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*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed June 11, 1919.

**New Jersey Supreme Court**

UNION COUNTY.

10

ABRAHAM ISAAC,

*Plaintiff-Respondent,*

*vs.*

HERMAN ELLIS, INC.,

*Defendant-Appellant.*

*Notice of Appeal.*

*To Stamler & Stamler, Esqs., Attorneys of the Plaintiff.*

20

Sirs:

Take notice that the defendant appeals from the whole of the judgment entered in this court to the Court of Errors and Appeals.

Perth Amboy, N. J., June 9th, 1919.

Yours respectfully,

WIGHT, WIGHT & GOLENBOCK,  
*Attorneys of Defendant-Appellant.*

30

Service acknowledged this 11th day of June, 1919.

STAMLER & STAMLER,  
*Attorneys for Plaintiff.*

40

*Summons.*

**SUMMONS.**

THE STATE OF NEW JERSEY to HERMAN ELLIS, a corporation:

10 (SEAL) YOU ARE SUMMONED to answer the annexed complaint of Abraham Isaac, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Judge of the said court, at Trenton, this fourth day of April, nineteen hundred and nineteen.

ENOCH L. JOHNSON,  
*Clerk.*

20 STAMLER & STAMLER,  
*Attorneys.*

30

40

*Complaint.*

**COMPLAINT.**

Filed April 9, 1919.

NEW JERSEY SUPREME COURT.

UNION CIRCUIT.

10

ABRAHAM ISAAC,

*vs.*

HERMAN ELLIS, a corporation,

*Plaintiff,*

*Defendant.*

*Action at Law.*

*Complaint.*

The plaintiff, Abraham Isaac, residing at the City of Elizabeth, in the County of Union and State of New Jersey, says: That the defendant is a corporation organized under and by virtue of the laws of the State of New Jersey.

20

1. That on the 28th day of December, 1918, the plaintiff sold and the defendant purchased, by an agreement in writing, five (5) cars of heavy melting steel suitable and acceptable on the defendant's order to Coatesville, Pa., at \$16.25 gross ton, F. O. B. cars Central Railroad Company of New Jersey tracks, Jersey City, N. J., that said agreement is evidenced by two letters, copies of which are hereto annexed, made part hereof and marked "Schedule A."

30

2. That at the time of the making of said contract the plaintiff was the owner of a large quantity of heavy melting steel such as is described in the first paragraph of this complaint, consisting of more than 25 cars.

3. That after the making of the said contract as set forth in paragraph 1, the plaintiff reserved for the use of and delivery to the defendant five (5) cars of said merchandise and held the same subject to further orders of the defendant.

40

4. That the plaintiff made all reasonable efforts to deliver to the said defendant the said five (5) cars of heavy melting steel in accordance with the terms of the contract, but that defendant neglected and refused to accept delivery of the same and thereby breached his contract of purchase.

*Complaint.*

5. That by reason of the failure of the defendant to accept delivery of the goods mentioned in paragraph 1 of this contract, the plaintiff sustained a loss of \$5.55 per gross ton on three cars of said merchandise of the weight of 311,440 lbs., equaling 139 tons 80 lbs., and also sustained an additional loss on two cars of said merchandise of the weight of 217,400 lbs., equaling  
 10 97 tons 120 lbs., in all sustaining damage in the sum of \$1,002.55.

6. That said loss was sustained by the said plaintiff, by reason of the failure of the defendant to comply with the terms of its agreement, and that the plaintiff after waiting a reasonable time to have the defendant accept said goods was obliged to sell the same in the open market at a loss, as set forth in paragraph 5 of this complaint.

Judgement will be claimed against the defendant for the sum of \$1,002.55, together with interest and costs of suit to be taxed.

20

STAMLER & STAMLER,  
*Attorneys for Plaintiff.*

## SCHEDULE "A".

HERMAN ELLIS,  
 DEALER AND BROKER IN SCRAP IRON,  
 STEEL AND METALS  
 Perth Amboy, N. J.,

30

December 28, 1918.

Mr. A. Isaacs,  
 Elizabeth, N. J.

Dear Sir:

40

As per conversation we had with you this date we confirm having purchased from you five cars of heavy melting steel suitable and acceptable on our order to Coatesville, Pa., at \$16.25 G. T., F. O. B. cars CRR tracks Jersey City, N. J. We have this day applied for a permit to cover movement of this material.

Yours truly,  
 Herman Ellis Inc.  
 per B. Pear.

*Complaint.*

December 28th, 1918.

Herman Ellis, Esq.,  
Perth Amboy, N. J.

Dear Sir:

Confirming my telephone call I beg to confirm sale to you of  
Five (5) cars steel scrap at Sixteen twenty five (\$16.25) dollars **10**  
per gross ton f. o. b. cars Jersey City, C. R. R. of N. J.

Please have permit issued for these cars at once as material  
will be loaded Monday.

Yours very truly,

Abraham Isaac.

*Notice to the Within Named Defendant:*

In the case the within summons and complaint are served **20**  
upon you personally, then take notice that if you intend to make  
a defense to this action, you must file an affidavit of merits  
within ten days from the date of service hereof upon you, and  
must file your answer within twenty days from the date of such  
service, and in default of the filing of such affidavit and answer  
judgment will be entered against you. Lawful service upon a  
corporation is deemed personal service for the purpose of this  
notice (P. L. 1912, p. 394, Rule 56).

STAMLER & STAMLER,  
*Plaintiff's Attorneys.* **30**

*Answer.*

**ANSWER.**

Filed May 7, 1919.

10 Defendant, a corporation organized under the laws of the State of New Jersey, having its principal office in the City of Perth Amboy, in the County of Middlesex, answering the complaint in the above entitled actions, says:

FIRST DEFENSE.

1. It admits the purchase by the defendant of five cars of heavy melting steel, suitable and acceptable on the defendant's order to Coatesville, Pennsylvania, at \$16.25 a gross ton, F. O. B. cars, Central Railroad Company of New Jersey tracks, Jersey City, and that the same were subject to the defendant procuring a railroad permit to move and ship said cars of steel.
- 20 2. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 2 of the complaint and leaves the plaintiff to his proof thereof.
3. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 3 of the complaint and leaves the plaintiff to his proof thereof.
4. It denies the allegations contained in paragraph 4 of the complaint.
5. It denies the allegations contained in paragraph 5 of the complaint.
- 30 6. It denies the allegations contained in paragraph 6 of the complaint.

SECOND DEFENSE.

1. That the said defendant purchased of the plaintiff five cars of heavy melting steel, to contain approximately twenty gross tons to a car, and that the said purchase was subject to defendant procuring railroad permits for the moving and shipping of the said cars to Coatesville, Pennsylvania.
- 40 2. That on account of an embargo on shipping being placed at Coatesville, Pennsylvania, point, defendant could not procure a permit for the shipping and moving of said cars of steel.
3. That the said defendant duly and promptly notified the said plaintiff that it was unable to procure the said permits to move said cars of steel and could not use the same.

*Reply—Judgment.*

THIRD DEFENSE.

1. That on or about February 17, 1919, plaintiff and defendant entered into an agreement, whereby the said contract referred to in paragraph 1 of the said defense was mutually cancelled, and the said plaintiff and defendant entered into a new or substituted agreement, whereby the said plaintiff agreed to ship five cars, of approximately twenty tons each, of No. 1 heavy melting steel, to the defendant, at Perth Amboy, New Jersey, and defendant agreed to accept and pay for the same. 10

2. That the plaintiff thereafter failed and refused to ship said steel according to said agreement.

WIGHT, WIGHT & GOLENBOCK,  
*Attorneys of Defendant.*

**REPLY.**

20

Filed May 2, 1919.

The plaintiff denies each and every allegation of the defendant as contained in its answer excepting such parts as admit the plaintiff's complaint.

STAMLER & STAMLER,  
*Attorneys of Plaintiff.*

**JUDGMENT.**

30

This action was tried before Judge George S. Silzer, with a jury, in the presence of the counsel of the respective parties at the Union County Circuit Court on May 26th and 27th, 1919.

The case having been heard and submitted to the jury they returned their verdict as follows: That they find in favor of the plaintiff and assess the damages at the sum of eleven hundred and two dollars and fifty-five cents. Whereupon it is adjudged that the plaintiff, Abraham Isaac, recover of the defendant, Herman Ellis, Inc., a corporation, the sum of eleven hundred and two dollars and fifty-five cents and his costs, which are taxed at the sum of forty-eight dollars and ninety-three cents, making in the whole the sum of eleven hundred and fifty-one dollars and forty-eight cents. 40

Judgment entered May 27, 1919.

*Grounds of Appeal.*

**GROUND OF APPEAL.**

Filed October 17, 1919.

10 **New Jersey Court of Errors and Appeals**

ABRAHAM ISAAC,

*Plaintiff-Respondent,*

*vs.*

HERMAN ELLIS, INC., a corporation,

*Defendant-Appellant.*

*On Appeal from  
the Union County  
Circuit Court.*

*Grounds of Appeal.*

20 *To Stamler & Stamler, Esqs., Attorneys for Plaintiff-Respondent.*

Sirs:

Take notice that the following are the grounds upon which the defendant, Herman Ellis, Inc., a corporation, appeals from the judgment heretofore entered in this cause against it:

1. That said judgment was given for the plaintiff, Abraham Isaac, and against the defendant, Herman Ellis, Inc., a corporation, whereas by the law of the land, judgment ought to have been given for the said Herman Ellis, Inc., a corporation, and  
30 against the said Abraham Isaac.

2. The Judge before whom the trial of the issues joined between the parties was had, erroneously denied defendant's motion for the direction of a verdict in its favor at the close of the whole case.

Dated, October 15, 1919.

Yours respectfully,

WIGHT, WIGHT & GOLENBOCK,  
*Attorneys of Defendant-Appellant.*

*Abraham Isaac, direct.*

# New Jersey Supreme Court

UNION COUNTY CIRCUIT.

May Term, 1919.

---

ABRAHAM ISAAC

*vs.*

HERMAN ELLIS, INC., a corporation.

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10

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. George S. Silzer, Circuit Court Judge, and a jury, at the Union County Court House in the City of Elizabeth, New Jersey, on the twenty-sixth day of May, A. D. 1919, at 2:35 P. M.

20

Appearances:

Messrs. Stamler & Stamler, representing the plaintiff.

Schuyler M. Cady, Esq., Messrs. Wight, Wight & Golenbock (Henry K. Golenbock, Esq., present), representing the defendant.

A jury being empanelled and found satisfactory, they were sworn.

Mr. Stamler opens the case for the plaintiff.

Mr. Golenbock opens the case for the defendant.

30

ABRAHAM ISAAC, the plaintiff, being duly sworn according to law, on his oath saith:

*Direct examination* by Mr. Stamler.

Q Mr. Isaac, you reside in Elizabeth? A I do.

Q All your life? A All my life.

Q What is your business? A Iron and metals broker.

Q Did you have any dealings with the Herman Ellis, Inc., Company? A I had.

Q Was it in the way of correspondence? A Correspondence, and also telephone communications.

40

*Mr. Stamler.* I demand the production of letter dated December 28th, 1918, written by the plaintiff to the defendant.

*Abraham Isaac, direct.*

Q I show you letter dated December 28th, 1918, and ask you whether you wrote that letter? A That is my signature.

Q Did you write it? A I did.

*Mr. Stamler.* I offer that letter in evidence.

(Letter entered in evidence and marked Exhibit P. 1.)

10

*Mr. Stamler.* I will read that letter.

(Letter read by Mr. Stamler.)

Q I show you letter dated the same date, December 28th, purporting to come from Herman Ellis. A Yes, sir.

Q Did you receive that letter? A I did.

*Mr. Stamler.* I offer that letter in evidence.

(Letter entered in evidence and marked Exhibit P. 2.)

(Letter read to jury by Mr. Stamler.)

20

*The Court.* Do you claim they crossed each other?

*Mr. Stamler.* These letters crossed each other, but there is no issue as to the contract.

Q These letters crossed while— A I confirmed the sale and he confirmed the purchase.

Q Before you got into negotiations with Ellis & Company relating to this scrap, did you have a quantity on hand of yours? A I had.

Q Where? A In Jersey City.

30

Q How much of it? A Why, at the time I sold him the five carloads I had three hundred tons.

Q What did you do after making this contract? A I held the cars.

Q Did you load them? A I loaded some cars for him.

Q How many cars did you load? A Three cars at that time.

Q How soon after you got the letters of December 28th? A Immediately. They were loading while letters were changing with one another.

40

Q Then what happened after that? A Waited until the second day of January, called him on the 'phone and asked him what disposition—

Q You called who on the 'phone? A Herman Ellis.

Q Who was he? A Well, rather, I don't know; I don't recall talking to Mr. Ellis, or one of his representatives, but I

*Abraham Isaac, direct.*

think it was one of his representatives at his office in Perth Amboy, and I stated to him that I had two of the cars moving.

Q Yes. A And he says he secured no permits. Well, I said to him, there was material moving to Pennsylvania, and the cars would be under demurrage, and I wanted to know what he intended to do. Well, he says, he can't do anything. Well, I said, then I am going to go ahead and ship. And I shipped three cars to Syracuse, New York.

10

Q He said what? A He said, "I can't do anything." I said, "I am going ahead and ship and sell them to someone else." He said, "I can't give you no orders." I said, "It isn't up to me, it is up to you." So I sent those three cars to Syracuse, New York.

Q Who did you send them to? A To J. Joseph & Company, Woolworth Building, New York City.

Q Is this your day book? A That is my day book.

20

Q Will you just refer to that and tell us the car numbers?

A On the first month, third day—

Q January 3rd? A The bill in the book was marked Herman Ellis and I shipped it to J. Joseph Bros., Syracuse. This car was C. R. R. 85028.

Q Go ahead. A The weight, gross tare 148,860 pounds; 105,340 pounds net weight. Second car, same day, third day, first month, car P. R. R. 275,507; gross weight 156,420 pounds; 44,760 tare; 111,660 pounds net.

Q Yes. A P. R. R. 334,650, shipped first month, third day; 143,200 pounds gross; 48,760 pounds tare; 94,400 pounds net.

30

Q The total shipment of that amounted to 311,440 pounds?

*Mr. Stamler.* That is a matter of addition.

Q I show you letter dated January 5th, 1919, and ask you whether that shows the confirmation of your sale to Joseph Joseph? A That does.

Q Of the cars in question? A The cars in question.

Q Do they give the numbers of cars you just read from the book? A Numbers of cars.

Q And the price at which you sold? A Price at which I sold.

40

(Letter entered in evidence and marked Exhibit P. 3.)

Q Who paid the freight to Syracuse, New York? A Well, Joseph, and deducted it from my account.

*Abraham Isaac, direct.*

Q What is the freight per ton to Syracuse, New York? A \$3.50 gross ton.

Q What did you sell these three cars to Joseph for? A Number one heavy moulding steel.

Q For how much? A Fourteen dollars per gross ton, F. O. B.  
10 Syracuse, New York.

*The Court.* What was the contract price?

*Mr. Stamler.* The contract price in this case was—

A \$16.25 F. O. B. Jersey City.

*Mr. Stamler.* I will read this letter.

Q What was the loss to you on this shipment? A The difference of \$16.25 I was to receive at Jersey City, and the difference of \$10.50 that I received at Syracuse, New York.

20 Q \$10.50 or \$10.70? A \$10.70.

Q That made a difference to you of \$5.50 a gross ton? A Per gross ton.

Q And you had there 311,440 pounds? A Just as you have the figures there.

Q How many gross ton is that? Have you figured that up? Here is a statement. Just tell the jury. A The weights of the three cars 311,440 pounds, the difference at \$5.50.

Q Yes. A Amounts to \$771.64. It does not require a ton. It is just the amount. It is the difference of amount on the  
30 cars.

Q What did you do after that? A Then I got in touch with Ellis several times, and I stated that I wanted to still give him his cars, if he wanted them; and he made a proposition if I would ship five cars to his yard and pay the freight, he would accept them. I said, "I will not, as long as you bought the material on cars," I said, "that is the way you are going to take it." So he said, "we will not take the material." And I said, "if that is the case, I will keep on shipping again." So then I turned around and I shipped two cars, to fill his order  
40 of five cars, to the Nagel Steel Company at Rahway, New Jersey.

Q Mr. Ellis wanted you to ship, you say, to Perth Amboy? A Ship the cars to his name, Perth Amboy.

Q Why didn't you ship them? A Because he wanted me to stand the freight.

*Abraham Isaac, direct.*

Q What did that amount to? A \$1.50 per ton.

Q Were you willing to ship them if he paid the freight?  
A That is what I was only too glad to give him the cars if he had paid the freight.

Q Then you sold them, you say, to whom? A I sold them to Nagel Steel Company at Rahway here, through their purchasing department at Pottstown. 10

Q I show you a paper and ask you what that is? A That is an order for one carload of heavy moulding steel scrap from Nagel Steel Company.

Q Is that the scrap you had for Joseph & Company? A Same material.

Q How much did you sell it at? A At \$15.00 F. O. B. cars, delivered to their warehouse, Rahway, New Jersey.

Q What was that net to you? What was the freight on that?  
A \$2.10. 20

Q So you got \$12.90? A \$12.90.

Q You sold that at \$12.90 a gross ton?

*Mr. Stamler.* I offer that order in evidence, the one of January 31st, 1919.

(Order entered in evidence and marked Exhibit P. 4.)

Q Here is another order dated February 3rd, 1919. What is that for? A This car is also for a carload of heavy moulding steel scrap to be delivered at their warehouse, at \$15 per gross ton. 30

Q And you really got only \$12.10 for that? A No. \$12.80.

Q What was the freight to Rahway? A \$2.10. Seven cents war tax on that.

(Order entered in evidence and marked Exhibit P. 5.)

Q What loss did you sustain on the other two cars? A The other two cars contained 217,400 pounds, at a difference of \$3.42 a gross ton, \$331.91.

Q What is your total claim? A \$1,102.55.

Q Before you made the sale of the second shipment to Rahway, did you write a letter to the Herman Ellis Company? Is that your letter? A That is my letter. 40

*Mr. Stamler.* I offer that letter in evidence.

(Letter entered in evidence and marked Exhibit P. 6.)

*Abraham Isaac, direct.*

Q Why did you write this letter, Mr. Isaac? A Because I still wanted to fill his contract, as the market was getting lower and lower all the time.

Q Did you have the merchandise on hand? A I had the merchandise at all times to give him.

10 Q Did they answer you on this letter? A I don't recall.

Q I mean other than by letter? Did they call you on the 'phone, or have any 'phone conversation? A No. There was no acknowledgment of my letter at all.

*Mr. Stamler.* I demand letter of February 11th.

*Mr. Golenbock.* We haven't got that.

Q I show you copy of letter dated February 11th, 1919, and ask you whether you wrote that letter to the defendant in this suit? A I did.

20 (Letter entered in evidence and marked Exhibit P. 7.)

*Mr. Stamler.* I offer the letter of February 13th, 1919, from the defendant to the plaintiff.

(Letter entered in evidence and marked Exhibit P. 8.)

*Mr. Stamler.* I offer the letter dated February 14th from the plaintiff to the defendant.

(Letter entered in evidence and marked Exhibit P. 9.)

Q Did you get any further correspondence after that letter? A That was all.

30 Q What did you do with the balance of this material that you had on hand in February? A Shipped it to the Nagel Steel Company.

Q After February 14th? A Well, I sold that to other parties.

Q At what price did you sell it?

*Mr. Golenbock.* I object to that on the ground that a bill of particulars calls for—interrogatories have been served which call for certain materials which have been sold to the people he indicated—

40 *The Court.* Do you claim the damages were—

*Mr. Stamler.* We are going to show we are giving them—

*The Court.* I understand he admits you claim pay for those you have already shown.

*Abraham Isaac, direct.*

*Mr. Stamler.* Yes, we want to show we sold the others for less money, but we claim only damage for what we have shown.

*Mr. Golenbock.* I object to the testimony along that line. They have given us data and particulars as to certain shipments. 10

*The Court.* I understand their point is the damages they claim, which are those they have already shown. Now the purpose is to show that after that the market was still less, so that they do not claim any more damage, but they show they could not have sold it for more.

*Mr. Stamler.* That is the idea.

*Mr. Golenbock.* I cannot see how that is material, even though they could have sold it for more.

*The Court.* Because they held it open, as I understand, as late as February, and if the market had been higher at that time you might then claim on your side that they sold it for too little. I think it is admissible. 20

*Mr. Golenbock.* Prays exception.

Exception allowed—sealed accordingly.

*Judge.*

Q What did you do with the balance of the material that you had left? A Shipped it to different mills. 30

Q What is the price? A Average about \$14 to \$14.25, with the freight rates, a little higher than I would have received if I had shipped it to Rahway to the Nagel Steel Company, which was the nearest point of destination.

Q When you say delivered—

*By the Court.*

Q Was that a less price than what you had sold to these others for? A It was. 40

*By Mr. Stamler.*

Q It was at a less price? A It was at a less price.

*Mr. Stamler.* Cross examine.

*Abraham Isaac, cross.*

*Cross examination by Mr. Golenbock.*

Q Mr. Isaac, do you recall with whom it was you had this conversation, upon which you had sent the letter, and which Herman Ellis, Inc., had sent a letter confirming the order?

A Confirming the purchase?

10 Q Who did you have a talk with? A Mr. Pear.

Q Is this the gentleman here? A I do not know if this is Mr. Pear or not.

Q Did you ever meet him? A I met some gentleman down there, I have met several of them, but I couldn't swear this is the gentleman.

Q In the last year how many times have you visited the office of the Herman Ellis, Inc.? A This year. Not last year.

20 Q Did you ever see Mr. Pear there before the last visit you made at the office? A I did.

Q This conversation you say was over the telephone? A The sale and purchase was over the telephone?

Q You talked at that time about permits, didn't you? A It was Mr. Ellis that committed himself about permits, because I was not shipping—

Q You have answered the question. You have talked about permits at the time the order was given? A He spoke about it. He called my attention to permits.

30 Q You knew at the time that the United States Railroad Administration required permits before any car or any material could be moved? A To certain places only.

Q And you knew that Coatesville was one of the places which required permits to move material? A I knew it was.

Q You knew it very well, didn't you? A I did.

Q And if permits were not obtained material could not be moved to Coatesville, you knew that, didn't you? A There was material—

40 Q Answer the question. If permits were not obtained from the railroad administration you could not move any cars or material to Coatesville? A That is true.

Q Don't you remember the conversation that you had with Mr. Pear that this order was subject to his procuring permits to ship the material? A It wasn't understood because—

Q Didn't he say that to you? A He did not. He said to me, "I will secure permits for you within a few days." He said

*Abraham Isaac, cross.*

that. And I said, "that is the reason I am going to give you the material, because I could have sold the material to someone else."

Q Didn't he tell you that Coatesville was the only point where they had any orders for steel? A But there was—

Q Just answer the question? A That is true, he said that. But I didn't know which mill he was shipping to. 10

Q He also told you the order he had from Coatesville was a small order, and that he did not want you to load up big cars, didn't he? A Did not mention. He told me that he had an order of cars. Not tonnage. And at that time it was always understood the railroad administration demanded—

*Mr. Golenbock.* I move that latter part be stricken out.

Q Didn't he tell you that they had a small order from Coatesville for steel? A Number of cars. Not tonnage. 20

Q Didn't he say that he had a small order? A No. He said he had a small order, he did say that.

Q What did he say about it being small? A He said he had a small order down there and he would take the five cars.

Q And didn't he also say, after he told you that he had a small order, that he wanted you to ship five minimum weight cars? A Five minimum?

Q Yes. A No, sir.

Q Didn't he say that because he had a small order that was the reason he wanted you to ship five minimum weight cars? A No. It is impossible, and he knew that as a business man it couldn't be done. 30

Q Why can't it be done? A Because the railroad company wouldn't give you cars to load at twenty tons, where one car carries 150,000 pounds. They wouldn't give you the cars.

Q Mr. Isaac, how long have you been in this line of business? A I have been all my life in it, that is, I can say for the last twenty-three years.

Q Isn't it a fact, Mr. Isaac, that the railroad company will give you what they call a carload rate, if you have twenty tons in it? A They will give you that, yes. 40

Q Isn't that right? A That is true.

Q And isn't it also a fact that if you have twenty tons they will charge you at the carload rate, but if you have less than

*Abraham Isaac, cross.*

twenty tons they will charge you a higher rate? A That is true.

Q When you load a car, Mr. Isaac, there is nobody there watching you? You load any car— A But I didn't do the loading. The railroad did it themselves.

10 Q The railroad company did the loading? A The railroad company did the loading of those three cars that went out, and it was the manager of the railroad company, when the second two cars went out, that they had to be loaded to full capacity.

Q William is the name, and he was not working for the railroad company, was he? A The New Jersey Central Company.

Q Is that a railroad company? A It is a side issue of the Jersey Central.

Q You hired these men to load your cars, isn't that all there is to it? A I didn't hire them. They charge so much per ton  
20 for loading.

Q In other words, the only business they do is to load cars? A Under the supervision of the railroad company. The railroad property.

Q You didn't mean to convey the impression to the Court and jury that every car that you order is loaded by the railroad company? A I could not load the cars myself.

Q I am not saying you could load the cars yourself, but the railroad don't load them either; it is simply under your supervision, under your charge? A I know I can't. The railroad.  
30 I did not handle the material either. The material was put on railroad property and they took care of the cars. They were paid for the goods, and I understand they have a working agreement with someone that handles the material, as to cost per ton.

Q It was up to you to say how much was to go into any one car? A There has never been a case of that kind. They would not give me cars at that time to do it.

Q It was under your supervision, under your say so, as to how much should go into any one car, isn't that right? A No,  
40 sir.

Q Your say as to how much would be loaded into any one car that you order? A The man that loads the cars.

Q But the man that loads the cars is a man working for you, and not for the railroad? A Not working for me. I have nothing to do with it.

*Abraham Isaac, cross.*

Q Isn't there any contract with you at so much a ton? A No, sir. The railroad company pays him for the loading. They charge me with it.

Q Then you could not tell what was loaded in those cars? A From the New Jersey Central Company I haven't got it—

Q Can you get it by tomorrow morning? A Can I get it by tomorrow morning? 10

Q Yes. A I can't give it to you, because I had an arrangement with the lighterage people, to the J. C. McQuaid Company, who lightered the material to the docks, and he charged me so much per ton.

Q You didn't pay that to the Jersey Central, did you? A He paid it to the Jersey Central for handling it.

Q He paid the Jersey Central Railroad Company for handling? A He paid the Jersey Central Railroad Company for handling; yes, sir. 20

Q Is he working for the Jersey Central Railroad? A I don't know if he is or not.

Q Did you ever hear, Mr. Isaac, that the railroad company had any supervision as to the loading or unloading, other than materials belonging to them? A From what I understood, and from the experience I have had, that when a man has a shipment from 250 to 500 tons, there was a scarcity of cars, and they demanded that the cars be loaded to capacity, or overload them ten per cent. to fifteen per cent. 30

*By the Court.*

Q Was this just a war time measure? A I have cards right here—

Q Listen. A It was a war time question.

Q Not a matter in normal times? A That if you are a large shipper, and you make the cars small, and give them a long ride, the railroad company will notify you that they will prohibit giving of cars to you, and the question was of loading the cars to capacity, instead of taking three where one will answer. 40

*By Mr. Golenbock.*

Q Did you ever get such a notice? A I have been notified by the railroad company at Elizabeth.

Q When was that? A During the war time.

Q In writing? A Verbal.

*Abraham Isaac, cross.*

Q And who was it notified you? A The clerk of the Jersey Central Railroad.

Q Sure of that? A Positively.

Q That same rule applies whether it was during war time, or whether it was not during war time? A I have never had it anywhere that I can go ahead and load small cars.

Q At the time Mr. Pear spoke to you on the telephone you knew that this order was subject to this procuring of permits of the railroad administration? A I did not.

Q Mr. Isaac, you say that on January 5th you sold three cars of iron to Josephs, is that right? A I did.

Q You didn't say anything at all about it to Mr. Ellis, or to the corporation? A Sir?

Q You didn't say anything to anybody of the corporation that you had sold three cars to Mr. Joseph, on their account, did you? A I didn't think there was any necessity for it, because I was notifying him at all times that I was always in position to get the material and fill his order.

Q But you didn't say anything to Mr. Ellis, or to Mr. Pear, or anybody else of the corporation, that you had sold three cars to Mr. Joseph? A I did not.

Q And on January 24th of 1919, letter marked Exhibit P. 6, you stated that "the material will have to be moved"? A I did.

Q "And trust that you will let me have an early reply to same." So that at that time you hadn't shipped any material belonging to Mr. Ellis? A It is not the question of the way I took it. That letter replies that I have had material for to fill his contract at all times, and I wanted to get his material shipped, because of the price declining. I was satisfied to give material at any time.

Q Did you ship any other cars, or take any other orders between December 28th and January 5th? A No, I did not.

Q So that the orders, after the one for Mr. Ellis, was to Mr. Joseph? A That is right.

Q Did you have any orders after that for a number one moulding steel? A I had plenty before and plenty after.

Q I asked you whether you had plenty after? A I did.

Q When is the next order that you received, after the one that you got from Mr. Joseph? A I can't say offhand.

*Abraham Isaac, cross.*

Q Look at your book, please, and say whether— A I can't say off my book, because my book carries contracts from last November and December.

Q Wouldn't that show from what order you made shipment?

A I don't know. I just have a book to show shipment of cars.

Q Have you any book will show orders as you get them?

A My file.

Q What is this book you have here? A My day book of daily shipments.

Q What does that indicate? A That indicates the shipping of car, destination, number of cars, and weights.

Q Does it show anything with reference to the order? A No order number on these books.

Q How can you determine that the order you shipped to Joseph was the—

*Mr. Golenbock.* Have you any objection to—

*Mr. Stamler.* Let counsel see the book. Nothing to conceal about it.

*Mr. Golenbock.* Let us hope so.

Q Where you have on the side of each page the dates, does that show the dates of shipment, or the date when the order was received? A That is the date of the car being forwarded.

Q Will you turn to the page where you have to show that the shipment was made to Joseph, of the cars that you had intended to be for Ellis? A The name of shipment runs right out on the top, marked "Coatesville," and erased and marked "J. Joseph & Company," and marked "Syracuse, New York." Showing the three cars.

Q You say that the three cars are marked "Coatesville"? A Three cars marked "Coatesville."

Q Will you turn to the first one on top of the page and say whether that is marked "Coatesville"? A No. That was a carload of mixed scrap. Entirely a different car altogether.

Q Which cars are the ones? A 85,028, 275,507, 334,650.

Q Could you tell from that page when you started to load those cars? A When I started to load?

Q Yes. A I can recall by looking, of the original shipped to me, that is, the sale to me by the broker, which is denoted here, I can tell when the boat, or cars, were turned over.

*Abraham Isaac, cross.*

Q But can you tell by this page here, page 202 of your book, by any mark or memorandum there, when these cars were commenced to be loaded? A On January 2nd.

Q All of them, three of them? A These three cars.

Q How long does it ordinarily take you to load a car? A Those cars were loaded by magnet. Three cars in three hours.

10 Q Three of them in three hours. Will you show us the next shipment, after these three cars will you turn to the next shipment of any heavy moulding steel that you made between that shipment and the one that you made to Rahway? A Next shipment 1/24 and on the 1/25. Those were shipped some time after that.

Q Where did those shipments go? A They went on an order to the Nagel Steel Company at Rahway, New Jersey.

20 Q Are those the ones you are talking about? A No, sir. That was an order that was taken in the early part of, that I can recall, if I am not mistaken, in the early part of December, to the Nagel Steel Company.

Q How much of an order was that? A I can't say offhand. I have very many orders with the Nagel people. I don't stipulate, or use any marks whatever.

Q How many cars did you send? A Two. One on the 24th and one on the 25th.

30 Q When you received these orders from the Nagel Steel Company on January 31st and February 3rd, you didn't have in mind anything of the Ellis order, did you? A I had so much material all along in mind. Five cars is nothing to handle. It was to get it cleaned up.

Q In other words, when you were taking these orders, it was not on behalf of the stuff or material sold to Ellis? A On behalf of it?

Q Yes. For the material that you sold to Mr. Ellis? A I can't seem to get you clear on that.

Q When you were taking orders for steel, after December, 1918, you didn't have in mind to cover any of the material that you sold to Mr. Ellis? A Nothing at all.

40 Q Or the corporation? A Nothing at all.

*Mr. Golenbock.* I ask for the production of a letter sent by H. Ellis, Inc., to Mr. Isaac, dated February 17th, 1919.

*Mr. Stamler.* No such letter was received by us, and no such demand was made of us to produce such a

*Abraham Isaac, cross.*

letter. We have a demand for a letter of the 14th, which we produced. But there is no letter of the 17th, and it was never demanded of us.

Q Mr. Isaac, will you kindly give us some of the weights of cars that you shipped to others, after you had made the shipment to Nagel? A I can't say offhand. Let me have my book and I will be only too glad to give it to you. 10

Q Yes, sir. We are talking about moulding steel, of course. A Two cars went to Nagel, that was the 1/24.

Q I am talking now about after the two cars you claim you shipped to Nagel on our behalf. A Outside of those two cars the first car I. N. C. 11878, 100,620 pounds; P. & L. 810,293, 120,540 pounds; next car steel P. & R. 26,000, 95,800; P. & L. 46,103, 102,400; P. R. R. 80,138, 120,000 pounds.

Q Was that all to Nagel? A No. The two upper cars went to Louis Brothers & Company, one went to Connecticut, the other went down to Nagel Steel. P. R. R. car went to Connecticut; P. & L. 129,800 went to Pennsylvania. 20

Q Mr. Isaac, is there any way on your book to indicate that these cars contained heavy moulding steel? A By my word "steel" opposite each car.

Q Is there any way to indicate that they were borings or turnings? A By every car denotes on my book which it is. Borings and turnings, turnings, steel, steel, steel, steel, mixed turnings, borings.

Q Mr. Isaac, isn't it a fact that the loading of the cars would all depend upon the size of your order? A Orders for carloads have always been loaded heavy on account of the demand—an order for tonnage is always heavy cars. 30

Adjourned until tomorrow, May 27th, 1919, at 9:30 A. M.

*Abraham Isaac, cross.*

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

May Term, 1919.

10	ABRAHAM ISAAC  <div style="text-align: center;"><i>vs.</i></div> HERMAN ELLIS, INC., a corporation.
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Transcript of stenographer's notes of evidence, taken in the above entitled matter, before Hon. George S. Silzer, Circuit Court Judge, and a jury, in the Union County Court House, City of Elizabeth, New Jersey, on the twenty-seventh day of May, A. D. 20 1919, at 9:30 A. M.

Appearances:

Messrs. Stamler & Stamler, representing the plaintiff.

Schuyler M. Cady, Esq., Messrs. Wight, Wight & Golenbock (Henry K. Golenbock, Esq., present), representing the defendant.

ABRAHAM ISAAC, resumed.

*Cross examination* (continued) by Mr. Golenbock.

30 *Mr. Golenbock.* I demand production of letter dated February seventeenth, 1919, sent by Herman Ellis, and marked to Mr. Isaac, the plaintiff in this case.

*Mr. Stamler.* In reply would state that the demand was made upon us last night, although a demand for the production of other documents was made upon us over ten days ago. And that letter was not included. We have no such letter.

Q I show you a paper, and ask you if you ever received the original of the contents of this letter? A No, sir.

40 *Mr. Golenbock.* I offer that for identification.  
(Letter marked D. 1 for identification.)

Q In your letter of February fourteenth, marked Exhibit P. 9, when you wrote that you were satisfied to accept one hundred tons in five cars of steel to be shipped to Perth Amboy?

*Abraham Isaac, cross.*

*Mr. Stamler.* I object to it; the letter speaks for itself.

*Mr. Golenbock.* It is already in evidence.

*The Court.* I will allow the question.

(Question repeated by stenograprer.)

A I was not.

10

*Mr. Stamler.* I object to it, unless the letter is sent by the plaintiff.

*The Court.* He said he was not.

Q Would this in any way refresh your recollection that you were satisfied to accept five cars of steel to be shipped to Perth Amboy, containing one hundred tons? Just answer yes or no; would that refresh your recollection? A Question again.

(Question repeated by the stenographer.)

20

A It would.

Q Isn't that a fact that you were satisfied when you wrote this letter to ship five cars containing one hundred tons of steel to Perth Amboy? A No, sir.

Q What did you mean by that letter—what did you mean when you said "As your Mr. Ellis stated he would accept five cars of twenty tons to the car, or total of one hundred tons, and I could ship this to your yard Perth Amboy, New Jersey." Then you said, "I shall be pleased to have you advise if you will accept the shipment of these five cars in question?" A The letter referred to a telephone conversation calling my attention to the contract being void. After answering the telephone conversation I dictated that letter and mailed it off to draw the attention that Mr. Ellis made the proposition to take five cars of one hundred tons which was not satisfactory to me.

30

Q Did you say anything in your letter that that proposition was not satisfactory to you?

*Mr. Stamler.* Letter speaks for itself; I object to it.

Q Why didn't you say in your letter that the proposition to ship five cars of scrap iron of one hundred tons, to Perth Amboy, was not satisfactory to you? A Because it was not necessary over the telephone I told him.

40

Q Yet you say that you incorporated into this letter the entire conversation pertaining to the shipment? A Not at all; just

*Abraham Isaac, cross.*

to draw the attention to the conversation with Mr. Ellis. Mr. Pear, I thought, was talking to me, and stated Mr. Ellis was away.

Q What did you mean when you said, "I should be pleased to have you advise if you will accept the shipment of these five cars in question?" A Because I wanted to get the thing cleared up.

Q When you said these five cars in question, didn't you refer to the five cars of twenty tons to the car or a total of one hundred tons, and I could ship these to your yard, Perth Amboy, New Jersey, as previously referred to in this same letter?

20 *Mr. Stamler.* I object to that. That does not incorporate the whole statement in the letter, because he omitted a very important part of it. The letter further states—

*Mr. Golenbock.* I think I have a right to examine this witness as to what his state of mind was, and what his intentions were.

*The Court.* What was further stated in the letter?

*Mr. Stamler.* The letter states this, "that he also stated he would give me one hundred dollars if I would cancel the order. I stated to him at that time I didn't care for the money." (Reading letter.)

30 *The Court.* It seems to me it is very important.

*Mr. Golenbock.* I will incorporate that if your Honor suggests it.

*The Court.* Let him have the whole letter.

*Mr. Golenbock.* No. I already asked him about the whole letter. I am now getting at the particular parts of the letter.

Q When you asked to be advised whether Mr. Ellis, or the incorporation, will accept the shipment of these five cars in question, didn't you refer that to the cars as you indicated in this letter? A No, sir.

Q Then what did you mean when you said these cars in question? A The cars in question? The conversation was with Mr. Pear, Mr. Ellis not being at home, and I drew Mr.

*Abraham Isaac, cross.*

Pear's attention, after getting through talking to him by letter, telling him to take it up with Mr. Ellis to see if we can't get the cars in question shipped, which meant the order which is open of five cars that is due him.

Q So this conversation you had with Mr. Pear and not with Mr. Ellis? A With Mr. Pear, and not with Mr. Ellis.

Q What did you mean in your letter, "As your Mr. Ellis stated he would accept five cars of twenty tons to the car or total of one hundred tons, and I could ship this to your yard, Perth Amboy, New Jersey," and he also stated he would give you one hundred dollars? A Mr. Pear told me he would consider the order cancelled.

Q What did you mean when you said Mr. Ellis stated it if it was Mr. Pear said it to you? A That was to make it real plain—

Q That is what you want, to make it real plain. A That letter will cover this: taking Mr. Ellis asking to accept the shipment five cars; Mr. Ellis made me the proposition as there noted—

Q Didn't you say— A Wait a minute!

Q Your answer is sufficient for the present. Didn't you say you had this conversation with Mr. Pear and not with Mr. Ellis? A First conversation at the top of my letter covers the conversation with Mr. Ellis; second covers the conversation with Mr. Pear, when he states over the telephone he considers my order cancelled.

Q I call your attention to the top of that "in reply to your letter of the thirteenth instant I beg to advise you that I do not consider my order void." Wasn't this in answer to a letter and not any conversation with Mr. Pear? A It was also conversation as well as a letter.

Q Why didn't you say in reference to your conversation as well as your letter of the thirteenth instant? A Because I was replying to his letter.

*Mr. Stamler.* The letter states, it says: "at no time I had any conversation with him"—

*Mr. Golenbock.* If that is what you want to put in, that is what I am trying to bring out.

*Mr. Stamler.* Let him see the letter.

*Abraham Isaac, cross.*

*Mr. Golenbock.* He seen it three times; if you are worried about it I will show him it again.

*Mr. Stamler.* Let him see it.

Q Would you care to examine it, Mr. Isaac?

10 (Hands paper to the witness.)

Q Now, you are sure you got it straight now, Mr. Isaac, have you? A I got it straight.

Q Which is it; did you have a conversation with Mr. Pear or a conversation with Mr. Ellis? A Conversation with both.

Q Conversation with both over the telephone? A Over the telephone.

Q With whom did you have the conversation first? A Mr. Ellis.

20 Q And second with Mr. Pear? A And second with Mr. Pear.

Q Did you ever get any correspondence from the corporation? A Yes, sir; I did.

Q This letter which was marked P. 9, was this a response to letter or conversation, or both? A To letter and conversation, both.

Q To the conversation you had with both Mr. Ellis and Mr. Pear? A No; conversation with Mr. Pear; not Mr. Ellis.

30 Q Did you reply to the conversation you had with Mr. Ellis? A I did not.

Q Don't you remember that at the time Mr. Ellis offered you one hundred dollars to settle this entire controversy, he also said the reason he offered it was to keep your friendship and your business; didn't he say that? A I don't recollect that.

Q You would not deny he said that? A I recollect he said get the thing over with.

Q Would you deny he said that? A I deny I don't recall him saying friendship and business.

40 Q Don't you also remember that you said you would accept two hundred dollars to settle the whole controversy?

*Mr. Stamler.* I object to that.

*The Court.* Why?

*Mr. Stamler.* What he offered to settle for without litigation has nothing to do with this case.

*Benjamin Pear, direct.*

*Mr. Golenbock.* They brought it out by introduction of this letter; we have a right to show what the whole controversy was, and how there came to be an offer of settlement.

*The Court.* Let me see that letter. Yes, I think it is cross examination. 10

*Mr. Stamler.* All right, I will withdraw the objection.

Q Isn't that a fact? A Don't.

Q You deny it? A I deny it.

Q You deny you offered to accept two hundred dollars to settle this whole controversy? A I do.

Q Mr. Isaac, between December twenty-eighth and April—December twenty-eighth, 1918, and April, 1919, did you ship any iron of any kind to Coatesville? A I didn't.

Q Don't you know, as a matter of fact, that there was an embargo during that period for iron to Coatesville? A I didn't know until after it was sold. 20

Q When did you first find out there was an embargo on Coatesville? A Mr. Ellis stated about it to me.

Q When was the first time you learned that? A When he bought the material from me.

*Mr. Golenbock.* That is all.

*Mr. Stamler.* That is all. That is our case, if your Honor please.

PLAINTIFF RESTS. 30

#### DEFENDANT'S TESTIMONY.

BENJAMIN PEAR, produced as a witness on behalf of the defendant, being duly sworn on his oath, according to law, saith:

*Direct examination* by Mr. Golenbock.

Q Mr. Pear, what connection are you with the Herman Ellis Incorporation? A I am vice-president of the corporation, and I manage the office. 40

Q Do you recall a conversation you had with Mr. Isaac over the telephone in reference to placing an order for steel? A I do.

*Benjamin Pear, direct.*

Q And will you please state the conversation you had with him?

10 *Mr. Stamler.* I object to it. The letters show the whole contract; any conversation after the making of the contract is proper and admissible, but any conversation prior to that time is embodied in the contract which is embodied in these two letters.

*The Court.* I think that is so.

*Mr. Golenbock.* If that is so, that is true. I won't argue that proposition of law. But I submit, if your Honor please, that the letters are not complete.

*The Court.* In what particular?

20 *Mr. Golenbock.* For instance, they are not only not complete, but they are ambiguous, and we have a right to explain. For instance, our letter addressed to Mr. Isaac says, "Confirming conversation"—

*The Court.* Read the whole letter.

30 *Mr. Golenbock.* "As per conversation we had with you this day we confirm having purchased from you five cars heavy melting steel, suitable and acceptable on our order to Coatesville, Pennsylvania, at \$16.25 a gross ton, f. o. b. cars C. R. R. Jersey City. We have this day applied for permit to move this material." I submit it is indefinite what the term "suitable and acceptable" was. And we have a right to explain that. We also have a right to—we are not going to vary any terms of the contract, by any testimony to be produced, but we are going to confine to the entire contract made then, which was not covered by this.

*The Court.* I understand there is no dispute in this case that the quality of the steel is "suitable and acceptable"?

*Mr. Golenbock.* No, it is not.

*The Court.* Isn't that what it has reference to?

40 *Mr. Golenbock.* Acceptable does not refer to material. That is what I am going to bring out. Acceptable on our order, and I will show that there is a material difference between the confirmation as sent by the plaintiff to the defendants with that of the one sent by the defendants

*Benjamin Pear, direct.*

to the plaintiff, so that we have a right to show what the contract really was. I desire to call your Honor's further attention to the fact that his testimony was admitted by the plaintiff as part of it that conversation took place in the first place, that they had a small order and they didn't want to overload; and secondly that Mr. Pear, the witness on the stand, told him that the whole order would be subject to go—I would not use that; I take that back. He was told he would have to procure permits before they could ship that material. We contend that the conversation was that the order was subject to their procuring permits for the moving the stuff. The last answer being made was that he was told that there was an embargo to Coatesville. If your Honor recollects, that was the very last answer.

10

*The Court.* The first point is the words suitable and acceptable applies to the cars and not to the character of the steel

20

*Mr. Golenbock.* The word "suitable" does; yes, sir; but the word "acceptable" does not apply to the quality. It applies to the procuring the permits, and that is to be accepted by the consignee for that reason. Also the question as to the tonnage is open in the contract, and we have a right to show what the contract really was as to that.

*The Court.* What is your contention? What is it you want to show that suitable and acceptable means?

30

*Mr. Golenbock.* We will show that the contract called for a certain class of material which is covered by the word "suitable," and also that it was subject to procuring permits in order to be shipped.

*The Court.* Your claim is that the steel that was provided was not suitable for your purpose?

*Mr. Golenbock.* We don't say so. That word "suitable" does not need to be explained. That is common ordinary usage in the trade to show what it is. "Acceptable" on our order, that is the word is ambiguous, and we claim that referred to the conversation showing that the order depended upon the defendant's procuring permits to be used, so that, of course, it could be accepted on that order. If your Honor will realize the situation,

40

*Benjamin Pear, direct.*

that unless a permit was procured, even though shipped, it would not be accepted by the consignee. He had no right to accept; because the consignee was the one secured the permits and not the consignor. We also claim the tonnage—

10 *The Court.* I think that is admissible, “acceptable on our order to Coatesville,” in other words, that it can be accepted in order that it might be used at Coatesville.

*Mr. Stamler.* I pray an exception to the Court’s ruling.

*The Court.* Yes. Exception allowed.

Exception allowed, sealed accordingly.

*Judge.*

20 Q Will you state the conversation you had at the time when you spoke to Mr. Isaac? A Mr. Isaac called me up and told me that he had some steel to offer and wanted to know whether we could use it. I told Mr. Isaac we might be able to use that material. I asked him what would be the best price at which he would accept? He quoted price \$18.00, and I told him that price was entirely out of the question. He asked me what I could offer him; I offered him \$16.00 and finally it was accepted at \$16.25. Mr. Isaac, however—

(Answer repeated by the stenographer.)

30 —called my attention to the fact that Coatesville was embargoed, which I well knew. He told me what I thought of my chances of securing a permit for Coatesville. I told him as he well knew, being in business in the same line of business we are, that permits are dependent a whole lot upon the car in which the material goes, as well as the people who issue the permits. I told him, however, I would try my best and secure the permits as soon as possible. He said, well, go ahead. He then said he would accept the order under those conditions. And I mailed our order, marking it suitable and acceptable—

40 Q What did you mean by the word “acceptable,” Mr. Pear?

*Mr. Stamler.* I object to what he meant by it.

*The Court.* Yes, what was said.

*Benjamin Pear, direct.*

Q When he used the term "acceptable" in his conversation, did that refer to when you had the conversation with Mr. Isaac over the telephone in reference to this order?

*Mr. Stamler.* I object to that.

*The Court.* Yes. It is objectionable. It draws his conclusion, what he refers to. 10

*Mr. Golenbock.* I am referring to the conversation.

*The Court.* Yes, but it draws his conclusion as to what he applies it to.

A When—

*Mr. Stamler.* Just a minute.

Q Have you answered the question?

*Mr. Stamler.* The Court has overruled it. 20

*The Court.* I note that there are only eleven jurors present.

*Mr. Golenbock.* If the gentleman was here present during the course of the trial I have no objection.

*The Court.* Better go on with eleven, I think, because Mr. French (?) was over on the other side and did not hear some of this testimony this morning.

*Mr. Golenbock.* Yes, sir.

*Mr. Stamler.* By consent; put it on the record.

*The Court.* Yes. 30

Q State the conversation which you had with Mr. Isaac in reference to the order being conditioned upon procuring the permits.

*Mr. Stamler.* I object to that; he has testified to the entire conversation.

*Mr. Golenbock.* I do not know that he has. He hasn't said that was the entire conversation.

*The Court.* Whatever the conversation is is all he can testify to; not to the conclusions. Have you told him all the conversation took place? 40

A No, sir; not yet.

Q Proceed, Mr. Pear. A He then—I then called his attention again to the fact that our order at Coatesville was the only

*Benjamin Pear, direct.*

order we had, and it was a small order and that he should be careful and load the carloads to minimum capacity because otherwise our order will be overshipped. He said he will try and load the car small as he possibly can. And I called his attention just before the conversation was over that the carloads should not exceed one hundred tons or thereabouts.

10 Q Thereabouts.

*By the Court.*

Q Didn't you know at that time that the railroad administration would not permit partial carloads to be loaded? A Well, a car consists—a car of iron consists of twenty tons, and in all my experience with the railroad I have never had them refuse a car to me that was anywhere near twenty tons; eighteen or nineteen tons they never—

20 Q Suppose the car was larger, they would not load twenty tons into a forty-ton car? A They have loaded cars—

Q I mean during the war? A During the war we have had one hundred thousand pounds, or one hundred and twenty thousand pounds capacity with twenty tons.

Q In the latter part of the war? A Yes, sir.

Q What months? A Any months at all.

Q That can't possibly be, Mr. Pear; do you mean to say, Mr. Pear—what cases did you have in the months of September, October, or November, 1918, loaded less than a carload lot? A Well, a carload lot is twenty tons.

30 Q But, if the car is larger than twenty tons, they would not permit you to put it in? A Yes, sir; they have.

Q Where have you done it? A Right along.

Q September, October, and November? A Yes, sir. Beginning 1919.

Q I am not talking of 1919. A 1918.

*By Mr. Golenbock.*

40 Q Mr. Pear, assuming you had an order for two hundred tons and that to complete the order you had to have a car containing twenty or less tons, could you ship it?

*Mr. Stamler.* I object to it.

Q Explain how such a case could arise where a car would be less than twenty tons even; where there is an order, assuming

*Benjamin Pear, direct.*

two hundred tons, and there is still due a balance of fifteen or twenty-five tons.

*The Court.* Aren't there any railroad orders on this subject?

*Mr. Stamler.* Yes, sir; we will produce them. We will get them here. 10

*The Court.* I will allow the question.

Q Will you answer that, please? A We could make that shipment. We have made a shipment of ten ton of cotton ties during the war, and the railroad accepted the shipment.

Q And you were charged how much? A For twenty gross ton.

Q In other words, if the tonnage was less than twenty you had to pay for twenty tons? A We had to pay for twenty tons. That was the minimum carload allowed. 20

Q What did Mr. Isaac say when you told him that the order depended on your procuring permits? A He said he knew about it; but he wanted me to try my very best to secure the permits.

Q Did you make any efforts to procure the permits? A I did.

Q Now, these permits are procured by who? A We had to apply to Coatesville Scrap Iron and Steel Company which was brokers in the case; they in turn apply to the Midvale Steel and Ordnance Company which was the ultimate mill ordered the steel. Midvale Steel and Ordnance had to get these permits from the main office from the railroad administration at the Broad Street Station, Philadelphia, Pa. 30

Q I show you a letter addressed from the Coatesville Scrap Iron and Steel Company, dated January twenty-first, 1919, and ask you whether your concern received this? A We received that letter from Coatesville.

*Mr. Golenbock.* I offer it in evidence.

*Mr. Stamler.* I object to it. The best reason that it is not admissible— 40

*Mr. Golenbock.* If your Honor please—

*Mr. Stamler* (continuing)—it has no connection with our case at all, and I would have the Court read it.

*Benjamin Pear, direct.*

*Mr. Golenbock.* Before your Honor reads it, I desire to call your attention—

*Mr. Stamler.* I do not want you to make statements as to any evidence.

*Mr. Golenbock.* No; but there is an agreement.

10 *The Court.* Just a minute. (Examines letter.) No, I do not think that is admissible.

*Mr. Golenbock.* I only desire to call your Honor's attention to an agreement made between counsel prior to the trial of the case any letter showing the condition in Coatesville would be admitted by counsel to be read without preliminary proof.

*The Court.* But his objection to this is—

20 *Mr. Stamler.* It is not from the Ordnance Department or any office thereof. I stated any communication from the Ordnance Department, or anybody authorized to give any such statement would be admitted without further proof.

(Further discussion at the Court's bench.)

*Mr. Stamler.* Is the objection sustained?

*The Court.* Yes.

Q Mr. Pear, you know who Mr. Price is? A Mr. Price is in charge of the permits at Philadelphia; particularly covering Coatesville, on scrap iron and steel.

30 Q What department or what concern or what branch of service was it connected with? A He was connected with the Freight Traffic Committee of the North Atlantic Ports, Domestic Division.

Q Did you have any conversation with him in reference to procuring permits to Coatesville? A I did.

Q And during what period of time did you have such conversation? A Immediately after I wrote to the Coatesville people a letter asking for permits they told me—

40 *Mr. Stamler.* Just a minute; I object to what he told you.

*The Court.* Not what he told you.

Q Never mind what Coatesville told you. What conversation did you have with this Mr. Price?

*Benjamin Pear, special cross.*

*Mr. Stamler.* I object to it.

*The Court.* I understand Price is the one gives the permits, isn't he?

*Mr. Golenbock.* Yes.

*Mr. Stamler.* I don't know that, your Honor.

*Mr. Golenbock.* He said so. 10

*Mr. Stamler.* Can I cross examine him on that?

*The Court.* Yes.

*Special cross examination by Mr. Stamler.*

Q Have you ever seen Mr. Price? A I have spoken to him.

Q Have you ever seen him? A No.

Q Did you know who he was? A I did.

Q How did you know who he was? A Every time I called up the Philadelphia office, it was a personal call for Mr. Price, and when the telephone operator connected me she told me it was Mr. Price talking to me. 20

*By the Court.*

Q Who would you call up? A Mr. Price, Freight Traffic Committee, North Atlantic Ports, Mr. Price on the 'phone. It was always a personal call.

Q You either got permits or refusals at the same place before?  
A Yes, sir.

*By Mr. Stamler.* 30

Q Did you ever get a permit from Mr. Price? A Not directly.

Q You were not the person—you said before that the permits were to be obtained from Coatesville? A Yes, sir.

Q You were not interested in getting any permit for the movement of those cars at all; it was up to Coatesville to get it? A We were.

Q Why? A We were anxious to move the material.

*The Court.* He means you were not the proper person to apply? 40

Q I mean you were not the proper person to apply. A We were not.

Q And the person to apply was your customer?

*The Court.* Coatesville people.

*Benjamin Pear, direct.*

A Coatesville people; it was up to the Midvale Iron and Steel.

Q It was up to them? A Yes, sir.

Q Therefore you never could have obtained a permit for this material!

*Direct examination (continued) by Mr. Golenbock.*

10 Q How many times have you called Mr. Price in reference to permits either for this order or any other order? A I called him up all along from the time P. & R. embargo went into effect.

Q How many times had you occasion to ask Mr. Price for permits for shipments in which you were interested? A Numerous times.

Q Can you give us an idea of how many times? A I would estimate at least fifteen or twenty times, perhaps more.

20 Q And when you would have a conversation with him in reference to permits, you would indicate or state to him where the movements of those cars would be made? A I would.

Q Was it many times through your efforts permits were received? A If it occurred, immediately on the issuing of the permits he used to give me over the telephone the number of the permit which would expedite the shipment.

Q In other words, before you were able to start loading, you would have to have the number of the permit? A And the permit itself.

30 Q So that having the number of the permit you were able to promise the consignee— A It was coming; and the other people start loading the car.

Q Did you in your conversation with Mr. Price endeavor to get the permits for the shipment of this material?

*Mr. Stamler.* I object.

*The Court.* Allowed.

*Mr. Stamler.* I pray an exception. Conversation with a third party.

(Question repeated by the stenographer.)

40 A We did.

Q What was the result of such conversation? A We endeavored—

Q Could you or could you not get such permits? A We could not.

*Benjamin Pear, direct.*

Q Did you have any conversation, after the time that order was given to Mr. Isaac, in reference to the movement of this material? A I don't recollect. We did have subsequently.

Q That is what I am talking about. Subsequent to the time of the order? A Do you mean any time after the first conversation?

Q Yes. After? A I did. 10

Q What were the conversations? A The conversations was he called me up time and again, asked me about the permits. I told him that he well knew that permits didn't depend upon us. The permits had to be issued by the mill, and we were absolutely helpless to secure a quick issuing of that permit. I told him only thing I could do was to try to get the permit as soon as permits were issued.

Q What did he say to that? A He said he understood the situation, and he would wait. 20

Q Did you have a conversation with him some time during February? Early part of February? A He called up several times during the month.

Q I show you a letter and ask you whether this letter refreshes your recollection what conversation you had with him in the early part of February, 1919, showing Exhibit P. 9? A I did.

Q Will you state the conversation you had with him about that time? A He called up and he spoke to me and I told him that being we could not ship that order and the order was given with the understanding that it was subject to our being able to secure permits that we considered this order void, inasmuch as it was impossible for us to make the shipment, due to no fault of our own. 30

Q Do you recall a conversation Mr. Isaac had in your presence? A I do.

Q Do you recall what it was? A Have you reference to the conversation previous to that letter?

Q I have reference to the conversation referred to in letter Exhibit P. 9. A Mr. Ellis told Mr. Isaac that being we have done business before there was no reason why this agreement should be made on this, and he said he would accept one hundred ton shipment or rather Mr. Isaac proposed that he would ship one hundred tons to Perth Amboy. Mr. Ellis said he would accept it; and furthermore the conversation went further 40

*Benjamin Pear, direct.*

and Mr. Ellis asked whether to forget everything and start business anew; whether Mr. Isaac wouldn't accept one hundred dollars in full settlement of the case, in full settlement of that order.

10 Q I show you a letter, and ask you—I show you letter marked Exhibit P. 9, and ask you whether that was received by your firm? A It was.

Q And did you make a reply to that? A I did.

Q I show you a letter, and asked you whether or not that is a carbon copy and reply which you made? A It is.

*Mr. Golenbock.* I offer it in evidence.

*Mr. Stamler.* I object to it until it is proven; that is the letter we deny we ever got.

*The Court.* They said they sent it now.

20 *Mr. Golenbock.* I wanted to prove that they sent it to him.

*The Court.* I thought he said he sent it.

*Mr. Stamler.* Let me examine him on that.

*Special cross examination by Mr. Stamler.*

Q Who wrote this letter? A I did.

Q On the typewriter? A On the typewriter.

Q On the date it bears date? A Exactly.

30 Q Who mailed it? A I did.

Q Yourself in the box? A Myself.

Q Do you remember that distinctly? A Well, I presumed—I mailed all the letters. There is no reason why I shouldn't have mailed this letter.

*Mr. Stamler.* All right.

*Direct examination (continued) by Mr. Golenbock.*

(Letter formerly marked D. 1 for identification, entered in evidence and marked Exhibit D. 1.)

40 (Mr. Golenbock reads Exhibit D. 1 to the jury.)

Q And did you, after that, hear anything further from Mr. Isaac until you received a summons? A We didn't.

*Mr. Golenbock.* All right; yours.

*Benjamin Pear, cross.*

*Cross examination by Mr. Stamler.*

Q The letter which you got here in evidence now marked A. Isaac, Westfield avenue, Elizabeth, New Jersey, that is the address you got? A Yes, sir.

Q All the correspondence you got from Isaac, where was it sent? A It was always sent to Westfield avenue. 10

Q Just look! A Broad street.

Q Broad street. Was that his address? On all the correspondence? A I presume so.

Q Where did you get Westfield avenue from? A We called him up always at Westfield avenue, and sent all his correspondence to Westfield avenue.

Q Are you sure of that? A Positive.

Q I will show you the other letters and see whether that is so. Do those two letters show that address? A This is simply— 20

Q Do they or do they not? A They don't.

Q Do they show address of Westfield avenue? A No.

*Mr. Golenbock.* You are only showing him one.

*Mr. Stamler.* No, two letters.

A Others do.

*Mr. Stamler.* I have no other letters.

*Mr. Golenbock.* I have; I will show them to you. 30

*Mr. Stamler.* You have other letters?

*Mr. Golenbock.* Addressed Westfield avenue.

*Mr. Stamler.* From Herman Ellis to us?

*Mr. Golenbock.* Yes, sir.

Q Now, what is the name? A Pear.

Q Pear. You say that you wanted five cars containing twenty tons? A Each.

Q And you told him that originally when the contract was made? A I did. 40

Q Are you sure about that? A Positive.

Q You knew that the cars in which steel is loaded contained thirty to forty tons? A Sometimes.

Q Most of the time? A Don't.

*Benjamin Pear, cross.*

Q Don't know that? A As the loading is entirely up to the shipper, he can load as much or as little as he pleases in the car.

Q Why didn't you? You know then there was cars going thirty or forty ton, holding thirty or forty ton? A What is that?

10 Q You knew that there was cars holding thirty to forty tons? A I did.

Q Why didn't you order only three cars? A Because he told me he had to load out five cars; I didn't know whether they came from the same place or whether they didn't.

Q The freight is dearer, isn't it? A Not if it is twenty tons; it does not matter how much it is over twenty tons; freight is so much a ton.

Q If it is over twenty ton? A If it is over twenty ton.

20 Q If it is under? A Under twenty ton you have to pay for the full twenty ton.

Q And no more? A And no more.

Q That was the condition existed during the war time? A All along.

Q Have you shipped during the month of December steel and iron? A I presume so.

Q Isn't it a fact that the average car you shipped contains at least one hundred and twenty thousand pounds? A It didn't.

30 Q Do you know of one person that you shipped during the month of December a car of steel containing less than thirty ton? A If I had my record, I most probably could mention two or three.

Q Just give me one now. A Coatesville Scrap Iron and Steel Company.

Q You did ship them? A Yes, sir.

Q During the month of December? A Yes, sir.

Q And in January, too? A We were unable to ship in January.

Q Did you ship anything in January? A I suppose so.

40 Q To other places? A I suppose so.

Q Do you know anybody that you shipped less than thirty ton to? A If I had my record I could give you—if I had my invoice book I could recall all that by that memorandum; I could recall.

*Benjamin Pear, cross.*

Q You haven't sold quite a number of cars in January and February? A We haven't shipped much in January and February.

Q Market was declining? A No, sir; but shipments could not be made.

Q Why? A On account of the congestion of the railroads. 10

Q Coatesville was the only place embargoed? A Entire P. & R. line was embargoed; if I am not mistaken the P. R. R. was embargoed.

Q Didn't you ship to any other places on any railroad outside of the P. & R.? A Ninety per cent. of all the steel points lie along one or two railroads.

Q You didn't ship any in January? A Perhaps we made a few shipments, but I don't remember to who we shipped or what the shipment consisted of.

Q Mr. Pear, you say that Mr. Isaac came to your office and at that time settled the whole case? A At what time? 20

Q After he got your letter? After he got your letter of February thirteenth? A He hadn't been. You mean subsequently to that? Will you please specify about the time you have reference to?

Q February thirteenth? A February thirteenth, he was not there; he was on the 'phone.

Q Well, when there was an offer made of one hundred dollars to settle the whole thing? A That also was on the 'phone.

Q You did not hear what Isaac said. Didn't you lead us to believe you were present when this conversation was made? A I was. 30

Q How do you know what Isaac said? A We have two extensions, one at the office, and one inside the office, and Mr. Ellis was connected inside office, and I had the receiver off the switch, so I could hear the conversation either way, which I always do when there is anything which he wishes.

Q In other words, you always have a witness to what occurs? A No. But for the simple reason Mr. Ellis likes to have us down so that in case of the memorandum price we could mark it down. 40

Q That is the reason you hear it both ways? A Yes, sir.

Q Does Mr. Ellis ever talk to anybody when you don't listen? A He does.

Q Get in on the wires? A He does.

*Benjamin Pear, cross.*

Q You say the whole case was settled then in that conversation? A He was willing to ship us one hundred tons to Perth Amboy.

Q Who was to pay the freight? A At that time when I told him he would have to pay the freight.

10 Q You told him he would have to pay the freight? A Yes, sir.

Q Mr. Isaac said he would do it? A Mr. Isaac didn't say anything.

Q Didn't he say he wouldn't pay the freight to Perth Amboy? A Not at that time.

Q Didn't he say he wouldn't pay the freight to Perth Amboy? A Not at that time.

Q At no time? A That conversation was previous to that.

20 Q Did Mr. Isaac say at that time "all right, I will ship you five cars and pay the freight to Perth Amboy?" A Not at that time. He said he was willing to ship the one hundred tons to Perth Amboy.

Q And pay the freight? A No mention was made at that time of freight.

Q Did you expect Mr. Isaac to pay the freight at that time? A That question didn't come up.

Q Did you or did you not? A It appeared to me he should have paid the freight.

30 Q It appeared to you he should have paid the freight? A Freight.

Q That is the way you thought that settlement was made? A That is the way I felt about it.

Q As a matter of fact, your contract was you were to pay the freight? A We bought it F. O. B. Jersey City.

Q And you wanted Isaac to reduce the tonnage and pay the freight, in order to make that settlement, is that right? A There was no question of reducing the tonnage, because only one hundred tons were sold.

40 Q As a matter of fact, you had a contract for two hundred tons with this concern in Coatesville? A We did; but part of the order—

*Mr. Stamler.* That is all.

*Mr. Golenbock.* Give him a chance to answer the question. I will have him answer that.

*Benjamin Pear, cross.*

*Mr. Stamler.* You can ask him anything you please.

Q As long as you had this whole thing settled, when Mr. Isaac talked to you on the 'phone on the thirteenth, and on the fourteenth Mr. Isaac also talked the case, evidently, from his letter which was shown to you as Exhibit 9? A Yes. I don't think he spoke on the fourteenth. 10

Q You don't think. You think on the thirteenth? A It was up around that day. I don't remember the exact date.

Q It must have been after that letter of the thirteenth he called you on the 'phone. Here is your letter of the thirteenth. A No; I don't recollect whether that conversation was held before the thirteenth or on the thirteenth.

Q Mr. Isaac, on the fourteenth, stated to you in his letter—

A Yes, sir.

Q (continuing)—that he didn't want to accept the proposition that Mr. Ellis has made in his letter of the thirteenth. 20

*Mr. Golenbock.* I object to that.

*Mr. Stamler.* All right.

*Mr. Golenbock.* Because Mr. Stamler's own objection to it is the letter speaks for itself.

*Mr. Stamler.* You are right. I will withdraw the question. You are right. I concede it.

Q And you say that the letter of the seventeenth— A Yes, sir. 30

Q (continuing)—was written by you? A Yes, sir.

Q After a conversation? A No, after the letter.

Q After the letter of the fourteenth of Mr. Isaac? A Yes, sir.

Q Is that correct now? A Yes, sir.

Q I want you to show me how you happened to reply to Mr. Isaac's letter and what led you to believe Isaac accepted your proposition?

*Mr. Golenbock.* I object to that, because the conversation and letter speak for themselves. 40

*The Court.* I will allow the question.

*Mr. Stamler.* All right; I will withdraw it.

Q You wrote a letter on February seventeenth, which you claim you have sent, "Replying to yours of the fourteenth, beg

*Benjamin Pear, re-direct.*

to say that you may ship us five cars to our name, Perth Amboy, Central Railroad of New Jersey. Delivered. Five cars but not to exceed one hundred tons. Will you kindly notice that you will have to ship nothing but number one heavy steel, melting steel"? A Yes.

10 Q What was in the letter of February fourteenth, that made you write that letter? A That last paragraph.

Q What does that say there? A "I would be pleased to have you advise if you will accept the shipment of the five cars in question."

Q When was the embargo lifted? A I presume—some time in March.

Q March nineteenth, wasn't it? A I am not positive.

Q About that time? A About the middle of March.

20 *Mr. Stamler.* That is all.

*Re-direct examination by Mr. Golenbock.*

Q Mr. Pear, I show you letter, copies of letters and ask you what they are? A They are letters written to Mr. Isaac.

Q Both of them? Look at both, please. A Yes.

Q And are they addressed to Westfield avenue, Elizabeth?  
A They are.

30 *Mr. Golenbock.* I offer these in evidence. You have not seen any of them, have you?

*Mr. Stamler.* I object to that; it is prior to the making of the contract, and no notice to produce has been given.

*Mr. Golenbock.* There was a question raised about this particular letter being addressed to Elizabeth avenue, and another is merely Elizabeth. And I want to show that it went—

*The Court.* I think that is so.

40 *Mr. Stamler.* That is true, but they should give us a notice to produce the original letter. That is some copy they are introducing, and I object to it on that point.

*Mr. Golenbock.* That is only for that purpose.

*The Court.* I will allow it.

*Mr. Stamler.* Exception.

*The Court.* Collateral matter.

*Benjamin Pear, re-cross.*

Exception allowed, sealed accordingly.

*Judge.*

(Letter entered in evidence and marked Exhibit D. 2.)

(Letter entered in evidence and marked Exhibit D. 3.)

*Mr. Stamler.* My objection is on the ground it is secondary evidence, and there is no notice to produce was given. 10

*The Court.* Yes. Being collateral matter no notice to produce is necessary.

Q That is the order of two hundred tons. Did you have any other orders to cover on that same order? A We did.

Q So that Mr. Isaac could not have shipped or could not ship the entire two hundred tons on that order? A It was impossible. 20

Q And you have no recollection as to whether at the time that the letter marked P. 9 was sent that there was any question as to freight charges? That is the letter of February fourteenth? A Will you repeat the question?

(Question repeated by the stenographer.)

A There was nothing said and nothing was answered. The matter of freight was not raised.

*Mr. Golenbock.* That is all.

*Re-cross examination by Mr. Stamler.* 30

Q You did, however, say that Mr. Ellis wanted Mr. Isaac to pay the freight? A I didn't say that.

Q Didn't you say in your testimony a few minutes ago that Mr. Ellis at one time—not at that conversation—at a previous conversation asked that the goods be shipped from Jersey City to Perth Amboy and that Isaac was to pay the freight? A When I told him—

Q Did you say so? A I did.

Q Is it true that such a conversation was had? A Yes, sir. 40

*Mr. Stamler.* That is all.

*By Mr. Golenbock.*

Q But my last question did not refer to a previous conversation. It referred to the time when Mr. Isaac on February four-

*Herman Ellis, direct.*

teenth confirmed subsequent conversation. A There was nothing about freight said at that time. No mention of freight made.

*Mr. Golenbock.* That is all.

*By Mr. Stamler.*

10 Q Did you, in your mind, expect Isaac will pay it?

*Mr. Golenbock.* I object to that on the ground it calls for a conclusion.

*The Court.* Yes, I think so.

Q Didn't you a few moments ago state that it was your opinion Isaac ought to pay for it?

*Mr. Golenbock.* I object to that. That is immaterial, an opinion on the part of the witness, not binding on the defendant.

20

*The Court.* He did state that.

*Mr. Golenbock.* That is so, but I do not want to have it repeated by these questions.

*Mr. Stamler.* That is all. I just wanted the jury to be sure he did state that; that's all.

HERMAN ELLIS, the defendant, being duly sworn on his oath, according to law, saith:

*Direct examination by Mr. Golenbock.*

30

Q Mr. Ellis, you are president of Herman Ellis, Incorporated? A Yes, sir.

Q You know Mr. Isaac, don't you? A I do.

Q How long have you known him? A Several years, I guess.

Q You have done business with him a number of years? A No; not for a number of years.

40

Q Well, how long have you done business with him? A I really could not say exactly. But around six months or eight months.

Q Do you recall this order of five cars of heavy melting steel for Coatesville? A Yes, sir; yes, sir.

Q Do you recall having any conversation with him, after the order was placed, as to shipments? A Yes, sir.

*Herman Ellis, direct.*

Q Will you state to the Court and jury the conversation you had with Mr. Isaac with reference to the movement of these cars? A I told him we could not move the cars unless we got a permit to move them, because the Government would have to issue permits, and we couldn't get them. I have got to get the people that get the permits to take the material; or he can ship it into Perth Amboy. 10

Q And this conversation with reference to shipping to Perth Amboy, was had sometime in February, wasn't it? A I don't really remember exactly. Some time in February, probably.

Q You don't mark anything by pencil? You don't keep any record yourself, do you? A I don't; no.

Q On account of your eyesight, and otherwise you don't write at all? A Yes, sir; I have very bad eyesight.

Q Do you remember the conversation you had with Mr. Isaac in reference to the settlement of this matter? A On the telephone or in my office? He was one time on the 'phone, and one time at the office. 20

Q What was the last conversation? A On the telephone

*The Court.* Either, or both.

A He called me on the telephone to know what I am going to do with the five cars. I told him ship it into Perth Amboy, because I can't ship on account we have no permits. He said, "Who is going to pay the freight?" I said, "We will talk about the freight later; I suppose we can come together." He said, "I sold those cars anyway, and I lost three hundred odd dollars," and he said, "We will give you old scrap iron that we got from another concern." 30

Q Was there anything said in reference to one hundred dollars or two hundred dollars? A That was in my office, he really told me.

Q The next conversation? A He really told me he was going to send in the papers; we said we will give him check for one hundred dollars; I said we will give him it; he said he will go home and think it over. He sent up the papers; he wanted two hundred. 40

Q He wanted two hundred? A Yes, sir. I think he told me where he sold the scrap, but I just forget who it was. He said he lost three hundred and odd dollars, and he will take two hundred to settle.

*Herman Ellis, cross.*

Q This letter Exhibit P. 9, dated February fourteenth, from Mr. Isaac to you, you knew about this letter, didn't you? A What is that?

Q You knew about this letter? A Yes; I seen that letter. He reads the letter every morning to me, Mr. Pear.

10 Q Mr. Pear reads the letter to you? A Every morning, yes.

Q Did you know about this letter, Exhibit D. 1, in answer to this particular letter of Exhibit P. 9? A Yes. I told him to write this letter. I talked to Mr. Isaac, I think, previous to this letter; when he sent the other letter I talked to him and I told him to ship it into Perth Amboy.

*Mr. Golenbock.* That is all.

*Cross examination by Mr. Stamler.*

20 Q Mr. Ellis, how many times did Isaac try to make delivery of these goods to you? A I don't really remember.

Q At least, say fifteen times? A No, not as many as that.

Q Ten times? A Three or four times; we couldn't take the goods because we didn't have any permits.

Q You said you wanted him to ship to Perth Amboy? A Yes, sir; when he called on the telephone and wrote that letter.

Q How many times after he made the contract did he try to make delivery? A Beg pardon?

30 Q How many times after he made the contract did he try to make delivery? A I don't remember.

Q He called you up following Monday, didn't he? A I am not really in the office all the time.

Q Didn't he call you up the following Monday after he made the contract? A I couldn't say what day, he called me up after writing the letter. Probably he called me couple of times more at the house.

Q He called you at the house, too? A Yes, sir; and probably at the office.

40 Q How many times did he call you up? A I don't remember.

Q Five or six times? A Two or three or four times; he generally called me up to send me material, and then he talked about same trouble.

Q Every time he called you up January and February, he talked to you about the delivery of those goods? A He cer-

*Herman Ellis, cross.*

tainly did. Whenever he called me up he asked me when we have a permit to ship the goods, and I said we haven't.

Q How many times did you tell him to ship to Perth Amboy?

A I told him two times.

Q When? A I told him, I wrote that letter, and probably a month before that, too.

Q A month before that, too? A Yes. And he mentioned the freight; who is going to pay the freight.

Q What did you say? A I told him he should come in and we will talk over it, and he didn't come until some time after. And he was very nice, and he said he would take two hundred dollars.

Q Yes, he said that. A And I said I would give him one hundred dollars to settle.

Q You did not owe him any money? A I did; yes. He came for a check; he wanted a check that same day.

Q He refused to deliver the goods to Perth Amboy? A He refused to deliver?

Q Yes, didn't you say that? A I don't know that he refused; he didn't ship them; that's all.

Q You did not owe him any money? A We owed him money over other material.

Q I am talking about this one hundred dollars settlement? A Yes.

Q You just wanted to give him one hundred dollars for nothing? A I didn't say nothing. I said to keep up friendship, and I will give him \$100 to keep up friendship; he told me two hundred, and he told me two times on the telephone before that.

Q Are you sure of that? A Yes, sir.

Q Why didn't you write to him? A Write to him?

Q Yes, sir. A Why will I? Didn't I talk to him over the telephone?

Q You told your man to write everything else? A What did he write?

Q On February thirteenth you wrote? A He answered his letter.

Q Yes, sir; he answered his letter; do you say anything here about settlement? A I don't remember that. I will have to ask Mr. Pear.

Q Look at that letter, read it, and see whether there is anything in there about settlement.

*Herman Ellis, re-direct.*

*Mr. Golenbock.* I object to it because this letter isn't the one the witness is speaking about.

I submit, if your Honor please, the witness is being examined on a different letter; that is what he has done.

*The Court.* He may say if that is so.

10 A What is the matter with this letter?

Q Show me what does that say in that letter? Read that letter. Read that. A "In reply to your letter of recent date, we wish to say that we understand, as per recent telephone conversation we had with you, that the order was void. We feel—" I can't read that.

Q I will read it for you. On February thirteenth you wrote this letter. "In reply to your letter of recent date we wish to say that we understood, as per telephone conversation we had with you, that the order was void." When did you make that agreement, that you speak of, that the order was void?

A I don't know when we made such agreement.

Q Did you make any such agreement? A People cancel with us lots of orders; more than a dozen.

Q Did you make that agreement with Mr. Isaac? A No, I don't—didn't.

Q Why did you write that letter? A Because often when the people canceled with us we try to cancel with them; because the Government didn't accept it.

30 *Mr. Stamler.* That is all.

*Re-direct examination* by Mr. Golenbock.

Q Mr. Ellis, when you said that the contract was void, did you have in mind the fact you were unable to procure permits?

A Of course we couldn't get any permits.

Q I want to ask you if you know the freight rate between Jersey City and Perth Amboy? A Freight rate is eighty cents a gross ton.

Q Have you had occasion to pay freight? A Yes, sir.

Q So it is not \$1.50 between Jersey City and Perth Amboy?

A No; eighty cents.

*The Court.* At what time?

A Government raised the freight. It was fifty cents.

*Herman Ellis, re-cross.*

Q It was fifty cents, before the Government took charge?

A Fifty cents to Jersey City, and we had fifty cents to Elizabeth; and then they raised it to eighty cents, I am pretty sure.

Q When you had this letter sent, marked defendant's Exhibit 1, that was in response to his letter of February fourteenth, in which he said you should let him know whether to ship the five cars of one hundred ton of scrap to Perth Amboy? 10

A I talked Mr. Isaac same day he wrote that letter.

Q I am talking now of your letter of February seventeenth, marked D. 1, in which you said he should ship one hundred ton in five cars; that was in response to his letter of February fourteenth in which he wanted to know whether he should ship that? A Exactly; I don't know exactly the date; but we answered that letter.

*Re-cross examination by Mr. Stamler.*

Q Before you wrote the letter of February seventeenth, you wanted Isaac to pay the freight, didn't you? A There wasn't anything mentioned about freight at that time, at all. 20

Q Did you expect Isaac to pay the freight?

*Mr. Golenbock.* I object to that.

*The Court.* Allowed.

A Did we expect Isaac to pay?

Q Yes. A Not exactly. If he would come around I would think he would pay the freight. 30

Q Did you ask him to pay the freight? A He didn't asked me a question. You asked that question once before.

Q And you say that the freight from Jersey City to Perth Amboy is how much? A Eighty cents.

Q Are you sure of that? A I think I am pretty positive; I have been paying it. Maybe they raised it again; I don't think so.

Q Don't you think that you may possibly have made a mistake? A I may have made a mistake, but I don't think so.

Q That is what I mean. 40

*Mr. Golenbock.* I offer in evidence orders of United States Railroad Administration dated January seventh, 1919; and January seventeenth, 1919; March fourth, 1919; September twenty-sixth, 1918; September tenth, 1918,

*William H. Whiting, direct.*

and August twenty-seventh, 1918, as to embargo at Coatesville.

*Mr. Stamler.* Let us dispose of one at a time, if your Honor please.

10 *Mr. Golenbock.* He either accepts them all, or not at all; I think that is fair.

*The Court.* What is the objection?

*Mr. Stamler.* I object to them on the ground that there are a number of them which have been read off which are prior to the making of the contract. We know nothing about them, whether circumstances have not changed. Certainly a number of them have been read off after the date of this contract; I don't know what they are. I think I should have a right to examine them.

20 *The Court.* Certainly.

*Mr. Golenbock.* I think I should have a right to offer them all.

*The Court.* What is the purpose of this?

*Mr. Golenbock.* Beg pardon?

*The Court.* What is the purpose of this?

*Mr. Golenbock.* Purpose is to show there was an embargo there.

*Mr. Stamler.* We admit that.

30 *The Court.* Everybody admits that.

*Mr. Golenbock.* All right.

*The Court.* Do you rest?

*Mr. Golenbock.* Yes, sir.

DEFENDANT RESTS.

PLAINTIFF'S REBUTTAL TESTIMONY.

40 WILLIAM H. WHITING, produced as a witness on behalf of the plaintiff, in rebuttal, being duly sworn on his oath, according to law, saith:

*Direct examination by Mr. Stamler.*

Q Mr. Whiting, what position do you hold with the railroad company? A Acting chief clerk.

*William H. Whiting, direct.*

Q With what company? A Central Railroad of New Jersey, at the Elizabeth freight office.

Q During the—were you employed in the same capacity during the month of December and January, December, 1918, and January, 1919? A Yes, sir.

Q I show you paper and ask you whether you are familiar with it, a paper of that kind? A Yes, sir; that is a permit. 10

Q Permit issued by whom? A Freight traffic committee.

*Mr. Golenbock.* Wait a minute. I believe you are well experienced in the courts of law to know how to put in the proper proof.

*The Court.* One moment!

*Mr. Stamler.* The jury is going to take care of that.

*The Court.* Make your objection in the regular way.

*Mr. Golenbock.* I object to the witness going into the paper any further. The paper speaks for itself if it is proper evidence. 20

*The Court.* He simply asked him what the paper is generally; the title.

*Mr. Stamler.* I asked him and he said that—

*Mr. Golenbock.* That is sufficient, isn't it?

*Mr. Stamler.* What are you objecting to?

*Mr. Golenbock.* You are asking him to go into and describe what the paper is. 30

*Mr. Stamler.* I ask him over again.

Q What is that paper?

*Mr. Golenbock.* I object to that; it is already answered.

*The Court.* Allow the question.

Q What is that paper? A That is freight traffic committee permit.

Q What does that mean? Just tell the jury what that means. 40

*Mr. Golenbock.* I object to that. That is well known—

*The Court.* Allow the question.

Q When you say a freight and traffic committee permit, tell the Court and jury what that means. A Purpose of the freight

*William H. Whiting, special cross.*

traffic permit is for the shipper to make shipment to restricted territory, owing either to congestion or embargo.

*Mr. Stamler.* I offer that paper.

10 *Mr. Golenbock.* I object to the introduction in evidence of this paper for the reason this is dated December fifth, and our contract was dated long past that, and I can't see how this would be relevant. We do not deny permits could be procured at some time.

*The Court.* That is for the purpose of showing the form.

*Mr. Stamler.* Showing the form and nothing else.

*Mr. Golenbock.* Showing the form and nothing else?

*Mr. Stamler.* Yes.

20 *Mr. Golenbock.* There is no discussion or dispute as to what the form of the permit is.

*The Court.* Oh, yes, there is considerable discussion as to the tonnage and car.

*Mr. Golenbock.* How could that be in any way affected as to us?

*The Court.* You claim on your side they would take twenty tons to a car; and the other side they would not take it.

30 *Mr. Golenbock.* May it please your Honor, I want to say this, that each permit, of course, speaks for itself.

*The Court.* I do not know that; you say that.

*Mr. Golenbock.* The reason I object to the introduction in evidence is this—

*The Court.* You may cross examine the witness on that if you desire to.

*Special cross examination by Mr. Golenbock.*

Q What is your particular business, Mr. Whiting? A My particular business is accounting.

40 Q Accounting? A But at the present time I am acting chief clerk.

Q How long have you been acting chief clerk? A I have been acting as chief clerk about two years owing to the fact, I might add a little bit, that the chief clerk is in the service, and he is still in the service.

*William H. Whiting, special cross.*

Q Have you been acting as chief clerk for the past two years? A I have been acting as chief clerk for the past two years.

Q And as chief clerk have you charge of these permits? A Permits are received in the general mail and are handed to the waybill clerk who has charge of them. 10

Q So the proper man to have charge of these papers is not you, but somebody else? A Question of charge I will have to explain.

*By the Court.*

Q They all come under you as chief clerk? A All mail received in the office during that period came to me, to my attention, and as the documents were handed to me they were distributed by me to the parties directly responsible for the handling. 20

Q You were the responsible head of this office? A I was the responsible head of that office under the general agent.

*By Mr. Golenbock.*

Q You have charge of all the permits that come to your office? A Beg pardon?

Q You have charge of all the permits that come to your office? A Inasmuch as I have charge of all detail matters; detail matter is distributed among those who will be directly affected by it; the waybill clerk in this case. 30

Q So, as a matter of fact, you may never see any of the permits? A No; permits come into the office.

Q And you turn them over to the person who has charge of them? A I turn them over to the person who has charge of them; to the waybill clerk.

Q These permits are secured by the consignee in every case? A These permits are secured by the consignee.

Q And the consignee makes his— A Permits are secured by the shipper through his connection with the consignee. In other words, there is a mutual arrangement between the shipper and the consignee to get the permit. 40

Q The party has to appeal for the permit is the consignee? A As I recall.

Q And they have to send the data to secure the permit? A As I recall.

*William H. Whiting, direct.*

Q Do they also state the tonnage when they apply for them?

A I can't answer.

Q You don't know a thing about it? A Not that, I don't.

10 *Mr. Golenbock.* I object to the witness testifying to the permits on the ground he is in no position to testify as to the maximum or minimum, in the permit.

*By the Court.*

Q Is this the only form that is used or are there additional forms besides this? A That is only form of permit that I am familiar with in any sense.

Q That is the only one that comes through you at all? A Permit would come into—

Q Is that the only form? A That is the only form would come to us.

20 *The Court.* Has that some maximum and minimum amount?

*Mr. Golenbock.* That is typewritten.

*The Court.* It seems to me that is a matter of filling in wherever they send them out.

*Mr. Stamler.* I am going to ask him.

*Mr. Golenbock.* I object to any question on that ground. He has stated he don't know.

*The Court.* Allow the question.

30 *Mr. Golenbock.* Exception.

Exception allowed, sealed accordingly.

*Judge.*

*Direct examination (continued) by Mr. Stamler.*

Q Mr. Whiting, do you know the rules and regulations that existed in the United States Railroad Administration during the month of December, 1918, and January, 1919, relating to the loading of cars? Are you familiar with the rules? A I  
40 am familiar with the conditions existing.

Q And the rules? A I am familiar with the conditions existing.

Q And the rules of the United States Administration? A I can't answer that.

*William H. Whiting, direct.*

Q When you say you are familiar with the conditions, what do you mean?

*Mr. Golenbock.* I object to that. I object to that, as the witness has already said he is not familiar with the rules.

*The Court.* Allow the question. 10

*Mr. Golenbock.* And he may be familiar with the rules, and he does not give the shipment.

*The Court.* That may be his way of putting it; I will allow the question.

*Mr. Golenbock.* Exception.

Exception allowed, sealed accordingly.

*Judge.*

*By the Court.* 20

Q What do you mean by conditions? A What I referred to in connection with the conditions was the conditions obtaining during the period of the war, whereby the general public was requested by the general freight department through the local agents of the various stations, to load the cars in the maximum capacity in order to conserve the equipment.

Q Yes, but what we want to know here is whether that was always enforced, or whether people were allowed to ship less than maximum capacity if they paid for it? A There was a time under classification, there was a minimum loading amount allowed, but where I am referred to, Judge, is the fact that the Government, through the freight department, called on the shippers to help the country by loading the cars— 30

Q We understand that. But what we are trying to find out, here, is whether the Government insisted on that, or whether there were times they would permit less than carload lots to be sent.

*Mr. Stamler.* Of iron; of scrap? 40

A There was no shipment of less than carload of scrap shipment unless the scrap weighs a certain amount per piece.

*Abraham Isaac, direct.*

*By Mr. Stamler.*

Q What is the smallest tonnage per car of scrap iron allowed in your railroad in December, 1918— A Classification minimum—

10 Q (Continued)—and January, 1919? A (Continued)—at that time, thirty thousand pounds. I beg pardon, I must correct myself on that, was fifteen gross ton, and twenty gross ton. Twenty gross ton, as I recall it, referring to shipments going off our line.

Q What about this? A At that period, as I recall it, was fifteen gross ton.

Q On scrap? A On scrap iron; yes, sir.

*Mr. Stamler.* That is all.

*Cross examination* by Mr. Golenbock.

20

Q What is your name? A Whiting.

Q Whiting. Do you know the freight rate between Elizabeth and Perth Amboy? A Do I know the freight rate?

Q Yes. A I can't quote that authoritatively.

Q Beg pardon? A I am not in a position to quote it.

Q Would it refresh your recollection that one of the witnesses claims it is eighty cents? A It would not refresh my memory, as I pay no connection—I have no connection with the handling of the freight rates.

30

*Mr. Golenbock.* That is all.

*Mr. Stamler.* That is all.

ABRAHAM ISAAC, recalled on rebuttal.

*Direct examination* by Mr. Stamler.

Q Mr. Isaac, when did you last ship from Jersey City to Perth Amboy? A Some time in January.

Q To whom did you ship? A I think to Herman Ellis.

Q What freight did you pay? A \$1.50 per ton.

40

Q Did you at any time have a conversation with Mr. Ellis, whereby you agreed to ship five cars of twenty tons each to Perth Amboy? A I didn't; because I couldn't load a car for twenty ton if I didn't do the loading myself; that would be impossible.

*Abraham Isaac, cross.*

Q I want to ask you one more question, and I will be through with you: Did you sell to Herman Ellis number one heavy melting steel? A I did.

*Mr. Stamler.* That is all.

*Cross examination by Mr. Golenbock.*

Q Where is that freight bill you paid \$1.50 to Perth Amboy? A The amount was taken off my bill by Herman Ellis charging \$1.50 per ton. 10

Q Where is that bill? A I haven't got it with me.

Q Where is it? A Where is it?

Q Yes. A I don't think I received it. I received an account, deducting the amount of freight from my original bill, from Mr. Ellis.

Q Where is that amount? A On Mr. Ellis' freight bill; on my books. 20

Q Where is that account you received from Mr. Ellis showing a deduction of \$1.50 a ton freight? A On my books.

Q Didn't you receive an account from him showing that deduction? A Only on my bill; when I mailed the bill he took it off in ink.

Q Didn't you receive it? A I didn't receive it.

Q How do you know he deducted it? A Because the amount of freight was \$1.50 a ton, he deducted.

Q When he sent you a remittance, didn't he also show you how he arrived at the figure he sent you? A At the charge of \$1.50. 30

Q Didn't he show you in some way in writing how he arrived at the amount for which he sent you a check? A Amount was derived was the amount of weight at \$1.50, amounting to the cost deducted.

Q No. I mean didn't you get a memorandum with the remittance showing the deductions? A I didn't.

Q Never? A Not that I recall.

Q How long have you been doing business with Mr. Ellis? A First business I had with him that I recall I think some time in around October or November. 40

Q And you had made a number of shipments to him, didn't you? A Very few, in comparison.

Q How many? A I can't recall that, unless looking at my book. I can give it by looking at my books.

*Abraham Isaac, re-direct.*

Q At the time you had this conversation in reference to the settlement in which he offered you \$100, and you asked for \$200, on that day you received a remittance for some money—

*Mr. Stamler.* I object to that. The witness has not testified to any settlement.

10 *The Court.* Yes. "Attempt to settle it."

Q Attempt to settle. At the time Mr. Ellis—at the time when you say that Mr. Ellis offered you \$100, at which time Mr. Ellis claims you wanted \$200, didn't you at that time receive a settlement on some other material? A I did.

Q And wasn't that the occasion of your visit to Mr. Ellis' office? A To get some money; because bills were overdue on those particular cars.

20 Q You were not afraid of the account, were you? A It was a long time coming.

Q Were you afraid of the account? A I was.

Q You say that for the benefit of the jurors? A No, I say it for the benefit from a business standpoint.

Q Isn't the corporation financially worth more than you are?

*Mr. Stamler.* I object to that. He may be worth more, and not paying his bills promptly is another thing.

*The Court.* I do not think that is relevant.

30 *Mr. Golenbock.* Very well.

Q This \$1.50 included switching charges, did it not, Mr. Isaac, in your answer? A No, sir; no switching on that.

Q No switching on that? How about due charges? A Nothing on that.

Q You are sure of that? A Positively.

*Mr. Golenbock.* That is all.

*Re-direct examination by Mr. Stamler.*

40 Q When you sent your bill to Mr. Ellis for the merchandise that bill shows the number of pounds of scrap? A Number of pounds.

Q You sold him. And the charge per ton? A At price per ton.

*Motion for Direction of Verdict.*

Q And that same bill would show less so much in there for such freight? A Just mark the freight so much and deduct the amount.

Q Did you get a check with that? A I got a check with the bill.

Q What did you do with the bill on which the freight was? A Acknowledged it and credited him for it. 10

Q You sent it back to Mr. Ellis? A I sent it back to Mr. Ellis.

Q So they have that? A So they have that.

*Re-cross examination by Mr. Golenbock.*

Q So you also received a credit memorandum showing what payments were for on this bill? A Sometimes I did; and sometimes I didn't.

20

**MOTION FOR DIRECTION.**

*Mr. Golenbock.* I ask for direction of a verdict on the ground that the plaintiff, from his own testimony, and the confirmation of the contract as such has not proven a cause of action. If your Honor please, the original confirmation, as far as we are concerned, is embodied in a letter which was sent on December twenty-eighth from the defendant to the plaintiff, in which it is said—and I call that part of the letter particularly to your attention, because that is the basis of my motion, it says: “five cars of heavy melting steel suitable and acceptable on our order to Coatesville, Pennsylvania.” I submit, if your Honor please, that the plaintiff has not shown that the order of five cars were acceptable upon the order to Coatesville. 30

*The Court.* You see this, Mr. Golenbock, must be read in connection also with the letter that crossed at the same time. Both parties met to that extent, so both must be read, and left to the jury to determine— 40

*Mr. Golenbock.* But there is further testimony, if your Honor please, that upon receipt of his letter there was confirmation informing him and reaffirming that the order was subject to the acceptance and the procurement of permits which Mr. Isaac has not denied.

*Motion for Direction of Verdict.*

*The Court.* There is no such testimony at all in the case. It is prior to the making of the contract.

10 *Mr. Golenbock.* Prior to the making of the contract there was no such conversation. The first conversation with reference to this merchandise was had over the telephone to which these letters were confirmed. There was no prior conversation to the making of the contract. I submit, if your Honor please, the contract was originally made over the telephone. A confirmation is not always necessary, but it may be confirmed in writing.

*The Court.* Both parties chose to put their contract in writing so they would both have something.

20 *Mr. Golenbock.* Suppose we combine both letters of both parties, and you can't detract anything, that you can't take both and put them together so that we have, outside of the plaintiff's letter, merely a confirming blank as to the sale, asking to secure permits, which would make a question of fact for the jury whether they discussed permits at that time at all. Also the letter from the defendant to the plaintiff, in which it is said that the steel should be acceptable to the Coatesville on the order.

30 One of the germane facts and which they must sustain is the proof that this particular material on these cars could be acceptable or were acceptable to Coatesville on such order at such time. So, I therefore submit, if your Honor please, that the plaintiff has failed to make out a cause of action, and that your Honor should direct a verdict in favor of the defendant.

*The Court.* I think it is a question for the jury.

*Mr. Golenbock.* I pray exception.

*Mr. Stampler.* That question is not raised by your pleading.

40 *Mr. Golenbock.* It does not have to be. As a matter of fact, our defense is what I said it to be, in sum and substance.

Exception allowed, sealed accordingly.

*Judge.*

Mr. Golenbock commences to sum up for the defendant.

*Benjamin Pear, direct.*

*Mr. Stamler.* If your Honor please, since counsel began summing up a matter came to my attention; I would like to recall Mr. Pear and show him a letter that I would want him to identify, and I would ask your Honor's permission at this time.

BENJAMIN PEAR, recalled.

10

*Direct examination by Mr. Stamler.*

Q I show you a letter dated February 1, 1917, and ask you whether you ever saw that letter before?

*Mr. Golenbock.* I would ask where that letter came from?

*Mr. Stamler.* Blew over here, on my papers.

*The Court.* Have you seen that letter before?

20

A Yes, sir.

Q That is one of the letters you received in the ordinary course of business? A No; it was not consigned to us.

Q What is that? A No; it was not consigned to us.

Q But one of the letters you had in your possession turned over to your counsel? This letter you had in your possession turned over to your counsel? A Yes, sir.

*Mr. Stamler.* I offer that letter in evidence. I did not find it; it blew over.

30

*Mr. Golenbock.* I consent to the introduction in evidence of this letter on condition that the other letter which was addressed from the Coatesville people be admitted. And I will show your Honor both letters.

*Mr. Stamler.* If they reply, one to the other, I will be glad to do it.

That is all.

*Mr. Golenbock.* I did not ask him any questions.

*The Court.* Yes; I will allow them both to go in evidence.

40

*Mr. Stamler.* Let them go in as my evidence. Both of them.

*Mr. Golenbock.* Let them go in as both our evidence.

(Letter from the Coatesville Scrap Iron and Steel Company entered in evidence and marked Exhibit P. 1a.)

*Charge to Jury.*

(Letter of February first, 1919, entered in evidence and marked Exhibit P. 2a.)

(Mr. Stamler reads both letters to the jury.)

Mr. Golenbock continues suming up for the defendant.

10 Mr. Stamler sums up for the plaintiff to the jury.

**CHARGE TO JURY.**

## NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT

May Term, 1919.

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 ABRAHAM ISAAC
*vs.*
 HERMAN ELLIS, INC., a corporation.
 

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Transcript of Court's charge to the jury, by Hon. George S. Silzer, Circuit Court Judge, as follows:.

Gentlemen of the Jury:

30 The plaintiff in this case claims that the defendant bought certain scrap iron by simple contract; that the defendant refused to take it, as the result of which the plaintiff was obliged to sell in the open market, and he now asks damages, claiming the difference between the contract price and the price he was able to get in the open market.

40 The defendant interposes three defenses to this. You will observe, gentlemen, first that the contract is the important thing for you to determine. What was the contract between the parties? It appears that the contract was made over the telephone, and you have heard the testimony on both sides as to that, and both parties then attempted to put their understanding of it in writing by letter. The letter from Mr. Isaacs, the plaintiff, says "confirming my telephone call I beg to confirm sale to you of five cars of steel scrap at \$16.25 per gross ton, f. o. b. cars

*Charge to Jury.*

Jersey City, C. R. R. of N. J. Please have permit issued for these cars at once as the material will be loaded Monday." And that, you see, has nothing attached to it; simply a plain sale of five cars at certain price, asking that a permit be issued, as the cars are being loaded.

Defendant's letter, on the other hand, is slightly different; the letter from the Ellis Company to Mr. Isaacs says, "As per conversation we had with you this day we confirm having purchased from you five cars of heavy melting steel, suitable and acceptable on our order to Coatesville, Pennsylvania, at \$16.25 a gross ton, f. o. b. cars Central Railroad tracks Jersey City, New Jersey. We have this day applied for a permit to cover movement of this material." 10

Now, you see the change in the Ellis statement is to this effect: they both agree as to the five cars of steel scrap, the price, the location, and the shipment, but in Mr. Ellis' letter it said "Steel suitable and acceptable on our order to Coatesville," and that is where the parties differ. Both letters seem to contemplate that the Ellis people were to get the permit because Mr. Isaac says please have the permit issued, and Mr. Ellis' letter says "We have this day applied for the permit." 20

There are three defenses interposed; the first defense is that those goods were bought but they were subject to the defendant's being able to secure railroad permit in order to move the steel. And that, when they said in this paper "suitable and acceptable on our order to Coatesville," that it meant if they would be able to get the permit in order to ship it to Coatesville. 30

The next defense interposed is that the cars were to be twenty gross ton each, and that they were too full to get the permit. You have heard the testimony, gentlemen, as to that feature of it. It is for you to say whether there was anything said or agreed by the parties as to being twenty gross ton cars, and you will observe that neither one of the letters says so, and you have a right to take, in connection with that, the testimony of all the parties and the railroad freight man to ascertain what the truth is as to that particular. 40

Now, the third defense is that this agreement was cancelled; that the parties came together and they agreed to cancel this agreement, and that Mr. Isaac agreed to ship five cars to Perth Amboy instead, and that he failed to do that.

*Charge to Jury.*

Those are the defenses that are interposed, and you will have to determine, gentlemen, whether the defendant has satisfied you that those defenses are in accordance with the facts.

10 If you find from all the facts and circumstances that the understanding of the parties was that this was not an outright sale, but that it was contingent on, either that they were to get the permits from the railroad or that Mr. Isaac tied himself up to that, and they were unable to get them; or they were not the kind of freight cars they were to ship, and for that reason they did not take them, or if you find that there was another contract substituted, then, of course, the defendant would be entitled to judgment.

20 On the other hand, if you find that this was a plain, ordinary contract, that the goods were sold, and Mr. Isaac had them ready for delivery as agreed, and the defendant without any just cause or excuse refused to take them, and Mr. Isaac had then to go into the open market and sell them, the plaintiff would be entitled to recover. And the measure of damages in that case would be the difference in the price between what the Ellis people agreed to pay, in accordance with the contract, and the price the seller was able to get in the open market, at the time of the breach, which the plaintiff says is \$1,002.00 and some cents.

*Mr. Stamler.* \$1,102.55.

30 *The Court.* \$1,102.55. So take the case, gentlemen; you have listened patiently, and determine where the truth is as to the facts in dispute between the parties.

Then if you find from the facts in favor of the defendant, then the form of your verdict would be "no cause of action;" if, on the other hand, the plaintiff is entitled to recover, then you assess his damages at the loss which he has sustained, which the plaintiff claims is \$1,102.55.

*Mr. Golenbock.* May I ask your Honor to charge as to the preponderance of evidence?

40 *The Court.* Yes, the burden of proof is on the plaintiff to satisfy you upon the fact that there was a contract, what the contract was, and that there was a breach, and that damages were suffered.

*A Juror.* Do I understand that this material was loaded from a scow on the cars?

*Charge to Jury.*

*The Court.* I understood at Jersey City it had been; yes, sir.

*A Juror.* The material was on that boat at Jersey City loading on the cars on this Monday in question?

*The Court.* I do not know this particular day. I do not recall the testimony as to that, but the letter of Mr. Isaac says the cars will be loaded on Monday, and I understood him to say that the material had come from scews at Jersey City. 10

*Mr. Stamler.* And they loaded by magnet; with a magnet.

*The Court.* The stevedore company.

*Mr. Golenbock.* That is not the cars they are suing for.

*A Juror.* They are supposed to be on boat.

*Mr. Golenbock.* No. Because those cars were shipped many weeks after, that they are suing for.

*Mr. Stamler.* You will find it referred to in Exhibit P. 3 of the case. 20

*The Court.* Have you it there?

*Mr. Stamler.* Yes. (Reads Exhibit P. 3.)

*Mr. Golenbock.* What date is that?

*Mr. Stamler.* Mr. Isaac testified, from his record, they were loaded on January third.

*Mr. Golenbock.* It seems to me they can't charge us with that because we didn't know we could take it at that time.

*The Court.* I understand the question the juror asks is whether the goods sold under this contract had been brought by scow to Jersey City from New York? 30

*Mr. Stamler.* They were.

*The Court.* I understood they were. You will have to recollect the testimony.

(Jury retires, but is brought back to the court room after seven minutes.)

*The Court.* Gentlemen of the jury, the defendant's counsel calls my attention to this, which I think I ought to speak to you about: If you find that the defendant failed to live up to the contract, and that the contract was only to take twenty-ton cars, that is, five twenty-ton cars, instead of the amount that the plaintiff says; if that was the situation, then the damages of the plaintiff would be \$471.00. Perhaps you better take a memorandum of that, so that you will have the figures. \$471.00. 40

*Exhibits.*

10 In order to make that clear to you, gentlemen, if you find that this was an outright sale, and that the defendant failed to live up to the agreement, Mr. Isaac says that he is entitled to the difference between what the contract price was and what he sold the five cars at, at the larger tonnage, which he says is \$1,102.55; now the defendant says that if you find that the agreement was that those cars would only be twenty-ton cars, and there was a failure to take them, then, of course, it would not be as much damage as if he agreed to take the larger cars. So that, in this case, if you find the defendant breached the contract, failed to live up to it, but the contract was only for five twenty-ton cars, then the damages would be only \$471.00.

Counsel felt I should state that to you so that you would have all the facts before you.

20

**EXHIBIT P. 1.**

5/26/19

G D Z

ABRAHAM ISAAC  
PURCHASING AND SALES AGENT  
207 Broad Street  
Elizabeth, N. J.

30

December 28th, 1918.

Herman Ellis, Esq.,  
Perth Amboy, N. J.

Dear Sir:—

Confirming my telephone call I beg to confirm sale to you of Five (5) cars steel scrap at Sixteen twenty five (16.25) dollars per gross ton f. o. b. cars Jersey City, C. R. R. of N. J.

Please have permit issued for these cars at once as material will be loaded Monday.

40

Yours very truly,

ABRAHAM ISAAC.

*Exhibits.***EXHIBIT P. 1A.**

Date 5/27/19

Edwin J. O'Brien, Stenographer  
Union County Courts

COATSVILLE SCRAP IRON &amp; STEEL CO. 10

SAMUEL GERSON, Prop.  
Scrap Iron and Steel

Coatesville, Pa., Jan. 21, 1919.

Herman Ellis,  
Perth Amboy, N. J.

Dear Sir:—

We are in receipt of your telegram of today. In reply thereto would state that we have done everything that is possible in order to obtain these permits for you. We applied for them some time ago and just as soon as Midvale Steel & Ordnance Co. allow these permits to come forward we will immediately wire them to you. 20

This is the very best that we can do.

Yours very truly,

COATESVILLE SCRAP IRON & STEEL CO.,  
Per JAS. J. ATKUNSON. M.**EXHIBIT P. 2A.**

30

Date 5/27/29

Edwin J. O'Brien, Stenographer  
Union County CourtsMIDVALE STEEL AND ORDNANCE COMPANY  
CAMBRIA STEEL COMPANYWidener Building  
PhiladelphiaJ. C. Agnew,  
Assistant to President.

February 1, 1919. 40

Gentlemen:—

We have in our possession Permit FTC. No. 97909, covering the shipment of one car of Heavy Steel Scrap Iron from Herman Ellis, Perth Amboy, N. J., to our Coatesville Plant. We will

*Exhibits.*

not forward this permit to you for the reason that we would like to have you withhold shipment until requested, as the congestion at Coatesville at the present time is such that it makes it necessary to take this action. The permit does not expire until February 20th, and we hope to allow you to ship before it expires.

10

Kindly acknowledge receipt of this letter.

Yours truly,

MIDVALE STEEL & ORDNANCE COMPANY.

J. C. AGNEW,

Assistant to President.

R.

To—

Coatesville Scrap Iron & Steel Company,  
Coatesville, Pa.

20

HAR:FM.

**EXHIBIT P. 2.**

5/26/19

G D Z

HERMAN ELLIS

Dealer and Broker in

SCRAP IRON, STEEL AND METALS

Borings and Turnings a Specialty

Smelter of Lead and Babbitt

30

Perth Amboy, N. J.,  
December 28, 1918.

Mr. A. Isaacs,  
Elizabeth, N. J.

Dear Sir,

As per conversation we had with you this date we confirm having purchased from you five cars of heavy melting steel suitable and acceptable on our order to Coatesville, Pa., at \$16.25 G. T. F. O. B. cars CRR tracks Jersey City, N. J. We have this day applied for a permit to cover movement of this material.

40

Yours truly,

HERMAN ELLIS, INC.

Per B. PEAR.

*Exhibits.***EXHIBIT P. 3.**

5/26/19

G D Z

HF/K.

THE JOS. JOSEPH & BROS. CO.  
RAILWAY SUPPLY & M'F'G CO.

10

Woolworth Bldg.  
New York

Jan. 5th, 1919.

Mr. Abraham Isaac,  
126 Broad St.,  
Elizabeth, N. J.

Dear Sir:—

Confirming telephone conversation, we accept cars 85028,  
334650 and 275507 at Fourteen Dollars (\$14.00) per gross ton  
delivered Syracuse, New York, usual terms.

20

Very truly yours,  
THE JOS. JOSEPH & BROS. CO.

J.

FORM 25

**EXHIBIT P. 4.**

5/26/19

G D Z

30

Order No. R--8600

Req. No. ....

January 31, 1919

NAGLE STEEL COMPANY  
Pottstown, Pa.

Mr. Abraham Isaac,  
Elizabeth, N. J.

Please furnish the following materials, in accordance with  
instructions noted below.

40

1 carload of 35 to 45 gross tons of exclusively clippings and  
punchings from Soft Steel Plates all from material  $\frac{1}{4}$ " thick  
and heavier, free of dirt and excessive rust, and free of curly-  
cues or galvanized stock; no pieces to be over 18" wide nor over  
4' long, nothing to be included which would weigh over 200#

*Exhibits.*

in weight, and no other grade of stock than that enumerated above to be included.

Prompt shipment to be made.

Price: \$15.00 per gross ton of 2,240# delivered f. o. b. cars our Rahway Works, Rahway, N. J.

Terms: Cash 30 days.

10 See our offer Jan. 27th; your acceptance Jan. 30th.

Will make application for permit in line with your desire.

Ship by ..... and charge to

NAGLE STEEL COMPANY,

R. P. CAIRNES,

B.

Purchasing Agent.

148800

43200

20

105600@15. \$707.41

C R R 85354

Mark and Consign the above material: Nagle Steel Company, Rahway Works, Rahway Station, N. J., being sure to ship for Pennsylvania Railroad delivery.

Bills in triplicate with price on original copy only, to be mailed same day material is sent forward, to Nagle Steel Company, Pottstown, Pa. Render separate bill for each order, showing order number, route prepaid or collect. Shipper's name and order number must be plainly marked on each lot of material shipped.

30

Freight—When price is delivered our works prepay freight to destination; when delivered shipping point, ship freight collect, so marking bill.

No charges allowed for drayage or packing.

Unless otherwise agreed in writing the sellers of these goods agree to assume the defense of any suit for infringement of patents brought against the Nagle Steel Company by reason of the use of such goods, and to indemnify said Company against any decree or cost in such suit.

40

FORM 25

Exhibits.

**EXHIBIT P. 5.**

5/26/19

G D Z

Order No. R-8615

Req. No. ....

10

**NAGLE STEEL COMPANY**

Pottstown, Pa.

February 3, 1919.

Mr. Abraham Isaac,  
Elizabeth, N. J.

Please furnish the following materials, in accordance with instructions noted below:

1 carload of 30 to 40 tons of #1 Heavy Soft Steel Scrap consisting of punchings and clippings from plates, channels, beams, angles, etc., all from materials 1/4" thick and heavier, to be in pieces not over 18" wide, not over 4' long; no pieces to be over 200# in weight, to include no galvanized stock, and to be free of cury-cues, and there to be no other scrap than the classification enumerated above to be included.

20

Prompt shipment to be made.

Price: \$15.00 per gross ton of 2,240 lbs., delivered f. o. b. cars our Rahway Works, Rahway, N. J.

Terms: Cash 30 days.

See your favor Feb. 1st, #1236.

Ship by ..... and charge to

30

**NAGLE STEEL COMPANY,**

R. P. CAIRNES,

B.

Purchasing Agent.

158900

47100 15

111800@/784.66

W. M. 50071

Mark and consign the above material: Nagle Steel Company, Rahway Works, Rahway Station, N. J. Being sure to ship for Pennsylvania Railroad delivery.

40

Bills in triplicate with price on original copy only, to be mailed same day material is sent forward, to Nagle Steel Com-

*Exhibits.*

pany, Pottstown, Pa. Render separate bill for each order, showing order number, route prepaid or collect. Shipper's name and order number must be plainly marked on each lot of material shipped.

10 Freight—When price is delivered our Works prepay freight to destination; when delivered shipping point, ship freight collect, so marking bill.

No charges allowed for drayage or packing.

Unless otherwise agreed in writing the sellers of these goods agree to assume the defense of any suit for infringement of patents brought against the Nagle Steel Company by reason of the use of such goods, and to indemnify said Company against any decree or cost in such suit.

20

**EXHIBIT P. 6.**

5/26/19

G D Z

ABRAHAM ISAAC

Purchasing and Sales Agent

207 Broad Street

Elizabeth, N. J.

File

1188

Jan. 24, 1919.

30

Herman Ellis, Inc.,  
Perth Amboy, N. J.

Gentlemen:

I shall be pleased to have you advise what disposition you want me to make of the steel scrap on order of December 28th. This material will have to be moved, and I trust that you will let me have an early reply to same.

Yours very truly,

ABRAHAM ISAAC.

AI/NF.

40

*Exhibits.***EXHIBIT P. 7.**

5/26/19

1274

G D Z

Feb. 11, 1919.

Herman Ellis, Inc.,  
Perth Amboy, N. J.

10

Gentlemen:

I beg to notify you that I will have on tracks at Jersey City your five (5) carloads of scrap as per your letter of Dec. 28th.

I trust that you will at this time apply for a permit covering the movement of said cars; or do you want me to ship these cars to your yard, Perth Amboy?

Awaiting your early reply, I beg to remain,  
Yours very truly,

AI/NF

20

**EXHIBIT P. 8.**

5/26/19

G D Z

HERMAN ELLIS, INC.  
Dealers and Brokers in  
SCRAP IRON, STEEL AND METALS  
Borings and Turnings a Specialty  
Smelter of Lead and Babbitt

30

Perth Amboy, N. J.,  
February 13, 1919.

A. Isaacs,  
Elizabeth,  
N. J.

Dear Sir:

In reply to your letter of recent date we wish to say that we understood as per recent telephone conversation we had with you that the order was void. We fail to see the reason for writing us this letter as you know very well that at the present time it is impossible to ship any material whatsoever. The only thing that we can do for you is to try and use this material

40

*Exhibits.*

as soon as the steel market will open. We also wish to call your attention to the fact that we bought from you five cars of twenty tons each or one hundred tons in all.

Yours very truly,

HERMAN ELLIS, INC.,

Per B. PEAR.

10

**EXHIBIT P. 9.**

5/26/19

G D Z

ABRAHAM ISAAC

PURCHASING AND SALES AGENT

1291

20

207 Broad Street

Elizabeth, N. J.

Feb. 14, 1919.

Herman Ellis, Inc.,  
Perth Amboy, N. J.

Gentlemen:

30

In reply to your letter of the 13th inst. I beg to advise that I do not consider my order with you void, and beg to state that at no time have I had telephone conversation with either you or Mr. Ellis notifying you of such. As your Mr. Ellis stated he would accept five cars of twenty tons to the car or a total of one hundred tons, and I could ship this to your yard, Perth Amboy, N. J.

He also stated that he would give me One Hundred Dollars (\$100.00) if I would cancel the order. I stated to him at the time that I do not care for the money as I want to ship this material as same has been bought and I have got to move it.

I shall be pleased to have you advise if you will accept the shipment of these five cars in question.

40

Yours very truly,

ABRAHAM ISAAC.

AI/NF

*Exhibits.*

**EXHIBIT D. 1.**

Date 5/27/19

Edwin J. O'Brien, Stenographer  
Union County Courts

For  
Identification

D. 1

Feb. 17, 1919.

Mr. A. Isaac,  
Westfield Ave.,  
Elizabeth, N. J.

Dear Sir:

Replying to your letter of the 14th beg to say that you may ship us the five cars to our name at Perth Amboy, Central Railroad of New Jersey delivery. The five cars are not to exceed 100 tons. You will kindly notice that you will have to ship nothing but No. 1 Heavy Melting Steel.

Yours truly,

HERMAN ELLIS, INC.

per

**EXHIBIT D. 2.**

Date 5/27/19

Edwin J. O'Brien, Stenographer  
Union County Courts

Dec. 7, 1918.

Mr. A. Isaacs,  
Westfield Ave.,  
Elizabeth, N. J.

Dear Sir:

As per telephone conversation we wish to state that we will take in the car you overshipped at \$15 per ton F. O. B. Perth Amboy. Please send us order for same immediately.

Yours truly,

HERMAN ELIIS, INC.

per

HE/SE

*Exhibits.*

December 28, 1918.

Mr. A. Isaacs,  
Elizabeth, N. J.

Dear Sir:

As per conversation we had with you this date we confirm  
10 having purchased from you five cars of heavy melting steel  
suitable and acceptable on our order to Coatesville, Pa., at  
\$16.25 G. T. F. O. B. cars CRR tracks Jersey City, N. J. We  
have this day applied for a permit to cover movement of this  
material.

Yours truly,  
HERMAN ELLIS, INC.,  
Per PEAR.

20

30

40

# New Jersey Court of Errors and Appeals

ABRAHAM ISAAC,

Plaintiff-Respondent,

vs.

HERMAN ELLIS, Inc.,

a corporation,

Defendant-Appellant.

On Appeal.

## BRIEF FOR ABRAHAM ISAAC

This cause was tried before the Circuit Judge and a Jury, and the Jury gave a verdict in favor of the plaintiff and against the defendant, and the defendant now appeals.

### FACTS

The testimony discloses that the plaintiff was engaged in the iron and metal business and had on hand a large quantity of heavy melting steel, and that on the 28th day of December, 1918, the plaintiff sold to the defendant five cars of such steel at \$16.25 per gross ton, f. o. b. cars Jersey City. The said sale was confirmed, in writing, by the parties as evidenced by Schedule A and B annexed to the complaint, pages 4 and 5, and as evidenced by Exhibit P-1, pg. 70 and Exhibit P-2, pg. 72. The two exhibits crossed in the mail, page 10, l. 22-24. The plaintiff loaded 3 cars on January 2, 1919, and asked the defendant for shipping instructions, but none were forthcoming, p. 10, l. 42; p. 11, l. 1-10. From that time on the plaintiff endeavored to make delivery of the goods, but the defendant refused to accept the same, claiming that it was unable to procure a permit from the Railroad Administration to ship the merchandise to Coatesville, and finally on February 11, 1919, the plaintiff by Exhibit P-7, p.

77, offered to ship the goods to Perth Amboy. The defendant thereupon by Exhibit P-8, refused to accept the goods and then there were negotiations between the parties relative to the delivery of the goods to Perth Amboy, upon the express condition that the plaintiff pay the freight from Jersey City to Perth Amboy, this the plaintiff refused to do.

The plaintiff claims that by reason of defendant's breach of the contract he sustained damage in the sum of \$1,102.55, and for that amount the Jury awarded the plaintiff a verdict.

The reasons assigned by the defendant as grounds for appeal are as follows:

1. That said judgment was given for the Plaintiff, Abraham Isaac, and against the defendant, Herman Ellis, Inc., a corporation, whereas by the law of the land, judgment ought to have been given for the said Herman Ellis, Inc., a corporation, and against the said Abraham Isaac.

issues joined between the parties was had, erroneously denied defendant's motion for the direction of a verdict in its favor at the close of the whole case.

#### ARGUMENT

The first point raised by counsel in his Brief, is THAT THE COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT. We respectfully submit that the grounds now urged by the defendant for a reversal of the judgment below, on the ground of the Court's refusal to direct a verdict in favor of the defendant, are not the same as set forth at the trial of the cause, pg. 63. We respectfully submit that the defendant cannot now urge new reasons for a direction of a verdict.

Consolidated Traction Co. vs. Behr, 50  
N. J. L. 447.

The defendant's Brief by paragraph C claims, THERE WAS NO PROOF ON THE PART OF THE PLAINTIFF THAT HE SOLD ANY OF THE STEEL ORDERED BY THE DEFENDANT AT OPEN MARKET AFTER THE DEFENDANT REFUSED TO ACCEPT THE MERCHANDISE; OR THE DIFFERENCE IN VALUE BETWEEN THE CONTRACT PRICE AND THE MARKET PRICE ON OR ABOUT FEBRUARY 14, 1919. That question was not raised at the trial and we therefore submit that the defendant should not, at this time, be permitted to raise the question on appeal.

Delaware etc. R. Co. vs. Dailey, 37 N. J. L. 526.

We respectfully submit that the case was tried on a theory of loss of profits and the Court properly submitted the matter to the Jury.

Berg. vs. Rapid Motor Co., 78 N. J. L. 724.

DeRaimes vs. DeRaimes, 71 N. J. L. 680.

Frisby vs. Thomas Jefferson, etc., 74 N. J. L. 213.

#### EXHIBIT P-2a

The real reason why the defendant did not give shipping instructions to the plaintiff is evidenced by the above Exhibit, and we respectfully call the Court's attention to the same. That was a letter from the Midvale Steel and Ordnance Company addressed to the Coatesville Scrap Iron & Steel Company, and we quote that letter in full, which reads as follows:

**"MIDVALE STEEL AND ORDNANCE COMPANY  
CAMBRIA STEEL COMPANY**

Widener Building  
Philadelphia

**J. C. Agnew,**  
Assistant to President

February 1, 1919

Gentlemen:

We have in our possession Permit FTC No. 97909 covering the shipment of one car of Heavy Steel Scrap Iron from Herman Ellis, Perth Amboy, N. J., to our Coatesville Plant. **We will not forward this permit to you for the reason that we would like to have you withhold shipment until requested, as the congestion at Coatesville at the present time is such that it makes it necessary to take this action.** The permit does not expire until February 20th, and we hope to allow you to ship before it expires.

Kindly acknowledge receipt of this letter.

Yours truly,  
**MIDVALE STEEL & ORDNANCE COMPANY,**  
**J. C. Agnew,**  
Assistant, to President."

To Coatesville Scrap Iron & Steel Company,  
Coatesville, Pa.

HAR: FM.

The Court will not that the Coatesville Scrap Iron & Steel Company had in its possession the permit for the shipment of these goods, but fraudulently withheld the same with the full knowledge of the defendant. When this letter came to the attention of plaintiff, at the trial, he promptly asked the Court for leave to put that letter in evidence, pg. 65.

The Judgment below should be affirmed.

Respectfully submitted,  
**STAMLER & STAMLER,**  
Of Counsel with Respondent.

## New Jersey Court of Errors and Appeals

ABRAHAM ISAAC,

*Plaintiff-Respondent,*

*vs.*

HERMAN ELLIS, INC., a corporation,

*Defendant-Appellant.*

*On Appeal.*

### DEFENDANT-APPELLANT'S BRIEF.

This action was instituted in the Supreme Court, Union County, for damages, by reason of plaintiff-respondent alleging that the defendant-appellant refused to accept delivery of certain merchandise under a contract made between the parties in the following manner:

On December 28, 1918, the parties had a telephone conversation, at which time the sale and purchase was agreed upon, and two letters were sent by the parties as confirmation of said sale and purchase, which letters crossed each other in the mail (p. 16, ll. 20 to 23).

The letter sent by the defendant to the plaintiff reads as follows:

“As per conversation we had with you this date we confirm having purchased from you five cars of heavy melting steel suitable and acceptable on our order to Coatesville, Pa., at \$16.25 Ct., F. O. B. cars C. R. R. tracks, Jersey City, N. J. We have this day applied for a permit to cover movement of this material” (p. 4, State of Case).

On the same day, the plaintiff sent to the defendant the following letter:

“Confirming my telephone call, I beg to confirm sale to you of five (5) cars steel scrap at sixteen twenty-five (\$16.25) dollars per gross ton F. O. B. cars Jersey City, C. R. R. of N. J.

Please have permit issued for these cars at once as material will be loaded Monday” (p. 5, State of Case).

Plaintiff testified that when he talked over the telephone with the defendant, at the time the purchase and sale were made, he knew that Coatesville was one of the places that required permits to remove material, and that no material could be

shipped to Coatesville unless permits were procured from the Railroad Administration (p. 16, ll. 35 to 40), and that Mr. Ellis spoke to him about the permits and called his attention to it (p. 16, ll. 21 to 30), and that Mr. Ellis told him further at the time, that there was an embargo on shipping to Coatesville (p. 29, l. 23).

The defendant contends that the order was given subject to the steel being suitable for Coatesville, and that same could be accepted by Coatesville upon the procuring of permits from the Railroad Administration to ship the material as, at that time, there was an embargo on shipping to Coatesville.

## ARGUMENT.

### I.

**The Court erred in refusing to direct a verdict in favor of the defendant.**

At the close of the whole case, the defendant moved for direction of a verdict in its favor because the plaintiff had not made out a cause of action, which motion was denied by the learned Trial Judge. This, we submit, was clearly error.

**A. There was no proof that defendant's steel was suitable on the Coatesville order.**

The sale and purchase were made over the telephone between the plaintiff and defendant (p. 16, ll. 6 to 10), upon which telephone conversation both of these parties attempted to confirm, in writing, by the letters marked Exhibit P. 1 and Exhibit P. 2 (pp. 70 and 71).

Both of these instruments being a part of one transaction should be read together and each should be construed in reference to the other:

*Canadian Improvement Co. v. Lea*, 74 N. J. E. 234.

*Owens v. Owens*, 23 N. J. E. 60.

There is no testimony whatsoever on the part of the plaintiff tending to show that he objected to the conditions placed by the defendant, as shown in its letter to the plaintiff (Exhibit P. 2), that the material must be suitable on the Coatesville order.

The defendant had a right to prescribe in his offer any condition as to time, place, quantity, mode of acceptance or any

other matter it may please to insert and make part of the contract, and the acceptance must in every respect meet and correspond with the offer, neither falling short of or going beyond terms proposed.

Corpus Juris, Vol. 13, p. 283.

While there seems to be no acceptance in writing by the plaintiff of the conditions placed by the defendant it may be considered as having been accepted by the defendant by acquiescence, and in endeavoring to assert his rights thereunder.

One of the conditions of the confirmation of the sale by the defendant to the plaintiff, as marked Exhibit P. 2, is that the heavy melting steel should be suitable to the defendant's order to Coatesville, Pa.

The plaintiff failed to show that the kind of material was suitable on the defendant's order to Coatesville.

**B. There was no proof on the part of the plaintiff that the steel was acceptable on the defendant's order to Coatesville.**

The specific reference to the defendant's letter to the plaintiff confirming purchase (P. 4, State of Case) says:

“Suitable and acceptable on our order to Coatesville, Pa.”

The defendant's witness testified that he told the plaintiff that he would purchase the material from him subject to the procuring of permits, so that the goods would be accepted at Coatesville (p. 32, ll. 30 to 40).

The plaintiff admitted that at the time of said conversation he knew that Coatesville was one of the places requiring the procuring of permits to have material shipped, and that there was an embargo on shipping at that point (p. 16, ll. 11 to 35; p. 29, l. 23).

It was admitted by counsel for the defendant that there was an embargo on shipping, and that the United States Railroad Administration issued various orders, beginning August 27, 1918, and including March 4, 1919, and that there was an embargo on shipping at Coatesville during that period of time (p. 53, ll. 40 to 45; p. 54, ll. 1 to 30).

The Court correctly stated (p. 32, ll. 10 to 13) that the words that “acceptable on our order to Coatesville, in other words, it can be accepted in order that it might be used at Coatesville.”

The performance of the contract of sale and purchase of the steel depended upon the contingency and condition that the material could be shipped and accepted, in order that it might be used at Coatesville.

And the evidence is upon the plaintiff to show that there was no embargo at said point, and that shipment could have been made at Coatesville, so that it could have been accepted in order that the material be used at Coatesville.

On the contrary, the evidence is uncontradicted and admitted that during the time in question there was an embargo at Coatesville, and that no permits could have been gotten, in order to ship the material, before he made out a *prima facie* case, in order to have same submitted to the jury to pass upon.

**C. There was no proof on the part of the plaintiff that he sold any of the steel ordered by the defendant at open market after the defendant refused to accept the merchandise; or the difference in value between the contract price and the market price on or about February 14, 1919.**

Plaintiff testified that he waited until January 2, 1919, when he telephoned to defendant's office, and he was advised that they had no permits to ship the material to Coatesville, and he replied:

“Well, I said, then I am going to go ahead and ship. And I shipped three cars to Syracuse, New York” (p. 11, ll. 10 to 18).

On January 3rd he shipped three cars to Joseph Brothers, Syracuse (p. 11, ll. 20 to 32), and, by reason of same, he lost \$771.64 (p. 12, ll. 10 to 28), and on January 24th he shipped two more cars to Nagel Steel Company, at Rahway (p. 12, ll. 30 to 40), and by reason of such shipment he sustained a loss of \$331.91 (p. 13, ll. 30 to 40).

Plaintiff admitted that he never notified the defendant that he sold the three cars, which he shipped on January 3rd to Joseph Brothers, or that he was going to sell it on their behalf (p. 20, ll. 16 to 25); nor is there any testimony that the plaintiff advised defendant of the January 24th shipment.

He admits that he charged the defendant with shipment of cars made on January 3rd and January 24th, and that on Feb-

ruary 11, 1919, as appears by Plaintiff's Exhibit 7 (p. 77) he wrote to the defendant as follows:

"I beg to notify you that I will have on tracks at Jersey City your five carloads of scrap as per your letter of December 28th.

I trust that you will, at this time, apply for a permit covering movement of said cars, or do you want me to ship these cars to your yard, Perth Amboy?

Awaiting your early reply."

On February 14th, according to Plaintiff's Exhibit 9 (p. 78) he again wrote a letter, in which he said:

"I shall be pleased to have you advise if you will accept the shipment of these five cars in question."

So that, even as late as February 11th and February 14th, he had not considered that there was a breach of contract and had not sold any material to be charged to the defendant.

It would, therefore, clearly appear, that when the plaintiff shipped three cars on January 3rd and two cars on January 24th, they were not the material which was originally to go to the defendant, or sold at its account.

An Act concerning the sale of goods and to make uniform the law relating thereto (P. L. 1917, p. 311, Sec. 64, subdiv. 3),  
MEASURE OF DAMAGES: DIFFERENCE BETWEEN CONTRACT PRICE  
AND MARKET PRICE.

"Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price, at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

So that, according to the statute, the plaintiff's cause of action arose, if at all, on January 2nd, when plaintiff said he telephoned to the defendant, asking whether defendant secured permits, and, when he was told that it had not, said he was going to go ahead and ship (p. 10, ll. 40 to 45; p. 11, ll. 1 to 12).

Plaintiff saw fit in waiving the breach, if there was any, at the time, by extending the time within which to ship, and as late as February 11th he wrote a letter to the defendant, advising that he had five carloads, according to the original order, ready to ship, and also letter Exhibit P. 9, dated February 14th, practically to the same effect.

Plaintiff's damages could only be the difference between the contract price and the market price on or about February 14th, when he knew and was told that the defendant disputed the validity of the contract. This the plaintiff failed to show, but merely relied upon several previous shipments, which he never intended to be for and on account of the defendant on the order given, and never notified the defendant that he had ever shipped any material on its account, and that any damages sustained were to be charged to the defendant corporation.

## II.

**The judgment below should be reversed.**

Respectfully submitted,

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ANDREW J. WIGHT,  
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Bond

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