Record No. 1653

In the Supreme Court of Appeals of Virginia at Richmond

VIRGINIA ICE & FREEZING CORPORATION, A CORPORATION,

v.

MARY A. COFFIN

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK.

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 1653

VIRGINIA ICE & FREEZING CORPORATION, A CORPORATION, Plaintiff-in-Error,

versus

MARY A. COFFIN, Defendant-in-Error.

PETITION FOR WRIT OF ERROR AND *SUPERSEDEAS.*

To the Honorable Justices of the Supreme Court of Appeals of Virginia:

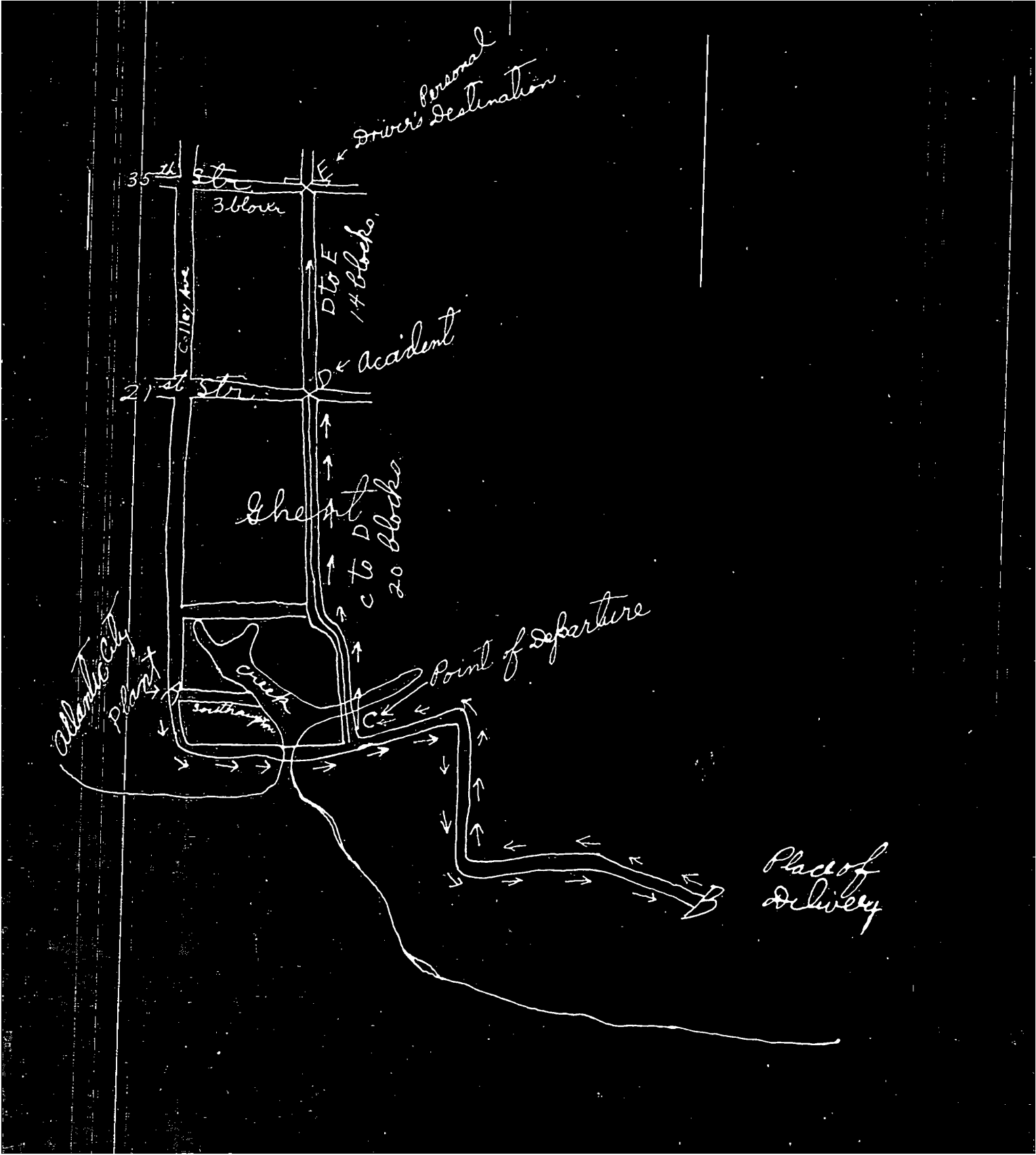
Your petitioner, Virginia Ice & Freezing Corporation, defendant in the court below, respectfully represents that it is aggrieved by a final judgment rendered against it in the Circuit Court of the City of Norfolk on January 24, 1935, in favor of Mary A. Coffin in the sum of Three Hundred Sixteen Dollars and Thirty Cents ($316.30) and costs, with interest from the date aforesaid.

FACTS.

The case was submitted to the trial court on an agreed statement of facts, a jury being waived. For a concise statement of the facts herein, this Court is respectfully referred to the said "agreed statement of facts", record, page 6.

Petitioner's assignment of error is that the trial court erred in refusing to strike out plaintiff's evidence and in entering final judgment for the said plaintiff, Mary A. Coffin. The correctness of the trial court's judgment depends upon whether there was any evidence justifying the imposition of liability upon the defendant for the negligent act of the truck driver, or whether the facts show as a matter of law such a departure by the driver from his duties as to cause his actions at the time of the accident to be beyond the scope of his employment.

The following diagram, showing the course followed by the driver, has been traced from the map made a part of the agreed statement of facts:


Driver's Personal Destination
35 st
E
3 blocks
Colloy Ave
D to E
14 blocks
Accident
21st Str.
Sheet
C to D
20 blocks
Atlantic City Plant
Creek
Southampton
Point of departure
C
B
Place of delivery

As shown by the diagram, the driver, when within one block of the York Street Bridge leading to defendant's plant in Atlantic City, instead of continuing on York Street across the said bridge to the plant, turned right on Botetourt, went across the Botetourt Street Bridge into Ghent, and continued in a direction opposite to his former and proper destination for a distance of twenty city blocks, at which point the accident occurred (the driver intending to continue fourteen additional blocks in the same direction), solely for the purpose of paying a personal bill at 35th Street.

Counsel submit that the case is governed by the rule of:

Cohen v. *Meador,* 119 Va. 429, 89 S. E. 876; *Kidd* v. *DeWitt,* 128 Va. 438, 105 S. E. 124; *Bivens* v. *Manhattan Car Corporation,* 156 Va. 483, 159 S. E. 395; *Sydnor and Hundley* v. *Bonifant,* 158 Va. 703, 164 S. E. 403; *Western Union Telegraph Company* v. *Phelps,* 160 Va. 674, 169 S. E. 574.

In the *Kidd case, supra,* it is declared that:

"Any driving for the chauffeur's own pleasure, at times, *or to places not authorized expressly or by implication, by the employer,* does not constitute driving for the employer, and an injury occurring while so driving will not bind the employer."

In the *Western Union* decision, *supra,* it is stated:

"If the servant step aside from his master's duty * * * to do an act not connected with such business, the relationship of master and servant is for the time suspended * * *."

"In cases of this nature a question of law and fact is presented, *which is to be determined by the court when the facts are not disputed or are conclusively proven.* Such cases are for the jury when the facts are disputed or the evidence is conflicting."

In the Cohen case, *supra,* the family returned from a trip in the father's automobile—the son let the family out of the car at the father's store and started with his two small brothers to put the car in the garage. On the way he met two friends and drove them towards West Norton where there was an accident. Verdict and judgment against the father *reversed.*

In the decision of *Kidd* v. *DeWitt, supra,* demurrer to the evidence was sustained where the chauffeur, with specific instructions to take passenger to point X and back, after reach-

ing X went on pleasure trip, the court citing with approval *Patterson* v. *Kates* (C. C.), 152 Fed. 481, where the driver was directed to bring the car to Philadelphia. He reached the Delaware River leading to Philadelphia and *took a third party a mile back on the road*—held that there was no liability on the master for an accident occurring.

In the *Bivens case, supra,* the only factual distinction between it and the instant case is that in the Bivens case the driver returned to the defendant's place of business but without stopping continued on his personal errand, while in the present case the driver came to within one block of the bridge leading to the defendant's plant and there turned in an opposite direction across the Botetourt Bridge into Ghent and proceeded on his personal errand of 34 blocks.

However, in *Sydnor and Hundley* v. *Bonifant, supra,* the driver, after completing his orders, drove to the corner of 7th Street (which was about half a block from the garage where he was supposed to place the car), and there turned and went across the river to get whiskey for himself. The jury's verdict for the plaintiff against the master was upheld only because there were admissions tending to contradict and discredit the above evidence sufficient to warrant the jury in disregarding it. Otherwise, it would have been held as a matter of law that the defendant was not liable.

See Mechem Outlines Agency, Third Edition—Liability of Principal—Section 523:

"It would still be a detour, rather than a departure, even though he chose the other street because he wished to do some errand of his own on that street upon the way, like stopping at his own house to leave a parcel, and the like * * *."

Section 524.—"If, however, in the case put, his house was *not upon any available and proper street to the station, but in an entirely opposite direction,* and he started in that *opposite direction for his own purpose,* that would be a departure, and for his negligence while it continued his master would not be liable."

Mechem cites with approval *McCarthy* v. *Timmins,* 178 Mass. 378, 59 N. E. 1038, 86 Am. St. R. 490, where the driver, on his way to the stable, *turned completely away* from the stable and went some distance in an *opposite direction in order to obtain a drink at a saloon. The court directed a verdict for the defendant.* (The facts of this case are practically identical with the one at bar.)

The instant decision is unlike the *Drake* v. *Laundry Corpo-*

ration, 135 Va. 354, 116 S. E. 668, where the driver was following a circuitous route *acquiesced in and consented to* by the defendant.

It is unlike *Elliott Trant Motor Corporation* v. *Brennan,* 161 Va. 140, 170 S. E. 601, where the deviation was never in fact made except to the extent of one block, this being negligible. It is unlike *Crowell* v. *Duncan,* 145 Va. 489, 134 S. E. 576, where the driver of a taxi was invested with certain discretion which left in doubt whether he was on the master's business. In the instant case the driver's authority is special, that is, limited to the particular delivery and return. He had neither express nor implied authority to embark on a trip of 20 or 34 blocks through Ghent to 35th Street on his personal business. In fact, his use of the truck for his personal use was prohibited.

In reply to opponent's contention that a jury question is presented, counsel stress the fact that the only purpose of submitting such cases to the jury is where the facts are disputed. Here they are admitted. The "Agreed Statement of Facts", submitted to the Court, itself declares that when the driver turned from the plant and went 20 blocks in the opposite direction in another portion of the city to pay his personal bill that this "had no connection with the master's business" and that the servant was "thereby abandoning the business of the master".

The driver, at the time of the accident, was driving in an opposite direction from the plant, in a portion of the city not authorized expressly or by implication by the said defendant, for the servant's personal purposes, and consequently beyond the scope of the driver's employment.

Your petitioner respectfully asks that it be granted a writ of error and *supersedeas* to the aforesaid judgment; that the case be reviewed and final judgment entered for the said defendant.

The record and exhibits in this case are attached to this petition and a copy of this petition was delivered to defendant-in-error's counsel February 28, 1935. Petitioner respectfully requests permission to present orally this petition.

This petition will be adopted as plaintiff-in-error's brief.

Respectfully submitted,

VIRGINIA ICE & FREEZING CORPORATION,
By EARL W. WHITE, Counsel.

I, J. Walter White, attorney at law, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that

in my opinion the judgment complained of in the foregoing petition should be reviewed and reversed by the Supreme Court of Appeals of Virginia.

Given under my hand this 1st day of Mch., 1935.

J. WALTER WHITE.

EARL W. WHITE,
FEREBEE & WHITE,
Counsel for Petitioner.

Received March 28, 1935.

M. B. WATTS, Clerk.

Writ of error granted and *supersedeas* awarded. Bond $500. April 9, 1935.

J. W. EGGLESTON.

Rec'd April 10, 1935.

M. B. WATTS, Clerk.

RECORD

VIRGINIA:

Pleas before the Circuit Court of the City of Norfolk, at the Courthouse thereof, on the 18th day of February, in the year, 1935.

BE IT REMEMBERED, that heretofore, to-wit: In the Circuit Court of the City of Norfolk, on the 8th day of October, 1934, came Mary A. Coffin the plaintiff in a certain warrant sued out by the said Mary A. Coffin against the defendants Virginia Ice & Freezing Corporation, and W. H. Bailey, and docketed her appeal from the judgment of the Civil Court of the City of Norfolk, on said warrant, rendered on the 15th day of September, 1934.

The following is the warrant above referred to:

Commonwealth of Virginia, City of Norfolk, To-Wit:

To the High Constable of said City:

I hereby command you in the name of the Commonwealth to summon Virginia Ice and Freezing Corporation, a corpo-

ration and W. H. Bailey to appear before the Civil Justice of the City of Norfolk, to try this warrant, in the City Building, 406 Plume Street, in said City, at 10 A. M. on the 15th day of September, 1934, to answer the complaint of Mary A. Coffin upon a claim for money, to-wit: for the sum of
page 2 } $601.85 due $101.85 due for damages done to plaintiff's car, $500.00 for damages sustained by plaintiff in traffic accident occurring at 21st Street and Colonial Avenue, City, on August 11th, 1934. Said accident being caused by negligence of defendant's driver. with interest thereon .....from the..... day of ..... 193.., until paid, and $..... protest fees; and $..... costs; and then and there make return of this warrant.

Given under my hand this 10th day of September 1934.

R. H. HOPKINS, J. P.

Mary A. Coffin

v.

Virginia Ice and Freezing Corp., a corporation and W. H. Bailey.

In Debt—Before the Civil Justice of the City of Norfolk, Va. on the 15th day of September, 1934.

Judgment is that the Plaintiff recover of the Defendant, W. H. Bailey only, $307.85, with interest from the 15th day of September, 1934, until paid, and $..... protest fees, and $8.45 costs due by ..... Upon a claim against which the homestead cannot be demanded.

REGINALD J. B. PAGE, C. J.

The following is the service made on the foregoing warrant:

State of Virginia,
City of Norfolk, to-wit:

page 3 } AFFIDAVIT.

Executed in the City of Norfolk, Virginia Sept 10 1934 by delivering a true copy hereof in writing to the defendant(s) W. H. Bailey in person. Further I am not a party to or otherwise interested in the subject matter in controversy.

CLAUDE R. HOGGARD.

Subscribed and sworn to before me on the 11 day of Sept. 1934.

My Commission expires 2-26-1938.

LILLIAN MARX,
Notary Public.

Service accepted for Va. Ice Freezing Corp.

EARL W. WHITE, Atty.

The following is the affidavit of Virginia Ice & Freezing Corporation filed with the foregoing warrant in the Civil Court:

AFFIDAVIT.

This day personally appeared before me, the undersigned, a Notary Public in and for the City of Norfolk, State of Virginia, W. C. French, Secretary and Treasurer of Virginia Ice & Freezing Corporation, the defendant in the above styled proceedings, who, being by me first duly sworn, made oath as follows:

That at the time and place alleged in the warrant for judgment, to-wit, 21st and Colonial Avenue, on August 11, 1934, the said defendant did not operate or control the automobile truck involved in said action nor was said automobile truck engaged in and about the business of said corporation.

VIRGINIA ICE & FREEZING CORPORATION,
By W. C. FRENCH,
page 4 } Secretary and Treasurer.

Subscribed and sworn to before me this 6th day of September, 1934.

MRS. E. M. GUSTIN,
Notary Public.

And at another day, to-wit: In the Circuit Court aforesaid on the 24th day of January, in the year, 1935:

This cause came on this day to be heard on an agreed statement of facts submitted by counsel for the plaintiff and defendant, which agreed statement of facts was introduced in Court and made a part of the record in this case.

Whereupon counsel for the defendant moved to strike the evidence on the ground that same showed as a matter of law that the deviation as evidenced by plat of the City of Norfolk, herewith attached, was so material and unusual as to render the defendant not liable for its driver's negligence, and the Court, being of the opinion that a jury should pass on the question as to whether or not the deviation in question is so unusual and material as to render the defendant in this case not liable for the negligence of its driver, doth accordingly overrule defendant's motion, to which action of the Court counsel for the defendant duly excepted, and it further appearing to the Court that counsel for the plaintiff

page 5 } and defendant have agreed that in the event the Court should overrule defendant's motion to strike the evidence, judgment should be entered in favor of the plaintiff for the sum of $316.30 with interest from the date hereof till paid and costs, judgment is accordingly entered for the plaintiff against the defendant in said amount.

And thereupon said defendant having signified its intention of applying to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the foregoing judgment it is ordered that execution upon said judgment be suspended for the period of sixty (60) days from the end of this term of the Court upon said defendant or someone for it, entering into and acknowledging a proper suspending bond before the Clerk of this Court in the penalty of Five Hundred ($500.00) Dollars with surety to be approved by said Clerk and with condition according to law.

And now at this day, to-wit: In the Circuit Court aforesaid, on the 18th day of February, 1935, the day and year first hereinabove written:

This day came again the parties, by counsel, and the defendant, Virginia Ice & Freezing Corporation tendered its Bill of Exceptions to certain rulings of the Court on the trial of the case, and it appearing to the Court that the said plaintiff has had reasonable notice in writing of the time and place application would be made for the signing of same, it is duly signed, sealed, and made a part of the record of this case,

page 6 } within sixty (60) days from the date on which final judgment herein was entered, to-wit: on the 24th day of January, in the year 1935.

The following is the Bill and Certificate of Exceptions filed by leave of the foregoing order:

DEFENDANT'S BILL AND CERTIFICATE OF EXCEPTIONS.

BE IT REMEMBERED that the following is a complete account and report of all of the testimony, evidence and exhibits, and all other incidents of the trial of this cause, tried in the Circuit Court of the City of Norfolk, Virginia before Honorable Allan R. Hanckel, Judge of said Court, together with all of the motions, objections and exceptions on the part of the respective parties thereto, the action of the Court in respect thereto and the exceptions of the respective parties as hereinafter shown.

The following is the Agreed Statement of Facts filed herein and made a part of the foregoing Bill of Exceptions.

AGREED STATEMENT OF FACTS.

The plaintiff secured a judgment in the Civil Justice Court of the City of Norfolk against the driver, Wyman Bailey, and said Civil Justice dismissed the cause of action against the principal, Virginia Ice & Freezing Corporation. Plaintiff appealed as to Virginia Ice & Freezing Corporation to the Circuit Court of the City of Norfolk and there secured a judgment the principal, Virginia Ice & Freezing Corpo-
page 7 } ration, in the sum of $316.30, which latter case was heard by the court, a jury having been waived on agreed statement of facts as follows:

Affidavit having been filed in due form, denying operation and control by the principal, Virginia Ice & Freezing Corporation, at the time the accident occurred, it is stipulated between counsel that the undisputed facts are as follows:

That one of the defendants, Virginia Ice & Freezing Corporation, operates an ice plant, situated on Southampton Avenue one block north of Front Street, in the City of Norfolk, Virginia; that on the 11th day of August, 1934, at 5:00 p. m., the defendant's driver was instructed to make a delivery at the Union Station, in the City of Norfolk, and return to the plant; that all drivers have blanket instructions not to use the defendant's trucks for their own personal use; that the usual course, and the only direct route, for the driver to have taken, is from the plant one block east to Colley Avenue; south one block to Front Street; east on Front Street over Atlantic City bridge connecting with York Street; east on York Street to Boush Street; south on Boush Street to Main Street; east

on Main Street to the Union Station, the place of delivery, and return to the plant by same route.

That said driver followed the aforesaid route, completed the delivery, and on returning by the aforesaid route to York and Botetourt Streets, then and there, instead of continuing on York Street over the Atlantic City bridge and west on Front Street, turned right on Botetourt Street over
page 8 } Botetourt Street bridge, drove north five blocks to Olney Road; west on Olney Road one block to Colonial Avenue, and turned north on Colonial Avenue and drove fifteen blocks to the intersection of 21st and Colonial Avenue, where the accident occurred, thereby abandoning the business of the master, and deviated from the usual and only direct route twenty city blocks. It was the intention of the driver to continue on Colonial Avenue to 35th Street, fourteen additional blocks, to pay a personal bill, which had no connection with the master's business.

The amount of damages in the sum of $316.30 is admitted and the defendant raised no question with reference to the negligence of the driver.

On the above agreed statement of facts, the court entered judgment for the plaintiff against the Virginia Ice & Freezing Corporation in the sum of $316.30, to which action of the court the defendant excepted.

The foregoing facts are true and correct.

PRESTON TAYLOR,
Counsel for Mary A. Coffin.
EARL W. WHITE,
Counsel for Virginia Ice & Freezing Corporation.

This cause came on this day to be heard on an agreed statement of facts submitted by counsel for the plaintiff and defendant, which agreed statement of facts was introduced in Court and made a part of the record in this case.

Whereupon counsel for the defendant moved to
page 9 } strike the evidence on the ground that same showed as a matter of law that the deviation as evidenced by plat of the City of Norfolk, herewith attached, was so material and unusual as to render the defendant not liable for its driver's negligence, and the Court, being of the opinion that a jury should pass on the question as to whether or not the deviation in question is so unusual and material as to render the defendant in this case not liable for the negligence of its driver, doth accordingly overrule defendant's motion, to which action of the Court counsel for the defendant duly excepted, and it further appearing to the Court that counsel for the

plaintiff and defendant have agreed that in the event the Court should overrule defendant's motion to strike the evidence, judgment should be entered in favor of the plaintiff for the sum of $316.30 and costs and interest from January 25, 1935, judgment is accordingly entered for the plaintiff against the defendant in said amount.

The defendant, Virginia Ice & Freezing Corporation, a corporation, duly excepted to the action of the Court in refusing to strike out the plaintiff's evidence and to the action of the court in rendering judgment for the plaintiff against the defendant for the reasons aforesaid.

I, Allan R. Hanckel, Judge who presided at the aforesaid trial, do certify that the foregoing is a true and correct account and report of all the testimony, evidence, exhibits and other incidents of the trial in this cause, with the exceptions and objections of the respective parties thereto as page 10 } herein set forth.

I do further certify that the attorneys for the defendant had reasonable notice in writing of the time and place of tendering this certificate and bill of exceptions, containing the account and report of the trial as aforesaid.

Given under my hand this 18 day of February, 1935, within sixty (60) days from the time at which the judgment complained of was rendered.

ALLAN R. HANCKEL,
Judge of the Circuit Court of the City of Norfolk, Va.

A copy—teste:

ALLAN R. HANCKEL, Judge.

The following is the Notice of Appeal filed herein with the Bill of Exceptions:

To Mary A. Coffin:

PLEASE TAKE NOTICE that on February 18, 1935, at 9:45 o'clock A. M., or as soon thereafter as the undersigned defendant can be heard, we shall present to Judge Allan R. Hanckel of the Circuit Court of the City of Norfolk, Virginia the defendant's bills of exceptions in the case of Mary A. Coffin, plaintiff, *v.* Wyman Bailey and Virginia Ice & Freezing Corporation, a corporation, defendants, together with a copy and report of all of the testimony, all of the evidence, and all other incidents of the trial of the cause, together with

all of the original exhibits a part thereto, for the
page 11 } authentication and cerification by the aforesaid
Judge of the said Court in accordance with the rules of the Supreme Court of Appeals of Virginia, and at the same time and place will present the same to and request the Clerk of the Circuit Court to make up the record for the purpose of presenting to the Supreme Court of Appeals of Virginia a petition for writ of error and *supersedeas* to the judgment rendered against the undersigned defendant in the aforementioned cause.

VIRGINIA ICE & FREEZING CORPORATION,
a Corporation, Defendant.
By EARL W. WHITE, Counsel.

Service accepted this 15 day of February, 1935.

MARY A. COFFIN,
By PRESTON P. TAYLOR,
Her Counsel.

page 12 } Virginia:

In the Clerk's Office of the Circuit Court of the City of Norfolk, on the 1st day of March, in the year 1935.

I, Cecil M. Robertson, Clerk of the aforesaid Court, do hereby certify that the foregoing transcript includes the papers filed, and the proceedings had thereon in the case of Mary A. Coffin, plaintiff, *against* Wyman Bailey and Virginia Ice & Freezing Corporation, a corporation, Defendants, lately pending in our said Court.

I further certify that the same was not made up, completed and delivered until the plaintiff had received due notice thereof in writing and of the intention of said defendant, Virginia Ice & Freezing Corporation, to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the judgment therein.

Teste: CECIL M. ROBERTSON, Clerk.
By MARGUERITE R. GRONER, D. C.

Fee for transcript $13.50.

A Copy—Teste:

M. B. WATTS, C. C.

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