffice, and if subsequently the letter were returned to defendant, its liability to account would not be based upon a failure of consideration, but upon the fact that in the due performance of its contract in the manner contemplated by the contract, it had received foreign money for which it was obliged to account to the plaintiff. The essential character of the contract as a sale of credit, which was to be remitted in the manner stated in the contract, cannot be changed merely because of the failure of the Russian postoffice.

The situation, therefore, at the close of the plain-

tiff's case, was that the plaintiff had proven the purchase of a credit available in Russia for one thousand rubles for a price which included the profit of the defendant's agent and an agreement to remit through the Russian postoffice the one thousand rubles represented by the credit, to Tese Kaczier, and had also proven, by admission, that the rubles had not been received.

The variance between the allegations and the proof consisted in the fact that the plaintiff alleged a contract to deliver \$194.50, while the proof showed that the \$194.50 was not to be delivered but was the purchase price of the thing to be remitted and that the agreement was not an agreement to *deliver* which would obligate the defendant to actually make a tender of the thing to be delivered but an agreement to remit through the Russian postoffice. This, it is submitted, was a material variance which affects the substance of the entire case.

The State of Demand alleged an entirely different contract from that proven; one which imposed an entirely different liability and the motion for nonsuit should, therefore, have been granted unless an amendment of the State of Demand were made so as to make the allegations conform to the proof. The motion for nonsuit was not based upon the desire to take advantage of a technical defect in pleading, but upon the right which the defendant had to have the real issues in the case truly stated in the pleadings and adjudicated by the court.

While the effect of a variance between the allegations and the proof at common law has been greatly modified by our statutes permitting amendments, it is still the law that

“There must be no variance to the prejudice of the adverse party between the case declared upon and the case proven and that a recovery

must be *secundum allegata et probata.*" *Jordan v. Reed*, 77 N. J. L. 584, 591 (Ct. of Errors and Appeals).

The view which the Supreme Court took of this matter illustrates the essential difference between the contract proven and the one alleged. Under the contract alleged the recovery was upon the basis of an entire failure of consideration (case, p. 62, lines 35-40; p. 63, lines 1-5) because of the failure to deliver, whereas, under the contract proven there was no failure of consideration unless there had been a failure to remit and while perhaps, the proof that the rubles had not been received might be *prima facie* proof of the failure to remit, this could be rebutted by proof that the remittance had been made in the manner contemplated by the contract, even though delivery had not occurred.

It is respectively submitted that the denial of the motion for nonsuit was error, for which the Supreme Court should have reversed the judgment.

II.

As to requests for findings of fact Nos. 1, 2, 4 and 6.

At the trial in the District Court the plaintiff requested the court to make the following findings of fact, Nos. 1, 2, 4 and 6:

These requests appear on pages 48-49 of the State of the Case, and are as follows:

"1. That the plaintiff purchased from the defendant through its agent, a credit available in Russia for one thousand rubles, and that the defendant agreed to remit through its Russian correspondent the sum of one thousand rubles to Tese Kaczier at Baveznica Lucking

Wolyack, said remittance to be made by postal money order obtained from the Russian post-office at Petrograd, Russia, and sent by mail through the Russian post office, to said Tese Kaczier at Baveznica, Lucking Wolyack.

"2. That the agreement made by the defendant to remit one thousand rubles to Tese Kaczier was made subject to the rules and regulations of the Russian post office.

"4. That the usual and ordinary method of making a cable remittance of money from the United States to Russia is as follows:

"The remitter purchases a credit for rubles available in Russia, paying therefor the price fixed by the seller. The seller undertakes to remit through his correspondent in Russia, the amount of rubles represented by the credit purchased by the remitter, to the person named by the remitter at the address given. This remittance is accomplished by means of a communication sent by cable from the seller to the correspondent in Russia, instructing him to make the remittance as above stated. Upon the receipt of this communication, the Russian correspondent purchases a money order at the Russian post office and mails the same, postage prepaid, to the person designated by the remitter at the address given.

"6. There is no evidence in the case which will support the inference that the defendant failed in any way to make the remittance of one thousand rubles to Tese Kaczier at Baveznica, Lucking Wolyack, in accordance with its contract."

The Supreme Court stated that these requests were all based on the proofs in the case, and that they assumed them to have been found in the consideration of the questions raised. They are undoubtedly supported by evidence in the case which is uncontradicted.

Requests 1, 2 and 4 are substantiated by proof of what both the plaintiff and defendant's agent said at the time the purchase was made (case, p. 14,

line 8; p. 15, line 22 *et seq.*). They are also supported by the receipt (Exhibit P 1, case, p. 51), by the testimony of Mr. Dennis (case, pp. 23-29), and also by the testimony of Mr. Metcalf (case, pp. 34 and 35). It appears from this testimony that the usual method of making a cable remittance of money to Russia employed by the American Express Company, is to send a cable message to the Russo-Asiatic Bank, its correspondent at Petrograd. Upon the receipt of this message, the correspondent with whom the defendant always maintains a considerable ruble credit, purchases money orders at the postoffice in Petrograd and mails these money orders to the persons named in the cablegram at the respective addresses therein given. There was no evidence in the case which in any way contradicted this evidence or which would support any contrary inference.

All that the plaintiff said was that he wished to send a thousand rubles. The defendant's agent testified that he told the plaintiff the price of the rubles and sold them to him. As has above been argued, the receipt is further evidence of the contract. There is no evidence from which it can be inferred that the defendant agreed to remit these rubles in any other than the usual way. The proof as to what that way was was all one way and is absolutely uncontradicted.

The importance of these findings of fact will be considered under Point III.

III.

The Supreme Court erred in sustaining the action of the trial court in refusing to find the law in accordance with defendant's requests 1 to 5 inclusive.

First Request. This request is as follows:

"1. The sale by the defendant to the plaintiff of a credit for one thousand rubles available in Russia, was a completed transaction on the date the receipt was issued by the defendant under which the plaintiff became the owner of the credit in Russia and the defendant became the owner of the money paid for such credit."

As to this request the Supreme Court stated that they thought the finding of the trial court was correct without assigning any reason for such belief. The Supreme Court reached this conclusion although it assumed that the facts had been found in accordance with the first request for finding of fact (case, p. 48, line 10), that the plaintiff purchased a credit available in Russia for one thousand rubles, and that the plaintiff agreed to remit through its Russian correspondent the sum of one thousand rubles to Tese Kaczier, Baveznica Lucking Wolyack, said remittance to be made by postal money order obtained from the Russian postoffice at Petrograd, Russia, and sent by such Russian correspondent through the Russian postoffice. If, as has been conceded by the Supreme Court, there was a purchase of a credit available in Russia, no reason is perceived why the seller of that credit did not become the owner of the money paid for such credit at the time the sale was made. The plaintiff and the trial court both insisted that the transaction was the deposit of money with the defendant

upon the defendant's promise to deliver its equivalent in rubles to a person in Russia. The Supreme Court, by assuming the first request for finding of fact to have been found, conceded that the transaction was a sale of credit and not the deposit of money with the defendant.

Since the transfer was to be made by cable, as evidenced by the receipt, it is obvious that the specific money paid the defendant was not intended to be transferred. This becomes even more apparent when we consider the fact that the only compensation which the defendant received in this matter was the *profit* on the *sale* of the credit, from which profit it paid the expense of the transaction including the commission of its Russian agent (case, p. 45, lines 28-40). If this had been intended to be a mere remittance of \$194.50, the defendant's compensation would have been ascertained and paid in some other way. It appears also in the testimony, to which reference has above been made, that the defendant was the owner of a ruble credit in the Russo-Asiatic Bank at Petrograd, and that the plaintiff purchased this credit and instructed the seller to send the proceeds of the credit to the person named in Russia. A transaction of this character was considered by the Supreme Court of New York, Appellate Division, in *Strohmeyer & Arpe Co. v. Guaranty Trust Co.*, 157 N. Y. Supp. 956, as a purchase of credit. In this case the court said in part:

"What the seller of a cable transfer does is to sell a sum of money, or a credit for a sum of money, payable at the place indicated in the contract. What the buyer does is to purchase a credit available at such place. In the present case the plaintiff bought 75,000 lire to be paid in Genoa. *The transaction was a completed one*, and plaintiff or its correspondent ultimately received precisely what defendant engaged should be received to wit, 75,000 lire in

Genoa. The inequity of plaintiff's claim can be appreciated by considering what would have been the rights of the parties if the fluctuations of exchange had been such that on November 11th the value of \$1 in Italian lire had been more than 5.20, instead of less, and that, as in the present case, the delay in transmission had been due to no fault of the defendant. In such a case it is evident that defendant, having sold the transfer at 5.20 on October 23rd, would have had no valid claim against plaintiff for the value of the transfer at the market rate on November 11th.

"As we regard the transaction it was complete on October 23d when the cable transfer was sold. The money paid for became defendant's money, against which plaintiff received defendant's obligation that payment would be made in Genoa."

The above case points out the substantial distinction between a cable transfer or cable remittance and the deposit of money to be forwarded to a foreign country. This distinction is also referred to in *Musco v. United Surety Co.*, 117 N. Y. 21, aff. 90 N. E. 171. See also *Oshinsky v. Taylor*, 172 N. Y. S. 231.

If instead of purchasing a credit, the plaintiff had purchased and paid for a chattel, for example, an automobile tire, with instructions to the seller to send the same by Adams Express Co. to a person named at an address in Chicago, and if the defendant had thereupon issued a receipt stating that it had received the purchase price of the tire and that the tire was to be sent to the person named by the Adams Express Co., there could be no doubt that such a sale would be a completed transaction on the date the receipt was issued, and that the plaintiff would become the owner of the tire and the defendant the owner of the price paid. The only distinction between the case put and the one under consideration is that in the case put the title to a

definite chattel would pass to the plaintiff at the time of the purchase, while in the case under consideration, the plaintiff instead of acquiring a title to a definite chattel acquired title to a credit available in Russia.

The second request is as follows:

“2. That the agreement made by the defendant to remit one thousand rubles to Tese Kaczier, was made subject to the rules and regulations of the Russian post office.”

The character of the contract with regard to the obligation of the defendant to *deliver* has been considered under Point I. Proof of the manner of making a cable remittance appears in the testimony of Mr. Dennin (case, pp. 23-29) and Mr. Metcalf (case, pp. 34-35), to which reference has above been made. In fact, the Supreme Court conceded that the uncontradicted evidence showed this method to be as stated in the fourth request to find facts, appearing at page 48 of the Case and under Point II of this brief. The Supreme Court did not give its reason in its opinion for sustaining the action of the trial court in refusing this request, except as that reason can be gathered from the part of its opinion which deals with the denial of the motion to nonsuit. It evidently had the impression that the defendant agreed to *deliver* the rubles in question. It is difficult to understand upon what portion of the evidence this impression could have been based. If, as has been above stated under Point I, there is a substantial distinction between an agreement to remit through the postoffice and an agreement to deliver, there is no support for the assumption that the defendant agreed to deliver.

It is apparent that an agreement to *deliver* a comparatively small sum of money to a person located, perhaps, in a remote part of Russia, would be an undertaking which might involve great difficulty and expense. It may be assumed that the defendant

had no knowledge of the whereabouts of Tese Kaczier; that it did not even know of the existence of such a person. It was willing to assume the burden of securing a money order drawn to his order, and mailing such money order in a stamped envelope addressed to him at the address given, and in its receipt it is plainly stated that the remittance would be made in that way and subject to the rules and regulations of the Russian postoffice. It cannot be assumed that because it undertook this duty it was willing to obligate itself to see that this money order was placed in the hands of the remittee. The receipt plainly shows the character of the obligation which the defendant undertook and clearly negatives the idea that the defendant undertook to remit in any other manner.

It also clearly appears from the evidence that this was the manner in which a cable remittance is customarily made, that in fact the term "cable remittance" imports a remittance made in this manner (case, p. 35). There was nothing in the evidence which could in any way support the claim that defendant was obligated to *deliver* the remittance.

The custom or practice set forth in the second and fourth requests for finding of fact was entirely consistent with the contract as established by the other evidence and the parties are deemed to have contracted with it in mind, and to have intended that it should be followed.

See

Miller v. Great Western Com. Co., 152 N. W. 787 (Neb.);

Strong v. Ringle, 152 Pac. 631 (Kan.);

Miller v. Fischer, 126 N. Y. S. 996;

Van Dusen-Harrington Co. v. Jungeblut, 77 N. W. 970 (Minn.);

Cole v. Leach (Appel. Ct. Ind.), 94 N. E. 577.

The third and fourth requests, which are as follows:

"3. If the defendant's Russian correspondent, upon the receipt in due course of the cable message advising him to make the remittance to Tese Kaczier, purchased a money order for said one thousand rubles at the Russian post-office, enclosed the same in an envelope with postage prepaid, addressed to Tese Kaczier at the address given, this constituted a remittance of the money in the manner contemplated by the contract, whether or not Tese Kaczier ever received the money order.

"4. If, after the Russian postal money order had been sent by the defendant's Russian correspondent to Tese Kaczier at the address given, it was returned by the post-office authorities to the defendant's Russian correspondent as undeliverable, it became the duty of the defendant to hold to the plaintiff's account and subject to his order, the credit purchased by him for one thousand rubles or at the plaintiff's request to return to the plaintiff the equivalent of the said credit in American money."

have become inapplicable because of the refusal of the court to permit the defendant to take the deposition of Mr. Jacobsen, which refusal will be considered under Point IV. Because of this refusal there was no evidence in the case as to what was done by the defendant's Russian correspondents toward making this remittance. The Supreme Court in considering these requests said:

"This we do not agree to and their refusal was correct; nor in this case did the defendant's agent hold anything to plaintiff's credit."

If by this language the Supreme Court meant that there was no evidence in the case to show that the cablegram sent by defendant to the Russo-Asiatic Bank was received by it; that upon its receipt it purchased a money order drawn to the

order of Tese Kaczier and deposited this money order in a properly stamped and addressed envelope in the Russian postoffice, and that subsequently the money order was returned to the said Bank and that upon such return it was surrendered to the Russian postoffice and redeemed by such postoffice by payment of one thousand rubles to the Bank, we concede that it is true. But the defendant intended to prove these facts by the deposition of R. Jacobsen which the trial court did not permit it to take because in the opinion of the trial court such evidence was immaterial. The fact that the absence of this proof is significant shows that the trial court was wrong in considering it immaterial and in excluding the tender of such proof which was made just before the defendant rested. In view of the denial of this application an assumption by the Court that the money order was not purchased or that the defendant's account with the Russian bank was not charged with this remittance is erroneous. There is proof in the case that the remittance was not "effected" but there is nothing in the case from which any inference can be drawn that the money order was not purchased and mailed and defendant's account charged accordingly.

The fifth request is as follows:

"5. The purchase of a credit available in Russia for one thousand rubles was complete when made, and if, because of a depreciation of rubles pending the time which elapsed between the time of purchase and the return of the same to the defendant's correspondent as undeliverable, said credit became of less value when measured in terms of American money than the sum paid therefor by plaintiff, the loss occasioned by such depreciation upon the re-conversion of such credit into American money must be borne by the plaintiff."

This request embodies the substantial point in difference between the plaintiff and the defendant.

The defendant concedes that it is obliged to return to the plaintiff the value of the credit which it sold to the plaintiff, but the plaintiff contends that by reason of the fact that *delivery* of the remittance was not made by the postoffice to Tese Kaczier there was an entire failure of consideration of the contract and it became the duty of the defendant to deliver the consideration received. The defendant insists that it did the things which it agreed to do under the contract, and because of the failure of the Russian postoffice to perform its functions (which may have been due to the occupation of the place to which the letter was addressed by the German army, or because of the death or removal of the remittee, or on account of some other unexplained reason), the rubles were not delivered by the postoffice to the remittee. Under these circumstances there was no failure of consideration, for the defendant did what it agreed to do. This has been argued under Point I. Assuming, therefore, that there was no failure of consideration but that the defendant performed its contract by purchasing through its Russian agent a money order to the credit of Tese Kaczier, and by depositing this money order in a properly stamped addressed envelope, in the postoffice at Petrograd, and that after such postoffice money order had been so deposited, it was for some reason returned to the defendant, it is obvious that the only duty cast upon the defendant was to return to the plaintiff the thing which it held which belonged to the plaintiff. When the money order was purchased, drawn to the order of the remittee, the credit which plaintiff had purchased was applied to the purpose contemplated by the plaintiff, and either the plaintiff or his remittee became the owner of the money order which the defendant as his agent had purchased and mailed. When the money order was returned by the postoffice to the Russo-Asiatic Bank, and

the bank surrendered it to the postoffice upon receiving its value in rubles, these rubles were received by the bank to the use of the plaintiff. The defendant's agent then had in its possession one thousand rubles which it held for the use of the plaintiff, and in the ordinary course of business it notified the defendant of that fact and the defendant in turn notified the plaintiff. If this was the character of the transaction and this is what the defendant proved, there can be no doubt but that the thing which plaintiff was entitled to receive was the proceeds arising from the redemption of the money order. In an action brought in this country to recover such proceeds, the plaintiff is entitled to recover the value thereof in American money at the time his cause of action arose. It follows, therefore, that if between the time of the purchase of the rubles and the time when plaintiff was entitled under the contract to the return of the rubles, there was a depreciation in the value of the rubles, that loss must be borne by the plaintiff.

Very few cases can be found which consider this question. The doctrine of *Strohmeyer, &c., v. Guaranty Co.*, 157 N. Y. Supp. 956, *supra*, necessarily supports this conclusion for it is there held as above stated that the transaction is a purchase of credit available in a foreign country.

Fliker v. State Bank, 159 N. Y. Supp. 730, is somewhat in point. In this case the plaintiff paid to the defendant \$217.50 for the purchase of five hundred rubles which the bank agreed to forward to a person in Russia. ~~It does not appear whether the rubles were to be forwarded through the post office or in some other way, or whether an agreement was made to deliver them.~~ The rubles were not paid to the remittee and the defendant bank was subsequently notified of that fact, and in turn notified the plaintiff. The bank tendered to the plaintiff the sum of \$171.50, which was the then

equivalent in American money of the five hundred rubles, which tender the plaintiff refused. The court, referring to the claim of the plaintiff that he was entitled to recover the American money paid at the time the purchase of credit was made, said in part:

“I cannot agree with this view. The general purpose of a bank is not to act as a merchant, but as an agent for a principal, and that such is the relationship here is evidenced by the agreement, which describes its object to be a ‘remittance’, which, in the words of Bouvier, is ‘money sent by one merchant to another, either in specie, bill of exchange, draft, or otherwise’. Plaintiff, the principal, *purchased* of defendant, the banking agent, 500 rubles, and as part of the transaction defendant was to endeavor to make delivery of plaintiff’s 500 rubles to the designated person. As the agent was unable to perform, his remaining obligation was to return the principal’s property, the 500 rubles to him. This has been tendered, and, to my mind, that ends the bank’s obligation.

“To hold with plaintiff would be to also determine that at the place of payment, regardless of the market value of rubles, the payment by the bank, or its Russian correspondent, would have to be upon the basis of the purchasing value of rubles for \$217 in United States money at that time and place. Clearly this was not the contract, and if the bank could not be called upon to be affected by a gain or loss in the value of rubles, if delivered in Russia, how can it be upon their return to New York? And, if so, at what point did this condition commence? Plaintiff dealt in rubles, and he is entitled to his rubles or their equivalent at the time of his demand.”

See also *Gelfand v. State Bank*, 172 N. Y. Supp. 99. In this case the plaintiff, who was intending to go to Russia, purchased a draft from the defendant on a bank in Radem, Russia, to his own order

for thirteen hundred rubles on the 29th of July, 1914. After the defendant had notified the bank of the transfer of credit the plaintiff on the 3rd of October surrendered the draft to the defendant and demanded the return of his money. The value of the rubles had depreciated in the meantime. The plaintiff was unwilling to accept the then value of the rubles, claiming that he was entitled to the full amount paid for the draft. The defendant was unwilling to pay the then value, claiming that the re-transfer of credit was not effective until the Russian Bank had notified it that it had been made. Subsequently the plaintiff sued the defendant to recover the purchase price of the draft. The trial judge gave judgment for the value of the thirteen hundred rubles as of the date when the action was brought. The Supreme Court, Appellate Division, held that this was erroneous; that the plaintiff was entitled to recover the value of the rubles in American money at the time when the transfer of credit was made back to the defendant under the customs of the banking business, whether that time was at the time when the draft was accepted for cancellation or at the time when notice of such cancellation was given to the drawee in Russia, or at the time when it received acknowledgment of such re-transfer from the defendant bank.

The following is a brief extract from the opinion of the court:

“In the same manner, when the defendant agreed, as it certainly impliedly did, by accepting the draft for cancellation, that the credit which it had given to the plaintiff in Russia should be transferred to itself, it became liable to the plaintiff for the value of a credit of 1,300 rubles *at the time when such transfer of credit was made back to itself*. The record does not disclose with any certainty whether that transfer of credit was made back to the

defendant under the customs of the banking business at the time when the draft was accepted for cancellation, or at the time when notice of such cancellation was given to the drawee in Russia, *or at the time it received acknowledgment from the drawee bank*; but in any event the plaintiff is entitled to recover the value of a draft for 1,300 rubles *at the time when the transfer of credit became operative in favor of the defendant*, and not at the time when this action was brought."

If, for example, as has been above suggested, the plaintiff had purchased from the defendant and paid for, an automobile tire, instead of a credit, and had given the direction that the tire be sent by Adams Express Company to a person named at an address in Chicago, and the tire had been so sent, but had not been delivered and had been returned by the Express Company to the shipper, undoubtedly the plaintiff would be entitled to the tire. Upon no theory could he be said to be entitled to the return of the purchase price. Following the same line of reasoning the thing to which the plaintiff was entitled was the proceeds of the redemption of the money order held in Russia by defendant's Russian correspondent, and any depreciation in these proceeds stated in terms of American money which occurred between the time the plaintiff purchased them and the time when he became so entitled to their return, is a loss which he must bear.

When the money order had been purchased the plaintiff's sole claim was against the postoffice for the rubles represented by that money order. When the money order had been redeemed by payment of the rubles represented by it to defendant's correspondent, it would seem to be obvious that plaintiff's sole claim was for the amount paid by the postoffice to the bank. *If rubles had risen instead of declining in price, the plaintiff would be entitled*

to the increased value. Whether the price of rubles went up or went down, defendant would neither gain nor lose by the application of this rule. Its profit on the transaction was fixed at the time the credit was sold. If it again acquired the ruble credit by paying its value in American money, such payment should be made on the basis of the then value of the credit.

The Supreme Court adverted to the fact that there was no proof in the case showing the value of the rubles in Russia at the time the Russian agent attempted to make delivery and failed. The absence of this proof cannot operate against defendant (1) because under the custom of the business the defendant's Russian correspondent was obliged to notify the defendant by mail that the postoffice had been unable to deliver the money order (case, p. 26, line 10 *et seq.*). Until this notice was received the defendant was obliged to treat the credit which it had sold the plaintiff as the plaintiff's property and could not in any way deal with it as its own. If the plaintiff had applied to the Russian Bank *in Russia* for the return of the rubles at the time the bank redeemed the money order, he might have been entitled to their return at that time, but it is obvious that the defendant could not return the value of the rubles to the plaintiff *here* until it had received notice that they had not been paid to Tese Kaczier. The case contains proof of the value of the rubles at the time such notice was received (case, p. 41, line 31). It was, as above stated, the custom of the business to send such notice by mail, which custom was followed in this case. (2) Since proof of the value of the rubles in terms of American money at the time plaintiff's cause of action accrued was essential in order that the amount which plaintiff was entitled to recover could be ascertained, it was plaintiff's duty to produce such proof. There could be no presumption

that such value remained the same as at the time of purchase because of the evidence in the case that such value was constantly changing and that it was not the same (case, p. 44, lines 20-33).

It is submitted that the fifth request was a correct statement of the law and that the action of the Supreme Court in sustaining the trial court's refusal to find in accordance therewith was error.

IV.

The Supreme Court erred in sustaining the action of the trial court in refusing the defendant permission to take the deposition of R. Jacobsen and in excluding the tender of proof of the facts called for by the interrogatories to be propounded to R. Jacobsen.

The application to take depositions appears on pages 2-6 of the state of the case and the interrogatories on pages 3-5. From the affidavit annexed to the application, it appears that R. Jacobsen was the manager of the Russo-Asiatic Bank, the agent of the defendant at Petrograd, Russia, and had charge of the remittance of the one thousand rubles to Tese Kaczier, the remittee named by the defendant.

The interrogatories were intended to develop the fact of his employment by the Russo-Asiatic Bank and his connection with the particular transaction in question, showing the receipt by said bank of the cablegram from the American Express Company, calling for the production of the original message received and his testimony as to what was done toward carrying out the instructions contained in

such message with regard to this remittance. He was asked whether he sent the rubles as directed by the defendant; in what manner they were sent; if they were not received, whether or not they were returned; if they were not sent, why they were not sent; whether or not any rule or regulation of the Russian postoffice was responsible for the failure to send, if such failure occurred; whether the Russian postoffice was, at this time, accepting remittances to the place named by the plaintiff. The purpose of these questions was to show that the defendant performed its contract with the plaintiff in the manner contemplated by the contract: *i. e.*, that the Russo-Asiatic Bank procured from the Russian postoffice a money order made payable to Tese Kaczier and deposited it in a properly stamped and addressed envelope in the Russian postoffice; that subsequently the postoffice, being unable to deliver the money order, had returned it to the bank which had in turn surrendered it to the postoffice and received from such postoffice the thousand rubles.

The trial court held that the interrogatories were inadmissible; that since actual delivery of the rubles had not been made, it was immaterial what steps had been taken by the defendant in the performance of the contract. As has above been shown, the agreement of the defendant was that it would transfer by cable, a credit which it had with the Russo-Asiatic Bank; that the bank would use this credit in the purchase of a money order at the Russian postoffice drawn to the order of Tese Kaczier and that it would mail this money order to Tese Kaczier at the address given by the plaintiff. The claim of the plaintiff is based upon the failure of the defendant to do what it agreed to do.

By refusing the request to take depositions, the court prevented the defendant from showing that it had done the things which it agreed to do. The

proposition that the defendant in an action on contract, may not show that it has performed its contract in the manner provided by the contract and contemplated by the parties, is indeed a novel one. Proof of the performance of the contract was of the very essence of the defense.

The credit was purchased by the plaintiff in order that it might be used in Russia by the defendant's agent in the purchase of a money order. If this credit was so used and the money order was purchased, the plaintiff's claim, if any, was then, and until the money order was returned to the bank and redeemed by the postoffice, against the postoffice and not against the defendant.

The money order was certainly at that time the property either of the plaintiff or of the person to whom the remittance was to be made. If the money order was mailed, as contemplated by the contract, the defendant, up to that time, had done everything which it had agreed to do. If the money order was subsequently returned to the defendant's agent, it was then the duty of the defendant's agent to take the money order to the postoffice and receive from the postal authorities its value in rubles. If this was done, it became the duty of the defendant to account to the plaintiff for the rubles which it had so received. This duty to account in the United States, however, could not arise until in the ordinary course of business, the defendant had been advised that its Russian correspondent had received the return of the rubles.

The uncontradicted testimony shows that the ordinary course of business required the mailing by the Russian agent to the defendant, of notice that the money order had not been delivered. If these things were done, the defendant had fully performed its contract, except that it was obliged to return to the plaintiff the then value of the rubles received from the Russian postoffice.

By the refusal to permit the defendant to prove these facts, the court prevented it from showing that it had performed its contract in the manner contemplated by the parties at the time the contract was made. This contract was to be performed in Russia by the agent of the defendant in Russia and in no other way could the performance of the contract be established except by this testimony. No one who testified for either party had or professed to have any knowledge as to what was done or omitted by the Russo-Asiatic Bank in performance of this contract. All that was established was that the remittance had not been removed and that was done by way of admission of the defendant.

The denial of the application to take depositions was a denial of the right of the defendant to a substantial defense to the action. The action of the trial court in denying the application was not the exercise of discretion. So far as the court exercised discretion, it was in defendant's favor, for he ruled that the application would be granted if the evidence were material. His determination that the evidence was immaterial was an erroneous determination of a question of law.

In *Oshinsky v. Taylor*, 172 N. Y. S. 231, the Supreme Court held that where defendant had sold a cable transfer and had undertaken to *make payment* of such transfer within three or four days, but had failed to do so, its failure was open to explanation, that proof that the failure to pay was due to war or other conditions might have excused such failure, but that the burden was on defendant to offer such proof. The clear inference to be drawn from this decision is that even when an assurance that payment would be made in the course of two or three days had been given, proof of conditions which made such performance impossible would be admissible. If that is true, a

fortiori is it true that the defendant in this case was entitled to prove by the testimony of its Russian agent that it had performed its contract in the manner contemplated by the parties.

Under the doctrine of the case last above cited, the questions which defendant desired to ask Jacobsen would be admissible, even though the plaintiff's contract were construed as a contract to *deliver* which we insist under the evidence in this case cannot be done.

Before the defendant rested, it tendered the evidence to be produced by the answers to these questions to the same effect as though a witness competent to answer the questions annexed to the notice of application had been sworn in behalf of the defendant and each of such questions had been overruled by the court as immaterial and exception duly taken. If, therefore, any one of these questions was material, the court committed reversible error by excluding it and because of this error, the defendant is entitled to a reversal of the judgment.

CONCLUSION.

As above stated, the questions involved in this case are of great importance both to those who buy and to those who sell cable remittances. The Supreme Court, in its opinion, stated that "it should be remembered that the defendant did not buy rubles for the plaintiff, for it appeared in the state of the case that they had at least one thousand rubles deposited in the Russian bank and it lost nothing through its inability to tender delivery of the one thousand rubles." While it is true that the defendant had a credit with the Russo-Asiatic Bank for at least one thousand rubles, the conclusion which the Supreme Court drew from that

fact is clearly erroneous. After the credit for that amount had been sold to the plaintiff, defendant could no longer deal with that credit as its own. The credit was then as effectively withdrawn from the use of the defendant as though a check for that amount had been presented to the Russian bank by the plaintiff and cashed by that bank. When the money order was purchased for plaintiff by the Russian bank the credit of the defendant with that bank for the one thousand rubles was extinguished. When the money order was returned to the bank and redeemed by the postoffice by paying the rubles to the bank, the ruble credit was then the credit of the plaintiff. It is obvious that the defendant could not possibly have any use of that credit, at least, not until it was notified that the money order had been returned and redeemed. In its transactions in the ruble market between the date of the sale of credit and the date of receipt of this notice, it was obliged to regard the credit for one thousand rubles as the property of the plaintiff and to arrange its credit with the bank accordingly. It certainly could not sell this credit to some other purchaser while the plaintiff continued to be its owner.

By the judgment of the Supreme Court, the plaintiff is made to accept the re-transfer of the credit at a cost exceeding the price for which it could obtain a similar credit in the open market. If, instead of a credit, the defendant had sold a chattel, the fallacy of this view would be apparent! The loss of the defendant is just as real in the case of a sale of a credit as in the case of a sale of a chattel.

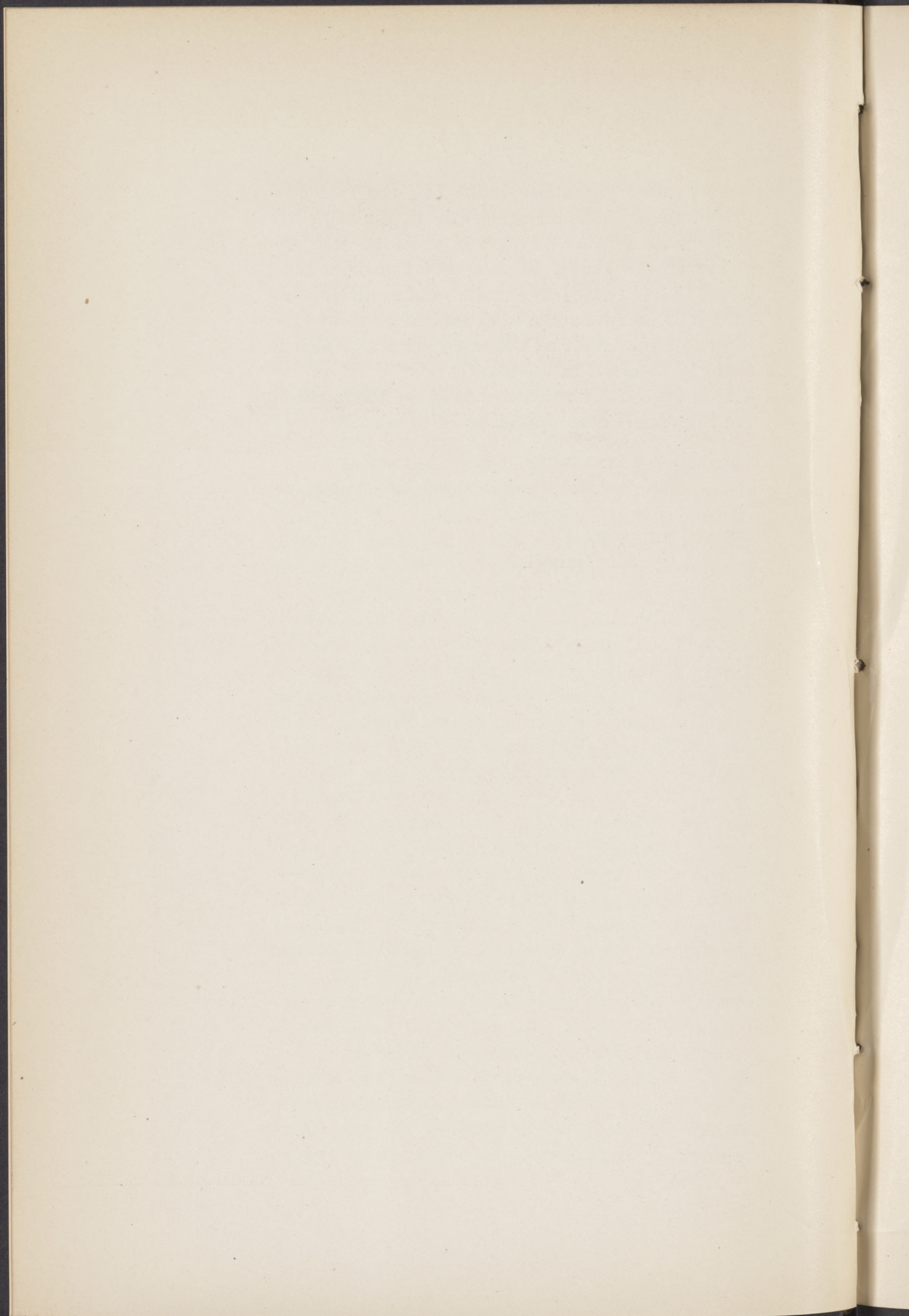
It is certainly inequitable to cast upon the defendant the burden of the loss sustained by the depreciation of the value of the credit while that credit was the property of the plaintiff, and not subject to disposition or control by the defendant.

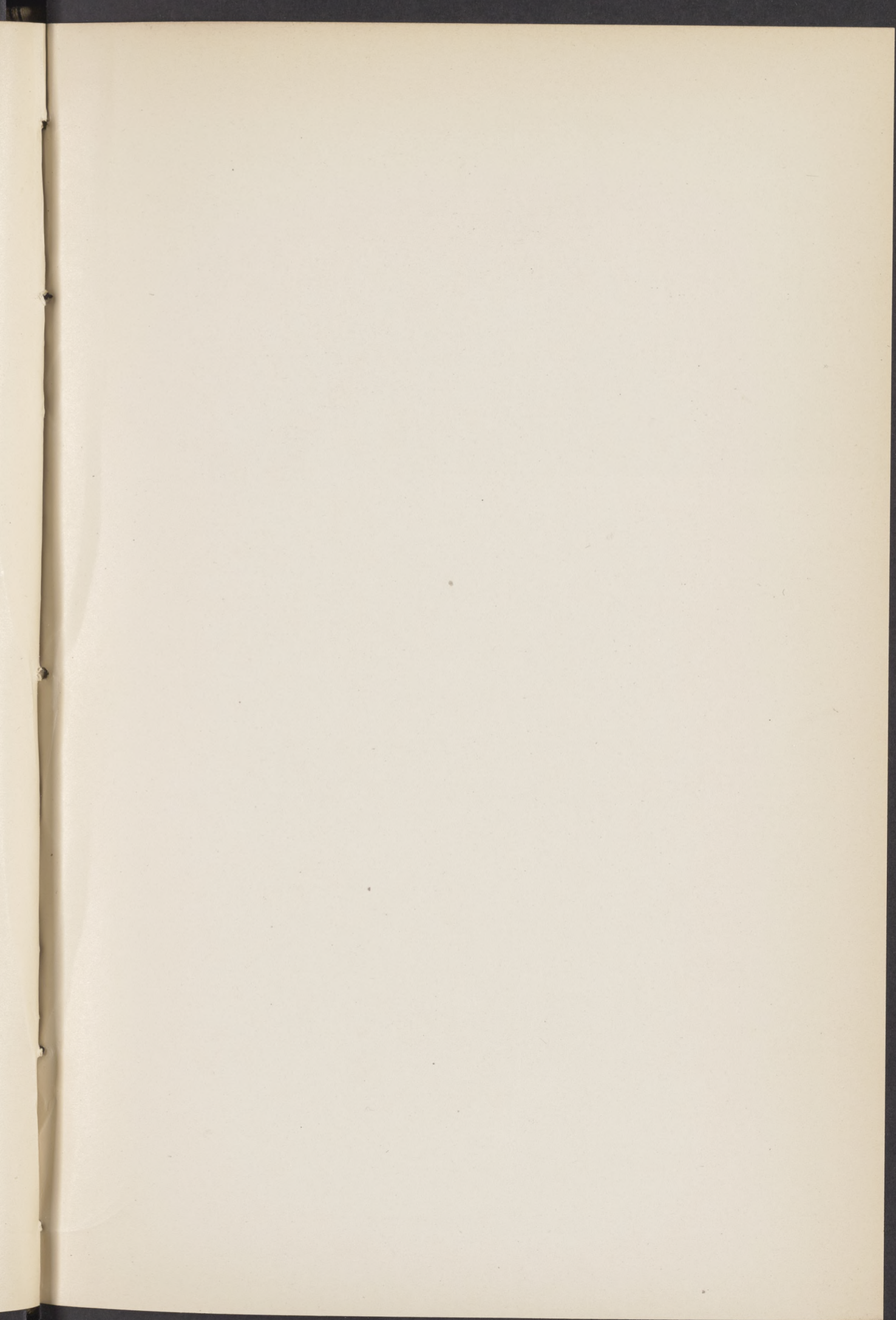
As pointed out under Point III, the rule contended for by defendant, is fair to plaintiff. If rubles had advanced in price while he was the owner of the credit, he, and not the defendant, would have reaped the gain, while under this rule, it is no advantage to defendant to secure the return of the credit at the same price at which it could be obtained in the market.

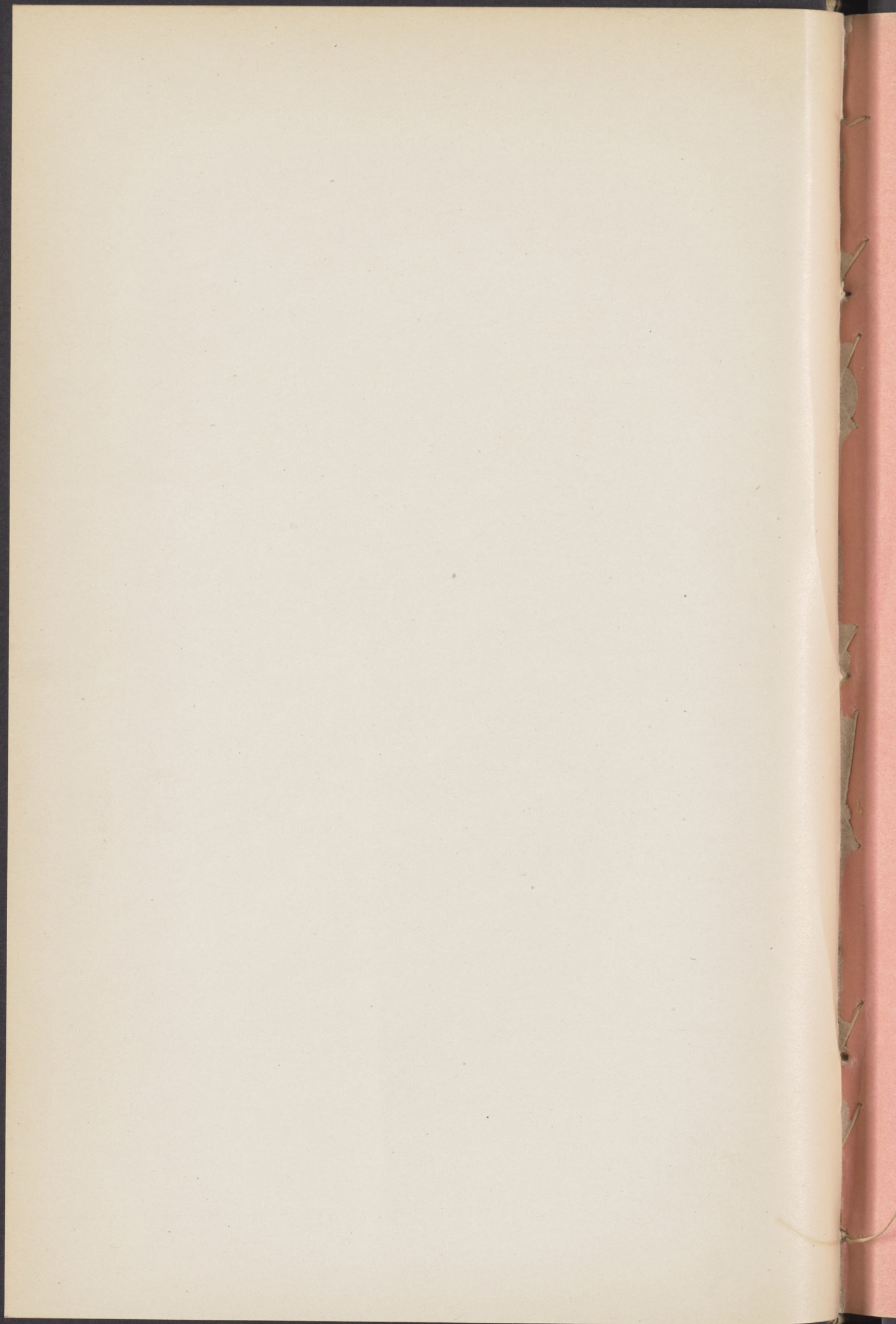
It is respectfully submitted that the judgment of the Supreme Court should be reversed.

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