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Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed July 17, 1926.

Essex County Circuit Court

A. HOLLANDER & SON, INC., a corporation, <i>vs.</i> DANIEL RUDER,	} <i>Plaintiff,</i> <i>Defendant.</i>	} <i>Action at Law. Notice of Appeal and Grounds of Appeal.</i>	10
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To Daniel Ruder, defendant, and Benjamin F. Jones, attorney of defendant. 20

TAKE NOTICE, that the plaintiff hereby appeals to the New Jersey Court of Errors and Appeals from all of the judgment entered herein on the verdict rendered in this cause on November 4, 1925.

AND TAKE FURTHER NOTICE, that the plaintiff assigns the following grounds of appeal from the judgment of the Essex County Circuit Court. 30

1. The Court erroneously denied plaintiff's motion to strike out from the defendant's answer the First Separate Defense to the First Count of plaintiff's complaint, on the ground that under the common law a common carrier is not permitted to exempt himself from liability for loss of goods.

2. The Court erroneously refused to permit plaintiff's attorneys to ask the following questions of the plaintiff's witness, Louis Reicheimer, 40

Notice and Grounds of Appeal.

“Was there a reference to this one bag of muskrat skins on that receipt?”

3. The Court erroneously made the following ruling and statement:

10 “The Court: I will ask him the question of this witness whether he is testifying as the agent for A. Hollander & Son or whether the company is insured against an adverse verdict in this case.” (See transcript of testimony, p. 85.)

4. The Court erroneously asked the following question of plaintiff’s witness, Charles Katz:

20 “(By the Court.) Well, as the company’s agent I mean the company’s interest, or whether the company is insured against the result of an adverse verdict in this case?” (See transcript of testimony, p. 85.)

5. The Court erroneously made the following ruling and statement:

“The Court: If the company (plaintiff) is insured against an adverse verdict, he can testify to that. I think he said he did not know anything about it.” (See transcript of testimony, p. 86.)

30 6. The Court erroneously refused to direct a verdict in favor of the plaintiff and against the defendant on plaintiff’s motion.

7. The Court erroneously refused plaintiff’s request to charge as follows:

“That on January 21, 1919, plaintiff delivered to defendant among other merchandise a bag containing 1,000 muskrat skins for carriage to Long Branch.”

Notice and Grounds of Appeal.

8. The Court erroneously refused plaintiff's request to charge as follows:

"That the value of said bag of skins on said date was \$2,500.00."

9. The Court erroneously refused plaintiff's request to charge as follows:

"That said bag of skins was not carried safely and delivered by defendant to the consignee at Long Branch, but said bag was lost in transit." 10

10. The Court erroneously refused plaintiff's request to charge as follows:

"That defendant is absolutely liable to plaintiff for said loss in the sum of \$2,500.00 with interest on said sum from January 21, 1919, to date, making a total sum of \$3,500.00." 20

11. The Court erroneously charged the jury as follows:

"To turn to Robbins' testimony, he admitted when he arrived at Long Branch, that he took the tailboard of this truck down and that it was tied just as it had been tied when they left Newark. He said that after he took the tailboard down someone gave him money and he went to get his lunch, and when he got back they claimed there was a bag short, and that Lubin, who was an employee of the plaintiff, said it had never been on the load. Afterwards, a conference was held by some of the interested parties and among others who were present were Mr. Ruder, Sr., and Mr. Robbins, and Robbins said that at the time Lubin said it was not on the load." (See transcript of testimony, p. 95.) 30 40

Notice and Grounds of Appeal.

The Court's error consisted in the fact that the underlined portion of the foregoing statement by the Court is not supported by the testimony of Robbins, this witness having testified on cross examination that he could not understand anything that Lubin spoke (in a foreign language) and that he, Robbins, only interpreted Lubin's gestures as signifying that the bag never went on the truck.

12. The Court erroneously charged the jury as follows:

"Mr. Ruder indicated that Lubin said he was sure this bag had not been put on the truck." (See transcript of testimony, p. 95:)

The Court's error consisted in the fact that this was a statement by the Court not supported by the testimony. On cross examination Ruder admitted that Lubin's alleged assertion was in the form of gestures and the shake of the head, which Ruder interpreted to signify that the bag had not been put on the truck.

13. The Court erroneously charged the jury as follows:

"The receipt which is alleged to have been signed by the defendant is not produced and the burden of proof in this case is upon the plaintiff to show by the greater weight of the evidence that the defendant did have this bag of muskrat skins loaded on his truck on that day." (See transcript of testimony, p. 96.)

This was a statement with reference to the testimony, which was likely to mislead the jury as to the legal and probative effect of the mere non-production of the receipt and to mislead the jury as to the legal and probative effect of all

Notice and Grounds of Appeal.

the uncontradicted testimony as to the existence of the receipt, its loss, its contents, and the possession of a copy of the receipt by defendant's employee, Robbins.

Yours respectfully,

BILDER & BILDER,
Attorneys of Plaintiff.

10

Service of the within notice of appeal and grounds of appeal is hereby acknowledged this 14th day of July, 1926.

BENJAMIN F. JONES,
Attorney of Defendant.

Affidavit of Service.

20

STATE OF NEW JERSEY, }
ESSEX COUNTY. } ss.

CHARLES PFEIFER, Deputy Sheriff of the County aforesaid, being duly sworn, on his oath deposes and says that on the 18th day of September, A. D. 1924, he delivered personally to the said defendant, Daniel Ruder, a true copy of the within summons and complaint, with a ten days' notice endorsed thereon.

30

CHARLES PFEIFER.

Subscribed and sworn to this 19th
day of September, A. D. 1924.

HARVEY W. KEOUGH,
Notary Public of New Jersey.

40

Summons.

SUMMONS.

The State of New Jersey to Daniel Ruder.

(SEAL) YOU ARE SUMMONED to answer the annexed complaint of A. Hollander & Son, Inc., a corporation, in an action
10 at law in the Essex County Circuit Court, and TAKE NOTICE, that unless you file your answer to the said complaint with the Clerk of the Circuit Court at Newark within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you (and see notice endorsed hereon).

20 WITNESS, WORRALL F. MOUNTAIN, Judge of the Essex County Circuit Court, at Newark, this 15th day of September, A. D. 1924.

JOHN H. SCOTT,
Clerk.

BILDER & BILDER,
Attorneys.

30

40

Complaint.

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

<p>A. HOLLANDER & SON, INC., a corporation,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>DANIEL RUDER,</p> <p style="text-align: center;"><i>Defendant.</i></p>	}	<p><i>Action at Law. Complaint.</i></p>	10
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The plaintiff, a corporation organized under and by virtue of the laws of the State of New Jersey, alleges that:

1. At the times herein stated, defendant was a common carrier of goods for hire from Newark, New Jersey, to Long Branch, New Jersey.

2. On January 21, 1919, the said plaintiff delivered to said defendant as such carrier goods of the plaintiff, namely, eleven bales and one bag of muskrat skins, for carriage for reward from Newark to Long Branch, and there to be delivered by the defendant to plaintiff.

3. Defendant neglected his duty and did not safely carry the said goods from Newark to Long Branch, nor there deliver the same to the plaintiff, but by the default of the defendant one bag of muskrat skins of the value of \$2,500.00 was wholly lost to the plaintiff.

Wherefore, plaintiff demands of the defendant the sum of \$2,500.00 besides interest from January 21, 1919.

40

Complaint.

Judgment will be claimed by the plaintiff against the defendant in the sum of \$2,500.00 besides interest from January 21, 1919.

BILDER & BILDER,
Attorneys of Plaintiff.

10 I hereby appoint and depute Charles Pfeifer to serve the within writ.

Witness my hand and seal this 17th day of September, 1924.

(SEAL) HARRY B. O'CONNELL,
Sheriff.

By Alfred C. Walker,
Under Sheriff.

20 Sheriff fees, \$3.78.

Served the within complaint, summons and—thereon with a ten days' notice endorsed September 18, 1924, personally upon Daniel Ruder, the within-named defendant, at his place of business, No. 113 New York avenue, Newark, N. J.

HARRY B. O'CONNELL,
Sheriff.

30 By Charles Pfeifer,
Special Deputy.

Complaint.

Notice to the within-named defendant:

In case the within summons and complaint is served upon you personally, then take notice that if you intend to make defense to this action, you must file an affidavit of merits within ten days from the date of service 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. 10

BILDER & BILDER,
Attorneys of Plaintiff.

20

30

40

Affidavit of Merits.

AFFIDAVIT OF MERITS.

Filed September 23, 1924.

ESSEX COUNTY CIRCUIT COURT.

10	A. HOLLANDER & SON, INC., a corporation, <i>Plaintiff,</i> <i>vs.</i> DANIEL RUDER, <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Affidavit of Merits.</i>
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STATE OF NEW JERSEY, ss.
COUNTY OF ESSEX.

20 DANIEL RUDER, of full age, being duly sworn, on his oath saith that he is the defendant in the above-stated cause and he believes that he has a just and legal defense to the said action on the merits of the case.

DANIEL RUDER.

Subscribed and sworn to before me
this 22nd day of September, 1924.

30 GUSTAVE HAUSSLING,
Master in Chancery of N. J.

*Answer.***ANSWER.**

Filed September 30, 1924.

ESSEX COUNTY CIRCUIT COURT.

<p>A. HOLLANDER & SON, INC., a corporation, <i>vs.</i> DANIEL RUDER,</p>	<p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>Defendant.</i></p>	<p style="font-size: 4em; vertical-align: middle;">}</p> <p style="vertical-align: middle;"><i>Action at Law. Answer.</i></p>	10
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Defendant, residing in the City of Newark,
County of Essex and State of New Jersey, says
that:

20

(1) He denies the truth of the matters con-
tained in the complaint.

FIRST DEFENSE.

(1) Prior to the month of January, 1919, de-
fendant entered into a contract with the plain-
tiff, under the terms of which contract defendant
rented to the plaintiff, on a per diem basis, an
automobile truck with driver, to do certain truck-
ing work for the plaintiff, and it was expressly
understood and agreed between the plaintiff and
defendant that defendant should not be liable for
the loss or damage of any goods belonging to
the plaintiff while in process of moving.

30

(2) On or about January 21, 1919, pursuant
to said contract, defendant's automobile truck,
with driver, was used by the plaintiff for the
purpose of carting certain goods and chattels

40

Answer.

10 belonging to the plaintiff, from Newark, New Jersey, to Long Branch, New Jersey. Said goods and chattels were loaded on said truck by the plaintiff, his agent and servants, and said goods were at all times under the care, custody and control of the plaintiff while being moved from Newark to Long Branch, and the said plaintiff, by his agents and servants, removed said goods and chattels from said truck at Long Branch.

(3) Defendant fully performed and carried out all of the conditions of said contract on his part to be performed.

BENJAMIN F. JONES,
Attorney for Defendant.

20

30

40

Amended Complaint.

AMENDED COMPLAINT.

Filed November 4, 1925.

ESSEX COUNTY CIRCUIT COURT.

<p>A. HOLLANDER & SON, INC., a corporation, <i>Plaintiff,</i></p>	}	<i>Action</i>	10
<i>at Law.</i>			
<i>vs.</i>			
<p>DANIEL RUDER, <i>Defendant.</i></p>	}	<i>Amended</i>	20
		<i>Complaint.</i>	

The plaintiff, a corporation organized under and by virtue of the laws of the State of New Jersey, alleges that:

FIRST COUNT.

1. At the times herein stated, defendant was a common carrier of goods for hire from Newark, New Jersey, to Long Branch, New Jersey.

2. On January 21, 1919, the said plaintiff delivered to said defendant as such carrier, goods of the plaintiff, namely, eleven bales and one bag of muskrat skins, for carriage for reward from Newark to Long Branch, and there to be delivered by the defendant to plaintiff.

3. Defendant neglected his duty and did not safely carry the said goods from Newark to Long Branch, nor there deliver the same to the plaintiff, but by the default of the defendant one bag of muskrat skins of the value of \$2,500.00 was wholly lost to the plaintiff.

Wherefore, plaintiff demands of the defendant the sum of \$2,500.00 besides interest from January 21, 1919.

Amended Complaint.

Judgment on this count will be claimed by the plaintiff against the defendant in the sum of \$2,500.00 besides interest from January 21, 1919.

SECOND COUNT.

10 1. On January 21, 1919, plaintiff delivered to the defendant and the defendant received from plaintiff certain goods of the plaintiff, to wit, eleven bales and one bag of muskrat skins, which the defendant then and there agreed with plaintiff to carry and transport for plaintiff for reward from plaintiff's place of business in Newark to plaintiff's place of business in Long Branch, New Jersey, and deliver said goods to the plaintiff's place of business at Long Branch.

20 2. After said goods had been delivered as aforesaid by plaintiff to the defendant for the above-mentioned purpose, and while said goods were in defendant's possession and in transit between Newark and Long Branch, a portion of said goods, to wit, one bag of muskrat skins, was lost.

3. Plaintiff alleges that the loss of said bag of muskrat skins was caused by and was the result of the defendant's negligence.

30 4. Said bag of muskrat skins was of the value of \$2,500.00.

5. By reason of the aforementioned facts and defendant's negligence, plaintiff sustained damages in the sum of \$2,500.00.

Wherefore, plaintiff demands of the defendant in the sum of \$2,500.00 besides interest from January 21, 1919.

Judgment on this count will be claimed by the plaintiff against the defendant in the sum of \$2,500.00 besides interest from January 21, 1919.

40

BILDER & BILDER,
Attorneys of Plaintiff.

Answer to Amended Complaint.

ANSWER.

Filed November 6, 1925.

ESSEX COUNTY CIRCUIT COURT.

<p>A. HOLLANDER & SON, INC., a corporation, <i>Plaintiff,</i> <i>vs.</i> DANIEL RUDER, <i>Defendant.</i></p>	}	<p><i>Action at Law. Answer.</i></p>	10
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Defendant, residing in the City of Newark,
County of Essex and State of New Jersey, says
that: 20

(1) He denies the truth of the matters con-
tained in the amended complaint.

FIRST DEFENSE.

(1) Prior to the month of January, 1919, de-
fendant entered into a contract with the plain-
tiff, under the terms of which contract defendant
rented to the plaintiff, on a per diem basis, an
automobile truck with driver, to do certain
trucking work for the plaintiff; and it was ex-
pressly understood and agreed between the plain-
tiff and defendant that defendant should not be
liable for the loss or damage of any goods be-
longing to the plaintiff, while the automobile
and driver were under the direction and control
of said plaintiff. 30

(2) On or about January 21, 1919, pursuant
to said contract, defendant's automobile truck, 40

Answer to Amended Complaint.

10 with driver, was used by the plaintiff for the purpose of carting certain goods and chattels belonging to the plaintiff from Newark, New Jersey, to Long Branch, New Jersey. Said goods and chattels were loaded on said truck by the plaintiff, his agents and servants, and said goods were at all times under the care, custody and control of the plaintiff while being moved from Newark to Long Branch, and the said plaintiff, by his agents and servants, removed said goods and chattels from said truck at Long Branch.

(3) Defendant fully performed and carried out all of the conditions of said contract on his part to be performed.

20 BENJAMIN F. JONES,
Attorney for Defendant.

30

40

*Judgment.***JUDGMENT.**

ESSEX COUNTY CIRCUIT COURT.

36752 A. HOLLANDER AND SON, INCOR- PORATED, a corporation, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> DANIEL RUDER, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> <i>On Verdict by a Jury.</i> <i>Judgment for Defendant.</i>	 10
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Benjamin F. Jones, defendant's attorney.

This action was tried before Judge Worrall F. Mountain with a jury at the Essex County Circuit Court on November 4, 1925. 20

The cause having been heard and submitted to the jury, they return their verdict as follows:

They find in favor of the defendant, Daniel Ruder, and against the plaintiff, A. Hollander and Son, Incorporated, a corporation.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and the defendant recover of the plaintiff costs, which are taxed at sixty-four dollars and eighteen cents. 30

Judgment entered and signed November 4, 1925.

Clerk's Certificate.

ESSEX COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

10 I, JOHN H. SCOTT, Clerk of the Court of Common Pleas, in and for the County of Essex in the State of New Jersey, Do HEREBY CERTIFY That the foregoing is a true and correct copy of all the records in the case of A. Hollander & Son, Incorporated, plaintiff, *vs.* Daniel Ruder, defendant, together with a copy of the judgment record entered in Book 100, Circuit Court Judgments, page 465, and the same is taken from and compared with original copies of all the records and as the same now remains on the files of said office.

20 IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the
 (SEAL) official seal of said Court and County at Newark, N. J., this 22nd day of July, A. D. 1926.

JOHN H. SCOTT,
 Clerk.

30

40

Opening.

ESSEX COUNTY CIRCUIT COURT.

November 2, 1925.

A. HOLLANDER & SON

vs.

DANIEL RUDER.

*Action
at Law.*

10

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For the plaintiff appear Bilder & Bilder (by Walter J. Bilder).

For the defendant appears Benjamin F. Jones.

A jury is called and sworn.

20

Mr. Bilder opens for the plaintiff.

Mr. Bilder: I ask leave to file an amended complaint, in which I add one count. The cause of action is one by the plaintiff against the defendant, who took plaintiff's goods for transportation from Newark to Long Branch and a certain item was lost in transit. The plaintiff charges the defendant as being a common carrier in the only count in the complaint originally. I desire to amend by adding another count charging the same facts, but not alleging the defendant is a common carrier, but charging him as a bailee. I served my adversary about ten days ago.

30

The Court: Is there any objection?

Mr. Jones: The amended complaint sets up a cause of action based on negligence, and that, of course, is a tort action, and if it is sought to charge the defendant with responsibility on the ground of negligence—

40

Opening.

The Court: I understand the amended complaint sets up a bailment?

Mr. Bilder: That is all.

The Court: Is there any objection to the amendment?

10 Mr. Jones: I have no opportunity to file an answer unless the Court allows a verbal answer to be filed at this time.

The Court: I will allow you to do that, of course. That is a substantial right you have.

Do you want to file a general denial to the second count of this amended complaint?

Mr. Jones: Yes.

The Court: Were you served with a copy of it?

20 Mr. Jones: Yes.

The Court: Then, you wish to file a general denial to the second count of the amended complaint?

Mr. Jones: Yes, your Honor.

Mr. Jones opens for the defendant.

Mr. Bilder: I desire to move to strike out the first separate affirmative defense in defendant's answer.

30 I take it that will be treated in reference to the first count in which the defendant is charged as a common carrier. The defendant's affirmative defense is that a contract was entered into between the plaintiff and the defendant whereby the defendant was to be exempt from liability for loss, and I move to strike that out on the ground that under the law a common carrier is not permitted to exempt himself from liability for loss of goods.

40

Louis Richeimer, direct.

The Court: I will deny your motion. You may have an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

LOUIS RICHEIMER, sworn in behalf of the plaintiff. 10

Direct examination by Mr. Bilder.

Q On January 21, 1919, by whom were you employed? A A. Hollander & Son.

Q In what capacity? A Receiving and shipping clerk of raw skins.

Q What business was A. Hollander & Son in at that time? A What is that? 20

Q What business was A. Hollander & Son in at that time? A Fur business.

Q What parts of the fur business? A All kinds, all kinds of skins.

Q Fur dyeing? A Fur dyeing and fur dressing.

Q In the conduct of their business did they buy and sell furs or just dye and dress? A Dyeing and dressing.

Q Whose furs did they generally dye and dress, their own or other persons'? A Other merchants'. 30

Q Belonging to third persons? A What is that?

Q I say belonging to third persons? A Second persons.

Q Furs belonging to others? A Yes, sir.

Q None of their own? A None of their own.

Q How long have you been in that position?

A Twenty-five years. 40

Louis Richeimer, direct.

Q Do you know a man named Robbins, who is now in court? A Yes, sir.

Mr. Bilder: Mr. Robbins, stand up, please.

(A man arises in the audience.)

10 Q Do you recognize this man? A Yes, sir.

Q Do you recall seeing him on January 21, 1919? A Yes, sir.

Q Where? A By Ruder's truck.

Q By Ruder's truck? A Yes, sir.

Q Where? A In front of the stockroom.

Q What stockroom? A A. Hollander & Son's stockroom.

20 Q Did you have any business with him on that date? A Loading the skins for Long Branch.

Q Whose truck was it? A Ruder's.

Q The defendant in this case? A Yes, sir.

Q What was this man's connection with that?

A As far as I know?

Q As you saw him there? A Yes, sir.

Q Did you see him there? A Yes, sir.

Q Was he in charge of that truck? A Yes, sir.

30 Q Had you had dealings with him before then? A Yes, sir.

Q How often? A From eight to twelve times.

Q On each occasion was he in charge of that truck? A Yes, sir.

Q On each of those occasions what was your dealing with him? A He signed my receipts before he left the place.

40 Q What did he do? A He watched the loading of the truck.

Louis Richeimer, direct.

Q On each of these occasions what was done in connection with the truck by you and the others down there? What was going on? A Loading skins for our branch factories.

Q For each? A Yes, sir.

Q On this truck? A On this truck; yes, sir.

Q Robbins was in charge of it each time? A Yes, sir. 10

Q On January 21st what did you put on that truck? A Ten bales and one bag.

Q Did you see the stuff go on? A Yes, sir.

Q Was Robbins there at that time? A Yes, sir.

Q What about this bag of skins; did you see that go on? A Yes, sir.

Q Where was that put? A About the center of the truck on top of the bales.

Q Is there a difference in appearance between that bag and the bales? A Yes, sir. 20

Q What is the difference? A A bale is planked and a bag is any shape.

Q Did a bale have more in it than a bag? A Yes, sir.

Q Is a bag lighter than a bale? A Yes, sir.

Q Very much lighter? A About half.

Q Who else was there while that stuff was being put on the truck? A Mr. Geller. 30

Q Who was he working for at that time? A A. Hollander & Son.

Q What connection did Geller have with your work? A Assistant superintendent.

Q What did Robbins do with you in connection with that load of skins you put on? A Signed my receipt.

Q What kind of a receipt was that? A On yellow paper.

Q What was on it? A The slip number, the bag number. 40

Louis Richeimer, direct.

Mr. Jones: I object.

The Court: Sustain the objection.

Q Where is that receipt now? A Lost.

Q When is the last time you saw it? A April, 1919.

10 Q April, 1919? A Yes, sir.

Q How do you fix the time of April, 1919, as the last time you saw it? A Because I signed an affidavit of that.

Q Of when this was shipped? A Yes, sir.

Q Is this the affidavit you refer to? A Yes, sir.

Q Was the receipt before you when you executed that affidavit? A Yes, sir.

20 Mr. Bilder: I offer the affidavit in evidence.

Mr. Jones: I object.

The Court: Sustain the objection.

Mr. Bilder: I ask to have the affidavit marked for identification.

(Same is marked P. 1 for identification.)

30 Q What was on that receipt? A The slip number.

Mr. Jones: I object.

The Court: Sustain the objection.

Q Have you made a search for that receipt?

A Yes, sir.

Q In whose charge was that receipt? A In the office.

Q What office? A A. Hollander & Son.

40 Q Did you make any search in that office for that receipt? A Yes, sir.

Louis Richeimer, direct.

Q Did you attempt to find it? A Yes, sir.

Q Did you look every place it may have been throughout the files? A Yes, sir.

Q What was on that receipt? A The bale numbers, slip numbers, customer's name and amount of skins.

Q Was there a reference to this one bag of muskrats on that receipt? 10

Mr. Jones: I object.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Who signed that receipt?

Mr. Jones: I object. 20

Q (By the Court.) Did you see him sign it?
A Yes, sir.

Q (Question read.) A Robbins.

Q (By Mr. Bilder.) The man who just stood up in court? A Yes, sir.

Q What was done then with the receipt after it was signed? A Filed up in A. Hollander & Son's office. 30

Q Was any copy of that receipt made? A Yes, sir.

Q Who kept that? A Robbins.

Mr. Bilder: Have you that, Mr. Jones?

Mr. Jones: The defendant never had a copy of any receipt and it never was in his possession, or a copy of same.

Q You say Robbins kept that copy? A Yes, sir. 40

Louis Richeimer, cross.

Q When did you give him that copy? A The middle of January.

Q When, with reference to giving him the goods, did you give it to him? A When he took the load.

Q Where were those goods directed to go to?
10 A Long Branch.

Q Did you see them finish loading that wagon with everything on it on that occasion? A Yes, sir.

Q When you had given Robbins goods before did you get any receipts? A Yes, sir.

Q Did you always get a receipt? A Yes, sir.

Q Signed by Robbins? A Yes, sir.

Q Did you see the skins that were put into
20 that bag, that one bag of muskrat skins? A Yes, sir.

Q Were they put in in your presence? A Yes, sir.

Q By whom? A Mr. Geller.

Q What can you say about the grade of quality of those skins? A Prime and selected.

Q With reference to all the 1,000 skins that were in that bag? A Yes, sir.

30 *Cross examination by Mr. Jones.*

Q Who loaded those skins on the truck? A Mr. Geller.

Q Did you help him? A No, I stood there.

Q Mr. Geller put all the skins in himself, did he? A No, with a few men.

Q They were all employees of Hollander & Son? A Yes, sir.

40 Q They did all the loading? A Yes, sir.

Louis Richeimer, cross.

Q After the truck was loaded what happened to the truck, did they close the back doors and tie it up? A It didn't have any back doors.

Q The truck did not have any back doors?

A No, sir.

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

Q You are just as sure of that as you are that they put the eleventh bag in there, aren't you? A Yes, sir. 10

Q When did you first hear that this bag was lost? A That afternoon.

Q Then, what did you do when you heard it was lost; what did you do? A A. Hollander & Son told me to make a search for it.

Q You made a search through the factory?

A Yes, sir.

Q How long did that search last? A About a day. 20

Q You made a thorough search of the factory? A Yes, sir.

Q To see whether you had been mistaken about putting the bag on? A Yes, sir.

Q Then, what other search did you make beside searching the factory? A None at all.

Q Didn't you send word to your other plant to search and see if that bag was not there? A No, sir. 30

Q Where was the plant you were shipping clerk at? A East Kinney street.

Q You have a plant on Johnson street? A Yes, sir.

Q Have one there now? A Yes, sir.

Q Did you have a search made at the Johnson street plant? A Yes, sir.

Q What was your idea of asking this man Robbins to sign a receipt? A I never let any merchandise leave my door unless I got a receipt. 40

Louis Richeimer, cross.

Q Isn't it a fact that Hollander & Son had a man on the truck with Robbins? A Yes, sir.

Q Isn't it a fact that every time Robbins, or any truck that belonged to Ruder was used by A. Hollander & Son they put a man on the truck? A Yes, sir.

10 Q As a matter of fact, didn't you have a receipt signed by the man who went with Robbins? A No, sir.

Q Are you sure about that? A Positively.

Q Wasn't it because the fellow who went with Robbins on this day could not write very good that you got Robbins to sign this receipt? A No, sir; none of our men sign receipts.

Q Wasn't Robbins your man? A No, he was Ruder's man.

20 Q Wasn't he hired by A. Hollander & Son? A Yes, sir.

Mr. Bilder: I object as calling for a conclusion of law, and this examination cannot go beyond the scope of the direct examination.

The Court: There is no objection to his telling us who Robbins was hired by.

Q You told Robbins where to go, didn't you?

30 A Yes, sir.

Q You gave him express instructions as to what to do? A No, sir; just told him to sign the receipt and check it off and see what is on the truck.

Q Didn't you tell Mr. Robbins where to go with this truck? A Told him to Long Branch.

Q Didn't you tell him what to do after he got there? A No, sir.

40 Q Didn't you tell him to go in and back his truck in and have the goods unloaded and get

Louis Richeimer, re-direct.

another load and bring it back to Newark? A
No, sir.

Q That is what he did, isn't it? Didn't you
tell Robbins what to do after he left Newark?
You told him to go to Long Branch? A Yes,
sir.

Q That is all you did tell him to do? A 10
Yes, sir.

Re-direct examination by Mr. Bilder.

Q When you made this search, did you make
that of your own accord? A No, sir.

Q Whose idea was that? A The company's,
A. Hollander & Company.

Q How did that search come to be made?
A On account of the bag being lost. 20

Q Did Mr. Ruder have anything to do with
having that search made? A He must have had.

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

The Court: Strike it out.

Q Who was it that told you to make that
search? A I think it was Mr. Fenuk.

Q (By the Court.) Did you tell your em- 30
ployers you had seen this bag put on the truck?
A Yes, sir.

Q In spite of that information, they wanted
you to make a search? A Yes, sir.

Q (By Mr. Bilder.) Didn't you have a re-
ceipt at the time the search was made? A Yes,
sir.

Q Did you show that to your employers? A
Yes, sir. I told them, "There is no use to make
a search— 40

Louis Richeimer, re-cross—re-direct.

Mr. Jones: Never mind what you told them.

Q Were you ever present when Mr. Ruder was shown that receipt with this one bag of muskrats specified on it? A No, sir.

10 Q You were not present? A No, sir.

Q Was that bag found in that search? A No, sir.

Re-cross examination by Mr. Jones.

Q Wasn't that search made because the man who was with Robbins, Hollander's man who was with Robbins, told you that the bag never could have been lost, that he was there all the time? A The man never told me, because I
20 wouldn't understand him if he did. He didn't speak English.

Q You didn't understand that? A No.

Q Didn't he tell you in broken English? A He couldn't even speak broken English.

Re-direct examination by Mr. Bilder.

Q This man who is referred to as being on
30 the truck, why was he sent on that truck?

Mr. Jones: I object.

The Court: I will admit it.

A In case there was a breakdown, or something, and Mr. Robbins had to go for assistance, someone would be there to watch the truck.

Q Did Robbins ever have a helper on that truck? A No, sir.

Q No one with him? A No, sir.

40 Q Is that a motor truck? A Yes, sir.

Sam Geller, direct.

Q Is it a pretty big one? A Yes, sir.

Q Had you ever spoken to Ruder about why he did not have a helper on that truck? A No, sir.

Re-cross examination by Mr. Jones.

Q Did you give this man that went with Robins that day, did you give him instructions as to what he was to do in case of helping? A No, sir. 10

Q Why did you say he was sent in case of helping in a breakdown? A Why?

Q Yes, if you don't know. A He knew what to do.

Q How do you know? A Because I know he knew what to do. 20

Q Is that the best answer you can give to that question? A Yes, sir.

Q Did you have a conversation with him about it? A No, sir, I didn't talk to him.

Q Did anyone else talk with him? A Yes, sir.

Q Who? A I don't remember.

Q Do you mean to say he was not put on there for the purpose of watching and safeguarding those goods and seeing that they reached their destination? A Well, partly. 30

SAM GELLER, sworn in behalf of the plaintiff.

Direct examination by Mr. Bilder.

Q Where were you working in January, 1919?

A A. Hollander & Company. 40

Sam Geller, direct.

Q What were you doing? A In the stock-room.

Q Did your work have any connection with Mr. Richeimer's work? A We were both working in the same department.

10 Q Do you know this man Robbins? A Yes, sir.

Q Did you see him in January, 1919? A Yes, sir.

Q At the Hollander & Company place in Newark? A Yes, sir.

Q What was he doing there? A He was watching them loading the truck.

Q Watching the loading of the truck? A Yes, sir.

20 Q Was he in charge of that truck? A He was the driver for the truck.

Q Did you have anything to do with the loading of that truck? A We loaded the truck and he was watching.

Q Did you personally take part in it? A Yes, sir.

Q You helped? A I have three men.

Q Did you help? A Yes, sir.

30 Q Do you remember anything about a bag of muskrat skins? A Yes, sir.

Q Did that go on that truck? A It was on the truck; I put it on myself, on the truck.

Q Do you know what was in that bag? A Yes, sir.

Q What was in it? A One thousand muskrat skins.

Q Do you know who put them in the bag? A A man put it in and I helped him.

40 Q Did you see those skins as they went in? A Yes, sir.

Sam Geller, direct.

Q What can you say about the grade or quality of those skins? A That was first quality; I know from what house they come.

Q You say first quality? A Yes, sir; first quality.

Q Were they what is known as selected muskrats? A Selected. 10

Q Did you see any paper or writing handed between Robbins and Richeimer? A Yes, sir.

Q What did you see there? A I see him sign a receipt—

Mr. Jones: I object.

A (Continuing.) —and give it to Louis Richeimer.

Mr. Jones: I object to the question. 20

The Court: You may ask him if you saw him sign a paper.

Q Did you see Robbins sign a paper? A Yes, sir.

Q Did you see what was done with that paper? A He handed it to Mr. Louis Richeimer.

Q The man who was just on the witness-stand? A Yes, sir. 30

Q Was that at the time this stuff was loaded on the wagon? A The stuff was all loaded.

Q The stuff was all loaded on then? A Yes, sir.

Q When that paper was handed by this man to Richeimer? A Yes, sir.

Q Did you see this man writing on it, Robbins? A Yes, sir.

Q Had you seen Robbins before that time down there? A Yes, sir. 40

Sam Geller, cross.

Q About how many times, about? A A great many times, seven, maybe eight times.

Q What was he doing the other days down there? A Carting stuff to the branches.

Q Carting fur skins? A Yes, sir.

Q Was he in charge of this truck, this same truck? A Yes, sir.

10 Q Do you know where these goods were directed to at that time in January when Robbins took them? A Long Branch.

Q Is there any difference in the way a bag looks from the way a bale looks? A Yes, sir.

Q What is the difference? A A bale is like a square box, heavy, and a bag is light.

Q More loosely packed than a bag. A bag was not packed as tight as a bale? A Not as tight.

20 Q Did your bale contain fur skins also? A Yes, sir.

Cross examination by Mr. Jones.

Q What was the value of that load that was on the truck?

Mr. Bilder: I object.

30 The Court: Sustain the objection.

Q You are an expert on skins, aren't you?

A Yes, sir.

Q What kind of skins did you say were in that bag? A Muskrats.

Q What kind of skins were in the bale? A The same kind of skins.

Q The same quality? A They were different qualities.

40 Q There were eleven bales? A Ten bales and one bag.

Sam Geller, cross.

Q What proportion, how many more skins were in the bales than in the bags? A Some bales they have 2,500 in a bale.

Q Some bales have 2,500 skins in? A Yes, and some have 3,000 in a bale.

Q So, there were ten bales having an average of 2,500 skins each? A Ten bales and one bag. 10

Q You put this bag in yourself? A Yes, sir.

Q Did you put the ten bales in, too? A Yes, sir.

Q That is, you directed the men who were shoving the bales in? A Yes, sir.

Q You loaded the truck? A I loaded the truck; yes, sir.

Q When you got the bales all in did you put this bag on top? A I put the bag on top of the bales. 20

Q Then what did you do with the dashboard; did you tie that up? A The bag was on top of the bales.

Q I say after you got the bag and the bales in, then did you put the back dashboard up? A I got nothing to do with that.

Q I didn't ask you that. I said did you tie up the load? A I put only the load on the truck; I don't tie it. 30

Q Who tied it? A The driver.

Q Robbins tied it? A Yes, sir.

Q Who helped him tie it? A He have another man, but I got nothing to do with the tying, as soon as we get through loading I close the door and go inside.

Q What door? A The gates where you are loading the truck.

Q Then you go upstairs. Your office is upstairs? A No, downstairs. 40

Sam Geller, cross.

Q It is below the platform level? A Yes, sir.

Q That is where you have these receipts signed? A After he signed the receipt I closed the door.

Q Where was he when he signed the receipt?

10 A Right by the door.

Q Are you sure he wasn't downstairs in your office? A Well, he didn't was in the office, only by the door, and when he was through loading he signed the receipts.

Q How near complete was the loading when you say he signed this receipt? A The load was by the sidewalk.

Q How soon was the loading finished when he signed the receipt? A The load was loaded
20 when he signed the receipt.

Q All of it? A All was loaded.

Q All except this bag? A This bag was on the truck.

Q You threw this bag on before you asked him to sign this receipt? A First we put on the load and the bag was on top of the bales after he signed the receipt.

Q Then you went away? A Then I closed
30 the door.

Q You did not see whether the goods were tied up or not? A No.

Q You did not see whether the back door of the van was closed? A He didn't have a back door.

Q It was an open van? A It was an open van.

Q Didn't have any dashboard? A Only a tailboard.

40 Q It had that? A Yes, sir.

Sam Geller, cross.

Q You do not know whether he raised that or not, do you? A It was not raised up high; it was a low tailboard.

Q I am asking you whether the tailboard was put in position while you were there? A I got nothing to do; didn't look for that.

Q You don't know whether the goods were tied in or the tailboard put up or not? A I don't know about why. 10

Q You say you saw Mr. Robbins, who was the driver of the truck, several times? A Yes, sir.

Q There were several occasions when he brought a truck up there and did some work for A. Hollander & Company? A Yes, sir.

Q He may have loaded sawdust occasionally? A We haven't anything to do with sawdust only in the stockroom for the skins. 20

Q You saw him there with sawdust on his truck, didn't you? A Sawdust? Not in my department.

Q Did you see him there moving sawdust for A. Hollander & Company? A Yes, sir.

Q He moved other things, barrels and things of that kind, from different places? A Yes, sir.

Q Did he generally work between the two plants or between the Newark plant and various plants of A. Hollander & Company, didn't he? 30

A The other stuff I got nothing to do with.

Q Your trucks were broken down at the time you got this Ruder truck?

Mr. Bilder: I object, as the witness has not testified on that subject, and second, it is immaterial and irrelevant.

The Court: Sustain the objection.

John Alberti, Jr., direct.

JOHN ALBERTI, JR., sworn in behalf of the plaintiff.

Direct examination by Mr. Bilder.

10 Q Where were you employed in January, 1919? A Long Branch Fur Dressing & Dyeing, Long Branch.

Q Is that one of the Hollander & Company places? A Yes, sir.

Q What were you doing there in January, 1919? A Receiving and stock clerk.

Q Do you recall seeing this man Robbins in January, 1919? A Yes, sir.

20 Q What was he doing there? Where did you see him? A I saw him at the Pearl street entrance.

Q In Long Branch? A In Long Branch.

Q What was he doing there? A In January, 1919?

Q Yes. A He brought down a load of skins from Newark.

Q Did he hand you any paper on that occasion? A Yes, sir.

Q What was it? A Ten bales and one bag.

30 Q What was on the paper? A On the paper?

Q Yes.

Mr. Jones: That is objected to.

Q What connection did the paper have with the load he brought? A Why, it referred to the load, the amount of bales and bag.

Q Did you check it up? A Yes, sir.

40 Q What did you find? A Ten bales, and one bag short.

John Alberti, Jr., cross.

Q Did you notify him about that? A Yes, sir.

Q Was there any other bag in that lot besides that one named in the list? A No, sir.

Q That bag itself was not on the load, was it? A No, sir.

Q Did you notify your employers of that fact? A I notified the office right way. 10

Cross examination by Mr. Jones.

Q When Robbins arrived there, what did you do with him? A What did I do with him?

Q Yes. A I saw the truck come in and I came downstairs—the stockroom is upstairs—and then Robbins and the other fellow they were off the truck. 20

Q Standing alongside of it? A Yes, and they opened the back and I started to check off as the stuff came off.

Q Didn't you give them a dollar and ask them to go and get something to eat? A I did not.

Q Who did? A They got it from the office.

Q Isn't it a fact that Robbins and some other fellow were both given a dollar to go off to a lunch counter somewhere to get something to eat? A I beg your pardon? 30

Q I say, isn't it a fact that Robbins and some other fellow were both given a dollar and they went off to a lunch counter somewhere to get something to eat? A After the stuff was unloaded?

Q No, before? A No, sir.

Q Did you untie the load? A Did I untie the load?

Q Yes. A No, sir. 40

Abraham Smith, direct.

Q Did you take down the back dashboard or tailboard? A No, sir.

Q When you got down there the tailboard was down, was it? A No, sir.

Q Who took it down? A One of my men.

Q Your men unloaded the stuff? A Yes, sir.

10 Q After it was unloaded you called Robbins' attention to the fact of this shortage and you put on a load to go back to Newark? A He was right there when I was unloading and I checked off bale for bale and called his attention to it.

Q You put on another load for him to take back to Newark? A I didn't.

Q Who did? A Some men down there.

Q That is all you know about it? A That's all.

ABRAHAM SMITH, sworn in behalf of plaintiff.

Direct examination by Mr. Bilder.

30 Q What business were you in in January, 1919? A Buying and selling skins.

Q Did you deal in muskrat skins? A Yes, sir.

Q Did you know what the market value of selected, prime muskrat skins was on or about January 21, 1919? A About \$2.50.

Q I show you certain invoices and ask you what they are. A The invoices show they were bought from a man during January and February, 1919.

40 Q Muskrats? A Yes, sir.

Daniel Ruder, (for plaintiff) direct.

Q According to this invoice of January 6, 1919, what did you pay for muskrats on that date?

Mr. Jones: I object.

The Court: Sustain the objection.

Q Do you have any record of a purchase of muskrat skins made by you January 6, 1919? A Yes, sir. 10

Mr. Jones: I object as immaterial.

Cross examination waived.

DANIEL RUDER, sworn in behalf of the plaintiff. 20

Direct examination by Mr. Bilder.

Q You are the defendant, are you not? A Yes, sir.

Q In January, 1919, this man Robbins was in your employ, was he not? A Yes, sir.

Q Driving a truck for you? A Yes, sir.

Q How many trucks did you have in January, 1919? A We might have had four. 30

Q Auto trucks? A Yes, sir.

Q What were they used for? A Moving furniture, or hired out by the day.

Q I say what were they used for? A Moving furniture and boxes and for hire by the day.

Q Tell me everything those trucks used to carry, in January, 1919?

Mr. Jones: I object.

The Court: I will admit it. 40

Daniel Ruder, (for plaintiff) direct.

A What is the question?

Q Tell me every kind of merchandise and goods those trucks used to carry in January, 1919? A Our specialty was moving furniture and boxes.

10 Q Tell me every kind of merchandise or goods those trucks used to carry in January, 1919? A When we worked for the Hollander people?

Q Just enumerate the kind and description of goods, merchandise and property that used to be carried on those trucks in January, 1919, or about then? A We carted machinery and fur and sawdust.

Q You carted anything you could get to cart on them, didn't you? A Not always.

20 Q What wouldn't you carry on them? A Well, we often turned a job down that didn't suit.

Q That what wouldn't suit, the price? A Well, the price.

Q What else? A What I mean, I say we didn't have to go to work unless we wanted to.

Q Who told you to say you didn't have to go to work unless you wanted to? A Nobody told me.

30 Q Oh, yes, someone must have told you that. A I don't think so.

Q Well, but they did.

Mr. Jones: I object to that kind of a question.

The Court: It is rather argumentative.

40 Q What do you mean you didn't have to go to work unless you wanted to? Do you mean someone was supporting you? A You don't

Daniel Ruder, (for plaintiff) direct.

have to go to work if you don't want. We don't have to truck if we don't want to.

Q Nobody told you to say that? A No, sir.

Q What connection has that with this case?

A It is up to you; you are asking the questions.

Q Do you remember refusing to carry any goods? A We often refused. 10

Q Why? A Because we didn't just want the job.

Q The price didn't suit? A Sometimes the price, and there is other conditions.

Q What other conditions? Do you remember? Tell me some of the people who used to be your regular customers. A Our regular customers?

Q Yes. A Well, we carted for Hollander, American Tobacco Company and O'Connors occasionally; you mean about that time? 20

Q Yes. Any customers you had? A Oh, we moved about fifteen families every day.

Q I mean aside from the families? A We didn't do much of this other kind of work.

Q You did not? A No, sir.

Q Have you your books here? A I haven't any books. 30

Q Didn't you keep books in January, 1919? A Just a piece of paper.

Q A piece of paper? A Yes, just a small book.

Q Was it a book or a piece of paper? A Not a regular book. Well—

Q It had some covers on it? A You call it a book then.

Q It had covers, didn't it? A Just a cheap book. 40

Daniel Ruder, (for plaintiff) direct.

Q I am not asking you how much it cost. You had a book. A Well, you might call it that.

Q It had covers on it and sheets bound together; didn't it? A (Witness pauses.)

10 Q Don't be afraid to say so. A Just a common—like a loose-leaf, we had.

Q A loose-leaf system? A No, we didn't have no system; we have no bookkeeping system.

Q I didn't ask you whether it was a good bookkeeping system. Did you have a book? A We had some way of marking down what we done every day.

Q Did you have a book? A Yes, but I didn't save it.

20 Q I didn't ask you whether you saved it? You had a book? A Well, we had pads of paper.

Q What are you afraid of? A You ain't scaring me.

Q You had a book, didn't you? A No; we might have had a pad.

Q You didn't keep what you had? A That's it.

30 Q You used to send out bills? A Yes, sir.

Q To all your customers that you used to cart for? A They are pretty nearly all cash for us.

Q They were? A Yes, outside of Hollander & Company. We would send them a bill and they would send us a check and the records went.

Q Name me all the people you can remember who you were doing trucking for at that time. A It is six years ago.

40 Q You named O'Connors. A Yes, sir.

Daniel Ruder, (for plaintiff) direct.

Q American Tobacco Co. A Yes, sir. I don't think we were carting for the tobacco company at that time; I think that was before that.

Q You were in the trucking business, weren't you? A Trucking and moving.

Q You had four trucks? A Three or four trucks, yes, sir. 10

Q You got paid for trucking? A You couldn't do it for nothing.

Q You got paid for your trucking? A Yes, sir.

Q You have a receipt book, don't you? A A receipt book?

Q Yes or no. A No.

Q You have no receipt book? A No.

Q In January, 1919? A No, sir.

Q Do you remember being examined in this case before? A Yes, sir. 20

Q Do you remember being asked the question? A Do you remember you examined me.

Mr. Jones: I object to using any previous examination of this case.

Q Do you remember being asked this question?

The Court: Was this a question in an examination before trial? 30

Mr. Bilder: Yes, I have the stenographer here with his original transcript.

The Court: I will admit it.

Q Do you remember being asked the question—

The Court: First of all I think it is fair to call his attention to the circumstances under which the examination took place. 40

Daniel Ruder, (for plaintiff) direct.

Q Do you remember being subpoenaed to appear before Herman Winarsky, a Supreme Court examiner, on February 5, 1924, at 790 Broad street? A Yes, sir, at your office.

Q Do you remember being questioned with reference to this transaction? A Yes, sir.

10 Q Do you remember being asked, "Q You did not, in your business, use trucking receipts for goods to be trucked? A You mean for a day's work? Q Well, I mean trucking receipts for trucking work. Did you have any printed receipts? A That is, the printed form when we deliver small packages for goods entrusted in our care? You had receipt forms? A We had a receipt book." A I think you are wrong on that.

20 Q You did not say that? A No, sir.

Q Do you think you did not, or are you positive you did not? A I am pretty sure I did not say that, because we didn't have no receipts.

Q You saw this receipt, didn't you, in the Hollander & Company place after they told you the goods were lost? A I never saw the receipts.

Q Did you see that receipt? A No, sir.

30 Q After Hollander & Company told you the goods were lost? A No, sir.

Q Didn't you, on the occasion of that same examination before Mr. Winarsky, testify as follows: "Q Did you ever see the receipt?" A I saw the receipt; yes, sir." A I think you added on to that.

Q I added that answer? A I never saw the receipts.

40 Q Do you say I added that answer? A I say I never saw that receipt you are talking about.

Daniel Ruder, (for plaintiff) direct.

Q You deny you said before Mr. Winarsky you had seen it? A I never saw it.

Q You deny that you said you had seen it, before Mr. Winarsky? A Yes, I will have to deny it, because I never saw it.

Q What did you carry for the tobacco company? A Cigars and tobacco. 10

Q Where did you take it? A Well, we worked on different railroads.

Q You would cart it to the railroad? A Yes, sir.

Q You would go pretty often for the tobacco company? A Every day.

Q What did you carry for O'Connors? A Well, that was mostly furniture and boxes.

Q Where would you carry it to? A From 20
New York and around the city here; wherever he wanted us to go.

Q O'Connor would direct you where to deliver? A Sure.

Q You mentioned someone else you carted for? A Who was it? I forget.

Q You mentioned O'Connor and the tobacco company and someone else. Can you remember? A good customer you used to do a lot of work for? A We don't have many regular customers; it was all chance work with us. 30

Q You get a telephone call, and so forth? A Yes, sir.

Q And go out with the truck? A Yes, sir; that's it.

Q Do you always have a truck around there ready to go out and answer phone calls? A Not always. At times we have two or three and at time we haven't any. 40

Herman Winarsky, direct.

Cross examination by Mr. Jones.

Q In other instances where you do any work you make a contract for the job? A In this particular case we didn't.

10 Mr. Bilder: I object. I did not examine as to this particular case. I made a general examination.

Q Do you mean to say you did not have an agreement with Hollander & Company as to how much per day you would get for it? A If you want to know just how Hollander & Company hired us I will tell you.

Mr. Bilder: I object.
20 (Withdraw the question.)

HERMAN WINARSKY, sworn in behalf of plaintiff.

Direct examination by Mr. Bilder.

30 Q You are a Supreme Court examiner of the State of New Jersey? A I am, sir.

Q How long have you been such? A Since 1921.

Q Appointed as such by the New Jersey Supreme Court? A I have.

Q You are a court stenographer, are you? A Yes, sir.

Q How long have you been a court stenographer? A 1918—seven years.

40 Q Have you with you the original transcript of testimony taken before you on February 6, 1924? A I have.

Herman Winarsky, cross.

Q Being the testimony of Daniel Ruder? A Yes, sir.

Q At which time Mr. Benjamin F. Jones, counsel sitting at this table, was present? A Yes, sir.

Q And Mr. Ruder, sitting at this table, the defendant, was present? A Yes, sir. 10

Q Was Mr. Ruder sworn? A Yes, sir.

Q Did he testify? A He did, sir.

Q Look at your notes and see whether you find the following question asked of Mr. Ruder by me, "Q You did not, in your business, use trucking receipts for goods to be trucked? A You mean for a day's work?" Do you find that? A That question and answer are both here.

Q A further question. "Q Well, I mean trucking receipts for trucking work. Did you have any printed receipts? A That is the printed form what we deliver small packages for goods entrusted in our care." A Both answer and question are both here. 20

Q "Q You had receipt forms? A We had a receipt book." A Yes, sir.

Q Do you find this further question, "Q Did you ever see the receipt?" A Yes, sir.

Q "A I saw the receipt, yes, sir." A The question and answer are both here. 30

Cross examination by Mr. Jones.

Q You say you are a stenographer? A Yes, sir.

Q Did you submit the transcript of this testimony to Mr. Ruder after you took it? A Not to Mr. Ruder directly; no, sir.

Q You did not get his signature to the transcript after you wrote it out? A No, sir. 40

Herman Winarsky, re-direct—re-cross.

Q You have never made a mistake in your taking notes? A I wouldn't say that.

Re-direct examination by Mr. Bilder.

Q Did you ever make a mistake in this particular case? A I don't believe I did.

10 Q Are you sure you did not? A I am positive I did not.

Re-cross examination by Mr. Jones.

Q Are you willing to swear you did not make any mistake in the transcription of these notes that have been read? A In this transcription; yes, sir.

20 Q The taking of them down? A I remember hearing the questions asked and the answers given and I recorded them accurately as I heard them.

Q You think you did. You do not know if you did? A Well—

Q You do not remember Mr. Ruder making those statements? A I can't remember now, but I wrote those things.

Re-direct examination by Mr. Bilder.

30

Q Those original notes are in your hand; you wrote there? A Yes, sir.

40

Daniel Ruder, (for plaintiff) direct—cross.

DANIEL RUDER, recalled in behalf of the plaintiff.

Direct examination by Mr. Bilder.

Q Hollander & Son paid you for the work done on January 21, 1919? A They always paid their bill. 10

Q That was the job Robbins was on? A Yes, they don't owe us a penny.

Cross examination by Mr. Jones.

Q How much did they pay you for that job? A It was so much a trip.

Q How much did they pay you? A Thirty dollars.

Q That was the agreed price? A We got thirty-five dollars, but they cut us down to thirty dollars. 20

Q You agreed to take thirty dollars? A Yes, we were anxious to go to work.

PLAINTIFF RESTS.

Mr. Jones: I respectfully ask that the complaint, so far as the first count is concerned, be stricken out on the ground there is no evidence to show that the defendant was a common carrier. 30

The Court: I do not think I can do that. Mr. Ruder testified that he was in the trucking and moving business and that he moved for certain people and that some of his work was chance work, and if he got a telephone call he would go out with the truck. It is true that would constitute a common carrier, as a matter of law, but whether Mr. Ruder 40

Daniel Ruder, (for defendant) direct.

comes under the definition of a common carrier is a question of fact.

I will deny the motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10 Mr. Jones: I respectfully move for a non-suit on the ground there is no evidence to show liability on the part of the defendant as charged in the complaint.

(Argument.)

The Court: I will have to deny that motion, because if the jury finds that the defendant was a common carrier they will find he was the insurer of the goods, and if they find he was a bailee, then they would test his action by whether or not he had used reasonable care.

I will deny the motion.

DANIEL RUDER, defendant, recalled in his own behalf.

Direct examination by Mr. Jones.

30 Q You have already testified that you are the defendant in this case? A Yes, sir.

Q Do you remember the circumstances under which you rented this truck to Hollander & Son?

A Yes.

Mr. Bilder: I object to the question as leading.

Q (By the Court.) Do you remember the circumstances by which you sent the truck up there to get these skins? A Yes, sir.

40

Daniel Ruder, (for defendant) direct.

Q Tell us about that. A Well, you mean when Hollander & Company first hired the truck; how we come to work for Hollander & Company?

Q Yes.

Mr. Bilder: That was not the question.

Q (By the Court.) That particular day you sent the truck up there how did you come to do it? A We worked there before that day. 10

Q (By Mr. Jones.) On previous occasions you had made arrangements in regard to the trucking?

Mr. Bilder: I object as leading.

The Court: I will admit it.

Plaintiff's counsel prays an exception to this ruling of the Court. 20

Exception noted as ground of appeal.

Q On previous occasions you had made arrangements in regard to Hollander & Company?

Mr. Bilder: I object as—

The Court: How did you happen to send the truck up there that day? 30

The Witness: We worked there before and sent the truck over. They didn't hire us just that day; we had worked before that.

Q (By Mr. Jones.) Did you have an understanding and agreement before that as to the work to be done? A When they first hired the truck.

Q Was that arrangement entered into at that time in force on the day in question? A I thought it was. 40

Daniel Ruder, (for defendant) direct.

Q Well, was it? A Yes, we had no other contracts.

Mr. Bilder: I object. Let us have the facts.

(Argument.)

10 Q (By the Court.) How did you come to send your truck up that day? A We had worked there before and a truck used to go with Robbins and take his orders every morning. I would say, "Does Hollander want you?" and he would say, "Yes," and I would go over to him.

Q (By Mr. Jones.) What arrangement did you have with Hollander & Company about the use of that truck?

20 Mr. Bilder: I object. The witness says that when Hollander & Company wanted him he would send his man up. As to this transaction I have no objection.

Q (By the Court.) Tell us what arrangement you had with Hollander & Company, if you had any. A When they first started to hire the truck?

30 Q What arrangement did you have? A A man by the name of Fitzsimmons came over and wanted to hire the truck without a driver and I told him we didn't hire the truck out that way and then he went over and they telephoned to send a truck with a driver and they were supposed to pay so much a day for the truck and driver, and our man didn't have to do anything outside of drive. Our man is always on the wagon. Sometimes they had as high as four
40 men on the truck.

Daniel Ruder, (for defendant) direct.

Q (By Mr. Jones.) Who was Fitzsimmons?

A He worked for Hollander & Company.

Q He came down to your place? A He was the first one that came down and hired the truck with a driver.

Q Then with whom did you make arrangements as to the cost of the truck? A My son went over there afterwards and made arrangements. 10

Q You did not make the arrangements yourself? A No, I heard him come over to our place and ask for a truck without a driver and I told him we wouldn't hire a truck out that way.

Q Your arrangement with him was that you had—how much were you to get for the truck?

A That was New York, \$25 a trip.

Q \$25 a trip to New York? A Yes, the first few trips were to New York. 20

Q Then, did you go any other place for them?

A Yes, we went to Long Branch and Middletown and there is another plant in Plainfield. Where is that other plant?

Q Don't ask questions. Then, your arrangements were what? What were you to get for your truck? A I was supposed to get so much a day for the truck and driver.

Q Would that depend on the distance? A Yes. We got more from Middletown than to Long Branch, because Middletown used to take us pretty nearly twenty hours. 30

Q Did you have any conversation with a Mr. Katz? A Not until after the bag was lost.

Q Did you have a conversation with Mr. Katz after one of your Middletown trips? A I didn't bother a whole lot about it, because I always felt their man was on the wagon and they were in full charge and I knew I had a good man in Robbins to drive the truck. 40

Daniel Ruder, (for defendant) direct.

Q What was your understanding or agreement with Hollander & Son as to the use of the truck?

Mr. Bilder: I object.

10 The Court: Sustain the objection. It is a question the jury has to decide.

Q Tell the Court and jury exactly what your agreement with Hollander & Company was if you had any understanding and agreement with them?

RECESS FROM 1 TO 2 P. M.

20 Q Shortly before adjournment I asked you if you had a conference with Mr. Katz, and I understood you to say you had a conference after the alleged loss of this bag? A Before and after.

Q Do you want to correct your answer if your answer was it was after? A I had a conference before this bale was lost and after.

Q That is the way you wish to make the answer? A Yes, sir.

30 Q Tell the Court and jury exactly what that conference was and what took place at that conference; who was present and what was said with Mr. Katz, prior to the alleged loss of this bag?

Mr. Bilder: I object.

The Court: Did it have anything to do do with this action?

A Yes, sir.

40 Q Answer the question. A My son drove the truck to Middletown and in getting up there he went over a couple of detours and when he got

Daniel Ruder, (for defendant) direct.

to the other end the man at the other end says, "You are lucky you weren't held up; there was \$40,000 worth of skins on this truck—"

Mr. Bilder: I object to that as hearsay.

Q (By Mr. Jones.) Do not tell what your son said, tell what took place. A That is what my son told me. 10

Q Tell what took place at this conference between Mr. Katz. Who is Mr. Katz? A He is in the room here; he is the superintendent down at the Hollander plant.

Q You had a conference with him? A My son told me that there was \$40,000—

Q Just a moment. You had a conference with him in regard to the subject matter of this suit before the day on which the trip was made to Long Branch? A I had a conference with Mr. Katz before we ever thought of this bale. 20

Q Tell us what was said, what did you say, and Katz? A When I heard there was \$40,000 worth of stuff on the wagon I told Mr. Katz, "We can't work for you any more," and he said, "All the goods are insured and we have our own man on the wagon," and he tapped me on the back and I says, "If you say it is all right, all right, otherwise I can't hire you the truck any more." 30

Mr. Bilder: I object to that on the ground a common carrier cannot enter into a contract exempting himself from a liability of negligence and I ask that that be stricken out.

The Court: I will not strike it out.

The Witness: If he was not liable I wouldn't have hired the truck to him no more. 40

Daniel Ruder, (for defendant) cross.

Q After this alleged loss of this bag of skins did you see Mr. Katz again? A Yes, the next morning.

10 Q State what was said. A The whole lot of us went up in the office, four or five, and one man said the bag was on and one man wasn't so sure it was on, and the man who was riding with Robbins, he was sure it was not put on; he knew there was only the ten bags there; this man Rubin, I think his name was.

Q He was there? A Yes, sir.

Q Mr. Katz was there? A Mr. Katz was there, yes, sir.

Q And Hollander was there? A And Fenuk was there.

Q And who else? A My son was there.

20 Q Your son Danny? A Yes, sir.

Q What did they decide to do at that conference, if anything? A They tried to find out where the bag went to and nobody seemed to know and for two or three days thereafter they looked over the Johnson street plant for the bags that were supposed to have been put on our truck.

30 Q Did you have any business dealings with Hollander & Son after that? A Yes, we worked for them afterwards; not long.

Q How long? A Maybe a couple of weeks, three weeks; it may have been a month.

Cross examination by Mr. Bilder.

Q Your memory is a bit fresher this afternoon, after lunch, than it was this morning? A About the same.

40 Q It hasn't been refreshed any during the lunch hour? A No, sir. I myself started to think over things; it is six years ago.

Daniel Ruder, (for defendant) cross.

Q You started to think well during the noon hour? You hadn't been thinking so well this morning. You may have had another conference with Mr. Katz. A I only had the two, before and after.

Q This morning you didn't say anything about having a conference with Mr. Katz before? 10
A No, this morning you got me mixed up.

Q I did, when Mr. Jones was asking you?
A You kept picking on me.

Q Probably looking at you. Who is Mr. Fitzsimmons you were talking about this morning? A John Fitzsimmons. Well, the Hollander people knew him better than I did.

Q Who is he? A A driver I have employed there now.

Q He is a chauffeur and drives the truck? A 20
At times he does.

Q As far as you know does he do anything else? A No, I don't.

Q You said this morning he is the man who first hired you to work for A. Hollander & Son?
A He didn't do the hiring, he asked about a truck.

Q Weren't you asked this morning who did you make your first arrangements with? A 30
No; Mr. Fitzsimmons was the first one that came over and afterwards there was a telephone conversation.

Q With whom? A I don't know that.

Q When you testified this morning about a man coming over and hiring a truck, you said Fitzsimmons? A Yes, sir.

Q Do you say now that he was the first man that made the original arrangements? A I 40
would say he come to hire a truck and he came to see about hiring a truck.

Daniel Ruder, (for defendant) cross.

Q What did he say? A He wanted to hire a truck without a driver. He spoke for Hollander & Company and wanted to know if we had a truck for the Hollander people to hire.

Q Did he say to you, "I am Hollander's representative. I am looking to make a general arrangement with you for the hiring of trucks"?

10 A I don't think he was Hollander's real representative; he was only an errand boy, you might say; I don't think he had full charge.

Q He didn't have full charge of the plant?

A No, he was only sent to look for a truck.

Q Did his truck break down that day? A I don't think any truck broke down.

Q On that day did his truck break down? A I don't know anything about that at all.

20 Q Who did you have your first talk with about working for Hollander's? A My son had to do with that.

Q You did not? A No.

Q Are you sure of that? A Yes, I am sure of that; but he didn't have all.

Q Do you know how you first came to be hired to work for Hollander & Son? A Well, I do in a way, but I wasn't there when they called up on the telephone; I didn't answer the

30 'phone.

Q So the first hiring was by telephone, was it? A No, first Mr. Fitzsimmons came and asked about a truck.

Q Did he get a truck? A I wouldn't say they got a truck that day or not.

Q Did you send a truck in response to the telephone message? A No; I think my son went down and talked to someone there.

40 Q Your son is the first man who talked with a representative of Hollander & Company about your working for them? A Yes, sir.

Daniel Ruder, (for defendant) cross.

Q Are you sure of that? A Someone had to hire the truck; I didn't.

Q Do you remember testifying before Mr. Winarsky on the occasion referred to this morning that you were the first man who went down and talked to Mr. Katz about trucking for Hollander & Sons? A I didn't talk to Mr. Katz until after the Middletown trip. 10

Q You did go over to see Mr. Katz about the trucking work for Hollander & Son, did you? A No, I went over to see Mr. Katz after we came back from Middletown.

Q Never before? A No, I never bothered before.

Q Did you have any talk with him before? A I don't think so.

Q Do you remember testifying as follows before Mr. Winarsky: "Do you know personally how you came to truck for them? A They called us up on the telephone and asked us to come over to go to New York for them. Q You have in mind now the first occasion you did trucking for them? A Yes, sir. Q Did you talk on the telephone on that occasion? A And then I went over to see Mr. Katz." Do you remember saying that? A No, I don't; it is quite a while ago, six or seven years. 20 30

Q Do you remember saying this last year when you testified? A I am not so positive.

Q You won't say you did not say that? A I am not positive; I ain't sure.

Q Do you remember me asking this question, "On that first occasion was any general arrangement made with you or were you hired for any particular job. A They hired our truck for the day to go to New York. That was the first work we done for them, to bring over— 40

Daniel Ruder, (for defendant) cross.

well, I suppose we would take a load over and bring some back, whatever they had. Q. You are speaking of the first job? A. About the first. Q. That was a single hiring for a single day? A. Well, I don't know whether it was for a single day or not. Q. What arrangement was made on that first occasion? A. Well, 10 they simply hired a truck—maybe for that day. Q. When you speak of hiring a truck, what do you mean by that—that they would furnish their own chauffeur? A. No, no; we would furnish the truck and chauffeur and they would furnish the men to do the loading and unloading and take care of the goods. Q. On that first trip did you ride on the truck? A. No, I think a son of mine rode on the truck." Did you son ride on the truck the first trip? A. I couldn't say 20 that either. No doubt he was, but maybe he wasn't.

Q. Do you remember I asked you this question before Mr. Winarsky, "Have you a sign on your place? A. Yes; I have plenty of signs. Q. What is the sign? Well, Ironbound Storage and General Trucking." Do you remember that? A. Well, there is signs down there, "Ironbound Storage."

30 Q. Do you remember answering and saying that you had a sign on which included general trucking? A. I don't think we used that word.

Q. Will you deny you used that word? A. I don't know whether I did or not.

Q. You won't deny it? A. I can't say I said it, or I won't deny it. There is no sign down there "General Trucking"; it is furniture and boxes moved by us.

40 Q. You say you had a talk with Mr. Katz after your son got back from Middletown? A. That was before the bag was lost.

Daniel Ruder, (for defendant) cross.

Q How long before the bag was lost did that conference take place? A It may have been a month.

Q Might it have been more? A Yes, more or less; I haven't any record.

Q Do you remember in your testimony before Mr. Winarsky saying you had a talk with Mr. Katz three months before the bag was lost? A 10
Maybe I said three months. I don't know how long we worked for Mr. Hollander.

Q What do you say now? A It might have been two months.

Q It might have been three? A Yes, sir.

Q It might have been three? A It is over six years ago that this happened.

Q It might have been three? A It might have been two or three. 20

Q Do you remember being asked this question, "Did you make any personal arrangement for this particular job? A No. When we started to work we worked by the trip and made no arrangements outside of talking to Mr. Katz about three months before this thing happened."

A It may have been two months.

Q "Q Did you talk to Mr. Katz about three months before this thing happened?" A Yes, sir. Q What about? A My son went to Mid- 30
dletown, New York, for the Hollander people, and when we got up there the fellows started to kid him." That is the occasion you are just referring to? A That's it.

Q You remember saying three months there, don't you? A I may have said three months, but it was six years when he cross examined me.

Q It might be a little less? A Perhaps.

Q What did you say to Mr. Katz on that occasion? A I told Mr. Katz we couldn't go to 40

Daniel Ruder, (for defendant) cross.

work for him any more, with his \$40,000 worth of stuff; if we lost that much stuff I would be a poor man. I told him I couldn't go to work for him any more unless he was responsible for the goods, and he tapped me on the back and said, "The goods are all insured and you are not responsible." He said, "We have already got
10 our own man on the wagon."

Q After the goods were lost you had a little talk down at the Hollander plant, you say? A Yes, sir.

Q Who was present? A Mr. Katz and the shipping clerk.

Q Mr. Richeimer. A I don't know his name, and that man with the book records and Mr. Rubin and Mr. Fenuk.

Q And yourself? A Myself and my son.

20 Q Now, what was said to you on that occasion? A I didn't have a whole lot to say because I didn't know where the bag went.

Q What did you go there for? A Well, they called me up and told me there was a bag missing and told me if I would see him.

Q What did you say when you got there? A They done most of the talking.

30 Q What did they say to you? A They were talking among themselves. There was one man, Fishkill Rubin, who said, "The bag never went on the truck."

Q He said that to you? A He said that to the Hollander people, half Jewish and half German, and I understood the German part of it.

Q You understood him to say the bag never went on the wagon? A That's what he said.

40 Q Did you know that when you testified before Mr. Winarsky in February, 1924? A Yes, I knew it, but didn't happen to bring it out, I suppose.

Daniel Ruder, (for defendant) cross.

Q Do you remember being asked, "Who spoke to you about the loss first on behalf of the Hollanders? A I am pretty sure it was Mr. Katz.

Q Do you remember what he said to you? A No, I don't. Well, I can tell you what happened up there in the office.

Q Was Katz present? A Katz was present.

Q You were saying about what happened in the office. Do I understand Mr. Katz was present? A Why, I met Mr. Katz and we talked on the sidewalk." A That is wrong. 10

Q "Q Yes. A After the package was lost, the next morning I met Mr. Katz and my son and the man who was riding on the truck with this Robbins—their employees, see? He was the fellow with the big whiskers. He couldn't talk the English language; but they talked to him there and from what I could understand my driver only left the seat once to get a cup of coffee, and he was only gone about two minutes, and this Hollander man was on the truck all the time. His name was Lubin, I think. He went back home since; I don't see him around any more. Q To Europe? A I think so. Q Tell what happened in that conversation with Katz. 20

A With Katz upstairs? Q Yes. A Well, Albert Hollander was there, too, and the shipping clerk, and there didn't appear to be anybody sure that the package went on the wagon; and they went downstairs looking for the package, and a few days after they went over to Johnson street looking for the package to see if it was around. There was nobody positive that the package went on the wagon that morning in the office." Do you remember that's all you said about this? A Everything there is all right. 30

Q It is? A Yes, sir. 40

Daniel Ruder, (for defendant) cross.

Q Why didn't you, then, tell us you understood this man to say positively the package did not go on the wagon? Didn't you remember that a year and a half ago? A No, I didn't just remember that, but I remember him saying something to the people that the package never
10 went on the wagon.

Q You knew that when you testified a year and a half ago? A Yes, but I didn't think about it.

Q Yet you were being asked about everything that pertained to that talk, weren't you? A If you had asked me about that I would have answered you.

Q Didn't you say, "Well, I can tell you what happened up there in the office," and then go on
20 and tell all this? A All that happened in the office; you got it right there.

Q You didn't say, then, that Fishkill Rubin had said he was positive this package did not go on? A If you have no record of it, maybe I didn't say it.

Q Then you went on to testify, "Q Why were you there? A Because they claimed the package was lost? Q Were you asked any ques-
30 tions by Albert Hollander or anybody else there representing A. Hollander & Son? A I think Albert Hollander questioned all the men who had to do with it, and I stood there and listened. Once in awhile this fellow talked a German word and I could understand him; I could just about get that he said he didn't leave the truck this whole—" and then you broke off. Isn't that all you said on that occasion? A I don't know, but up in the office he said he was sure the pack-
40 age never went on the wagon.

Daniel Ruder, (for defendant) cross.

Mr. Jones: I object. I think all this evidence should be put in in its entirety.

Q Do you remember testifying before Mr. Herman Winarsky, a Supreme Court examiner, on February 6, 1924, as follows: "Q Were you asked any questions by Albert Hollander or anybody else there representing A. Hollander & Son? A I think Albert Hollander questioned all the men who had to do with it, and I stood there and listened. Once in awhile this fellow talked a German word and I could understand him; I could just about guess that he said he didn't leave the truck this whole—" and then you broke off. Do you deny having so testified? A No doubt that is right. 10

Q You have just now testified that you have named all the persons, haven't you? A I don't know whether I named all of them or not. 20

Q Who would you like to add now? A I got nobody to add.

Q You will stand on what you said before? A Yes, sir.

Q You didn't mention Mr. Albert Hollander about his having been present, in your testimony just now? A Well, there was a Hollander present, but I ain't so sure whether it was Albert or not. 30

Q Just now when you were naming those persons at this interview you did not name Mr. Albert Hollander, did you? A I don't know whether I did or not. You have me a little confused; I will admit that.

Q You didn't mention Mr. Hollander. You just said that you gave the names of all those who were present? A The only man I know was Mr. Katz, by name. 40

Daniel Ruder, (for defendant) cross.

Q You didn't know the other fellows at all?

A No, the other fellow told me his name was Senuk.

Q You knew when you came to court today this man Rubin would not be here, didn't you?

A I don't know anything about it.

10 Q Didn't you ask Mr. Richeimer the other day, "Is Rubin around; will he be at the trial?" A I never talked to that man until the bag was lost and that was a few words that morning.

Q Did you ask Mr. Katz the other day whether Rubin would be at the trial? A No, I did not.

Q You heard that Rubin went to Europe years ago, didn't you?

20

Mr. Jones: I object.

The Court: Sustain the objection.

Q Do you remember testifying as follows:

"Q You were saying about what happened in the office. Do I understand Mr. Katz was present? A Why, I met Mr. Katz, and we talked

on the sidewalk. Q Yes. A After the package was lost, the morning I met Mr. Katz and my

30 son and a man who was riding on the truck with this Robbins—their employees, see? He was the fellow with the big whiskers; he couldn't talk

the English language, but they talked to him there, and from what I could understand, my

driver only left the seat once to get a cup of coffee, and he was only gone about two minutes,

and this Hollander man was on the truck all the time. His name was Lubin, I think. He went

back home since; I don't see him around any

40 more. Q To Europe? A I think so." A I

Daniel Ruder, Jr., direct.

don't know whether he went back home or not. I don't think so.

Q Didn't you so testify? A Because I didn't know where the man went.

Q Do you deny you so testified? A I don't remember. I don't know where the man went.

Q Didn't you tell the Hollander people, the employees of Hollander & Company and the persons in charge of the place where you had this talk, as you say, that they ought to look all around the place to make sure the package was not around? A No, the shipping clerk suggested that, the man who claimed he put the bag on the wagon. 10

Q He suggested that? A Yes, sir.

Q Are you sure of that? A Some of the Hollander people suggested that and they looked for three days. 20

Q Why did you just say that the shipping clerk suggested it and now you say some of the Hollander people suggested it? A Someone in the office suggested it.

Q Why, a moment ago, did you say positively it was the shipping clerk? A You know how that is.

Q You thought it would be a good thing to say? A It didn't make any difference to me. 30

Q This case doesn't make any difference to you? A Well, sure.

DANIEL RUDER, JR., sworn in behalf of the defendant.

Direct examination by Mr. Jones.

Q In 1919 were you working for your father? 40
A Yes, sir.

Daniel Ruder, Jr., direct.

Q Do you remember any negotiations or arrangements that were made with the Hollander & Company with respect to the use of the truck and driver?

Mr. Bilder: I object as leading.

10 A Well, about that time a driver who worked for Hollander by the name of Fitzsimmons came around and wanted to hire a truck and it was a bad day; I think it was snowing, and I told him we didn't have a driver around and I was the only one there and I didn't feel like working, and he said, "We will take the truck without a driver," and I couldn't let the truck go out like that on account of the liability insurance and someone telephoned from Hollander & Company
20 and I went over.

Q Who did you see, do you know? A I am not sure. So, I went over there and I rented the truck for three days for a trip to Long Branch. We were carting machinery; no skins were on then, and the reason Hollander hired our truck—

Mr. Bilder: I object.

30 Q What was said at the time? A Their little auto car broke down at Middletown and they had nothing to work with.

Q How do you know this? A Because on the way back we stopped in and were going to tow it home, but I couldn't, and the next day we made another trip of machinery.

40 Q Go ahead and tell what your arrangements were with Hollander & Company in regard to the truck. Have you testified to all? A Yes, sir.

Daniel Ruder, Jr., direct.

Q You say when your truck was first used it was used to cart machinery. Did you ever cart any sawdust? A Sawdust and parisite before we carted skins.

Q Parisite? A Parisite from Perth Amboy.

Q Do you recall a trip made to Middletown? A Yes, sir. 10

Q What did you get for that trip? A Fifty dollars.

Q Did you make arrangements in regard to the payment of that amount before you made the trip? A We got fifty dollars from Middletown, thirty dollars for Long Branch and thirty-five dollars for New York and twenty-five dollars for Somerville.

Q How was that price determined? What was the determining factor in making that price? 20

Mr. Bilder: I object as immaterial and irrelevant.

The Court: Sustain the objection.

Q Do you recall a conversation that your father and you had with Mr. Katz after a trip to Middletown? A Yes, sir.

Q Tell the Court and jury exactly the circumstances of that. A I took a load of skins to Middletown, New York, and when I got up there was pretty bad detour, only a single track. We backed in and started to unload and the superintendent of the plant in there said, "You were lucky you weren't held up— 30

Mr. Bilder: I object to what was said at Middletown.

Q This Middletown plant was a plant of Hollander's, wasn't it? A Yes, sir. 40

Daniel Ruder, Jr., direct.

Mr. Bilder: I object to the witness answering, because the witness has answered another question.

10 Q (By the Court.) Tell us what was said to Mr. Katz. A I have to tell you the first part of it, your Honor.

The Court: I guess he cannot answer it.

Q I will reframe my question. Tell the Court and jury the circumstances, all the circumstances leading up to and including your conversation with Mr. Katz.

Mr. Bilder: I object to that question as being general and vague.

20 A I backed into Middletown and the superintendent came out and said something about a detour. He said, "It is a lucky thing you weren't stuck-up on that road." I laughed and said, "Why?" He said, "Because the load is worth \$40,000." I said, "That won't make any difference to us," and I talked it over with my dad, and he said to Mr. Katz, "Was that man kidding about the value of that load?" And he
30 said, "No, it was worth that much," and my dad said that he couldn't run a truck any more if we are responsible, and he tapped my father on the back and said, "Everything is covered with insurance," and we have nothing to worry about. That was at the plant, and we walked down the street, and I saw Mr. Albert Hollander and I said, "Is that all right what Mr. Katz said?" He said, "Yes, everything is covered by insurance and we have our own man on there. All
40 you have to do is drive."

Daniel Ruder, Jr., cross.

Q After the word came to your office that this bag of skins was supposed to have been lost did you and your father go up to Hollander's?

A Yes, sir.

Q Next morning was that? A Yes, sir.

Q Tell us what took place. A We went up there and went in the showroom, and this fellow Louis was there and Charley Katz, and this fellow with the whiskers, and they talked it over, talked about loading the truck. Well, there was another fellow sitting there employed as a chauffeur for Hollander, and he stood there right where the truck was loaded and said the thing never went on, and this fellow with the whiskers kept making motions with his hands that the bag was never put on and Louis was not so sure about it. The shipping clerk he said to look through that plant and the Johnson street plant and maybe they would find it, and from there we went up in the office, and Albert Hollander questioned a few of the men, and one fellow said, "Yes," and one said, "No," so they were not sure whether the bag went on the truck or not.

Cross examination by Mr. Bilder.

Q You differ a little from your father, don't you, as to who said it never went on the truck?

A What was the question?

Mr. Jones: I object.

The Court: Sustain the objection.

Q You do not say it was Rubin that said that, do you? A It was Rubin. I told you one or the other; I told you one said "Yes," and one said, "No."

Daniel Ruder, Jr., cross.

Q Didn't you just say there was another chauffeur standing up there—you didn't name him—and you said it was him. A He wasn't even in the conversation.

Q (Question read.) A The truck was not right there; that was the day before that.

10 Q What was the day before? A When the bag was lost.

Q Do you stand by the answer that it was some other fellow said the bag did not go on? A Lubin was there, but this fellow stood by the truck when it was loaded, the day before.

Q Do you stand by your answer in which you said there was some other fellow there and that this chauffeur said that he stood by the truck and it didn't go on? A The chauffeur broke in the
20 conversation.

Q So, you withdraw that answer; is that right? A Yes, sir.

Q How did Lubin say it didn't go on? A Well, I can't talk the way he talks so I can tell you.

Q Did you question him and see, or was it by gestures? A Well, that is when I had him on the truck with me.

30 Q How did he say it to you? A I can't talk the way he talks.

Q How did you get the question from him when he was saying it didn't go on, by movements or by word of mouth? A By movements of his hands and movements of his mouth.

Q What was it he said? A I can't remember.

Q What was it he said about the bag? A He would point to the bag and keep shaking his hands and shook his head like that (indicating).
40

Daniel Ruder, Jr., cross.

Q He held his hands out this way and shaking his head, and what was he looking at? A At another bag there.

Q You saw him looking at one out of a thousand bags and he held his hands out this way and shook his head and you interpreted that as him saying that the bag did not go on? A Yes, sir. 10

Q Did you say to one of the Hollander officers or someone representing Hollander there, "Just look and see what Lubin is doing; he is motioning that the thing never went on," did you say that? A No, sir.

Q Was your father with you when you saw the other chauffeur there who stood up and said it didn't go on? A I don't think so.

Q Where was the conversation at? A I told you the chauffeur was there the day before when the truck was loaded. The chauffeur was already discharged by Hollander; he didn't know anything about it, the chauffeur. 20

Q What conversation are you talking of? A I guess Mr. Katz can tell you the fellow's name who discharged him.

Q What conversation are you talking of at which the other chauffeur was there? A This other chauffeur who stood by the truck the day before. 30

Q What other chauffeur do you mean? A We will leave the other chauffeur out of it.

Q Now you want to leave him out of it? A I told you that before.

Q When was this conversation that you say took place between your father and Mr. Katz before the loss occurred? A When?

Q Yes. A The day after the Middleton trip.

Q About how long before the loss was that? A I guess about two or three weeks. 40

Daniel Ruder, Jr., cross.

Q About two or three weeks? A Yes, sir.

Q Wasn't it as much as three months? A I don't think so.

Q Where did that take place? A Over in Hollander's factory on East Kinney street.

Q How many times did you do trucking for Hollander after that? A We worked a week or
10 two after that.

Q What was it that made you go around and talk to Mr. Katz on that occasion? A Because this fellow said something about liabilities of \$40,000.

Q Had there been a hold-up for \$40,000? A Yes, they had a few losses.

Q There had been a hold-up for \$40,000? A Not on our truck.

Q On any other truck? A Yes, sir, on
20 trucks they ran.

Q Who told you that? A I heard about it.

Q From whom? A Some of the employees.

Q Of Hollander & Son? A Yes, sir.

Q Where? A Around the factory.

Q What factory? A Why, Hollander's factory.

Q In what city? A Newark.

Q Do you remember who it was told you there was a \$40,000 hold-up? A I didn't say
30 \$40,000; I said a loss; that's what the superintendent at Middletown said. I guess he was held up.

Q You guess he was held up? A That's it.

Q What did he say to you? A He said it would be easy for a couple of stick-up men to take that load; it was worth \$40,000. I had no idea the load was so valuable.

Q You had no idea that the load was so valuable? A No, sir, not until he said something
40 about a stick-up.

Daniel Ruder, Jr., cross.

Q When did you first start carrying skins? Was this the first load of skins you carted for Hollander? A No, sir; I think the first one was at Middletown.

Q You carried at least ten loads of skins before, didn't you? A No, sir, we carted machinery.

Q How many loads of skins did you carry? 10
A I can't guess.

Q Could you guess as many as half a dozen? A Maybe.

Q You knew that was all fur? A They used to mix it all up; sometimes they would give me dye and sawdust and would put the skins in front.

Q You would know skins when you saw them? A You couldn't tell unless you opened the bag.

Q You generally learned what you were carrying, didn't you? A Yes, sir. 20

Q You knew whether it was sawdust or furs? A Not unless you looked in the bag.

Q You never knew whether you were carrying sawdust or furs? A Oh, you know the difference between sawdust and furs.

Q Was anyone else present at this conversation you had? A You mean before the bag was lost?

Q Yes. A Mr. Katz and Mr. Hollander. 30

Q Did you think you would be responsible, when you went around to Mr. Katz, for hold-ups if you were held up? A No, sir.

Q That is why you went around to see him? A Yes, sir.

Millard Robbins, direct.

MILLARD ROBBINS, sworn in behalf of the defendant.

Direct examination by Mr. Jones.

10 Q Where are you working now? A For a company in Connecticut.

Q Connecticut? A Yes, sir.

Q In 1919 did you work for Daniel Ruder? A Yes, sir.

Q Driving a truck? A Yes, sir.

Q That was your position, wasn't it? A Yes, sir.

Q That was your job? A Yes, sir.

20 Q Do you remember a job that took your truck up to Hollander & Company's? A Yes, sir.

Q What time did you get up there in the morning? A We got up there in the afternoon around four or five o'clock; I can't tell just the exact time; it was around noontime I was in Perth Amboy.

Q What? A It was around noontime I was in Perth Amboy.

30 Q What time did you get to Hollander's place in Newark with the truck? A You mean from Long Branch?

Q No. A You mean the first thing in the morning?

Q Yes. A Yes, sir.

Q Who did you take instructions from as to what you were to do and where you were to go? A The shipping clerk gave me the instructions where to go.

Q Certain goods were put on the truck, weren't they? A Yes, sir.

40 Q By whom? A By their men.

Millard Robbins, direct.

Q Did anybody ask you to sign a paper? A Well, the superintendent asked me to sign, to show I was there with the truck.

Q When did you sign the paper with respect to the loading of the truck? A Sometimes we signed before the load is on.

Q In this particular case, or whatever day it was in January, was the load on when you were asked to sign the slip of paper? A No, it was partly loaded. 10

Q Where did you sign it? A I don't remember.

Q Did you go upstairs or downstairs, or where? A I think I signed it downstairs and they took the papers up in the office.

Q Did you read the slip you signed? A No, sir.

Q Did you have any authority from Mr. Ruder to sign the slip? A No, sir. 20

Mr. Bilder: I object as incompetent and irrelevant.

The Court: The question has been answered.

Mr. Bilder: Then I ask that the answer be stricken out on the same grounds.

The Court: The motion will be denied. 30

Q What were the instructions given to you by this representative of Hollander's you testified to, what were the instructions this particular day? A My instructions were to take it down there and their men would take the load off, and bring it back, if they had anything, and just drive the truck.

Q That is what you did? A Yes, sir.

Q Was there a tailboard on this truck? A Yes, sir. 40

Millard Robbins, direct.

Q Was the tailboard put in place after the goods were put on the truck? A Yes, I put the tailboard up and tied the load.

Q Was there a canvas or something that came down from the top? A A canvas that was put over the top.

10 Q Did you tie it in position? A Yes, sir.

Q Did the work you did in tying up the back, fixing the back, was that the usual and regular way in which you always tied loads? A Yes, sir.

Q A man for Hollander & Son accompanied you on the truck? A Yes, sir.

Q Where did he sit, about? A Right on the seat.

Q Did he leave the truck at any time from the time he left the Hollander plant in Newark until it arrived at the Hollander plant in Long Branch? A No, sir.

Q How do you know that? A I made one stop at Perth Amboy at a lunch wagon and stopped in front of it and wasn't gone for five minutes and got a cup of coffee and a sandwich and I asked him to stay on the seat and he said he would; he was eating on the seat himself.

Q Could you see the truck from the lunch wagon? A Yes, sir.

30 Q Did you see that he sat on the seat when you went in for a sandwich? A Yes, sir, he was still eating when I came out.

Q He never left the truck at all from the time it left Newark until it went to Long Branch? A No, sir.

Mr. Bilder: I object.

Q After you got to Long Branch what happened? A Backed into the place.

40

Millard Robbins, direct.

Q What place? A The Long Branch property.

Q Of Hollander & Son? A Yes, sir.

Q Then what happened? A Well, I took the tailboard down and somebody from in the office, I don't know who it was, gave me money and I went and got supper, or lunch, it was about five o'clock—and they took off the stuff and reloaded it—I don't know what they reloaded it with and I brought the stuff back and when I came back from the lunch place they claimed a bag was missing and the man who was with me claims it wasn't put on—that is Mr. Lubin. 10

Q He couldn't speak English, could he? A No, he couldn't speak English, but I made out what he meant. He admitted it wasn't on the truck, wasn't put on. 20

Q You never saw the bag, did you? A No, sir.

Q You never touched any of the goods before? A No, sir, and it was always tied on just the same when we left the plant and when we got down there.

Q You did not touch the goods being unloaded? A No, sir; they unloaded them.

Q You were not there when they unloaded them, were you? A No, sir. 30

Mr. Bilder: I object as leading.

The Court: Do not lead the witness.

Q Were you present when that load you brought down to Long Branch was unloaded by the employees of Hollander & Company? Were you there? A While they were taking it off?

Q Yes. A No, I went to lunch for \$1.00 or seventy-five cents. 40

Millard Robbins, cross.

Q You went away to lunch when they unloaded the goods? A Yes, sir.

Q You didn't know anything about it until you came back? A I didn't know anything about it until I came back and then they called up the Newark branch and told them all about it.

10 Q You drove the truck back from Long Branch to Newark? A Yes, the truck was put in their place until the next morning if it wasn't unloaded the same night.

Q You left the truck at the plant? A In Hollander's garage if the truck had a load on.

Q What time did you get back from Long Branch? A I judge it may have been around eleven o'clock at night.

Cross examination by Mr. Bilder.

20

Q You say that was left there if it had a load on? A It was always in charge of Hollander's when they had their stuff on.

Q When you got to Long Branch how did they come to tell you there was a piece missing? A They must have checked it up some way.

Q How did they check it up? A I can't tell you.

30 Q You don't know how they checked it up? A No, I wasn't there when they checked it up; I went to eat.

Q What do you mean by checking up? A How could they tell there was a bag there if they didn't check up something.

Q How did they know what you had on the wagon? A I don't know.

Q Did you ask them? A No, I didn't ask what kind of stuff they had on.

40 Q Didn't you say when they said there is a piece short, didn't you say, "How do you know there is a piece short?" A Oh, yes.

Millard Robbins, cross.

Q Then, what did they say? A They said it was short on the bill; it was supposed to be ten and one.

Q On what bill was it short? A I don't know.

Q Did you ask them on what bill it was short?
A No, I didn't ask them anything because their men had charge of it and I didn't pay any particular attention. 10

Q You didn't pay any attention to the goods?
A No, by the bill that they had.

Q What bill did they have? A I don't know.

Q Well, then why do you talk of a bill?

Mr. Jones: He isn't talking of a bill. I object.

Q You just now said you asked them how they knew it, didn't you? A I don't know if I did or not. 20

Q What do you know about this bag being short? A I don't know anything; only his man himself said the bag wasn't put on; the man who was with me had charge of it.

Q How did he say it? A I couldn't tell you in what way he said it, but I kind of found out what he was talking about.

Q What language did he talk? A He really didn't talk anything. He talked with his signs, with his hands. 30

Q You could interpret his signs, could you?
A I had him on the truck a few times.

Q You could understand what he meant by his motions with his hands that the bag did not go on the truck? A Yes, sir.

Q What kind of movements did he make with his hands that spelled that? A I don't know; I couldn't tell you. 40

Millard Robbins, cross.

Q He didn't use deaf and dumb language, did he? A It may have been pretty nearly like it.

Q Can you imitate the motions? A No, sir, that has been six years ago and I don't remember it.

10 Q You remember it was motions? A Yes, sir.

Q And not language? A Yes, sir.

Q Who gave you the money to go to supper? A I couldn't say who gave it to me—some one in the company.

Q How is that? A Someone in the company.

Q You can't remember? A No, sir.

Q The stuff—was that on the truck when you went to supper? A Yes, sir.

20 Q Where did you leave the truck when you went to supper? A In their charge.

Q Where on the curb or did you back it into some driveway? A I backed it into the driveway where they unloaded their stuff.

Q Into a driveway? A I don't know where, whether a driveway or a platform.

Q How long was it from the time you—you backed it up to a platform? A Yes, sir.

30 Q How long was it from the time you backed it up to the platform and went to supper? A It may have been a half an hour or three-quarters.

Q During that time you were standing there? A It was unloaded when I came back.

Q I mean from the time you backed up—how long was it from the time you backed up and the time he handed you the dollar to go to supper?

A I don't know; two or three minutes.

Q You went right away? A Yes, sir.

40 Q Did you go around the truck to examine whether everything was tight and tied up? A I put the tailboard down and it was just the same

Millard Robbins, cross.

as it was when I got there as when I left the East Kinney street plant.

Q What did you have to do to get the tailboard down? A Undo the rope.

Q All of them? A Yes, every one; the rope holding the tailboard up and holding the curtains.

Q So, you stripped the wagon so that the load was exposed? A Yes, sir.

Q Then you went away? A Yes, sir.

Q That only took you two or three minutes? A Two or three minutes; yes, sir.

Q Did you tie it up at Newark before you started out? A Yes, sir.

Q How long did it take you to do that? A Not very long; five minutes.

Q Did you see a bag on top of the bale before you went away? A I didn't take any particular notice.

Q You didn't take any particular notice of that? A No, sir.

Q Did you notice who was standing there while that wagon was being packed there in Newark? A No, I did not.

Q Did you see Mr. Richeimer there? A I guess he may have been there.

Q Do you remember seeing that man (indicating Geller)? A Yes, I think he helped load the stuff.

DEFENDANT RESTS.

Charles Katz, direct.

CHARLES KATZ, sworn in behalf of plaintiff,
in rebuttal.

Direct examination by Mr. Bilder.

Q By whom were you employed in January,
1919? A A. Hollander & Son.

10 Q In what capacity? A Superintendent.

Q For how long prior to January, 1919, were
you so employed? A Since 1908.

Q Did you ever have a conversation with Mr.
Daniel Ruder and his son in which Mr. Ruder
told you he would not do any trucking of mer-
chandise for A. Hollander & Son any more be-
cause the loads were too expensive?

20 Mr. Jones: I object as leading.

Q And you answered by slapping him on the
back and saying that he need not worry, he was
not responsible, the goods were insured? A No,
sir; I would not allow him to cart the goods
unless he was responsible.

Q Did you ever say anything to him? A I
didn't say it.

30 Q Do you know who it was, who originally
hired Ruder to do the trucking of merchandise?
A I do not.

Q Was there ever a \$40,000 hold-up of any
goods of A. Hollander & Son that went to Mid-
dletown? A No, not \$40,000; there was a loss
at one time.

Q How much was that? A I couldn't tell
you; I don't remember, because at that time I
wasn't in charge of that.

40 Q When was that loss? A About three or
four years ago.

Charles Katz, cross.

Q Was it prior or after the loss of this bale?

A After.

Q I am talking of prior to the loss of this bale? A No, we haven't had no loss prior.

Cross examination by Mr. Jones.

Q You say you had an agreement with Mr. Ruder? A I have had no agreement. I hired him to do the trucking and he did it.

10

Q Didn't you say you wouldn't have made any agreement with Mr. Ruder unless he agreed to be responsible? A I didn't say that. I wouldn't allow him to truck for us if he wasn't responsible, because it is too expensive a merchandise.

Q Then it was your understanding that Mr. Ruder was insuring all these goods?

20

Mr. Bilder: I object as to what Mr. Katz's understanding was.

The Court: Sustain the objection.

Q Isn't it a fact that you hired that truck and driver from Dan Ruder? A I hired the truck; I didn't hire the physical truck or driver; I hired him to do the trucking.

30

Q Didn't you agree to pay him so much per day for truck and driver? A Per trip.

Q The charge was based upon the approximate time it would take to cover a certain distance? A Yes, sir.

Q For instance, you paid him \$25 for a trip to New York and back? A Yes, sir, New York.

Q To New York it would take a certain time and to Long Branch it would take longer? A Yes, thirty or thirty-five dollars.

40

Charles Katz, cross.

Q It took nearly two days to go up to Middletown, didn't it? A I don't know how long it took them in the winter months; it is sixty-eight to seventy miles.

Q You paid more money for that than for New York? A Yes, sir.

10 Q Your men were in charge of this truck, weren't they? A No.

Q You say that? A I say no.

Q Why did you send your man with the truck every time it was taken out? A To help him.

Q Help him to do what? A Load or unload, or sometimes maybe the back would fall off if it should open or should he get stuck in the road he should have a helper, because Mr. Ruder sent only one man and I thought it advisable to send
20 another man with him.

Q The other man was to help the driver? A The other man was to help the driver at all times.

Q The other man wasn't to be there to see that the goods were not lost? A Well, he was there with the man.

Q Your men put the goods on the truck? A Yes, sir.

Q And they took them off? A Yes, sir.

30 Q This driver, he was there under the instructions of your people from the time he arrived at the factory until he got back with the truck? A Yes, sir.

Q You say you did not have any conversation with Mr. Ruder? A Quite often, naturally; I had many a conversation.

Q How many did you have? A Almost every time I called up Mr. Ruder would come down and I told him where he has to send his truck today, and he would send a truck over and
40 that is as far as our conversation went.

Charles Katz, cross.

Q You made a separate deal each time? A He gave me a price on each trip.

Q You had agreed to that in advance? A Yes, sir.

Q So there was no necessity of discussing price each time? A No.

Q It was understood that these trips would be taken and an amount paid as agreed upon? A Yes, sir. 10

Q Did Mr. Ruder ever discuss with you his responsibility or the question of his responsibility of these trucks? A No, sir.

Q Didn't he ever say to you in substance, "I want to know whether you expect to hold me responsible for the goods"? A No. I called him up for the work and he came around for it.

Q Didn't you tell him you were fully covered with insurance? A I never spoke about that to him. 20

Q You were covered, weren't you?

Mr. Bilder: I object on the ground that insurance does not excuse the defendant from liability.

The Court: Sustain the objection.

Q Didn't your company receive the full amount of this claim from the insurance company? 30

Mr. Bilder: I object on the ground that the question of whether the insurance was paid is incompetent.

Mr. Jones: I think we should have all the facts, if these people are insured.

Mr. Bilder: I think that is highly improper, and if were not for the loss of time 40

Charles Katz, cross.

I would ask your Honor for a new trial, but I refrain from doing that.

(Argument.)

10 The Court: I will let him ask the question of this witness whether he is testifying as the agent for A. Hollander & Son or whether the company is insured against an adverse verdict in this case.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q (By the Court.) As agent of the plaintiff, A. Hollander & Son, are you testifying in your own interest, that is, as an agent of the company? A Not personally.

20 Q (By the Court.) Well, as the company's agent, I mean the company's interest, or whether the company is insured against the result of an adverse verdict in this case?

Mr. Bilder: I respectfully object to your Honor's question and pray an exception.

Exception noted as ground of appeal.

30 A I do not handle any insurance and I do not know anything about any insurance of any part of the plant. I merely was employed at that time to hire labor and see that they moved the stuff for the plant and any part of the business pertaining to insurance was out of my line of responsibility. I didn't know anything about that goods were insured. Of course, I knew we were insured, but I didn't know how much insurance we carried or who we were insured with or who was handling it. I know the office is
40 handling all the insurance.

Charles Katz, cross:

Q (By Mr. Jones.) You say you have nothing to do with the insurance? A No.

Q And you do not know the amount of the insurance?

Mr. Bilder: I object.

The Court: Sustain the objection. 10

Q You only knew the company was insured?

Mr. Bilder: I object to the question as incompetent, irrelevant and immaterial.

The Court: If the company is insured against an adverse verdict he can testify to that. I think he said he did not know anything about it.

Q You had a conference with Mr. Ruder and his son, didn't you, in reference to the alleged loss of the bag? A I remember calling Mr. Ruder after the loss was reported to me; I believe it was the next morning when Mr. Ruder came down to the office. 20

Q His son was with him? A I don't remember the old man. Of course, I have never dealt with the old man; the son used to come down when I called up for trucks. 30

Q You mean you have never talked with the old man? A Oh, yes, I spoke to him several times when they would come around, but when I called for a truck or asked someone to come down, the son used to come down and transact the business.

Q You remember, you say, the conversation at your factory about the alleged loss of this bag? A I don't think I was there; I can't remember that. 40

Albert Hollander, direct.

Q Was it you who ordered the search to be made at the factory? A No.

Q Did you order the search of the Johnson street factory? A I don't know whether any search was made.

Q You do not recall being at this conference?

10 A I do not recall being there.

Q You do not recall any conference between Mr. Ruder and his son and yourself? A No, I am quite sure I did not have any conference with him.

Re-direct examination by Mr. Bilder.

Q Were you present after the loss was reported, on the day of the loss and the day after when the elder Mr. Ruder was present at a talk
20 at your place of business there, the Hollander & Son place, at which Lubin was present and at which some other chauffeur was present? A I can't recall that.

Q Do you recall whether there was ever a time when you were present and when Mr. Ruder was present and someone who was a chauffeur said that the goods never went on the truck? A I do not think I was ever in any such conversation.
30

ALBERT HOLLANDER, sworn in behalf of the plaintiff, in rebuttal.

Direct examination by Mr. Bilder.

Q Did you ever have a conversation with either the elder Mr. Ruder or the younger Mr. Ruder, the gentlemen who are both in court to-
40

Motion for Direction of a Verdict.

day, with reference to the loss of a bag of muskrat skins testified to in this case? A No, sir.

Cross examination by Mr. Jones.

Q You knew about this loss, didn't you? A Pardon?

Q I say you knew about this loss? A About two months later.

Q You did not hear about it the next day? A No, sir.

Q You do not recall having had a conversation with Big Dan and Little Dan? A I know I did not.

PLAINTIFF RESTS.

DEFENDANT RESTS.

Mr. Bilder: I respectfully move for the direction of a verdict in favor of the plaintiff and against the defendant on both counts of the amended complaint.

(Argument.)

Adjourned to Wednesday morning, November 4, 1925, at 10:00 o'clock A. M.

SECOND DAY.

November 4, 1925.

Continued pursuant to adjournment.

Present, counsel as before stated.

The Court: In the present case the Court has discussed the motions that were made on Monday with counsel, and the Court is going to

Motion for Direction of a Verdict.

10 leave one question to the jury. I am going to find as a matter of law on the facts, the facts which I deem most favorable to the defendant, that the defendant was a general truckman transporting goods for hire under a special contract as a common carrier. Secondly, it is the law of this State that a common carrier cannot
20 lawfully contract for exemption from liability for losses resulting from its negligence or his negligence. The question I am going to leave to the jury under the circumstances is this: that there is a claim on behalf of the plaintiff that this bale of muskrat skins was delivered to the defendant. Without charging you now as to the various phases of the testimony for and against that claim, which is denied by the defendant, I am going to leave that question to you. I will touch upon it in a few moments in my charge.

Counsel may sum up to the jury.

Mr. Jones sums up for the defendant.

Mr. Bilder sums up for the plaintiff.

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*Charge to Jury.***CHARGE TO JURY.**

The Court charges the jury as follows:

MOUNTAIN, J.:

You have frequently heard railroad and express companies alluded to as common carriers and you have perhaps heard that in the absence of a special contract they were insurers when they accepted any goods for carriage and were paid for it, unless the injury or loss was occasioned by an act of God or the public enemy. 10

If a person delivers a trunk to an express company, and the law was not as I have stated, you can easily see that if the trunk was lost the person who owned the trunk would be in a helpless position. The express company might say, "Well, we are not negligent. This trunk disappeared somewhere between New York and Boston; we do not know how it disappeared; it was not our fault." The man might not be able to prove that it was their fault. He had surrendered possession of the trunk to the company. So, the law is that when a common carrier takes charge of a trunk, or of any chattel, or goods or merchandise, that that common carrier is an insurer except for loss or injury sustained by some act of God or the public enemy, and is responsible, unless, as is sometimes the case, the liability is limited by the contract. A common carrier cannot exempt himself from liability entirely. 20 30

In this case I charge you that the defendant was a common carrier and if he did receive this bale of muskrat skins he was responsible to the plaintiff for them; he was responsible if they were lost after he had received them and he was responsible for their value as of January 22, 1919. 40

Charge to Jury.

The plaintiff says that these skins were delivered to the defendant, but the defendant denies that he received the skins.

10 Let us examine the testimony that was given. It appears that the defendant sent a truck up to the plaintiff's place of business and this truck was in charge of a man named Robbins, an employee of the defendant. When Mr. Robbins arrived, we are told that the plaintiff's employees started to load the truck. Mr. Richeimer said he was the receiving and shipping clerk of the plaintiff company and that ten bales and one bag—and it was the bag which is in question—were put on this truck. He said the bag of skins were put on the center of the truck and that all of the loading of these bales and this bag was done by employees of the plaintiff, A. Hollander & Son. 20 He says that Robbins signed a receipt. There was another man present we are told who represented the plaintiff and his name was Samuel Geller. He said he helped load the truck and put this bag of muskrat skins—one thousand of them in this bag—on the truck, and that Robbins signed a paper and handed it to Mr. Richeimer.

30 Without proceeding further with the plaintiff's claim, let us turn to what Robbins has to say about that. He said that he arrived at Hollander's the first thing in the morning and that the goods—whatever they were—were loaded on the truck by Hollander's men and when the truck was partially loaded the superintendent asked him to sign a paper, which he signed without reading. It seems to be the insistence of the plaintiff that this paper was a receipt. It appears that after the truck was loaded a man named Lubin, an employee of the plaintiff, was 40 put upon the truck to accompany Robbins, the

Charge to Jury.

agent of the defendant, on this trip to Long Branch. Robbins said that when they reached Perth Amboy he stopped the truck and he went into a lunch wagon to eat and that the other man on the truck also ate. When they reached Long Branch the receiving and stock clerk, John Alberti, of the plaintiff corporation, says that he checked up this load when it arrived and found ten bales, but there was a bag short. He insisted that after the bales were unloaded the two men on the truck received one dollar to get something to eat. Robbins says they got the dollar first and went before the truck was unloaded. Mr. Alberti admitted that the plaintiff's men unloaded the truck and he says that Robbins was right there; Robbins says he was not there.

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To turn to Robbins' testimony, he admitted when he arrived at Long Branch that he took the tailboard of this truck down and that it was tied just as it had been tied when they left Newark. He said that after he took the tailboard down someone gave him money and he went to get his lunch and when he got back they claimed there was a bag short and that Lubin, who was an employee of the plaintiff, said it had never been on the load.

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Afterwards a conference was held by some of the interested parties and among others who were present were Mr. Ruder, senior, and Mr. Robbins; and Mr. Ruder senior said that at this conference—which was also attended by Lubin, who has been described, I believe, as “the whiskered man,” and who apparently spoke English rather poorly. Mr. Ruder indicated that Lubin said he was sure this bag had not been put on the truck, and Robbins said that at that time Lubin said it was not on the load.

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Exceptions to Charge.

Perhaps you will wish that this case was richer in testimony to indicate the probabilities on the one side or the other, but unfortunately you have to take the case as the testimony has been given to you. The question for you to decide is whether or not this bag of skins was put on the truck. Lubin has not been produced to testify. There is testimony indicating that he is in Europe.

He is not here. The receipt, which is alleged to have been signed by the defendant, is not produced, and the burden of proof in this case is upon the plaintiff to show by the greater weight of the evidence that the defendant did have this bag of muskrat skins loaded on his truck on that day. If the plaintiff does not prevail upon you by the greater weight of the proof, then your judgment should be for the defendant, and if the plaintiff, on the other hand, having the burden of proof, convinces you that it is entitled to recover, it must be upon the findings of fact by you that the bag of skins, as I say, was put on the truck. If the bag of skins was not put on the truck your judgment would be for the defendant. If you find for the plaintiff your judgment should be for \$2,500 with interest at six per cent. from January 22, 1919, until today. If you find for the defendant, then your verdict would be returned as a judgment in the defendant's favor.

(The jury retires.)

The Court: I would suggest that the amended complaint be filed with the county clerk and that you file your answer, Mr. Jones.

Mr. Jones: Yes, your Honor.

Mr. Bilder: I respectfully pray an exception to your Honor's refusal to charge each and every one of the plaintiff's requests to charge.

Exceptions to Charge.

Exception noted as ground of appeal.

Mr. Bilder: I respectfully pray an exception to certain statements made by your Honor to the jury: Your Honor, when referring to the testimony of Robbins, the defendant's truckman, said he had testified that Lubin, down at Long Branch, when Robbins' attention was called at Long Branch to the fact that this bag was missing, Lubin is said to have asserted that the bag had not gone on the load. I believe your Honor's statement unqualified was prejudicial to the plaintiff in that your Honor did not add that on cross examination Robbins admitted he could not understand anything that Lubin spoke of and that he only interpreted Lubin's gestures to mean that Lubin was indicating to him that the bag never went on the truck.

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Exception noted as ground of appeal.

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Mr. Bilder: I respectfully pray an exception to that portion of your Honor's charge where your Honor referred to the testimony of the defendant with reference to the conference that was had at the plaintiff's place after the loss was reported, on which occasion, as Ruder testified, Lubin had said that the bag never went on the truck. I believe your Honor's statement was prejudicial to the plaintiff and should have been qualified by the added statement that on cross examination Ruder admitted that Lubin's assertion was in the form of gestures and the shake of the head, which Ruder, senior, interpreted.

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Exception noted as ground of appeal.

Mr. Bilder: I respectfully pray an exception to that portion of your Honor's charge where your Honor further called attention to the fact that the receipt for the goods in question had

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Plaintiff's Requests to Charge.

not been produced. I believe your Honor's statement to that effect was prejudicial to the plaintiff in that your Honor did not add there was complete proof of the loss of the receipt and that there was positive proof of the existence of the receipt by two of the plaintiff's witnesses and proof of the existence of a duplicate of that receipt in the possession of Robbins when he arrived at Long Branch, which duplicate receipt was called for by the plaintiff of the defendant by notice to produce and was not produced, and that the contents of the receipt was testified to by plaintiff's witness Richeimer, and that none of this testimony, as to the contents of this receipt and its loss, was contradicted.

Exception noted as ground of appeal.

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PLAINTIFF'S REQUESTS TO CHARGE.

1. That on January 21, 1919, plaintiff delivered to defendant among other merchandise a bag containing 1,000 muskrat skins for carriage to Long Branch. Denied.

2. That the value of said bag of skins on said date was \$2,500.00. Denied.

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3. That said bag of skins was not carried safely and delivered by defendant to the consignee at Long Branch, but said bag was lost in transit. Denied.

4. That defendant is absolutely liable to plaintiff for said loss in the sum of \$2,500.00 with interest on said sum from January 21, 1919, to date, making a total sum of \$3,500. Denied.

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New Jersey Court of Errors and Appeals

A. HOLLANDER & SON, INC., a
corporation,

Plaintiff-Appellant,

vs.

DANIEL RUDER,

Defendant-Respondent.

*Action
at Law.*

BRIEF FOR DEFENDANT-RESPONDENT.

This action is based upon the alleged delivery by the plaintiff to the defendant, for transportation from Newark to Long Branch, of ten bales of skins and one bag of muskrat skins. The ten bales were delivered, and the question as to whether or not the bag of muskrat skins was actually entrusted to the defendant for delivery is the question which was left to the jury in this case.

There was proof that the value of the bag of skins was \$2,500.00. The defendant denied that the bag of skins was placed on his truck. The jury found for the defendant. Eight grounds of appeal have been presented in the appellant's brief; these will be answered *ad seriatem*.

(1)

Second Ground of Appeal.

This ground of appeal is as follows:

“The Court erroneously refused to permit plaintiff's attorneys to ask the following question of the plaintiff's witness Louis Reicheimer, ‘Was there a reference to this one bag of muskrat skins on that receipt?’”
(State of Case, page 25, lines 10 to 17.)

There was no error in the Court's refusal to permit the witness to answer the question, for two substantial reasons:

(a) Obviously, it was a leading question. We repeat it:

“Q Was there a reference to this one bag of muskrat skins on that receipt?

Mr. Jones: I object.

The Court: I sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.”

Permission to ask leading questions is in the sound discretion of the Court. In sustaining the objection the Court did not abuse its discretion.

(b) Even if it should be held that the exclusion of the answer was illegal, nevertheless such exclusion was not prejudicial to the plaintiff. There was evidence of what the alleged receipt contained in the testimony produced by the plaintiff. Louis Reicheimer testified as follows:

“Q What was on that receipt? A The bale numbers, slip numbers, customer's name and amount of skins” (page 25, line 4).

Therefore, the fact that the witness was not permitted to answer a leading question as to what the receipt contained did not deprive the plaintiff of the evidential effect of the contents of the alleged receipt.

Then, too, there is evidence in the plaintiff's case to show to the jury the quantity of goods alleged to have been placed on the truck. Witness for plaintiff, Samuel Geller, testified:

“Q Do you remember anything about a bag of muskrat skins? A Yes, sir.

Q Did that go on the truck? A It was on the truck; I put it on myself—on the truck” (page 32, line 30).

Again, the witness Louis Reicheimer testified on this subject:

“Q Did you see the stuff go on? A Yes, sir.

Q Was Robbins there at that time? A Yes, sir.

Q What about this bag of skins, did you see that go on? A Yes, sir” (page 23, line 11).

If the witness had been permitted to respond in the affirmative, it would have merely produced proof for the consideration of the jury to the effect that the bag of muskrat skins was mentioned in the receipt and would not have proved that the bag of muskrat skins had been actually placed on the load.

The effect of the contents of the alleged receipt, even if the receipt had been produced, was subject to the testimony of the driver of the truck, Robbins, who testified that the receipt in question was signed by him before the truck had been completely loaded and that he thought the paper had been signed by him at a point distant from where the truck was loaded and that he did not read the paper which he signed. Robbins' testimony is as follows:

“Q In this particular case or whatever day it was in January, was the load on when you were asked to sign the slip of paper? A No, it was partly loaded.

Q Where did you sign it? A I don't remember.

Q Did you go upstairs or downstairs or where? A I think I signed it downstairs and they took the papers up in the office.

Q Did you read the slip you signed? A No, sir” (page 79, lines 7 to 18).

From these excerpts, it is apparent that the plaintiff was not prejudiced by the ruling of the Trial Court in refusing to permit the witness to answer a leading question.

(2)

Third Ground of Appeal.

This ground of appeal is as follows:

“The Court erroneously made the following ruling and statement:

‘The Court: I will let him ask the question of this witness whether he is testifying as the agent for A. Hollander & Son or whether the company is insured against an adverse verdict in this case’” (State of Case, page 90, lines 7 to 14).

This question was entirely proper under *Day v. Donahue*, 62 N. J. Law 380. Questions of this nature are also entirely in the discretion of the Court. While it is true that a person committing a tort cannot set up in mitigation of damages that somebody else, with whom he has no connection, has either in whole or in part indemnified the party injured, that principle of law does not apply to the gravamen of the case under consideration.

(a) All that the plaintiff was entitled to receive, if the jury found for the plaintiff, was the value of the skins alleged to have been lost. If it appeared as a result of the inquiry propounded by the Court to the witness that the plaintiff was not only insured against an adverse verdict in this case, but had actually been reimbursed, the defendant would have been justified, upon the disclosure that payment had been made to the plaintiff, in applying to the Court to amend his answer, by pleading payment in the nature of a release.

(b) This observation on the part of the Court was merely *obiter* and was not a ruling upon any question propounded to the witness, then unanswered; and

(c) Witness did not reply to this question.

Practically the same question was then asked by the Court, as follows:

“Q (By the Court.) Well, as the company’s agent, I mean the company’s interest, or whether the company is insured against the result of an adverse verdict in this case.

Objection made and exception noted.”

The answer to this question is as follows:

“A I do not handle any insurance and I do not know anything about any insurance of any part of the plant. I merely was employed at that time to hire labor and see that they moved the stuff for the plant and any part of the business pertaining to insurance was out of my line of responsibility. I didn’t know anything about that goods were insured. Of course, I knew we were insured, but I didn’t know how much insurance we carried or who we were insured with or who was handling it. I know the office is handling all the insurance” (State of Case, page 90, lines 30-40).

The answer is immaterial and is not prejudicial in the slightest degree in the plaintiff’s case. The witness does not say that the company was insured against the result of an adverse verdict in this case, nor that payment had been made to the plaintiff to reimburse plaintiff for this loss. What he does say is: “I didn’t know anything about that goods were insured.”

(3)

Fourth Ground of Appeal.

This ground of appeal is as follows:

“The Court erroneously asked the following question of plaintiff’s witness Charles Katz:

‘(By the Court.) Well, as the company’s agent I mean the company’s inter-

est, or whether the company is insured against the result of an adverse verdict in this case?" (State of Case, page 90, lines 20 to 23.)

This is similar to the point involved in the third ground of appeal, and the same answer applies to this contention.

(4)

Fifth Ground of Appeal.

This ground of appeal is as follows:

"The Court erroneously made the following ruling and statement:

'The Court: If the company (plaintiff) is insured against an adverse verdict he can testify to that. I think he said he did not know anything about it.' (State of Case, page 91, lines 16 to 19.)

By reference to the printed case it will be readily observed that the witness did not answer the question—"You only knew the company was insured?"—to which objection was made by the plaintiff, which resulted in the observation of the Court to the aforesaid effect. There was no exception taken on the record to this *obiter*.

(5)

Sixth Ground of Appeal.

This ground of appeal is as follows:

"The Court erroneously refused to direct a verdict in favor of the plaintiff and against the defendant on plaintiff's motion." (State of Case, page 93, lines 21 to 24, and page 93, line 38; to page 94, lines 1 to 21.)

The Court was justified in refusing to direct a verdict in favor of the plaintiff upon its motion. There was a contested question of fact

in the case, which, under the law, could only be determined by the jury, viz., Was or was not the bag of skins on the truck? The plaintiff contends that it was, and the defendant asserts that it was not entrusted to it for transportation. There is evidence on both sides of the question. A number of witnesses testified that Lubin, an employee of the plaintiff, stated that he was sure that the bag of skins was not put on the load. (Testimony of Daniel Ruder, State of Case, page 58, lines 10 to 12.) There was testimony that another man, who was employed by the plaintiff as a chauffeur, and who stood by when the goods were placed on the truck, had stated that the bag was never placed on the truck. (Testimony of Daniel Ruder, Jr., page 73, lines 10 to 20.) There was also testimony that the agent of the plaintiff never left the truck during the entire trip; that the tail-board and ropes fastening the load on the truck were in exactly the same position when the load was delivered to plaintiff's factory at Long Branch as they were in when the truck left the plaintiff's plant at Newark. (Testimony of Millard Robbins, State of Case, pages 80 and 81.) Again, there was testimony that when Albert Hollander, of the plaintiff company, questioned some of his men, one said "yes" and one said "no"; so they were not sure whether the bag went on the truck or not. (State of Case, page 73, lines 20 to 25.)

The jury also had a right to take into consideration the evidence of the direction by the plaintiff, through its proper officers and employees, to search the plant to endeavor to discover the alleged missing bag of muskrat skins. Louis Reicheimer, witness for the plaintiff, admitted that A. Hollander & Son directed him to make a search for the bag, and that he made a

thorough search of the factory on the day after the alleged loss of the bag of skins to see whether he, Reicheimer, had been mistaken about putting the bag on the load.

Louis Reicheimer testified as follows:

“Q You made a search through the factory? A Yes, sir.

Q How long did that search last? A About a day.

Q You made a thorough search of the factory? A Yes, sir.

Q To see whether you had been mistaken about putting the bag on? A Yes, sir.
(State of Case, page 27, lines 15-22.)

The evidence raised a fair conflict of testimony which presented a question for the jury and which it would have been improper for the Court to decide.

(6)

Eleventh Ground of Appeal.

This ground of appeal is as follows:

“The Court erroneously charged the jury as follows:

‘To turn to Robbins’ testimony, he admitted when he arrived at Long Branch that he took the tail-board of this truck down and that it was tied just as it had been tied when they left Newark. He said that after he took the tail-board down someone gave him money and he went to get his lunch, and when he got back they claimed there was a bag short, and that Lubin, who was an employee of the plaintiff, said it had never been on the load. Afterwards, a conference was held by some of the interested parties, and among others who were present were Mr. Ruder, Sr., and Mr. Robbins, and Robbins said that at the time Lubin said it was not on the load.’ (State of Case, page 97, lines 19 to 39.)

'The Court's error consisted in the fact that the underlined portion of the foregoing statement by the Court is not supported by the testimony of Robbins, this witness having testified on cross examination that he could not understand anything that Lubin spoke (in a foreign language) and that he, Robbins, only interpreted Lubin's gestures as signifying that the bag never went on the truck.'''

The criticism made in appellant's brief to this excerpt from the charge of the Court is: "This statement by the Court as to Robbins' testimony was erroneous in that Robbins testified on cross examination that he had *not* heard Lubin *say* that the lost goods had not been put upon the defendant's truck, but that he, Robbins, saw Lubin make gestures and gesticulations which he, Robbins, interpreted to signify an assertion by Lubin that the goods in question had not been put on the defendant's truck. The point which it is assumed that the plaintiff's attorney desires to raise is that determined by the case of *State v. Lovell*, 88 N. J. Law 353, where the Court assumes in its charge to the jury a fact which does not appear in the evidence. That is not the situation here. The jury could not have been misled by the statement of the Court that Robbins said that Lubin *said* that the bag of skins had never been on the load. That was exactly what Robbins did say on cross examination.

"Q What do you know about this bag being short? A I don't know anything only his man himself [Lubin] said the bag wasn't put on—the man who was with me had charge of it." (State of Case, page 83, lines 19-22.)

While Lubin's language might have been partly unintelligible, the jury was acquainted by the evidence with the manner in which Lubin indi-

cated unmistakably, by gestures and gesticulations, that the bag of skins had never been placed on the load. The Court, therefore, did not assume a fact which did not appear in the case, and the jury could not have been misled as to the legal effect of such testimony. (*Lindley v. O'Rielley*, 46 Law, 352.)

The testimony of defendant Daniel Ruder shows clearly that not only did Lubin express himself by gestures and gesticulations, but also by word of mouth, as shown by the following testimony:

“Q What did they say to you? A They were talking among themselves. There was one man, Fishkill Lubin, who said the bag never went on the truck.

Q He said that to you? A He said that to the Hollander people, half Jewish and half German, and I understood the German part of it.” (State of Case, page 64, lines 25 to 31.)

The Court did not import into the case a fact of importance clearly connected with the merits when such fact has neither testimony nor color of testimony to support it. (*State v. Lovell, supra.*) Here clearly there was testimony and color of testimony fully justifying the statement in the charge of the Court.

(7)

Twelfth Ground of Appeal.

This ground of appeal is as follows:

“The Court erroneously charged the jury as follows:

‘Mr. Ruder indicated that Lubin said he was sure this bag had not been put on the truck.’ (State of Case, page 97, lines 36 to 39.)

The Court's error consisted in the fact that this was a statement by the Court not supported by the testimony. On cross examination Ruder admitted that Lubin's alleged assertion was in the form of gestures and the shake of the head, which Ruder interpreted to signify that the bag had not been put on the truck."

This is similar to the point involved in the eleventh ground of appeal and the same answer applies.

(8)

Thirteenth Ground of Appeal.

This ground of appeal is as follows:

"The Court erroneously charged the jury as follows:

'The receipt which is alleged to have been signed by the defendant is not produced and the burden of proof in this case is upon the plaintiff to show by the greater weight of the evidence that the defendant did not have this bag of muskrat skins loaded on his truck on that day.' (State of Case, page 98, lines 13 to 18.)

This was a statement with reference to the testimony, which was likely to mislead the jury as to the legal and probative effect of the mere non-production of the receipt and to mislead the jury as to the legal and probative effect of all the uncontradicted testimony as to the existence of the receipt, its loss, its contents, and the possession of a copy of the receipt by the defendant's employee, Robbins."

The Court first stated a fact viz., "the receipt which is alleged to have been signed by the defendant is not produced." That was a fact undisputed in the case; and the Court then proceeded to correctly state the rule of law, to the effect that "the burden of proof

in this case is upon the plaintiff to show by the greater weight of the evidence that the defendant did have this bag of muskrat skins loaded on his truck on that day." It will be noted that the ground of appeal states "that the defendant did not have this bag of muskrat skins loaded on the truck on that day." That undoubtedly is a typographical error in appellant's brief. The word *not* does not appear in the charge of the Court (page 98, lines 10-20).

It requires no argument to support the correct statement of the law as given to the jury by the Court in his charge. (State of Case, page 98, lines 11 to 13.) The burden is always upon the plaintiff to show by the greater weight of the evidence the facts alleged in the complaint upon which the case rests.

It is respectfully submitted that the judgment below should be affirmed.

BENJAMIN F. JONES,
Attorney for and of Counsel with
Defendant-Respondent.

New Jersey Court of Errors and Appeals

A. HOLLANDER & SON, INC., a
corporation,

Plaintiff-Appellant,

vs.

DANIEL RUDER,

Defendant-Respondent.

*Action
at Law.*

BRIEF FOR APPELLANT.

This is an action to recover from the defendant-respondent the value of a bag of muskrat skins which plaintiff-appellant delivered to defendant-respondent for carriage from plaintiff-appellant's place of business in Newark to plaintiff-appellant's place of business in Long Branch, and which, according to plaintiff-appellant, the defendant-respondent lost in transit. The bag of skins in question was included in a shipment which consisted of eleven bales of similar skins in addition to the bag in question. The lost bag of skins had a value of \$2,500.00. The defendant-respondent's defense was a denial that the lost bag of skins had been delivered by plaintiff-appellant to him for carriage, and, as affirmative defenses, an allegation that by special agreement plaintiff-appellant had exempted defendant-respondent from liability for any loss of or damage to goods of the plaintiff-appellant in transit by defendant-respondent, and that in the carriage of plaintiff-appellant's goods on the occasion in question, defendant-respondent was acting as a private carrier and not a common carrier, and that the goods were in the control of plaintiff-appellant or plaintiff-

appellant's servants during their transportation from Newark to Long Branch.

The Court found as a matter of law and charged the jury that in respect to the carriage of plaintiff-appellant's goods here in question, defendant-respondent was and was acting as a common carrier, and hence could not exempt himself entirely from liability for loss of the goods, and left to the jury to determine only the question of whether or not the bag of muskrat skins had in fact been delivered by plaintiff-appellant to defendant-respondent on the occasion in question. On this sole issue, the jury found in favor of the defendant-respondent. (State of Case, p. 93, l. 38, to p. 94, l. 21.)

The plaintiff-appellant has set forth thirteen grounds of appeal, but will prosecute the appeal on eight of these grounds only, waiving the other grounds of appeal.

Second Ground of Appeal.

This ground of appeal is as follows:

“The Court erroneously refused to permit plaintiff's attorneys to ask the following question of the plaintiff's witness, Louis Reicheimer, ‘Was there a reference to this one bag of muskrat skins on that receipt?’”
(State of the Case, p. 25, ll. 10 to 17.)

This question related to the most important issue in the case, to wit: the question of whether or not the lost bag of skins had been put on defendant's truck. This witness had testified that he made out a receipt itemizing the goods put by him on defendant's truck, and that he had defendant's truck driver sign this receipt. He then testified as follows:

“Q What did Robbins do with you in connection with that load of skins you put on? A Signed my receipt.

To the Honorable Judges of the Court of
Errors and Appeals:

The Plaintiff-Appellant respectfully requests that consideration be given only to the following grounds of appeal discussed in Plaintiff-Appellant's brief, viz; 3rd, 4th, 5th and 6th grounds of appeal. Plaintiff-Appellant will rely solely on said grounds of appeal on this appeal.

Very truly yours,

Bilder & Bilder

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to the Honorable Judges of the Court of

Q What kind of a receipt was that? A On yellow paper.

Q What was on it? A The slip number, the bag number.

Mr. Jones: I object.

The Court: Sustain the objection.

Q Where is that receipt now? A Lost.

Q When is the last time you saw it? A April, 1919.

Q April, 1919? A Yes, sir.

Q How do you fix the time of April, 1919, as the last time you saw it? A Because I signed an affidavit of that.

Q Of when this was shipped? A Yes, sir.

Q Is this the affidavit you refer to? A Yes, sir.

Q Was the receipt before you when you executed that affidavit? A Yes, sir.

Mr. Bilder: I offer the affidavit in evidence.

Mr. Jones: I object.

The Court: Sustain the objection.

Mr. Bilder: I ask to have the affidavit marked for identification.

(Same is marked P. 1 for identification.)

Q What was on that receipt? A The slip number.

Mr. Jones: I object.

The Court: Sustain the objection.

Q Have you made a search for that receipt? A Yes, sir.

Q In whose charge was that receipt? A In the office.

Q What office? A A. Hollander & Son.

Q Did you make any search in that office for that receipt? A Yes, sir.

Q Did you attempt to find it? A Yes, sir.

Q Did you look every place it may have been throughout the files? A Yes, sir.

Q What was on that receipt? A The bale numbers, slip numbers, customer's

name and amount of skins." (See State of Case, p. 23, l. 35, to p. 25, l. 9.)

That testimony established the existence of the receipt, its description, the fact that it was lost, that it had not been seen by witness since April, 1919, which was more than six years before the trial, that diligent and thorough search had been made by the witness for the receipt in the place where the receipt was kept and should have been found, to wit: in the files in plaintiff's office. Consequently, a proper foundation was laid for proof of the contents of the receipt by secondary evidence and the above question involved in this ground of appeal, had full legal warrant and justification.

In *Johnson v. Arnwine*, 42 N. J. L. 451, 454, the Court said:

"The theory on which evidence of a secondary grade is admitted is that the production of the primary evidence is out of the party's power. The loss or destruction of a paper is the occasion on which this rule is most frequently invoked, yet, in the practical application of the rule to lost papers, proof of loss or destruction so fully as to exclude every hypothesis of the existence of the original, *is not* required. It is *not* necessary to prove, exhaustively, that the paper nowhere exists. 1 Wharton on Evidence, Section 141. The question is always one of *diligence* in the effort to procure the original, before evidence of its contents is resorted to. As a general rule, the party is expected to show that he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. 1 Taylor on Evidence, Section 399; 1 Greenleaf on Evidence 558; *Simpson v. Dall*, 3 Wall. 460."

By ruling out this question, the Court committed an error which was manifestly and seriously prejudicial to plaintiff's case.

Third Ground of Appeal.

This ground of appeal is as follows:

“The Court erroneously made the following ruling and statement:

‘The Court: I will let him ask the question of this witness whether he is testifying as the agent for A. Hollander & Son or whether the company is insured against an adverse verdict in this case.’” (State of Case, p. 90, ll. 7 to 14.)

In the Court's ruling and statement here complained of, there was a plain implication, from the standpoint of the jury, that *it was important for the jury to know whether or not plaintiff was insured against an adverse verdict*; and as a result the jury could not fail to be influenced by a consideration of that matter. But the rule is well established in this State that a defendant is not entitled to the benefit of any insurance on the part of plaintiff and hence evidence of any such insurance is irrelevant and incompetent.

In *Hauser & Son v. Ryan*, 73 N. J. L. 273, 274, the Court said:

“The principle is settled for this court by the opinion in *Weber v. Morris and Essex Railroad Co.*, 7 Vroom 213, where Chief Justice Beasley says: ‘A person committing a tort cannot set up in mitigation of damages that somebody else, with whom he has no connection, has either in whole or in part indemnified the party injured.’”

In *Bradley v. Clear Co.*, 86 N. J. L. 338, 341, the Court said:

“The other grounds of appeal will be considered collectively, since they all relate to

but a single point to the effect that the appellant's rights had been prejudiced before the jury because the plaintiff had illegally and improperly injected into the evidence, as if it had been proved, the fact that defendant had been insured against loss from accident. * * *

Michael Bradley, the plaintiff's son, who was called as a witness for plaintiff, upon his cross examination, was asked by defendant's counsel, as follows: 'Q You have even refused to allow a physician to examine your father to see how badly he was hurt?' 'A I did.' At this point the witness was interrupted by the defendant's counsel before he had finished his answer, and, at the request of the Court, the question and answer was repeated. The witness replied, 'I didn't answer that.' To which the Court answered, 'You did, you said "I did!"'

Unfortunately, the witness had no opportunity to complete his answer to the original question until after the Court had ruled upon the question next following (put to him by the plaintiff's counsel), viz.: 'Q At the time you say you refused to allow a physician to examine your father, wasn't it the insurance physician you refused to allow to examine your father?'

Whatever may have been the undisclosed purpose of this question, it was objected to by the defendant, *and was promptly stricken out of the testimony* by the Court. It was after the Court had thus ordered this question to be expunged from the record, that the defendant's counsel asked the Court to permit the withdrawal of a juror, and to order a mistrial on the ground that, as he stated it, counsel for the plaintiff had improperly brought before the jury and interjected into the case the fact that the defendant company was insured against accidents such as the plaintiff was suing for. This request was refused by the Court under exception by defendant.

This recapitulation of the trial proceedings, as they occurred, is persuasive that the Court *scrupulously excluded* from the trial record every attempt (if any were made), on the part of the plaintiff, to introduce in the evidence before the jury any reference whatever to the defendant's alleged insurance.

It is apparent that the judge did not fail to exercise at least a reasonable degree of care and watchfulness in keeping and eliminating from the testimony all allusion, either by plaintiff's counsel or witness, to the defendant's insurance against accident."

The Court's statement was contrary to law and erroneous. That said statement was highly and seriously prejudicial to the plaintiff's case, cannot be doubted, particularly in view of the fact that the Court's statement, several times repeated, elicited from the witness (plaintiff's witness, Charles Katz), the testimony that *plaintiff was insured*.

The transcript of the record in this connection, is as follows:

"Q (By the Court.) Well, as the company's agent, I mean the company's interest, or whether the company is insured against the result of an adverse verdict in this case?

Mr. Bilder. I respectfully object to your Honor's question and pray an exception.

Exception noted as ground of appeal.

A I do not handle any insurance and I do not know anything about any insurance of any part of the plant. I merely was employed at that time to hire labor and see that they moved the stuff for the plant and any part of the business pertaining to insurance was out of my line of responsibility. I didn't know anything about *what* goods were insured. Of course, I knew we were insured, but I didn't know how much insurance we carried or who we were insured with or who

was handling it. I know the office is handling all the insurance." (State of Case, p. 90, ll. 20 to 40.)

Fourth Ground of Appeal.

This ground of appeal is as follows:

"The Court erroneously asked the following question of plaintiff's witness, Charles Katz:

'(By the Court.) Well, as the company's agent I mean the company's interest, or whether the company is insured against the result of an adverse verdict in this case?'" (State of Case, p. 90, ll. 20 to 23.)

This ground of appeal is virtually the same as the foregoing third ground of appeal, the Court's statement here complained of being substantially a repetition of the Court's previous statement complained of in the third ground of appeal. Consequently, everything that has been said hereinabove under the third ground of appeal together with the rule and cases, is applicable to the fourth ground of appeal.

Fifth Ground of Appeal.

This ground of appeal is as follows:

"The Court erroneously made the following ruling and statement:

'The Court: If the company (plaintiff) is insured against an adverse verdict, he can testify to that. I think he said he did not know anything about it.'" (State of Case, p. 91, ll. 16 to 19.)

The Court's statement here complained of, is in its effect, substantially the same as the Court's statements complained of and dealt with under the third and fourth grounds of appeal hereinabove, but the language of the Court in this

particular statement was more forceful and plainer to the effect that it was of great importance for the jury to know as to whether or not the plaintiff was insured against an adverse verdict. Consequently, everything that has been said hereinabove with reference to the third and fourth grounds of appeal, including the rule of law referred to and the cases cited, is applicable to this ground of appeal. It should be noted that the Court's statement, "I think he said he did not know anything about it," did not in the slightest degree diminish the prejudicial effect of the statement here complained of, because this assertion of the Court's was in itself erroneous in fact. As the above-quoted portion of the record plainly demonstrates, the witness had actually testified that *plaintiff was insured*; and the Court's recollection of this testimony was faulty. But it must be assumed here on appeal that the jury remembered that the witness had testified that the plaintiff was insured, such testimony being given by the witness in answer to the third question immediately preceding the Court's statement here under discussion.

Sixth Ground of Appeal.

This ground of appeal is as follows:

"The Court erroneously refused to direct a verdict in favor of the plaintiff and against the defendant on plaintiff's motion." (State of Case, p. 93, ll. 21 to 24, and p. 93, ll. 38 to p. 94, ll. 1 to 21.)

Refusal to Direct Verdict.

For the purpose of determining the question raised by this ground of appeal, the Court must take as true, all evidence which supports the view of the party against whom the motion is made. *Andre v. Mertens*, 88 N. J. L. 626.

The defendant's defenses to the action were:

1. Denial that the goods alleged to have been lost were received by it from plaintiff for carriage.
2. That by virtue of an agreement entered into between the plaintiff and defendant, plaintiff was exempted for any liability for said alleged loss.

On plaintiff's motion for direction of a verdict therefore, it was incumbent upon the Court to determine whether the evidence offered by defendant, if taken to be true, proved or established said defenses, or either of them.

With reference to the first defense, viz: a denial that plaintiff had delivered to defendant for carriage the goods alleged to have been lost, defendant offered the following evidence:

1. Defendant himself testified on direct examination as follows:

“Q After this alleged loss of this bag of skins did you see Mr. Katz again? A Yes, the next morning.

Q State what was said. A The whole lot of us went up in the office, four or five, and one man said the bag was on and one man wasn't so sure it was on, and the man who was riding with Robbins, he was sure it was not put on; he knew there was only the ten bags there; this man Rubin, I think his name was.”

* * * * *

Q What did they decide to do at that conference, if anything? A They tried to find out where the bag went to and nobody seemed to know and for two or three days thereafter they looked over the Johnson street plant for the bags that were supposed to have been put on our truck.” (State of Case, p. 58, ll. 3-27.)

In order to make this testimony clear, it should be stated that the "office" to which the witness was referring, was plaintiff's office; the person named "Robbins," was defendant's driver, who drove defendant's truck which carried the goods in question; and the person named "Lubin" was the employee of plaintiff who rode on the truck with defendant's driver, Robbins.

The substance of defendant's aforesaid testimony then appears to be that in a conversation which took place in plaintiff's office on the day after the alleged loss of plaintiff's goods in transit, the defendant heard "one man say, the bag was on and one man wasn't so sure it was on," and he heard Lubin say he "was sure it was not put on." So far as this portion of the aforesaid testimony is concerned, it is obvious that it is merely hearsay evidence consisting of statements alleged to have been made by one of defendant's employees. Not only is such hearsay in its very nature incompetent and insufficient to prove defendant's contention that "the bag was not put on" defendant's truck, but aside from this objection, the alleged fact (here taken to be true) that the said employee made such a statement is of course absolutely no legal evidence of its truth.

The other portion of the aforesaid testimony in which defendant says in substance that a search was made "in the Johnson Street Plant" for the bag of skins alleged to have been lost by defendant, is certainly no legal evidence to prove that the lost goods had not been put on defendant's truck. In the very nature of things, the alleged fact (here taken to be true) that a shipment of goods alleged to have been lost by a carrier, proceeds to search his own premises after the reported loss of goods in transit and after a

conference with the *carrier*, does not in the slightest degree tend to *prove* that the lost goods had not been delivered by the shipper to the carrier, but at the utmost merely indicates that the shipper was trying to eliminate any alternative possibility and was acting in a way to satisfy completely the self-serving *doubts of the carrier*. Moreover, the very fact that the search was made and did not result in a finding of the lost goods, gives to this testimony a significance quite opposite to what defendant intended. Furthermore, regard must be had to the fact that the search was not voluntarily made by plaintiff's employees, viz: Louis Richheimer and Sam Geller, who testified that they personally put the lost bag of skins on defendant's truck, but was ordered to be made by plaintiff, virtually over the protest of said witness, Richheimer. In this connection, the plaintiff's witness, Richheimer testified as follows:

“Q When you made this search did you make that of your own accord? A No, sir.

Q Whose idea was that? A The company's, A. Hollander & Company.

Q How did that search come to be made? A On account of bag being lost.

Q Did Mr. Ruder have anything to do with having that search made? A He must have had.

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

The Court: Strike it out.

Q Who was it that told you to make that search? A I think it was Mr. Fenuk.

Q (By the Court.) Did you tell your employers you had seen this bag put on the truck? A Yes, sir.

Q In spite of that information they wanted you to make a search? A Yes, sir.

Q (By Mr. Bilder.) Didn't you have a receipt at the time the search was made? A Yes, sir.

Q Did you show that to your employers?

A Yes, sir. I told him, 'there is no use to make a search—' " (State of Case, p. 29, ll. 15 to 40.)

Consequently, the making of the search has no such significance as it would have had if it were shown that the plaintiff's said employees Richheimer and Geller, who testified that they had personally put the lost bag of skins on defendant's truck, had made a search of their own accord, which would have indicated some remaining doubt in their own minds. In this immediate connection, attention should be called to the following testimony of defendant on cross examination:

"Q Didn't you tell the Hollander people, the employees of Hollander & Company and the persons in charge of the place where you had this talk, as you say, that they ought to look all around the place to make sure the package was not around? A No, the shipping clerk suggested that, the man who claimed he put the bag on the wagon.

Q He suggested that? A Yes, sir.

Q Are you sure of that? A Some of the Hollander people suggested that and they looked for three days.

Q Why did you just say that the shipping clerk suggested it and now you say some of the Hollander people suggested it? A Someone in the office suggested it.

Q Why, a moment ago, did you say positively it was the shipping clerk? A You know how that is.

Q You thought it would be a good thing to say? A It didn't make any difference to me." (State of Case, p. 69, ll. 10 to 32.)

This testimony as to the making of the search, is deprived of every vestige of probative quality when regard is had to the fact that plaintiff's witnesses, Richheimer and Geller testified positively that the lost bag of skins had been put by

them personally on defendant's truck, that a written receipt itemizing all of the goods delivered to defendant's truck on that occasion was signed by defendant's driver, Robbins, and a duplicate of said receipt then and there was given to defendant's said truck driver, Robbins, coupled with the testimony of defendant's witness John Alberti, to the effect that when defendant's truck arrived at Long Branch, he, Alberti, received delivery of the goods on defendant's truck, checked off the goods *as noted on a paper handed to him by defendant's driver*, and observed that the bag of skins mentioned thereon was missing from the truck. Alberti's testimony was as follows:

“Q Where were you employed in January, 1919? A Long Branch Fur Dressing & Dyeing, Long Branch.

Q Is that one of the Hollander & Company places? A Yes, sir.

Q What were you doing there in January, 1919? A Receiving and stock clerk.

Q Do you recall seeing this man Robbins in January, 1919? A Yes, sir.

Q What was he doing there?

Q Where did you see him? A I saw him at the Pearl street entrance.

Q In Long Branch? A In Long Branch.

Q What was he doing there? A In January, 1919?

Q Yes. A He brought down a load of skins from Newark.

Q Did he hand you any paper on that occasion? A Yes, sir.

Q What was it? A Ten bales and one bag.

Q What was on the paper? A On the paper?

Q Yes.

Mr. Jones: That is objected to.

Q What connection did the paper have with the load he brought? A Why, it re-

ferred to the load, the amount of bales and bag.

Q Did you check it up? A Yes, sir.

Q What did you find? A Ten bales, and one bag short.

Q Did you notify him about that? A Yes, sir.

Q Was there any other bag in that lot besides that one named in the list? A No, sir.

Q That bag itself was not on the load, was it? A No, sir." (State of Case, p. 38, l. 8, to p. 39, l. 9.)

It is of the utmost importance to note also that defendant's driver, Robbins, testifying as defendant's witness, admitted on cross examination that plaintiff's said witness Alberti *had checked off the goods and found one piece short.*

Defendant's son, Daniel Ruder, Jr., testified as follows:

"Q After the word came to your office that this bag of skins was supposed to have been lost did you and your father go up to Hollander's? A Yes, sir.

Q Next morning was that? A Yes, sir.

Q Tell us what took place. A We went up there and went in the showroom and this fellow Louis was there and Charley Katz, and this fellow with the whiskers and they talked it over, talked about loading the truck. Well, there was another fellow sitting there employed as a chauffeur for Hollander and he stood there right where the truck was loaded and said the thing never went on, and this fellow with the whiskers kept making motions with his hand that the bag was never put on and Louis was not so sure about it. The shipping clerk he said to look through that plant and the Johnson street plant and maybe they would find it, and from there we went up in the office and Albert Hollander questioned a few of the men and one fellow said, 'Yes,' and one said, 'No,'

so they were not sure whether the bag went on the truck or not.

Cross examination by Mr. Bilder.

Q You differ a little from your father, don't you, as to who said it never went on the truck? A What was the question?

Mr. Jones: I object.

The Court: Sustain the objection.

Q You do not say it was Rubin that said that, do you? A It was Rubin. I told you one or the other; I told you one said 'Yes,' and one said 'No.'

Q Didn't you just say there was another chauffeur standing up there—you didn't name him—and you said it was him? A He wasn't even in the conversation.

Q (Question read.) A The truck was not right there; that was the day before that.

Q What was the day before? A When the bag was lost.

Q Do you stand by the answer that it was some other fellow said the bag did not go on? A Lubin was there, but this fellow stood by the truck when it was loaded, the day before.

Q Do you stand by your answer in which you said there was some other fellow there and that this chauffeur said that he stood by the truck and it didn't go on? A The chauffeur broke in the conversation.

Q So, you withdraw that answer, is that right? A Yes, sir.

Q How did Lubin say it didn't go on? A Well, I can't talk the way he talks so I can tell you.

Q Did you question him and see, or was it by gestures? A Well, that is when I had him on the truck with me.

Q How did he say it to you? A I can't talk the way he talks.

Q How did you get the question from him when he was saying it didn't go on, by movements or by word of mouth? A By movements of his hands and movements of his mouth.

Q What was it he said? A I can't remember.

Q What was it he said about the bag? A He would point to the bag and keep shaking his hands and shook his head like that (indicating).

Q He held his hands out this way and shaking his hands, and what was he looking at? A At another bag there.

Q You saw him looking at one out of a thousand bags and he held his hands out this way and shook his head and you interpreted that as him saying that the bag did not go on? A Yes, sir."

* * * * *

Q Where was the conversation at? A I told you the chauffeur was there the day before when the truck was loaded. The chauffeur was already discharged by Hollander, he didn't know anything about it, the chauffeur.

Q What conversation are you talking of? A I guess Mr. Katz can tell you the fellow's name who discharged him.

Q What conversation are you talking of at which the other chauffeur was there? A This other chauffeur who stood by the truck the day before.

Q What other chauffeur do you mean? A We will leave the other chauffeur out of it.

Q Now, you want to leave him out of it? A I told you that before." (State of Case, p. 73, l. 3, to p. 75, l. 35.)

The substance of the foregoing testimony of defendant's son, when its contradictions are sifted out, amounts to this: that at the conference which he says took place at plaintiff's office after the loss was reported, the witness observed certain gestures and gesticulations made by plaintiff's employee Lubin (who did not speak English) which the witness interpreted to mean Lubin was indicating that the lost bag of skins had not been put on the defendant's truck, and

that a search of the plant was ordered to be made. It should be noted that the witness is testifying as to the same occasion and conference of which defendant himself testified, and that while both the witness and his father, the defendant, agree in stating that plaintiff's employee Lubin said that the lost bag of skins was not put on the defendant's truck, the defendant's son and defendant differ as to how Lubin signified his meaning; the defendant testifying that Lubin did so by word of mouth half in Jewish and half in German, while defendant's son testified that Lubin signified his meaning by gestures and gesticulations.

This testimony of defendant's son, so far as it relates to what Lubin did or said on the occasion being testified to, not only tends to impeach and invalidate the testimony of the defendant on that score, but manifests its own evidential worthlessness in that it involves and is based upon construction put upon *the gestures* of Lubin by the witness without giving any assurance of the accuracy of the witnesses' interpretation of those gestures. Assuming, however, that the witnesses' interpretation of Lubin's gestures was correct, viz; that Lubin was signifying by those gestures that the lost bag of skins had not been put on defendant's truck, it is sufficient to say that this testimony encounters the same objections that have been heretofore been advanced hereinabove against the similar testimony of the defendant himself as to the same matter. In other words, this testimony as to what Lubin said or signified by gestures at said conference after the loss was reported, does not constitute legal evidence to prove that the bag of skins had not been put on defendant's truck.

As to the above mentioned testimony of this witness that a search was ordered to be made on said occasion, it is sufficient also to repeat by reference thereto the same objections advanced hereinabove to the testimony of the defendant himself as to the same matter.

In the case of the testimony of the witness now under discussion, it is even more apparent that the making of the search has no value because the testimony of this witness furnishes an obvious reason for the making of such search to wit: "one fellow said yes, and one said no." Consequently (it is to be inferred) the officials of the company ordered a search of the premises to be made in order to dispell any doubt created *in the mind of the defendant who was then and there present at said conferences.*

Defendant's driver Robbins testified on direct examination as follows:

“Q Certain goods were put on the truck, weren't they? A Yes, sir.

Q By whom? A By their men.

Q Did anybody ask you to sign a paper?

A Well, the superintendent asked me to sign, to show I was there with the truck.

Q When did you sign the paper with respect to the loading of the truck? A Sometimes we signed before the load is on.

Q In this particular case, on whatever day it was in January, was the load on when you were asked to sign the slip of paper? A No, it was partly loaded.

Q Where did you sign it? A I don't remember.

Q Did you go upstairs or downstairs, or where? A I think I signed it downstairs and they took the papers up in the office.

Q Did you read the slip you signed? A No, sir.

Q Did you have any authority from Mr. Ruder to sign the slip? A No, sir.

Mr. Bilder: I object as incompetent and irrelevant.

The Court: The question has been answered.

Mr. Bilder: Then I ask that the answer be stricken out on the same grounds.

The Court: The motion will be denied.

Q What were the instructions given to you by this representative of Hollanders you testified to, what were the instructions this particular day? A My instructions were to take it down there and their men would take the load off and bring it back, if they had anything, and just drive the truck.

Q That is what you did? A Yes, sir.

Q Was there a tail-board on this truck?

A Yes, sir.

Q Was the tail-board put in place after the goods were put on the truck? A Yes, I put the tail-board up and tied the load.

Q Was there a canvas or something that came down from the top? A A canvas that was put over the top.

Q Did you tie it in position? A Yes, sir.

Q Did the work you did in tying up the back, fixing the back, was that the usual and regular way in which you always tied loads? A Yes, sir.

Q A man from Hollander & Sons accompanied you on the truck? A Yes, sir.

Q Where did he sit, about? A Right on the seat.

Q Did he leave the truck at any time from the time he left the Hollander plant in Newark until it arrived at the Hollander plant in Long Branch? A No, sir.

Q How do you know that? A I made one stop at Perth Amboy at a lunch wagon and stopped in front of it and wasn't gone for five minutes and got a cup of coffee and a sandwich and I asked him to stay on the seat and he said he would, he was eating on the seat himself.

Q Could you see the truck from the lunch wagon? A Yes, sir.

Q Did you see that he sat on the seat when you went in for a sandwich? A Yes, sir, he was still eating when I came out.

Q He never left the truck at all from the time it left Newark until it went to Long Branch? A No, sir.

Mr. Bilder: I object.

Q After you got to Long Branch what happened? A Backed into the place.

Q What place? A The Long Branch property.

Q Of Hollander & Son? A Yes, sir.

Q Then, what happened? A Well, I took the tail-board down and somebody from in the office, I don't know who it was, gave me money and I went and got supper, or lunch, it was about five o'clock—and they took off the stuff and reloaded it—I don't know what they reloaded it with and I brought the stuff back and when I came back from the lunch place they claimed a bag was missing and the man who was with me claims it wasn't put on, that is Mr. Lubin.

Q He couldn't speak English, could he? A No, he couldn't speak English, but I made out what he meant. He admitted it wasn't on the truck, wasn't put on.

Q You never saw the bag, did you? A No, sir.

Q You never touched any of the goods before? A No, sir, and it was always tied on just the same when we left the plant and when we got down there.

Q You did not touch the goods being unloaded? A No, sir, they unloaded them.

Q You were not there when they unloaded them, were you? A No, sir.

Mr. Bilder: I object as leading.

The Court: Do not lead the witness.

Q Were you present when that load you brought down to Long Branch was unloaded by the employees of Hollander & Company,

were you there? A While they were taking it off?

Q Yes. A No, I went to lunch for \$1.00 or seventy-five cents.

Q You went away to lunch when they unloaded the goods? A Yes, sir.

Q You didn't know anything about it until you came back? A I didn't know anything about it until I came back and then they called up the Newark branch and told them all about it.

Q You drove the truck back from Long Branch to Newark? A Yes, the truck was put in their place until the next morning if it wasn't unloaded the same night.

Q You left the truck at the plant? A In Hollander's garage if the truck had a load on.

Q What time did you get back from Long Branch? A I judge it may have been around eleven o'clock at night.

Cross examination by Mr. Bilder.

Q You say that was left there if it had a load on? A It was always in charge of Hollander's when they had their stuff on.

Q When you got to Long Branch how did they come to tell you there was a piece missing? A They must have checked it up some way.

Q How did they check it up? A I can't tell you.

Q You don't know how they checked it up? A No, I wasn't there when they checked it up. I went to eat.

Q What do you mean by checking up? A How could they tell there was a bag there if they didn't check up something.

Q How did they know what you had on the wagon? A I don't know.

Q Did you ask them? A No, I didn't ask what kind of stuff they had on.

Q Didn't you say when they said there is a piece short, didn't you say, 'How do you know there is a piece short?' A *Oh, yes.*

Q Then, what did they say? A They said it was *short on the bill*, it was supposed to be ten and one.

Q On what bill was it short? A *I don't know.*

Q Did you ask them on what bill it was short? A No, I didn't ask them anything because their men had charge of it and I didn't pay any particular attention.

Q You didn't pay any attention to the goods? A No, by the bill that they had.

Q What bill did they have? A I don't know.

Q Well, then why do you talk of a bill?

Mr. Jones: He isn't talking of a bill. I object.

Q You just now said you asked them how they knew it, didn't you? A I don't know if I did or not.

Q What do you know about this bag being short? A I don't know anything, only his man himself said the bag wasn't put on, the man who was with me had charge of it.

Q How did he say it? A I couldn't tell you in what way he said it, but I kind of found out what he was talking about.

Q What language did he talk? A He really didn't talk anything. He talked with his signs, *with his hands.*

Q You could interpret his signs, could you? A I had him on the truck a few times.

Q You could understand what he meant by his motions with his hands that the bag did not go on the truck? A Yes, sir.

Q What kind of movements did he make with his hands that spelled that? A I don't know, I couldn't tell you.

Q He didn't use deaf and dumb languages, did he? A It may have been pretty nearly like it.

Q Can you imitate the motions? A No, sir, that has been six years ago and I don't remember it.

Q You remember it was motions? A Yes, sir.

Q And not language? A Yes, sir.

Q Who gave you the money to go to supper? A I couldn't say who gave it to me, someone in the company.

Q How is that? A Some one in the company.

Q You can't remember? A No, sir.

Q The stuff, was that on the truck when you went to supper? A Yes, sir.

Q Where did you leave the truck when you went to supper? A In their charge.

Q Where, on the curb or did you back it into some driveway? A I backed it into the driveway where they unloaded their stuff.

Q Into a driveway? A I don't know where, whether a driveway or a platform.

Q How long was it from the time you— you backed it up to a platform? A Yes, sir.

Q How long was it from the time you backed it up to the platform and went to supper? A It may have been a half an hour or three-quarters.

Q During that time you were standing there? A It was unloaded when I came back.

Q I mean from the time you backed up, how long was it from the time you backed up and the time he handed you the dollar to go to supper? A I don't know, two or three minutes.

Q You went right away? A Yes, sir.

Q Did you go around the truck to examine whether everything was tight and tied up? A I put the tail-board down and it was just the same as it was when I got there as when I left the East Kinney street plant.

Q What did you have to do to get the tail-board down? A Undo the rope.

Q All of them? A Yes, everyone, the rope holding the tail-board up and holding the curtains.

Q So, you stripped the wagon so the load was exposed? A Yes, sir.

Q Then, you went away? A Yes, sir.

Q That only took you two or three minutes? A Two or three minutes, yes, sir.

Q Did you tie it up at Newark before you started out? A Yes, sir.

Q How long did it take you to do that? A Not very long, five minutes.

Q Did you see a bag on top of the bale before you went away? A *I didn't take any particular notice.*

Q You didn't take any particular notice of that? A No, sir.

Q Did you notice who was standing there while that wagon was being packed there in Newark? A No, I did not.

Q Did you see Mr. Richheimer there? A I guess he may have been there.

Q Do you remember seeing that man (indicating)? A Yes. I think he helped load the stuff." State of Case, p. 78, l. 38, to p. 85, l. 32.)

The substance of this testimony is to the effect that the truck was loaded with plaintiff's goods in the witnesses' presence by plaintiff's employees; that at the request of plaintiff's superintendent, the witness *signed a paper* with respect to the load on the truck; that he did not read what was on the paper before he signed it; that he tied the load on the truck after it was loaded; that plaintiff's employee Lubin sat on the truck with witness and did not leave the said truck at any time until witness reached Long Branch with the truck; that witness "stopped at Perth Amboy and left the truck for five minutes to drink a cup of coffee and eat a sandwich"; that at Long Branch witness untied the load and plaintiff's employees at Long Branch unloaded the goods from the truck while the witness went to lunch; that after witness got back from lunch plaintiff's employees at Long Branch claimed that a bag of goods was missing; that plaintiff's employee Lubin, who was riding on the truck

with witness made signs with his hands which the witness interpreted to mean that he was saying that the bag did not go on the truck; that plaintiff's employees at Long Branch *checked off the items of goods on the truck by reference to a "bill."*

That part of the witnesses' testimony which relates to the gestures and gesticulations of Lubin which the witness interpreted to mean an assertion by Lubin that the lost goods were not put on the truck, may be immediately dismissed upon the same grounds of objection made hereinabove to the testimony given by the defendant and defendant's son respectively as to a similar statement which they say the same man Lubin made by words or gestures. After thus disposing of and eliminating that portion of the testimony of this witness, there remains to be considered only the witnesses' statement that he tied the load at Long Branch and that when he untied the ropes at Long Branch, they were in the same condition as when he tied them on at Newark; and the fact that, as he says, plaintiff's employee Lubin was seated on the seat of the truck during all the time of the trip from Newark to Long Branch. Taking this testimony to be true, it is nevertheless apparent that it does constitute any legally sufficient evidence that the lost bag of skins had not been put on the truck. In the first place, it does not follow that because Robbins found the ropes tied at Long Branch exactly as he had tied them at Newark, that no item of goods which had been put on the truck could have been lost in transit either through having fallen off or having been taken off, particularly a comparatively light bag of skins. The witness did not testify as to the quantity of rope that was used in tying

up the load or the manner in which the rope was tied across the load, so as to negative the possibility of a loss or removal of the particular bag in transit without a removal of the rope or some part thereof. Then again the fact, here assumed to be true, that Lubin was seated on the truck during the entire trip has absolutely no evidential effect upon the question as to whether or not the lost bag was put on the truck at Newark. For not only did it *not* appear that Lubin was so seated that it would have been impossible for the particular bag of skins to fall or to be taken off the truck without Lubin's knowledge, but it was made to appear evident that, being seated on the *seat* of the truck, Lubin had his back to the load during the entire trip. Moreover, and what is of the utmost importance, it appears from the testimony of this witness, *that he left the truck at Perth Amboy to get a cup of coffee and a sandwich.* It may be that this furnished the very opportunity for a theft of the lost bag of skins from the truck. Although the witness says that he only left the truck for about "five minutes" on that occasion, it is to be presumed that his estimate of the time of his absence as "five minutes," was a mere case of guessing and that very likely it took more than that time to order his coffee and a sandwich in the lunch room and to get it and eat it.

Thus the testimony of this witness is not only destitute of any evidence legally sufficient to support defendant's contention that the lost bag of skins was not put on the defendant's truck, but actually contains proof to the contrary. For the witness states that plaintiff's employees at Long Branch, in unloading the truck "*checked off*" the goods by reference to a "*bill,*" found

that one piece viz, a bag of skins, was missing, and called this fact to the witness' attention. It cannot be doubted that the "bill" which the witness referred to and which was used to "check off" the goods, was the duplicate copy of the receipt which was signed by the witness in Newark and which copy was given to him to take along, as testified by plaintiff's witness, Richheimer.

Indeed, the testimony of this witness of the defendant, being the driver of the defendant's truck which carried the goods in question, not only fails to lend any support to defendant's defense, but actually disproves and refutes it and establishes plaintiff's case.

It appears, therefore, that while defendant failed to furnish any legally sufficient evidence to support defendant's contention that the lost bag of skins had not been delivered to plaintiff by defendant for carriage, the testimony of three witnesses of plaintiff's furnished proof of the most abundant and positive character that the lost bag of skins was delivered by plaintiff to defendant. And above all, plaintiff's witness, Winarsky, who is a Supreme Court Examiner and Court Stenographer, testified that on an examination before trial in this cause, defendant himself testified that *he saw this receipt.*

There was thus presented to the Court a situation in which plaintiff's evidence of the delivery of the lost goods by plaintiff to defendant was positive and abundant and *without any direct contradiction*, while the testimony on the part of the defendant contained absolutely no legally sufficient evidence to support the contrary contention, not one of defendant's witnesses testifying of *his own knowledge* that the lost bag of

skins had not been put on defendant's truck. That this situation called for and required a direction of a verdict by the Court in favor of plaintiff and against the defendant, is plainly established by the authorities.

The case of *Jones v. Public Service Railway Company*, 86 N. J. Law 646, states the rule that a motion to direct a verdict admits the truth of the evidence of the opposite party and of every *legitimate* inference of fact to be drawn therefrom, *but denies the sufficiency in law of such evidence to support the contention of said opposite party.*

This rule is precisely the one upon which plaintiff relied in making the motion for direction of a verdict.

In *Jerolaman v. Belleville*, 90 N. J. Law 206, the Court said:

Where there is a *fair* conflict of evidence, a direction of a verdict is improper. See also 90 N. J. Law 311.

By a "*fair conflict*" of evidence, the Court undoubtedly meant a conflict between evidence of the same legal character and competency. Certainly, there can be no such *fair* conflict between evidence on one side (plaintiff's) by witnesses testifying as to the material facts positively *of their own knowledge*, and testimony (of defendant) by witnesses as to a hearsay statement which they say was made by a third person, a mere employee of plaintiff, not by word of mouth but *in the form of gestures*, and testimony that the ropes on defendant's truck showed no indication of having been tampered with during the trip from Newark to Long Branch, and testimony that plaintiff ordered its employees to

search plaintiff's factory for the lost bag of skins after a conference on that subject between one of plaintiff's officers and defendant. There can be no fair conflict between direct, positive, personal-knowledge, testimony, and hearsay and inferential testimony, the latter being furnished by alleged proof of circumstances capable of giving rise to inferences of various and opposite characters.

Eleventh Ground of Appeal.

This ground of appeal is as follows:

“The Court erroneously charged the jury as follows:

‘To turn to Robbins’ testimony, he admitted when he arrived at Long Branch, that he took the tailboard of this truck down and that it was tied just as it had been tied when they left Newark. He said that after he took the tailboard down someone gave him money and he went to get his lunch, and when he got back they claimed there was a bag short, and that Lubin, who was an employee of the plaintiff, said it had never been on the load. Afterwards, a conference was held by some of the interested parties and among others who were present were Mr. Ruder, Sr., and Mr. Robbins, and Robbins said that at the time Lubin said it was not on the load’ (State of Case, p. 97, ll. 19 to 39).

‘The Court’s error consisted in the fact that the underlined portion of the foregoing statement by the Court is not supported by the testimony of Robbins, this witness having testified on cross examination that he could not understand anything that Lubin spoke (in a foreign language) and that he, Robbins, only interpreted Lubin’s gestures as signifying that the bag never went on the truck.’”

The rule is well established in this State that the Trial Court has the right to comment upon the testimony and to even intimate an opinion as to the weight of the evidence. *Foley v. Loughran*, 60 N. J. Law 464, 477. But there are two other rules relating to the same subject, which are equally well established, viz: that it is improper for a court to make a statement of fact which is not supported by testimony in the case. See *Camden & Atlantic R. R. Co. v. Williams*, 61 N. J. Law 646. And it is improper for the Court to make a statement with reference to the testimony, which was likely to mislead the jury as to the legal effect of such testimony. See *Lindley v. O'Rielley*, 46 N. J. Law 352; *Gerety v. New York and New Jersey Railway Co.*, 89 N. J. Law 175; *Smith & Bennett v. State*, 41 N. J. Law 370.

In the above-quoted portion of the Court's charge, the Court was summarizing the testimony of the defendant's witness, Robbins, the driver of the defendant's truck, and the Court represented Robbins as having testified that on two occasions after the alleged loss of goods, he, Robbins, had heard Lubin, plaintiff's employee, state that the goods in question had not been put on the defendant's truck. This statement by the Court as to Robbins' testimony was erroneous in that Robbins testified on cross examination that he had *not* heard Lubin *say* that the lost goods had not been put upon the defendant's truck, but that he, Robbins, *saw Lubin make gestures and gesticulations* which he, Robbins *interpreted* to signify an assertion by Lubin that the goods in question had not been put on the defendant's truck. The difference between what Robbins actually testified to (when reference is had to his entire testimony, both on direct and cross),

and what the Trial Court stated to the jury that Robbins had testified, was obviously of a fundamental and decisive character, being the difference between a *plain* and unequivocal statement by word of mouth, and an expression by the use of gestures, whose meaning might be variously and incorrectly interpreted.

Under the foregoing rules, this clearly was such an error on the part of the Court, as constitutes legal ground for complaint on appeal. The same statement by the Trial Court furnishes legal ground of complaint on the part of the plaintiff, also because it misled the jury as to the legal effect of Robbins' testimony as to what Lubin "said." For as a matter of law, even if Robbins had heard Lubin actually say by word of mouth that the lost goods had not been put on defendant's truck, such testimony by Robbins as to what he heard Lubin say, would constitute no legal evidence as to the fact in question, being merely *hearsay evidence*. It would not be competent as an admission since it was made by a mere employee and hence not binding upon plaintiff.

In making the statement here complained of, therefore, the Trial Court made an assertion that was contrary to the actual testimony of the witness, Robbins, and also gave to the jury the impression that the alleged testimony in question was of such legal character as to properly affect and influence the jury's determination of the issue of whether or not the lost goods had been put on the defendant's truck. In both of said respects, the said portion of the Court's charge was contrary to the rules of law set forth in the foregoing cases of *Lindley v. O'Rielley*, 46 N. J. Law 352; *Camden & Atlantic*

R. R. Co. v. Williams, 61 N. J. Law 646; *Gerety v. New York and New Jersey Railway Co.*, 89 N. J. Law 175.

Twelfth Ground of Appeal.

This ground of appeal is as follows:

“The Court erroneously charged the jury as follows:

‘Mr. Ruder indicated that Lubin said he was sure this bag had not been put on the truck’ (State of Case, p. 97, ll. 36 to 39).

The Court’s error consisted in the fact that this was a statement by the Court not supported by the testimony. On cross examination Ruder admitted that Lubin’s alleged assertion was in the form of gestures and the shake of the head, which Ruder interpreted to signify that the bag had not been put on the truck.’”

The same rules of law referred to hereinabove in dealing with the eleventh ground of appeal, are applicable to and are relied upon by appellant in connection with the twelfth ground of appeal.

Thirteenth Ground of Appeal.

This ground of appeal is as follows:

“The Court erroneously charged the jury as follows:

‘The receipt which is alleged to have been signed by the defendant is not produced and the burden of proof in this case is upon the plaintiff to show by the greater weight of the evidence that the defendant did not have this bag of muskrat skins loaded on his truck on that day’ (State of Case, p. 98, ll. 13 to 18).

This was a statement with reference to the testimony, which was likely to mislead the jury as to the legal and probative effect of the mere non-production of the receipt

and to mislead the jury as to the legal and probative effect of all the uncontradicted testimony as to the existence of the receipt, its loss, its contents, and the possession of a copy of the receipt by defendant's employee, Robbins."

In that portion of the Court's charge which is here complained of, it is respectfully contended that the Court misled the jury as to the legal and probative effect of all of the testimony on the subject of the receipt. By the plainest implication, the Court by its said statement, gave the jury the impression that the non-production of the receipt by plaintiff in and of itself, and despite all of the other testimony with reference to the receipt itself and the delivery of the goods in question, had a grave and serious effect upon the weight of the evidence.

The Court's mention of the non-production of the receipt in immediate connection with the following words "and the burden of proof in this case is upon the plaintiff to show by the greater weight of the evidence that the defendant did have this bag of muskrat skins loaded on his truck on that day," must have produced an impression upon the jury which was seriously prejudicial to plaintiff.

Three of the plaintiff's witnesses, viz, Richheimer, Geller and Alberti, had testified positively and of their own knowledge, to the existence of the said receipt; two of them, Richheimer and Alberti, had testified that the lost item of goods, viz, the bag of skins, was mentioned on said receipt; two of them, Richheimer and Geller, testified that the said receipt was signed by the defendant's driver, Robbins; and two of them, Richheimer and Alberti, testified that a duplicate of this receipt was in the

possession of the defendant's driver, Robbins. Plaintiff's witness, Winarsky, a Supreme Court Examiner and Court Stenographer, testified that the defendant himself, at an examination before trial in this cause, had testified to having seen the receipt. All of this testimony, except Winarsky's was absolutely uncontradicted by any direct testimony on the part of the defendant or any of the defendant's witnesses. Moreover, two of the plaintiffs's witnesses, Richheimer and Geller, had testified positively that the lost bag of skins had been put on defendant's truck by them, and this testimony also was without any direct contradiction by any of the defendant's witnesses testifying from their own knowledge. Yet the Trial Court, disregarding all of the said testimony, mentioned at this point only the single fact of the non-production of the receipt in connection with burden of proof and weight of evidence. By so doing, the Court misled the jury as to the legal effect of the mere non-production of said receipt to the prejudice of the defendant, within the meaning of the rule set for in *Lindley v. O'Rielley*, 46 N. J. Law 352, and *Foley v. Loughran*, 60 N. J. Law 464, 477.

Respectfully submitted,

BILDER & BILDER,
Attorneys of Plaintiff-Appellant.

WALTER J. BILDER,
Of Counsel.

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