

INDEX.

	PAGE
Notice and Grounds of Appeal	1
Opinion	2
Judgment of Reversal	6
Notice of Appeal	7
Grounds of Appeal	8
Judgment	9
Summons	10
Second Amended Complaint	11
Answer to Second Amended Complaint	15
Reply to Answer to Second Amended Com- plaint	20
Rejoinder to Reply to Answer to Second Amended Complaint	23
Testimony	24
Motion to Direct Verdict	74
Judge's Charge	75

PLAINTIFF'S WITNESSES.

Jacob Gross:

Direct	28
Cross	41
Redirect	44

Louis Gross:

Direct	45
Cross	52
Direct (continued)	53
Cross	54
Redirect	59, 74

Jacob Leibner:

Direct	55
Cross	58

DEFENDANT'S WITNESSES.

	PAGE
Walter Guiol:	
Direct	60
W. F. Cunningham:	
Direct	63
Cross	67
Redirect	68
Dexter Fairchild:	
Direct	68
Cross	71

EXHIBITS.

Exhibit P-1.....	30	81
" P-2.....	33	81
" P-3.....	33	82
" P-4.....	36	83
" P-5.....	38	84
" P-6.....	38	85
" P-7.....	39	86
" P-8.....	40	87
" P-9.....	40	87
" P-10.....	53	89
" P-11.....	54	90
" P-12.....	55	91
" P-13.....	56	92
" P-14.....	58	94
" P-15.....	58	95

Notice and Grounds of Appeal.

(Filed Aug. 25, 1923.)

New Jersey Supreme Court.

10

EMANUEL GROSS,
Plaintiff-Appellant,

v.

NEW YORK CENTRAL RAILROAD
COMPANY,
Defendant-Respondent.

On Appeal.

Notice of
Appeal.

20

To Messrs. Wall, Haight, Carey & Hartpence,
Attorneys of Defendant:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause by the New Jersey Supreme Court on the following grounds:

1. The New Jersey Supreme Court erred in reversing the judgment entered in the Hudson County Court of Common Pleas, in favor of the plaintiff and against the defendant.

30

2. The New Jersey Supreme Court erred in refusing to affirm the judgment entered in favor of the plaintiff and against the defendant, in the Hudson County Court of Common Pleas.

3. The New Jersey Supreme Court erred in holding that the third count of plaintiff's complaint should have been stricken out.

40

Opinion.

4. The New Jersey Supreme Court erred in holding that the plaintiff's action was barred after two years and one day from the delivery of the property to the initial carrier.

10 5. The New Jersey Supreme Court erred in holding that plaintiff was barred by any limitation as to the time within which plaintiff's action might be brought.

GROSS & GROSS,
Attorneys of Plaintiff-Appellant.

Opinion.

NEW JERSEY SUPREME COURT,

NOVEMBER TERM, 1922.

20

EMANUEL GROSS,
Plaintiff-Respondent,

v.

NEW YORK CENTRAL RAILROAD
COMPANY,
Defendant-Appellant.

30

Submitted December 6, 1922; decided August 4, 1923.

On appeal from Hudson County Court of Common Pleas.

Before—GUMMERE, Chief Justice, and Justices
SWAYZE and TRENCHARD.

40

For the Appellant, WALL, HAIGHT, CAREY &
HARTPENCE (EUGENE H. VREDENBURGH on
the Brief).

For the Respondent, GROSS & GROSS.

Opinion.

PER CURIAM:

This action was brought to recover losses alleged to have been sustained by the plaintiff's assignor, the Southseas Import and Export Company, as a result of damage to a shipment of honey, delivered to the Southern Pacific Company in Nevada, by the Hicks Southerland Company, during the month of October, 1917, for transportation to consignees in the East and finally diverted to the order of the Southseas Company.

10

The suit was begun February 24, 1921, more than three years after the shipment arrived at its destination in New York City, and was tendered to the Southseas Company for delivery.

The complaint contained three counts: the first alleging breach of the contract to transport safely; the second, breach of the defendant's duty as bailee; and the third alleging a contract between defendant and the Southseas Company to settle the claim for \$1,151.64.

20

The defendant pleaded that the action had not been instituted within the time required by the bill of lading under the terms of which the property was transported, and also denial of any contract to settle.

30

At the trial, and before the jury was empaneled, the defendant moved to strike out the complaint on the ground that the suit had not been instituted within the time limited by the following clause of the bill of lading: "And suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

40

The Court struck out the first and second counts,

Opinion.

but refused to strike out the third count, and an exception was taken to such refusal.

10 The case went to trial upon the third count alone. The Trial Judge in his charge stated that "no action can be brought against a railroad company engaged in interstate traffic after the expiration of two years and one day from the time the cause of action occurs, and *concededly in this case the action was started after the expiration of that time.*" And so, the only question of fact submitted to the jury was whether or not the defendant railroad company had promised to pay to the Southseas Company a certain sum of money in consideration of the promise of the latter not to sue. The jury returned a verdict for the plaintiff and from the judgment entered thereon the defendant appeals.

20 We think that the Judge erred in refusing to strike out the third count. It sufficiently appeared, or was conceded, that the shipment was interstate in character and was controlled by the provisions of the Interstate Commerce Act, and that, as required by that Act, upon the receipt of the honey for transportation, the Southern Pacific Company (the initial carrier) issued a bill of lading therefor which contained the provision that suit shall be instituted only within two years and one day after the delivery of the property, hereinabove recited, and which was in accordance with the bill of lading form in the schedule filed by the Southern Pacific Company, as required by the Act, and in force at that time.

30 In the circumstances of the present case that clause in the bill of lading was binding upon the shipper and carrier alike and must be enforced by the courts. "The parties cannot substitute

40

Opinion.

therefor a special agreement." *Southern Ry. Co. v. Prescott*, 240 U. S., 632. "The question is not one of form, but of actuality." "The effect of the stipulation cannot be escaped by the mere form of the action, the scope and effect of which is an action for damages against the carrier." *D'Utassy v. Barrett*, 219 N. Y., 420 (citing *Great Northern Ry. Co. v. O'Connor*, 232 U. S., 508; *A. T. & S. F. Ry. Co. v. Robinson*, 233 U. S., 173; *Southern Railway v. Prescott*, 240 U. S., 632; *G. F. & A. Ry. Co. v. Blish Co.*, 241 U. S., 190).

10

In *Georgia F. & A. Ry. Co. v. Blish Milling Co.*, 241 U. S., 190, it was said:

"But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act, nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariff and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed."

20

30

In *A. J. Phillips Company v. Grand Trunk West Ry Co.*, 236 U. S., 662, it was further said that "under such a statute the lapse of time not only bars the remedy but destroys the liability." "The prohibitions of the statute against unjust discriminations relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or *the waiver of defenses open to the carrier*. The railroad company therefore was bound

40

Judgment of Reversal.

to claim the benefit of the statute." This case is cited in *Olivit Bros. v. Penna. R. Co.*, 88 N. J. L., 241.

10 In the case at bar the plaintiff had a right of action which he could assert against the carrier at any time within two years and one day from the date of delivery of the shipment. This he did not do, but allowed the period of limitation to elapse. He now seeks to enforce his claim by setting up a contract which enlarges and revives the liability of the carrier as defined by the terms of the bill of lading. This he could not do, since, as seen, under the authority of the cases, his right of action was extinguished and the liability of the carrier was terminated.

20 The judgment will be reversed.

Judgment of Reversal.

NEW JERSEY SUPREME COURT.

	EMANUEL GROSS, Plaintiff-Respondent, <i>v.</i> NEW YORK CENTRAL RAILROAD COMPANY, Defendant-Appellant.	On Appeal. Rule of Reversal and Remittitur.
30		

40 This cause having been submitted on briefs at the November Term, 1922, of this Court by Wall, Haight, Carey & Hartpence (Eugene H. Vredenburg on the brief), attorneys for appellant, and Gross & Gross, attorneys of respondent, and the Court having inspected the record and judgment below;

Notice of Appeal.

It is ordered that the judgment of the Hudson County Court of Common Pleas be in all things reversed and the record remitted to the Court below to be proceeded with according to law and practice of said Court.

Entered August 22, 1923, on motion of

10

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys of Appellant.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Notice of Appeal.

(Filed, June 8, 1922.)

20

HUDSON COUNTY COURT OF COMMON PLEAS.

EMANUEL GROSS,
Plaintiff,

v.

NEW YORK CENTRAL RAILROAD
COMPANY,
Defendant-Appellant.

Action at Law.

30

To: MESSRS. GROSS & GROSS,
Attorneys for Plaintiff-Respondent.

TAKE NOTICE: that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause.

Dated June 5, 1922.

40

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant-Appellant.

Grounds of Appeal.

(Endorsed)

Service of a copy of the within Notice of Appeal
is hereby acknowledged this 6th day of June, 1922.

GROSS & GROSS,
Attorneys of Plaintiff.

10

Grounds of Appeal.

(Filed, Oct. 4, 1922.)

NEW JERSEY SUPREME COURT.

EMANUEL GROSS,
Plaintiff-Respondent,

v.

20

NEW YORK CENTRAL RAILROAD
COMPANY,
Defendant-Appellant.

30

And now comes the Defendant-Appellant, New
York Central Railroad Company, by Wall, Haight,
Carey & Hartpence, its attorneys, and sets down
the following grounds of appeal from the judg-
ment rendered against it and in favor of plain-
tiff-respondent, in the Hudson County Court of
Common Pleas, in the above stated cause;

1. The Trial Court erred in refusing to strike
out the third count of the second amended com-
plaint.

40

2. The Trial Court erred in refusing to direct
a verdict in favor of defendant and against the
plaintiff on the ground that the servants and agents
of defendant with whom the alleged contract was
entered into by the South Seas Import & Export

Judgment.

Company were not authorized by defendant to make said contract.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant-Appellant.

(Endorsed)

10

Service of a copy of the within grounds of appeal is hereby acknowledged this 3rd day of October, 1922.

GROSS & GROSS,
Attorneys of Plaintiff.

Judgment.

(Entered May 24th, 1922.)

This action tried before Judge Richard Doherty, with a jury at the HUDSON COUNTY COURT OF COM-
PLEAS, July Twentieth and Twenty-first, 1922.

20

The cause having been heard and submitted to the Jury they returned their verdict as follows:

They say they find for the plaintiff and against the defendants and they assess the damages of the plaintiff on occasion of the premises at the sum of Thirteen hundred and twenty-four dollars and thirty cents (\$1324.30).

30

Whereupon it is adjudged that the plaintiff recover of the defendants the sum of Thirteen hundred and twenty-four dollars and thirty cents (\$1324.30) and his costs amounting to Fifty-five dollars and nine cents (\$55.09), making in the whole the sum of Thirteen hundred and seventy-nine dollars and thirty-nine cents (\$1379.39).

RICHARD DOHERTY,
Judge.

40

Summons.

(Served March 2, 1921.)

The State of New Jersey; To: THE NEW YORK
CENTRAL RAILROAD COMPANY:

10

You are summoned to answer the an-
(L. S.) nexed complaint of EMANUEL GROSS,
in an action at law in the Hudson
County Court of Common Pleas;

AND TAKE NOTICE that unless you file your
answer to said complaint with the Clerk of the
said Court, at Jersey City, within twenty days
after service upon you of this writ and the an-
nexed complaint, the plaintiff may proceed in the
suit and judgment may be entered against you.

20

WITNESS, RICHARD DOHERTY, ESQ., Judge
of our said Hudson County Court of Common
Pleas, this twenty-fourth day of February, nine-
teen hundred and twenty-one.

JOHN J. McGOVERN,
Clerk.

GROSS & GROSS,
Attorneys.

30

40

Second Amended Complaint.

(Filed Nov. 22, 1921.)

HUDSON COUNTY COURT OF COMMON
PLEAS.EMANUEL GROSS,
Plaintiff,*v.*NEW YORK CENTRAL RAILROAD
COMPANY,
Defendant.

Action at Law.

10

Plaintiff residing in the City of Jersey City,
County of Hudson and State of New Jersey, says
that:

20

FIRST COUNT.

1. That on or about October 23, 1917, South-
seas Import & Export Company, a corporation
of the State of New York, became the owner of
743 cases of honey which had been delivered to
the Southern Pacific Company, a common carrier
by railroad for hire, at Yerington, Nevada, con-
signed to Hicks Sutherland Company or order,
which said shipment was directed to be delivered
to said Southseas Import and Export Company,
in the City of New York, and said Hicks Suther-
land Company did duly endorse and deliver to
said Southseas Import and Export Company the
bill of lading therefor so issued by said Southern
Pacific Company and that thereupon said South-
seas Import & Export Company became the own-
ers of said goods and entitled to delivery thereof
in good condition in the City of New York.

30

40

Second Amended Complaint.

10 2. That The New York Central Railroad Company is a common carrier of goods for hire and is engaged in the business of carrying merchandise from other states of the United States into the State and City of New York, and as such common carrier had delivered to it, as a connecting carrier of said Southern Pacific Company, the afore-

10 said goods and merchandise and thereby agreed to carry the same safely and deliver the same to said Southseas Import and Export Company, in the City of New York.

20 3. That said defendant did transport and convey said merchandise from some point outside of the State of New York into the City and State of New York, so that the same arrived in said City of New York on or about November 21, 1917; but so carelessly and negligently handled the same, that the said goods became damaged, broken and deteriorated; that the Southseas Import & Export Company through and because of such negligence and carelessness, damage and injury suffered a loss of \$2,105.34.

30 4. On January 3, 1921, said Southseas Import and Export Company duly assigned, by an instrument in writing, said claim to plaintiff, who is now the owner and holder thereof.

5. Plaintiff has demanded payment of said claim, but said defendant has failed and refused and does now refuse to pay the same.

SECOND COUNT.

40 1. On October 23, 1917, and prior thereto and since said date defendant was and is a common carrier of goods for hire and was and is engaged

Second Amended Complaint.

in the business of carrying merchandise from other states of the United States into the State and City of New York.

2. On or about October 23, 1917 Southseas Import & Export Company, a corporation of the State of New York became the owner of 743 cases of honey which were then in course of transit or transportation, and were delivered to defendant, as such common carrier at some point outside of the State of New York for transportation and delivery to said Southseas Import & Export Company in the City and State of New York; and did thereupon agree, as such common carrier, to so carry the said merchandise safely, and deliver the same to said Southseas Import & Export Company, in the said City of New York.

3. That said defendant did transport and convey said merchandise from some point outside of the State of New York into the City and State of New York, so that the same arrived in said City of New York on or about November 21, 1917 and thereupon the said defendant stored the same in one of its cars upon the siding of its railroad and while the same were in its possession in its yard upon said siding in said City of New York and there held by it merely as bailee for delivery to said Southseas Import & Export Company, it the said defendant so carelessly and negligently handled the same that the said goods became damaged, broken and deteriorated and thereby and because of such negligence, carelessness, damage and injury, the said Southseas Import & Export Company suffered a loss of \$2,105.34.

4. On January 3, 1921 said Southseas Import & Export Company duly assigned, by an instru-

Second Amended Complaint.

ment in writing, said claim to plaintiff, who is now the owner and holder thereof.

5. Plaintiff has demanded payment of said claim, but said defendant has failed and refused and does now refuse to pay the same.

10

THIRD COUNT.

1. Plaintiff here repeats the allegations of paragraphs 1, 2 and 3 of the second count.

20

2. That on or about November 20, 1919, said Southseas Import and Export Company stated an account with the said defendant and settled and adjusted the amount of said loss, damage and injury, whereupon said defendant in consideration that said Southseas Import & Export Company would forbear to bring any suit or action for the amount of its said loss or damage, agreed to pay unto said Southseas Import & Export Company as and for the amount of the loss and damage suffered by it, the sum of \$1151.64 and said Southseas Import & Export Company did then and there, in consideration of the premises and of the agreement of the said defendant to so pay to it the sum of \$1151.64 refrain and forbear from bringing any action for the recovery of the damage and loss so suffered by it as aforesaid.

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3. The allegations of paragraphs 4 and 5 of the second count are here repeated.

Judgment will be demanded on the first count in the sum of \$2105.34 with interest thereon from November 21, 1917.

40

Judgment will be demanded on the second count in the sum of \$2105.34 with interest thereon from November 21, 1917.

Answer to Second Amended Complaint.

Judgment will be demanded on the third count in the sum of \$1,151.64 with interest from November 20, 1919.

GROSS & GROSS,
Attorneys of Plaintiff.

(Endorsed)

10

Consent is hereby given to the filing of the within second amended complaint; defendant to have twenty days from date within which to file answer hereto. Defendant reserves all its rights to move to strike out the complaint in whole or in part for any cause whatsoever.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

Nov. 21, 1921.

20

Answer to Second Amended Complaint.

(Filed Dec. 9, 1921.)

HUDSON COUNTY COURT OF COMMON PLEAS.

EMANUEL GROSS, Plaintiff, <i>v.</i> NEW YORK CENTRAL RAILROAD COMPANY, Defendant.	}	Action at Law.	30
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The defendant, New York Central Railroad Company, a body corporate of the State of New York, answering the second amended complaint herein, says that—

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Answer to Second Amended Complaint.

ANSWER TO FIRST COUNT.

(1) It has no knowledge or information sufficient to form a belief as to the allegations contained in the first paragraph, and it therefore denies the same.

10

(2) It admits that it is a common carrier of goods for hire, and is engaged in the business of carrying merchandise from other states of the United States into the State and City of New York. It denies all other allegations of the second paragraph.

20

(3) It admits that the goods described in the first count of the complaint arrived in the City of New York on November 21, 1917, and that the same were delivered to the Southseas Import & Export Company on the said date. It denies all other allegations of the third paragraph.

(4) It denies the fourth paragraph and says that the alleged claim, if any, of the Southseas Import & Export Company is not an assignable claim.

30

(5) It admits that plaintiff has demanded payment of his alleged claim, and that defendant has refused to pay the same.

ANSWER TO SECOND COUNT.

(1) It admits the first paragraph.

(2) It denies the second paragraph.

40

(3) It admits that certain goods of the character mentioned and described in the second count of the complaint, arrived in the City of New York on November 21, 1917, and that on said date the same were delivered to the Southseas Import &

Answer to Second Amended Complaint.

Export Company. It denies all other allegations of the third paragraph.

(4) It denies the fourth paragraph and says that the alleged claim, if any, of the Southseas Import & Export Company, is not an assignable claim.

10

(5) It admits that plaintiff has demanded payment of the alleged claim, and that defendant has refused to pay the same.

ANSWER TO THIRD COUNT.

(1) Defendant here repeats the allegations of paragraphs 1, 2 and 3 of its answer to plaintiff's second count.

(2) It denies the second paragraph.

20

(3) The allegations of paragraphs 4 and 5 of defendant's answer to the second count, are here repeated.

SECOND DEFENSE TO FIRST COUNT.

The bill of lading covering the alleged shipment mentioned in the first count of the complaint contained, among other things, the following provisions:

30

"Suits for recovery of claims for loss, damages or delay shall be instituted only within two years after delivery of the property."

Plaintiff's action was not commenced within two years after the delivery of the property mentioned in the complaint and covered by said bill of lading.

40

THIRD DEFENSE TO FIRST COUNT.

The damage, if any, to the property described

Answer to Second Amended Complaint.

in the first count of the complaint, arose from defect and vice in the property, and without negligence on the part of the defendant, and under the terms of the bill of lading covering said shipment the defendant is not liable for any damage thereto, arising from such defect or vice in said property.

10

FOURTH DEFENSE TO FIRST COUNT.

The injury and damage to the property described in the first count of the complaint, if any, was occasioned by strikes and by the terms of the bill of lading covering said shipment, the defendant is not liable therefor.

FIFTH DEFENSE TO FIRST COUNT.

20

The bill of lading covering the alleged shipment mentioned in the complaint contained, among other things, the following provisions:

“No carrier shall be liable for loss, damage or injury not occurring on its own road or its portion of the through route.”

30

Any injury or damage to the shipment mentioned in the first count of the complaint herein, did not occur on the road of this defendant, or on its portion of the through route.

SECOND DEFENSE TO SECOND COUNT.

The shipment mentioned in the second count of the complaint was transported under and pursuant to the terms of a certain bill of lading issued by the initial carrier, Southern Pacific Company. Said bill of lading contained, among other things, the following provisions:

40

“Suits for loss, damage or delay, shall be instituted only within two years after delivery of the property.”

Answer to Second Amended Complaint.

Plaintiff's action was not commenced within two years after the delivery of the property mentioned in the complaint and covered by said bill of lading.

THIRD DEFENSE TO SECOND COUNT.

The shipment mentioned in the second count of the complaint was transported under and pursuant to the terms of a certain bill of lading issued by the initial carrier, Southern Pacific Company. The damage, if any, to the property described in the second count of the complaint, arose from defects and vice in the property, and without negligence on the part of the defendant, and under the terms of said bill of lading, the defendant is not liable for the alleged damages or loss, arising from such defects or vice in said property.

10

20

FOURTH DEFENSE TO SECOND COUNT.

The injury and damage to the property described in the second count of the complaint, if any, was occasioned by strikes and by the terms of the bill of lading covering said shipment, the defendant is not liable therefor.

SECOND DEFENSE TO THIRD COUNT.

30

The shipment mentioned in the third count was transported under and pursuant to the terms of a certain bill of lading issued by the initial carrier, Southern Pacific Company. Said bill of lading, among other things, contained the following provisions:

"Suits for recovery of claims for loss, damage or delay shall be instituted only within two years after delivery of the property."

40

Reply to Answer to Second Amended Complaint.

Plaintiff's action was not commenced within two years after the delivery of the property mentioned in the complaint and covered by said bill of lading.

WALL, HAIGHT, CAREY & HARTPENCE,
Defendant's Attorneys.

10

**Reply to Answer to Second Amended
Complaint.**

(Filed Dec. 16, 1921.)

HUDSON COUNTY COURT OF COMMON PLEAS.

20

EMANUEL GROSS, Plaintiff, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.	}	Action at Law.
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FIRST REPLY TO SECOND DEFENSE TO
FIRST COUNT.

30

Plaintiff denies the truth of the matters set forth in the second defense to the first count.

SECOND REPLY TO SECOND DEFENSE TO
FIRST COUNT.

40

Plaintiff's assignor and defendant were negotiating for the settlement of the loss or damage alleged in plaintiff's complaint for more than two years and one day after the delivery of the said property and said defendant requested plaintiff's assignor to bring no action for said damage or loss as it, the defendant, had concluded to settle

Reply to Answer to Second Amended Complaint.

the same, and said defendant thereby waived any alleged limitation in said bill of lading as set forth in the second defense to the first count.

REPLY TO THIRD DEFENSE TO THIRD COUNT.

Plaintiff denies the truth of the matters set forth in the third defense to the first count.

10

REPLY TO FOURTH DEFENSE TO THE FIRST COUNT.

Plaintiff denies the truth of the matters set forth in the fourth defense to the first count.

REPLY TO FIFTH DEFENSE TO FIRST COUNT.

Plaintiff denies the truth of the matters set forth in the fifth defense of the first count.

20

FIRST REPLY TO SECOND DEFENSE TO SECOND COUNT.

Plaintiff denies the truth of the matters set forth in the second defense to the second count.

SECOND REPLY TO SECOND DEFENSE TO SECOND COUNT.

Plaintiff's assignor and defendant were negotiating for the settlement of the loss or damage alleged in plaintiff's complaint for more than two years and one day after the delivery of the said property, and said defendant requested plaintiff's assignor to bring no action for said damage or loss, as it, the defendant, had concluded to settle the same and said defendant thereby waived any alleged limitation in said bill of lading as set forth in the second defense to the first count.

30

40

*Reply to Answer to Second Amended Complaint.*FIRST REPLY TO THIRD DEFENSE TO
SECOND COUNT.

Plaintiff denies the truth of the matters set forth
in the third defense to second count.

10 SECOND REPLY TO THIRD DEFENSE TO
SECOND COUNT.

Plaintiff's assignor and defendant were nego-
tiating for the settlement of the loss or damage
alleged in plaintiff's complaint for more than two
years and one day after the delivery of the said
property and said defendant requested plaintiff's
assignor to bring no action for said damage or
loss, as it, the defendant, had concluded to settle
the same and said defendant thereby waived any
alleged limitation in said bill of lading as set forth
in the second defense to the first count.

20 REPLY TO FOURTH DEFENSE TO SECOND
COUNT.

Plaintiff denies the truth of the matters set forth
in fourth defense to second count.

FIRST REPLY TO SECOND DEFENSE TO
THIRD COUNT.

30 Plaintiff denies the truth of the matters set forth
in the second defense to third count.

SECOND REPLY TO SECOND DEFENSE TO
THIRD COUNT.

40 Plaintiff's assignor and defendant were nego-
tiating for the settlement of the loss or damage
alleged in plaintiff's complaint for more than two
years and one day after the delivery of the said
property and said defendant requested plaintiff's
assignor to bring no action for said damage or

Rejoinder to Reply.

loss, as it, the defendant, had concluded to settle the same, and said defendant thereby waived any alleged limitation in said bill of lading as set forth in the second defense to the first count.

GROSS & GROSS,
Attorneys of Plaintiff. 10

Rejoinder to Reply to Answer to Second Amended Complaint.

(Filed Feb. 7, 1922.)

HUDSON COUNTY COURT OF COMMON PLEAS.

EMANUEL GROSS,
Plaintiff-Respondent,

v.

NEW YORK CENTRAL RAILROAD
COMPANY,
Defendant.

Action at
Law.

20

Defendant, by way of rejoinder to plaintiff's reply, says that—

(1) It denies plaintiff's second reply to the second defense to the first and second counts of the complaint. 30

(2) It denies the second reply to the third defense to the second count of the complaint.

(3) It denies the second reply to the second defense to the third count of the complaint.

OBJECTION IN POINT OF LAW.

40

The defendant objects in point of law to the sufficiency of the second reply to the second de-

Testimony.

10 fense to the first and second counts of the complaint; to the second reply to the third defense to the second count of the complaint; to the second reply to the second defense to the third count of the complaint, on the ground that each of said replies fails to disclose a sufficient answer in law to the several defenses to which said replies are addressed. Before or at the trial of this action, defendant will move to strike out each of said replies on the grounds above stated.

WALL, HAIGHT, CAREY & HARTPENCE,
Defendant's Attorneys.

(Endorsed)

20 We consent to the filing of the within Rejoinder as of time.

GROSS & GROSS,
Attorneys of Plaintiff.

Testimony.

HUDSON COUNTY COURT OF COMMON PLEAS.

Before—Hon. RICHARD DOHERTY and a Jury.

30

EMANUEL GROSS	}
<i>v.</i>	
NEW YORK CENTRAL RAILROAD COMPANY.	

APPEARANCES:

GROSS & GROSS for the Plaintiff.

40 WALL, HAIGHT, CAREY & HARTPENCE, by Mr.
VREDENBURGH, for the Defendant.

Tried May 23rd, 1922.

Testimony.

Mr. Vredenburg moved to strike out the third count on the ground that it would be illegal for the railroad company to make a contract which would have the effect of permitting the shipper to sue on the claim after the two year and one day limit had expired; that it was not only an express waiver of the two year and one day clause, but it was an illegal contract on the part of the railroad company which had the effect of extending the two year clause and was a discrimination within the meaning of the Interstate Commerce Act in favor of this shipper.

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Mr. Gross: As to the third count, here is a contract entered into by one who happens to be a common carrier to settle a claim against it. If it had issued its check and the check had been dishonored, for instance, certainly it would be held liable. Now, assuming that on the last of the two years and one day, on the last day of that period, it had said to the plaintiff, "Don't bring suit, we have settled this thing and you will receive payment in due course," can it be said that this section applies? Here is an actual contract made for the adjustment, fixing the liability of the railroad company for this claim and agreeing to pay it. It would pay a great deal less, of course, than the loss suffered by the plaintiff, but they entered into a valid contract. One of the conditions of this contract was that no action should be instituted by the plaintiff or its assignees. That is the consideration for the settlement, and we say there was a valid and existing agreement which seems to have been in force under this third count; so that the provisions of the act relating to actions for loss or damage to goods have absolutely no application.

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Testimony.

10 The Court: I can understand that Congress, having undertaken to regulate the transportative activities of railroads, imposed a set of rules that are fair to all, not only to the railroads but to those doing business with the railroads, and any restraints that are placed on the railroads must have been considered by the parties dealing with the railroads because the relationship was regulated by a public law, and for that reason I think that the point is well taken in respect of it being sued upon a bill of lading which, under the law, should have contained a provision limiting the right of action to a period of two years. The purpose of this law was to substantially and accurately regulate the rights of interstate transportation, and

20 Congress, having addressed itself to that task, I cannot understand how there would survive any pre-existing rules of common law as would enable a shipper to disregard the terms of the act of Congress and have resort to an ordinary action for negligence in connection with a railroad, for the purpose of the Congressional act was to require all people to deal with the railroad as a railroad engaged in interstate commerce. I think the point is well taken as to that, but if this case proceeds

30 it can only proceed on the third count. That alleges that there was a compromise agreement based on sufficient consideration, entered into within the period of two years. Whether permission to enter into such a contract as that is withheld by the act of Congress or not, I do not know. I am inclined to believe that Congress was only regulating the ordinary relationships that exist between transporter and shipper and that it did not undertake to restrain the legal rights of the railroad to enter

40 into such contracts as it normally might, irrespec-

Testimony.

tive of the common function as a common carrier. Have you anything to urge against that, that this act of Congress to which you refer prevented the railroad company from agreeing as to the amount of damage and binding itself by a competent agreement to pay the amount of the damage?

Mr. Vredenburg: I should say that the railroad company is not permitted to substitute any other agreement for the agreement made under the bill of lading, which bill of lading is a part of the filed tariff and is filed with the Interstate Commerce Commission.

The Court: But don't lose sight of the fact that in this case it is alleged that they made the agreement and broke it. The agreement was for safe and careful transportation. It is alleged that they broke that agreement. Now, can they, under the act of Congress agree with their shipper as to the amount of damage and state an account with them and enable the shipper to bring an action, and do that within two years?

Mr. Vredenburg: I think not. The contract provides it must transport safely; it also provides as a term of that contract that suit must be brought within two years if they do not carry safely.

The Court: Suit brought on the contract of shipment and not on the contract of settlement.

Mr. Vredenburg: It has been held in the Prescott case that the parties cannot substitute for the bill of lading as a contract, a special agreement. This is a special agreement which they are substituting for the contract between the parties, which must govern everything, both in the transportation and in the recovery after transportation. It governs the complete transaction. They are now setting up a special agreement which had to do

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Jacob Gross, direct.

with interstate commerce and which controlled the rights of the parties in interstate commerce, altering the terms of service—they are not altering terms of service, but they are altering terms of liability as fixed by that agreement; the railroad company cannot do it and the shipper cannot do it.

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The Court: I am going to rule against you on that point.

Mr. Vredenburg: I ask an exception.

The Court: You may have your exception noted. You understand, we are now proceeding on the third count?

Mr. Gross: Yes.

The Court: And that the first and second counts are struck out.

20

Mr. Gross: Your Honor will allow me an exception, for the purpose of the record.

The Court: You consented to the striking out of the first.

Mr. Gross: Yes.

The Court: You may have an exception as to the second.

JACOB GROSS, sworn.

Direct examination by Mr. Gross:

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Q. Where do you reside? A. 895 Bergen Avenue, Jersey City, New Jersey.

Q. How long have you lived in Jersey City? A. All my life.

Q. Were you connected with the Southseas Import and Export Company in November, 1917? A. Yes, sir.

Q. Did that company become the owner of a carload of honey? A. 743 cases of honey.

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Q. Where was this honey coming from? A. Yerington, Nevada.

Jacob Gross, direct.

Mr. Vredenburg: I object to that as immaterial. The question in this case is the agreement of the railroad company to pay a certain sum in payment of suit then being brought. What happened to the honey is absolutely immaterial in this case.

10

Mr. Gross: I wish to show that there was a claim—the basis—

The Court: Objection overruled.

A. Yerington, Nevada.

Q. Do you remember approximately when that car of honey arrived in the City of New York?

A. About November 24th, 1917.

Q. And how did you know that? A. We expected this car to arrive about that time and we were continually telephoning to the New York Central Railroad, Tracing Division, and asking them to ascertain for us—

20

Q. Speak louder; these gentlemen want to hear you. A. We telephoned. We were in constant telephone communication with the New York Central Railroad Company asking them to trace this car for us. This car of honey was in great demand at the time and we finally discovered that the car was expected in New York on November 24th.

30

Q. Well, did it arrive in New York on November 24th? A. Thereabouts.

Q. Where and how did you first get information as to its arrival? A. We wrote a letter on November 24th asking about the arrival of this car.

Q. Have you a copy of that letter? A. This is a copy of it.

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Mr. Gross: Have you the original, Mr. Vredenburg?

Jacob Gross, direct.

Mr. Vredenburg: The first matter I have in my file is April 13th, 1918. I will admit it in evidence.

(Marked Exhibit P-1.)

10 Q. Did you, after writing this letter receive word as to the arrival of this car of honey? A. I did. I was told over the telephone the car had arrived at the St. Johns Park Station, New York.

Q. How long after the arrival of this letter was it? A. I think the letter was written in the morning and I had information then in the afternoon. I called up again.

20 Q. After you were informed that this car arrived at the St. Johns Park Station what did you do? A. About late in the afternoon, about four o'clock I went down there with a man who wanted to buy the car of honey from us. We went down to the St. Johns Park Station.

Q. Who was this man? A. Mr. Cohen, of the Excelsior Honey Company, and we came down to the station and inquired who—

30 Q. Whose station was this? A. The New York Central Railroad, St. Johns Park Station, and inquired of the station master where the car was and he said it was a bit too late in the day, that they were closing the yard at half past four; that he would show us where the car was, but if we wanted to examine it we had better come back in the morning and he would have the car opened for us. I took Mr. Cohen over to the siding where this car was and we looked at it. The car was sealed and on the track ready to be pushed in alongside of the terminal.

40 Q. Platform, you mean? A. Yes, the platform of the St. John Park Station.

Q. What condition was the car in at this time?

Jacob Gross, direct.

Mr. Vredenburgh: I object; utterly immaterial to this case. The only point to be fixed by the arrival of the car is the date from which the two years commenced to run. If that is fixed any further testimony regarding the car or the shipment is immaterial under this count.

10

The Court: We will proceed.

Mr. Vredenburgh: It does not make any difference whether it was damaged or was not damaged. This is an agreement to settle.

The Court: We are proceeding on a contract to settle a claim. It is relevant to show, in my judgment, that such a claim did exist.

Mr. Vredenburgh: I ask an exception.

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The Court: Objection overruled; you may have an exception.

A. The car was in sound condition; the seals on both doors were unbroken.

Q. What was the condition of the car itself?

A. The car was whole and just as it had arrived, without being broken at all.

Q. Did you go back to the yard again? A. I went back to the yard the next morning. We found the car alongside of the platform. The chassis of the car had been all crumpled up and boards broken out and the side of the car torn away and these crates and cases of honey in the car all about the car, on the car floor and about the platform and station and the honey was oozing out of the doors and out of the cracks and the place looked a mess.

30

Q. What did you do then in respect to that? A. I then went down, as soon as we saw the condition.

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Jacob Gross, direct.

10 This buyer told me he would not consider the car in the condition it was in for anything. I went and saw the station master, the man in charge of the St. Johns Park Station, and asked him what he intended to do about the matter. He said "Let the matter rest for a few days and you will hear from us just what we expect to do. We will let you know just what we expect to do with the car."

Q. Did you hear anything from the railroad company or any of its representatives after that with respect to the disposition of the matter of the honey? A. No, other than the reply to the telephone call which we made and inquired when we might expect to have definite word as to what the railroad company wanted us to do with the car. We continued to telephone them without any favorable reply then finally we wrote them a letter on December 13th—

Q. One moment—

The Court: Do you think we need go into the details of this claim?

Mr. Gross: Yes, your Honor.

The Court: Having established that there was a claim; why go into the particulars of it?

30 Mr. Gross: I wish to show authority on the part of the people that were acting. That is what I am coming to. I call on the other side to produce the original of a letter dated December 13th, 1917, written by the South Seas Import and Export Company to the Claim Agent of the New York Central Railroad Company.

40 Mr. Vredenburg: I do not find it in my files.

Mr. Gross: I offer in evidence copy of let-

Jacob Gross, direct.

ter dated December 13th, 1917, written by the South Seas Import & Export Company to the Claim Agent of the New York Central Railroad Company.

(Marked Exhibit P-2.)

Q. After the writing of this letter did you hear from the railroad company? A. Just a while before we wrote that letter we were informed by the railroad company that they put the goods in the warehouse and found they were exactly in the same condition as they were when still in the car. In reply to that letter we received a notice from the railroad company on a form like this, asking us to produce some paper, whether it was the bill of lading or paid freight bill, or something else, I don't remember.

10

Q. You say the paper you received was exactly the same form as this? A. Identical.

20

Q. And signed as this is? A. Signed "W. F. Cunningham."

(Form offered in evidence and marked Exhibit P-3.)

Q. After that what did you do? A. When we received the form and saw the matter was put in Mr. Cunningham's hands—Mr. Cunningham was the—

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Mr. Vredenburg: I object to what Mr. Cunningham was.

A. (Continuing.) I knew the notice was signed by Mr. Cunningham and designated as the Freight Claim Agent of the New York Central. I went down to his office. This was on December 27th.

Q. What year? A. 1917.

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Jacob Gross, direct.

Q. And where was his office? A. Grand Central Terminal.

Q. And what did you say when you got there?

A. I spoke to them relative to the condition of the car.

10

Q. To whom? A. Mr. Cunningham.

Q. Had you ever seen Mr. Cunningham before that time? A. No, I went in and asked for Mr. Cunningham and he was brought out to the counter, where I spoke to him. In the course of the conversation I told Mr. Cunningham all the details about the car and he asked me to wait a few moments, and he came over again with a file in his hand and he said yes, he had received a report—

20

Mr. Vredenburgh: One moment, I object to what Mr. Cunningham said as not binding on the defendant corporation.

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The Court: That is a matter that will have to be submitted to the jury. The testimony is he got a letter from Mr. Cunningham relative to his claim, that he went over to the premises of the defendant and saw Mr. Cunningham there and that he spoke to him as an employe of the company. I think I will allow the question, regulated by the requirement that it be connected up later. I overrule the objection.

Mr. Vredenburgh: Exception.

Q. You say you met Mr. Cunningham at the Freight Claim Department, New York Central Railroad? A. I did.

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Q. Was he the man in charge there? A. He was the man in charge. I spoke to Mr. Cunningham about this car and he looked through his papers and said yes, he was familiar with the contents, what had happened and—

Jacob Gross, direct.

The Court: What office did you go into?
what department?

The Witness: The Freight Claim Bureau,
Grand Central Terminal, New York City.

The Court: Freight Claim Bureau?

The Witness: Yes, Freight Claim Adjust-
ers. 10

The Court: Where was it?

The Witness: New York Central offices,
Grand Central Terminal.

The Court: New York?

The Witness: New York.

Q. Yes? A. And I told Mr. Cunningham that
we were continually being called up by people who
were anxious to buy the honey from us and if the
honey were to lie in the warehouse in the condition
it was in it would spoil and be worthless and sug-
gested that we would have the car removed to the
premises of Hildreth & Segleton who would sal-
vage the honey and thus have whatever good
honey they could recover. Mr. Cunningham said,
"Yes, I know Hildreth & Segleton, they are a pretty
reputable firm and if you send the honey up there
I will be perfectly satisfied with whatever recovery
they make of it and as soon as the honey is sal-
vaged have them sell it at the best possible price
and send me your bill for whatever loss is and
I will see that you get a check by return." 20 30

Mr. Vredenburg: The same objection
goes to this.

The Court: The objection is applicable to
all this line of testimony.

A. Accordinly, after I returned to the office after
my interview with Mr. Cunningham I sent this let-
ter out to him— 40

Jacob Gross, direct.

Q. Dated when? A. Dated December 27th.

Mr. Gross: Have you that letter, Mr. Vredenburgh?

Mr. Vredenburgh: From who to whom?

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Mr. Gross: The South Seas Import and Export Company to the New York Central Railroad, Claim Department, 45th Street and Lexington Avenue, New York City, attention of Mr. Cunningham.

Mr. Vredenburgh: Yes.

Q. I show you the original of that letter of December 27th, 1917, and ask you whether that letter was written under your direction or supervision?
A. It was.

20

Mr. Gross: I offer that in evidence.

Mr. Vredenburgh: No objection.

(Marked Exhibit P-4.)

Q. Did you receive any communication in response to that letter? A. No, I did not.

Q. What did you do, if anything? A. We allowed the salvaging of the honey to go on and we waited until we received a statement from Hildreth and Segleton showing the amount that they had recovered.

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Q. Did you receive such a statement? A. On April 13th we wrote to—

Q. Did you receive such a statement from Hildreth & Segleton? A. We did.

Q. I show you a paper on the stationery of Hildreth & Segleton and ask you whether that is the statement you received? A. It is.

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Q. And is that the sale price of the honey they salvaged? A. It is.

Q. How much was recovered for all that dam-

Jacob Gross, direct.

aged honey? A. It is shown here on this statement, \$1,698.

Q. What was the cost of recovering that amount?

A. The actual loss sustained by us was \$2,105.

Q. I am not asking you that; I am asking you what did it cost to salvage that amount? A. \$872.

Q. What are those items appearing there? A. Oh, yes, \$1,698.

Q. \$1,698. Any cents? A. Sixty-six cents.

Q. Is that the net amount of the proceeds of that honey received by the South Seas Export & Import Company from Hildreth & Segleton? A. It is.

Mr. Gross: Have you any objection to this going in?

Mr. Vredenburg: I don't see how it is binding.

Mr. Gross: Then I will not offer it.

Q. Did you thereafter write to the New York Central after you received this account of sales or invoices from Hildreth & Segleton? A. I did. On April 13th I wrote a letter to the New York Central to the attention of Mr. Cunningham, and I—

Mr. Gross: One moment. Have you the original of that letter, Mr. Vredenburg? April 13th?

Mr. Vredenburg: I have not the original.

Q. I show you a copy of letter dated April 13th, 1918, by the South Seas Export and Import Company to the New York Central Railroad Company and invoice, or copy of invoice, dated the same day to the New York Central Railroad Company and ask you whether these were mailed by

Jacob Gross, direct.

your concern under your supervision? A. They were.

10

Q. And what does that invoice dated on that day show? A. That invoice shows the actual loss which we suffered due to the breaking of the car while being put alongside the platform of the St. Johns Park Station.

Q. What was the value of the honey in New York at that time?

Mr. Vredenburg: I object to that, as I contend the third count sets forth the amount of the alleged agreement.

The Court: I will allow it.

20

Q. Does this statement correctly show the amount of loss suffered by the company?

Mr. Vredenburgh: Objected to as immaterial.

The Court: I will allow the actual loss to be shown.

Mr. Vredenburgh: Exception.

A. This statement shows the actual loss suffered by the company.

30

Mr. Gross: I offer this letter and invoice in evidence.

(Marked Exhibits P-5 and P-6 respectively.)

Q. After sending them this invoice did you hear any thing further from the New York Central? A. No, we did not. We called them up and asked them when we could expect—

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Q. Called who up? A. Cunningham, and I asked him when we could expect to receive a check in settlement of the claim. He said, "Well,

Jacob Gross, direct.

you know we have thousands of claims against the company and you have to be patient for a few days longer and you will receive your check."

Q. Who said that? A. Not having received this check we wrote to them again on May 9th and asked when—

Q. Never mind; have you a copy of that letter?

A. I have a copy of the letter here.

Mr. Gross: Have you the original, Mr. Vredenburg?

Mr. Vredenburg: I don't think so. I will permit it to go in.

Q. Is this a true copy of the letter you wrote the New York Central Railroad, or written under your supervision? A. It is.

Mr. Gross: I offer this in evidence.
(Marked Exhibit P-7.)

Q. Did you hear anything from the New York Central after the writing of that letter? A. Nothing other than responses to our telephone communications with Mr. Cunningham, and I think it was the early part of June when Mr. Cunningham began to tell us that the matter would have to wait a few days longer, that there was a clause in the bill of lading and they were going to limit our claim to the amount of the invoice value at the point of shipment. I said to Mr. Cunningham, "Why didn't you tell me that before just because you people stuck a clause in the bill of lading that we had absolutely no control over, why should we people suffer at this time?" He asked me would I get him the original of the invoice from the point of shipment.

Q. Where was that, Yerington, Nevada? A. Yes, sir.

Jacob Gross, direct.

Q. You did not buy these goods in Nevada? A. No, in Toronto, Canada.

Q. While in course of transit? A. Yes, the car was diverted.

10 Q. Did you again write the New York Central? A. I wrote again on June 25th; this is a copy of the letter.

Q. Is this the letter which was written by you or under your supervision on June 25th to the New York Central? A. Yes, sir, it is.

Q. Did you receive a reply to that letter? A. I received a reply on June 26th.

(Plaintiff's letter of June 25th offered, marked in evidence, Exhibit P-8).

20 Q. Is this the original of the letter you received in reply to your letter of the 25th? A. It is.

Q. Is that the only letter that you have received from the New York Central Railroad Company in response to your various communications? A. It is, apart from that one notice which we received from them.

Mr. Gross: I offer this letter in evidence.
The Court: June 26th? what year?

30 Mr. Gross: Dated June 26th, 1918.
(Marked Exhibit P-9,)

Q. Did you take up any further matters in connection with this claim after receipt of that letter of June 26th, 1918? A. No, I did not. I left for Europe, to manage our office there and the management here was left in charge of Mr. Louis Gross.

40 Q. That is all you know about the matter then? A. Yes.

Mr. Gross: Cross examine.

Jacob Gross, cross.

Cross examination by Mr. Vredenburg:

Q. Referring to Exhibit P-3, reading, "In order to properly investigate this claim it will be necessary for us to have the additional documents indicated by X below, which kindly attach hereto and return. Upon receipt the claim will have our immediate attention." When did you send the documents that were requested? A. I didn't send the documents which were requested, I went to Mr. Cunningham's office with the notice.

10

Q. Did this notice have an X requesting you to send the original or a certified copy of the shipper's invoice? A. I don't remember what was the fact.

Q. Where is the original that you received? A. We have not got it.

20

Q. Well, you say you went— Did Mr. Cunningham ever waive receipt of the original or certified copy of the shipper's invoice? A. Mr. Cunningham told me, "Go ahead and have the car salvaged and send me the bill for whatever the loss is and I will send you a check in return for it." Knowing Mr. Cunningham to be the freight claim agent of the New York Central I took his advice.

Q. When did he tell you that? A. December 27th.

30

Q. So that when you wrote to him under date of April 13th, 1918, referring to Exhibit P-5 why did you say then? "We shall be glad if you will immediately make any necessary investigations and place our claim in line for prompt payment." A. Because Cunningham said it would take a few days after he received our statement before he made payment.

40

Q. When did he tell you he would send you a check? A. December 27th, when I spoke to him

Jacob Gross, cross.

he said as soon as he would receive a statement we would have a check back—he would send us a check.

Q. This letter of December 27th, in evidence, that was after your interview with Cunningham, was it not? A. Yes.

10

Q. Referring to Exhibit P-4— “We beg to confirm our understanding to the effect that we will proceed with the salvaging and sale of this honey, obtaining the best possible price and filing our claim for our loss thereafter.” A. No, after the amount of the proceeds of the sale had been arrived at.

20

Q. “Thereafter.” When you filed your claim, is that the claim you refer to in this letter? A. The claim was filed immediately with Mr. Cunningham but in order to determine the total amount of the claim we had to furnish him with a statement after the honey had been salvaged, in order to determine what the amount would be.

The Court: In other words, you made a general claim against them for reimbursement for the amount that this statement, after salvaging, would show?

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The Witness: Yes, sir.

The Court: Was the reimbursement to take the form of the difference between the amount obtained through the sale and the original cost?

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The Witness: Mr. Cunningham would not settle for the full amount of our claim because of the third paragraph of that bill of lading, but he would settle for an amount that he was satisfied with according to his own bill of lading.

The Court: On December 27th did he in

Jacob Gross, cross.

any way say what would be the basis and the amount that he would pay after finding out the amount—

The Witness: He said he would pay the amount we settled for.

Q. Is that the reason Mr. Cunningham asked you to furnish him the original or a certified copy of the shipper's invoice? A. I do not remember that he ever asked me to furnish him that.

10

Q. You remember receiving a letter from Mr. Cunningham's office over the signature of Mr. Fairchild that it would be necessary to have the original invoice to White & Company of Toronto, the original consignee of the goods in question, as any damages for which the carrier may be liable must be determined from the value of the goods at the time and place of shipment? A. Six months from the time Mr. Cunningham promised to pay the full total amount of our losses.

20

Q. When did he first mention it? A. He first mentioned it about June 25th, I think.

Q. When you were speaking to him? A. Yes.

Q. And what did he say? A. He said—naturally it had taken so much longer and we kept on asking why it was that we had not received our check—it was six months since he had promised we would receive it—and he said, "You know, there is one thing that is holding this thing up now; we want to have the original bill of lading." I said, "Why didn't you ask me for that some time ago?" He said, "Well, that is what we will have to have now, the original bill of lading." I said, "Very well." I said I could not get the original bill of lading and I wrote him a letter to that effect; that is, the original invoice, and I wrote him a letter to that effect on June 25th.

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Jacob Gross, redirect.

Q. What did he say about clause 3 of the bill of lading? A. This was the first I heard of clause 3, this letter of June 26th.

10 Q. I wish you would tell us if you can, just what the basis was of the settlement which Mr. Cunningham—which you say Mr. Cunningham agreed to make? A. Mr. Cunningham agreed to reimburse us for the total amount of the loss suffered by us through the wrecking of the car.

Q. Based on the value of the honey at what place? A. Naturally, based on the market value of the honey in New York. If honey was twenty cents in New York, Mr. Cunningham would not have expected to settle for fifteen.

20 Q. And that was the agreement Mr. Cunningham made? A. Yes, sir.

Mr. Vredenburg: That is all.

Redirect examination by Mr. Gross:

Q. Did you ever meet Mr. Fairchild, Mr. Dexter Fairchild? A. Yes.

30 Q. Where did you meet him? A. The first time I went up to see Mr. Cunningham, Cunningham introduced Mr. Fairchild before I left, and said, "Mr. Gross, I suppose you notice how busy I am in the office here, I cannot attend to every matter myself, I will introduce you to Mr. Fairchild who is freight claim agent just like myself, and you can go over the matter with him."

Q. Did you meet Mr. Fairchild at the Freight Claim Office of the New York Central? A. In the office of Mr. Cunningham.

(Witness excused.)

Louis Gross, direct.

LOUIS GROSS, sworn.

Direct examination by Mr. Gross:

Q. Were you connected with the South Seas Import and Export Company? A. I was.

Q. In what capacity? A. Assistant Treasurer and General Manager. 10

Q. And where was their office in November, 1917? A. 87 Nassau Street, New York City.

Q. And did you take up this matter of the loss of honey with the New York Central Railroad after the president had left for Europe as he has testified? A. I did.

Q. And what was the first thing you did in connection with it? A. I took up the thread immediately after he left. I spoke to Mr. Cunningham and asked him when we could expect the check to be forthcoming in settlement of our claim. 20

Mr. Vredenburg: When was this?

The Witness: Immediately after Mr. Gross left for Europe.

Q. About when was it? A. June, 1918.

Q. What else did you do? A. Why I had been asking him when that check would be forthcoming. Mr. Fairchild called down to the office and I spoke to Mr. Fairchild about it and we did not seem to be getting any action from either Mr. Fairchild or Mr. Cunningham. 30

Q. Who is Mr. Fairchild? A. Mr. Fairchild is the New York Central claim agent.

Q. And did he come to see you at any time? A. He did, he was at my office.

Q. Do you remember when he came to see you at your office? A. It was immediately after Mr. Gross left for Europe. 40

Louis Gross, direct.

Q. Did you have any conversation with him?
A. I did.

10

Q. What was the conversation? A. I spoke to Mr. Fairchild and told him that we had salvaged the honey and rendered an invoice for the difference between what we would have gotten for the honey at the time of its arrival and what we did recover, and that we were expecting a check, and Mr. Fairchild said that he was sent down by Mr. Cunningham to look into the matter and we would probably get our check very shortly.

20

Q. Did he ask you for any further information about it? A. He did. He brought up the question of the value of the goods at the original point and asked whether we could not get him an original invoice. We could not get this because in fact we had not bought the car of honey from the original shipper of the goods. The honey was sold by the original shipper to a firm in Toronto and we had bought the car from this firm in Toronto and we could not seem to get the original invoice from White & Company, the Toronto firm.

30

Q. What did he say about that after you told him you could not get this invoice? A. The thing lagged after that and I kept on ringing Mr. Cunningham without any result whatsoever, and I finally turned the thing over to Mr. Leibner for suit.

Q. Who is Mr. Leibner? A. Our attorney in New York.

Q. Is he here in court now? A. Yes, he is.

Q. Did the claim ever come back to you from Mr. Leibner's office? A. It did.

40

Q. Did you see either Mr. Cunningham or Mr. Fairchild about the matter after the claim was returned to your office by Mr. Leibner? A. I saw them both.

Louis Gross, direct.

Q. Do you remember when the claim was returned to you by Mr. Leibner? A. Yes, I received a phone call from Mr. Leibner asking me to come over to his office. He told me that Mr. Fairchild—

Q. You cannot testify to what he told you. What did you do in response to that telephone call?

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A. I went over to Mr. Leibner's office. The question again was raised as to—

Q. Was Mr. Fairchild or Mr. Cunningham there?

A. Neither of them were there at the time.

Q. What did you do? A. Why, Mr. Leibner told me that the question was again raised as to the settlement of the claim and that the railroad company was stalling, that they had said they would not pay the value of the honey in New York, that there was a clause in the bill of lading that they were not liable only for the value of the stuff at the point of shipment and that we would have to settle for the value of the stuff at the point, even though our loss was much greater than that.

20

Q. Did you ever see the bill of lading? A. I never did.

Q. What did you do after this conversation at Mr. Leibner's office; did you see Mr. Fairchild or Mr. Cunningham after that? A. I did, I saw them both. I saw Mr. Fairchild—

30

Q. Where did you see him? A. Down at my office.

Q. Did you have any talk with him? A. I did.

Q. What was the talk? A. He told me he had been talking to Mr. Leibner, but he wanted to check some figures over with me.

Q. Where did you get the figures? A. Mr. Leibner sent them over to my office.

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Louis Gross, direct.

Q. I show you a paper with some figures; are those the figures you had there? A. Yes, they are.

Q. And did you go over that with Mr. Fairchild? A. I did.

10 Q. And explain to him the various items? A. I did.

Q. Just tell us what those items are so that the gentlemen of the jury will understand more intelligently what those figures mean. A. The car consisted of two grades of honey. There were 734 cases of honey in all. There were 630 cases of comb honey and the balance of the car was made up of extracted honey in cans. The bill as we rendered it or the figures as we made them up for the railroad company were based on these two different grades of honey. We made up those figures and figured our actual cost at the point of shipment. There was a profit to the Toronto firm but they were figuring on the price sold by the Yerington, Nevada, concern to the Toronto concern.

20 Q. What was the condition of the market with respect to honey at this time? A. The market was very strong. There had been a great foreign demand and there was very little honey to be gotten in the market; very little honey or any goods could be gotten in the market.

30 Q. What did you figure—just tell us what you showed? A. We showed there were 21 cases of comb honey which were entirely missing from the car. We billed this at \$4.50 a case—\$3.50 plus \$1 for freight; that brought that up to \$94.50. There was one case of extracted honey missing out of the car, and extracted honey at the time was selling in New York for over twenty cents a pound. We billed it to the railroad company at \$12 $\frac{3}{4}$ c.,

40

Louis Gross, direct.

which brought it to \$15.20. The balance of \$1,041.84 made up the difference between what we recovered and what we actually paid.

Q. For the damaged honey? A. Yes, sir.

Q. Which made up a total loss of \$1,151.64? A. Yes, sir.

Q. And that was fixed as the value of the honey at Yerington, Nevada? A. Yes, sir.

Q. At invoice prices? A. To the Toronto firm.

Q. White & Company? A. Yes, sir.

Q. Had you ever seen that invoice? A. To White & Company?

Q. Yes? A. I saw a copy of an invoice which White furnished us but the railroad company asked for the original.

Q. And you say the value of the honey in New York was considerably more than that? A. Yes, more than double, we could have realized.

Q. After you went over these figures with Mr. Fairchild, what was the result? A. Mr. Fairchild said, "Now we have arrived at a basis, this thing has been hanging fire, and these figures look right to me, the only thing that has been holding this claim up has been the fact that you have not been able to get the original invoice; now that you have billed the stuff to us at the original figures we will put the settlement right through." The figures appeared entirely satisfactory to Mr. Fairchild and he took a copy of them.

Q. Was the claim then in Mr. Leibner's hands? A. The claim was in Mr. Leibner's hands.

Q. And when did this conversation with Mr. Fairchild take place? A. The early part of November, 1919.

Q. What was finally said and agreed on with respect to those figures you showed Mr. Fairchild?

Louis Gross, direct.

Mr. Vredenburgh: I object to the question as to what was finally agreed upon; that is for the Court and jury to decide.

10 Q. What was finally said with respect to those figures? A. Mr. Fairchild took a copy of those figures and put them in his pocket and went off and told us we could expect to hear from him very shortly now that the thing had finally been arrived at.

Q. What do you mean, "arrived at"? A. We had finally arrived at the proper figure, which Mr. Fairchild said was proper.

20 Q. Was there anything said about your attorney at that time? A. Yes, there was. Mr. Fairchild told us that we could consider that the matter was entirely closed, it was settled; we could advise Mr. Leibner not to bother with the matter at all.

Q. Then did you talk to Mr. Fairchild or Mr. Cunningham after that conversation? A. I did, I spoke to Mr. Cunningham.

30 Q. How long after this conversation with Mr. Fairchild? A. Probably two or three days. I went up to see Mr. Fairchild; the thing had been hanging fire so long I went up to see Mr. Cunningham at his office and told him that the matter had been settled with Mr. Fairchild and we wanted our check. Mr. Cunningham said, "Yes, Mr. Fairchild reported to me, I have the figures and everything we need now; just be a little patient and you will get your check now that we have the proper figures.

40 Mr. Vredenburgh: When was this?

The Witness: Right after I had seen Fairchild; a day or two after.

Louis Gross, direct.

Q. Did you say anything about your attorney on that occasion? A. Yes, I raised the question right then and there with Mr. Cunningham; I told Mr. Cunningham, "Now, this thing has been hanging fire so long will it still be necessary for us to bring suit or are you going to settle? The fact of the matter was I was disgusted with it. Mr. Cunningham told me, "Just be a little patient, it is not necessary for your attorney to take any steps, you will receive your check in a couple of days."

10

Q. Did you after that again communicate or write to him? A. Yes, I kept on communicating with him by 'phone, then I finally wrote him.

Q. When did you write him? A. During February, 1920.

Q. Have you a copy of the letter you wrote to him on that day? A. Yes, I have.

20

Mr. Gross: Have you the original letter dated February 3rd, 1920?

Mr. Vredenburg: No, I have not. I object to that copy.

Q. Is this a true copy of the letter you wrote? A. It is. It was dictated by me.

Mr. Gross: The other side has not the original, at least they do not produce it upon call and I offer the copy.

30

Mr. Vredenburg: I object to it going in evidence. That is not proper proof; there is no presumption we received it until there is proof of mailing.

Q. Who had charge of mailing correspondence in your office? A. I had general charge of correspondence.

40

Q. Who mailed your letters? Was it one of your duties? A. Yes, in the evening.

Louis Gross, cross.

Q. Who mailed the letters? A. I had charge of every letter in the office.

Q. Did you yourself mail this letter? A. I did.

Q. Was it addressed in a properly post-paid envelope? A. It was.

10 Mr. Vredeneburg: I object to your leading this witness.

The Court: Objection overruled.

Q. And addressed as the letter appears to be addressed? A. Yes, sir, it was addressed to the attention of Mr. Cunningham.

Mr. Gross: Now I offer it.

Mr. Vredenburg: I would like to cross examine.

20 Mr. Gross: Certainly.

Cross examination by Mr. Vredenburgh:

Q. How many letters did you mail that day? What was the date? A. During February, 1920.

Q. What was the date? A. I do not recall exactly, I think it was the 16th of February.

30 Q. How do you know you mailed it if you do not recall the date? A. I mailed every letter both dictated by me and those which were not dictated by me. I had general supervision of all the letters in the office. It was a close corporation, owned by my father and I had general supervision of everything that went on in that office.

Q. You mailed this letter, you remember mailing it? A. Yes.

Q. And you do not recall the date you mailed it? A. No, sir. It was the same day the letter was written and dated.

40 Q. What date is it? A. February 16th, I believe.

Louis Gross, direct.

Q. February 3rd? A. February 3rd.

Mr. Vredenburgh: I don't think there has been proper proof of mailing.

The Court: He said he mailed it. It is for the jury to pass upon the weight of that testimony.

10

Mr. Vredenburgh: I object to the Court's ruling.

(Copy of letter received in evidence and marked Exhibit P-10.)

Direct examination by Mr. Gross (continued):

Q. Did you hear anything further from the railroad company or any of its representatives after writing this letter? A. I called them up several times but never got any satisfaction from them.

20

Q. Who did you talk to? A. I spoke to Mr. Cunningham.

Q. And what did he say? A. All I could get from him was that I should be patient that I would receive the check any day. The check never came.

Q. You never received it? A. Never received it.

Mr. Vredenburgh: I make the further objection, if it is not too late that this letter is a self-serving declaration unless there is a reply put in evidence. It speaks of a sum which the railroad company—Mr. Cunningham—agreed to pay.

30

Mr. Gross: It is not. It is marked in evidence.

The Court: Objection overruled.

Q. Did you sign this assignment as treasurer of the company? A. Yes, sir, that is my signature.

40

Q. Jacob Gross, as its secretary? A. Yes, sir.

Louis Gross, cross.

Q. Corporate seal of the South Seas Import and Export Company on there? A. It is.

Mr. Gross: I offer the assignment in evidence.

(Marked Exhibit P-11.)

Mr. Gross: Cross examine.

10

Cross examination by Mr. Vredenburg:

Q. Who made the agreement to pay you \$1,-151.64? A. Mr. Fairchild first did, then Mr. Cunningham.

Q. And you? A. Yes.

20

Q. Was this any different from the agreement that was made with your brother? A. They originally told us they would pay us the full amount of our loss which was, of course, twice that. It was all due to the clause which was stuck in the bill of lading. We lost almost as much as what the loss was.

Q. This was a new agreement? A. Yes.

Q. When was this made? A. In November, 1919.

Q. What date? A. Somewhere around the middle of November.

Q. Can you place the date any nearer than that? A. Must have been about the 17th or 18th.

30

Q. How do you place it on that date? A. In accordance with the letter written by Mr. Leibner in which he gave them a check—back of the figures which he made up.

Q. Where is that letter? A. I believe Mr. Leibner has it.

(Witness excused.)

40

Jacob M. Leibner, direct.

JACOB M. LEIBNER, sworn.

Direct examination by Mr. Gross:

Q. You are an attorney and counsellor of law of the State of New York? A. Yes, sir.

Q. Were you counsel for the South Seas Import and Export Company in connection with its claim against the New York Central for loss of honey that occurred about the month of November, 1917? A. Yes, sir.

10

Q. And did you take this matter up with any of the representatives of the railroad company? A. I took it up with Mr. Fairchild.

Q. In what way? A. I wrote a letter to the company on July 23d, 1919.

Q. Have you a copy of the letter you wrote? A. Yes, sir.

20

Mr. Gross: Will you produce the original, Mr. Vredenburgh, July 23d, 1919?

Mr. Vredenburgh: Here it is.

Q. Is this the original letter, produced by the defendant company? A. Yes, sir, that is the original.

Q. The initials here in lead pencil, are they in your handwriting? A. They are not.

30

Q. And the pencil memoranda at the foot of the letter are they in your handwriting? A. They are not.

Q. Were these lead pencil writings on there when this letter left your office? A. It was not on.

Mr. Gross: I offer this letter in evidence.

Mr. Vredenburgh: No objection.

(Marked Exhibit P-12.)

40

Q. Did you hear anything from the railroad

Jacob M. Leibner, direct.

company or its representatives in response to that letter of July 23d? A. Nothing except that Mr. Fairchild called at my office and spoke to me.

Q. And spoke to you? A. Yes.

10 Q. Do you remember the conversation? A. We went over the entire thing. I claimed to be entitled to a considerable amount over two thousand dollars and Mr. Fairchild said he would want to have the original invoice. I believe that that was the gist of the conversation, with reference to obtaining the original invoice—the cost of these goods.

Q. From the place of shipment in Nevada? A. Yes, the original place of shipment.

20 Q. And what was the result of this conversation? A. I told Mr. Fairchild that the matter had been delayed, that there should be a settlement and he said he would take the matter up and call on me later.

Q. And did you hear from him later? A. I did not until I wrote the letter of November 15th.

Q. Is the paper you have in your hand a true copy of the letter of November 15th, written by you? A. It is.

30 Q. And was the copy of the invoice that appears to be attached to your copy annexed to the letter as you mailed it? A. It was.

Mr. Gross: Have you the original of that, Mr. Vredenburgh?

Mr. Vredenburgh: I have not.

Mr. Gross: I offer in evidence letter written by J. M. Leibner to the New York Central Railroad dated November 15th, 1919.

40 (Marked Exhibit P-13.)

Q. Did you hear anything from the railroad

Jacob M. Leibner, direct.

company or any of its representatives after that date? A. Mr. Fairchild called upon me within a day or two after writing that letter and spoke to me about the figures and I told him that was the best we could do, we could not obtain the original invoice and that this was a copy of the invoice which I enclosed. I believe he had my original letter with the copy of the invoice.

10

Q. You mean he had the original letter of November 15th, 1919? A. Yes, sir. And from what he spoke to me he thought we could cut the figures down. I showed him the figures again on this ship of paper.

Q. Are those figures in your handwriting? A. They are.

Q. Are they the figures from which the witness who preceded you testified a moment ago? A. Yes, sir.

20

Q. And were they made up by you in the presence of Mr. Fairchild? A. They were made up by me, as far as I can remember, in the presence of Mr. Fairchild, showing how I arrived at those figures and I told him they were absolutely the last figures we could arrive at in making the claim and that I should like to know what the company intended to do about them as the matter had been pending for so long a time.

30

Q. What was the result of that conversation? A. He said he thought the matter could be settled; and my clients receive a check for this amount; that that was fair and reasonable under the circumstances, except, he said he would like to see my clients again and talk to them about the matter and have a talk with one of the representatives of the South Seas Import and Export Company and I need not bother with it.

40

Jacob M. Leibner, cross.

Q. Did you thereafter turn over the papers to the South Seas? A. I believe I did, I explained the outcome to them either over the telephone or at my office.

10 Q. Did you also send them this memorandum of your figures? A. Yes, I did.

Q. Did you afterward hear again from the railroad company with respect to a settlement or adjustment of this claim? A. I did not.

Q. Did you either telephone or write them thereafter? A. I wrote a letter, January 16th, 1920.

Mr. Gross: I first offer in evidence this memorandum of figures which was made up in the presence of the representative of the defendant.

20

Mr. Vredenburg: No objection.
(Marked Exhibit P-14.)

Q. Is this a copy of the letter written by you on January 16th, 1920 to the New York Central? A. It is.

Mr. Gross: Have you the original letter, Mr. Vredenburg?

Mr. Vredenburg: No objection.
(Marked Exhibit P-15.)

30

Q. Were you instructed by the South Seas with respect to the question of whether or not suit should be brought after this arrangement for settlement? A. Why, why, why, as I recall, I was told not to proceed in the matter any further.

Mr. Gross: Cross examine.

Cross examination by Mr. Vredenburg:

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Q. When were you told not to proceed any further? A. I believe in November, 1919, soon

Louis Gross, redirect.

after my last letter, the November letter, was written.

Q. A week? A. No, I won't say a week, it was something less than a week's time; may have been a day or two after Mr. Fairchild called upon me.

Q. Then why did you say in your letter of January 16th, 1920 that "Mr. Fairchild called to see me the other day and stated the matter had been settled with my client?" When did you understand this settlement to have been made? A. As I understand, it was made immediately after Mr. Fairchild called upon me in November, 1919.

Q. And when did they tell you not to proceed any further with it? A. Within a few days after that.

Q. But you nevertheless wrote this letter of January 16th? A. After they notified me that they had not received the check.

Q. Why didn't you bring suit over in New York? A. They instructed me not to sue. I could not bring any suit unless I was instructed to sue.

Q. That is why suit was not brought over in New York? A. I do not know. I know I did not bring any suit.

(Witness excused.)

LOUIS GROSS, recalled.

Redirect examination by Mr. Gross:

Q. Did you bring any suit against the New York Central after this arrangement for the settlement had been arrived at? A. We did not. We depended upon the arrangement with Mr. Cunningham.

(Witness excused.)

Recess until 10 A. M. May 24th.

Walter Guiol, direct.

10 A. M. May 24th, 1922.

Mr. Gross: We rest.

DEFENDANT'S CASE.

WALTER GUIOL, sworn.

10 *Direct examination by Mr. Vredenburg:*

Q. By whom are you employed? A. New York Central Railroad.

Q. And in what capacity? A. Chief Clerk of the Disbursement Office.

Q. Where? A. New York Central Offices, Grand Central Station.

Q. New York City? A. New York City.

20 Q. And how long have you been so employed?
A. Well, I have been in the capacity of Chief Clerk for two years; I have been with the New York Central twenty years.

Q. And what are your duties as such? A. Well, overseeing the office, seeing that the audits are proper and that all payments are in accordance with the rules and instructions—in general overseeing all the office, seeing that payments are in accordance with our rules and instructions and that all payments are proper.

30 Q. What are the duties of the auditor of disbursements? A. He approves the payments, approves the vouchers, because he has general supervision over everything.

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

Q. W. F. Cunningham? A. Yes.

Q. Is that the gentleman sitting over there to the right? A. Yes, sir.

40 Q. What are Mr. Cunningham's duties? A. Freight claim agent.

Q. District freight claim agent? A. Yes, sir.

Walter Guiol, direct.

Q. New York City? A. Yes, sir.

Q. How long has he been so employed? A. I am unable to state at present without looking into my records; sometime, though.

Q. Was he so employed in 1918 and 1919? A. Yes, sir.

Q. And what are his duties?

10

Mr. Gross: I object to that unless the witness knows what duties were conferred upon Mr. Cunningham by the Board of Directors of this company.

The Court: He would at least have to show competency to the extent of being in a position himself that would indicate a supervision of the proper performance of the duties by Mr. Cunningham.

20

Mr. Vredenburg: I withdraw the question.

Q. Will you please state the course that is taken in the statement of a claim for damages to freight?

Mr. Gross: I object to that.

The Court: This testimony is addressed to the scope of Mr. Cunningham's agency, isn't it?

Mr. Vredenburg: Yes. To show what course the claim takes, from the beginning until it is wound up.

30

The Court: It is relevant to show the extent of his powers; I will allow it.

Mr. Vredenburg: I will withdraw the question and consent that it be stricken out.

Q. After the claim has been filed with Mr. Cunningham what does he do before payment is considered, in the matter of determining whether or

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Walter Guiol, direct.

not any payment will be made? A. Well, he will investigate the claim.

Q. He investigates the claim? A. Yes, sir.

Q. Supposing the amount to be paid in settlement of the claim is one hundred dollars, then what is the next step in the payment of that claim?

10 A. Well, if he feels after investigating that the claim is just he is allowed to settle with the client by a draft, issuing a draft.

Q. And is Mr. Cunningham's O. K. on that draft sufficient? A. Yes, sir.

Q. Now, supposing the amount which is to be paid is \$250, then what happens?

Mr. Gross: Well, I object to that.

20 The Court: I think the question is not in proper form, I sustain the objection.

Q. Who O' K.'s the payment of drafts in excess of two hundred dollars?

Mr. Gross: Well, I object to that, if the Court please. It is not a question of who O. K.'s the draft; we are not interested in that question at all; the question is as to the authority of this man to make these arrangements.

30 The Court: I sustain the objection.

Mr. Vredenburg: Exception.

Q. Will you state what the duties of your office are; that is, the office of the Auditor of Disbursements as to O. K'ing drafts in payment of freight claims. A. Well, we need an O. K. on the drafts—

40 Q. Who does the O. K'ing? A. On drafts up to two hundred dollars, simply Mr. Cunningham or the District Freight Claim Agent.

W. F. Cunningham, direct.

Q. And above that amount? A. By the Assistant Freight Claim Agent and the Freight Claim Agent.

Q. Who is the Freight Claim Agent? A. Mr. R. L. Corbins.

Q. Now, if the amount to be paid is over two hundred dollars it must go to Mr. Corbins? A. Yes.

10

Mr. Gross: You are speaking of drafts now?

Mr. Vredenburg: Yes. Cross examine.

Mr. Gross: No cross examination.

(Witness excused.)

W. F. CUNNINGHAM, sworn.

20

Direct examination by Mr. Vredenburg:

Q. By whom are you employed? A. New York Central Railroad.

Q. In what capacity? A. District Freight Claim Agent.

Q. New York City? A. New York City.

Q. Were you so employed in the years 1917, 1918 and 1919? A. Yes, except, of course, the company was at that time operated by the U. S. Railroad Administration, or for the better part of that time.

30

Q. Do you recall a claim made by the South Seas Import and Export Company in 1917 for damages to a shipment of honey? A. Just in a general way from a recent examination of the claim filed.

Q. Do you recall having conferences with these two gentlemen sitting here concerning the claim? A. No, I do not, but I believe it is probably they called on me before any claim was presented and

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W. F. Cunningham, direct.

I may have at the time advised them to ascertain the amount of damages to their honey and present a claim for it.

10 Q. It was testified yesterday by this gentleman here, Mr. Hyman Gross, that in the latter part of 1917 or early part of 1918, he called upon you in reference to this claim and that you agreed to pay him the amount that was actually lost by the plaintiff due to the damage which occurred to this honey. Do you recall such a conversation? A. I do not.

Q. Do you recall having promised to pay the amount he actually lost? A. I do not recall any such promise, no.

20 Q. Do you ever make any such promises in the line of your duties?

Mr. Gross: I object to the question.

The Court: I sustain the objection.

Q. What are your duties as District Freight Agent, Mr. Cunningham? A. To investigate the validity of claims for loss and damages to freight and when liability, in my judgment, is established, I can pay the allowance up to two hundred dollars, by draft.

30 Q. And if that amounts to over two hundred dollars, what is your authority? A. All such payments require approval by other officials and vouchers are issued, rather than what we term a draft. In such an instance, if I consider that a claim is one of liability for an amount in excess of two hundred dollars, I submit a complete report of the facts with the papers to my superior officer, with the recommendation of the amount I believe is to be paid.

40 Q. Who is your superior officer? A. R. L. Corbins, Freight Claim Agent.

W. F. Cunningham, direct.

Q. And what does he do in regard to those claims which are over two hundred dollars, which you just testified to? A. If you will pardon me just a minute—to give this in chronological order I should have said that the claim file goes to the Assistant Freight Claim Agent, who, if he agrees with my version will prepare his voucher, which then goes to the Freight Claim Agent for his approval. Mr. Corbins has general supervision of the freight claim department.

10

Q. And what happens to the claim in excess of two hundred dollars and he O. K. it? A. If my recommendation is approved, the Assistant Freight Claim Agent with all the evidence in the case, who will approve or disapprove, as he sees fit.

20

Q. Have you any authority to agree, on behalf of the railroad company to pay a claim in excess of two hundred dollars? A. No, I always qualify such an understanding with the statement that my agreement with the claimant as to the figures is subject to the approval of higher officials.

Q. Have you ever during your employment as District Freight Claim Agent, agreed to pay a claim in excess of two hundred dollars?

30

Mr. Gross: I object to that.

The Court: I sustain the objection.

Q. It was testified yesterday that late in November, 1919, this Mr. Gross called upon you at your office and presented to you some figures which have been put in evidence, referring to Exhibit P-14.

Mr. Gross: I object to that question. I do not like to be objecting but I might suggest to counsel that he is under a misapprehen-

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W. F. Cunningham, direct.

sion as to what the testimony was. Those figures that were testified about were presented to Mr. Fairchild and not to Mr. Cunningham.

Mr. Vredenburgh: Also to Mr. Cunningham.

10

The Court: Who testified to that?

Mr. Vredenburgh: Mr. Gross.

Mr. Gross: The testimony is it was taken up with Mr. Fairchild. I am willing to have the record referred to.

Mr. Vredenburgh: I will withdraw the question.

20

Q. According to the testimony, this witness has testified that shortly before the 21st of November, 1919, he came to your office and advised you that Mr. Fairchild had agreed that the sum of \$1,151.64 was the proper amount to be paid in settlement of this claim and that the witness thereupon went to see you at your office and told you of his conversation with Mr. Fairchild and referred to the sum of \$1,151.64 and after some conversation with you, you agreed on behalf of the railroad company to pay that amount in settlement. Do you recall such a conversation? A. I do not recall the conversation.

30

Would it be in order for me to ask whether he at that time agreed to accept that amount? A. I do not recall such a conversation but I have a good many conversations with different claimants and I would like to ask, if it is permitted, whether the gentleman had agreed to accept that amount in settlement of the claim? If he had I would have promptly recommended the payment if I considered the claim one of liability. If, of course, he had refused to accept it I might possibly, or probably, not recommend the payment.

40

W. F. Cunningham, cross.

The Court: You have no independent recollection of what transpired?

The Witness: No, I do not remember the visit at all.

Q. Have you authority as District Claim Agent to agree on behalf of the railroad company to pay or to settle a claim in excess of two hundred dollars? A. Only subject to approval of our officials. 10

Q. Then your approval is simply a recommendation to the proper authorities, is that so? A. Yes.

Mr. Vredenburg: Cross examine.

Cross examination by Mr. Gross:

Q. Mr. Cunningham, you have no definite recollection of this case, have you? A. No, except what I gathered from looking over the papers a few days ago. 20

Q. And by the papers you mean the letters and correspondence in your files, is that correct? A. Yes, sir.

Q. When did you look over these papers? A. About a week or ten days ago, I should say.

Q. In the office of the railroad company's attorneys? A. No, in my own office.

Q. Don't you know that these letters and papers were in the hands of your attorneys since the month of June, 1921? A. They had the papers but they loaned them to me, as I say, about ten days ago. 30

Q. You have no definite recollection of the conversations you have had with either of these two gentlemen, have you? A. No, I have not.

Q. Who is Mr. Fairchild? A. Special agent in my office. 40

Q. An investigator of claims, isn't he? A. Yes, sir.

Dexter Fairchild, direct.

Q. And you are the District Claim Agent of the New York Central Railroad Company for the District of New York, is that correct? A. That is correct.

10 Q. And you have an office in the Freight Claim Department of the office building of the New York Central Railroad Company at the Grand Central Terminal, New York City? A. My office has been moved several times in the last five years. It was in the Grand Central Terminal and then it was moved to an outside building; now it is in the New York Central Office Buildings on Lexington Avenue.

Mr. Gross: That is all.

20 *Redirect examination by Mr. Vredenburg:*

Q. How many claims do you handle a year, approximately, Mr. Cunningham? A. My office handles, well, anywhere from thirty to fifty thousand claims in a year.

(Witness excused.)

DEXTER FAIRCHILD, sworn.

30 *Direct examination by Mr. Vredenburg:*

Q. By whom are you employed, Mr. Fairchild? A. New York Central.

Q. In what capacity? A. My title is Special Agent.

Q. And were you so employed in 1917, 1918, and 1919? A. I was.

40 Q. What were your duties at that time? A. Well, my principal duties were to look after shipments of news print paper arriving in New York City over the New York Central Railroad. Occa-

Dexter Fairchild, direct.

sionally I would be assigned claims by Mr. W. F. Cunningham to investigate.

Q. Were you assigned this claim to investigate?
A. Yes, sir.

Q. And do you recall having a conversation with this witness in Mr. Leibner's office in New York?
A. I do not.

10

Q. At the office of the South Seas Import and Export Company? A. I do not.

Q. Have you ever seen this paper before, referring to Exhibit P-14? A. No, sir, I do not recall ever having seen that before.

Q. Do you recall a conversation with this Mr. Gross in his office in November, 1919? A. No, sir.

Q. Well, what conversation do you recall having with Mr. Gross regarding settlement of this claim? A. This Mr. Gross?

20

Q. Yes. A. I do not recall having had any conversation with him.

Q. Well, do you recall having any conversation with anybody regarding this claim? A. Yes, sir.

Q. With whom? A. With a Mr. Stern, who was connected with the firm of the claimant, the South Seas Export & Import Company.

30

Q. And when did you have that conversation, as near as you can remember? A. My recollection is that when I inspected the carload of honey at the warehouse of Hildredth & Segleton, Mr. Stern was present and we talked over the matter.

Q. Did you have any later? A. Yes, I called at his office afterward.

Q. When was that; how long afterward? A. Well, I could not recall just exactly. It was several weeks, possibly two months afterward.

40

Dexter Fairchild, direct.

Q. What did you do regarding this claim after that; did you investigate it further or not. A. I investigated it further at the St. Johns Park Station, yes, sir.

Q. When was that? A. Well, that was shortly after I inspected the honey, as I recall it.

10 Q. Did your investigations continue into the fall of the year 1919? A. Well, it would depend upon what you mean by my investigation. The matter had not been settled and in the fall of the year 1919 a letter was received from an attorney and I called on him in regard to it.

Q. Mr. Leibner? A. Yes.

20 Q. And what took place at that interview, what did you say? A. As near as I can recall I asked Mr. Leibner to obtain for us the original covering this shipment of honey.

Q. What did Mr. Leibner say? A. Well, as I remember, he said he would try and get it.

Q. Now why did you want the original invoice? A. To enable us to arrive at the amount of damage or to the amount due for the damage to this carload of honey.

30 Q. Why did you need the original invoice for that? A. To prove its value at the time and place of shipment.

Q. Then at this interview you requested Mr. Leibner to furnish that document? A. Yes, sir.

Q. And he said he would try to get it? A. That is my recollection.

Q. What occurred after that? A. Well, I recall that I got him on the 'phone, I think some days after that to ask if he had obtained it.

40 Q. What occurred after that? A. That is the last I remember of the transaction.

Q. You knew nothing more of the claim than that? A. No, sir.

Dexter Fairchild, cross.

Q. You do not recall telling Mr. Gross that you considered the figures of \$1,151.84 as the proper amount that should be paid? A. No, sir, I do not.

Q. Did you ever see the original invoice? A. No, sir.

Q. It was never furnished to you? A. No, sir.

10

Mr. Vredenburg: That is all.

Cross examination by Mr. Gross:

Q. Have you told us all of the conversation you had with Mr. Leibner? A. Well, I do not recall all that was said? A. No, sir.

Q. And you do not recall all that was said out here at the office of the South Seas Import and Export Company when you say you spoke to Mr. Stern, is that correct? A. Yes, sir, that is correct.

20

Q. You knew at the time you went to Mr. Leibner's office that the original bill of lading was not obtainable, didn't you? A. That the original bill of lading—?

Q. The original invoice rather, was not obtainable? A. No, sir, I did not.

Q. Is that the first time that you demanded the original invoice? A. No, sir.

30

Q. Had you demanded it before? A. Yes, sir.

Q. Was it forthcoming? A. No, sir.

Q. Was there any explanation given to you why it was not forthcoming? A. No, sir.

Q. Isn't it a fact that you were told that these goods were bought from a house in Toronto that had bought this honey from a concern in Nevada and that they could not get the original invoice, isn't that so? A. No, I do not recall that.

40

Q. You do not recall that? A. No, sir.

Dexter Fairchild, cross.

Q. What explanation was given to you, if any, as to why the original invoice was not produced?

A. I do not recall that any explanation was given. My memory is that they said they would try and get it.

10 Q. Well, when did they tell you that they could not get it? A. I don't know that they ever told me that.

The Court: What is your recollection; that this process of settlement just lagged?

The Witness: Just lagged along; yes, sir. We were waiting for the original invoice to establish the price.

20 Q. I show you a letter written on the stationery of the New York Central Railroad, dated June 26th, 1918, marked Exhibit P-9 in this case, signed W. F. Cunningham, District Freight Agent. Can you tell who dictated that letter? A. Yes.

Q. Who did? A. I did.

Q. You acted for Mr. Cunningham in dictating and mailing this letter? A. I didn't mail it; I dictated it to the stenographer.

30 The Court: The question is, did you act for Mr. Cunningham in that dictation?

The Witness: Yes, sir.

Q. Do you remember calling at the office of the South Seas Import and Export Company with the original of this letter, marked Exhibit P-3? A. The original of this letter?

Q. Yes. A. No, sir.

40 Mr. Gross: Have you the original of this letter, Mr. Vredenburgh:

Mr. Vredenburgh: No, it is not in evidence.

Dexter Fairchild, cross.

Q. Did you ever see the copy of the invoice which appears to be annexed to that copy of the letter? A. No, sir.

Q. You mean you do not recall it or you never saw it? A. I do not recall it. Just let me get that question straight, please.

Q. You mean you do not recall it or you never saw it. A. No, sir.

Q. Did you ever see this letter which I hand you and which is in evidence, produced by counsel for the railroad company, marked Exhibit P-8? A. Yes.

Q. You did see that? A. Yes, sir, that was in our file, I remember.

Q. You say you never received an explanation from the South Seas Import & Export Company as to why they could not obtain the original invoice from the original shipper? A. No, sir; I do not recall it.

Q. Have you read this letter now, this letter I have just shown you? A. I have glanced over it.

Q. See if that does not refresh your recollection somewhat as to whether you have ever received any explanation as to why that never was produced? A. That does not refresh my memory any.

Q. Then you say that your only reason for holding up the payment of this claim was because the original invoice of the shipper in Nevada was not produced to you, is that correct? Is that your best recollection? A. That is my best recollection, yes, sir.

Q. Can you tell us how the office of the South Seas Import and Export Company was arranged? A. No, sir, I could not.

Q. You do not remember that? A. No.

Q. Do you remember the desk of Mr. Stern? A. No, I could not remember.

Louis Gross, redirect.

Q. Don't you remember that there was a desk at which Mr. Louis Gross was seated on one side and Mr. Stern at the other end? A. I do not recall that; no, sir.

(Witness excused.)

10

Mr. Vredenburg: That is our case.

REBUTTAL.

LOUIS GROSS, recalled.

Redirect examination by Mr. Gross:

Q. You have a desk in the office of the South Seas Import & Export Company? A. I did.

20

Q. How were you placed there with respect to Mr. Stern? A. We were placed opposite to each other; in other words when we were both sitting at the desk we were facing each other.

Q. And with whom was Mr. Fairchild talking when he was there, you or Mr. Stern? A. He spoke to me when he came in, he sat at my side of the desk.

Mr. Gross: That is all.

Mr. Vredenburg: No cross examination.

(Witness excused.)

30

Mr. Gross: That is our case.

Mr. Vredenburg: I ask for a direction of a verdict on the ground that neither Mr. Cunningham nor Mr. Fairchild, who are said to have made the agreement or contract with the plaintiff, were authorized to bind the corporation. Their authority cannot be shown; on the contrary it is shown that they did not have authority, either of them, to bind the corporation.

40

Judge's Charge.

The Court: It is a question of fact that must be submitted to the jury.

Mr. Vredenburg: Exception.

Judge's Charge.

Gentlemen of the Jury: The proper execution of
 your duty requires you to very closely observe 10
 the distinction between a case of this kind and an
 action that is brought to recover damages from a
 railroad company for negligence in the transporta-
 tion of freight. In the present posture of the law,
 no action can be brought against a railroad com-
 pany engaged in interstate traffic after the ex-
 piration of two years and one day from the time
 the cause of action occurs, and concededly in this 20
 case the action was started after the expiration of
 that time. This plaintiff would be entirely barred
 from a recovery if his case were for the recovery
 from the railroad company of damages for their
 failure to properly transport the freight that has
 been referred to. This action is brought upon a
 distinct and subsequent contract, a contract where-
 by the railroad company agreed to reimburse the
 plaintiff's assignor for the damages. Now, this
 agreement in itself would not entitle the plaintiff 30
 to bring this action unless the plaintiff or his
 assignor on its part agreed to do something by
 way of consideration. You are probably familiar
 with the principle of law that a promise without
 a consideration is not binding and that principle
 has very active application in this case. Even
 though the defendant company promised to adjust
 this damage on a definite basis it would not be
 bound by that unless a consideration of some kind 40
 was furnished by the person to whom that promise
 was made.

Judge's Charge.

10 In the plaintiff's testimony there is the contention made that there was a consideration; that under the statute of limitations to which I have alluded, the plaintiff might have come into court during the period of two years and submitted to a jury his general claim for damages because of the loss or the destruction of this freight; that by reason of the promise that the defendant's agent made to them they forewent that right to sue; that they relied in good faith on the performance of the promise that had been made to them and surrendered their right to sue, and that that was the consideration that they supplied for the promise of the defendant.

20 The defendant disputes that, says that there was no such contract made and that if there was anything in semblance of such contract that it was made by some agent of theirs who had no authority to go that far in the direction of binding the company; that their district freight claim agent was a functionary of limited power and limited capacity and that if he transcended his authority in this respect the company is not obliged to abide by his violation of duty.

30 With the controversy presented to us in that aspect, it becomes your duty to inquire; first, whether there was a contract made for the reimbursement of the plaintiff. A contract in this respect is a mutual agreement, an understanding as to which the minds of both parties meet. It must also be an agreement on ascertained terms. There is no agreement while there is a divergence of understanding as to what the parties are undertaking to do. The terms of all agreements, in order to entitle it to the name of an agreement, must be reasonably definite and there must be a considera-

40

Judge's Charge.

tion to support the promise. In this case, as I have already casually adverted to, this defendant is introduced to us here as a corporation. It can act only through agents and can conduct its business and safeguard its interests only through the conduct of agents possessing from it authority to conduct its business. They say, in this case, that they did have agents who were qualified to conduct these negotiations and to conclude the adjustment of this claim, but that the proper agent did not act. The man who was active in the matter was a man who had no right to go the length of reaching a definite settlement. In respect of that, the principle of law is this: that where one holds out another as his agent, it is entirely immaterial to a third party who deals with that agent what the agent's actual authority or instructions are. He is entitled to act according to what the apparent or the indicated authority of that agent is. He does not have to deal with the agent on a basis of distrust or suspicion, such as requires him at his peril to inquire just what the principal has told the agent to do in respect of the matter in hand. He may, exercising reasonable prudence and being guided by the common course of affairs in respect of such matters, go according to what appears to be the authority of the agent, and the Court of Errors and Appeals, our highest authority on that point, has expounded the principle as follows:

"As between the principal and third persons, the true limit of the agent's power to bind a principal is the apparent authority with which the agent is invested. The principal is bound by the acts of the agent within the apparent authority which he knowingly permits the agent to assume, or which he holds the agent out as possessing.

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Judge's Charge.

10 The question in each case depending upon the apparent authority of the agent is whether the principal has, by his voluntary act, placed the agent in such a situation that a person of ordinary prudence, consistent with business exigencies and the nature of the particular business is justified in presuming that such agent has authority to perform the particular act in question and when the party relying upon such apparent authority presents evidence that would justify a finding in his favor he is entitled to have the question passed upon by a jury."

20 I am now submitting to you as a question of fact in this case, that lies exclusively and peculiarly within your province, whether the evidence here satisfies you that the defendant, New York Central Railroad Company, has voluntarily created such a set of circumstances in respect of the authority of their claim agents as to induce a person of ordinary prudence and judgment and familiarity with the affairs of business to believe that their agent had the right to talk with authority and with binding powers in respect of the conduct of the company's business. If they did voluntarily produce such a situation and led people dealing with them into such a reasonable belief, then they could not turn around and say, "Well, we told our agent something different in respect of his authority and you were self-deluded by the appearance we created." They must abide by a situation that they disclose to the public view.

30
40 Turning to the question of the consideration that is alleged in this case, it must appear to your satisfaction that there was a mutual understanding between both of these parties, that the action on the original claim would not be brought if the

Judge's Charge.

foregoing of the right to sue was induced by the conduct of the defendant in agreeing to settle his claim. The defendant must have known or from the circumstances should have known that that was going to be the influence that its promise would have upon the plaintiff. They cannot delay the matter until a day or so before the expiration of the time to sue and then say, "Well, we will agree on a settlement now," and go no further, then a couple of days after the time has expired and after the plaintiff has lost his right to go into court, they cannot very well say, "Well, we did not know that you were going to give up your right to sue." In that situation they are held to have known what the influence of their promise would reasonably be upon the conduct of the plaintiff.

10

20

Now, gentlemen, I do not know of any further reference that I might take to this case, you being the judges of the facts and of the credibility of the witnesses by whom those facts are adduced. The sharp conflict of the evidence here casts upon the jury rather than upon the court the greater burden of determining the justice of this claim.

The plaintiff bears the burden of satisfying you that he is entitled to recover. He comes here as a voluntary litigant. He brings the defendant here to answer to a claim. In that situation the plaintiff must satisfy you by the greater weight of the evidence, by the preponderance of the proof that he is entitled to recover, and he must satisfy you to that degree also in respect of the elements in this case. He must satisfy you that there was a contract made, that its terms were definite, that it was supported by a consideration upon his part and that there was a breach of that contract. If

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40

Judge's Charge.

10 you so find the facts to be in this case, the next question is as to the amount that should be awarded. There can be no recovery at all in this case except for the amount that the evidence shows was agreed to be paid by the New York Central Railroad, together with interest due thereon commencing from a reasonable time after that.

Unless there is some aspect of this case I have overlooked, I will allow you to consider your verdict in this matter.

Jury retired.

20 Mr. Vredenburg: I take an exception to that part of the Court's charge where he said, "Turning to the question of the consideration that is alleged in this case, it must appear to your satisfaction on that there was a mutual understanding between both of these parties, that the action on the original claim would not be brought if the foregoing of the right to sue was induced by the conduct of the defendant in agreeing to settle his claim. The defendant must have known or from the circumstances should have known that that was going to be the influence that its promise would have upon the plaintiff. They cannot delay the matter until a day or so before the expiration of the time to sue and then say, 'Well, we will agree on a settlement now,' and go no further, then a couple of days after the time has expired and after the plaintiff has lost his right to go into court, they cannot very well then say, 'Well, we did not know that you were going to give up your right to sue.' In that situation they are held to have known what the influence of their promise would reasonably be upon the conduct of the plaintiff."

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*Exhibits.***Exhibit P-1.**

Nov. 24, 1917.

Arrival Clerk, New York Central Railroad,
St. Johns Park Station, New York City.

Dear Sir:—

10

We are advised that on Nov. 21, there arrived at 60th St. Car PFE 5855 containing 743 cases honey consigned to order, notify Southseas Import & Export Co. Inc. This car was routed to St. Johns Park Station and we shall be glad if you will advise us when it arrives.

Yours very truly,

SOUTHSEAS IMPORT & EXPORT CO. INC.
E. Stern,
Secretary.

20

ES.DB.

Exhibit P-2.

SOUTHSEAS IMPORT AND EXPORT COMPANY
INCORPORATED
87 Nassau Street
New York.

Dec. 13, 1917.

30

Claim Agent,
New York Central Railroad Co.,
St. Johns Park Station, New York City.

Dear Sir:

On or about November 21st, there arrived at New York, consigned to Messrs. White & Co., notify Southseas Import & Export Co., Inc. Car No. FPE 5855, supposed to contain 743 cases honey. This honey was subsequently stored in the Warehouse of F. C. Linde & Co., there having

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Exhibits.

10 been short delivered by them by the Railroad company 15 cases in addition to which there were a great number of broken and slack cases. We have not as yet been able to ascertain the amount of damage, but we expect tomorrow to remove this honey from Linde's Warehouse to the Warehouse of Messrs. Hildreth & Segelken, 265 Greenwich St., where the honey can be examined. As it is our intention to claim upon you for the shortages, breakages and damage on this shipment, we beg to request that you have your representative call on us as promptly as possible in order that we may make the arrangements with him to inspect the honey and ascertain the amount of damage due us.

20 Yours very truly,
 m SOUTHSEAS IMPORT & EXPORT CO. INC.
 E. Stern,
 ES/DB Secretary.

Exhibit P-3.

THE NEW YORK CENTRAL RAILROAD COMPANY

FREIGHT CLAIM DEPARTMENT

W. F. CUNNINGHAM

30 *District Freight Claim Agent*
 Grand Central Terminal

New York, April 16, 1918

When replying please return
 this letter or refer to our No.
 58228

40 Southseas Import & Export Co.,
 29 Broadway,
 New York City.

Gentlemen:

Referring to your claim dated April 13, 1918

Exhibits.

presented on account of loss and damage amount
\$2105.34

In order to properly investigate and promptly
adjust this claim it will be necessary for us to
have the additional documents indicated by "X"
below, which kindly attach hereto and return.
Upon receipt, the claim will have our immediate
attention. 10

- X—Bill of Lading (original)
- X—Freight Bill (original) Paid by Consignee
- Freight Bill (original) Showing Prepayment
- X—Shipper's Invoice (original or certified copy)
- Live Stock Contract (original)
- Original—Receipt
- Bill of Loss or Damage (itemized)
- Specific Authority for Rate Claimed 20
- Certificate of Weight, Showing Clearly how
Claimed weight was Ascertained.

Respectfully,

W. F. CUNNINGHAM,
District Freight Claim Agent.

Exhibit P-4.

SOUTHSEAS IMPORT AND EXPORT COMPANY 30
INCORPORATED
87 Nassau Street

New York, Dec. 27, 1917.

New York Central Railroad,
Claim Department,
45th St. & Lexington Ave.,
New York, N. Y. *Attention of Mr. Cunningham*

Gentlemen:— 40

Referring to the interview of our Mr. H. Gross

10

Your very truly,

Enc.

Exhibit P-5.

87 Nassau St.

45th St. & Lexington Ave.,

New York, N. Y. Attention of Mr. Cunningham

December 27th.

Account Sales from Messrs. Hildreth & Segelken,

Exhibits.

a copy of which we enclose together with our invoice covering our loss in the matter which amounts to \$2105.34. We shall be glad if you will immediately make any necessary investigations and place our claim in line for prompt payment.

Yours very truly,

10

ES/IL SOUTHSEAS IMPORT & EXPORT CO. INC.
E. Stern,
Secretary.

Enc.

Exhibit P-6.

SOUTHSEAS IMPORT AND EXPORT COMPANY
INCORPORATED
87 Nassau St.

20

New York, Apr. 13, 1918.

CLAIM.

New York Central Railroad Co.,
New York, N. Y.

To Loss By Breakage and Shortage on 630 cases
of Comb Honey Contained in Car P F E 5855,
Arrived at St. John Park Station, New York, on
or about November 21st, 1917.

30

Contents of Comb Honey in Car
as per billing 630 cases
Delivered to us 609 "

Shortage 21 cases

@ \$6 per case \$126.00

Fair Market Value of 609 cases
delivered in bad order

40

@ \$6 per cases 3654.00

\$3780.00

Exhibits.

	Net Proceeds on Sale as per Account Sales Attached	1698.66
	Total Loss on Comb Honey	\$2081.34
	Shortage on 1 case of Extracted Honey contained in Same Car	
10	Billing	113 cases
	Delivered	112 "
	Shortage	1 Case
	Weighing 120 lbs. @ 20c per lb.	24.00
	Due us	\$2105.34

20

Exhibit P-7.

May 9, 1918.

New York Central Railroad Co.
 Claim Department,
 45 St. & Lexington Ave.,
 New York, N. Y.

Attention of Mr. Cunningham.

Gentlemen:

30

Under date of April 13th, we wrote you with reference to our claim enclosing copy of our invoice in the matter.

We have been favored with no reply with reference thereto and we shall be pleased to know what progress has been made in the matter of settlement.

Yours very truly,

40

SOUTHSEAS IMPORT & EXPORT CO. INC.
 E. Stern
 Sec'y.

ES/IL

*Exhibits.***Exhibit P-8.**

June 25, 1918.

New York Central Railroad Co.,
 Claim Department,
 45th St. & Lexington Ave.,
 New York, N. Y.

10

Attention of Mr. Cunningham.

Gentlemen:

Referring to our claim as per bill rendered for \$2105.34 covering breakage and shortage on Car of Honey PFE 5855, we regret that we have been unable to obtain a certified copy of original invoice as requested by you.

We have, however, previously given you a copy of original invoice from Messrs. White & Co., as well as statement of Messrs. Hildreth & Segelken, showing disposition of the damaged portion and we trust that this will enable you to make prompt settlement of our claim.

20

Yours very truly,

ES/IL SOUTHSEAS IMPORT & EXPORT CO. INC.,
 E. STERN,
 Sec'y.

30

Exhibit P-9.

June 26, 1918

Claim 58228

Southseas Import & Export Co.,
 87 Nassau Street,
 New York City.

40

(Attention Mr. E. Stern)

Gentlemen:

Your letter of June 25th at hand regarding your

Exhibits.

claim for \$2105.34 covering damage to carload of honey, No. PFE 5855:

10 As explained by our representative it will be absolutely necessary for us to have the original invoice of Hicks Sutherland & Company, the shipper, to White & Company, Toronto, the original consignee of the car in question, as any damage for which carriers may be liable, according to section 3 of the bill of lading, must be determined by the value of the goods at the time and place of shipment.

There is no objection to your transferring your claim, however, to White & Company and let them take it up with the carriers if that plan will help you.

20 We regret the delay in bringing this matter to a settlement, but as stated we can do absolutely nothing until the original invoice is produced showing the value of the goods when shipped.

30 We would also call attention to another phase of the matter which has developed in our investigation of the handling of this car, namely, that after the car arrived and was unloaded at St. John's Park and you saw the condition of the honey, nothing was done for practically three weeks which certainly did not improve the condition of the goods.

Respectfully,

DF:KG W. F. CUNNINGHAM,
Dist. Freight Claim Agent.

*Exhibits.***Exhibit P-10.**

February 3, 1920.

New York Central Railroad Company,
Claim Department,
45th Street and Lexington Ave.,
New York City.

10

Attention Mr. Cunningham.

Gentlemen:

About three months ago your Mr. Fairchild called at our office in accordance with an appointment made with the writer, for the purpose of going over the figures concerning our claim for loss of honey in shipment which arrived in New York in November, 1917, and after checking up the figures and thoroughly going over them with us again, you agreed to settle the matter as per figures arrived at—\$1151.64. He said that we would receive check in settlement in few days. We called him the other day and he expressed surprise because we had not received check. As the matter had already been unduly delayed, would appreciate it if the matter will receive your prompt attention, as we have taken no action in the matter because you requested us to refrain from doing so.

20

30

Awaiting to hear from you, we are

Very truly yours,

SOUTHSEAS IMPORT AND EXPORT COMPANY.

By LOUIS GROSS.

LG/BG.

40

*Exhibits.***Exhibit P-11.**

10 KNOW ALL MEN BY THESE PRESENTS, that we,
Southseas Import and Export Company, a corpo-
ration of the State of New York, party of the
first part, for and in consideration of the sum of
One Dollar and other valuable consideration, to
us in hand paid by Emanuel Gross, of the City of
Jersey City, County of Hudson and State of New
Jersey, party of the second part, have sold and
do hereby sell, assign, set over, transfer and
grant unto the said Emanuel Gross, party of the
second part, all and every our right, claim,
demand and cause of action which we have against
the New York Central Railroad Company, by
virtue of damage caused to us, the said party of
20 the first part, to a certain shipment of honey made
from Yerington, Nevada, on or about October 23,
1917, which said honey was so damaged while in
possession of the said New York Central Railroad
Company and through its negligence, upon arrival
thereof in the City of New York on or about No-
vember 24, 1917, in car No. 5855 P. F. E. or because
of any agreement of settlement of said claim.

30 And we do hereby appoint the said party of the
second part our true and lawful attorney, irre-
vocable in the premises, to have, receive and col-
lect all of said damages, claim or demand, so due
to us, and to sue for and recover for the same in
our name or otherwise, but to his use, hereby
ratifying and confirming all that our said attorney
may lawfully do in the premises.

40 IN WITNESS WHEREOF we have caused these
presents to be signed by our president, and at-
tested by our secretary, and caused our corporate

Exhibits.

seal to be hereunto annexed, this third day of
January, nineteen hundred and twenty-one.

SOUTHSEAS IMPORT AND EXPORT COMPANY, INC.,
By LOUIS GROSS,
Treasurer.

Attest:

JACOB GROSS,
Secretary.

10

Exhibit P-12.

New York, July 23rd, 1919.

Your Claim No. 58228

New York Central Railroad,
Freight Claim Department,
Grand Central Terminal,
New York City.

20

Some considerable correspondence was had by
my client Southseas Import & Export Co. with
you regarding claim for \$2105.34 covering short-
age and damage to cases of honey in car No. PFE
5855, arriving about November 21st, 1917 at St.
John Park Station, New York.

The loss is considerably more than the amount
claimed, as I am informed, but my clients are
willing to make settlement of this amount in order
to avoid suit.

30

As this matter should not be delayed any longer,
I would ask you please to take it up and let me
know whether adjustment can be had.

Very truly yours,

J. M. LEIBNER.

MR. W. F. CUNNINGHAM,
Agent.

40

JML:EV

*Exhibits.***Exhibit P-13.**

November 15th, 1919.

Your claim No. 58228.

10 New York Central Railroad,
Freight Claim Department,
Grand Central Terminal,
New York City.

Dear Sir:

On July 23rd last I wrote to you respecting claim of my client Southseas Import & Export Co. Inc. for shortage and damage to honey in Car PFE 5855, arriving November 21st, 1917, at St. John's Park Station, New York.

20 Your Mr. Fairchild called to see me, and requested the invoice to White & Co., Toronto, Canada, original consignee. The original invoice is not obtainable as we are informed by White & Co., but a copy obtained is in my possession, and a copy thereof is enclosed herewith.

Also, Mr. Fairchild stated that the claim should be limited to the actual value of the goods when shipped, and this according to copy invoice enclosed is as follows:

30 Out of 365 Cases Fancy Honey there was total loss of:

21 cases at \$3.50 plus \$1.00 freight each	\$94.50
609 cases, Balance were damaged valued,	
cost plus freightage at \$405	
.....	\$2740.60

Realized upon sale for same

609 cases	1698.66
-----------------	---------

40 Loss of Damage 1041.84

1 Case Extracted Honey containing

120 lbs. short at 12¾c. per lb.....	15.30
-------------------------------------	-------

Total	\$1151.64
-------------	-----------

Exhibits.

My client, Southseas Import & Export Co. Inc. purchased the honey from White & Co. Toronto, Canada, and therefore, the honey was redirected en route to be shipped to my client and that the price paid for it to White & Co. and its actual value was considerably more than stated in copy invoice enclosed, and to my mind the matter is still an open question as to whether your Company would not be liable for the value of the merchandise when shipment was redirected to my client.

10

The original claim made was upon the basis of cost to my client, Southseas Import and Export Co. Inc. at the loss sustained by them which was \$2105.34, of which you have an itemized statement.

20

November 15, 1919.

New York Central RR.

(2nd)

Upon suggestion of your Mr. Fairchild, however, I have cut the claim down to \$1151.64 in accordance with original cost to White & Co. and must, therefore, ask you to take the matter up immediately and without any delay.

I must positively hear from you within a reasonable time whether you wish to settle this matter and pay the claim or that my client will be compelled to go to suit.

30

Very truly yours,

JML:EV

J. M. LEIBNER.

40

Exhibits.

Los Angeles, California, 3/18/19.

HICKS, SUTHERLAND & COONS

Purchasing Agents

712-716 Hollingsworth Building

Los Angeles, Cal.

10	Shipment No. 504					
	Car PFE 5855					
	From Yerington, Nevada 10/22/17					
	Shipper Hicks, Sutherland & Co.					
	To White & Co., Toronto, Canada.					
	Via SPD&RG-MP-Wabash, Can. Pacific. Vents					
	Closed to Destination. Put Plugs in					
	356	Cases	Fancy Comb Honey	3.50	1246.00	
	209	"	No. 1 " "	3.25	679.25	
20	65	"	No. 2 " "	3.00	195.00	
	113	"	Extract Honey, 14,351 lbs.			
			Net,	.12 $\frac{3}{4}$	1829.75	
						\$3950.00

Exhibit P-14.

	Case per	350	1 ftge.
		24	
30		350	
		700	
	609 cases at	7350	
	4.50		
		21	
	304.50		
	2436	9450	120.
		1530	12 $\frac{3}{4}$
40	2740.50		
	1698.66	104185	.90
	1041.84	115164	14.90
			15.30

*Exhibits.***Exhibit P-15.**

January 16, 1920.

Your claim No. 58228.

New York Central Railroad Company,
 Freight Claim Department,
 Grand Central Terminal,
 New York City.

10

Gentlemen:—

After considerable negotiations for the adjustment of the claim of my client, Southseas Import and Export Company, for shortage and damage to cases of honey which arrived in New York about November 21, 1917, at St. John's Park Station, New York, your Mr. Fairchild called to see me the other day and stated that the matter has been settled with my client. This morning I got in touch with my client and was much surprised to learn that while the matter was settled they have not as yet received remittance. I have been instructed to bring no action against you for the loss suffered by my client because of your agreement to pay the adjusted amount and hope that you will not further delay the actual payment of the amount due.

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Very truly yours,

JML:EV

J. M. LEIBNER.

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New Jersey Court of Errors and Appeals

EMANUEL GROSS,
Plaintiff-Appellant,

v.

NEW YORK CENTRAL RAILROAD CO.,
Defendant-Respondent.

Action at Law.
On Appeal from
Supreme Court.

BRIEF ON BEHALF OF PLAINTIFF- APPELLANT.

Statement.

This is an appeal from the judgment of the Supreme Court, reversing a judgment entered in favor of the plaintiff against the defendant, upon the verdict of a jury in the Hudson County Court of Common Pleas, for the sum of \$1,324.30 (p. 9).

On the appeal from the judgment of the Hudson County Court of Common Pleas, the defendant urged but two grounds for reversal, viz.:

1. That the Court below erred in refusing to strike out the third count of plaintiff's complaint.

2. That the Court erred in refusing to direct a verdict for the defendant upon the ground of lack of authority of the defendant's agent to effect the settlement proved to have been made. See grounds of appeal to Supreme Court (p. 8).

The opinion of the Supreme Court (p. 2) deals with the first ground of reversal (which is in its

nature an assignment of error) alone, and we contend that the Supreme Court erred in reversing the judgment of the Court of Common Pleas.

The Facts.

Some time in November, 1917, Southseas Import & Export Company purchased from White & Company, of Toronto, Canada, a carload of comb honey, which the latter firm had purchased from Hicks, Sutherland Co., of Yerington, Nevada. This merchandise was in course of transportation when so purchased by the Southseas Company, and was redirected to it at New York City. The merchandise arrived at the St. Johns Park station of the defendant company on the afternoon of November 24, 1917, when a representative of the Southseas Company went to the St. Johns Park station with a prospective purchaser of the honey, and there the car was pointed out to him, and was in sound condition, with the seals of the car unbroken. Because of the late hour, the car would not be opened, and he was told to return the following morning (p. 29, line 32, pp. 30-31). The following morning he again returned to the yard, and found that the car had been drilled alongside the platform, but that the chassis of the car had been all crumpled up, boards broken out of the side of the car and torn away, and the crates and cases of honey in the car thrown all about on the floor thereof, and about the platform and station, and the honey oozing out of the boards and out of the cracks of the car (p. 31, lines 29-40). The prospective purchaser would not then consider making the purchase, in view of the then condition of the merchandise. An interview was then had with the station master of the defendant, in charge of the St. Johns Park station of defendant, concern-

ing the matter, and he requested that nothing further be done until the railroad company's advices would be received. After several telephone conversations, the Southseas Company were advised by defendant that it, the defendant, had put the goods in a warehouse, and that they were in the same condition as when last seen in the car.

On December 13, 1917, the Southseas Company wrote defendant making a general claim for its loss, and advising defendant that it intended to remove the honey to the warehouse of Hildreth & Segelken, honey merchants, where it could be properly examined (Exhibit P-2, p. 81), and in reply thereto, received from defendant a printed form, on the stationery of the defendant, with the name of William F. Cunningham as District Freight Claim Agent printed thereon as part of its heading, and signed by said William F. Cunningham as District Freight Claim Agent, of which Exhibit P-3 (p. 83) is a facsimile (p. 33, line 10, *et seq.*). The representative of the Southseas Company thereupon called at the Freight Claim Department of defendant at its office in the Grand Central Terminal, and asked for Mr. Cunningham, who was the person in charge, and spoke to him concerning the matter (pp. 33, 34, 35). It was agreed between them that the firm of Hildreth & Segelken should salvage the honey, and sell it for the best possible price, and that payment for the loss would be made immediately upon receipt of bill therefor. Upon return to his office, the Southseas Company's representative immediately caused the letter, Exhibit P-4 (p. 83), to be written, confirming the conversation had that date. The honey was thereupon salvaged by Hildreth & Segelken and sold for the best price obtainable, showing a loss to the Southseas Company of \$2,105.34, and on April 13,

1918, Exhibits P-5 and P-6 (pp. 84 and 85) were sent to the defendant showing in detail how the loss was arrived at (pp. 37, 38, 39). Subsequent telephone conversations resulted in nothing, excepting a request on the part of defendant's representative for patience, and that a check would be forwarded in payment of the claim (p. 39, line 2). It was not until June, 1918, that the defendant began to demand the production by the Southseas Company of the original invoice made by the original shipper in Nevada, which the Southseas Company could not obtain, because it had not purchased the goods there, but from White & Company, of Toronto. The Southseas Company had theretofore furnished original invoice from White & Company, its vendors, but that was not deemed sufficient by defendant. It might here be stated that the Southseas Company never had the bill of lading for these goods, nor knew the contents thereof.

Thereafter the matter was taken up by the defendant, through its Mr. Fairchild and another representative of the Southseas Company, Mr. Louis Gross. Mr. Fairchild had been introduced by Mr. Cunningham at his office as a Freight Claim Agent, and as assisting him in the adjustment of claims (p. 44, lines 25-40). Mr. Fairchild thereafter called at the office of the Southseas Company and spoke to Mr. Louis Gross concerning the claim, and was informed that the honey had been salvaged and an invoice rendered for the difference between what was obtained for the honey and its value upon arrival in New York, and was informed by Mr. Fairchild that he was sent down by Mr. Cunningham to look into the matter, and that check in settlement would probably be forthcoming shortly. Mr. Fairchild further went into the question of the value of the goods at the point

of shipment, and asked if the original invoice could not be obtained from the original shipper, and was told that this could not be obtained because the Southseas Company had not purchased the goods from the original shipper, but from a firm in Toronto, and that he could have the original invoice from the Toronto firm. After many subsequent telephone conversations, without result, the Southseas Company turned the matter over to Mr. Leibner, its attorney in New York, for collection (p. 46, line 30, *et seq.*). On July 23, 1919, Mr. Leibner wrote Exhibit P-12 (p. 91) to the defendant (p. 55), in response to which Mr. Fairchild called at his office and went over the entire matter with him. Mr. Leibner thereafter again wrote on November 15, 1919, Exhibit P-13 (p. 92), enclosing a copy of the original invoice of the original shipper, which was all he could in the meantime obtain, and setting forth in detail the claim, upon the basis of the cost of the honey at the time and place of shipment (p. 56). This letter was addressed to the defendant, and in response thereto Mr. Fairchild called, having in his possession the original of this exhibit, and calculations were made by them, the original of which, in Mr. Leibner's handwriting, was produced as Exhibit P-14 (p. 94), and shows that the loss of the Southseas Company based upon the charge made by the original shipper to its consignee was \$1,151.64, although the loss to the Southseas Company, in fact, was almost twice that amount.

Mr. Fairchild stated that he thought the matter could be settled for that amount, that that was fair under the circumstances, but that he should like to speak to one of the representatives of the Southseas Company, and that he, Mr. Leibner, need not bother any further with it (p. 57, bottom). Mr. Leibner thereupon returned the papers to the

Southseas Company (p. 58, line 1), and Mr. Fairchild called at the office of the Southseas Company, and again spoke to Mr. Louis Gross, its representative. The items were again gone over and agreed upon, and Mr. Fairchild stated that now that the goods had been billed at the original figures, that the settlement would be put right through (pp. 50, 51). Mr. Fairchild took a copy of the figures with him, and told Mr. Gross that he considered the matter entirely closed and settled, and that Mr. Leibner need not bother with the matter any further.

Mr. Gross, a few days after this conversation, went up to see Mr. Cunningham at his office, and told him that the matter had been settled with Mr. Fairchild, and that he wanted a check in payment. Mr. Cunningham stated that Mr. Fairchild had reported to him, and that he had the figures and everything he needed, and that they should be a little patient, and that a check would now be forthcoming since the figures had been adjusted.

Mr. Gross further stated that the matter had been hanging so long that it would be necessary to bring suit unless settlement was effected, to which Mr. Cunningham replied that he be a little patient, and that it is not necessary for the attorney to take any steps, and that check would be received in a couple of days (pp. 50, 51). In several subsequent telephone conversations, Mr. Cunningham requested that the South Seas Company be patient, and stated that a check would be forthcoming (p. 53, lines 17-28). It was upon the faith of the settlement and upon the request of Mr. Cunningham that no action be taken by the attorney of the Southseas Company, that it forebore from bringing an action for the recovery of the amount of its loss (p. 59, line 32, *et seq.*).

The Southseas Company assigned its claim to plaintiff (Exhibit P-11, p. 90).

Upon the trial of the action, and before the offer of any evidence, the defendant moved to strike out the three counts of plaintiff's complaint. The Court struck out the first and second counts, and denied the motion as to the third count (p. 28). At the conclusion of the entire case, defendant moved for the direction of a verdict in its favor, *solely* upon the ground of want of authority in either Mr. Cunningham or Mr. Fairchild to make the settlement, which motion was denied. It was *solely* the denial of these two motions which was the subject of review under the reasons for reversal, and they were the only two grounds argued on the defendant's appeal to the Supreme Court (p. 8).

POINT I.

The Trial Court did not err in refusing to strike out plaintiff's third count, and the Supreme Court erred in holding that the third count should have been stricken out.

The third count of plaintiff's complaint is based upon an agreement entered into between plaintiff's assignor and defendant, wherein and whereby defendant agreed to pay plaintiff's assignor the sum of \$1,151.64 in settlement of the damage suffered, in consideration that plaintiff's said assignor, the Southseas Company, would forebear from bringing its action to recover for the actual loss sustained by it, and pursuant to which agreement plaintiff's said assignor did actually refrain from bringing action as it might have done. (See third count, p. 14.)

To this count the defendant pleads that the goods in question were transported under and pursuant to the terms of a certain bill of lading issued by the initial carrier, the Southern Pacific Com-

pany, and that said bill of lading contained a provision that no suit shall be brought for loss, damage or delay, unless instituted within two years after the delivery of the property (p. 19, second defense to third count): Plaintiff, in his reply to this defense, denies the truth thereof (p. 22, line 30, first reply to second defense to third count). The question therefore, as to whether such provision was contained in the bill of lading was at issue, and the Court could not strike out the third count, which on its face set forth a good cause of action. If the defense thus pleaded was in fact true, the burden was upon defendant to establish it, and there is not a single piece of evidence in the entire case from which this defense can be found substantiated. It was undoubtedly for that reason that the defendant did not move for the direction of a verdict upon that ground.

The motion to strike out the plaintiff's third count raised merely a question of law upon the pleading, and if the count in substance set forth a cause of action, it could not be stricken out. And most certainly the Court could not strike out the count when the matters of fact set forth in defense to it are denied.

The Supreme Court in reversing the judgment states in substance, in its opinion, that it was shown, or was conceded that the bill of lading contained the limitation pleaded in the defendant's answer, but we respectfully submit that plaintiff plainly and unequivocally denied it; that it was *not shown nor conceded at any time*, and that the defendant failed to prove it as it might have done if true in fact.

The Supreme Court in its opinion further sets forth that the goods were shipped from Nevada some time in October, 1917. We respectfully submit that there is no proof of that anywhere in the

record; neither was it shown at the trial what the tariffs filed by the carrier with the Interstate Commerce Commission contained. We submit, however, that all of these questions had nothing whatever to do with the motion pending before the Trial Court to strike out the third count of plaintiff's complaint, and that the Court's ruling that the allegations of that count were sufficient in law as setting forth a cause of action, was correct, especially so when the defense pleaded thereto was at issue. We maintain that the Trial Court would have fallen into error had it stricken out this count in view of the condition of the pleadings.

Under Rule 26 annexed to the Practice Act of 1912, it is provided:

"Demurrers are abolished. Any pleading may be struck out on motion on the ground that it discloses no cause of action, defense, or counter-claim respectively. * * * In lieu of a motion to strike out, the same objection, and any point of law (other than a question of pleading or practice) may be raised in the answering pleadings, and may be disposed of at, or after, the trial; * * *"

Thus, the motion to strike out is substituted for the demurrer, and the real test as to whether the third count of plaintiff's complaint should have been stricken out is whether a demurrer to it would have been sustained. We submit that the question answers itself, and that a demurrer to plaintiff's third count would have been overruled.

It is respectfully submitted that the Supreme Court erred in holding that the Trial Court should have stricken out the third count of plaintiff's complaint upon the defendant's motion at the opening of the case, and in reversing the judgment in favor of the plaintiff upon that ground.

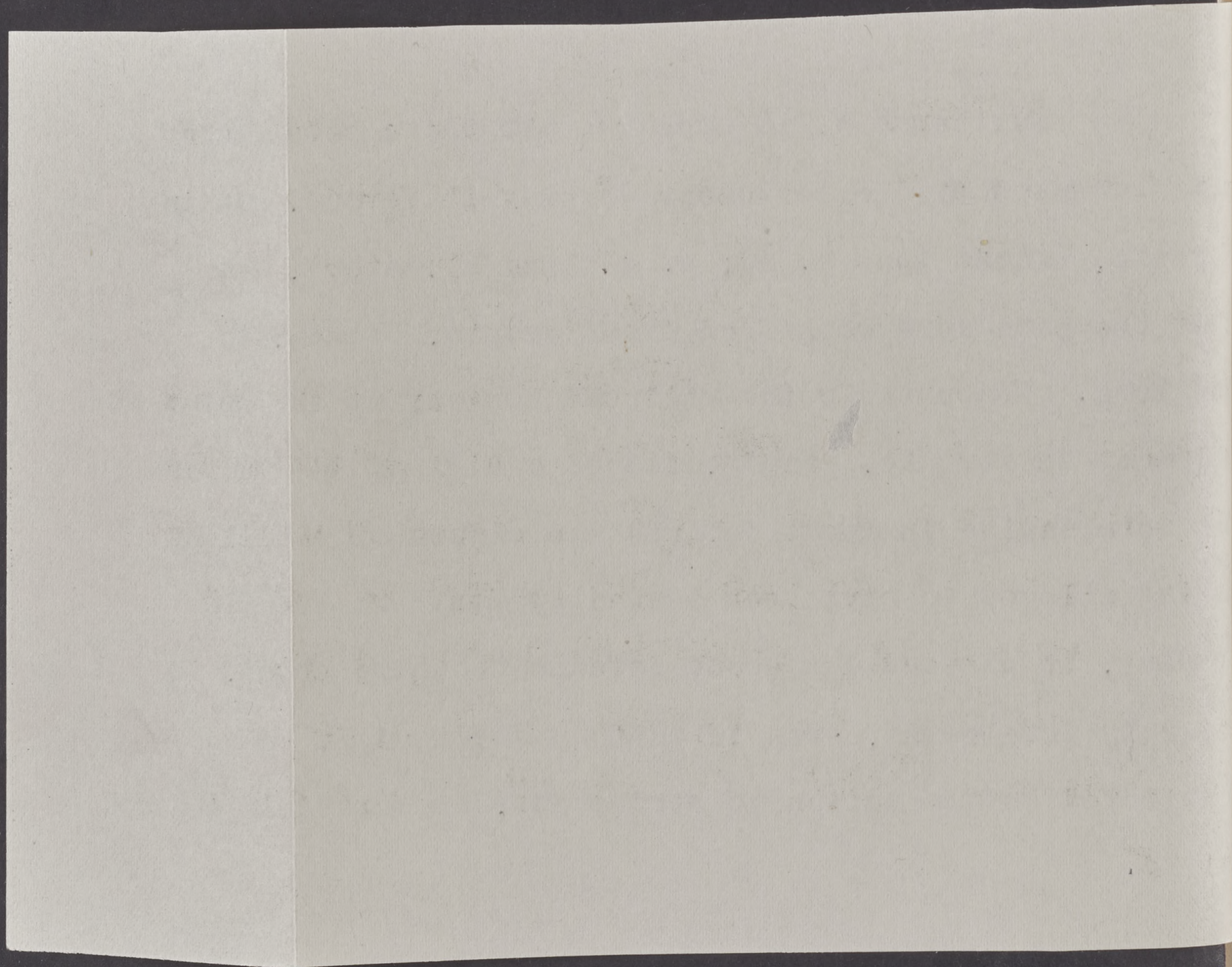
We have no quarrel with the cases cited by the learned Supreme Court, but cannot agree that that Court may go beyond the pleadings to ascertain whether the Trial Court committed *legal error* in denying a motion to strike out, which is a substitute for a demurrer. The Court must place itself in the position of the Trial Judge and determine the question upon the same material that was before him. The question is: Did the Trial Judge commit error when he refused to strike out the third count of the plaintiff's complaint, when it set forth a perfectly good cause of action, and while a defense to it was put at issue? It has been held that even though one of the defenses admit a fact, if another defense deny it, the fact is at issue and the plaintiff must prove it.

See Sterry v. Fitz-Gerald, 95 N. J. Law, 51; 111 Atl., 636.

Although not necessary for the purposes of this point, we might take a step further:

Assuming that the defendant had established the specific limitation which it pleads, we contend that it would have availed it nothing by way of defense to the third count. That count is not founded upon any cause of action for loss or damage to the goods, but upon an agreement of settlement for which the defendant exacted and received a consideration, to wit, the forbearance of suit. Agreements of settlement in consideration of forbearance of action are not by law required to be in writing. But supposing the defendant had given plaintiff's assignor a written agreement that in consideration of the forbearance of suit, it would, within a certain specified time, pay to plaintiff's assignor the amount agreed upon by way of settlement; or, supposing that it had given its promissory note for such amount, and an ac-

Furthermore, it appears that these goods were not purchased by the Southseas Company in Nevada, but in Toronto, Canada (top p. 40; p. 46 line 20, etc.), and that the same were reshipped from Toronto, Canada, to New York. Undoubtedly the railroad company at the point of shipment in Toronto, Canada, issued a bill of lading for the merchandise in question, and the clause of a bill of lading alleged to have been issued by Southern Pacific Company, as pleaded in second defense to third count, is entirely irrelevant, even if that question might be considered on the motion to strike out, as certainly it may not be.



tion were founded upon such agreement or note, can it be claimed that defendant might interpose the defense of a two (2) year limitation against the bringing of action for loss or damage during transportation? We think not. The agreements are entirely distinct and separate, and constitute a liquidation by the railroad company of its liability, and a definite promise to pay. The situation presented by the third count is precisely the same, except that the agreement is not in writing.

The contention of the defendant in its brief that if such were permitted, preferences might be obtained by some shippers over others, we believe, is untenable. It certainly cannot be claimed that a person who merely receives a promise to be paid within a few days, receives any preference over one who demands and receives immediate payment. Furthermore, the defendant contends that plaintiff's assignor should have brought its action within the alleged two (2) years' limitation. Supposing, as in this case, the settlement was actually effected two or three days before the expiration of the two years, with an agreement on the part of the plaintiff's assignor to forbear from bringing action, which is the usual consideration exacted upon an agreement to settle. Could the plaintiff's assignor bring its action within the alleged two years' limitation in violation of its own agreement to settle? If it did, the defendant might readily bar it by interposing as a defense that it had agreed to forbear bringing the action for several days, weeks or months. That this is no preference, see *Purity Farms v. Adams Express Co.*, 112 Atl., 334.

An examination of the plaintiff's third count, we believe, will satisfy this Court that it should not be stricken out on demurrer or motion. If that is so, the Trial Court was right in denying the mo-

tion, which was merely addressed to the complaint, and the Supreme Court was in error when it held that the motion to strike out the third count should have prevailed.

In view of the fact that there is not an iota of proof that the bill of lading contained any such provision of limitation as pleaded by way of defense, *and in view of the fact that the matter was at issue under the pleadings*, with the burden upon defendant to prove its allegation, the Trial Court was justified in refusing to strike out the third count of plaintiff's complaint, and, indeed, had it granted such motion, in view of the state of the pleadings, it would have erred.

POINT II.

The Trial Court did not err in refusing to direct a verdict in favor of defendant.

The defendant's motion for a direction of a verdict in its favor upon the conclusion of the entire case upon the ground that neither Mr. Cunningham nor Mr. Fairchild was shown to have authority to effect the settlement upon which this action was based, was denied, and the Court left the question to the jury for its determination as to whether or not these gentlemen or either of them possessed apparent authority upon which plaintiff's assignor relied, and was justified in relying, under the circumstances of the case. The Court in its charge read the extract from the case of *Law v. Stokes*, 32 N. J. L., 249, at page 251, as follows:

"A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorized him to do, but also whatever usually belongs to the doing of it, or is necessary to its perform-

ance. Beyond that, he is liable for the acts of the agent *within the appearance of authority* which the principal himself knowingly *permits the agent to assume* or which he *holds the agent out to the public* as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent, within the scope of the authority he holds the agent out as having or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such cases, would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established, it must flow from the act of the principal. And when established, *it cannot*, on the one hand, *be qualified by the secret instructions of the principal*, nor, on the other hand, be enlarged by the unauthorized representations of the agent. These principles find ample illustrations in the elementary books, and in decided cases."

The salutary principle thus enunciated was followed by the Court of Errors and Appeals in the case of *J. Wiss & Sons v. H. G. Vogel Co.*, 86 N. J. L., 621. In the latter case, one representing himself as a salesman and representative of defendant, and presenting his card and executing an agreement as such, entered into a contract with the plaintiff, and the Court refused to leave it to the jury to determine from the facts and circumstances in the case whether agency had been proved, and non-suited the plaintiff. This the Court of Errors and Appeals held was erroneous, for the jury might have found from the facts and circumstances that agency in fact existed; even to the extent of modifying or changing the figures submitted by the principal.

In *Calhoun v. Buehre*, 75 N. J. L., 439 it was

held that one acting as manager of a hotel, under the circumstances had authority to bind his principal by a contract for advertising.

In *Heckel v. Cranford Country Club*, 117 Atl. Rep., 607, the defendant was held liable for merchandise purchased by one conducting a restaurant at the defendant club, but who, to third parties and to the plaintiff, appeared as managing it for the defendant.

We contend that the case at bar is much stronger than any of the cases cited.

Mr. Cunningham and Mr. Fairchild were not merely assistant freight claim agents. Let us examine the evidence as the jury did to ascertain their status: The defendant, a large railroad corporation, maintained in its office building at the Grand Central Terminal, New York City, a Freight Claim Department, of which Mr. Cunningham was in charge (p. 34, line 38; p. 63, line 25). Mr. Cunningham was the District Claim Agent of the New York Central Railroad Company for the District of New York (p. 68, line 1). Exhibit P-2 (p. 81) was written by plaintiff's assignor, addressed to Claim Agent of the New York Central R. R. Co., at its New York Station, and brought forth Exhibit P-3 (p. 82), a printed form, on stationery of defendant with Mr. Cunningham's name printed thereon (and as part of its heading) as District Freight Claim Agent, also bearing the signature of Mr. Cunningham as District Freight Claim Agent, in which exhibit he requires the production of certain papers "in order to properly investigate and promptly adjust this claim." The paper, Exhibit P-3, appears to be dated in April, 1918, but that is not the identical paper received, because the original was lost; it is, however, a facsimile of the paper received by plaintiff's assignor in December, 1917 (p. 33, line 21). Mr. Fairchild

was introduced by Mr. Cunningham as having like powers with himself at the office of the Freight Claim Department of defendant. Then conversations with Mr. Cunningham, the one in charge, who promised repeatedly to make remittance for the loss as agreed upon. On June 26, 1918, Exhibit P-9, was written on defendant's stationery over the signature of Mr. Cunningham as "District Freight Claim Agent" to plaintiff's assignor, in which he states, "We regret the delay in bringing this matter to a settlement." Then we have the various letters written by plaintiff's assignor to defendant, which were responded to by either Mr. Cunningham or Mr. Fairchild, acting for the defendant, and at no time they, or either of them, or the defendant in any way intimating their lack of authority. The further fact that Mr. Leibner addressed his letter, Exhibit P-13, to the defendant, and Mr. Fairchild called with it in his possession to see Mr. Liebner concerning the matter (p. 56, line 40; p. 57). The letter Exhibit P-9 was dictated by Dexter Fairchild, acting for Mr. Cunningham, and written on the stationery of the defendant (p. 72, lines 19-30). The fact is that Mr. Cunningham *actually issues drafts in settlement*, where the amount involved is \$200 or less (p. 61, line 39, to p. 62, line 10). And it may be that the secret limitation of authority only applied to the issuance of drafts (p. 62, line 38, top page 63, *et seq.*).

The question is not what the actual authority of Mr. Cunningham was, as it might have been limited by secret instructions, but with what apparent authority was he clothed by the defendant in so far as third persons were concerned. Would an ordinarily prudent man, conversant with business usages, dealing with the matter in hand with a large railroad corporation having its involved

systems of offices and bureaus, be led to believe that Mr. Cunningham had the authority to settle the claim in question? The jury in this case has, by its verdict, found that Mr. Cunningham did have the apparent authority to effect the settlement, and that he did effect such settlement. This Court has held time and again that it will leave inferences of fact to be drawn by the jury, and that the drawing of such inferences is the jury's province alone.

Mr. Cunningham does not deny the conversations testified to by the plaintiff's witnesses to the effect that he had agreed to pay the sum sued for, in settlement. If the jury believed the testimony of the plaintiff's witnesses, as they were justified in doing, to the effect that Mr. Cunningham had promised payment within a few days, we maintain that the jury was justified in finding, if it were necessary to so find, that Mr. Cunningham in the usual and regular course of his duties, had submitted the report which was in his hands, and had obtained express authority to settle for the amount agreed upon. This would be a reasonable inference from his unqualified promise to pay.

In any view of the case, the question of the authority of Mr. Cunningham was for the jury, under appropriate instructions from the Court, *and no exception was taken to the Court's charge*. Neither was any objection made to the offer of the various exhibits, which are in the record.

We respectfully submit that it is not a question of how the Court would decide the issue, but was there evidence in the case from which the jury might directly, or by inference find the fact.

It is clear from the evidence, that the plaintiff's assignor might have recovered from the defendant the full amount of its damage at any time within six (6) years from the time that the cause of action

arose, no limitation of the time within which action could be brought having been proved or shown. Plaintiff has chosen to take what it was agreed should be paid by way of settlement of an honest bona fide and meritorious claim, as shown by the testimony in this case, and we respectfully submit that the question of the authority of the District Freight Claim Agent of the defendant, for the District of New York, the officer in charge of its executive office for the settlement of freight claims, was properly left to the jury, and that the jury has properly found its verdict upon all of the facts and circumstances of the case. Any other method of dealing would require a claimant against a railroad company to deal with its duly representative agent, at his hazard, or ascertain from the Board of Directors of the company, the exact authority of the person with whom he was dealing, regardless of appearances created by it, or its holding out. Such is not business custom or usage.

The cases submitted in defendant's brief are not cases of apparent agency but are cases where agency arises by a repeated course of conduct permitted by the principal. These cases do not come within the principle followed in the case of *J. Wiss & Sons Co. v. H. G. Vogel Co.*, 86 N. J. L., 621, above cited; nor the case of *Heckel v. Cranford Country Club*, 117 Atl. Rep., 607, above cited.

POINT III.

It is respectfully submitted that the Trial Court committed no error with respect to either of the two reasons assigned by the defendant for reversal; and that the Supreme Court erred in reversing the judgment in favor of the plaintiff; and that the judgment of the Supreme Court reversing the judgment of the Hudson County Court of Common Pleas in favor of the plaintiff, should be reversed, and the judgment of the Hudson County Court of Common Pleas should be affirmed, with costs.

Respectfully submitted,

GROSS & GROSS,
Of Counsel with Plaintiff-Appellant.

ISAAC GROSS,
Of Counsel.

New Jersey Court of Errors and Appeals

EMANUEL GROSS, Plaintiff-Appellant, <i>v.</i> NEW YORK CENTRAL RAILROAD COMPANY, Defendant-Respondent.	}	Action at Law. On Appeal from Supreme Court.
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BRIEF ON BEHALF OF NEW YORK CENTRAL RAILROAD COMPANY, DE- FENDANT-RESPONDENT.

Statement of Facts.

This suit was brought to recover losses alleged to have been sustained by plaintiff's assignor, the Southseas Import & Export Company, a New York corporation, as a result of damage to a certain shipment of honey. This shipment was delivered to the Southern Pacific Company at Yerington, Nevada, by the Hicks Sutherland Company during the month of October, 1917, for transportation to consignees in the East, and it was finally diverted to the order of the Southseas Company (Case, p. 28).

The suit was commenced on February 24th, 1921, or more than three years after said shipment arrived at its destination, and was tendered to the Southseas Company for delivery.

The second amended complaint contains three counts: the first count alleging breach of the con-

tract to transport safely; the second count alleging breach of defendant's duty as bailee of the goods, and the third count alleging a contract between defendant and the Southseas Company to settle the claim for damage for the sum of \$1,151.64.

The defendant pleaded that suit had not been instituted within the time required by the bill of lading under the terms of which the said property was transported and also a denial of the making of any contract to settle.

At the trial of the case and before the jury was impaneled, counsel for the defendant moved to strike out the complaint (Case, pp. 25-28) on the ground that the suit had not been instituted within time limited by the following clause contained in the bill of lading, which was read to the Court:

"And suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property or in case of failure to make delivery, then within two years and one day after a reasonable time for delivering had elapsed."

After argument of counsel, the Court struck out the first and second counts of the complaint as amended on this ground (Case, p. 28), but refused to strike out the third count, expressing the opinion that (Case, p. 28):

"Congress was only regulating the ordinary relationships that exist between transporter and shipper and that it did not undertake to restrain the legal rights of the railroad to enter into such contracts as it normally might, irrespective of the common function as a common carrier."

An exception to this ruling of the Trial Judge was duly taken, and is noted in the record (Case, p. 28).

The jury was then sworn and the case went to trial on the *third count alone*. The jury returned a verdict in favor of plaintiff on this count.

Defendant thereupon appealed to the Supreme Court upon the two following grounds:

1. The Trial Court erred in refusing to strike out the third count of the second amended complaint.

2. The Trial Court erred in refusing to direct a verdict in favor of defendant and against the plaintiff on the ground that the servants and agents of defendant with whom the alleged contract was entered into by the South Seas Import & Export Company were not authorized by defendant to make said contract.

The Supreme Court reversed upon the first ground alone, making no mention whatever, in its opinion, of the second ground. We will not, therefore, consider the second ground in this brief, although we believe that plaintiff failed to produce competent evidence that the servants and agents of defendant had authority to make the alleged contract of settlement, which they denied making, and that the Trial Court erred in refusing to direct a verdict in defendant's favor.

On this appeal plaintiff argues first, that the Supreme Court should not have considered the two year and a day limitation because the bill of lading was not marked in evidence; second, that the Supreme Court was in error in reversing the judgment and ordering the third count stricken out, and third, that the Trial Court did not err in refusing to direct a verdict in favor of defendant.

As we have remarked above, the Supreme Court did not consider this third point, and we are not considering it herein.

ARGUMENT.

I.

The bill of lading was properly before the Court.

1. When the motion to strike out the second amended complaint was made before the Trial Court, counsel for defendant read the clause in the bill of lading limiting the time within which suits might be brought. Counsel for plaintiff did not make the point that the bill of lading contained no such provision, or that the document from which the clause was read was not in fact the original bill of lading issued on the shipment in question, but argued *on the merits* the question of law thus presented. By such action and conduct plaintiff is now precluded from raising the point that the document which was under consideration by Court and counsel was not the proper document or was not subsequently marked in evidence.

2. In the first paragraph of the first count of its second amended complaint, plaintiff recites that a bill of lading was issued by the Southern Pacific Company and duly delivered (Case, p. 11).

3. In its reply to defendant's answer plaintiff admits that bill of lading contained the said limitation clause by its pleas in confession and avoidance.

4. Plaintiff's witnesses referred to the bill of lading in their testimony (Case, pp. 33, 39, 43, 47).

It is submitted, therefore, that the bill of lading was considered by the Trial Court in granting the motion to strike out the first and second counts and refusing to strike out the third count, without

any objection by plaintiff's counsel except upon the merits; that its contents were admitted by defendant in its pleadings; that it was considered by the Supreme Court in arriving at its decision; and that plaintiff cannot now be heard to object to its consideration on this appeal.

II.

The Supreme Court was correct in holding that the terms of the bill of lading were binding on carrier and shipper alike and barred the present action.

This shipment moved from Nevada to New York, was, therefore, interstate in character and was controlled by the provisions of the Interstate Commerce Act, as amended (Case, pp. 29, 39, 40).

In view of this testimony and of the pleadings, the statement in plaintiff's brief that there is no proof that the shipment was interstate in character, cannot be taken seriously.

Section 1 of the Act makes it the duty of all common carriers subject thereto to

"establish, observe and enforce * * * just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts and bills of lading."

Section 4 provides that every common carrier

"shall file with the Commission * * * schedules showing all the rates, fares and charges for transportation between different points * * *. The schedules printed * * * shall contain the classification of freight in force * * *."

Section 20 provides that

"any common carrier * * * receiving prop-

erty for transportation * * * shall issue a receipt or bill of lading therefor * * *."

The schedules filed by the Southern Pacific Company, the initial carrier in this case, and in force at the time the shipment in question moved, contained a bill of lading form, one of the provisions of which is as follows:

"* * * and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed." (See certified excerpt printed at end of this brief.)

Upon receipt of the honey for transportation the said Southern Pacific Company issued a bill of lading therefor which contained a provision similar to the above (Case, p. 11). By force of the filing of said bill of lading, the said clause became part of the statute law of the United States. *Pennsylvania Coal Mining Co., v. International Coal Mining Co.*, 230 U. S., 186, 197; 57 L. Ed., 1446, 1451; *Moore v. Duncan*, 237 Fed., 780, 782.

In the latter case the Court said (p. 782):

"A published tariff, so long as it is in force, has the effect of a statute and is binding on carrier and shipper."

That the Federal Government, by virtue of the Commerce Clause of the Constitution and the Interstate Commerce Act, has power to regulate and control all contracts between carrier and shipper regarding interstate transportation is a proposition that needs but to be stated. In the case of *Adams Express Co. v. Croninger*, 226 U. S., 491, 500; 57 L. Ed., 314, 317, the U. S. Supreme Court said:

"That the constitutional power of Congress

to regulate commerce * * * comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury, or damage to such property, needs neither argument nor citation of authority."

This clause in the bill of lading that suits for loss, damage or delay must be instituted within two years and a day from the date of delivery of the shipment was a part of the contract between the parties *which was the only contract of transportation that could legally be made*. By reason of this contract the carrier became *vested* with certain rights, one of which was that any suit to recover for damage to the shipment must be instituted within the time limited, and furthermore was bound to comply with its terms. No contract varying this limitation could legally be entered into.

What were the effects of the contract alleged in the third count of the complaint? If this judgment is sustained one of the effects will have been to permit the plaintiff to bring an action after the expiration of the two-year limitation. For although this suit is technically upon a contract to settle the claim, the damages collected will, *in reality*, result from the losses sustained on the shipment.

The Federal Supreme Court has held that the contract (*bill of lading*) cannot be avoided by the mere form of the action.

In *Southern Ry. Co. v. Prescott*, 240 U. S., 632, 60 L. Ed., 836, a shipment of freight had reached its destination; the freight was paid by the consignee, and he signed a receipt for the goods, but left them in the possession of the railroad company as warehousemen. While in the warehouse of the company, the property was destroyed by

fire and the consignee brought an action to recover its value. The plaintiff contended that the contract evidenced by the bill of lading did not cover the relations of the parties after the goods had been received in the warehouse of the railroad company, and that the State law with respect to the liability of common carriers when acting as warehousemen governed. The U. S. Supreme Court said:

“Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier’s service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term ‘transportation,’ and subjected to the provisions of the act respecting reasonable rates and the like. It is also clear that, with respect to the service governed by the Federal statute, *the parties were not at liberty to alter the terms of the service as fixed by the filed regulations*. This has repeatedly been held with respect to rates. * * * And as the terminal services incident to an interstate shipment are within the Federal act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations the conditions thus fixed are controlling, *and the parties cannot substitute therefor a special agreement*.

“In determining, in this view, whether the contract had been discharged, and the case removed from the operation of the Federal act, regard must, of course, be had to the *substance of the transaction*. The question is not one of form, but of actuality.”

In *D'Utassy v. Barrett*, 219 N. Y., 420, there was a limitation of liability based on a declared value. A servant of the railway company stole the goods in question and the shipper contended that "the limitation value should not be applied to any case of theft by the carrier's employees, for the reason that the company is liable for such acts as if the company had been the thief."

The Court of Appeals said (p. 426) :

"So long as the tariff based on value remained operative it was binding upon the shipper and carrier alike and was to be enforced by the Courts in fixing the rights and liabilities of the parties; that the question is not one of form but of actuality, *and that the effect of the stipulation cannot be escaped by the mere form of the action, the scope and effect of which is an action for damages against the carrier.*" (Citing *Great Northern Ry. Co. v. O'Connor*, 232 U. S., 508. *A. T. & S. F. Ry. Co. v. Robinson*, 233 U. S., 173. *Southern Railway v. Prescott*, 240 U. S., 632. *G. F. & A. Ry. Co. v. Blish Co.*, 241 U. S., 190.)

In the case of *Georgia F. & A. R. R. Co. v. Blish Milling Co.*, 241 U. S., 190; 60 L. Ed., 948, the shipper failed to file claim for loss within the time stipulated in the bill of lading and brought suit in trover alleging conversion of the property. At page 952 the Court said :

"As we have said, the latter (*i. e.*, the terminal carrier) takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms (*Kansas City, etc., R. R. Co. v. Carl*, 227 U. S., 639; 57 L. Ed., 683; *Southern R. R. Co. v. Prescott*, 240 U. S., 632; 60 L. Ed., 836); and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the

case of the terminal carrier, which, in the contemplation of the parties, was to make the delivery. * * *

"In this view, it necessarily follows that the *effect of the stipulation could not be escaped by the mere form of the action*. The action is in trover, but, as the state court said: 'If we look beyond its technical denomination, *the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.*'

"It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. *But the parties could not waive the terms of the contract* under which the shipment was made pursuant to the Federal Act, nor could the carrier *by its conduct* give the shipper the right to ignore these terms which were applicable to that conduct, and *hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations*. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed."

In the case of *A. J. Phillips Company v. Grand Trunk West. Ry. Co.*, 236 U. S., 662; 59 L. Ed., 774, plaintiff sued the carrier to recover excessive freight charges under a provision of the Interstate Commerce Act requiring that such suits be instituted within two years. Suit was not commenced until five years had elapsed, and defendant filed a demurrer. Plaintiff argued that a statute of limitations could not be taken advantage of on demurrer. In denying this contention, the Court said (p. 776):

"Under such a statute the lapse of time not only bars the remedy but DESTROYS THE LIABILITY * * *. The obligation of the carrier to adhere to the legal rate, to refund only what

is permitted by law, and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period * * * to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and to discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such result may be accomplished. The prohibitions of the statute against unjust discriminations relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defences open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here."

This case is cited in *Olivit Bros. v. The P. R. R. Co.*, 88 N. J. L., 241, 246.

In the case at bar the plaintiff had a right of action which he could assert against the carrier at any time within 2 years from the date of delivery of the shipment. This he did not do but allowed the period of limitation to lapse and his right of action thereby was extinguished. Likewise, the liability of the carrier was destroyed. He now seeks to enforce his claim by setting up a contract which enlarges and revives the liability of the carrier as defined by the terms of the bill of lading. Undoubtedly the railroad company can legally settle claims against it but it cannot make a contract which will vary its liability by extending the time within which suit may be brought. It is true that this is a different cause of action but its scope and effect, as was said in the *Barrett* case (*supra*), is an action for damages against the carrier. This alleged conduct of the defendant permits the shipper to ignore the contract of transportation and

hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs, which conduct is held illegal in the *Blish Milling Company* case (*supra*). Furthermore the parties are attempting to substitute a special agreement governing the liability of the carrier, which, as has been shown, is contrary to the Act.

The question of whether or not conduct on the part of the carrier and shipper violates the statute does not depend on the fact that an unlawful discrimination has been made but rather on the fact that *such conduct constitutes a device by means of which an illegal preference can be effected*. *N. Y., N. H. & H. R. Co. v. I. C. C.*, 200 U. S., 361, 391; 5 L. ed., 515, 521; *Armour Packing Co. v. U. S.*, 209 U. S., 56; 52 L. ed., 681, 691.

In the former case the Court said:

"The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to *every method of dealing by a carrier by which the forbidden result COULD be brought about*."

And in the latter case:

"It is not so much the particular form by which, or the motive for which, this purpose was accomplished, but the intention was to prohibit any and all means that MIGHT be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

Suppose that the agreement to settle, instead of being for a portion of the amount claimed by the shipper, as in the case at bar, was for the full amount. Surely such conduct by the carrier would, if legal, have the effect of extending for six years the time within which that shipper might sue to

recoup his losses. That the suit is based on a different cause of action does not affect the result obtained. If such a contract should be held not to contravene the statute it would open the door to numerous abuses and permit carriers to discriminate in favor of particular shippers. It would provide also a ready means by the carriers to give rebates to claimants by means of waivers of defenses and consent judgments.

It is submitted that the proper construction of such a contract is that it is a liquidation of the shipper's claim, and that suit may be brought upon it at any time within 2 years after the delivery of the shipment. Upon the expiration of that period the liability of the carrier for damage ceases. The shipper is barred of his rights just as completely as if he had failed to file his claim within the time required, and no action by the railroad company before or after can operate to extend or revive this right of action.

It is evident, therefore, that the terms of every bill of lading are controlled by the filed tariffs and schedules. These, in turn, are part of the supreme law of the land and both shipper and carrier are conclusively presumed to know their provisions. The marking in evidence of a bill of lading, or excerpt from the tariff, is merely for the convenience of the Court, similarly as in the case of any other Federal statute.

CONCLUSION.

The decision of the Supreme Court follows the United States Supreme Court authorities cited therein and should be affirmed.

Respectfully submitted,

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant-Respondent.

EUGENE H. VREDENBURGH,
Of Counsel.

APPENDIX.

INTERSTATE COMMERCE COMMISSION

Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached (consisting of two typewritten sheets) contain true and correct extracts from the schedules therein more particularly described, said schedules having been filed with the said Interstate Commerce Commission on dates specified in said papers, and the said extracts therefrom having been in force throughout the period October 1, 1917, to October 31, 1917, both dates inclusive.

IN WITNESS WHEREOF I have hereunto
set my hand and affixed the Seal of said
[SEAL] Commission this 5th day of October,
A. D. 1922.

GEORGE B. MCGINTY,
*Secretary of the Interstate
Commerce Commission.*

Extracts from The Western Classification No. 54, R. C. Fyfe, Agent, I. C. C. No. 12, said schedule having been filed on July 7, 1916, and the said extracts therefrom having been in force throughout the period October 1, 1917, to October 31, 1917, both dates inclusive.

Title Page

THE WESTERN CLASSIFICATION
No. 54

Applying on Freight Traffic covered by Tariffs
issued subject thereto.

Pages i—viii

THIS CLASSIFICATION IS FILED WITH THE INTERSTATE
COMMERCE COMMISSION BY R. C. FYFE,
CHICAGO, ILL., AS AGENT FOR THE
FOLLOWING LINES:

Southern Pacific Co. FXI No. 27

Extracts from Supplement No. 5 to The Western Classification No. 54, R. C. Fyfe, Agent, I. C. C. No. 12, said schedule having been filed on November 29, 1916, and the said extracts therefrom having been in force throughout the period October 1, 1917, to October 31, 1917, both dates inclusive.

Page 15

UNIFORM BILL OF LADING

Straight Bill of Lading—Conditions.

Sec. 3.

Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export), or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed.

[659]

