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**Notice of Appeal.**

(Filed December 13, 1928.)

**New Jersey Supreme Court**

PASSAIC COUNTY.

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CONVEYOR & EQUIPMENT CO., INC.,  
a corporation,  
Plaintiff,

*vs.*

ALEX. SHAPIRO,  
Defendant.

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Action at Law.  
Notice of Appeal.

20

*To: Reuben H. Reiffin, Esq., Attorney of Defendant:*

PLEASE TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals of New Jersey, from the judgment entered in this cause in favor of the defendant and against the plaintiff.

Respectfully yours,

Dated: November 1st, 1928.

30

FEDER & RINZLER,  
Attorneys of Plaintiff.

FEDER & RINZLER,  
Of Counsel.

Service of a copy of the within notice acknowledged this 8th day of Nov., 1928.

REUBEN H. REIFFIN,  
Attorney for Defendant. 40



**Summons.***The State of New Jersey to Alex. Shapiro,*

GREETING:

10 [L. S.] YOU ARE HEREBY SUMMONED to answer  
the annexed complaint of Conveyor  
& Equipment Company, Inc., a cor-  
poration, in an action-at-law in New  
Jersey Supreme Court.

20 AND TAKE NOTICE, that unless you file your an-  
swer to said complaint with the Clerk of our Su-  
preme Court, at Trenton, within Twenty Days  
after the service upon you of the writ and the  
annexed complaint, the plaintiff may proceed in  
said suit and judgment may be entered against  
you.

WITNESS, WILLIAM S. GUMMERE, Esq.,  
Chief Justice of Our Supreme Court,  
at Trenton, this 17 day of May, in the  
year One Thousand Nine Hundred and  
Twenty-eight.

FRED L. BLOODGOOD,  
Clerk.

30 FEDER & RINZLER,  
Attorneys.



### Complaint.

Plaintiff, a corporation of the state of New Jersey, having its principal office in the City of Passaic, County of Passaic and State of New Jersey says that:

#### FIRST COUNT.

10

1. Between April 2nd, 1927, and November 26th, 1927, defendant became indebted to the plaintiff in the sum of Two Thousand Eighty-six Dollars and Forty-three (\$2,086.43) Cents, on a certain book account, a true copy of which is hereto annexed, made part hereof and marked Schedule "A".

2. Defendant has paid on account of said sum, the sum of One Thousand (\$1,000.00) Dollars, leaving a balance due and owing from said defendant to said plaintiff in the sum of One Thousand Eighty-six Dollars and Forty-three (\$1,086.43) Cents.

20

3. Although due demand was made for the payment of said balance sum, said defendant has failed and refused and still fails and refuses to pay the whole or any part thereof.

30

Wherefore, judgment will be asked in the sum of One Thousand Eighty-six Dollars and Forty-three (\$1,086.43) Cents, together with lawful interest and costs of suit on the First Count.

#### SECOND COUNT.

1. On November 26th, 1927, defendant became indebted to the plaintiff in the sum of Two Thousand Eighty-six Dollars and Forty-three (\$2,-

40



*Complaint.*

086.43) Cents, on an account had and stated by and between said plaintiff and said defendant, and said defendant acknowledged his indebtedness to said plaintiff in the sum of Two Thousand Eighty-six Dollars and Forty-three (\$2,086.43) Cents.

10     2. Defendant has paid on account of said sum, the sum of One Thousand (\$1,000.00) Dollars, leaving a balance due and owing from said defendant to said plaintiff in the sum of One Thousand Eighty-six Dollars and Forty-three (\$1,086.43) Cents.

20     3. Although due demand was made for the payment of said balance sum, said defendant has failed and refused, and still fails and refuses to pay the whole or any part thereof.

Wherefore, judgment will be asked in the sum of One Thousand Eighty-six Dollars and Forty-three (\$1,086.43) Cents, together with lawful interest and costs of suit on the Second Count.

## THIRD COUNT.

30     1. Between April 2nd, 1927 and November 26th, 1927, defendant became indebted to the plaintiff in the sum of Two Thousand Eighty-six Dollars and Forty-three (\$2,086.43) Cents, by virtue of certain goods and merchandise sold and delivered to said defendant and on his behalf and at his request.

40     2. Defendant has paid on account of said sum, the sum of One Thousand (\$1,000.00) Dollars, leaving a balance due and owing from said defendant to said plaintiff in the sum of One Thousand



*Complaint.*

Eighty-six Dollars and Forty-three (\$1,086.43) Cents.

3. Although due demand was made for the payment of said balance sum, said defendant has failed and refused and still fails and refuses to pay the whole or any part thereof. 10

Wherefore, judgment will be asked in the sum of One Thousand Eighty-six Dollars and Forty-three (\$1,086.43) Cents, together with lawful interest and costs of suit on the Third Count.

Wherefore, judgment will be asked in the sum of One Thousand Eighty-six Dollars and Forty-three (\$1,086.43) Cents, together with lawful interest and costs of suit on all Counts. 20

FEDER & RINZLER,  
Attorneys of Plaintiff.

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40



## Schedule "A", Annexed to Complaint:

CONVEYOR AND EQUIPMENT CO., INC.,

Passaic, N. J., April 24, 1928.

Sold To A Shapiro

23 Washington Ave., Paterson, N. J.

10						
		<i>1927</i>				
	Apr. 2	1 16 x 30' rebuilt conveyor equipped with LeRoi engine.....		375.00		
		1 screen hopper .....		25.00		400.00
				<hr/>		
	" 9	1 Screen .....		85.00		85.00
				<hr/>		
	" 12	1 Screen .....		85.00		85.00
				<hr/>		
20	May 3	10 ft. 16" belting	1.65.....	16.50		
		4 pr. belt lacings	.85.....	3.40		
		1 screen, 30" x 8' 1" mesh.....		12.00		31.90
				<hr/>		
	Jun. 15	1 50 tooth sprocket .....		8.50		
		2 belt idler shafts	.35.....	.70		9.20
				<hr/>		
	20	1 16 tooth sprocket .....		3.75		
		2 pr. belt lacings .....		1.70		
		1 pc. 16" used belting.....		.75		
		labor charges .....		2.40		8.60
30				<hr/>		
	30	1 24" x 35' conveyor, equipped with 5 H. P. 3 phase, electric motor. Also one rotary screen .....		1,050.00		1,050.00
				<hr/>		
	14	labor charges for installing LeRoi gas engine on 35' conveyor.....		14.10		14.10



## Schedule "A", Annexed to Complaint.

1927					
Jul. 27	1 tail roller complete.....		17.50		
	8 belt rollers .60.....		4.80		
	8 belt roller pins .15.....		1.20	23.50	
			<hr/>		
28	4 belt rollers .60.....		2.40		
	4 belt roller pins .15.....		.60		10
	4 ft. 16" belting 1.65.....		6.60		
	6 belt lacing pins .10.....		.60		
	2 belt roller brackets .75.....		1.50	11.70	
			<hr/>		
Aug. 1	labor charges for installing magneto....		2.40	2.40	
			<hr/>		
2	1 jackshaft .....		1.50		
	2 old type jackshaft holders 2.00.....		4.00		
	1 bearing for same .....		1.00	7.00	20
			<hr/>		
Aug. 3	4 belt rollers .60.....		2.40		
	4 belt roller pins .....		.60		
	1 tail roller complete.....		17.50	20.50	
			<hr/>		
" 4	1 belt idler complete.....		3.50		
	2 belt rollers .60.....		1.20		
	2 belt rollers shafts .15.....		.30		
	1 old type bottom belt idler.....		1.50		
	2 pr. belt lacings .85.....		1.70	8.20	30
			<hr/>		
" 10	labor charges for taking off gas engine and putting on electric motor, on 24" conveyor .....		4.20	4.20	
			<hr/>		
" 12	150 ft. 4 wire royal cord .35.....		52.50		
	1 8 H. P. used LeRoi Engine.....		75.00		
	labor charges .....		3.60	131.10	
			<hr/>		
					40



## Schedule "A", Annexed to Complaint.

		1927		
Sep. 12		1 3 H. P. 3 phase motor installed on conveyor. 8 H. P. LeRoi engine taken in trade plus.....	15.00	
		labor charges .....	5.40	20.40
10	" 14	1 head roller shaft .....	1.75	
		1 50 tooth sprocket .....	8.50	
		2 16 tooth sprockets 3.75.....	7.50	
		12 belt rollers .60.....	7.20	
		10 belt roller pins .15.....	1.50	
		2 pr. belt lacings .85.....	1.70	
		20 ft. 1/2 x 3/4 chain 1.00.....	20.00	
		2 1" bearings 2.50.....	5.00	55.15
20	" 21	100 ft. 4 wire cable .35.....	35.00	35.00
	" 30	labor charges for inspecting and changing fuses .....	2.00	2.00
Oct. 10		2 16 tooth steel sprockets 5.00.....	10.00	
		3 pr. belt lacings .85.....	2.55	
		1 tail roller complete.....	17.50	30.05
30	" 17	1 clutch collars .....	2.38	
		1 clutch finger .....	1.40	
		1 16 tooth sprocket, clutch.....	7.25	
		1 clutch latch .....	1.00	12.03
	" 28	1 clutch finger .....	1.40	
		1 clutch cone .....	4.60	6.00
40	" 11	18 5/16 belt roller pins .15.....	2.70	
		1 jackshaft .....	1.50	
		2 bearing housings 4.50.....	9.00	
		2 pr. belt lacings .85.....	1.70	
		2 bearings 2.50.....	5.00	
		18 3/8 belt roller pins .15.....	2.70	
		18 3/8 belt rollers .60.....	10.80	33.40
				\$2,086.43



## Schedule "A", Annexed to Complaint.

1927		Payments		
Apr. 9	By Check	.....	200.00	
Jun. 11	" "	.....	150.00	
" 25	" "	.....	200.00	
Jul. 16	" "	.....	100.00	10
Sep. 12	" "	.....	200.00	
" 29	" "	.....	100.00	
Nov. 26	" "	.....	50.00	
			<hr/>	
			1,000.00	
			<hr/>	
			\$1,086.43	

20

30

40



### Answer and Counterclaim.

Defendant, residing in the City of Paterson, County of Passaic and State of New Jersey, answering the complaint filed herein, says that:

10

#### AS TO FIRST COUNT.

1. Plaintiff denies that he ever became indebted to the plaintiff in the sum of \$2,086.43.
2. He admits paragraph two, said payment being made on account of all indebtedness ever owing to the plaintiff.
3. Paragraph three is denied.

20

#### AS TO SECOND COUNT.

1. The allegations answering the first count are repeated as to the second count the same as if fully set forth herein.

#### AS TO THIRD COUNT.

1. The allegations answering the first count are repeated as to the third count the same as if fully set forth herein.

30

#### FIRST SEPARATE DEFENSE TO THE FIRST, SECOND AND THIRD COUNTS.

1. On or about the 30th day of June, 1927, plaintiff, by its duly authorized agent, and defendant, entered into an agreement in accordance with the terms of which the plaintiff agreed to make, sell and deliver to the defendant 1 24" x 35' conveyor, equipped with 5 H. P. 3 phase, electric motor and rotary screen. It was further agreed that said conveyor, motor and screen were to be  
40 of such a type and quality as to be able to per-



*Answer and Counterclaim.*

form the necessary work for the defendant, of which work the defendant informed the plaintiff, at the same time informing it of contracts to be performed.

2. It was further agreed that in the event that the said conveyor, motor and screen were in any way defective, or unsatisfactory, the plaintiff would either make the said equipment work to the defendant's satisfaction or permit the defendant to return the same or retake it itself upon notice. 10

3. The said equipment, contrary to the said agreement, was constructed in a defective manner so that the same could not load, screen, balance or perform any of the work which defendant had advised the plaintiff it would be necessary for said equipment to perform, whereupon the defendant notified the plaintiff to repair or retake the same, which the plaintiff has refused and still refuses to do. 20

WHEREFORE defendant demands judgment.

Defendant, by way of counterclaim against plaintiff says that:

1. He repeats the allegations of paragraphs one, two, three of the first separate defense.

2. By reason of the plaintiff's breach of the agreement therein contained defendant was deprived of the benefits of contracts which he had entered into, and of which contracts plaintiff then and there had knowledge, to the extent of \$5,000.00. 30

WHEREFORE judgment will be demanded on the counterclaim in the sum of \$5,000.00.

REUBEN H. REIFFIN, 40  
Attorney for Defendant.



### Reply and Answer to Counterclaim.

Plaintiff, replying to the answer filed by the defendant in the above entitled matter, says that:

AS TO FIRST SEPARATE DEFENSE TO THE FIRST, SECOND AND THIRD COUNTS.

- 10     1. Plaintiff denies each and every allegation therein contained.
2. Plaintiff denies each and every allegation therein contained.
3. Plaintiff denies each and every allegation therein contained.

20     Plaintiff, answering the counterclaim filed by the said defendant in the above entitled matter, says that:

1. Plaintiff repeats its answers to the allegations of paragraphs one, two, three of the first separate defense, and makes them part hereof, as though repeated herein verbatim.
2. Plaintiff denies each and every allegation therein contained.

30

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Attorneys of Plaintiff.

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**Testimony.**

NEW JERSEY SUPREME COURT,  
PASSAIC CIRCUIT.

<p>CONVEYOR AND EQUIPMENT COM- PANY, INC., Plaintiff, <i>vs.</i> ALEX. SHAPIRO, Defendant.</p>	}	<p>10</p> <p>At Law.</p>
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Paterson, N. J., October 29, 1928.

Before:  
Hon. CLIFFORD L. NEWMAN, Judge, and a Jury. 20

Appearances:

For Plaintiff: FEDER AND RINZLER, Esqs.

For Defendant: DAVID S. HERMAN, Esq.

—————  
(A jury was called and sworn and counsel for  
the respective parties opened to the jury.)

30

—————  
STIPULATION.

Mr. Herman: As to the book account, if your  
Honor please, the defendant will admit it is in-  
debted to the plaintiff in the sum of \$36.43, leaving  
in dispute the only item this particular machine.

Mr. Rinzler: Yes.

40



*Pauline Grad, for Plaintiff—Direct—Cross.*

PAULINE GRAD, SWORN.

*Direct examination by Mr. Rinzler:*

Q. Miss Grad, where do you live? A. 199 Dayton Avenue, Passaic.

10 Q. Are you employed by the plaintiff company?  
A. Yes.

Q. You have been employed by that company for how long? A. Oh, about three years.

Q. Are you, and during the past three years were you, in charge of and did you keep the books, records, and accounts of the Conveyor and Equipment Company, Incorporated, the plaintiff? A. I did.

20 Q. Do your books show an account against the defendant, Alex. Shapiro? A. They do.

Q. Are these the books of the company? A. They are.

Q. How much is due on the account? A. \$1,086.43.

Q. Is that after you have given credit for all payments that were made by the defendant? A. That is.

Q. Give us the date of the last payment? A. November 26, 1927, payment of \$50.

30 Mr. Rinzler: I offer the books in evidence.

*Cross-examination by Mr. Herman:*

Q. How long have you been employed by the Conveyor and Equipment Company? A. Three years.

Q. Were these entries made in your handwriting? A. Yes, they were.

40 Q. What were they made from? A. Well, from the sales book, which would be taken from bills that were rendered to Mr. Shapiro.



*Pauline Grad, for Plaintiff—Cross.*

Q. How long does this account extend over? A. From April, 1927.

Q. I mean, the entire account with Shapiro. When does it begin? A. Oh, from the first time we done business with him?

Q. Yes. A. Well, that is before I was with the company. These books are dated from 1926, but he did business before that. 10

Q. Which are your entries? A. These are all my entries in this book, in 1926 I began.

Q. Did you have charge of the Shapiro account? A. Yes, ever since I have been with the company I have.

Q. Then, you were there from the beginning of this account? A. In this book, yes, because this book only dates from 1926. 20

Q. You don't know whether there was an account with Shapiro prior to 1926? A. Our records show in the office that there was.

Q. And this item that is in dispute is dated when?

Mr. Rinzler: I object to that statement.

The Court: Which item are you talking about?

Mr. Herman: The \$1,050.

Q. The item of \$1,050 is dated when? A. Well, it is dated June 30, 1927. 30

Q. Do you know what that item was? A. Yes.

Mr. Herman: No objection.

(Books marked Exhibits P-1, P-2, and P-3.)

Q. Do you know what that item of \$1,050, dated June 30, 1927, represents? A. Yes, represents a special machine that we built for Shapiro. 40

Q. That is all.

PLAINTIFF RESTS.



*Alex. Shapiro, for Defendant—Direct.*

DEFENDANT'S TESTIMONY.

ALEX. SHAPIRO, SWORN.

Mr. Herman: Will you admit those photographs?

10

Mr. Rinzler: No objection.

Mr. Herman: These two photographs, by consent of counsel, are admitted in evidence as representing the conveyor.

Mr. Rinzler: I waive proof by the photographer, that is my point.

(Photographs marked Exhibits D-1 and D-2.)

20 *Direct examination by Mr. Herman:*

Q. Where do you live, Mr. Shapiro? A. Fairlawn, New Jersey.

Q. What business are you in? A. Sand and gravel business.

Q. Do you know the plaintiff, the Conveyor and Equipment Company, Incorporated? A. Yes, sir.

Q. Its representative, Mr. Garret? A. Yes.

Q. Is he in court? A. Yes, sir.

30 Q. Is he now sitting at the table with Mr. Rinzler? A. Yes.

Q. Did you have a conversation with him regarding a conveyor some time prior to June 30, 1927? A. I did.

Q. By the way, how many conveyors did you have in your business at that time? A. Two.

Q. What did you use those conveyors for? A. To load the trucks.

Q. With what? A. Sand and gravel.

40 Q. Now, where did you speak to Mr. Garret with respect to this particular conveyor? A. In my office.



*Alex. Shapiro, for Defendant—Direct.*

Q. Where is your office? A. At 24 Washington Avenue, Paterson.

Q. Just tell the Court and jury what that conversation was, as best you can recall it now. A. Mr. Garret was over at my place and I asked him if he could overhaul one of my conveyors I have got at Tenth Avenue, Paterson, and I had two old conveyors, you know, and I asked him if he could overhaul one of them conveyors and what it would cost to put in shape and put to work over on the West Paterson sand pits, and he figured out and he said it would cost between four and five hundred to rebuild one of them old conveyors, and I told him we need something, because I have got a few more orders to carry on for that month, from that time on, and I like to put something else in to help load these trucks. So he says, "Well, it will cost you about four or five hundred to rebuild, but I would suggest you something else." He says, "You got a lot of trouble with screens there and everything?" I says, "Yes."

Q. What is a screen on these conveyors? A. A screen is this here. He built that for me, too. He built those screens for me, and we used to get a lot of trouble on account of screenage used to plug those leaks up, and we wasn't able to pull the screen out, and we had to clean all the screenings out to get the screens out to put the conveyor in again, so he says he was going to built a conveyor with a rotary screen on.

Q. Did you ever have a conveyor with a rotary screen? A. No, sir.

Q. Do you know whether Garret had conveyors with rotary screens in stock? A. No, he did not.

Q. Go on. A. And he said he will build me a conveyor to put on that pit, and he says every



*Alex. Shapiro, for Defendant—Direct.*

10 time you move your conveyor, why, the screen will be with it; it will be right attached, right with that conveyor, the rotary screen. He says the same time the belt will drop the sand over the screen, will feed the screen, and the screen will keep turning, and the sand will fall in the truck, and they could make a discharge where the gravel will shoot out, he said, so you can put an old truck on and shoot the gravel over to one side, and you will just load all your trucks with no trouble. So I give him the order. I asked him what he wants for it, and he said it will cost \$1,050, and I give him the order for it.

20 Q. How long had you been doing business with Garret prior to that? A. Well, I done business with Mr. Garret about five years ago when he was with Trowbridge Conveyor Company, and I done business with him, bought two conveyors off him.

Q. How many? A. Then I bought another one of him in April. I bought one off of him for the same pit.

Q. You found it satisfactory? A. Yes, always, the standard conveyors.

Q. And you paid for them? A. Yes.

30 By the Court:

Q. Just tell me again what Mr. Garret said about that conveyor? A. About that big one, the one he was going to build?

Q. Yes. A. He said he was going to build me a conveyor which shall guarantee to do the work better than any other, with no extra screen, but he was going to have a rotary screen on it.

By Mr. Herman:

40 Q. What work did he say it would do? A. Well, screen sand and gravel for me, load the trucks.



*Alex. Shapiro, for Defendant—Direct.*

Q. Did you take him to any particular sand pit and show him the run of sand which you were going to withdraw from it? A. Yes.

Q. What pit was that? A. West Paterson. That is where I give him the order, right there.

Q. Right at the pit? A. Right at the pit.

Q. At the time of this conversation did you tell him anything about any contract which you had at that time? A. I did.

Q. What did you tell him? A. I told him I had a contract with the Franklin Contracting Company and Union Building—I mean the Dyer and Kean, George F. Franklin.

Q. Was this prior to the beginning of your busy season or not? A. Well, yes. We started in in April, and that is our busy season at that time.

Q. Did Mr. Garret make any statements with respect to what this machine would be able to do?

Mr. Rinzler: I object.

The Court: Yes, that is too leading.

Q. What did Mr. Garret say about the machine, if anything? A. Well, he said he was going to build a machine to do the work, and he would be responsible for it; he says he will guarantee to make that machine work.

Q. When was this machine delivered to you? A. I think it was June 30, something like that. I know it was in June. June 30, the end of the month.

Q. Where was it delivered? A. West Paterson.

Q. The same pit? A. Same pit where I showed him where that machine was to work.

Q. Were you there when it was delivered? A. No; I was not there at that time.

Q. Do you know whether that machine was put to work immediately? A. No, sir.



*Alex. Shapiro, for Defendant—Direct.*

Q. Well, when was it put to work? A. About a week later, I guess.

Q. Were you there when the machine was put to work? A. Yes, sir.

Q. What happened, if anything? A. Why, she would not do the work.

10 Q. In what way? A. We put a load on it, the sand will get up right to that screen and then the weight of that sand will push the screen down and she wouldn't mesh with that pin in there, the main driver he had to turn that screen.

Q. Is this conveyor built in any manner different from other conveyors which you have bought from Mr. Garret? A. Yes, sir.

20 Q. Just explain to the jury the difference in the construction, if you can. A. Well, the other conveyors are smaller. They are 25 feet, the longest, and a whole lot better, not as heavy, and they have single wheels, which this has got double wheels and heavier construction all the way through. They put that carriage on the hill so as to balance the weight. After we take the sand out here we have to turn it here; just two or three men pick that end of the conveyor up and shove it in under the hill again; but this here, when we tried to work that, we took this screen  
30 off, we couldn't do nothing with it, on account of this carriage is balanced to carry the strain; it sets back this way to balance the big heavy screen right under here, to balance it; so when that screen was on there two or three men could pick this one up and move it around anywheres they wanted, but after they took that screen off all that weight laid right here and they couldn't push it; we had seven or eight men there and they couldn't push it.  
40



*Alex. Shapiro, for Defendant—Direct.*

The Court: How are we interested in the other conveyors?

Mr. Herman: I want to show the difference in the type of construction.

The Court: He didn't say anything about the other conveyors. He didn't guarantee them to be alike. It doesn't make any difference about the other conveyors. 10

Mr. Herman: The testimony has been that he bought other standard conveyors from the man.

The Court: I say, what difference does that make in this case?

Q. What else was on this conveyor besides what is represented in these photographs? A. There was a big— 20

The Court: Indicating what?

Q. Indicating Exhibit D-1. A. Why, there was a big rotary screen on the end, where the trucks used to get on there, and when the sand came up it used to feed that screen, and that screen was supposed to turn, to let the gravel run out at one side and the sand was supposed to go on the truck, which it didn't work, and he took it back. 30

Q. When you found that this conveyor did not work did you communicate with Mr. Garret? A. Immediately. 30

Q. Did he come up to the pit? A. Yes.

Q. Do you recall about when that was? A. What time of the day?

Q. No; what date was it, about? A. I couldn't recall the date.

Q. When he came up there what did you say to him, if anything? A. Well, we just showed him what was wrong about it. 40



*Alex. Shapiro, for Defendant—Direct.*

By the Court:

Q. What did you say? A. We told him it would not work, would not screen.

Q. Who is "we"? You? A. Yes.

10 By Mr. Herman:

Q. What did you say to Mr. Garret when he came up? A. I told him we put a load on this conveyer, it gets up as far as this screen and the sand gets inside the screen and it won't turn, it won't mesh, she stops turning, and we took shovels and rakes and everything to leave this sand out of it, to get it going again.

20 Q. What did Mr. Garret say? A. He said the carriers on each side of the—between the pinion and the main driver was too light.

Q. Speak a little more distinctly, so the jury can hear you. A. He said them carriers which kept the main driver and the pinions he had in there wasn't heavy enough to hold them together, so he made some kind of a pattern off it and he took it back to his shop.

Q. What did he take back to his shop? A. He just made a pattern of the stuff he needs.

30 Q. When did he come back? A. He came back. I think he came back the same day, in the afternoon. He sent his man up.

Q. Did he come up or did his men come up? A. His men came up.

Q. What did they do? A. They put that heavier stuff in it.

Q. Was the machine able to work then? A. No, sir.

Q. Did you notify Garret again? A. Yes, sir.

40 Q. Did he come up again? A. He came up again.



*Alex. Shapiro, for Defendant—Direct.*

Q. What did he do then? A. The bearings on each end would burn out. He had to put heavier.

Q. Why did they burn out? A. It is too much weight for it, too heavy, too much strain on it.

Q. What did Garret say when he came up? A. When he came up the second time he tried to blame the engineers; he said there wasn't enough grease in it, so he replaced it again, and he sent his men up again and replaced it, the bearings, and we kept greasing it, so it didn't do any good. 10

Q. Why, if you know? A. Well, she used to get too much weight on it, and the chain would jump off and it wouldn't pull the belt and it wouldn't turn the screen.

Q. Did you notify Garret a third time? A. Yes.

Q. What did he do then? A. Well, he tried to do something else. He came up again and sent his men up on Sunday, one time, and worked there. I worked there four or five hours on Sunday with one or two men. 20

Q. Did Garret ever take any part of that machine away? A. He did.

Q. What part was that? A. He took the whole business, that whole screen, that rotary screen, and everything, he took back with him after they couldn't do nothing with it, and he took it back to the shop. He said he was going to remodel it and make some different pattern. 30

Q. Did he bring that back? A. No, sir.

Q. Is that machine in use now without that rotary screen? A. No, sir.

Q. Did you write Garret a letter with regard to this machine? A. I got in touch with him a couple of times before I wrote him the letter. He used to come up in New York and I used to get in touch with him and call him up and say what he was going to do about it. 40



*Alex. Shapiro, for Defendant—Direct.*

By the Court:

Q. What did he say? A. He says he was going to try to fix it up and build a different pattern to make it work.

10 By Mr. Herman:

Q. To make it work?

Mr. Herman: I call upon the plaintiff to produce an original letter written by the defendant to the plaintiff under date of February 25, 1928.

20 Mr. Rinzler: Will you produce the letter that we wrote to your party? I have no notice to produce, and I want to produce it.

Mr. Herman: There was a notice to produce served on you Friday afternoon by me personally.

Mr. Rinzler: I am asking you a question. Will you produce the letters?

Mr. Herman: Answer my question.

The Court: It is your turn first.

30 Mr. Rinzler: Then, I say, I will produce it. I want to know whether counsel will produce.

Mr. Herman: I have no notice to produce any letter.

Mr. Rinzler: Will you produce it?

Mr. Herman: I will see if we have it. I call on you to produce a letter of February 25, 1928.

Mr. Rinzler: Produced.

Mr. Herman: Any objection to this letter going in evidence?

40 Mr. Rinzler: No, of course not.



*Alex. Shapiro, for Defendant—Direct.*

Mr. Herman: By consent of counsel this letter is admitted in evidence.

(Paper marked Exhibit D-3.)

Q. This letter was written, as I understood you to say, before or after the oral complaints to Garret? Which was it? Was this letter written after or before? A. After what? 10

Q. After you had these oral talks with Garret?  
A. Yes, after.

(Mr. Herman reads the exhibit as follows):

“Conveyor and Equipment Company, 26 Gregory Avenue, Passaic, New Jersey. Gentlemen: 20

In regard to the 35-foot conveyor loader equipped with rotary screen, which you delivered to us June 20, 1927, as you know this conveyor proved unsatisfactory. It did not screen well and could not attain nearly as much speed as any of the other standard machines. We would like to know what you intend to do about this loader. Would you either fix the machine to load and screen properly or take it back and deliver us a standard 30-foot machine without a screen? We are anxious to get this matter settled so as to be ready for full equipment for the spring. Awaiting an early reply, we are, Yours very truly, A. Shapiro.” 30

Q. Was anything done by Garret in response to that letter? A. No, not a thing.

Q. Has anything been done up to the present time with regard to this particular machine by Garret? A. Nothing at all. 40



*Alex. Shapiro, for Defendant—Cross.*

Q. Was your business in any way affected by reason of the delivery of this particular machine?

A. Yes.

Mr. Rinzler: I object to it as not being relevant to the issue.

10 Mr. Herman: This is by way of the defendant's counter-claim, if your Honor please.

The Court: I understand that you want to show that he lost certain contracts because he didn't have the machine; is that it?

Mr. Herman: Yes.

The Court: I will overrule that, and you may note an exception.

20 Mr. Herman: I ask an exception. That is all.

*Cross-examination by Mr. Rinzler:*

Q. What business are you in? A. Sand and gravel.

Q. Did you ever have a machine like this before in your life? A. Not one like that.

Q. Ever have a conveyor before? A. Yes, sir.

30 Q. Now, this conveyor is just larger than the other conveyors that you have, isn't it? A. Yes.

Q. The difference is it is heavier and its lift is higher, isn't that right? Higher and heavier lift? Don't shake your head. Say yes, if you mean that. A. Yes.

Q. You wanted to use this machine to excavate and to lift the excavated sand and convey it to a truck like other machines? A. Like other conveyors, yes.

Q. And for that reason this is a larger machine?

40 A. Yes, sir.



*Alex. Shapiro, for Defendant—Cross.*

Q. Now, you have been in business for many years, have you? A. Yes.

Q. For how many? A. Sand business about seven years, six or seven years.

Q. Before you got into the sand business what business were you in? A. Trucking.

Q. How long were you in the trucking business? 10  
A. Since 1920.

Q. Your trucking business was what, ordinary transportation? A. No, sir; hauling sand, stone.

Q. So that you know quite a bit about the sand business? A. Yes, sir.

Q. You have been in business, then, in connection with sand for more than twenty years? A. No.

Q. How many? A. Seven years, six or seven.

Q. Before that you were hauling sand for many years? A. Hauling sand? 20

Q. Yes. A. Since 1920. It wasn't sand. I used to haul hard stuff, asphalt and stone.

Q. You have been in the present business since 1920? A. In the trucking.

Q. In the sand business, excavating? A. Sand business about six years, six or seven years.

Q. Before that you were in the trucking business? A. Yes, sir.

Q. Hauling sand? A. Hauling asphalt.

Q. For how many years? A. Since 1920. 30

Q. Before 1920 what business were you in? A. Moving business.

Q. Moving what? A. Furniture.

Q. For how long were you in that business? A. Oh, I can't remember exactly. I was in the moving business about seven or eight years, nine years, something like that.

Q. How many trucks did you run? A. Two.

Q. Now, I assume you had a stenographer write 40



*Alex. Shapiro, for Defendant—Cross.*

this letter for you that is in evidence? A. Yes, sir.

Q. Exhibit D-3? A. Yes, sir.

Q. Did she work for you when you bought this machine? A. He did.

10 Q. You did not use that machine for a week?  
A. No, sir.

Q. Why not? A. Well, we wasn't quite ready for it yet.

Q. I thought you had the job even before you ordered the machine? A. I did, but the jobs wasn't ready yet.

Q. How long before you ordered the machine did you have that particular job for that pit in West Paterson? A. I had the orders in April—  
20 May.

Q. And the machine was delivered in June? A. Yes.

Q. Yet you didn't work for one week? A. I did not.

Q. Then you started using the machine? A. Yes.

Q. Who did? A. My man did.

Q. Which one? A. Oh, a couple of men.

Q. That man sitting in the front bench? A. Yes.

30 Q. Were you there? A. Yes, sir.

Q. Now, tell us what was the trouble with the machine? A. Why, she wouldn't do the work.

Q. Just tell us about it. A. Would not screen.

Q. What do you mean by that? A. Why, after that gets in, she brings a load of sand in as far as the screen and then the screen used to get blocked up and she wouldn't turn, and it wouldn't mesh with the main pinion and the men was there without it.

40 Q. That stopped the whole job? A. Yes.



*Alex. Shapiro, for Defendant—Cross.*

Q. Was it a big job? A. Yes.

Q. Were you able to use the other machines that you had on this job? A. We had to.

Q. Were you able to? A. Yes, sir.

Q. Then you ordered this machine? A. Yes, sir.

Q. So this machine was not any different than the other machines, excepting its lift was higher and the weight it carried was more; is that right? A. I needed another one. 10

Q. That is the only reason why you wanted it, though? A. Yes; otherwise I would not buy it.

Q. So that you went on doing the work, anyway, didn't you? A. Well, not as much. Just all we could do with our other two machines.

Q. Did you do the work, anyway? A. Not all the work. 20

Q. Did you finish the work? A. Well, some of it.

Q. Well, who did finish it then? A. Well, some different concern used to cart sand when I wasn't able to deliver.

Q. How many machines did you have besides this one? A. Two.

Q. Did you use those two machines? A. Yes.

Q. Worked steadily with them? A. Well, sometimes they break down, too. 30

Q. Oh, you mean the other two broke down? A. Yes.

Q. Excepting when they were broken down, you used them? A. Yes.

Q. Then, did you finish the job with them? A. Well, as much as we could deliver.

Q. Did you finish the job with them? A. Not me; somebody else to help me finish it. It was somebody else carting the sand on the same job. 40



*Alex. Shapiro, for Defendant—Cross.*

Q. Did somebody else start to cut sand at the beginning, too? A. No, sir. I did.

Q. What did you do? A. We weren't able to supply, and we called up Baker, and he used to cart sand, too.

10 Q. You had a contract to cut how many yards of sand? A. Two or three thousand yards.

Q. How long did you work there? A. Worked there for about three weeks, four weeks.

Q. Did you get another machine to substitute with this one that you bought from the conveyor company? A. After.

Q. I mean while you worked on that job? A. No.

20 Q. So that you didn't use this machine at all on that job, did you? A. No, we couldn't use it.

Q. Not a moment? A. No. I would not say not a moment.

Q. Well, you mean you tried to use it and you couldn't? A. We couldn't.

Q. And you stopped using it? A. Yes.

Q. You didn't use it at all on that work? A. After we fixed it up he tried it up again. He was up there a dozen times trying to get it fixed up, and every day he tried to fix it up, we tried to use it.

30 Q. You tried it, but it didn't work, did not use it? A. Didn't use it.

Q. So that machine did not do the work there at all? A. No.

Q. Did you get another machine to do the work of this one? A. After a while, next month we did.

Q. On this job did you? A. Not on this job.

Q. You did not, did you? A. No.

40 Q. So you worked there three weeks on that job with your two machines? A. Yes, sir.



*Alex. Shapiro, for Defendant—Cross.*

Q. Didn't use this one, and didn't get another one for it instead? A. No.

Q. Or substitute for it? A. No.

Q. Where was your stenographer when that machine was delivered; was he working for you? A. Yes.

Q. Is your name A. S.? A. Yes. 10

Q. Are the initials at the bottom of this letter to the left of the stenographer's initials your initials (indicating the initials A. S.)? A. Yes.

Q. Then there is a line, and are the initials to the right of the line, M. S. the stenographer's initials? A. Yes.

Q. Who is M. S.? A. Morris Shapiro.

Q. Your son? A. My nephew.

Q. Did he work for you? A. Yes, sir.

Q. A. Shapiro, the signature to the letter, is that your signature? A. Yes. 20

Q. Did you dictate the letter? A. Yes.

Q. Is that the only letter you wrote? A. Yes.

Q. This machine was delivered on June 30, 1927, wasn't it? A. Yes, sir.

Q. For eight months you did not write a letter, did you? A. No.

Q. You had your stenographer, didn't you? A. Yes, sir.

Q. Did you receive any letters before you wrote that letter, Exhibit D-3, to the plaintiff? A. I don't remember. 30

Q. Just think a little bit and refresh your memory. A. I might. I wouldn't say yes or no.

Q. I want to know whether you did or did not. A. I don't remember.

Q. You don't remember whether Mr. Garret, of the company, or the company that sold you this machine wrote you letters about it? A. Well, I can't think of it. He might. 40



*Alex. Shapiro, for Defendant—Cross.*

Q. Well, didn't you look it up before you went to your lawyer? A. When he started suit against me, yes, sure I did.

Q. Oh, he started to sue you? A. Yes.

Q. You did not start to sue him, did you? A. No. Why should I?

10 Q. All right. Why should you? Is that your question? A. Yes.

Q. He sued you by a summons issued in May, 1928; right? A. Yes, sir.

Q. You did not sue him up to that time, and your answer is, "Why should you"? Is that correct? A. Yes.

Q. Up to that time the machine still was no good; isn't that right? A. No good and never worked.

20 Q. Never was any good, but you never sued him, and the only letter that you wrote is Exhibit D-3? A. Yes, sir.

Q. Now, when you went to your lawyer and you got the papers from court did you look up your files to see what letters you had? A. No, sir.

Q. If you received any letters from the company did you answer them? A. No, sir.

Q. Read this letter and tell me whether you received it. A. Well, I can't read it.

30 Q. Eh? A. I can't read very good.

Q. Read it as good as you can. You say "not very good". Read it as good as you can. You dictated one letter.

Mr. Herman: Read it as well as you can.

The Court: Just read it to yourself.

Q. Did you receive that letter? A. I don't remember.

40 Q. Eh? A. I don't remember. I can't make that letter out plain enough.



*Alex. Shapiro, for Defendant—Cross.*

Q. You can't make it out? A. No.

Q. Did you receive any letter from the company before you wrote the letter, Exhibit D-3, asking for money or complaining about your failure to pay money for this machine? A. He did.

Q. How many letters did you get? A. Oh, I don't remember how many I got. 10

Q. Did you get five letters? A. I can't think.

Q. Have you your file here? A. I don't know. Maybe the bookkeeper has it.

Q. Where is the bookkeeper? A. He is there.

Q. You got a file here?

A Voice: No, I have not.

Q. You came here today to try this case, didn't you? A. Yes, sir.

Mr. Herman: I came here to try it. 20

Q. You came here with your lawyer? A. Yes.

Q. All the witnesses? A. Yes.

Q. And your bookkeeper? A. Yes, sir.

Q. You haven't your file here, have you? A. (No answer.)

Q. Now, read this letter of February 29, 1928, and tell me whether you received that. A. I say I cannot read here and you showing me letters.

Q. Can't read? A. No.

Q. You said you can't read very good? A. No, 30 I can't read.

Q. Not at all? A. No.

Q. What is the date on this letter, D-3? Look at it. A. 25th.

Q. In what month? A. February.

Q. Feb. is February; that is right, isn't it? A. Yes, sir.

Q. You have been in this country for how many years? A. Twenty-one.

Q. To whom was that letter written, Exhibit 40



*Alex. Shapiro, for Defendant—Cross.*

D-3? Look at it, please. A. I know it was written to Mr. Garret.

Q. You look at it and tell us what it says, now. Come on. A. I told you I can't read.

Q. What is that word? A. I don't know.

10 Q. You don't know, eh? A. No.

Q. You have been here twenty-one years in business? A. Yes.

Q. Will you send your bookkeeper down to your office or wherever that file is to get it?

The Court: No; he is not going to do that.

Q. Will you? Yes or no. A. Yes.

20 The Court: No; he is not going to do that.

Q. Why didn't you answer a single letter that was written to you by the company demanding payment for this machine and complaining about it?

Mr. Herman: I object.

The Court: He didn't have any payment coming.

30 Mr. Herman: I object to that. There is no proof of any letters written demanding payment for any machine.

Q. Did you receive any letters from the company complaining about your failure to pay for this machine or asking for payment? Yes or no. A. Not that I know.

Q. If they were received would your bookkeeper know about them?

40 Mr. Herman: I object.



*Alex. Shapiro, for Defendant—Re-direct.*

The Court: Well, I don't know what the bookkeeper knows.

Q. Does the bookkeeper have charge of the letters that come in? A. Yes.

Q. That is all.

10

The Court: Now, Mr. Herman, I will permit you to introduce the testimony about the losses, where they are a natural and direct result, provided they are in contemplation of the parties.

*Re-direct examination by Mr. Herman:*

Q. At the time you ordered this machine from Garret did you tell him—

20

Mr. Rinzler: I object.

The Court: No.

Q. What did you tell him about any contracts that you had?

Mr. Rinzler: I object to it as leading.

The Court: No; that is leading.

Q. When you ordered this machine from Garret—

30

The Court: Ask him the conversation.

Q. What was the conversation with him? A. I told him I getting busy and I needed another machine and asked him what it would cost to rebuild one of my machines from the other pit. I had an old—the old ones there, and I was going to remodel one and put one in that condition, and he advised me to build a new one at that time, which will do away with the—will do more work

40



*Alex. Shapiro, for Defendant—Re-direct.*

than two other machines put together, and wouldn't need to bother with no extra screen, so I took his advice and I gave him the order.

Q. What else did you say to him, if anything?

Mr. Rinzler: I object.

10 The Court: He may answer.

Mr. Rinzler: I ask an exception.

The Court: Counsel wants to know if that is all you said.

Q. Is that all your conversation there at that time when you ordered the machine? A. No; I asked him if he built anything like this before to show me it, and he said he didn't, but he was going to do the work; that is the first one he was going to build, but he will make it work.

20 Q. Was there or not any conversation about contracts that you had?

Mr. Rinzler: I object.

The Court: It is improper.

Mr. Herman: I ask an exception.

Q. Do you recall any other conversation? Do you recall any other conversation that you had with Garret at this time?

30 Mr. Rinzler: I object to the question as suggestive.

The Court: You may answer.

Mr. Rinzler: I ask an exception.

The Court: State all the conversation you had with Garret.

A. Outside of taking him over to the pit and showing where he had to place the conveyor and what work it was to do at the pit, I gave him the order. He was talking about price and all the

40



*Louis Shapiro, for Defendant—Direct.*

other machines in my office, and I go over to the pit and showed him where that conveyor was to work, and he looked at the pit and said, "I will build one," and I told him to go ahead.

Q. Did your business fall off—

Mr. Rinzler: I object to it as very leading. 10

The Court: It is a leading question, and it wouldn't make any difference, in view of the testimony up to date, whether it did or not.

Mr. Herman: If we can refer back to the previous testimony when your Honor cut me off on that—

The Court: There wasn't any testimony at that time. I emphasized that point. 20

Q. I will ask you once more to think, and if you can, recall any other conversation you had with Garret at that time.

Mr. Rinzler: I object to that, because he has already stated several times "No, sir."

The Court: You may ask him, under the circumstances. It is for the jury to say what effect it had.

Mr. Rinzler: I ask an exception. 30

A. No. Just about that.

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LOUIS SHAPIRO, SWORN.

*Direct examination by Mr. Herman:*

Q. You are a brother of the defendant? A. Yes.

Q. And employed by him? A. Yes. 40



*Louis Shapiro, for Defendant—Direct.*

Q. What do you do? A. I take charge of the sand pit for Mr. Shapiro.

Q. Do you know Mr. Garret? A. Yes.

Q. Do you recognize this machine, (showing the witness photograph, exhibit D-1)? A. Yes, sir.

Q. Where was that machine placed, if you know?

10 A. In the West Paterson sand pit.

Q. How long have you been in the sand business? A. Five years. I wasn't working for Mr. Shapiro.

Q. Do you remember when this machine was delivered? A. Yes, sir.

Q. When? A. On the 30th of June.

Q. Was that machine able to do any work?

20 Mr. Rinzler: I object. He has not shown his competency to testify on that.

The Court: I don't know that he needs to show competency to tell whether a machine has done work or not. He wouldn't need to be an expert on that. Any work.

Q. Was the machine able to do any work?

Mr. Rinzler: I ask an exception.

30 A. No; he brought the machine,—set the machine and thought it was going to work.

The Court: Go on.

Q. What happened there at the time when the machine was delivered? What did it do, if anything? A. Didn't work in the same time when he brought it.

The Court: The question is, he asked you if it was able to do any work.

40 Q. What did it do, if anything? A. She don't do nothing.



*Louis Shapiro, for Defendant—Direct.*

Q. Did they try to use it? A. Yes.

Q. What happened when they tried to use it?

A. They tried to use it, and as soon as the sand came up on the screen on that conveyor and fell on that screen, so the screen—the weight came down and the gears don't mesh and starting to make noise there and stopped.

10

Q. What happened after that? A. After that we call in the mechanic, Mr. Garret.

Q. Did you see him come up to the pit? A. Yes.

Q. Did Mr. Garret do anything up there? A. It was many things.

Q. Do you know how many times Mr. Garret was up there? A. I couldn't tell you exactly, but I guess around a dozen times.

Q. Did he remove any part of this machine? A. Yes, sir.

20

Q. What part of it? A. First of all, when he came he told me the weight is too light, that it hold up that screen, so he sent his mechanics and they put heavy stuff in it. Well, then we tried again and it didn't work again. And he used to have big planks put, that the screen should mesh in gears, and we couldn't help it. He knows it himself, Mr. Garret.

Q. Wait a minute. Did Mr. Garret ever remove any part of that machine? A. Yes.

Q. Do you know of your own knowledge whether he ever brought that part back? A. A couple of times, yes.

30

Q. Is it there now? A. What? Not now.

Q. The part to go up on the front here, has that part ever been returned? A. No, sir.

The Court: Is that the screen?

The Witness: Yes, sir.

Q. Is that machine of any use without that screen? A. She is too big. We couldn't handle it.

40



*Louis Shapiro, for Defendant—Cross.*

Q. Is it of any use without the screen? A. Not for that.

*Cross-examination by Mr. Rinzler:*

- Q. You are a brother of Mr. Shapiro? A. Yes.
- 10 Q. Work for him? A. Yes.
- Q. Worked for him how many years? A. Five years.
- Q. Ever built a machine like this? A. Never.
- Q. Never work on such a machine? A. Never.
- Q. Work for your brother now, too? A. Yes.
- Q. How long was that machine on the job in the West Paterson job? A. What do you mean, on the job?
- Q. How long was it on the job where the pit was? A. She is there yet.
- 20 Q. Have you got any other machines there? A. Yes.
- Q. How many other machines have you got there? A. Got two.
- Q. What are the other two machines doing there? A. They do all the work.
- Q. Oh, so you are keeping this third machine at the pit in West Paterson since June, 1927, about a year and a half, doing no work; right? A. Yes.
- 30 Q. Although there are two machines there and men working in that pit? A. Yes, sir.
- Q. Are you using screens in the other machines? A. Yes.
- Q. Now? A. Yes.
- Q. Now, on the two machines? A. Yes.
- Q. What kind? A. What kind we got there? Our mechanic make a machine and they use that screen.
- 40 Q. What kind do you use? A. I couldn't explain it to you. I am not a mechanic. Our mechanic made that screen and we do the work on that screen.



*Edwin Fairclough, for Defendant—Direct.*

By Mr. Herman:

Q. Was that conveyor ever able to complete a full load on the truck? A. Never. He knows himself, Mr. Garret.

Q. Never mind.

10

EDWIN FAIRCLOUGH, SWORN.

*Direct examination by Mr. Herman:*

Q. Where do you live? A. Paterson. Newark Avenue.

Q. What is your business? A. I run a steam shovel and take care of the machinery up there, the conveyors.

Q. You are employed by Mr. Shapiro? A. Yes, sir.

20

Q. Do you know Mr. Garret? A. Yes, sir.

Q. How long have you known Mr. Garret? A. Well, since he has been dealing with Mr. Shapiro.

Q. How long is that? A. Around five years.

Q. I show you Exhibit D-1 and ask you if you recognize what it represents? A. A conveyor.

Q. What conveyor? A. Mr. Garret. Specially built conveyor Mr. Garret built for Mr. Shapiro.

30

Mr. Rinzler: I object to the answer and ask that it be stricken out.

The Court: Strike out the answer.

Q. Did you see this conveyor when it was first delivered? A. Yes, I was right there.

Q. What was the difference between this conveyor and other conveyors which Mr. Garret delivered?

Mr. Rinzler: I object to it as not being relevant.

40

The Court: What is the purpose?



*Edwin Fairclough, for Defendant—Cross.*

Q. How did this conveyor operate? A. Wouldn't work at all.

Q. How was it supposed to operate? A. With the screen on the 'end.

10 Q. Just indicate to the jury where that screen was supposed to be situated? A. Off here (indicating).

Q. With that screen on there and operating, what would that machine be able to do? A. Practically nothing.

Q. Well, did it ever operate? A. Well, maybe for five minutes at the most.

Q. Was it ever able to load a full load on the truck? A. No, sir.

20 Q. Did you ever see Mr. Garret up there at the pit? A. Yes, sir.

Q. What was he doing there? A. He was looking at the conveyor, watching the defects in it.

Q. How many times was he up there? A. Well, six or eight times.

Q. Did you have any conversations with Mr. Garret with respect to the machine? A. Why, not exactly a conversation, but I told him the only way he could repair it, to put a stick of dynamite under it and blow it up.

30 Q. Can this machine be operated without the rotary screen? A. No, sir.

Q. Is the rotary screen on it now? A. No, sir.

Q. Do you know where it is? A. Mr. Garret has it.

*Cross-examination by Mr. Rinzler:*

Q. What is your business? A. Steam shovel operator.

Q. For whom? A. Mr. Shapiro.

40 Q. How long have you worked for him? A. Seven years.



*Russel Darling, for Defendant—Direct.*

Q. What job are you working at now? A. Why, in the Passaic yard now.

Q. Is Shapiro doing the job now at the West Paterson pit? A. No, sir.

Q. Since when hasn't he? A. Well, last few weeks back.

Q. Well, has he any conveyors there? A. Yes. 10

Q. How many? A. Well, two. Two that is working, and this one here.

Q. So he has three conveyors there? A. Yes.

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RUSSEL DARLING, SWORN.

*Direct examination by Mr. Herman:*

Q. You are a driver employed by Alex. Shapiro, are you not? A. I was. 20

Q. You are not employed by him now? A. No, sir.

Q. Were you employed by him in the month of June, 1927? A. Yes, sir.

Q. Do you recognize the machine depicted by this photograph, Exhibit D-1? A. Yes.

Q. Where is this machine situated or was it situated when you saw it? A. West Paterson sand pit. 30

Q. How was it equipped as not represented in this photograph, if you know? A. Had an electric motor on it and the screen on the front.

Q. Do you know whether that machine was able to work? A. No, sir, not for long at a time.

Q. Well, how long at a time did it work? A. On about a half a load.

Q. Then what happened, if anything? A. Screen got clogged up and the gears did not mesh and the belt slipped, chain came off. 40



*Russel Darling, for Defendant—Cross.*

Q. Did you ever see Mr. Garret up there? A. Yes.

Q. What was he doing up there? A. I couldn't tell you.

Q. Did you ever talk to him? A. No, sir.

10 Q. Do you know whether you were ever able to get a full load on from this conveyor? A. I never was. I don't know if anyone else ever did.

*Cross-examination by Mr. Rinzler:*

Q. You say you don't know what Garret did there at the pit? A. No, sir.

Q. Did you ever see him work on the machine? A. I couldn't remember whether I seen him or not; I seen his men working on it.

20 Q. When was the last time you were there? A. I don't know exactly.

Q. How long after that machine was delivered did you work at that West Paterson pit where it was delivered? A. I couldn't tell you exactly.

Q. About. A. A month.

Q. After that Mr. Shapiro did not do that job any more, did he? A. No, sir.

Q. Somebody else got the job entirely, didn't they? A. I don't know.

30 Q. Did he discontinue doing any work there? A. What, with that conveyor?

Q. With any conveyor. A. He worked there with other conveyors.

Q. Until when? A. I don't know.

Q. Isn't it a fact that shortly after this machine was delivered Mr. Shapiro lost a job there and some other excavator did the work and Mr. Shapiro did no work there at all? Isn't that right? A. No, sir.

40 Q. Well, for how long did he do work there after the machine was delivered? A. I don't know.



*Edwin Fairclough, for Defendant—Direct.*

Q. More than a week? A. I couldn't tell you.

Q. More than two weeks?

The Court: He said he didn't know.

Q. You worked for him? A. Yes. I was not at that pit all the time; I was working on other jobs. 10

Q. But you don't know how long he worked there at all? A. No, sir.

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Mr. Rinzler: I would like to recall Mr. Fairclough.

EDWIN FAIRCLOUGH, recalled.

20

*Further cross-examination by Mr. Rinzler:*

Q. How long did Mr. Shapiro work on that pit after June 30, 1927? A. Well, the rest of the summer.

Q. Until when? A. Well, until it got cold and the contractors didn't work no more.

Q. Until the Fall of 1927? A. Yes.

Q. After the Fall of 1927, did Mr. Shapiro do any work in that pit? Yes or no. A. In the Winter time? 30

Q. Any time, since the Fall of 1927. A. On and off.

Q. The Summer of 1928 included? A. Yes.

Q. When? A. All this Summer, the early part of this summer.

Q. When? A. In the Spring of the year.

Q. Who else did work there? A. Who else? What do you mean?

Q. What other excavators?

40



*Harry Seadike, for Defendant—Direct.*

Mr. Herman: I object.

The Court: I will permit it.

A. Why, Handecker.

Q. Vandecker? A. Yes.

Q. Anybody else? A. No, not that I know of.

10

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HARRY SEADIKE, SWORN.

*Direct examination by Mr. Herman:*

Q. You are a driver employed by Alex. Shapiro? A. Yes.

Q. Were you employed by him in June and July, 1927? A. Yes; I worked there for five years.

20 Q. Did you ever see this machine? A. I went down with it.

Q. Showing witness Exhibit D-1. A. I went down with this machine.

Q. You personally brought it up to West Paterson? A. Yes, sir.

Q. Is the machine as represented by the picture any different from the way it was when you brought it up? A. No.

30 Q. Is there anything missing from there that was on there? A. The motor is off it.

Q. Anything else? A. Well, no. The screen wasn't on it yet when we took it up. We hooked it up behind the truck and brought it up there that way.

Q. Did you ever see that with a rotary screen on it? A. I certainly did.

Q. Under what circumstances did you see it? Was it in operation at that time or not? A. I was under,—loading on it.

40 Q. You were trying to get a load? A. Trying to get a load.



*Harry Seadike, for Defendant—Cross.*  
*Morris Shapiro, for Plaintiff—Direct.*

Q. Were you able to get a load? A. Not a full load.

Q. Why not? A. Because a belt would either stick or a chain would jump and stop the belt and stuff the screen, and you had to poke it loose, and she stopped so I lost more time than I don't know what on it. 10

Q. Did you ever see Mr. Garret up there? A. I certainly did.

Q. Was that frequently or infrequently? A. It stopped right while he was there many a time.

*Cross-examination by Mr. Rinzler:*

Q. Ever return the machine? A. Return it? No, sir. Just pulled it up under a tree and let it lay there. 20

Q. Did you ever bring it back to where you got it from? A. No, sir.

Q. Where do you work? A. Work for Shapiro.

Q. Which Shapiro? A. Alex. Shapiro.

Q. The one that is being sued in this case? A. Yes.

Q. Work for him now? A. Yes.

DEFENDANT RESTS.

30

PLAINTIFF'S TESTIMONY IN REBUTTAL.

MORRIS SHAPIRO, SWORN.

*Direct examination by Mr. Rinzler:*

Q. Are you a bookkeeper for Alex. Shapiro? A. Yes, sir.

Q. Are you related to him? A. Nephew. 40



*Morris Shapiro, for Plaintiff—Direct.*

Q. Are you the young man whose initials are M. S. and who typewrote that letter for Mr. Shapiro, Exhibit D-3? A. Yes.

Q. Do you take charge of the correspondence outgoing and incoming? A. I do.

10 Q. And you would know whether any mail was received by Mr. Shapiro relating to his business, wouldn't you? A. I might.

Q. You might or you would? A. I can't remember everything.

Q. Not whether you can remember, but would the incoming mail come to your attention? A. Yes, it would.

Q. Would you open it? A. Yes, I would.

Q. Who would read it first, you or Shapiro?  
A. I would read it first.

20 Q. Then Shapiro would read it? A. Yes.

Q. Shapiro would read it after you would read it? A. Yes.

Q. Can he read? A. I would read it to him.

Q. What? A. I would read it to him.

Q. I asked you whether Shapiro would read it after you would read it and you answered yes.

Mr. Herman: I object. It is your witness.

30 Q. You were the first one that read it? A. Yes.

Q. Shapiro did not have it until after you? A. No.

Q. That is correct, isn't it? A. That is correct.

Q. Now, did you receive a letter reading as this one does?

The Court: Is that a copy?

40 Q. Dated January 12, 1928, from the plaintiff.



*Morris Shapiro, for Plaintiff—Direct.*

Mr. Herman: Are those copies of letters?

Mr. Rinzler: Yes, actual copies.

A. I may have received it.

Q. Let me hear that answer. A. I may have received it. 10

Q. Don't you know? A. I don't know.

Q. Will you say you did or did not receive it?

A. I did not receive it.

Q. So your answer is you did not receive it?

A. Yes.

Q. Now I show you a letter dated February 29 and I ask you whether you did or did not receive a letter reading as that one does from the plaintiff. A. I don't recall.

Q. Do you say you did or did not receive such a letter? A. I don't recall. 20

Q. Will you say you did not receive it?

Mr. Herman: I object to that form of question.

The Court: He is your witness.

Q. This one, dated February 29, you say you do not recall? A. I don't recall.

Q. Now I show you a letter dated March 9. Did you or not receive from the plaintiff such a letter? A. We received that letter. 30

Q. You did?

Mr. Rinzler: I wish to have it marked in evidence.

Mr. Herman: I object. This is not the letter.

The Court: You have to prove the original.

Mr. Rinzler: If your Honor please, he says yes, he received such a letter. 40



*Morris Shapiro, for Plaintiff—Direct.*

A. That hasn't anything to do with the case.

The Court: It is not admissible.

Q. Have you the letter? A. No, I haven't with me.

10 Q. Where is it? A. I don't know.

Q. Don't you know? A. Must be in the files.

Q. Do you know if it is there? A. If I received it it will be there.

Mr. Rinzler: I ask that it be marked in evidence.

The Court: No, it is not admissible.

Mr. Rinzler: All right.

20 Q. I show you a letter dated March 9, 1928,—another letter dated March 9, 1928, and ask you whether you received this letter or such a letter.  
A. Never got it.

Q. Never did. I show you a letter dated March 10, 1928, and ask you whether you received this letter from the plaintiff. A. I don't remember.

Q. Did the Conveyor Company ever loan Mr. Shapiro an engine to run a water pump?

30 Mr. Herman: I object to it as immaterial.

The Court: What is the purpose?

Mr. Rinzler: Well, to show that it was his motor, that he didn't have the right kind of motor. He was using temporarily a gas motor because he didn't have an electric motor. That we loaned him—

Mr. Herman: The question does not specify that.

40 The Court: You must make the question specific.



*Morris Shapiro, for Plaintiff—Direct.*

Mr. Rinzler: We will refer to the letter of March 10, 1928.

Mr. Herman: I object to any reference to this letter.

The Court: You cannot refer to a copy of the letter. There has been no testimony as to whether this is the copy or not. 10

Mr. Rinzler: I would like to finish the question.

The Court: Do not finish that, because that is improper, to start with.

Mr. Rinzler: I think I have a right to show whether he received such a letter at all, because if he didn't, then the notice to produce would have been futile.

The Court: You must find that out first, before you show it to him. 20

Q. You said you received this first letter dated March 9, 1928, didn't you? A. I believe we did.

Q. Aside from that letter did you receive any other letters from the Equipment Company? A. I don't recall.

Q. Will you say you did or did not? A. I won't say.

Q. What kind of letters did you receive? A. Well, in reference to the gasoline engine he loaned us? 30

Q. Yes.

Mr. Herman: I object and ask that the answer be stricken out. He is proving the contents of an instrument.

The Court: What do you mean by "what kind of letters?"

Mr. Rinzler: I mean with respect to the subject matter. 40



*Morris Shapiro, for Plaintiff—Direct.*

Mr. Herman: I object to it as the improper way to prove it.

The Court: I think that is broad enough. You may ask that.

Mr. Herman: I ask an exception.

10 A. Well, I did.

Q. What? A. In reference to the gasoline engine he loaned us.

Q. In reference to the machine itself? A. Not that I remember.

Q. Demanding payment for it?

Mr. Herman: I object.

The Court: Sustain the objection.

20 Q. Did the company ever demand payment?

Mr. Herman: I object.

The Court: Sustain the objection.

Q. Did the company in any wise ever demand payment for this machine?

Mr. Herman: I object.

The Court: Sustain the objection.

Mr. Rinzler: I note an exception.

30 Q. Was a demand ever made by this company for payment of the machine?

Mr. Herman: I object.

The Court: Sustain the objection.

Mr. Rinzler: Note an exception. That is all.

Q. Did you bring your file here? A. No, I did not.



*Pauline Grad, for Plaintiff—Direct.*

PAULINE GRAD, recalled.

*Direct examination by Mr. Rinzler:*

Q. Miss Grad, I show you a letter dated January 12 and ask you whether you sent the original of this by mail to the defendant? A. Yes.

10

Q. Did you deposit the original in an envelope addressed to the defendant in the United States Post Office?

Mr. Herman: I object to it.

The Court: There is no demand.

Mr. Rinzler: These two letters he says he did not receive.

The Court: This man said he did not receive them. You have to ask counsel if the originals are produced.

20

Mr. Rinzler: I ask counsel, then, to produce the originals of these two letters.

Mr. Herman: We haven't them here. We were not served with notice to produce, and we have not the letters here.

Q. Was the letter deposited for mailing in the United States Post Office? A. It was.

Q. Did it have the return address of your company? A. Yes, sir.

30

Q. Did it ever come back? A. No, it did not.

Q. Did they have prepaid postage on it? A. Yes, sir.

Q. Is the same true with respect to the original letter dated February 29, 1928? A. Yes, sir.

Mr. Rinzler: I offer each of these letters in evidence.

Mr. Herman: I object to them.

40



*Pauline Grad, for Plaintiff—Cross.*

The Court: I will admit it.

(Papers marked Exhibits P-4 and P-5.)  
(Mr. Rinzler read exhibits to the jury.)

*Cross-examination by Mr. Herman:*

10 Q. Is this the bill that you sent Mr. Shapiro for  
this conveyor?

Mr. Rinzler: I object to that as not being  
relevant to the cross-examination.

Mr. Herman: In the letter he refers to the  
conveyor. Now, here is a bill which shows  
exactly what was ordered and what was  
within the contemplation of the parties at  
the time the sale was supposed to have been  
made.

20

The Court: I will admit it.

Mr. Rinzler: I ask an exception.

A. Yes, it is the bill.

Mr. Herman: I offer it in evidence.

The Court: I will admit it.

Mr. Rinzler: Exception to plaintiff.

(Paper marked Exhibit D-4.)

30

Mr. Herman: Exhibit D-4 is the order  
which reads: "One 24 by 35 conveyor  
equipped with five horse power three phase  
electric motor, also one rotary screen,  
\$1,050."

40



*Matthew Garret, for Plaintiff—Direct.*

MATTHEW GARRET, SWORN.

*Direct examination by Mr. Rinzler:*

Q. What office do you hold in the Conveyor and Equipment Company? A. President and general manager.

Q. Is that company engaged in the manufacturing of machinery, including conveyors? A. Yes, sir. 10

Q. Did you manufacture any other machinery? A. Yes. Only coal handling machinery, conveyors.

Q. Only conveyors? A. Yes.

Q. How long have you been connected in that business? A. About seven years.

Q. Where is your business located? A. In Passaic. 20

Q. On what street? A. Gregory Avenue.

Q. Did your company manufacture the conveyor which is involved in this suit? A. Yes.

Q. Did you before this sale converse with Mr. Shapiro? A. Yes, we did.

Q. Now, with respect to these conveyors that you had previously sold him, is there any difference between those conveyors and the one now involved in this suit, excepting in so far as the higher lift and heavier weighting power is concerned? 30

Mr. Herman: I object.

The Court: I will permit it.

A. No; this is the same as our standard machine. It is five feet longer.

Q. Is there any difference in them except you made the lift higher? And heavier weight? A. None whatever. 40



*Matthew Garret, for Plaintiff—Direct.*

Q. Now, the machine was delivered June 30, 1927? A. June 23 the machine was delivered.

Q. After it was delivered did Mr. Shapiro, a week later or shortly afterwards, make any complaint to you about it? A. The machine was delivered with an electric motor, but he could not use it, due to the fact they didn't have electric power in their yard.

Q. So you did furnish an electric motor? A. We delivered the machine with an electric motor.

Q. He was not able to use it for what reason? A. Because of not having any power.

Q. Electric power? A. Didn't have any electric power.

Q. Any fault of yours? A. None whatever.

Q. You do not furnish power, do you? A. No, sir.

Q. When he found he was unable to use the electric motor in the absence of electric power there, what if anything did he do or say to you about it? A. He asked us if we would equip the machine with a gasoline engine so he could use it.

Q. That was after the machine was delivered? A. Two weeks after.

Q. Was that the first thing he said about the machine at all? A. Well, the first order we got for the conveyor, the machine was supposed to be equipped with a two phase motor. When the machine was delivered they found they were going to have three phase current instead of two phase, so necessarily we had to change the electric motor from a two phase to three phase.

Q. Was that done? A. Yes, it was done the following day after the conveyor was shipped.

Q. Was there any complaint up to that time? A. None whatever.

Q. So the next communication you received or



*Matthew Garret, for Plaintiff—Direct.*

word that you got, he spoke to you about the necessity of the gas power? A. Nothing except he could not use the power, and he had to get out the sand and he wanted power to run the conveyor, and that is the only power we could give him until he got his electric current installed.

Q. Did you or not then furnish him with a gasoline pump? A. Yes, we did.

10

Q. After that did he complain to you about the machine itself? A. No.

Q. Did he ever say to you that the machine couldn't do any of its work properly or did not work at all? A. No, never.

Q. Did he ever make the slightest complaint about the machine or objection to it? A. No.

Q. Were you there from time to time? A. I was there quite often.

20

Q. For what purpose? A. Well, that is all that I do; after I have been in the office in the morning I usually go out and go around looking over installations and checking up on machinery in general.

Q. Did you check up on that machine? A. Absolutely.

Q. What was its condition? A. Condition was all right.

Q. How many times had you seen it? A. Oh, I would say possibly ten or fifteen times.

30

Q. That is a trade practice that is done by you in all cases where these machines are sold?

Mr. Herman: I object.

The Court: That is leading.

Q. Did he ever make the slightest complaint about it? A. Not about the conveyor, no.

Q. How many letters did you write to the de-

40



*Matthew Garret, for Plaintiff—Direct.*

fendant about this matter? A. Well, I just counted about five or six letters I wrote to him.

Q. How many letters did you receive from Shapiro? A. One.

10 Q. Is that the letter, D-3 in evidence? A. Yes, that was the letter. I saw it.

Q. Before you got this letter, D-3, had you written to Mr. Shapiro demanding money? A. Yes, I had.

Q. How many times? A. Twice I wrote to him demanding money before that time.

Q. And the first and the only letter that you ever received from him was D-3? A. Yes.

20 Q. Did he ever say anything to you about the machine, as to whether he had use for it or not? A. Yes, he did.

Q. What did he say? A. He had no use for it, because he lost the contract. You see, the pit where he was taking his sand was supposed to be eighty per cent. sand and about twenty per cent. gravel.

30 Q. Yes? A. It finally turned out that he had about seventy-five per cent. gravel and about twenty-five per cent. sand, and it was unprofitable to work that pit. In fact, the people from the Franklin Construction Company turned down his contract.

Mr. Herman: I object.

The Court: Do not tell us that unless it was in your presence. Did somebody tell you?

The Witness: Mr. Shapiro himself. He lost the job due to the fact that the sand which he was supplying did not come up to specifications, not to the road specifications.

40

Q. That is what he told you? A. Yes.



*Matthew Garret, for Plaintiff—Cross.*

Q. When you say it is unprofitable, you mean there is more stone than sand? A. The machine is built to screen sand, sand usually consists of about approximately twenty-five per cent. gravel and seventy-five per cent. sand. In this case it turned out to be that he had about seventy-five per cent. rocks, large rocks, and about twenty-five per cent. sand. Well, he was trying to get sand, not gravel, so he handled seventy-five per cent. gravel to get twenty-five per cent. sand. 10

Q. Did you ever verbally demand payment from Mr. Shapiro for this machine? A. Yes, possibly two times a week.

Q. What did he say? A. Well, it was always that money was short and scarce, tight, and people didn't pay their bills, and so forth; the regular line, you know. 20

Q. Did he ever write you a letter after this letter of February 25, Exhibit D-3? A. Never.

By the Court:

Q. Was this screen for the purpose of screening the sand and gravel or gravel or which? A. No; the screen was made specially for the purpose of screening sand, not gravel. 30

By Mr. Rinzler:

Q. Was this machine gone over by experts in your place before it is ready to go out? A. Absolutely.

Q. What was its condition? A. Hundred per cent.

*Cross-examination by Mr. Herman:*

Q. You have been doing business with Shapiro for how long? A. Since 1923. 40



*Matthew Garret, for Plaintiff—Cross.*

Q. At the present time he doesn't owe you anything outside of this particular job, does he?

Mr. Rinzler: I object. He admits he owes him some money.

The Court: \$33.43.

10

Q. He has bought other conveyors from you, hasn't he?

Mr. Rinzler: I object.

Mr. Herman: I want to show he has sold him other machines.

The Court: There was never any complaint. What would that have to do with this machine?

20

Q. You testified on direct examination that this machine was no different than any other conveyors that you sold? A. That is what I said.

Q. If it is no different than any other conveyor, why did you charge \$550 more for it? A. Because it is a larger machine.

Q. Well, then, it is different? A. I said it was different on direct examination; I said the machine was five feet longer and wider.

30 Q. How much wider? A. Why, it is four inches wider.

Q. The other conveyors had stationary screens, didn't they? A. The other machines did not have any screens at all.

Q. Didn't have any screen at all? A. No.

Q. Did you ever supply any other screens for the other machines? A. Not for the other machines.

Q. You were up to the sand pit when this machine was ordered, weren't you? A. Why, no.

40 Q. With Shapiro? Yes, or no. A. No.



*Matthew Garret, for Plaintiff—Cross.*

Q. Were you ever up to the sand pit in West Paterson? A. Yes.

Q. Were you up there before the machine was delivered? A. Yes.

Mr. Rinzler: I object to it as immaterial.

The Court: I will permit it.

Mr. Rinzler: Exception to the plaintiff.

10

Q. Were you ever there before you made the machine? A. Yes.

Q. You were pointed out the run of sand and gravel up there at that time, weren't you? A. I can see the bank, but I can't say—

Q. Were you? Answer the question. Was the run of sand and gravel pointed out to you at the time that you were up there? A. No.

20

The Court: What do you mean by the run?

Mr. Herman: The quality of sand or gravel.

Q. It was not pointed out to you? A. No.

Q. What were you up there for before you made the machine? A. To get orders for machines.

Q. When you got the order for the machine, as you did, was the run of sand and gravel indicated to you? A. No.

30

Q. Did you see the run of sand and gravel up there? A. I didn't pay any attention to it.

Q. Didn't pay any attention to it at all? A. Furthermore, the machine—

Q. Just answer the question. Do you know this man? A. Which one? Let him stand up. Yes, I believe I did see him there.

Q. Do you remember being up at the sand pit when he was trying to operate this conveyor? A.

40



*Matthew Garret, for Plaintiff—Cross.*

Well, I would not recall whether that was the particular man that was trying to operate any conveyor, because that is not my business, to look and see who is operating the conveyors.

10 Q. Were you up there when the conveyor broke down?

Mr. Rinzler: I object.

The Court: He has not testified to that.

Q. Were you ever informed by Mr. Shapiro that the conveyor broke down? A. Not the conveyor, the screen.

Q. The screen? A. Yes.

20 Q. The screen was a part of this machine, wasn't it, when it was ordered? A. No; it is an attachment.

Q. It was an attachment? A. Yes.

Q. Supposed to make the machine more efficient, wasn't it? A. Not at all.

Mr. Rinzler: I object.

The Court: I will permit it.

Q. It was not? A. No.

30 Q. What did you build it for, if it had nothing to do with the machine? A. On Mr. Shapiro's recommendation and to order, on his suggestion.

Q. You told him you could build it, didn't you? A. Well, we did build it.

Q. Well, you took it back? A. No, they sent it back.

Q. They sent it back? A. Yes.

Q. Do you know why they sent it back? A. Yes; after I asked them to pay their bill.

Q. You wrote them a letter under date of February 29, did you not? A. Yes, sir.

40 Q. And you got this letter from them on February 25, telling you to take that machine back,



*Matthew Garret, for Plaintiff—Cross.*

didn't you? It was after that that you went and wrote the letter demanding payment? A. This is the letter I received.

Q. Answer the question. Your letter was written demanding payment after you received this letter notifying you to take the machine back? A. I wrote them several times and asked him to pay the bill, that I wrote to him before I received this letter. This is an answer to the letter I wrote.

10

Q. Well, this is an answer to your letter of February 29 in answer to this letter of February 25 notifying you to take the machine back; isn't that correct? A. No. This letter is an answer, yes.

Q. That is my question. A. Yes. I beg your pardon.

Q. That is when you demanded the money?

20

By the Court:

Q. Did you ever receive any portion of this machine, to repair it? A. They sent the screen back after we asked them for the bill. Just why they sent it back I don't know.

Q. What happened to it? A. It is still in the factory.

Q. What did they say they sent that back for? A. No reason whatsoever.

30

By Mr. Herman:

Q. You are sure it was not your mechanic that took the screen back? A. I know it was not. My mechanics don't do anything except on order.

Q. Did not Shapiro tell you that he lost all the Franklin contract because your machine was no good? A. No, never.

Q. Never did? A. Never told me that.

40



*Joseph Scator, for Plaintiff—Direct.*

Q. But Shapiro told you about the contract before you built this machine, didn't he?

Mr. Rinzler: I object to it as not proper.

The Court: What is your purpose?

Mr. Herman: I will withdraw it.

10

Q. Did you ever make a machine like this before? A. Why, yes, plenty of them.

Q. I mean exactly like this one? A. Absolutely.

By Mr. Rinzler:

Q. Was the machine as ordered? A. Just as ordered.

20

Mr. Herman: I object to that as leading.  
The Court: I will permit it.

---

JOSEPH SCATOR, SWORN.

*Direct examination by Mr. Rinzler:*

Q. Are you employed at present by the Conveyor and Equipment Company? A. Yes.

30 Q. You have been employed there for how long?  
A. About five and one-half years.

Q. Are you superintendent of their machine manufacture? A. Yes.

Q. How long have you been doing this kind of work? A. For about five and a half years.

Q. Did you see this machine that is involved in this suit? A. Yes, sir.

Q. Who supervised the construction and building of that machine? A. I did.

40 Q. What was the condition of the machine when it was ready for delivery? A. Why, the machine



*Joseph Scator, for Plaintiff—Cross.*

was complete and the screen was bolted on the machine, the top of the machine.

Q. In what kind of working condition was it?

A. O. K. It was working, right condition.

Q. Was it in that condition when it was taken away by Mr. Shapiro's man? Was it in good condition? A. Yes, sir.

10

*Cross-examination by Mr. Herman:*

Q. Did you ever build a machine like this before? A. Yes, sir.

Q. When? A. Five and a half or six years.

Q. Ever build a machine with a rotary screen on it before, to work with a rotary screen? Yes or no. A. Yes.

Q. When? A. Oh, I can't tell you when.

Q. Why can't you tell me when? A. Well, I can't tell you. I made last year a couple. I make before a few, and I made three years ago maybe twenty; I can't tell you when.

20

Q. Maybe twenty? A. Yes.

Q. What was the rotary screen attachment supposed to do?

Mr. Rinzler: I object to it as irrelevant.

The Court: I will permit it.

Mr. Rinzler: I ask an exception.

30

Q. What was this rotary screen supposed to do in connection with this machine? A. It was to screen the sand.

Q. What do you mean by that? A. For screening sand.

Q. What do you understand by screening sand? A. Well, I understand if he wants to sell sand and load on the trucks, so he screen the sand separate and the big stones separate, too.

40



*Joseph Scator, for Plaintiff—Cross.*

Q. Then, that attachment was supposed to separate the fine sand from the large stones or granite and the gravel which was in with the sand; is that correct? This rotary screen was supposed to separate the fine sand from the small stones and the gravel and granite, was it not? A. No, that  
10 was only one attachment, see.

Q. Wasn't this rotary screen supposed to separate the sand from the stones and the rock? A. I don't know that.

Q. Well, what was it for? A. Well, to screen sand.

Q. What do you mean by that? A. Well, to screen the sand and the big stones supposed to fall separate.

Q. Did you ever see this rotary screen back in your shop again? A. Yes, I saw that screen back in the shop.  
20

Q. Do you know why it was back in your shop? A. I don't know why.

Q. Do you know who brought it back to your shop? A. I wasn't that day in the shop.

Q. Where were you that day? A. I was home.

Q. What were you doing home? A. I was sick.

Q. Did you make an examination of the screen when you came back to the shop? A. I asked  
30 Mr.—

Q. No, no. Not what you asked; what you did. A. I didn't do nothing. I can't do nothing until I get instructions from the office.

The Court: Can you tell us about when it came back, the screen?

The Witness: I can't tell you when. It was last—I can't tell you sure when it was. I don't remember.



*Joseph Scator, for Plaintiff—Cross.*

Q. You know that the screen is still in your shop, don't you? A. Yes.

Q. It was never taken back to the sand pit, was it? A. Never.

Q. Did you ever go up to inspect this machine at the pit? A. Yes, I was up.

Q. Was it working when you went up there? A. Yes.

Q. Then, why did you go up to inspect it? A. Why I went up to inspect it? They call up we should inspect the machine.

The Court: Who called up?

The Witness: I don't know. I got the order from the office and after I do my work.

Q. Did you go up alone, or with Garret? A. I go up with some other mechanics.

Q. But not with Mr. Garret? A. No.

Q. When you got up there, what did you find to be the trouble? A. I saw they had big stones on the rotary screen, and the rotary screen was stuck, because the stone was maybe twelve or thirteen or fourteen inches in diameter and not supposed to be so big; long, about, maybe, five or six inches.

Q. It happened to be a large stone there? A. Yes.

Q. Well, now, they took the large stone out, didn't they? A. Of course, they took the stones out.

Q. Did you ever see any of the bearings burned out when you went up there? A. No, I don't see. I don't know. The bearings,—I don't think the bearings were burned out.

Q. You don't know? A. No, not the bearings.



*Joseph Scator, for Plaintiff—Cross.*

Q. Did the belt ever slip off, that you know of?

A. No, the belt never slipped off, because I used a standard size, and I built some five hundred or four hundred, and the belts never slip off, and—

10 Q. If that is a standard sized conveyor, why did you have the support up here? A. Well, we build every one like that.

Q. Isn't it a fact that you have the support up here because the rotary screen was supposed to be attached to the end of it here and the support was placed in that position in order to make it balance? A. Well, we do that on every conveyor like that, every one.

Q. You mean to say the support is up here? A. Yes.

20 Q. Isn't it a fact that the support on the ordinary conveyor is down here? A. No. Well, it is just the same as any one.

Q. Wasn't this conveyor a little bit wider than the ordinary? A. Yes, sure.

Q. About how many feet long? A. I think it is about 35 feet long.

Q. You say that the support was not placed 'way up near the end in order to balance with the screen? A. No; the carriage was just like that.

Q. Just like this? A. Yes.

30 Q. And the screen was attached up here, wasn't it? A. Yes.

Q. How big a load was that screen supposed to take? A. I can't tell you.

Q. How big was the screen? A. I can't tell you. About a square yard.

Q. Do you remember being up there on Sunday with two mechanics? A. Yes, sir.

40 Q. How long did you work on that Sunday? A. I worked on—I can't tell you. I worked four hours.



*Joseph Scator, for Plaintiff—Cross.*

Q. Four or five hours? A. Three or four, something like that; I couldn't tell you exactly.

Q. You with two other mechanics? A. Yes.

Q. What was the trouble then? A. We had big stones in—we had a big rock. He had a big stone in this rotary screen.

Q. Yes? A. Well, we told Mr. Shapiro he should never put so big stones in, because we no supposed to handle big stones like that.

Q. Well, they didn't need you and two mechanics to get those stones out of it, did they? A. Well, sure, they don't need. We went up.

Q. They needed you to take the stones out of there? Did you help take the stones out? A. Sure, I took it out.

Q. Did you do any other mechanical work besides taking stones out of there? A. We generally inspect the machine, in what condition is it, and we told Mr. Shapiro he should keep great care of his machine and no put so big rocks in.

Q. It took you and two mechanics about four or five hours to put a few stones out of it and tell Mr. Shapiro to take care, better care of the machine? A. Yes.

By Mr. Rinzler:

Q. Did you inspect the whole machine at that time? A. Yes, sure I did.

Q. What was its condition? A. In good condition.

By Mr. Herman:

Q. Did you have any electric motors and controls up there that day? A. Yes, sure, we carry always with the car, because we got a service car and we supposed to have everything on the car.

PLAINTIFF RESTS.



*Alex. Shapiro, for Defendant—Direct.*

DEFENDANT'S SUR-REBUTTAL.

ALEX. SHAPIRO, recalled.

*Direct examination by Mr. Herman:*

10 Q. When you went up to the pit with Mr. Garret did you show them the run of sand at the pit?

A. Yes.

Mr. Rinzler: I object. This is in reference to a collateral matter.

The Court: It makes no difference. The question is what the run was.

Q. What was the run of sand up at the pit?

20 Mr. Rinzler: I make the same objection, now. Not rebuttal. It refers to a collateral matter.

The Court: I will permit it.

Q. What is the answer? A. The sand was the same condition as it is just now.

Q. What is it? A. Well, this one.

Q. What was its condition? A. They needed a screen on there to screen the machine.

30 Mr. Rinzler: I object to it as not rebuttal.  
The Court: I will permit it.

Q. Just explain that situation, please.

Mr. Rinzler: I object to that question, because it is not rebuttal.

The Court: It is not rebuttal.

Q. Just answer the question, please. A. Well, the sand had to be screened.

40 Q. Why did it have to be screened?



*Alex. Shapiro, for Defendant—Direct.*

Mr. Rinzler: I object.

The Court: No, that is not rebuttal.

A. Why, it is stony.

Q. What is the condition of the sand now? A.  
All right.

Q. Was it all right then? A. Yes.

10

Q. Was there ever any complaint made to you  
about there being too many rocks in the sand?

Mr. Rinzler: I object to it as not being  
rebuttal.

The Court: Sustain the objection.

Q. That is all.

BOTH SIDES REST.

20

MOTION TO DIRECT A VERDICT.

Mr. Rinzler: If your Honor please, we  
are suing on a book account. We say that  
the machine is as ordered and delivered as  
ordered in performance of the order, and  
we say that the Court should direct a ver-  
dict for the plaintiff.

The Court: Oh, no.

Mr. Rinzler: Note an exception. I move  
for a non-suit on the counter-claim.

30

Mr. Herman: I will submit to that.

The Court: As to the counter-claim, I  
will direct a verdict when the time comes.

(Counsel for the respective parties  
summed up to the jury.)

40



### Court's Charge to the Jury.

NEWMAN, J.:

Members of the Jury: This is a case brought by Conveyor and Equipment Company against Alex. Shapiro to recover the amount which the plaintiff says is due it upon a book account. The book account embraces certain items to the extent of \$36.43 which the defendant admits is due and owing; and it embraces a further item of \$1,050 for a conveyor, which the plaintiff alleges it sold and delivered to the defendant, and the conveyor is the item which is in dispute and which is being submitted to you.

Now, there are questions of fact in this case which you are called upon to decide; and where, in any case which will come to your attention within your term of service which will follow, there are disputed questions of fact, then it becomes your job and your function to settle and determine just what the facts are. You, of course, have had before you all the witnesses in the case and have heard all the evidence which the witnesses bring forth, and therefore you are able to determine just what weight or credibility will be given by you to the witnesses, and that is solely your function. The Court has nothing to do with a determination of what the facts are, but it is the duty of the Court to lay down the rules of law which must guide you in your deliberations. The application of those rules of law to the facts as you find them is solely within your province and determination.

Now, in this case the plaintiff alleges that it sold and delivered this conveyor to the defendant. There is, of course, some dispute between the parties as to just what the agreement was. The



*Court's Charge to Jury.*

defendant says that there was an express agreement between this defendant and this plaintiff as to the attributes of the conveyor, and the defendant says that the plaintiff agreed to do the work, that it would screen sand and gravel, while the plaintiff itself says there was no such agreement. Yet, without any agreement, the law raises a warranty which the plaintiff makes without any express words to that effect, namely, that the goods and chattels which he sells shall be merchantable, and merchantability means that the goods shall be of at least medium quality or goodness of their kind and salable in the market under the description by which they were bought, at a fair average price. 10

While there is some difference between the parties as to whether there was an express agreement or not, in the long run it makes very little difference, because if a screen were sold and it would not screen sand or gravel, of course, you would hardly say that would be a merchantable article of that character. That, of course, is for you to say, as to whether there was an express agreement, or whether there was simply the agreement which the law implies between the parties. 20

Now, there is very little law involved in this case upon which the Court can be of much assistance to you. The plaintiff, Mr. Garret, says there was nothing the matter with the screen, and that the difficulty was that the defendant was unable to pay or disinclined to pay and continually made excuses for not paying him, and that he changed the location of his conveyor or business, and that this is simply a subterfuge, that it is merely an excuse for not paying his just debt. While the defendant says that the screen would not perform any work at all, but it would become 30 40



*Court's Charge to Jury.*

clogged after use, and that on several occasions Mr. Garret attempted to fix it and finally abandoned his efforts, and kept and did not return a portion of the machine or screen.

Well, of course, that question would be solved by your determining whether or not the machine  
10 corresponded with the agreement between the parties, if there was one, or by the agreement which the law provides in case there was no express agreement. So that the question of whether it was fixed or not would largely be settled by your determination of that question.

If the machine corresponded with the agreement between the plaintiff and the defendant, if it existed, or it was merchantable, if there was no such agreement between them, then, of course, the  
20 plaintiff would be entitled to the full amount of its bill. If it did not correspond with this agreement, then under the evidence the plaintiff would recover nothing, as far as the conveyor is concerned. And whether the conveyor belongs to the plaintiff or the defendant should have nothing to do with your decision; that is one of the things upon which you are not called upon to pass and need not worry in that respect; the law takes care of that question.

30 So that your verdict, if the defendant is not called upon to pay for the conveyor, would be \$36.43. If the defendant is called upon, in addition, to pay for the conveyor, it would be \$1,086.43. If your verdict is in favor of the defendant, then, of course, your verdict is simply for \$36.43, which he admits he owes.

Now, there is a counterclaim which has been filed on behalf of the defendant, and which counterclaim is unsupported by any testimony in the  
40 case. So as to the counterclaim, your verdict



*Court's Charge to Jury.*

must be no cause of action. Therefore, you are called upon to render two separate and distinct verdicts; first, you will render a verdict on the direct cause or book account which is sued upon, if in favor of the plaintiff for the full amount of \$1,086.43; if it recovers only for the book account, then it would be \$36.43; and your verdict in any event on the counterclaim filed by the defendant would be no cause of action. 10

**Exhibit D-3.**

Feb. 25, 1928.

Conveyor Equipment Co.,  
26 Gregory Ave.,  
Passaic, N. J. 20

Gentlemen:—

In regard to the 35 foot conveyor loader, equipped with rotary screen which you delivered to us June 20, 1927. As you know this conveyor proved unsatisfactory. It did not screen well and could not attain nearly as much speed as any of the other standard machines.

We would like to know what you intend to do about this loader. Would you either fix the machine to load and screen properly or take it back and deliver us a standard 30 foot machine without a screen. 30

We are anxious to get this matter settled so as to be ready with full equipment for the spring.

Awaiting an early reply, we are

Yours very truly,

A. Shapiro  
A. SHAPIRO

AS/MS.

40



**Postea.**

NEW JERSEY SUPREME COURT,  
PASSAIC COUNTY.

10

CONVEYOR & EQUIPMENT CO., INC.,  
a Corporation,  
Plaintiff,

*vs.*

ALEX. SHAPIRO,  
Defendant.

Action at Law.  
Postea.

20

This cause was tried before Judge Clifford L. Newman, with a jury, at the Passaic Circuit of the New Jersey Supreme Court on October 29, 1928.

On the plaintiff's cause of action, the jury returned a verdict of no cause for action.

On the counterclaim, the jury was directed by the trial judge to return a verdict of no cause for action.

CLIFFORD L. NEWMAN,  
Judge.

30

40



**Judgment.**

## NEW JERSEY SUPREME COURT.

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 CONVEYOR & EQUIPMENT Co., INC.

*vs.*
ALEX. SHAPIRO.
 

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Action at Law.

10

Judgment entered Nov. 1, 1928.

No costs.

Judgment for Defendant on complaint and for  
Plaintiff on counterclaim.

FRED L. BLOODGOOD,

Clerk.

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**Grounds of Appeal.**

(Filed December 13, 1928.)

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10

CONVEYOR & EQUIPMENT CO., INC.,  
a corporation,  
Plaintiff-Appellant,

*vs.*

ALEX. SHAPIRO,  
Defendant-Respondent.

Action at Law.  
On Appeal.  
Grounds of  
Appeal.

20 *To: Reuben H. Reiffin, Esq., Attorney of Defendant-Respondent:*

*Sir:*

PLEASE TAKE NOTICE that the plaintiff-appellant hereby states the following grounds of appeal on its appeal to the Court of Errors and Appeals of New Jersey, from the whole of the judgment for the defendant entered in this cause.

- 30 1. The judgment for the defendant is absolutely irreconcilable with the evidence.
2. The judgment for the defendant is contrary to the evidence.
3. The judgment for the defendant is contrary to the charge of the court and the law of the case.
4. Under the evidence adduced, and according to the charge of the court to the jury and the law of the case, the plaintiff-appellant was entitled to a judgment for \$1,086.43 as claimed by the plaintiff, or in the sum of \$36.43, the defendant having
- 40



*Grounds of Appeal.*

admitted at the trial his indebtedness to the plaintiff in the sum of \$36.43; and the plaintiff was, therefore, entitled to a judgment in any event.

5. The evidence adduced on behalf of the plaintiff established that the defendant was indebted to the plaintiff in the sum of \$1,086.43; the defendant denied that indebtedness but at the trial admitted that he owed the plaintiff the sum of \$36.43; the trial judge accordingly charged the jury that on the plaintiff's cause of action, the plaintiff was entitled to a verdict either for the sum of \$1,086.43 as claimed by the plaintiff, or for the sum of \$36.43 as claimed and admitted by the defendant; the jury, nevertheless, disregarded the evidence, the law of the case and the charge of the trial court and returned a verdict of no cause for action on the plaintiff's cause of action, and a judgment was accordingly entered for the defendant, which verdict and judgment is irreconcilable with the evidence, the law of the case and the charge of the court.

6. From the evidence, a verdict should have been entered for the plaintiff against the defendant, and a judgment for the plaintiff should accordingly have been entered against the defendant.

Dated: November 14th, 1928.

FEDER & RINZLER,  
Attorneys of Plaintiff-Appellant.

FEDER & RINZLER,  
Of Counsel.

Service of a copy of the within notice acknowledged this 19th day of Nov., 1928.

REUBEN H. REIFFIN,  
Atty. of Deft.-Resp.



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## New Jersey Court of Errors and Appeals

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CONVEYOR & EQUIPMENT CO. INC.,  
a corporation,  
Plaintiff-Appellant,

vs.

ALEX SHAPIRO,  
Defendant-Respondent.

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On Plaintiff's  
Appeal from  
Judgment of  
Supreme  
Court.

### BRIEF FOR PLAINTIFF-APPELLANT.

#### The Facts.

Plaintiff sued on a book account to recover the sum of \$1,086.43 representing the balance due on a book account besides interest. The book account consisted of an item in the sum of \$1,050.00 representing the purchase price of a certain conveyor machine sold by the plaintiff to the defendant, and various other articles aggregating a further sum of \$36.43.

At the trial which occurred before Judge Clifford L. Newman, with a jury, at the Passaic Circuit of the Supreme Court, on October 9th, 1928, counsel for the defendant-respondent made the following stipulation:

*“Mr. Herman: As to the book account, if your Honor please, the defendant will admit it is indebted to the plaintiff in the sum of \$36.43, leaving in dispute the only item this particular machine.*

Mr. Rinzler: Yes. (Case, p. 13, ll. 30-40.)



Evidence was adduced on behalf of both sides with respect to the mechanical condition of the machine, the plaintiff-appellant on the one hand presenting evidence tending to show that it was mechanically perfect, and the defendant-respondent on the other hand giving testimony that the machine was imperfect. In this posture of the case, the *only* dispute that existed was on the question whether the plaintiff was entitled to recover for the conveyor machine, and if so, the plaintiff was entitled to a verdict for the full amount claimed, namely \$1,086.43, plus interest, whereas, if the defense prevailed on the issue with respect to the mechanical condition of the conveyor, the verdict for the plaintiff should be in the sum of \$36.43, that amount being admitted as owing to the plaintiff by the defendant. At any rate, the plaintiff was entitled to a verdict either in the first mentioned sum or the latter. Under no theory was the defendant entitled to a verdict of "no cause for action." The jury, nevertheless, returned a verdict of "no cause for action." (See Postea, p. 76 and judgment p. 77).

Defendant filed a counter-claim, but as to that, the trial judge directed a verdict against the defendant and in favor of the plaintiff. (Case p. 71, bottom; Case p. 74-76). The judgment which was entered on the counter-claim does not enter into the appeal. Plaintiff-appellant writes down six grounds of appeal (Case p. 78-79). They are combined and argued under one head, namely, upon the evidence, the law of the case, charge of the court, and the stipulation already referred to, there can *legally* be *one proper* verdict, namely, a verdict for the plaintiff either in the one sum or the other, a verdict for the defendant being irreconcilable with and unsupported by, *any* evidence.



### Argument.

We consider that the facts already adverted to are sufficient in dealing with the error complained of except to add that the trial judge in his charge to the jury admonished the jury that regardless what their finding was with respect to the mechanical condition of the conveyor, that the plaintiff was entitled to a verdict, and that if the conveyor was as claimed to be by the plaintiff, plaintiff was entitled to a verdict of the full amount claimed, \$1,086.43 besides interest, but, that if the conveyor was as claimed by the defendant, then the verdict for the plaintiff should be only in the sum admitted to be due and owing by the defendant, namely, \$36.43, but that there must be a verdict for the plaintiff. In that regard, the trial judge charged the jury as follows:

*“So that your verdict, if the defendant is not called upon to pay for the conveyor, would be \$36.43. If the defendant is called upon, in addition, to pay for the conveyor, it would be \$1,086.43. If your verdict is in favor of the defendant, then, of course, your verdict is simply for \$36.43, which he admits he owes.*

*Now, there is a counterclaim which has been filed on behalf of the defendant, and which counterclaim is unsupported by any testimony in the case. So as to the counterclaim, your verdict must be no cause of action. Therefore, you are called upon to render two separate and distinct verdicts; first, you will render a verdict on the direct cause or book account which is sued upon, if in favor of the plaintiff for the full amount of \$1,086.43; if it recovers only for the book account, then it would be \$36.43; and your ver-*



*dict in any event on the counterclaim filed by the defendant would be no cause of action.*" (Case p. 74, ll. 30-40; Case p. 75, ll. 1-12.)

It must be apparent, therefore, that the judgment entered on the verdict of no cause for action on the plaintiff's claim is (1) irreconcilable with and contrary to the evidence; (2) contrary to the charge of the court and the law of the case, and for those reasons the judgment should be reversed. *Lanning, et ux. vs. Trenton and Mercer County Traction Corporation*, 3 Misc. p. 1006; *Swiencicki, et ux. vs. Wiczerzak*, 6 Misc. p. 145; *Muha vs. De Lucia*, 5 Misc. p. 274.

In *Blanchard Bros. Inc. vs. Berendge*, 85 N. J. Law, p. 532, decided upon appeal by our Supreme Court, the court held: ~~on appeal~~:

"It is only where there is *some* evidence to support the finding of the trial court that this court will decline to consider the correctness of the finding; but, where the finding of fact is *unsupported* by *any* evidence, it can furnish *no* basis for the liability predicated upon it." (Italics ours.) Citing *Warren vs. Finn*, 84 N. J. Law, p. 206, where the syllabus of the court reads:

"Where the testimony shows indisputably that there are *no* facts in the case upon appeal from the district court upon which the judgment of that court can be supported, it will be reversed in this court." (Italics ours.)

In *Doolittle vs. Hundertmark*, 88 N. J. Law, p. 515, the Supreme Court held:

"While the well-recognized rule is that the finding of a district court on a material question of fact will not be reversed *if* there is



*any* evidence to support it, the rule is *not* applicable to cases where there is *no* evidence to support such a finding; and in our opinion this is such a case. As was said by this court in the case of *Goodman vs. Lehigh Valley Railroad Co.*, 75 N. J. Law, p. 277, the finding in this case is one, not only against the weight, but against the *totality* of the evidence." (Italics ours.)

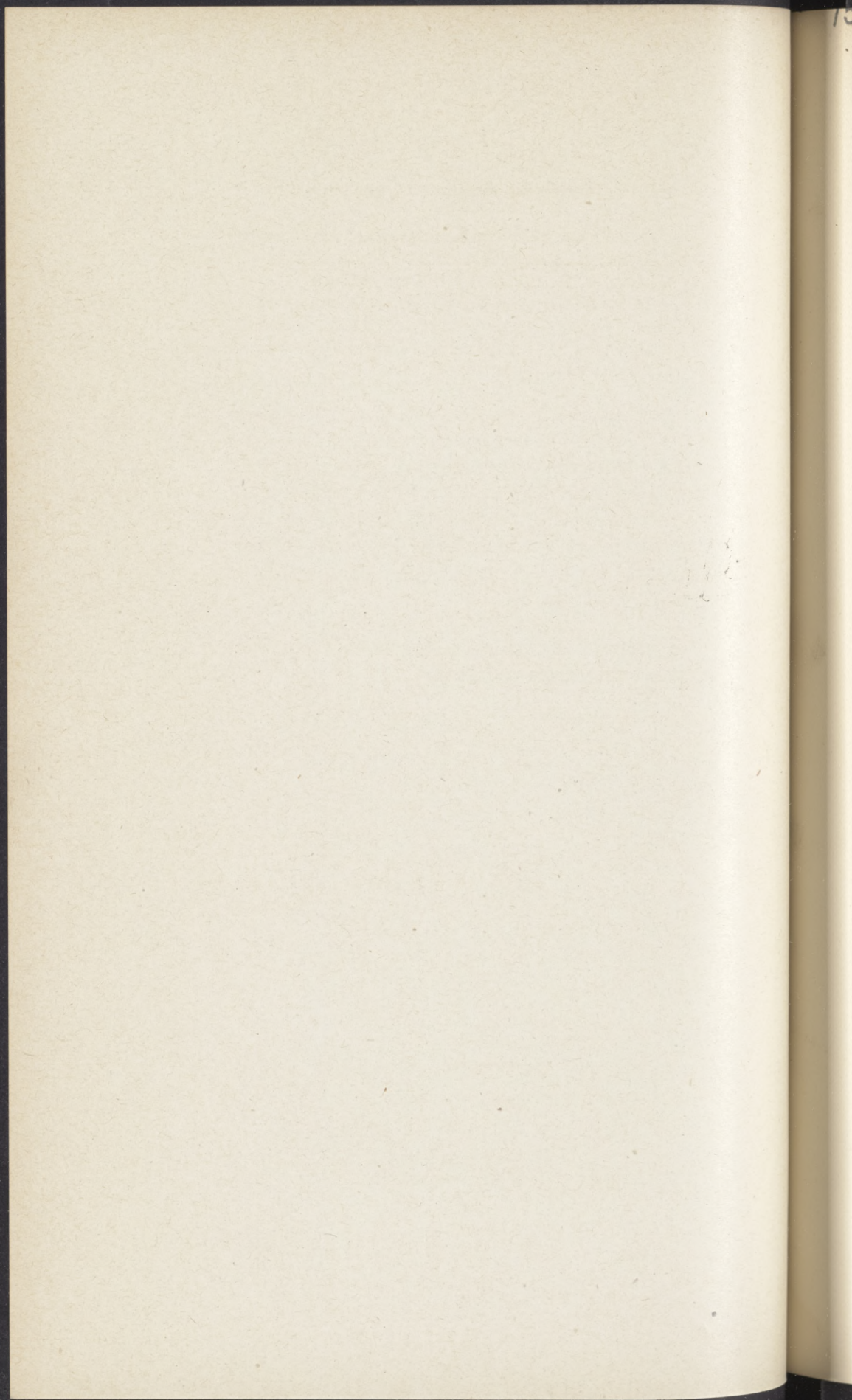
So in the case at bar, the verdict and judgment for the defendant is against the totality of the evidence for it is apparent from the testimony including the admission of indebtedness made at the trial by counsel for the defendant that there is *no* evidence to support the verdict and judgment for the defendant. This fact appears on the face of the record.

**We respectfully submit, therefore, that the judgment should be reversed.**

FEDER & RINZLER,  
Attorneys of Plaintiff-Appellant.

FEDER & RINZLER,  
Of Counsel.







**NEW JERSEY COURT OF ERRORS AND  
APPEALS**

CONVEYOR & EQUIPMENT Co.,  
Inc., a corporation,  
Plaintiff-Appellant,

vs.

ALEX SHAPIRO,  
Defendant-Respondent.

**BRIEF ON BEHALF OF DEFENDANT-  
RESPONDENT.**

**Abstract of Facts.**

Plaintiff sued defendant on three separate counts which, substantially, embrace one claim (case, pages 3 to 9).

At the trial defendant admitted an indebtedness to the plaintiff in the sum of \$36.43 (case, page 13), which left in dispute the sum of \$1,050.00 representing the alleged purchase price of a specially built conveyor (case, page 15, line 40; Schedule A, page 6, lines 30 to 34). The bone of contention was whether this machine complied with either a warranty implied in law from the sale of such a machine as to its fitness, or conformed with an alleged express agreement made between the plaintiff and the defendant as to the attributes of the machine when the same was ordered.



The issue thus narrowly defined was clearly charged to the jury by the Trial Court (case, page 72, lines 1 to 16) as follows:

“This is a case brought by Conveyor and Equipment Company against Alex Shapiro to recover the amount which the plaintiff says is due it upon a book account. The book account embraces certain items to the extent of \$36.43 which the defendant admits is due and owing; and it embraces a further item of \$1,050 for a conveyor, which the plaintiff alleges it sold and delivered to the defendant, and the conveyor is the item which is in dispute and which is being submitted to you.”

The Court, in its charge, also expressly directed the jury to bring in a verdict for the plaintiff in the sum of \$36.43 in the event that it resolved in favor of the defendant on the question of liability as to payment for the machine, saying:

“If your verdict is in favor of the defendant, then, of course, your verdict is simply for \$36.43, which he admits he owes” (case, page 74, lines 30-36).

The jury, however, obviously misconceived this particular direction of the court and upon rendition of their verdict found generally no cause of action for the plaintiff (see Postea, case, page 76).

This misconception of the jury represents the gravamen of this appeal, appellant contending that since he was, in any event, entitled to a verdict in the sum of \$36.43, he should, because of the misconception just mentioned, have the entire judgment reversed, and be allowed



a retrial of all the issues in the cause (see Grounds of Appeal, case, pages 78 and 79).

Appellant did not take out a rule to show cause to question the propriety of the jury's determination with respect to the principal item in dispute, namely, the verdict of no cause of action as to the conveyer which represented the sum of \$1,050, but seeks now, *by indirection*, to have it again tested.

In support of this statement counsel desires to advert, with the indulgence of the court, to but one circumstance *aliunde* the record.

When the *postea* was presented to the Trial Court for signature, counsel for the respondent, sensible that judgment should have been entered in accordance with the court's charge for the sum of \$36.43 in favor of the appellant, presented to the attorney for the appellant a *postea*, suggesting to him that such *postea* and stipulation would embody a correct verdict and, in the presence of Judge Newman, the Trial Judge, COUNSEL FOR THE APPELLANT DECLINED TO SIGN THE SAME. A copy of the proposed stipulation and *postea* follows herewith:



## NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

CONVEYOR & EQUIPMENT Co., Inc., a corporation, Plaintiff, vs. ALEX SHAPIRO, Defendant.	}	Action at Law. Stipulation and Postea.
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The above-entitled cause was tried before the Honorable Clifford L. Newman and a jury on the 29th day of October, 1928. The jury brought in a verdict of \$36.43 for the plaintiff and against the defendant and a verdict of no cause of action on the defendant's counterclaim.

Circuit Court Judge.

It is hereby stipulated by and between the attorneys for the respective parties that the judgment rendered by the jury be molded in conformity with the above postea.

Attorneys for Plaintiff.

Attorney for Defendant.

The action being laid in the Supreme Court, the Trial Court, of course, had no power of its own motion to control the situation.

In this posture of the case the appellant took the usual steps to perfect his appeal. The propriety thereof depends on the answer to the following question:



## ARGUMENT.

## POINT I.

Should this entire case, because of the erratum complained of, be remitted for a new trial; or should *this* court, by virtue of its inherent power, direct the Trial Court to file an amended *postea*, or itself mold the verdict in conformity with the Trial Court's charge?

"The tendency to avoid reversals for mere defects in form is reflected in the liberal power of amendment already given to the Court by the Practice Act of 1903, and further amplified by the Practice Act of 1912. The power of amendment may be exercised even by the Court of Errors and Appeals."

See:

Harris, "*Pleading and Practice in New Jersey*" (1926, page 653, Section 693), and the following citations therein contained:

*C. S.* 4091, Sec. 126; see *Hoboken v. Gear*, 27 N. J. L. 265; and *Miller v. West Jersey & S. R. Co.*, 76 N. J. L. 282, 70 Atl. 175.

*Cumul Suppl. to C. S.*, 2817, Secs. 299, 300; *Giaridini v. McAdoo*, 93 N. J. L. 138, 107 Atl. 437; *Klie v. Hollstein*, 98 N. J. L. 473, 120 Atl. 16; *Levenson Wrecking Co. v. Gatti-McQuade Co.*, 93 N. J. L. 184, 107 Atl. 277; *Kapherr v. Schmidt*, 98 N. J. L. 803, 121 Atl. 617.

Chancellor Walker, in the case of *Boniewsky v. Polish Home of Lodi*, 103 Law, page 323,



speaking for the full Court reviewed, *in extenso*, the legal principles and the procedure applicable to the case at bar. The sixth syllabus reads as follows:

“An amendment or amendments may be ordered to be made in an appellate court in aid of a verdict and to sustain a judgment, and this is extended even to matters hoped and intended to be tried in the case, and is not limited to matter within the issue upon the record.”

In the body of the opinion that learned jurist, after an exhaustive review of the authorities, summarizes his conclusions in the following language at page 338 of the case just cited:

“From the above, it may be deduced that the rule is, that an appellate court, to sustain a judgment, may regard a verdict expressed in untechnical language as truly finding the fact or facts in issue, or may mold a verdict itself, and affirm accordingly; but, where a verdict is to be changed to meet the facts which were introduced by amendment before the trial court, in order to support a judgment which will differ from one which might be entered on the issue sent down in the Circuit record, and which judgment must now be entered upon an amended verdict to be returned with an amended *postea*, the appellate court has power to require the judge who tried the case to mold the verdict and return it with such amended *postea*, so that such proper judgment may be entered.”

It would seem, therefore, that this Court has inherent power, either to direct the entry of the judgment in the sum of \$36.43 in conformity with the charge of the Trial Court, or to di-



rect the Trial Court to enter an amended postea as was suggested by counsel for the respondent at the time the original postea was signed. It is obvious from the evidence that the jury passed conclusively upon the question of the liability of the respondent to pay for the conveyor the sum of \$1,050.00, and decisively resolved that question in his favor.

It would seem, then, to counsel for the respondent, that for the Court to adhere to the suggestion made by counsel for the appellant would be to permit him to obtain a review of the judgment of the jury on the main issue in the cause in an indirect manner and by an attempted resort to a technicality such as should have no bearing in this Court, and which insignificant irregularity, by reason of the distinct issue submitted to the jury, can be easily corrected in this Court. It might further be stated that if the appellant was dissatisfied with the action of the jury this proper course of procedure would have been to apply to the Trial Court, or to the Supreme Court *en banc*, for a rule to review such action. This he did not see fit to do.

In view of the foregoing, it is respectfully submitted that the judgment should be affirmed with directions for molding the verdict to embrace the sum of \$36.43, which sum was admittedly due and owing to the appellant, but it is further respectfully submitted that the respondent be awarded the costs of this appeal.

REUBEN H. REIFFIN,

Attorney for Defendant-Respondent.

DAVID S. HERMAN,  
Of Counsel.



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Very truly yours,  
John B. Brown  
Attorney at Law



