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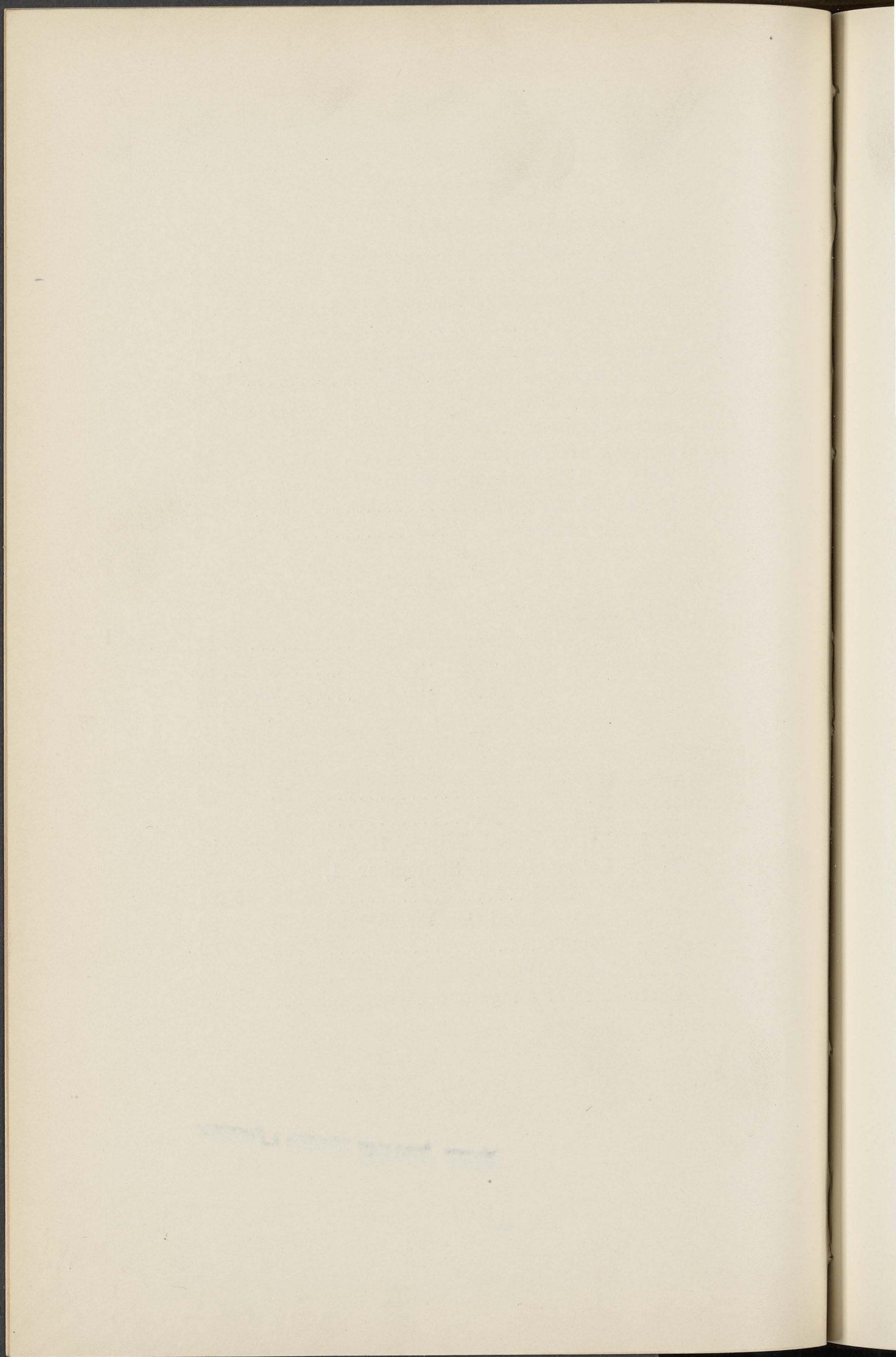
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NOTICE OF APPEAL.

Filed December 2, 1927.

**SECOND DISTRICT COURT OF JERSEY
CITY.**

ALOYSIUS McMAHON and FRANK E. BURDETTE, Receivers of David Grimes, Inc., <i>Plaintiffs,</i>	}	<i>In Tort.</i>	10
<i>vs.</i> AMERICAN RAILWAY EXPRESS COMPANY, <i>Defendant.</i>		<i>Notice of Appeal.</i>	

To John Milton, Esq., attorney for plaintiff.

SIR:

TAKE NOTICE that the defendant, the American Railway Express Company, hereby appeals to the New Jersey Supreme Court from the whole of the judgment of the Second District Court of Jersey City, rendered in the above-stated action on November 30, 1927.

HARLEY, COX & WALBURG,
Attorneys for Defendant.

Dated, December 1, 1927.

Copy of the within notice of appeal is hereby acknowledged this 2nd day of December, 1927.

JOHN MILTON,
Attorney of Plaintiff.

Summons.

Certified a true copy of original filed in the office of the Second District Court of Jersey City.

EDWARD J. POYNTON,
Clerk.

10

SUMMONS.

(SECOND) DISTRICT COURT SUMMONS

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.
CITY OF JERSEY CITY. }

The State of New Jersey, to the
Sergeant-at-Arms of the Second Dis-
trict Court of the City of Jersey City
or to any Constable of said County:

20

(L. s.)

SUMMON American Railway Express
Company, a corporation, to appear before the
Second District Court of Jersey City, Myron C.
Ernst, Judge, to be held at the Court Room, No.
662 Newark avenue, in said city, on the twenty-
third day of March, one thousand nine hundred
and twenty-seven, at ten o'clock in the forenoon,
to answer unto Aloysius McMahan and Frank E.
Burdette, Receivers of David Grimes, Inc., in an
action upon contract. Demand five hundred dol-
lars.

30

WITNESS, MYRON C. ERNST, Esq., Judge of said
Second District Court at Jersey City aforesaid,
the fifteenth day of March, in the year one thou-
sand nine hundred and twenty-seven.

EDWARD J. POYNTON,
Clerk.

40

Summons.

No. 76736

(SECOND) DISTRICT COURT
of Jersey City

Before
Myron C. Ernst, Esq., Judge

10

SUMMONS UPON CONTRACT

Aloysius McMahon and Frank E.
Burdette, Receivers of David
Grimes, Inc.,

Plaintiff,

vs.

American Railway Express Com-
pany, a corporation,

Defendant.

20

Agent—F. W. Davis,
168 York St., J. C.

Demand\$500.00
Costs 2.10
Mileage20

Returnable, March 23rd, A. D. 1927
10 o'clock A. M.

30

40

STATE OF DEMAND.

Filed March 15, 1927.

SECOND DISTRICT COURT OF
JERSEY CITY.

10

ALOYSIUS McMAHON and FRANK
E. BURDETTE, Receivers of
David Grimes, Inc.,
Plaintiffs,

vs.

AMERICAN RAILWAY EXPRESS
COMPANY, a corporation,
Defendant.

*On Contract.**State of
Demand.*

20

The plaintiffs demand of the defendant the sum of five hundred dollars (\$500.00) for that:

1. The defendant, American Railway Express Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to transact business in the State of New Jersey.

30

2. At the times hereinafter mentioned defendant was and now is doing business as a common carrier of goods for hire.

3. At the times set forth and in consideration of the usual rates for such freight between the said points as sets forth in Schedule A, defendant as such common carrier received from various consignors merchandise and undertook and agreed to transport the same and to deliver them to the plaintiff.

40

State of Demand.

4. Said shipments were received by the plaintiff in a damaged condition, whereupon plaintiff duly made various claims in writing against defendant for the damage to said goods, and for the value thereof, substantially as hereinafter set forth, and duly delivered said claims to the defendant, and demanded payment thereof; defendant has neglected and refused and still neglects and refuses to pay plaintiffs' loss and damage, or any part thereof. 10

5. Whereupon plaintiffs demand judgment in the sum of \$182.25, together with interest and costs of suit.

JOHN MILTON,
Attorney for Plaintiffs.

20

30

40

State of Demand.

SCHEDULE A.

DAVID GRIMES, INC.
151 Bay Street
Jersey City, N. J.

CLAIMS REFUSED BY EXPRESS COMPANY

	Our Claim	Their Reference	Amount of Claim	Shipped By
10	11-10-25	152	D-106327-A	\$ 5.40 Ed. Werner St. Clair, Mich.
	11-19-25	83	D-103060-A	6.00 Allen Auto Elec. Co. Akron, Ohio
	12- 4-25	175	D-107638-A	9.00 J. S. Champagne Albany, N. Y.
	12-10-25	203	D-108046-A	8.00 Michigan Music House, Detroit, Mich.
	12-11-25	159	D-106333-A	7.50 Belknap Hdwe. & Mfg. Co., Louisville, Ky.
	12-12-25	215	D-114739-A	7.50 Smith & Sons Southampton, Eng.
20	12-15-25	82	D-103081-A	12.00 Acker Elec. Co. Carbondale, Pa.
	12-15-25	166	D-106332-A	12.50 Brunswick Music Shop, Chicago, Ill.
	12-16-25	211	D-108430-A	12.50 Edw. Pazzamant New Brunswick, N. J.
	12-20-25	168	D-106329-A	7.00 Bierman, Reading, Pa.
	12-30-25	199	D-108049-A	9.25 J. P. Keenan Dover, N. H.
	1- 7 26	39	D-110898-A	5.00 Freeport Hdwe. Co. Freeport, Ill.
30	1-12-26	264	D-111636-A	14.00 Whitney MacGregor Minneapolis, Wis.
	1-21-26	42	D-111250-A	18.00 Okay Radio Co. Washington, D. C.
	3- 2-26	88	D-103084-A	12.00 G. & G. Elec. Co. Schenectady, N. Y.
	1-22-26	49	D-111966-A	6.50 Riley & Riley Corry, Pa.
	7-29-26	310	D-120998-A	5.40 Scranton Locomobile Co., Scranton, Pa.
	8-19-26	315	D-130073-A	24.70 B. & M. Elec. Co. Chicago, Ill.
40				\$182.25

AMENDED STATE OF DEMAND.

Filed December 2, 1927.

SECOND DISTRICT COURT OF
JERSEY CITY.

ALOYSIUS McMAHON and FRANK
E. BURDETTE, Receivers of
David Grimes, Inc.,

and

Plaintiffs,

AMERICAN RAILWAY EXPRESS
COMPANY,

Defendant.

10

*Amended
State of
Demand.*

20

The plaintiff amends the state of demand filed in the above-entitled cause by the addition of the following paragraph, to wit:

That the transportation of the goods mentioned in the state of demand was performed by defendant so carelessly and negligently that a part of said goods was damaged, which said loss and damage amounted to the sum of \$182.25.

JOHN MILTON,
Attorney for Plaintiffs.

30

40

TRANSCRIPT OF CLERK'S DOCKET.

Filed December 15, 1927.

**SECOND DISTRICT COURT OF
JERSEY CITY.**

10 STATE OF NEW JERSEY,)
HUDSON COUNTY,) ss.
CITY OF JERSEY CITY.)

Before Myron C. Ernst, Esq., Judge.

No. 76736.

20 ALOYSIUS McMAHON and FRANK
E. BURDETTE, Receivers of
David Grimes, Inc.,
Plaintiffs, } *In Contract.*
vs. } *Demand \$*
AMERICAN RAILWAY EXPRESS Co.,
a Corp., }
Defendant.

John Milton, plaintiffs' attorney.

Harley, Cox & Walburg, defendant's attorneys.

30
Summons, Copy\$ 1.50
Service and Return80
Trial Fee 1.50
Attorney's Fees 9.11

\$12.91

December 2, 1927. Notice of appeal filed.

40

Transcript of Clerk's Docket.

A summons was issued tested March 15, A. D. 1927, returnable March 23, A. D. 1927, at 10 o'clock in the forenoon. The constable or sergeant-at-arms returned the summons as follows, viz.: I served the within summons March 17, 1927, on the defendant, American Railway Express Company, a corp., by reading the same to F. W. Davis, agent in charge of the office of the defendant corporation and delivering to him a copy thereof. John J. Chauncey, Constable.

10

Plaintiffs' demand was filed March 15, A. D. 1927.

March 23, A. D. 1927. This cause was called for trial at ten o'clock in the forenoon and continued to September 21, 1927.

Order appointing receivers filed.

James S. Slavin sworn as stenographer.

20

Solomon Rusoff was sworn and testified, on the part of the plaintiff.

On the part of the defendant, no witnesses sworn.

The constable or sergeant-at-arms was sworn to attend said jury, who retired and after deliberation, return and say that they find

Decision Reserved.

Whereupon it is on this 30th day of November, A. D. 1927, by this Court considered and adjudged that said Aloysius McMahan and Frank E. Burdette, Receivers of David Grimes, Inc., plaintiff, recover against said American Railway Express Company, a corporation, defendant, the sum of one hundred eighty-two dollars and twenty-five cents damages and twelve dollars and ninety-one cents costs of suit.

30

I do hereby certify that the foregoing is a true copy of the record in the above-stated case.

EDWARD J. POYNTON,

(SEAL)

Clerk.

40

SECOND DISTRICT COURT.

JERSEY CITY, N. J.

10	ALOYSIUS McMAHON and FRANK E. BURDETTE, Receivers of David Grimes, Inc., <i>Plaintiffs,</i>
	<i>vs.</i>
	AMERICAN RAILWAY EXPRESS COMPANY, a corporation, <i>Defendant.</i>

June 15, 1927.

20 Before Hon. Myron C. Ernst, J.

Appearances:

John Milton, Esq., (by Clarence F. McGovern, Esq.), for the plaintiffs.

Harley, Cox & Walburg, Esqs. (by Wm. B. Harley, Esq.), for the defendant.

James S. Slavin, official stenographer.

30 Mr. McGovern: In looking over the State of Demand, I find that I started suit in contract. I would like to ask permission to amend this State of Demand to include a count for negligence.

Mr. Harley: That is satisfactory.

The Court: It is consented that the State of Demand be amended.

Solomon Rusoff, direct.

SOLOMON RUSOFF, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination by Mr. McGovern.

Q Where do you live, Mr. Rusoff? A 287 10
Chapel avenue.

Q What is your occupation, Mr. Rusoff? A
Traffic manager.

Q By whom are you employed at the present time? A At the present time by the National Liquidating Corporation.

Q How long have you been with them? A
A month ago.

Q Whom were you with before that? A
David Grimes, Inc. 20

Q When did you leave their employment? A
March 26, 1927.

Q Do you remember when you entered their employment? A July 13, 1925.

Q In what capacity were you employed by David Grimes, Inc.? A Traffic manager as head of stores, taking care of packing, shipping, transportation and receiving.

Q Am I right in the assumption that the position you held with David Grimes, Inc., was sort of floating job? A Yes. 30

Q Whom were you with before that? A Before that I was with the Bright Star Battery Company.

Q In what capacity were you employed by them? A A similar capacity; Traffic Manager, Stores Manager, Supervision of Shipping and Receiving.

Q I meant to ask you, Mr. Rusoff, why you left the employment of David Grimes, Inc.? A 40

Solomon Rusoff, direct.

Due to the fact that they went into the hands of a receiver, and my work was complete.

Q When did you enter the employment of the Bright Star Battery Company? A Around June, 1924.

Q When did you terminate that employment?
10 A About June, 1925.

Q Did I understand you to say that you were with them in the capacity of Traffic Manager? A Traffic Manager.

Q Whom were you with before that? A The National Carbon Corporation.

Q When did you enter their employment? A January, 1920.

Q When did that employment terminate? A May, 1924.

Q In what capacity were you employed by them?
20 A Supervisor, Assistant Head of Stores, Shipping, Transportation, Receiving.

Q Previous to your employment with the National Carbon Company, whom were you employed by? A The United States War Department Supply Base at Newark.

Q How long was that? A Three years.

Q In what capacity? A Traffic Manager and Supervisor of Stores.

Q Did that include packing?
30 A Packing and shipping.

Q Did you ever work for the American Railway Express Company? A During 1920, I believe, and 1922 and 1923. Evenings; yes.

Q In what capacity were you employed by the American Railway Express Company? A I was hired as clerk, and stores, freight—handling freight—graded freight, rated freight.

Q You also worked for David Grimes, Inc.?
40 A Yes.

Solomon Rusoff, direct.

Q What opportunity did you have to familiarize yourself, Mr. Rusoff, while in the employ of the American Railway Express Company, with their freight?

Mr. Harley: I object to this, on the ground that it is immaterial, irrelevant and incompetent. He worked for the American Railway Express Company in 1922, and these shipments were made in 1925. It has absolutely nothing to do with these shipments. 10

The Court: What do you want to say, Mr. McGovern?

Mr. McGovern: I want to say that this man is an expert as Traffic Manager in the packing of goods, receiving, and this suit against the American Railway Express Company— 20

The Court: I will allow it for what it is worth.

Mr. Harley: I ask for an exception.

The Court: I will allow it for what it is worth, provided it is connected.

Mr. McGovern: I will connect it later.

By Mr. McGovern. 30

Q Previous to your employment by the American Railway Express Company, whom were you employed by? A I wasn't employed with the American Railway Express Company exclusively; I worked for the American Railway Express Company while with the War Department. I wanted first-hand information as to how they handled their merchandise at transfer points. That was during 1920; and I believe in 40

Solomon Rusoff, direct.

1922 or 1923 I went back there again due to the fact that they had changed their method of handling certain shipments coming through there, so I would have full information regarding the handling of merchandise.

10 Q If I understand you rightly, you entered the employment of the American Railway Express Company to more familiarize yourself with the intricacies of the practice of Traffic Managers? A As an aid to that particular thing.

Q So as to make yourself well-rounded and schooled in that line of work? A Yes.

Q Whom were you employed by before your employment with the United States Army Supply Base? A B. P. Ducas Company at Jersey City.

20 Q Were you employed by the American Transfer Company? A By the American Transfer Company just a few months subsequent to B. P. Ducas Company.

Q In what capacities were you employed by the American Transfer Company and B. P. Ducas Company? A As Traffic Manager, Supervisor of Shipments, handling traffic matters, receiving, and so forth.

30 Q Whom were you employed by before Ducas Company? A Bruno Grosche & Company.

Q Do you remember when that employment begun? A With Grosche?

Q Yes. A October 25th until April 13th.

40 Q So for the last twenty-two years, Mr. Rusoff, you have been familiar with the duties of Traffic Manager, packing, receiving and practically everything that has to do with exporting and importing of shipments, is that right? A Right.

Solomon Rusoff, direct.

Q Discuss the shipment of the Michigan Music Shop, Detroit, Michigan. I show you, Mr. Rusoff, a form and I ask you what that is? A That is a collect express receipt issued by David Grimes and signed by the American Railway Express Company agent—representative, that is, the driver, and our shipping clerk. 10

Q Consigned to the— A Consigned to the Michigan Music Shop, 5646 Michigan avenue, Detroit, Michigan.

Mr. McGovern: I offer this original receipt in evidence, Mr. Harley.

Mr. Harley: That is on the outward movement?

The Witness: I wrote that on, myself. 20

By Mr. Harley.

Q That is the actual one? A That is the actual receipt.

Mr. Harley: I have no objection to that.

Mr. McGovern: I offer that in evidence.

(The paper referred to was received in evidence and marked Plaintiff's Exhibit 1.) 30

Solomon Rusoff, direct.

Exhibit P. 1.

ORIGINAL.

AMERICAN RAILWAY EXPRESS
COMPANY
(Incorporated)

10

Original
Uniform Express Receipt
Non-Negotiable COLLECT 232- 00632
Issued at Jersey City, N. J., July 29 1925
Received from DAVID GRIMES, Inc.

20

The following described articles to be forwarded to consignee and destination as given below, subject to the terms and conditions of the Uniform Express Receipt prescribed by the Interstate Commerce Commission, and in effect on the date of shipment.

Consigned to Michigan Music Shop
Street Address 5646 Michigan Ave
Destination Detroit State Mich

30

No. Packages	Description of Articles	Value	Weight Sub. to Correction
1	Cases—Radio Cartons Packages		
	Our Order No. 982		
	Customer's Order No.		
	Value herein declare to be total	\$150	55
	DAVID GRIMES, Inc., Shipper.		
	Per H K Heller		J W Burns 9 Bd
	For the Shipper		For the Company

40

Solomon Rusoff, direct.

NOTE

The Company will not pay over \$50, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

10

The Company's charges except upon ordinary live stock, is dependent upon the value of the property, as declared or released by the shipper. If the shipper desires to release the value to \$50 for any shipment of 100 pounds or less, or not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, the value may be released by inserting "not exceeding \$50", or "not exceeding fifty cents per pound", in which case the company's liability is limited to an amount not exceeding the value so declared or released.

20

By Mr. McGovern.

Q When these goods were returned to you, Mr. Rusoff, will you tell the Court just what happened? That is, from the moment the expressman delivered the radio sets and packages in your house on Bay street. Will you tell the Court what happened from the moment they were left there? A Why, when the expressman delivered the merchandise to our premises—

30

Mr. Harley: If the Court please, right here there is no evidence that the shipment was delivered to us at Detroit, Michigan. This is an outbound movement, and he has now testified about the return. There is no evidence that we received it.

40

Solomon Rusoff, direct.

By Mr. McGovern.

Q I show you a copy of another form of the American Railway Express Company, and ask you what that is? A That is a copy of a due bill covering the waybill on shipment from Detroit, Michigan.

10

Q Will you tell the Court what a due bill is? A A due bill is a copy of the waybill covering the receipt issued at the point of origin, and embodies transportation charges and acts as receipt of money to the driver making delivery at destination, and is the record of the American Railway Express Company at New York.

Mr. McGovern: I offer that in evidence.

20

Mr. Harley: I object to the admission of the slip on the ground that there is no evidence that it was made by the agent of the American Railway Express Company, or any agent having authority to make it. It is marked "Copy" on the face of it.

The Witness: I put that on there.

Mr. McGovern: It is a copy of the due bill of the American Railway Express Company.

30

The Court: Where is the original?

The Witness: The American Railway Express Company.

By the Court.

Q They have it? This is what they give the customer? A This is what they give us when we are on credit charge. This is the driver's signature; that is their own driver.

40

Q They have nothing else? A That is the only evidence.

Solomon Rusoff, direct.

Q It is the evidence given to the consignee by the driver of the American Railway Express Company?

Mr. Harley: I have no knowledge that that is a fact. I have never seen that slip before.

10

The Court: Well, the American Railway Express Company has the original and it is left by their agent, the driver.

Mr. Harley: He has not testified to that.

By Mr. Harley.

Q Did the driver give that to you? A That is the driver's signature.

Q Did you see him sign that? A Yes.

20

Mr. Harley: That is all right, then.

The Court: There is no objection to it, then.

Mr. McGovern: I offer that in evidence.

(The paper referred to was received in evidence and marked Plaintiff's Exhibit 2.)

30

40

Solomon Rusoff, direct.

Exhibit P. 2.

AMERICAN RAILWAY EXPRESS
COMPANY
(Incorporated)

10	J C Office	12/15/25	192
	M W B #9801		
	For transportation of 1-Bx Weight 55		
	Date shipped 12/10/25 Value \$150.00		
	To Address J C		
	From Mich Music Shop Address Detroit Mich		
	Due American Railway Express Co.		
	Leady 778	W J Chamberlaine	
	Driver	Consignee or Shipper	
	Express Charge		\$2.08
	Advance Charge		\$2.18
20	Value Charge		10c
	Manifest fee	
	C. O. D. Amount	
	C. O. D. Return Chg.	
			<hr/>
	Total		\$4.36

Copy.

By Mr. McGovern.

30 Q Referring to Exhibit P. 2, Mr. Rusoff, I ask you the significance of two charges, one an express charge of \$2.08 and the other underneath an advance charge of \$2.18. A The first charge is an advance charge of \$2.18, which indicates a movement other than the \$2.08 charge inbound, which would indicate to any traffic man that the merchandise was not delivered to the consignee on the original movement, but had been delivered by the Express Company on account of non-

40 delivery to the original shipper. Therefore, there

Solomon Rusoff, direct.

are two charges on that, \$2.08 express and ten cents valuation charge and the second \$2.18.

Q If it was a one-way shipment, there would be only one charge? A There would be only one charge if it was a one-way shipment; correct.

Q When this shipment arrived at your warehouse, Mr. Rusoff, will you tell the Court just what you did? 10

Mr. McGovern: This covers practically all of the cases, if your Honor please.

Mr. Harley: We must confine it to this case; all the cases are different.

The Court: Go ahead.

A The method employed on returned merchandise has been the receiving clerk naturally signs for the merchandise, boxes, packages, or whatever it might be, and the laborers open up the package right on the floor before it is moved any farther into the premises other than the receiving room. Notation is made as to the contents, condition, and any defective condition or damage; and my attention was called to the damage and I inspected the original packing, and immediately set it aside if it warranted a claim, and notified the express company to have their representative company or agent up there, who in turn made an examination of the self-same damage while I was in his presence and made his notation on that regular form, and then after I found it warranted a claim being made against the company for negligence for damage. 20 30

Q Did you carry on a series of correspondence with the American Railway Express Company?

A Yes.

Q I show you a letter under the heading of the American Railway Express Company and ask 40

Solomon Rusoff, direct.

you if you received that letter dated July 9th, 1926? A Yes, sir.

Q Whose signature is that on there? A W. E. Fogarty, Claim Agent.

Mr. McGovern: I offer that in evidence.

10 Mr. Harley: I have no objection.

(The paper referred to was received in evidence and marked Plaintiff's Exhibit 3.)

Exhibit P. 3.

AMERICAN RAILWAY EXPRESS
COMPANY

20 (Incorporated)
Claim Bureau
250 West 26th Street
New York

W. E. Fogarty,
Claim Agent

In your reply refer to D-108046-A

July 9th, 1926-

30 David Grimes, Inc.,
151 Bay Street, Att. G. Rusoff, T. M.
Jersey City, N. J.

Gentlemen:

D. Grimes, Inc., 151 Bay Street, Jersey City, New Jersey. from Michigan Music Co., Detroit, Michigan. December 10th, 1925. \$8.00-

Your claim #203.

40 We have advice from the shippers quoted in your claim that this shipment was originally for-

Solomon Rusoff, direct.

warded to him and refused and never in their possession.

Will you therefore have us supplied with copy of original forwarding receipt.

Yours truly,

CCB/HB

W E Fogarty
Claim Agent.

10

By Mr. McGovern.

Q Will you take Exhibit P. 3 and read the first paragraph of that to the Court? A "We have advice from the shippers quoted in your claim that this shipment was originally forwarded to him and refused and never in their possession."

Q Would you infer from that and the due bill which has been marked Exhibit P. 2, that this shipment was shipped from your concern in Bay street but never left the custody of the American Railway Express Company?

20

Mr. Harley: I object to that. The document speaks for itself.

The Court: The letter says it was never delivered.

30

By Mr. McGovern.

Q I show you a letter of the American Railway Express Company dated September 1st, 1926. Did you receive that letter? A Yes.

Mr. McGovern: I offer that in evidence.

Mr. Harley: Do you offer the entire letter?

Mr. McGovern: Yes.

40

Solomon Rusoff, direct.

Mr. Harley: I have no objection.

(The paper referred to was received in evidence and marked Plaintiff's Exhibit 4.)

10

Exhibit P. 4.

AMERICAN RAILWAY EXPRESS
COMPANY
(Incorporated)
Claim Bureau
250 West 26th Street
New York

W. E. Fogarty,
Claim Agent

20

In your reply refer to D-108046 A

Sept. 1st, 1926.

David Grimes, Inc.,
151 Bay Street,
Jersey City, N. J.

Gentlemen:

Referring to your claim 203.

30

The investigation discloses that our handling of the shipment was free of negligence.

It is further revealed that the shipment was improperly packed, and in these circumstances, according to the terms and conditions of the receipt, we are not liable for the loss, and claim is respectfully declined.

Yours truly,

W E Fogarty
Claim Agent.

CCB:AG

40

Solomon Rusoff, direct.

The Court: This is still in reference to the one claim?

Mr. McGovern: Yes.

By Mr. McGovern.

Q I show you a copy of the receipt of your concern to refresh your recollection, and I ask you in what kind of package this radio was shipped that was damaged. A This was a standard package; our standard package, approved by Mr. LaMarr of the vice-president's office of the American Railway Express Company. 10

Q What kind of package was it? A A wooden box, with wood blocking as panel, about an inch to an inch and a half or an inch and a quarter air vent allowance around the whole inside. 20

Q What is the nature of the damage? A Broken back panel.

Q Who repaired the damage? A Our repair department.

Q What was the cost of it?

Mr. Harley: I object to that.

By Mr. McGovern. 30

Q Was this repair department under your supervision? A Indirectly it was, but all repairs of this particular kind on claims or possible damage or through transportation faults come directly under my care.

Q Is eight dollars the reasonable value of the repairs to the damage? A Very reasonable. In fact, I worked to the point to try to be absolutely fair with the express company; so there was no animosity. 40

Solomon Rusoff, direct.

Q Was there any profit to the Grimes Company? A Not a cent; in fact, a loss.

Mr. McGovern: The next consignment, if your Honor please, is the shipment from Ed. Weiner, St. Clair, Michigan.

10 Mr. Harley: As to that, I am not going to contest.

The Court: You are not going to contest that as to the damage?

Mr. Harley: No.

(An adjournment was taken without date.)

SECOND DAY.

20

September 21, 1927.

Before Hon. Myron C. Ernst, *J.*

Appearances:

John Milton, Esq. (by Clarence F. McGovern, Esq.), for the plaintiffs.

Harley, Cox & Walburg, Esqs. (by Wm. B. Harley, Esq.), for the defendant.

30 James S. Slavin, official stenographer.

SOLOMON RUSOFF, resumed the stand on behalf of the plaintiff, and testified further as follows:

Mr. McGovern: If your Honor please, this is an unfinished case. You, no doubt, remember many of the facts. One of these eighteen cases has been tried at the previous hearing. I qualified Mr. Rusoff as a traffic

40

Solomon Rusoff, direct.

manager who has had intimate knowledge of all freight handlings and matters of that nature for the past twenty-five years, and this being a suit against the American Railway Express Company, your Honor may remember that I brought out in that qualification that Mr. Rusoff had been employed by the American Railway Express Company in the capacity of traffic manager. 10

Direct examination (continued) by Mr. McGovern.

Q Is that right, Mr. Rusoff? A No. Way bill clerk, freight assorter, and various other capacities.

Q In your employment by the American Railway Express Company did you have an opportunity of becoming familiar with their requirements for shipping and packing and the duties imposed upon agents of the American Railway Express Company in the handling of such shipments? A I did, yes, sir. 20

Mr. McGovern: Mr. Harley and I, your Honor, agreed to try about three of these cases—

Mr. Harley: And then submit the rest on stipulation, as the facts will be the same. We will save time, I think. 30

The Court: All right.

By Mr. McGovern.

Q This shipment is the B. & M. Electric Company shipment, Chicago. I show you a letter under the heading of the American Railway Express Company dated October 15, 1926. Did you receive that letter, Mr. Rusoff? A I did. 40

Solomon Rusoff, direct.

Q Will you read to the Court the second paragraph of that letter? A "It is further revealed that the shipment was improperly packed and in these circumstances, according to the terms and conditions of the receipt, we are not liable for the loss, and claim is respectfully declined."

10 Q Are you familiar with the packing of that, Mr. Rusoff? A I would like to see the papers further.

(The witness referred to papers.)

The Witness: This package was received by us in damaged condition, and noted when received that such damage had occurred.

20 (The letter dated October 15, 1926, was received in evidence and marked plaintiff's Exhibit 5.)

Exhibit P. 5.

AMERICAN RAILWAY EXPRESS COMPANY

(INCORPORATED)

CLAIM BUREAU

250 West 26th Street

NEW YORK

30

W. E. Fogarty, D-130073—A
Claim Agent In your reply refer to.....

October 15th., 1926.

David Grimes. Inc.

#151 Bay Street.

Jersey City N. J.

Gentlemen:—

40 David Grimes. Inc. 151 Bay Street. Jersey City N. J. from:— B. & M. Elec. Hdwe. Co.

Solomon Rusoff, direct.

Chicago Ill. August 19th 1926. Claim
\$24.70.

Referring to your #315. The investigation discloses that our handling of this shipment was free of negligence.

It is further revealed that the shipment was improperly packed and in these circumstances, according to the terms and conditions of the receipt, we are not liable for the loss, and claim is respectfully declined.

Yours truly

W. E. FOGARTY

Claim Agent.

CCB/LC

The Witness: These are shipments mainly on the shipments that went out from our plant to the consignee and subsequently returned within a day or fortnight. These are shipments that have left our plant, possibly for months, and subsequently returned to us, and were returned for possible minor defects, or may have been returned for credit, and naturally the movements from our plant to the consignee and return was in controversy. The matter remains that the shipments from the consignee to us had been damaged in transit, not in the first movement unless specified or indicated in our claim. Under these circumstances most of these shipments have come back to us at our solicitation for return of merchandise and credit issued to offset our bill against the consignee, or have been returned by them for possible mechanical defects, and naturally where this material came in and was found damaged, we had the American Railway Express Company inspectors on the job im-

10

20

30

40

Solomon Rusoff, direct.

mediately within a day or two after we notified them, and they found—

Mr. Harley: I object to what they found as not binding on the company. He can tell us what he knows about it.

10 *By Mr. McGovern.*

Q Do the American Railway Express Company inspectors give you a duplicate of their findings? A They do not, no. They do in some instances and some instances they do not. In Jersey City they wouldn't even at our request. In places outside of the City they have given information, and written information, concerning damage. We have papers there to prove that fact.

20 Q Once in a while you might be fortunate enough to get their report of the damage? A Yes, if you are fortunate.

Q I show you a report purported to be that of D. J. Brennan; who is D. J. Brennan? A One of the inspectors of the American Railway Express Company at Jersey City, at First Street Station.

30 Q Did he examine this damaged radio set of the B. & M. Electric Company? A Yes, he did.

Q Will you read to the Court his findings? A This is my writing in the first place with his signature. "B. & M. Electric Company, Chicago, Ill. Return Authorization 562, W/B 1288 from Chicago; 1-4 D set No. 4457. Packed in P. Boc—wrapped with paper packing paper. Cover and end damaged by fall of box— Inside panel broken—condensor loose—leg broken. Set must be tested for further defects." It was verified and signed by D. J. Brennan.

40

Solomon Rusoff, direct.

Q So Mr. Brennan authorized over his signature the fact that this shipment was damaged by the fall of the box? A Yes.

Mr. McGovern: I offer that in evidence.

Mr. Harley: I object to that on the ground that it is immaterial. 10

Mr. McGovern: I think it is very material.

By the Court.

Q Whose signature is that? A The Inspector of the American Railway Express Company.

Q Do you know his signature? A Yes.

Q Are you familiar with his signature? A Yes, sir.

Q Where is his place of business? A New York City—Jersey City. He was inspector in the office. 20

Q At Jersey City? A Yes.

The Court: Why haven't you got him here?

Mr. Harley: That wouldn't make any difference from my point of view. I don't doubt that this is authentic, but it says in there that it is the result of a fall, but it doesn't say whether it was in the hands of the American Railway Express Company. 30

The Court: If that is your objection I will take it for what it is worth.

Mr. Harley: I just want to get my objection on the record.

The Court: Yes.

Mr. McGovern: Will your Honor admit this? 40

Solomon Rusoff, direct.

The Court: Yes.

(The paper referred to was received in evidence and marked Plaintiff's Exhibit 6.)

Exhibit P. 6.

10

B & M Electric Co
Chicago Ill.

Ra 562

W/B 1288 from Chgo.

1-4 D Set #4457

Packed in P. Box—Wrapped with paper—
Packing paper. Cover and lid damaged by fall
of box—Inside Panel Broken—Condenser loose—
leg broken set must be tested for further de-
fects.

20

D J Brennan

Am Ry Ex Co

8/25/26

By Mr. McGovern.

Q How much was the charge? A The
charge—

30

Mr. Harley: \$24.70.

The Witness: \$24.70 is correct; we ar-
rived at that in this manner—

Mr. Harley: That is all right; we won't
dispute that.

By Mr. McGovern.

Q Now, Mr. Rusoff, when these shipments are
delivered to the Grimes Plant, they are immedi-
ately opened, are they not? A Within a day
they are, yes.

40

Solomon Rusoff, cross—re-direct.

Q You leave the packing and the goods there until the arrival of the American Railway Express Company inspector? A They never yet have been damaged in the original packing.

Cross examination by Mr. Harley.

10

Q Mr. Rusoff, you weren't present at Chicago, Illinois, when this shipment was tendered to the American Railway Express Company, were you?

A No, sir.

Q You say that this was a shipment which had gone to them from your plant some weeks before, or possibly a month before? A Correct.

Q Now, of your own knowledge—I want you to distinguish between what you assume from the facts and your knowledge—do you know the condition of this radio set when it was tendered to the American Railway Express Company at Chicago, Illinois? A No, I do not.

20

Mr. Harley: That is all.

Re-direct examination by Mr. McGovern.

Q Mr. Rusoff, does the nature of the damage in this case in the light of your long experience with radios, the duties of traffic manager and packing indicate to you that such damage was due to falling or negligence in handling?

30

Mr. Harley: I object to that, if your Honor please. It is obviously impossible to tell how the damage occurred unless you saw it and knew about it.

The only way, of course, that he can make out a prima facie case under the circum-

40

Solomon Rusoff, re-direct.

stances is to show delivery to us in good condition.

Mr. McGovern: I move that that be stricken out, if your Honor please.

The Court: Read the question, Mr. Stenographer.

10

(The last question was read by the stenographer.)

Mr. McGovern: Now, if the Court please, he is competent to testify to that. I qualified him as an expert in this line for the last twenty-five years. Your Honor knows how radios are put together; if one part falls down, another part may be shoved up against it. It is an opinion, of course, but an opinion is allowable from an expert.

20

By the Court.

Q Well, did you see this injury itself to the package? A Yes, sir; I seen the damage; in fact, that is my own statement of what we found, and the apparent cause was agreeable to the inspector.

Q The inspector of the company? A For the American Railway Express Company.

30

The Court: Well, then, why do you need this question at all if you have that?

Mr. McGovern: What is that?

The Court: He says that according to the inspector's report—

By the Court.

Q You saw this damage? A I seen the package when it was delivered to us; it was in bad order. They had their man around to inspect it,

40

Solomon Rusoff, re-direct.

Brennan, and our findings were mutually on that statement which he counter-signed, which I wrote out—

Q You say that he agreed with you by signing that paper that it was damaged in transit?

Mr. Harley: Well, he didn't say that. 10

The Court: That is what I understood him to say—that this man agreed—

Mr. Harley: Of course, this statement reads for itself. In transit means from the time it leaves the shipper.

The Court: I will allow it provided it is shown that these things were delivered to the company in good condition.

Mr. Harley: In other words, the burden is on the defendant— 20

The Court: No. I think you ought to show that when these shipments were given to the company they were in good condition.

Mr. McGovern: Let me say this, if your Honor please. With these eighteen different cases, as I told your Honor before, it is clearly impossible for me to take depositions.

The Court: Where were these things sent from? 30

Mr. McGovern: This was sent from Chicago, Illinois, and the damage is only six or seven dollars, repaired by Grimes. I can't take depositions to show that these goods were delivered to the shipper in good condition. I have letters in my files from the American Railway Express Company agent where they say they are advised by the shipper that the goods were returned to the 40

Solomon Rusoff, re-direct.

Grimes Company because received by him damaged.

The Court: If you have those letters I will receive his testimony subject to its being connected.

10

Mr. Harley: I ask that an exception be noted on the record.

Mr. McGovern: I think that is all on that case.

The second case is a shipment from the BelKnap Hardware Company.

The Court: How much is the first case?

Mr. Harley: \$24.70.

The Court: I think I ought to decide this case now.

20

Mr. McGovern: I think so.

The Court: Well, I think under that testimony there seems to be an admission that they were broken in transit.

Mr. Harley: If the Court can point out where there is any evidence that it was damaged by the American Railway Express Company in transit, that is all we want to know. There is no presumption—

30

The Court: I know, but by the admission of the American Railway Express Company's man—what is his name?

The Witness: Brennan.

The Court: Brennan, in conjunction with this man—

Mr. McGovern: Here is the point: he is attempting to non-suit me on all of these cases. Your Honor knows that you are not only sitting as a Court but also as a jury.

40

The Court: Oh, yes.

Solomon Rusoff, re-direct.

Mr. McGovern: And every possible inference you can draw favorable to me, you must resolve in my favor; then I am entitled to go to a jury on this matter and take the question away from you on the matter of law.

The Court: I think it is a question more of fact as to whether the damage occurred in transit or not than it is a question of law.

10

Mr. Harley: But there must be evidence.

The Court: I know, but the evidence is by this man employed by the express company—an admission that this was broken while in the possession of the company.

Mr. Harley: If the Court please, this man shown here is an inspector in Jersey City. How does he know what happened to it in transit.

20

The Court: But he inspected it for the company.

Mr. Harley: He doesn't say it was damaged in transit.

The Court: What does he say?

Mr. Harley: He says it was dropped; he doesn't say where.

The Court: I can draw that presumption from that—as to whether it is a question of law or fact.

30

Mr. McGovern: There is an endless line of cases from the Court of Errors and Appeals in this State that if two inferences may be reasonably deduced from the evidence, one favorable to me and one against me, it is a jury question. Now, your Honor can draw one of two inferences from this testimony—

40

Solomon Rusoff, re-direct.

The Court: I am satisfied from the testimony that the company ought to pay this damage, \$24.70.

Mr. McGovern: Let me ask your Honor one more question—

The Court: That is settled.

10

Mr. Harley: I want to note an exception.

The Court: Yes.

Mr. McGovern: The second case is the shipment from the BelKnap Hardware Company, Louisville, Kentucky.

The Court: For the record, I will say there is no evidence of good condition upon delivery to the company.

Mr. Harley: That is our point exactly.

20

The Court: You have got to take the law in this case. The express company did receive this package and if they received it, they should have seen it was in good condition or reject it. Therefore the presumption throws itself to the express company.

30

Mr. McGovern: Furthermore, I am just going to quote you an example which will guide you throughout all of these cases. Suppose someone in the State of Indiana shipped to you a bundle worth about five dollars and when it is delivered to your door the express company agent hands you a paper and a string and says to you, "Judge Ernst, here is your package." Now, is it conceivable that you had no relief? Must you go back to Indiana and take depositions? *Res Ipsa Loquitur*. The fact speaks for itself.

Mr. Harley: My exception is noted.

40

Solomon Rusoff, re-direct.

By Mr. McGovern.

Q Mr. Rusoff, I show you a letter of July 20, 1926, purporting to be signed by W. E. Fogarty, Claim Agent of the American Railway Express Company. Did you receive that letter? A I did.

10

Q Will you read to the Court paragraph two of that letter? A "We have in our file a letter from the shipper supplying the information that this instrument was returned to you for repairs to some mechanical defects, no damage."

Mr. McGovern: I offer that in evidence.

Mr. Harley: Did you read the rest of it?

The Witness: "We also have a report from our inspector which supplies the information that this set was returned to you in a second-hand paper box with no protection of any kind furnished on either the top or bottom of the radio set.

20

"Under these conditions we must again decline the claim."

By Mr. McGovern.

Q If that packing which Mr. Fogarty refers to in the letter of July 20, 1926, was insufficient packing, would the agent of the American Railway Express Company at the point of shipment have taken it?

30

Mr. Harley: I object to that on the ground it is immaterial.

Mr. McGovern: That is clearly competent. I have qualified this man as an expert. He is an expert and opinion evidence is admissible where it may aid the Court.

40

Solomon Rusoff, re-direct.

Mr. Harley: This shipment was in a box. How can you say it is damaged unless you can see what is in the box. The express company receives a million shipments a day.

By Mr. McGovern.

- 10 Q Mr. Rusoff, do you know of your own knowledge whether the packing which Mr. Fogarty objects to and which he puts up as a defense in your claim has been approved by the officials of the American Railway Express Company? A That particular thing there may not have been approved. Wherever they claim improper packing, they have a rule whereby their agents are governed in handling such a situation by non-acceptance of the package improperly
- 20 packed. That is what they are referring to.

By Mr. Harley.

Q Do they open every package? A They should reject every package that is packed improperly.

- Q You have been in the express business a long time. If you took sixty radios in wooden boxes to the Jersey City office would the agent open every one? A Not necessarily, if they are packed according to their requirements. Once they are accepted, there are receipts—
- 30

Q I am not asking you for any conclusions of your own. How can the agents know whether it is improperly packed if the package is nailed? A By examination of it at destination.

Q Up to that point they don't know? A They see it originally.

- Q They couldn't reject it if they didn't know it was improperly packed. A If they think
- 40

Solomon Rusoff, re-direct.

the packing is agreeable they accept it as standard packing. Mr. LaMarr is in our place—

Q There is no attempt made to pull open every box at the point of origin? A No, not where it conforms to their packing requirements.

By Mr. McGovern.

10

Q Is there any special packing required according to the rules of the American Railway Express Company which is set aside for radio sets?

A There is no special packing required for radio sets with the exception that they accept certain standards in packing: that they be protected properly—in their estimation, properly. There is no definite specification for it.

Q If these sets were improperly packed they would be refused shipment by the agent? A They would have been refused at the time it was given to them.

20

Q Are these sets marked "Fragile"? A They are, from our place and the radio industry is known as a fragile industry, and they know when they receive them that they are supposed to get extreme care in handling, which they don't get.

Mr. Harley: I object to that. We carry millions of radios.

30

The Court: Yes.

Mr. McGovern: I offer this letter of October 20th in evidence.

(The paper referred to was received in evidence and marked Plaintiff's Exhibit 7.)

40

Solomon Rusoff, re-direct.

Exhibit P. 7.

AMERICAN RAILWAY EXPRESS
COMPANY.

(INCORPORATED)

CLAIM BUREAU

10

250 West 26th Street
NEW YORK

W. E. Fogarty,
Claim Agent In your reply refer to.....
D-106333—A

July 20th, 1926.

David Grimes, Inc.
151 Bay Street,
Jersey City, N. J.

20

Attention of S. Rusoff,

Gentlemen:

Referring to your letter of July 13th, your file
Traffic Dept. B, claim #159.

We have in our file a letter from the shipper
supplying the information that this instrument
was returned to you for repairs to some me-
chanical defects, no damage.

30

We also have a report from our inspector
which supplies the information that this set was
returned to you in a second hand paper box
with no protection of any kind, furnished on
either the top or bottom of the radio set.

Under these conditions we must again de-
cline the claim.

Yours truly,

W. E. FOGARTY,

Claim Agent.

CCB:EH

40

Solomon Rusoff, cross—re-direct.

Cross examination by Mr. Harley.

Q Do you know from your own knowledge the exact condition of this radio set when it was delivered to the American Railway Express Company at Louisville, on shipment from Louisville to Jersey City? A No, I have no record of that, not being there at the time. 10

Q You don't know what it was? A No.

Mr. Harley: Before the Court decides this particular case inasmuch as I am putting a defense in: the only defense is a certified copy of schedules filed with the Interstate Commerce Commission, and also this official classification which has copies of express receipts in it. I would like to have this marked. 20

(The papers referred to were received in evidence and marked Defendant's Exhibit 1.)

By Mr. McGovern.

Q The defense of the American Railway Express Company according to Exhibit P. 7 is insufficient packing in that it was packed in a paper box. I ask you to consult this file and inform me whether it was packed in a paper box? A Here is a statement here from the Louisville shipper. 30

Mr. Harley: I object to a statement from the shipper. We haven't a chance to cross examine him, and it is hearsay as far as this gentleman is concerned.

The Court: I sustain the objection.

Solomon Rusoff, re-direct.

By Mr. McGovern.

10 Q Have you anything beyond the record of the Grimes Company which was made either by you or under your supervision? A That file reveals the nature of the packing. Why, yes. In this instance the packing was P-box originating from our company to the BelKnap Hardware Company.

By Mr. Harley.

Q For the Court's information, Mr. Rusoff, will you just say what is meant by a P-box? A Paper box.

By Mr. McGovern.

20 Q Mr. Rusoff, was the shipment of the radio set in a paper box approved? A They were approved by LaMarr, the agent for them.

Q If they weren't approved, Mr. Rusoff, would the express company's agent at the shipping point have taken the shipment in a paper box?

Mr. Harley: I object to that as immaterial and irrelevant.

30 Mr. McGovern: Your Honor, I qualified him as an expert for twenty-five years with various companies and four or five years with the American Railway Express Company, and he has been in a capacity where he knows those things.

The Court: I will allow it, but I have my doubts about it.

Mr. Harley: I ask for an exception.

40 Mr. McGovern: Opinion evidence is always admissible.

Solomon Rusoff, re-direct.

The Court: They might have done things when he worked for them that they don't do today. I sustain the objection. I couldn't allow that question. He can tell, possibly, as he has already, that the acceptance of this box with a radio in it makes a presumption from which the Court can draw an inference that it was in good condition; otherwise, they had a right to reject it. Have you anything else to show on that paper box?

10

Mr. McGovern: I wanted to ask him what the nature of the damage was.

Mr. Harley: That is \$7.50.

By Mr. McGovern.

20

Q What is the nature of the damage? A Hinge torn from the back panel, and mechanism damaged through jarring effects.

Q In the light of your long experience with the duties of traffic manager, Mr. Rusoff, would you say or would you not say that the damage was due to negligence in handling during shipment?

Mr. Harley: I object to that question on the ground it calls for a conclusion. It is immaterial, irrelevant, and incompetent.

30

Mr. McGovern: If the Court please, it calls for no conclusion at all. I asked him his opinion. He is an expert.

The Court: Well, I sustain the objection. You might show what he saw of this package or what he knows about this package.

40

Solomon Rusoff, cross—re-direct.

By Mr. McGovern.

Q Did you see that package when it was brought into the Grimes plant on Bay street? A I did.

Q Did you see the packing on it? A I did.

10 Q Was the packing damaged? A Apparently so.

Q What do you mean? A Why, the package showed manhandling.

Q Was it dented? A It was dented in various places. To indicate what the cause was would be pretty hard.

Cross examination by Mr. Harley.

20 Q Now, Mr. Rusoff, do you know of your own knowledge the condition of the packing box outside at the time this shipment was delivered to the defendant at Louisville, Kentucky? A I presume—

Q No. Of your own knowledge? You weren't there, were you? A No, I wasn't there.

Q You didn't see it? A No.

Q You don't know what its condition was? A No.

30 Q You are assuming what it was from the facts? A Yes.

Re-direct examination by Mr. McGovern.

Q You saw the package when it was delivered at the Grimes plant? A Yes.

Q You know what its condition was when it was delivered there? A Yes.

40 Q From your long experience in the shipping line you undoubtedly had some reactions towards

Solomon Rusoff, re-direct.

the condition of the packing on that radio set? A
I did.

Q What were those reactions?

Mr. Harley: I object to that on the
ground that it is incompetent, irrelevant and
immaterial. He has already testified that he
didn't know the condition of the contents or
the container— 10

The Court: I sustain the objection.

I will tell you what I am going to do, Mr.
McGovern. In the first case where I gave
judgment, with the consent of both counsel
I am going to remove that judgment and
leave it open and reserve decision on that,
and also the cases that you are going to
try, and I will give Mr. Harley a chance to
submit something to me on the law. 20

Mr. Harley: On the rest of these cases
I think Mr. McGovern and I can stipulate
that the facts will be the same, and he can
put in all letters that he got from us with-
out objection on my part.

Mr. McGovern: I want to get before your
Honor some of the rules and regulations of
the American Railway Express Company. 30

By Mr. McGovern.

Q Mr. Rusoff, will you refer to classification
number 29 and turn to page 44? Will you read
from page 44 item 19 headed "Musical Instru-
ments, automatic or other N. O. S."? A Auto-
matic or not otherwise specified.

Q What is the significance of the abbreviation
"NOS."? A Not otherwise specified or named. 40

Solomon Rusoff, re-direct.

Q Do you see following that where Musical Instruments are specified any specification for radios? A No, sir.

Q There isn't any, is there? A No, sir.

Q Will you read into the record item 19? A
 10 "Musical Instruments, Automatic or Other, N. O. S. Boxed or crated—Class 1—Will not be accepted when not so packed."

Q Will you turn to page 46 and read into the record item number 11? A "Phonographs and other Talking Machines, Automatic or otherwise—will not be accepted if not boxed or crated, Class 1."

Q Will you turn to page 18 and read into the record the heading of number five? A "Prohibited Shipments."

20 Q Will you read what follows? A "Explosives and inflammable articles and acids will not be accepted when not shipped in compliance with the Interstate Commerce Commission's 'Regulations for the Transportation of Explosives and other Dangerous Articles by Express' (I. C. C. No. 1922, Supplements thereto and subsequent issues thereof). (See Rule 8 (c).)"

30 Mr. Harley: I object to the inclusion of that material. This is not explosive—

Mr. McGovern: The heading is "Prohibited shipments," and he just said what is under those shipments.

Mr. Harley: All right.

The Court: Do you withdraw the objection?

Mr. Harley: Yes.

Solomon Rusoff, re-direct.

By Mr. McGovern.

Q Now, Mr. Rusoff, will you turn to page 23, item 18 headed "Packing Requirement"? Will you read into the record the requirements for packages wrapped in paper boxes? A "Unless otherwise specifically provided, packages weighing over 35 pounds will not be accepted if only paper wrapped, or in an ordinary paperboard box, whether such box is wrapped or not wrapped. (Such shipments must be in boxes, barrels, crates, sacks, bales or trunks, or otherwise securely packed as hereinafter provided in this rule, or in individual items in the Classification.)"

10

Q Do any of these radios shipped in paper boxes to your knowledge weigh over thirty-five pounds? A Yes, they do.

20

Q But prior to the regulations for packing of the American Railway Express Company they have been accepted for shipment by the American Railway Express Company agents?

Mr. Harley: I object to that. The regulations speak for themselves.

Mr. McGovern: If the Court please, the regulations are in the record. I am asking him of his own knowledge.

30

The Court: It is a nice question as to whether they specified that they be packed in a certain way and they took them another way—whether or not they waived that—

Mr. Harley: The question of packing is not in issue; it is only a matter of proving that we got them in good condition. The burden is on us after that to show how we shipped them and what we did with them.

40

Solomon Rusoff, re-direct.

Mr. McGovern: They have resisted claims right along on grounds of insufficient packing.

(The last question was read by the stenographer.)

10 The Court: I don't think there is anything to that. It was accepted by them.

Mr. Harley: But contrary to the regulations? I say the regulations speak for themselves. The Court can determine whether that is so or not possibly on a quiet reading of them.

The Court: I will let him answer subject to the regulations.

20 Mr. McGovern: The regulations are in the record. I asked him if they weigh over thirty-five pounds and he said "Yes".

By Mr. McGovern.

Q Mr. Rusoff, will you read into the record page 23, item 18, paragraph 8?

Mr. Harley: A or eight?

Mr. McGovern: Eight.

30 A "Specifications for containers or packing requirements provided in individual items in the Classification shall take precedence over those provided in this rule."

By Mr. McGovern.

40 Q Can you find any individual specified classification for radio sets? A There has never been one provided, and I asked the Express Company time and again for such specifications, and

Solomon Rusoff, re-direct.

they had no specific packing requirements authorized.

Q Therefore, according to page 23, item 18, paragraph 8, since there are no individual specified classification for radio sets, it doesn't take precedence over that rule? A Absolutely not.

Q According to the very wording of that classification itself? A Yes.

10

Mr. Harley: Ask him to read paragraph A of that.

By Mr. Harley.

Q Will you read into the record paragraph A on page 23?

Mr. McGovern: All right. I have no objection if that is read into the record.

20

A "All shipments must be so prepared or packed as to insure safe transportation with ordinary care on the part of the Express Company."

By Mr. McGovern.

Q Mr. Rusoff, turn to page 26, item 18 (Y) and read that packing regulation into the record.

30

A "Second-hand Containers. Shipments which under this rule or under individual items of the Classification require boxing must not be accepted when packed in second-hand or used pulpboard, fibreboard or corrugated strawboard containers, unless such containers conform in all respects to all of the provisions of this rule. Containers which are broken, crushed or otherwise damaged must not be used."

40

Solomon Rusoff, re-direct.

Mr. McGovern: That is all. Will your Honor decide this case now?

10 The Court: According to that last paragraph, it is apparent that they should not have accepted it. I won't decide it until I hear the next case—or, are they all the same?

Mr. McGovern: Yes, they are all the same.

The Court: The only question here is whether your proof has to be when they were received by the Express Company they were in good condition or not and subsequently damaged on the return.

Mr. McGovern: I claim I am entitled to go to the jury on that.

20 The Court: You claim it becomes not a question of law, but a question of fact for the Court to determine from the evidence that you produced that there was negligence in the handling of the package, is that it?

Mr. McGovern: Yes, that is right.

30 The Court: The only question is, what is your proof? What proof is required of you at the time the package was, we might use the term re-consigned by the consignee into the hands of the Express Company to be re-delivered to the original sender, is that it?

Mr. McGovern: Yes. I think I can ask a reasonable man to infer that the damage was due to the American Railway Express Company, and I ask you to find as a matter of fact I am entitled to go to the jury on that.

40 The Court: I feel now that you are entitled to a judgment unless it can be over-

Motion for a Non-suit.

whelmingly established that your contention at law is wrong.

Mr. McGovern: I ask your Honor to decide the case now.

Mr. Harley: I haven't asked for a non-suit.

The Court: I will give you a judgment unless Mr. Harley can show me the law. 10

Mr. Harley: If the Court is going to consider this case now I want to make a motion for a non-suit on the following grounds:

1. There is no evidence that the shipments referred to in the state of demand were delivered to the defendant at the points of origin referred to therein.

2. There is no evidence of the condition of the shipments referred to in the state of demand at the time they are alleged to have been delivered to the defendant at the various points of shipment referred to in the state of demand. 20

3. There is no evidence that the shipments referred to in the state of demand were in good order at the time they were delivered to the defendant at the point of shipment referred to in the state of demand. 30

4. There is no evidence of any negligence on the part of the defendant.

5. There is no evidence of the facts set forth in the state of demand.

6. There is no evidence of the damage to the shipments referred to in the state of demand at the time of delivery by the defendant at the point of destination.

Motion for a Non-suit.

7. There is no evidence that the defendant is the owner of the shipments referred to in the state of demand.

10

8. There is no evidence that the plaintiffs are the shippers or the holders of the Uniform Express Receipt covering the transportation of the shipments referred to in the state of demand.

9. There is no evidence of the fact that the shipments referred to in the state of demand were delivered to the defendant for carriage between the points referred to in the state of demand.

20

10. There is no legal evidence that the Uniform Express Receipts put in evidence were actually issued by an authorized agent of the defendant.

The Court: I will deny the motion at this time.

Mr. Harley: I will ask for an exception. I will be glad to submit briefs to your Honor.

The Court: Do you rest your case, too?

Mr. Harley: Yes.

30

The Court: You are not only resting your case at the non-suit point, but you are also resting it simply by consenting to submit a memorandum of law on it.

Mr. Harley: It is also understood that I make a motion for a direction of a verdict on the same grounds.

The Court: Yes.

Mr. Harley: The only evidence we put in is this tariff schedule.

40

Mr. McGovern: Will your Honor give me an opportunity to reply to Harley's brief?

The Court: Yes.

Certificates of Judge and Stenographer.

SECOND DISTRICT COURT

OF JERSEY CITY, N. J.

ALOYSIUS McMAHON and FRANK
E. BURDETTE, Receivers of
David Grimes, Inc.,
Plaintiffs,

10

vs.

AMERICAN RAILWAY EXPRESS
COMPANY, a corporation,
Defendant.

I, JAMES S. SLAVIN, a stenographer duly appointed to report stenographically the evidence given before the Second District Court of Jersey City in the above-entitled cause, do hereby certify that the foregoing is a true and correct transcript of the evidence given on the 15th day of June and 21st day of September, 1927, before Honorable Myron C. Ernst, Judge of the Second District Court of Jersey City, in said matter.

20

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 3rd day of October, 1927.

30

(SEAL)

JAMES S. SLAVIN.

I hereby certify the foregoing to be a true and accurate transcript of the above-entitled matter, as taken before me at the time, place and date, hereinbefore mentioned.

MYRON C. ERNST,
District Court Judge.

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SPECIFICATION OF DETERMINATIONS.

Filed December 17, 1927.

SECOND DISTRICT COURT
OF JERSEY CITY.

10	<p style="text-align: center;">ALOYSIUS McMAHON and FRANK E. BURDETTE, Receivers of David E. Grimes, Inc., <i>Plaintiffs,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">AMERICAN RAILWAY EXPRESS COMPANY, <i>Defendant.</i></p>	<p><i>Action at Law.</i></p> <p><i>Specification of Determina- tions of the District Court with which Appellant is Dissatisfied in Point of Law.</i></p>
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The following is a specification of the determinations of the District Court with which appellant is dissatisfied in point of law:

1. At the close of the plaintiff's case, the appellant's attorney made a motion for a non-suit on the following grounds:

30 (a) There is no evidence that the shipments referred to in the state of demand were delivered to the defendant at the points of origin referred to therein.

(b) There is no evidence of the condition of the shipments referred to in the state of demand at the time they are alleged to have been delivered to the defendant at the various points of shipment referred to in the state of demand.

40 (c) There is no evidence that the shipments referred to in the state of demand were in good

Specification of Determinations.

order at the time they were delivered to the defendant at the point of shipment referred to in the state of demand.

The Court denied the motion and appellant asked for an exception and same was granted. The Court erred in this determination and appellant is dissatisfied with same in point of law. 10

HARLEY, COX & WALBURG,
Attorneys for Appellant.

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OPINION OF SUPREME COURT.

Filed May 3, 1928.

NEW JERSEY SUPREME COURT.

No. 415, January Term, 1928.

10

ALOYSIUS McMAHON, *et al.*, Re-
ceivers of David Grimes, Inc.,
Plaintiffs-Appellees,

vs.

AMERICAN RAILWAY EXPRESS
COMPANY,
Defendant-Appellant.

*Appeal from
Second
District
Court of
Jersey City.*

20

Submitted January 27, 1928; decided May 3, 1928.

Before Justices Parker, Minturn and Campbell.

For appellant, William B. Harley.

For appellees, no appearance.

PER CURIAM:

30

This was an action to recover damages to radio sets claimed to have been damaged by the express company. There seem to have been eighteen shipments, the total damage claimed being \$182.25. Testimony was produced as to three shipments only and the trial judge sitting without a jury found for the appellees in the full amount of their claim.

40

Of the three cases in which proofs were presented the first was a shipment to the Michigan Music Shop, Detroit, in which the damage claimed was eight dollars, and this was not contested by the appellant; the second was a ship-

Opinion of Supreme Court.

ment to B. and M. Electric Company, Chicago, where the proof was that the express company found and reported the shipment improperly packed and that the damage was caused by a fall of the box, and the third was a shipment to the Bell Knap Hardware Company, Louisville, Ky., where there was simply proof of damage and nothing more. 10

We are asked to set aside this judgment upon the ground that the trial court erred in refusing motions to non-suit and direct a verdict because there was no proof that the goods were in good condition at the time of their delivery to the express company.

There is no question but that there must be proof of good condition at the time of delivery to carrier or a receipt from carrier acknowledging receipt of goods in good condition. *Gude v. P. R. R. Co.*, 77 N. J. L. 391. 20

Such proof was not produced as to the second and third shipments as to which evidence was taken before the trial court, but it does seem to appear that the appellant admitted or conceded its liability as to the first shipment.

But for this the appellant would have been entitled to a non-suit or direction of verdict in its favor. The difficulty is, however, that both of these motions were directed to the entire claim of the appellees without eliminating the first item or shipment. Under such circumstances it was not error for the trial court to refuse these motions and as the judgment is not attacked for any other reason or alleged error it must be affirmed. 30

REMITTITUR.

NEW JERSEY SUPREME COURT.

10	ALOYSIUS McMAHON and FRANK E. BURDETTE, Receivers of David Grimes, Inc., <i>Plaintiffs-Appellees,</i> <i>vs.</i> AMERICAN RAILWAY EXPRESS COMPANY, a corporation, <i>Defendant-Appellant.</i>	} <i>On Appeal from Second District Court of the City of Jersey City. Remittitur.</i>
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20 This cause having been brought to a hearing on appeal from the determination of the Second District Court of Jersey City at the January term of this court, and the Court having heard William B. Harley, of counsel with the appellant, and having duly considered the questions brought up by this appeal,

It is on this May 22, 1928, on motion of John Milton, of counsel with said plaintiffs-appellees, ORDERED, ADJUDGED and DECREED that the determination of the Second District Court of Jersey City made on the 30th day of November, 1927, from which the appellant appealed, be and the same is hereby in all things affirmed, with costs of appeal to be paid by the said appellant and that the appeal be and the same is hereby dismissed.

It is further ORDERED that the record in this cause be remitted to the clerk of the Second District Court of Jersey City for further proceed-

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Remittitur.

ings thereon according to law and to the statute
in such case made and provided.

Entered May 22, 1928.

On motion of

JOHN MILTON, 10
Attorney for Plaintiffs-Appellees.

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NOTICE OF APPEAL.

Filed June 20, 1928.

NEW JERSEY SUPREME COURT.

10	ALOYSIUS McMAHON and FRANK E. BURDETTE, Receivers of David Grimes, Inc., <i>Plaintiffs-Respondents,</i> <i>vs.</i> AMERICAN RAILWAY EXPRESS COMPANY, a corporation, <i>Defendant-Appellant.</i>	} <i>Action</i> } <i>at Law.</i> } <i>On Appeal</i> } <i>to the New</i> } <i>Jersey Court</i> } <i>of Errors</i> } <i>and Appeals.</i> } <i>Notice of</i> } <i>Appeal.</i>
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20 To John Milton, Esq., attorney of plaintiffs-respondents.

SIR:

TAKE NOTICE that the defendant-appellant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Respectfully yours,

HARLEY, COX & WALBURG,
 Attorneys for Defendants-Appellants.

30 Dated May 25, 1928.

40

GROUNDS OF APPEAL.

Filed June 20, 1928.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

ALOYSIUS McMAHON and FRANK
E. BURDETTE, Receivers of
David Grimes, Inc.,
Plaintiffs-Respondents,

vs.

AMERICAN RAILWAY EXPRESS
COMPANY, a corporation,
Defendant-Appellant.

10

*Action
at Law.*

*Grounds
of Appeal.*

20

The defendant-appellant states the following grounds of appeal:

1. The Supreme Court of New Jersey erred in giving judgment for the plaintiffs-respondents instead of for the defendant-appellant for some one or more of the grounds of appeal urged in said Supreme Court.

2. The Supreme Court of New Jersey should have reversed the judgment of the Second District Court of the City of Jersey City and granted a *venire de novo*, whereas the Supreme Court erroneously affirmed the judgment of the said court.

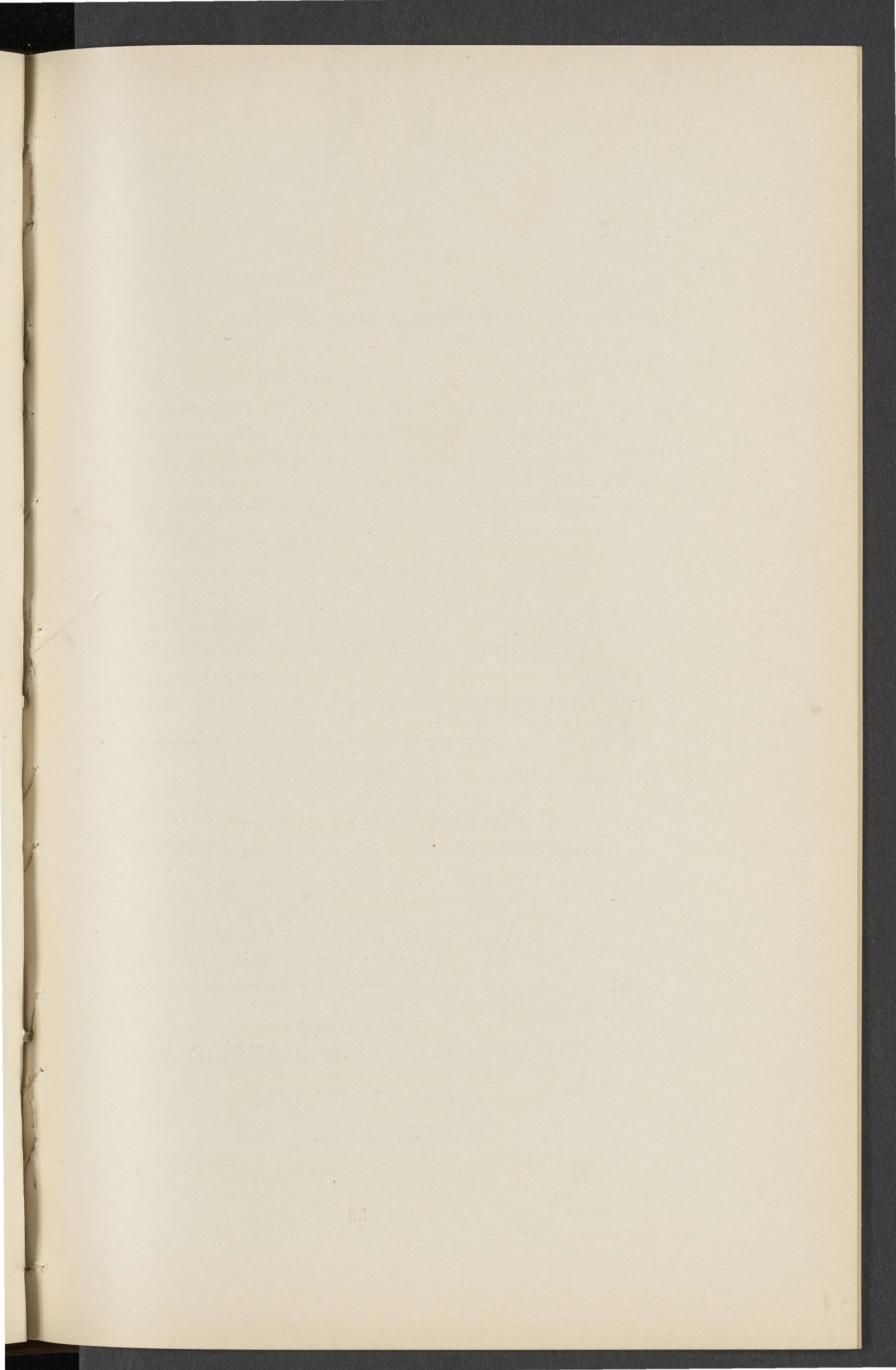
30

Respectfully yours,

HARLEY, COX & WALBURG,
Attorneys of Defendant-Appellant.

Dated May 25, 1928.

40



New Jersey Court of Errors and Appeals

ALOYSIUS McMAHON and FRANK E. BURDETTE, receivers of David Grimes, Inc., <i>Plaintiffs-Appellees,</i> <i>vs.</i> AMERICAN RAILWAY EXPRESS COMPANY, a corporation, <i>Defendant-Appellant.</i>	}	<i>On Contract. On Appeal from Supreme Court.</i>
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BRIEF OF HARLEY, COX & WALBURG FOR DEFENDANT-APPELLANT.

This case involves a shipment of a number of radios from various cities in the United States and Great Britian to the plaintiff at Jersey City, New Jersey, which the plaintiffs claim were damaged by the defendant, American Railway Express Company, while in its possession. The testimony concerning all of the shipments was not taken at the trial at it was conceded by counsel that all of the cases with the exception of the first shipment, covered by testimony on pages 10-26 were similar cases and that the same facts and law would be involved in each case. The first shipment, covered by testimony on pages 10-26 is not involved as it appeared at the trial that this radio never left the possession of the defendant, having been shipped to Detroit and returned to Jersey City. Therefore, no contest is made as to this particular shipment.

The question involved herein, however, is covered by the testimony from pages 26 to 54

and the only point urged for the reversal of the judgment entered in this case is as follows:

“There is no evidence that the shipments referred to in the state of demand were in good order at the time they were delivered to the defendant at the point of shipment referred to in the state of demand.”

This objection was raised on motion for a non-suit and direction of verdict as shown on page 53 of the State of Case and in the specification of defenses shown on page 56 of the record. The whole point involved in this case, therefore, is whether the plaintiff, in order to make a *prima facie* case against the defendant, must show by some evidence that the radios involved in this case were delivered to the defendant at Chicago, Illinois and Louisville, Kentucky, in good order, or whether the mere showing of the receipt of these radios at destination, *i. e.*, Jersey City, is sufficient to place on the defendant the burden of going forward.

It is our contention, as will be noted by the record, that the burden is on the plaintiff in cases of this type, in order to make a *prima facie* case against a common carrier, to show that the shipments were in good condition when delivered to the defendant at the points of origin and in a damaged condition when delivered to the defendant at destination.

In order that there may be no misunderstanding as to the facts, we call the Court's particular attention to the finding of fact of the trial judge as shown on page 38 of the record, lines 12-14:

“The Court: For the record, I will say there is no evidence of good condition upon delivery to the company.”

The defendant insists that under the law it is the duty of the plaintiff in order to make a

prima facie case to prove that the shipments were in good condition when delivered to the defendant at point of origin.

We most emphatically insist that this is the law as shown by the text books and the cases. As a matter of fact, radios are usually returned to the radio factory for repairs and the express companies and the railroads are moving hundreds of radios that have been damaged by users back to the factory for repairs. The Court will, therefore, see that it is common to ship radios in a damaged condition in order to have them repaired at the factory and that the express companies and other common carriers are daily carrying damaged radios, which damage is not the result of any negligence of the carrier.

Michie on "Carriers," Vol. 2, p. 820, p. 1057, lays down the rule applied to these cases as follows:

"After it has been shown that the goods were delivered to the carriers in good condition, and that it failed to deliver them or delivered them in a damaged condition, presumption is that the carrier was negligent and it has the burden of proving that the loss or damage resulted from some cause for which it was not responsible."

This rule is thereafter laid down in Hutchinson "Carriers," 3rd Ed., p. 1597, p. 1352:

"So where it is proven that when the goods were delivered to the carrier they were in good order and that when delivered at destination they were in a damaged condition, a prima facie presumption will arise that the damage was occasioned by some cause for which the carrier was responsible, and unless he can show that it was due to a cause for which by the law or his contract he would be excused, he will be liable."

See also *C. and O. Ry. Co. v Thompson*, 270 U. S. 415, 70 L. Ed. 659, where in an opinion written on behalf of the Supreme Court of the United States by Mr. Justice Stone, he said:

“The respondent, therefore, had the burden of proving the carrier’s negligence as one of the facts essential to recover. *When he introduced evidence to show delivery of the shipment to the carrier in good condition and its delivery to the consignee in bad condition, the petitioner became subject to the rule applicable to all bailees—that such evidence makes out a case of prima facie negligence.*”

It is apparently the contention of the plaintiffs in this case that the Court can infer that the goods were in good condition when delivered to the defendant at the point of origin, because they were found in damaged condition at the point of destination.

We would call the Court’s particular attention to the case of *Jean Garrison and Co. v. Flagg*, 19 N. Y. Supp. 289, where Mr. Justice Fitzgerald of the New York Supreme Court laid down the exact rule for which we are contending in this case as follows:

“The burden was upon the plaintiff to prove negligence and as a step in that direction it was essential to have shown the condition of the goods at the place of shipment. *The fact of delivery of goods by a carrier to a consignee at destination in an injured condition is not enough.* It must be shown in what condition the carrier received them in order to prove an injury at his hands. *Smith v. N. Y. Central R. R.*, 43 Barb. 225. As there was no evidence offered upon this subject, we are of the opinion that *the plaintiff failed to make out a case.* See also *Canfield v. B. and O. R. R.*, 75 N. Y. Rep. 144.”

The case of *Gude v. Pa. R. R.*, 77 N. J. L. 392, illustrates the attitude of the courts of New Jersey on this point. Although the facts in that case involved a connecting carrier, the principle of law involved is identical with the case of where there is but one carrier. See the bottom of page 393 where the Court says:

*“But a presumption must rest upon some proven or admitted fact or facts, and without it appears that the goods were not in a damaged condition when the shipper delivered them to the first carrier, there is nothing upon which to rest a presumption that they were not damaged when delivered by the shipper. There is no reason why the goods may not be shipped although damaged and without proof to the contrary, the presumption that they were, when shipped, in the condition found at their destination, is at least as strong as that they were not. The condition in which they were delivered for shipment is within the knowledge of the shipper, and the proof of it is readily obtainable * * *”*

The Court will note from the record that the only witness produced by the plaintiff testified under cross examination that he did not know the condition of the shipments or the containers at the time they were delivered to the defendant at points of origin.

“Q Mr. Rusoff, you weren't present at Chicago, Illinois, when this shipment was tendered to the American Railway Express Company, were you? A No, sir.

Q You say that this was a shipment which had gone to them from your plant some weeks before, or possibly a month before? A Correct.

Q Now, of your own knowledge—I want you to distinguish between what you assume from the facts and your knowledge—do you know the condition of this radio set when it was tendered to the American Railway

Express Company at Chicago, Illinois? A No, I do not.

Q Do you know from your own knowledge the exact condition of this radio set when it was delivered to the American Railway Express Company at Louisville, on shipment from Louisville to Jersey City?

A No, I have no record of that, not being there at the time.

Q You don't know what it was? A No."

It can be plainly seen, therefore, that the only evidence in the case is that these two shipments were damaged at destination and in the one case that an inspector of the defendant inspected one of the shipments and verified the damage.

Comments on Supreme Court Opinion.

The Supreme Court approved in its opinion the contention of the defendant that there must be evidence of delivery of goods in good condition as prerequisite to recovery in cases of this character. It further recognized that no such proof appeared in the record. However, a reversal of the judgment was denied because it appeared in the record that the defendant had acknowledged liability in one shipment and had failed to exclude that shipment in its motion for non-suit.

In this connection we would like to call to the Court's attention the case of *Smith v. Cruse*, 101 L. 82, where Chancellor Walker speaking for the Court of Errors and Appeals said:

"Now, the amendment to the Practice Act (P. L. 1916, page 109) provides that when cases are submitted to the Court to be heard without a jury, *any* error made by the Court in giving final judgment shall be subject to change, modification, or reversal without the grounds of objection having been specifically

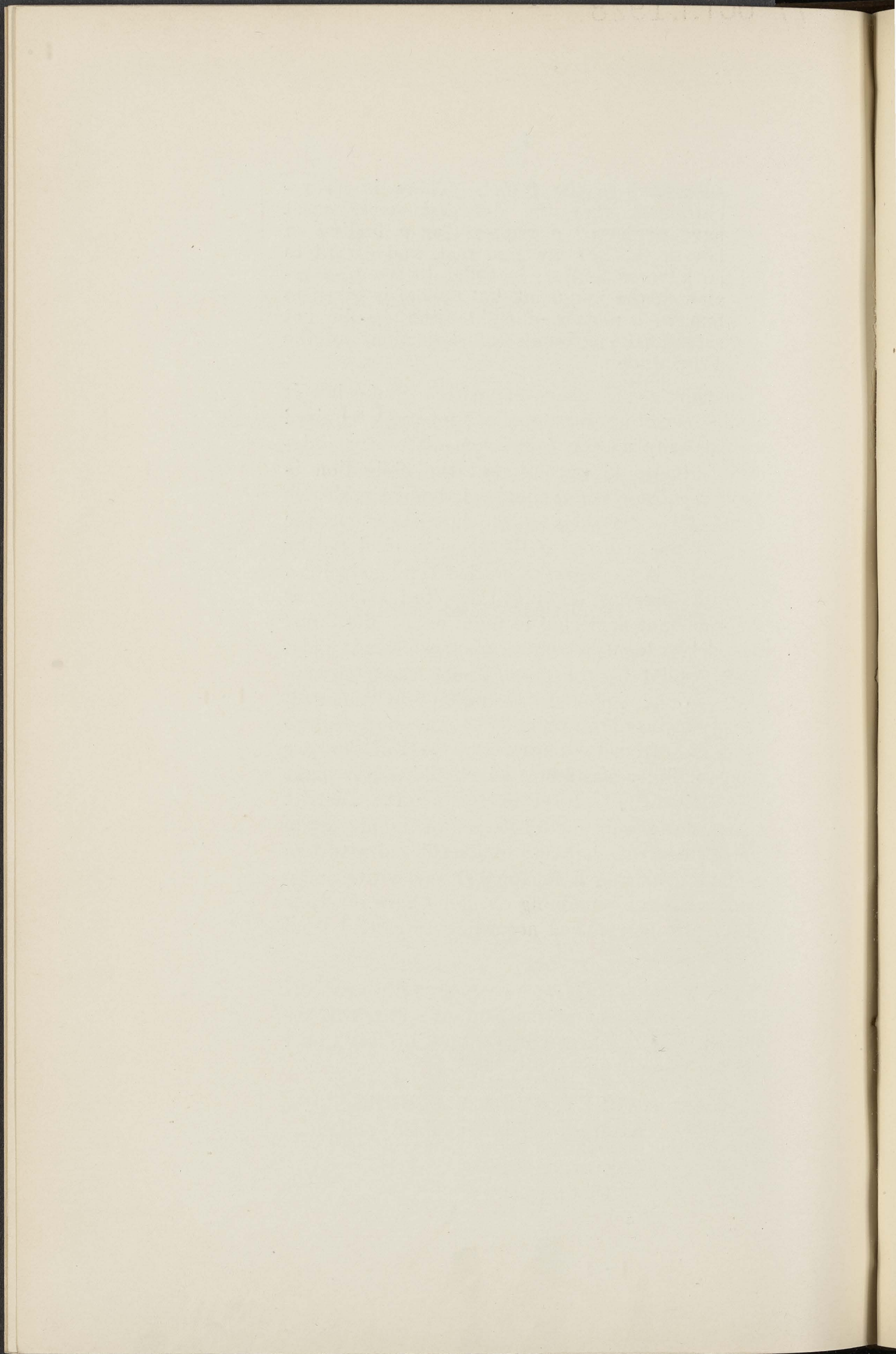
submitted to the Court. There is no requirement that the defeated party must have preferred a request for a finding of law or fact, or law and fact, and except to an adverse finding, in order to secure a review of the judgment, but appeal is given to him, as a matter of right altho' he did not submit the grounds of objection to the Trial Judge."

In view of the above exposition of the law it would seem that the appellant was not required to make any motion for a non-suit or for judgment. It would appear that the obligation is upon the Court to render a judgment which is justified by the rules of the law governing the facts of the case and if the decision rendered by the Court is contrary to settled legal principles it will be reversed on appeal despite the fact that the appellant neglected to point out to the Court the correct legal principles upon which his judgment should be founded. Under these circumstances, the appellant's motion for non-suit, being surplusage in its entirety, the mere failure to exclude from the motion that part of the case where liability was admitted, should not be made the basis of a refusal to reverse the District Court, nor should the admission of liability as to one element of the case be considered sufficient ground upon which to support the entire judgment when the remaining elements have not been sufficiently established according to settled legal requirements.

The appellant therefore respectfully requests that the judgment of the Supreme Court be reversed and ^{modified} judgment final entered by this Court for the defendant.

HARLEY, COX & WALBURG,
Attorneys of Defendant-Appellant.

WILLIAM B. HARLEY,
Of Counsel.



New Jersey Court of Errors and Appeals

ALOYSIUS McMAHON, <i>et al.</i> , Plaintiffs-Appellees, <i>vs.</i> AMERICAN RAILWAY EXPRESS COM- PANY, a corporation, Defendant-Appellant.	}	ON CONTRACT. ON APPEAL FROM SUPREME COURT.
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BRIEF FOR APPELLEES.

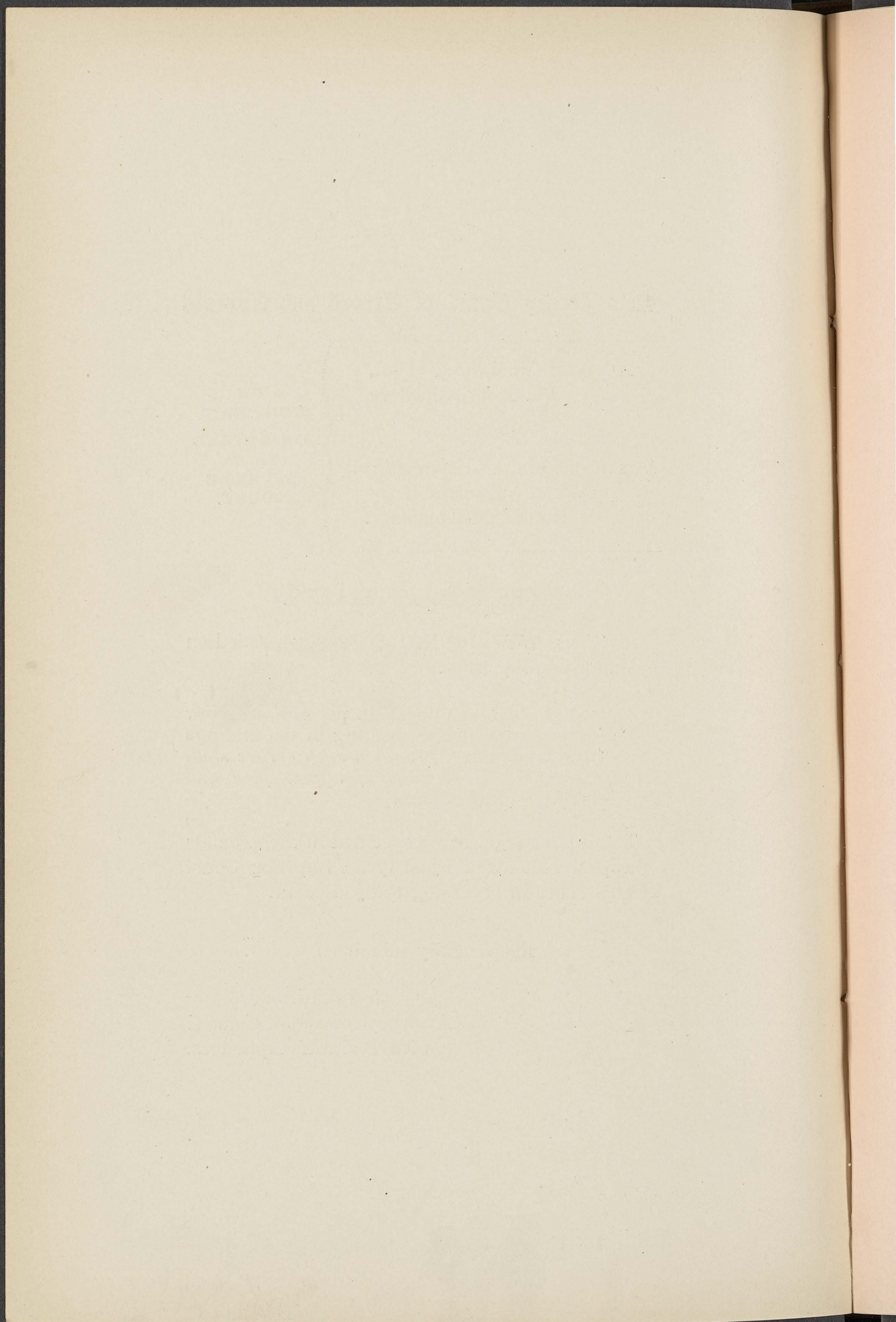
Smith vs. Cruse, 101 N. J. L. 82, p. 84, relied on by our adversary, says:

“ * * * this act of 1916 permits a review of any errors of law residing in the findings of the trial judge, *provided such errors shall be specified in grounds of appeal filed and served.*” (Italics ours.)

There is no legal error specified in the grounds of appeal which would justify the Supreme Court or this court in reversing the judgment.

Respectfully submitted,

JOHN MILTON,
Attorney for and of Counsel
with Plaintiffs-Appellees.



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