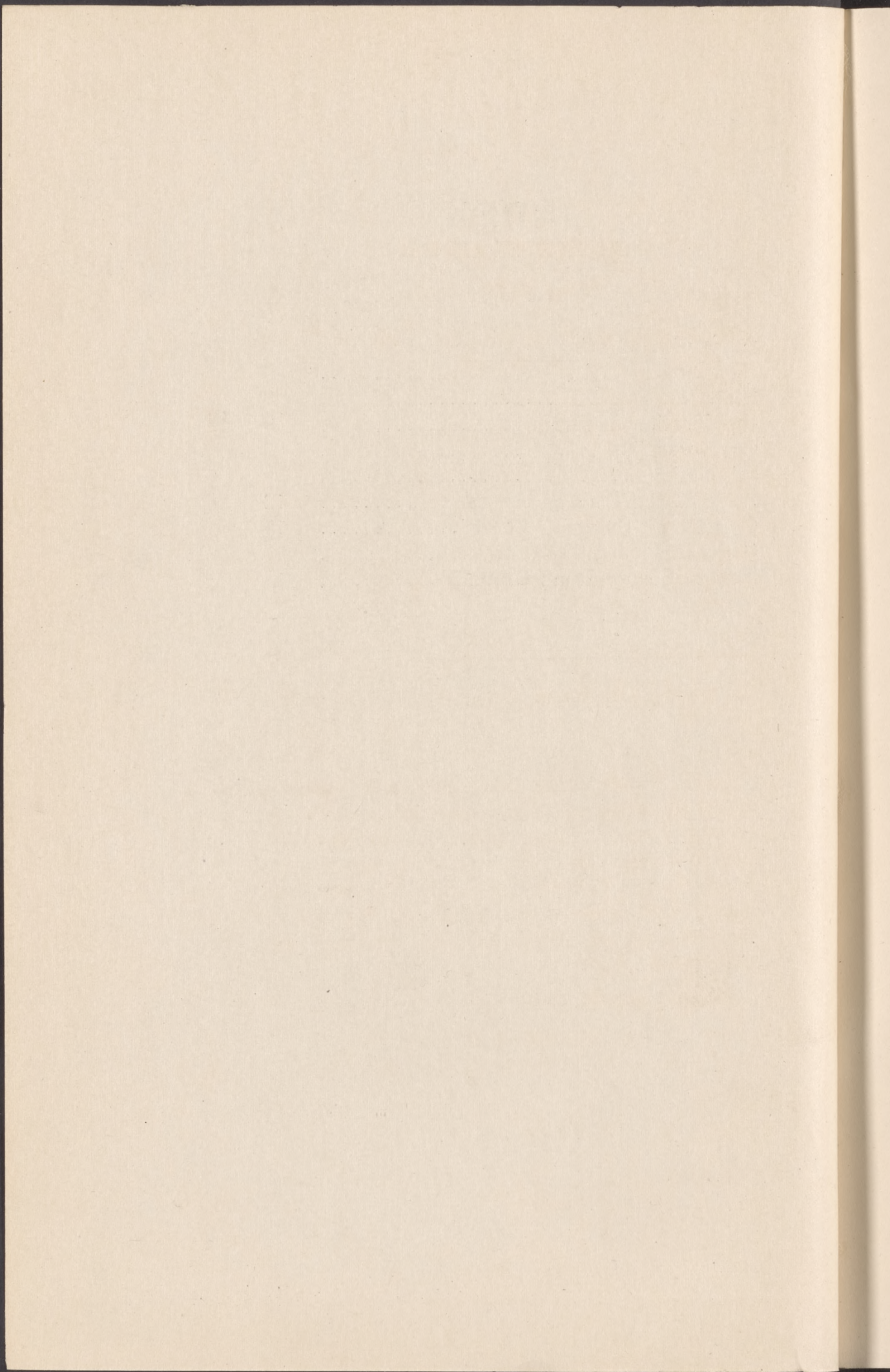


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*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed May 7, 1925.

FIRST DISTRICT COURT OF THE CITY OF  
NEWARK.

---

HELLER-RICKARDS, INC., a corporation,

*Plaintiff,*

*vs.*

SOLOMON BERLA and SAMUEL  
BERLA, partners trading as  
"ELIAS BERLA,"

*Defendants.*

---

10

*On Contract.*

*Notice of  
Appeal.*

To Harry Silverstein, Esq., attorney for plaintiff:

20

SIR:

TAKE NOTICE, That the defendants, Solomon Berla and Samuel Berla, partners trading as "ELIAS BERLA," hereby appeal to the New Jersey Supreme Court from the judgment of the First District Court of the City of Newark, rendered in the above-stated action, on the twenty-seventh day of April nineteen hundred and twenty-five.

30

Dated April 29, 1925.

PHILIP J. SCHOTLAND,  
Attorney for Defendants.

40

*Grounds of Appeal.*

**GROUNDS OF APPEAL.**

**New Jersey Supreme Court**

10	HELLER-RICKARDS, INC., a corporation, <i>Plaintiff-Appellee,</i> <i>vs.</i> SOLOMON BERLA and SAMUEL BERLA, partners trading as "ELIAS BERLA," <i>Defendants-Appellants.</i>	} <i>On Appeal.</i> <i>Grounds of Appeal.</i>
----	--	---

20 The following are the specifications of the determinations of the First District Court of Newark, from which the defendants appeal:

1. That under the facts as found by the Court, there should have been a judgment entered in favor of the defendants, on the counterclaim, and against the plaintiff, for the difference between the two claims, namely, \$10.75.

30 2. The facts, as found by the Court, established the negligence of the plaintiff, causing the damage to the defendants, the amount of which is not in dispute.

3. The Court erred in overruling the counterclaim.

4. The Court erred in rendering judgment for the plaintiff.

PHILIP J. SCHOTLAND,  
 Attorney for Defendants-Appellants.



*Transcript of Clerk's Docket.*

The summons was served and returned as follows:

I served the within summons January 31, 1925, on the defendant by reading it to him and giving him a copy thereof.

10 THEODORE J. CONLISS,  
Constable.

1925.

- Feb. 4. Specification of Defenses filed.  
 " 4. Counter-claim filed.  
 " 5. This cause was adjourned to February 13th, 20th, 27th, March 13th, 20th.  
 " 10. Stipulation filed amending the name of the defendant to Solomon Berla and Samuel Berla, partners trading as "ELIAS BERLA."  
 20  
 Mar. 20. The plaintiff and the defendant appearing the cause was tried and determined at this time.  
 Raymond Kingsland, sworn for plaintiff.  
 Defendant, Rush C. Rose, Edmond J. Bacon, Herman R. Root and Grover L. Adams, sworn.  
 30 The evidence being closed the Court reserved decision.  
 Apr. 28. The Court rendered decision this day giving judgment in favor of the plaintiff and against the defendants, Solomon Berla and Samuel Berla, partners trading as "ELIAS BERLA," in the sum of two hundred seventy dollars and seventy-five cents damages, with costs; whereupon judgment is hereby entered in favor of  
 40

*Summons.*

the plaintiff and against the defendants, Solomon Berla and Samuel Berla, partners trading as "ELIAS BERLA," in the sum of two hundred seventy dollars and seventy-five cents, damages with costs.

May 7. Notice of Appeal filed. 10  
 " 14. Appeal Bond filed, \$1.00.

**SUMMONS.****FIRST DISTRICT COURT SUMMONS.**

ESSEX COUNTY, ss.

THE STATE OF NEW JERSEY.

To any Constable in said County 20  
 or to the Sergeant-at-Arms of The  
 (SEAL) First District Court:

Summon Elias Berla to appear before the First District Court of the City of Newark, to be held in the City Hall, Broad Street (Ground Floor), in the said City, on the 5th day of February, 1925, at ten o'clock in the forenoon, to answer unto

Heller-Rickards, Inc., a corporation, in an action upon contract to the damages of the plaintiff Five Hundred Dollars, hereof fail not. 30

WITNESS, Cecil H. MacMahon, Esq., Judge of said Court at Newark, aforesaid, the 28th day of January in the year one thousand nine hundred and twenty-five.

CHARLES R. BALDWIN,  
 Clerk.

*State of Demand.*

**STATE OF DEMAND.**

Filed January 28, 1925.

FIRST DISTRICT COURT OF THE CITY  
OF NEWARK.

10	HELLER-RICKARDS, INC., a corporation, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> ELIAS BERLA, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>On Contract.</i>  <i>State of Demand.</i>
----	--	---	--

20 The plaintiff demands of the defendant the sum of \$500.00 upon a certain book account, a true copy of which is as follows:

1924.

Sept. 27th.	Balance due on lowering boiler sections into the cellar of New Firemen's Insurance Building, Rector Street .....	\$270.75
-------------	--	----------

30 Judgment will be claimed for the sum of Two hundred seventy dollars and seventy-five cents besides legal interest and cost of suit.

HARRY SILVERSTEIN,  
Attorney for Plaintiff.

*State of Demand.*

I served the within summons January 31, 1925,  
on the defendant Elias Berla by reading it to  
him and giving him a copy thereof.

THEODORE J. CONLISS,  
Sergeant-at-Arms,  
Constable.

10

232 Mulberry Street,  
Newark, New Jersey.

FIRST DISTRICT COURT  
OF NEWARK, N. J.

SUMMONS ON CONTRACT.

HELLER-RICKARDS, INC.,

*vs.*

ELIAS BERLA.

Demand .....	\$500.00	20
Summons .....	2.10	
Mileage .....	.08	
Listing Fee .....	1.50	
Attorney Fee .....		

Returnable February 5, 1925.

Harry Silverstein,  
800 Broad Street,  
Attorney for Plaintiff.

30

TO THE DEFENDANT:

TAKE NOTICE, that the plaintiff de-  
mand that the defendant shall file writ-  
ten specification of defenses intended to  
be made in said action on or before  
the time specified for appearance in the  
process issued in said cause.

HARRY SILVERSTEIN,  
Plaintiff's Attorney.

40

*Specification of Defenses.***SPECIFICATION OF DEFENSES.**

Filed February 4, 1925.

FIRST DISTRICT COURT OF THE CITY OF  
NEWARK.

10	HELLER-RICKARDS, INC., a corporation, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>	}	<i>On Contract.</i>
	<i>vs.</i>		<i>Specification</i>
	SOLOMON BERLA and SAMUEL BERLA, partners trading as "ELIAS BERLA," <div style="text-align: right; padding-right: 20px;"><i>Defendants.</i></div>		<i>of Defenses.</i>

20 The following is a specification of the defenses intended to be made by the defendants in the trial of the above cause:

1. They deny that they owe the money sued for.

2. The claim sued upon arises out of a charge for carting and delivering material consisting of boiler sections and appurtenances, and the plaintiff was required by the terms of its contract to carefully handle and deliver said articles, and notwithstanding its contract, so carelessly and negligently handled and delivered said articles as to break a section of the boiler, the value of which exceeds any balance owing.

3. The state of demand is insufficient in that it fails to set out a book account as sued upon.

PHILIP J. SCHOTLAND,  
Attorney for Defendants.

*Counter-claim.*

**COUNTER-CLAIM.**

Filed February 24, 1925.

FIRST DISTRICT COURT OF THE CITY  
OF NEWARK.

HELLER-RICKARDS, INC., a corporation,  <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> SOLOMON BERLA and SAMUEL BERLA, partners trading as "ELIAS BERLA,"  <div style="text-align: right;"><i>Defendants.</i></div>	}	10  <i>On Contract.</i>  <i>Counter-Claim.</i>
---	---	--

The defendants, by way of counter-claim, claim of the plaintiff, the sum of \$281.53 as follows: 20

The defendants hired the plaintiff to cart and deliver material consisting of boiler sections and appurtenances, and through its negligence, so carelessly and negligently handled and delivered said articles as to break a section of the boiler, and it was necessary to buy a new boiler; a true statement of which charges are as follows:

Aug. 12, 1924, Demurrage charge paid by defendants as authorized by plaintiff .....	\$	3.00	30
Oct. 10, 1924, replacement of boiler section broken by plaintiff's men..		267.75	
Oct. 23, 1924, freight on boiler section		5.78	
Oct. 23, 1924, cartage .....		5.00	
 Total .....		 \$281.53	

*Stipulation.*

Judgment will be asked by the defendants against the plaintiff, for the sum of \$281.53.

PHILIP J. SCHOTLAND,  
Attorney for Defendants.

10

**STIPULATION.**

Filed February 10, 1925.

FIRST DISTRICT COURT OF THE CITY OF  
NEWARK.

---

HELLER-RICKARDS, INC., a corp.,  
*Plaintiff,*

*vs.*

20 SOLOMON BERLA and SAMUEL  
BERLA, partners trading as  
"ELIAS BERLA,"  
*Defendants.*

---

*On Contract.*  
*Stipulation.*

30 It is hereby stipulated by and between the at-  
torneys for the respective parties in the above-  
entitled cause, that process in the above-entitled  
cause, be amended and Solomon Berla and  
Samuel Berla, partners trading as Elias Berla,  
be substituted in place of and in stead of the de-  
fendant, Elias Berla.

HARRY SILVERSTEIN,  
Attorney for Plaintiff.

PHILIP J. SCHOTLAND,  
Attorney for Defendant.

40

*Certificate of Clerk.*

I hereby certify that the above is a true copy of docket in Case No. 92116, Heller-Rickards, Inc., a corporation, plaintiff, *vs.* Solomon Berla and Samuel Berla, partners trading as "Elias Berla," defendants.

Given under my hand and seal this 19th day of June, 1925.

10

(SEAL) CHARLES R. BALDWIN,  
Clerk of the First District Court  
of the City of Newark.

20

30

40

*State of the Case on Appeal.*

**STATE OF THE CASE ON APPEAL.**

FIRST DISTRICT COURT OF THE CITY OF  
NEWARK.

10	HELLER-RICHARDS, INC., a corporation, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>	}	<i>On Contract.</i>
	<i>vs.</i>		<i>State of the Case on Appeal.</i>
	SOLOMON BERLA and SAMUEL BERLA, partners trading as "ELIAS BERLA," <div style="text-align: right; padding-right: 20px;"><i>Defendants.</i></div>		

20 The parties to this suit having been unable to agree upon a state of the case on appeal, have requested me, Cecil H. MacMahon, Judge of the First District Court, aforesaid, to prepare such state of the case on appeal, the time within which this was to be done having been duly extended.

The case was tried before me without a jury. I find the facts to be as follows:

30 Plaintiff is a truckman who was engaged by the defendant to receive from the Pennsylvania Railroad Company at Newark, New Jersey, certain boiler sections, weighing about 1,900 pounds each, to be delivered in the basement at Rector street, Newark, where a new building was being erected, for which Berla had the heating contract, and was to install under his contract, a boiler, furnishing, etc., consisting in part of these boiler sections.

40 The building was of the steel frame construction, and was in the course of erection when the trucking in question was done.

*State of the Case on Appeal.*

Upon arriving at the building with the first load, about noon on a Saturday, the plaintiff was shown by an employee of the construction company where to tie up to the steel work to lower the sections into the basement. The plaintiff then attached its hoisting apparatus at the place indicated and lowered the first load of boiler sections into the basement. Neither the defendant nor any of his employees were on the premises when the boiler sections were delivered, nor knew of the delivery until the following Monday. 10

The floor of the basement at the point where these sections were lowered was uneven, so that the boiler sections would not lie flat upon the ground. The sections were piled one on top of the other. 20

Later on, the same day the plaintiff brought two other loads of boiler sections to the building, unloading them as before, placing them on top of the boiler sections previously delivered. When the sections were delivered, unloaded, placed and left by the plaintiff they were all in good condition.

On Monday morning following, the section next to the ground was found to be broken. The break was occasioned because the lowest section was lying on the uneven ground and the weight superimposed, had been too much for the lowest section to sustain on the uneven ground. 30

There was testimony that blocks might have been used as the sections were lowered to block up the sections so that they would have a level spot or place to rest upon.

The plaintiff's claim is for a balance of \$270.75, due it for trucking. 40

*State of the Case on Appeal.*

The defendant files a counter-claim for the damage to the boiler section with cartage, etc., of \$281.50.

10 The question seems to be whether or not the plaintiff was negligent in placing the boiler section at the point where it did, on the uneven ground, which was there, but how apparent, I do not know, or whether the defendant was negligent in not caring for their property, as it was delivered by proper blocking, or by not providing a proper place on the ground upon which these heavy sections might rest.

My view is that no negligence has been shown on the part of the plaintiff.

Judgment for the plaintiff for \$270.75.

20 All of which is respectfully submitted this 12th day of June, 1925.

CECIL H. MACMAHON,  
Judge.

*Opinion of Supreme Court.*

**OPINION OF SUPREME COURT.**

Filed March 18, 1926.

No. 417 October Term 1925.

**NEW JERSEY SUPREME COURT.**

---

HELLER—RICKARDS, INC.

*vs.*

SOLOMON BERLA, *et al.*

---

10

Appeal from First District Court of Newark.  
Argued October term, 1925; decided October  
term, 1925.

Philip J. Schotland, for defendant-appellant.

20

Harry Silverstein, for plaintiff-appellee.

Argued before Parker, Minturn and Black, *JJ.*

PER CURIAM.

This action was tried in the First District  
Court of Newark without a jury, and judgment  
went for the plaintiff for \$270.75.

The plaintiff corporation, engaged in the truck-  
ing business, brought this action to recover  
charges for carting and delivering certain boiler  
sections (weighing 1900 lbs. each) from the rail-  
road yard to the cellar of a building in course  
of construction, for which building the defendant  
had the heating contract.

30

The plaintiff delivered the boiler sections on  
a Saturday afternoon, in the absence of the de-  
fendant, who first learned of the delivery on the  
following Monday. The sections, as delivered,  
were placed in the basement of the building on an

40

*Opinion of Supreme Court.*

uneven floor, by piling one on top of the other. On Monday morning following, the section next to the ground was found to be broken. The defendant counter-claimed for \$281.53 damages alleged to have been caused by negligence in hauling and delivering the boiler parts.

10 The defendant contends that the plaintiff is a common carrier, liable as an insurer, and that the Court therefore erred in over-ruling the counter-claim. The Court found, "When the sections were delivered, unloaded, placed and left by the plaintiff they were all in good condition—The break was occasioned because the lowest section was lying on uneven ground, and the weight superimposed had been too much for the lowest section to sustain on the uneven ground."

20 The evidence did not show the extent of the unevenness of the ground, but there was enough in the case to enable the Court sitting as a jury to reasonably infer it. The Court found no negligence upon the plaintiff's part, and since the situation presented a question of fact, we are not inclined to disturb the finding of the trial court.

The judgment will be affirmed.

30

40

*Order Affirming Judgment.*

**ORDER AFFIRMING JUDGMENT.**

NEW JERSEY SUPREME COURT.

HELLER-RICKARDS, INC., a corporation, <i>Plaintiff-Appellee,</i> <i>vs.</i> SOLOMON BERLA AND SAMUEL BERLA, partners trading as "ELIAS BERLA," <i>Defendant-Appellant.</i>	<i>On Appeal from First District Court of the City of Newark.</i>	10
	<i>Order Affirming Judgment.</i>	

This cause having been duly argued before the New Jersey Supreme Court, at the October term, 1925, by Philip J. Schotland of counsel for the Appellant, and Harry Silverstein of counsel for the Appellee, and the Court having heard said argument, and having inspected the record and judgment below, and considered the causes assigned for error, with which Appellant was dissatisfied in point of law, it is thereupon, on this 24th day of March, 1926,

ORDERED, that the judgment of said First District Court of the City of Newark be in all things affirmed, and that the record and proceedings be remitted to the said First District Court of the City of Newark, to be proceeded with in accordance with this judgment and the practice of the said Court.

On motion of Harry Silverstein, attorney for plaintiff-appellee.

Rule entered: March 24, 1926.

A true copy.

EDWARD J. KELLEHER,

Clerk.

40

*Notice of Appeal and Grounds.*

**NOTICE OF APPEAL AND GROUNDS.**

NEW JERSEY SUPREME COURT.

10	HELLER-RICKARDS, INC., a corporation, <i>Plaintiff-Appellee,</i> vs. SOLOMON BERLA and SAMUEL BERLA, partners trading as "ELIAS BERLA," <i>Defendants-Appellants.</i>	}	<i>On Appeal from First District Court of the City of Newark.</i>  <i>Notice of Appeal and Grounds.</i>
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To Harry Silverstein, Esq., Attorney of Plaintiff-appellee.

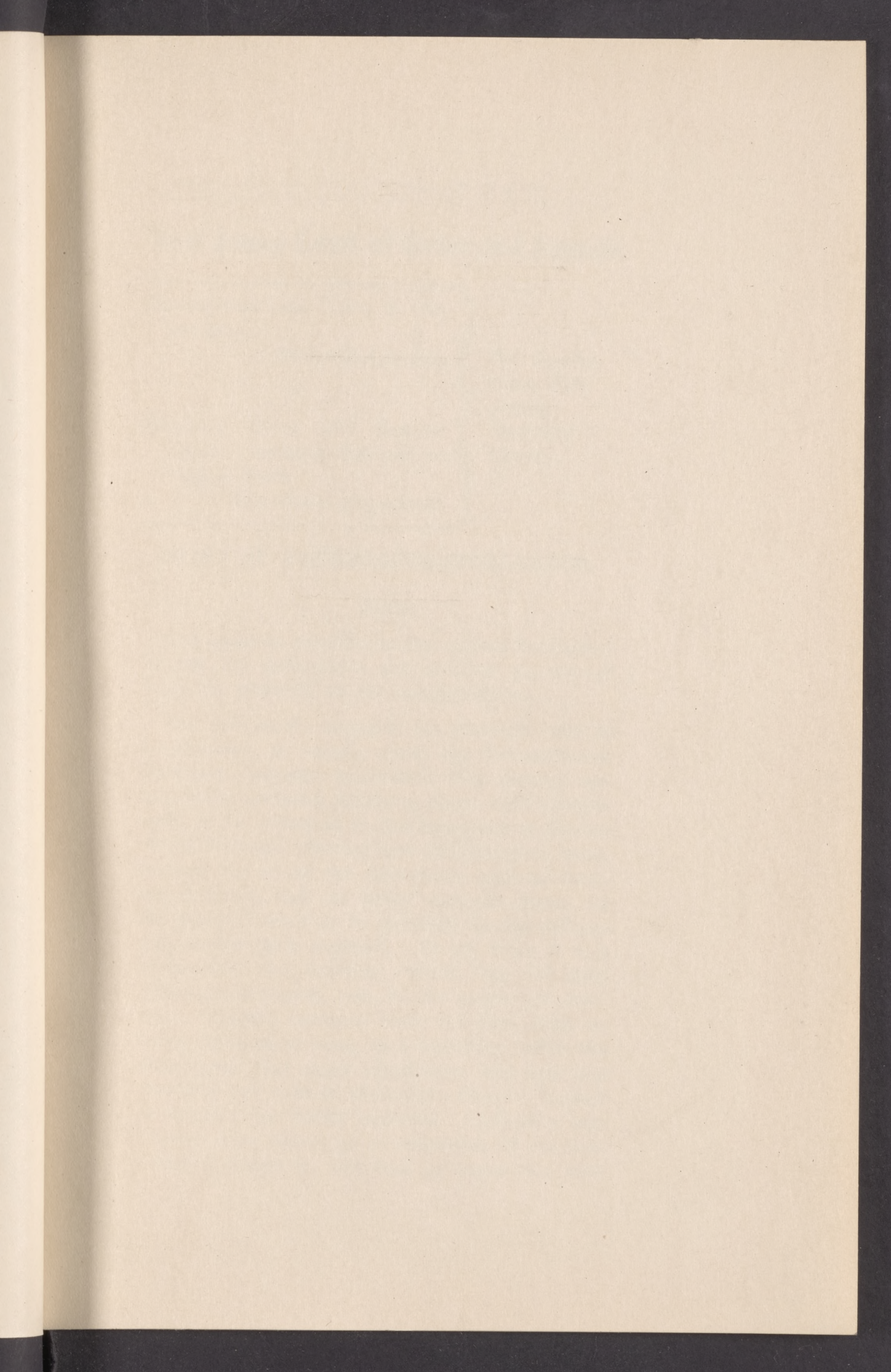
20 Sir:

PLEASE TAKE NOTICE, that the defendants-appellants in the above-stated cause, hereby appeal from the whole of the judgment entered therein, to the New Jersey Court of Errors and Appeals in the last resort in all causes, on the following ground:

30 That the Supreme Court erred in affirming the judgment of the District Court which it should have reversed.

Dated April 20, 1926.

PHILIP J. SCHOTLAND,  
 Attorney for and of Counsel  
 With Defendants-Appellants.





Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

HELLER-RICKARDS, INC., a corporation,

*Plaintiff-Appellee,*

*vs.*

SOLOMON BERLA and SAMUEL BERLA, partners trading as "Elias Berla,"

*Defendants-Appellants.*

*On Appeal  
from New  
Jersey  
Supreme  
Court.*

### BRIEF OF DEFENDANTS-APPELLANTS.

#### Facts.

The question involved in this appeal is whether or not the defendants are entitled to recover from the plaintiff on the counter-claim.

The defendants engaged the plaintiff, who is a truckman, to receive from the Pennsylvania Railroad Company, at Newark, New Jersey, certain boiler sections, weighing about 1,900 pounds each, to be delivered in the basement at Rector street, Newark, where a new building was being erected, for which the defendants had the heating contract, and the boiler sections carted by the plaintiff were to be installed by the defendants under their contract. At the time of this transaction the building, which was of steel frame construction, was in the course of erection. Plaintiff arrived with its first load of boiler sections at noon on a Saturday, after the defendants and their employees had left the premises and none of them were there to inspect or receive the boiler sections. Plaintiff's employees were shown by an employee of the construction company, who had no connection with

either plaintiff or defendants, where to tie up to the steel work so as to enable them to lower the sections into the basement. Plaintiff's employees then proceeded to lower the sections into the basement, and placed them on that part of the basement bottom which was uneven, and piled one section on top of the other. Later, on the same day, plaintiff brought two other loads of boiler sections to the building and placed them on top of the sections previously delivered. On Monday morning following, when defendants and their employees arrived, and for the first time became aware of the delivery of the boiler sections, they discovered that the bottom section was broken, and the Court below found as a fact that the break was occasioned "because the lowest section was lying on the uneven ground, and the weight superimposed had been too much for the lowest section to sustain on the uneven ground." (See p. 13, State of the Case.) The Court also reports in the state of the case that there was uncontradicted testimony that blocks might have been used as the sections were lowered, to block up the sections, so that they would have a level spot or place to rest upon. The amount of the defendants' damage, two hundred and eighty-one dollars and fifty cents, is undisputed. Notwithstanding this finding of facts by the Court below, defendants' counter-claim was overruled on the ground that no negligence has been shown on the part of the plaintiff. From this judgment the defendants appealed to the Supreme Court, which Court affirmed the District Court, on the ground that the situation presented a question of fact which the Supreme Court was not inclined to disturb, and from this affirmance this appeal is being prosecuted.

**ARGUMENT.**

The plaintiff, a common carrier, is liable as in the nature of an insurer.

*Mershon, et al. v. Hobensack*, 22 N. J. L. 372, at page 380, affirmed on the Supreme Court Opinion in the Court of Errors and Appeals.

The responsibility of a carrier of goods does not terminate until after the consignee has had reasonable time within which to remove them.

*Bobbink, et al. v. Erie R. R. Co.*, 82 Atl. 877, 82 N. J. L. 547.

In the case at bar, the evidence is undisputed and the Court found, as a fact, that defendants were not present and had no knowledge that the plaintiff was delivering the boilers at the time of delivery, and the Court also found, as a fact, that the section which was broken was broken by the manner in which the delivery was made. (See p. 13 of the State of the Case, ll. 30-34.) The Court also found as a fact that at the first opportunity which defendants would have had to take possession of said boiler sections they discovered the broken section. (See State of the Case, p. 13, ll. 11-15, and ll. 28-30.)

The general rule is clearly stated in 10 C. J., p. 102, section 119: "It is also the primary duty of the carrier to load and unload freight delivered to it for transportation and to **deposit it in a suitable place**, at which the consignee can receive it; and it will generally be liable for loss or injury to goods sustained in the performance of this duty." In the case at bar, the facts as found by the Court below clearly show that the damages were caused by the plaintiff's employees placing these heavy 1,900-pound boiler sections on top of each other, the bottom section resting on uneven ground.

The defendants therefore respectfully submit that the law as settled in the above-cited cases, applied to the facts as found by the Court, requires a judgment in favor of the defendants upon their counter-claim, and that the Court below erred in not finding the plaintiff liable for the damages caused by one section being broken, regardless of the fact whether the damage was caused by the plaintiff's negligence or not, as the defendants had not received the goods, nor did a reasonable time elapse within which they could have taken possession of the goods before the damage occurred.

Defendants respectfully submit, however, that, notwithstanding the fact that plaintiff is liable for the damage as an insurer, regardless of negligence, if it is necessary, in order for the defendants to recover, to prove negligence, the only legal interference that can be drawn from the facts as found by the Court is that the damage was caused by the plaintiff's negligence in one of two respects:

(a) In piling the boiler sections one on top of each other, after placing the first section on uneven ground, without blocking it up, so that it could support the weight; or

(b) By the very act of placing such heavy sections one on top of each other, so that the superimposed weight caused the damage, and the manner in which plaintiff placed said sections not having been done under the direction, or with the knowledge, or the consent of the defendants.

Defendants are therefore entitled to judgment on the counter-claim for two hundred and eighty-one dollars and fifty cents, less the amount they owed the plaintiff for carting, which is two hun-

dred and seventy dollars and seventy-five cents, leaving a balance in favor of the defendants of ten dollars and seventy-five cents, and that the judgment in favor of the plaintiff should be reversed, and a judgment in favor of the defendants for the sum of ten dollars and seventy-five cents entered.

Respectfully submitted,

PHILIP J. SCHOTLAND,  
Attorney and of Counsel with  
Defendants-Appellants.



101MAY.T.1926

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

HELLER-RICKARDS, INC., a corporation,

*Plaintiff-Respondent,*

*vs.*

SOLOMON BERLA AND SAMUEL BERLA, partners trading as "ELIAS BERLA,"

*Defendants-Appellants.*

*On Appeal  
from  
New Jersey  
Supreme  
Court,  
Affirming  
Judgment of  
the First  
District  
Court of the  
City of  
Newark.*

### BRIEF FOR PLAINTIFF-RESPONDENT.

#### Facts.

This is an appeal from the decision of the New Jersey Supreme Court, affirming a verdict for the plaintiff-respondent in the First District Court of the City of Newark.

The facts stated in appellants' brief, substantially set forth the situation involved in this appeal. The brief, however, omits to state, as the Court found (see State of Case, p. 13, l. 25) "when the sections were delivered, unloaded, placed and left by the plaintiff, they were all in good condition." This is mentioned because the Court found as above, and not as the appellants stated in their brief on page 3 "that the section which was broken, was broken by the manner in which delivery was made." This is important because the question on the appeal resolves itself into the question of fact, not whether the respondent so carelessly and negligently handled and delivered said articles, as to break a section of the boiler, which the Court

found not to be so, but as to whether or not, to use the language of the Court (see State of Case, p. 14, l. 4) "the plaintiff was negligent in placing the boiler section at the point where it did, on the uneven ground, which was there, but how apparent, I do not know, or whether the defendant was negligent in not caring for their property, as it was delivered, (the comma is lacking in the printed state of the case but appears in the written state of the case prepared by the Court) by proper blocking, or by not providing a proper place on the ground upon which these heavy sections might rest." It is undisputed that this was a fact question, taken into consideration by the Court, sitting as a jury, and upon all the testimony, as adduced before him, he found no negligence attributable to the respondent.

#### Discussion of Appellants' Points.

By way of premises it is submitted that an examination of the authorities does not shed any light on the situation as set forth in the matter *sub judice*. The only doctrine to invoke, and as appellants have properly done, is that of the common carrier, and the duty the law imposes on him. The respondent admits, as stated in appellants' brief, that the respondent, as common carrier, is liable in the nature of an insurer, under ordinary circumstances.

Respondent respectfully submits that the case of *Boblink, et als., v. Erie Railroad Co.*, 82 Atl. 871, 82 New Jersey Law 547, has no bearing on the issue presented to this Court for determination. That case, among others cited, involved the question of the failure of the consignee to remove certain flowers and shrubs from the

yards of the carrier company, and whether the carrier had notified the consignee, within a reasonable time after its delivery to the carrier at its yards, so as to give the consignee a reasonable opportunity to remove the same. Appellants also cite the general rule as laid down in 10 *Corpus Juris*, page 102, Section 119, that "it is also the primary duty of the carrier to load and unload freight delivered to it for transportation and to deposit it in a suitable place, at which the consignee can receive it; and it would generally be liable for loss or injury to goods sustained in the performance of this duty." An examination of the cases cited under this section show that they have no application to a state of facts such as is involved here, but refer to those cases, for instance, where the carrier is under a duty to deliver the freight to a place where the consignee can have ease in the removal of the same. Appellants have isolated the words "deposit it in a suitable place" and by a strange construction of the language, try to mould it into a situation as they believe is herein presented.

Appellants contend also (page 3 of Brief) that they were not present, and had no knowledge that the respondent was delivering the boilers at the time of the delivery, and that the Court also found, as a fact, that the section which was broken was broken by the manner in which the delivery was made. This latter statement is erroneous. The Court did not find that the section was broken because of the manner of delivery. (See State of Case, p. 13, ll. 30-34.) With reference to the personal absence of the appellants, as well as the absence of knowledge of time of delivery, it is submitted that there was no duty imposed upon the respondent, to

deliver the boilers, only, as, when, and if the defendants were present in person, and only, as, when and if the defendants had been given knowledge of the time of delivery. The contract of the carrier was merely to take the boilers from a certain freight yard, and to cart them to, and place them in the basement of certain premises in possession of the defendants' company. The time of delivery was not designated, and the particular place in said cellar, where the boilers were to be placed was not specified—merely delivery to the cellar—was the agreement between the parties.

The contention (page 4 of appellant's brief), that appellants "had not received the goods nor could they have possession of the goods before the damage occurred" is also without merit. It is submitted that delivery to a place designated, is tantamount to delivery to the person. The "reasonable time" theory, as set forth *supra*, has no application to this situation. In addition, it is submitted that neither of the above grounds was specified by the defendant in his grounds of appeal (page 2, State of Case).

With respect to the inference set forth on page 4 of the brief, sections A and B, respondent submits that the question raised, as the Court properly stated in the State of the Case, is, whether respondent was negligent "in placing the boiler section at the point, where it did, on the uneven ground \* \* \* etc."

#### ARGUMENT.

##### Damage, if any, was not Caused by any Negligence on the Part of the Respondent.

The respondent, agreed to cart the boilers from the railroad yard, to the place pointed out

by the appellants. The respondent admits, that had any damage occurred to the property of the appellants while in the possession of the respondent, and during its delivery, it would have been legally required to respond in damages. The testimony was clear upon this point, that the reason for the breakage was the defective condition of the ground upon which the boilers were placed. It is submitted that the contract of truckage did not contemplate, nor was it the agreement between the parties, that in the event that the ground of the cellar was found to be uneven that the carrier should first block the ground and then place the boilers on top thereof. As before stated, the contract between the parties was to cart these boilers, and that as soon as the boilers were delivered at the designated place, the contract of the cartage was over, and it is submitted that for any damages occasioned by the defect in the soil, liability for it must be borne by the appellants, for the contract was one to truck and deliver, and not one to level defective soil. It is submitted that if this was otherwise, and the Court found it was the carrier's duty to first ascertain whether the ground was level, and if the answer were found to be in the negative, that the carrier was under a duty to level the ground, that the Court would be making a new contract for the parties.

The rule of the Common Law making the common carriers liable as insurers, is an historical, rather than a logical one. This is true, as are many doctrines of the Common Law. It is the contention of the respondent, that the rule being of a penalizing nature cannot be extended to a situation such as this one, and place duties on the Common Carrier which were neither con-

templated nor contracted for, by the parties, and which, it is with safety, fair to say, the Common Law with all its strictness would not have included.

**The Court on Appeal will not Disturb the Findings of Fact of the Trial Court.**

The matter involved is strictly and solely a question of fact as is stated in the Trial Court's State of the Case (State of Case, p. 14, ll. 4-15), and the Trial Court's conclusions (State of the Case, p. 14, ll. 16-17). "My view is that no negligence has been shown on the part of the plaintiff." The Supreme Court, in its opinion, said (State of Case, p. 16, l. 23) "The Court found no negligence upon the plaintiff's part, and since the situation presented a question of fact, we are not inclined to disturb the finding of the Trial Court."

The Courts have uniformly held that the Appellate Court will not review the Trial Court upon questions of fact. It will only look so see if there is any legal evidence upon which the judgment may rest. *Marten v. Brown*, 80 New Jersey Law 143; 4 *Corpus Juris*, 876; *Mills v. Mott*, 59 New Jersey Law 15.

**Conclusion.**

Respondent respectfully submits that the judgment of the Supreme Court, in affirming the judgment of the First District Court of the City of Newark, be affirmed with costs.

Respectfully submitted,

HARRY SILVERSTEIN,  
Attorney and of Counsel with  
Plaintiff-Respondent.

