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EXHIBITS.

NOTICE OF APPEAL.

Filed September 19, 1929.

To: Nicholas LaVecchia, Esq., attorney for plaintiffs.

Sir:

Take Notice That the defendant, Erie Railroad Company hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the Second Judicial District of the County of Essex rendered in the above-stated action on the 4th day of September, 1929.

HOBART & MINARD,
Attorneys for Defendant.

Service of a copy of the within hereby acknowledged this 19th day of September, 1929.

NICHOLAS LaVECCHIA,
Plaintiff's Attorney.

TRANSCRIPT OF CLERK'S DOCKET.

#25096

ANTHONY GALIOTO, and JOSEPH GALIOTO Ind. and trading as A. J. GALIOTO,
Plaintiffs,

vs.

ERIE RAILROAD Co., a corp. 60 Park Place, Newark,
Defendant.

In Tort.

PLAINTIFFS' COST.

Summons	2.10
Mileage	.24
Listing	1.50
Attorney's fees	23.43

DEFENDANT'S COST.

Bond	1.00
Transcript	1.50

Nicholas LaVecchia, plaintiffs' attorney.

Hobart & Minard (A. J. Kelly), defendant's attorneys.

1928

Dec. 7 A summons was issued returnable Dec. 18, 1928. The demand was $500.00. The summons was returnable as follows: I served the within summons Dec. 11, 1928, on R. A. Miller he being .....of the within named defendant by reading it to him and giving him a copy thereof.

HARRY H. KIBBEE,
Constable.

Dec. 13 A state of demand was filed. This was adjourned to Dec. 31, 1928, Jan. 8-15-22-29, Feb. 1-5-11-19-26, Mar. 5-12-26, Apr. 2-16-23-30, May 14-17, June 7th, 1929. This case was listed and called. The plaintiff and the defendant appearing this cause was heard at this time. The following was sworn as stenographer Woebse. The following witnesses were sworn on behalf of the plaintiff Joseph Galioto, Samuel Galioto, Chas. Voelnmy, Louis Brody. The following witnesses were sworn on behalf of the defendant Theodore Romaine, Chas. Boehner, Wm. C. Cowan, Frank Wolfee. The exhibits were: P. 1, Postal; P. 2, Freight bill; P. 3, Do.; P. 4, Bill of lading; P. 5, Do.

1929

June 7 Decision was reserved for briefs.

Sept. 4 Decision was announced and judgment entered as follows: Sept. 4, 1929. Whereupon it is on this day, by this Court considered and adjudged that Anthony Galioto and Joseph Galioto ind. and trading as A. J. Galioto, plaintiff, recover against Erie Railroad Co., a corp., defendant, the sum of Four hundred Sixty-eight Dollars and Seventy Five Cents damages and the cost of suit. (DND)

Sept. 19 A transcript of the docket page was issued. (PBS)

" 19 An appeal bond was filed. (DND)

" 19 A notice of appeal was filed.

Transcript of Clerk's Docket.

I, J. Edward DeLancy, Clerk of the District Court of the Second Judicial District of the County of Essex, do hereby certify that the foregoing transcript of the docket page #25096 is a true copy of the record of the proceedings in the matter wherein Anthony Galioto and Joseph Galioto individually and trading as A. & J. Galioto were plaintiffs and Erie Railroad Company was the defendant and that the judgment above set forth stands open and unpaid of record. In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Irvington, New Jersey, this 19th day of September, A. D. 1929.

J. EDWARD DELANCY,
Clerk.
(SEAL)

STATE OF DEMAND.

Filed December 13, 1928.

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE COUNTY OF ESSEX.

ANTHONY GALIOTO and JOSEPH GALIOTO individually and trading as A. & J. GALIOTO, *Plaintiffs,*	*In Tort.*
vs.	*State of Demand.*
ERIE RAILROAD COMPANY, a corporation, *Defendant.*	

The plaintiffs demand of the defendant the sum of Five Hundred Dollars ($500.00) for that:

On or about July 18, 1928, plaintiffs purchased from Bananas Sales Corporation, of New York City, the articles set forth in Schedule A annexed hereto and made a part hereof.

Plaintiffs are banana dealers, having their places of business in Bloomfield, N. J. The said Banana Sales Corporation delivered the aforementioned articles to the Erie Railroad Co., at New York City for shipment to the plaintiff at Bloomfield, N. J. The goods as delivered to the said defendant were in good and perfect condition. On or about July 18, 1928, plaintiff was notified of the arrival of said goods at the freight station of said defendant. Said defendant so negligently, carelessly and recklessly transported and delivered the goods aforementioned, so that said goods, upon arrival, were greatly damaged. By reason of the defendant's negli-

gence, carelessness and recklessness as aforesaid, the goods greatly depreciated in value to plaintiffs' damage. By reason of said damage due to defendant's negligence, carelessness and recklessness, plaintiffs lost the profits that they would have made if the goods had been delivered in perfect condition and asks special damages therefor. As a further result, plaintiffs were compelled to pay cartage, freight, labor of workmen, etc., on said goods, which cartage, freight and labor were a loss to them, for which they claim special damages.

SCHEDULE A.

Initial	Car No.	Grade	No. Bunches	Variety Bananas	Wt.	Per Cwt.	Amt.
URT	40774	Ripe 9s	276	Cuyamel	13980	3.00	419.40
		Rej. 9s	139		6120	3.00	183.60
							603.00
FGE	31279	Ripe 9s	263	Cuyamel	15000	3.00	450.00
		Rej. 9s	117		5340	3.00	160.20
							610.20

Judgment will be claimed in the sum of Five Hundred Dollars and.....cents ($500.00....) together with lawful interest and costs of suit.

NICHOLAS LaVECCHIA,
Attorney for Plaintiffs.

STATEMENT OF THE CASE.

(Certified copy of Transcript of Testimony, filed September 19, 1927.)

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE COUNTY OF ESSEX.

ANTHONY GALIOTO and JOSEPH GALIOTO individually and trading as A. & J. GALIOTO, *Plaintiffs,*

vs.

ERIE RAILROAD COMPANY, *Defendant.*

In Tort.

Irvington, New Jersey.
June 7, 1929.

Before:
HON. A. F. MINISI,
Judge.

Appearances:

Nicholas LaVecchia, Esq., attorney for plaintiffs, by Herbert Kuvin, Esq., of counsel;

Hobart & Minard, Esqs., attorneys for defendant, by A. J. Kelly, Esq., of counsel.

(H. Richard Woebse, stenographer, sworn.)

Mr. Kuvin: I offer in evidence a postal card, two freight bills and two bills of lading.

Mr. Kelly: No objection.

(Postal card received in evidence and marked Exhibit P. 1.)

(Freight bills received in evidence and marked Exhibits P. 2 and P. 3.)

(Bills of lading received in evidence and marked Exhibits P. 4 and P. 5.)

Joseph Galioto, direct.

JOSEPH GALIOTO, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Kuvin.

Q Mr. Galioto, you are in partnership with your brother Anthony Galioto, trading as A. & J. Galioto? A Yes, sir.

Q What business are you in? A In the banana business.

Q In what city? A Bloomfield.

Q What state? A Bloomfield.

Q No, what state, New Jersey? A New Jersey, right.

Q On or about July 17, 1928, did you purchase any bananas from anybody? A Banana Sales Company. I buy two cars of bananas. I go down to New York.

Q In the yard? A Down in New York.

Q Did you designate how these bananas were to be shipped? A I generally ship on the Lackawanna. Now the people say to ship the fruit—tell me to load on the Erie. I didn't want to load it. The reason was, every time I load on the Erie—

Mr. Kelly: I object to any reason why.

The Court: Objection sustained.

Q Tell us, were these goods shipped on the Erie? A Yes.

Mr. Kelly: The contract of carriage is admitted.

Q These goods were loaded on July 17th? A Right.

Q July 18, 1928? A July 17th, if I am not mistaken. Get them out on the 18th.

Q They were loaded on July 17th? A Yes.

Q I refer you to Exhibit P. 2 in evidence, which is a freight bill issued by the Erie Railroad Company to A. & J. Galioto and ask you if you paid for the freight on that? A Positively.

Q That bill calls for 380 bunches of bananas? A Right.

Q When was this car which is designated F. G. E. 31279 placed for unloading?

Mr. Kelly: Can he tell without referring to anything?

Q Can you tell without referring to the bill? A Yes, loaded off on the 18th.

Q On the next day, the 18th? A Yes.

Q What time of that day? A 11:45.

Q Where was that car placed? A On Bloomfield avenue.

Q What city? A New Jersey.

Q What city, not what state? What city, Newark, Bloomfield, Glen Ridge, or Orange? A Bloomfield avenue.

Q Bloomfield avenue in Bloomfield? A Yes.

Q When did you first get notice that this car was in Bloomfield? A Why, I just went down about a quarter after seven in the morning.

Q You went down where? A Right up in the freight yard.

Q What freight yard? A Right up on Bloomfield avenue, Bloomfield.

Q The Erie Railroad freight yard? A Positively. I got the number of the car. I looked around, no car there.

Q Quarter after seven? A Yes.

Q Why did you get there at that time? A I waited about a quarter of an hour.

Q Why did you go there a quarter after seven on the 18th? A To load off.

Q To load off? A To get them out of the car.

Q Why did you go there at quarter after seven. Why didn't you go at eleven? A I got the sales every morning. I have the sale of them goods.

Q Was the car to have been delivered to the Bloomfield avenue freight yard at seven or quarter after seven or was it not?

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

The Court: Objection sustained.

Mr. Kuvin: I withdraw the question.

Q Were you present when the order was made to load the cars, to load the bananas on the Erie cars? A Yes, sir.

Q Did you designate any time that the bananas were to have been delivered?

Mr. Kelly: I object, if your Honor please.

A Yes.

The Court: I will allow it.

Mr. Kelly: I think it is immaterial whether he designated it or not. He is bound by the terms of his bill of lading.

The Court: Does the bill of lading specify the time of delivery?

Mr. Kuvin: No, sir, if the Court please.

The Court: Objection overruled.

Mr. Kelly: I ask an exception.

The Witness: The bill of lading, positively.

Q What time did you designate and to whom did you designate the time for delivery? A Why, I generally come down around seven o'clock in the morning. That is the time.

Q To whom? A In New York, the man with the banana company. The name is Long.

Q Did you tell anybody from the Erie Railroad Company that they were to be delivered at that time? A I asked him, I don't want to load. They always bring them later, that fruit I have to sell early in the morning.

Q What kind of bananas? A Color fruit and rejects.

Q How many ripes, how many bunches, how much did they weight? A I don't know exactly after one year.

Q You don't remember? A No.

Q Did you get a bill for these bananas? A Yes.

Q Did you pay for them? A Yes.

Q Will you refer to these bills to refresh your memory as to how much you paid? A Yes.

Q Are these the bills that you received (indicating)? A Yes, and I paid before ten days, too.

Mr. Kuvin: I didn't ask you that. I ask that it be stricken.

Q What bananas did you buy? How many bunches? A Loaded on the same day.

Q Will you answer my question? What bananas did you buy? A Both cars on the same day.

Q Take one car at a time. Tell me what that one car contained and give me the car number. A 31279.

Q Is that the car number? A Yes.

Q How many bunches of bananas in that car and how much did you pay for them? A I paid $3 a hundredweight.

Q You said they were ripe bananas and rejects? A Yes.

Q How many bunches ripes and how many bunches of rejects in that car? A 263 bunches of ripes and 117 bunches of rejects.

Q Now, Mr. Galioto, what kind of bananas are known as rejects? A Well, this means the colors.

Q What do you mean the colors, ripe, green or over-ripe? A It might be some ripe.

Q The rejects are color fruits? A The ripe mean the color fruit. You cannot ship far away on account of next morning delivery.

Q That is the ripes? A Yes.

Q What would be the rejects? A The rejects would be some broken bunches. A few fingers out of the hand.

Q Are they ripe, green, or over-ripe? A Very little green, little bit of color, ripe, color, everything.

Q These bananas, were they all ripe, I am talking about the ripes that you purchased? A Yes.

Q Were they ripe or over-ripe? A When I load them, they got color. When I get out the next morning, the time I get them, a little bad, too much bad, the reason I have to use the next day.

Q You said before that you called at the Bloomfield freight yard at a quarter after seven on the morning of July 18th? A Right.

Q Did you find both of your cars of bananas there? A No.

Q What did you do then, what happened? A I waited about half an hour for the train to bring around. After half an hour I don't see nobody. I have to wait until freight office opens. I go to East Orange where the freight office should be. I ask "Where is my car?"

Q Whom did you ask? A One of the East Orange branch.

Q In the freight office at the East Orange Branch? A It was after eight o'clock.

Q What did you do then? A They say they don't know nothing about it.

Q Did he do anything? A He say he try to do something, to see where is the car.

Q What did he do? A He tried to get them out. I don't see after that. I called to New York.

Q Whom did you call? A The people who ship them, the Banana Sales.

Q Then what happened? A I asked, "Where is my bananas? I no got them." He says, "You never got them yet? You call in about ten minutes." I called Long. He called back. He says, "I see you got the cars no before nine o'clock, because there be some mistake." That is the truth.

Q When did you get the car? A The car delivered at 11:45.

Q Was the car put right on the siding so that you could unload it? A No, he came in at 10:15 or 10:30, put alongside, he came back and backed in. I had four trucks there.

Q These four trucks were waiting how long? A Quarter after seven until eleven forty-five.

Q You say they backed the cars on the siding at ten-thirty? A Put the car on one side at ten-

thirty, right at Bloomfield avenue and Bloomfield, only I can't unload them.

Q What did you do about it? A I went back to East Orange again. In East Orange was a little crippled fellow. I don't know his name. I told the lame fellow. He told that fellow, "Why don't you push your cars a little more?"

Q He went up to Boomfield with you, this lame fellow? A Yes.

Q He told the engineer? A He told the engineer—

Mr. Kelly: I object to any conversation that may have taken place between this man and an agent of the railroad, if he is an agent, or between the man from East Orange and any engineer. I think it is outside of the scope of this case.

(Argument on objection made by Mr. Kelly.)

The Court: I will allow the question.

Mr. Kelly: Exception.

Q What did the engineer do after this lame fellow told him? A He can't do it; the reason he has something else to do.

Q Were the cars pushed? A The cars on one side he can't back to the track and can't get them out.

Q How did you get this fruit out of the cars? A Well, we had to wait, that is the reason I got them at 11:45.

Q Who waited, you waited? A I waited there.

Q Then did the engineer come back and push the cars on the siding? A There was somebody else.

Joseph Galioto, direct.

Q Did he push the car so that you could unload it later? A Yes.

Q That was at 11:45? A Yes.

Q That you opened the cars? A Yes.

Q Who was there when you opened the cars? A Myself and my driver.

Q Was there anybody there from the railroad company? A No.

Q How was the fruit when he opened the cars? A The fruit is not right.

Q What do you mean, not right? A Pretty bad shape; the way I unload them the first day we find in pretty bad shape. I don't find right shape.

By the Court.

Q This was in July? A Yes.

Q These were not refrigerator cars? A No, ventilators in the car, the air goes right through.

Mr. Kelly: That is what it says on the bill of lading, ventilators all open.

By Mr. Kuvin.

Q What did you do, did you unload these bananas? A Yes.

Q Then did you sell them? A Can't sell them that day, I lost my sales.

Q Why? A Because it comes too late. You have to buy after 12 o'clock; the time I get them in the store I am after 12.

Q How was the weather that day? A July is pretty bad.

Q Was it cold or hot? A Hot, you can't stand anywhere.

Q What did you do with the bananas when you unloaded them from your truck? A I put them in the store.

Q After that what did you do with them? A The next morning sell them.

Q Whom did you sell them to? A Anybody that come in.

Q What was the market price for bananas, for ripe bananas?

Mr. Kelly: I object, if your Honor please; I do not think that is the proper way to prove the market price of the bananas on that day.

Mr. Kuvin: I will qualify him.

Q How long have you been in the banana business, Mr. Galioto? A Twenty-eight years.

Q Wholesale banana business? A I started with a push-cart first.

Q How long have you been in the wholesale business? A Wholesale about twenty years.

Q Buying and selling bananas? A Yes, sir.

Q How many bananas, or how many carloads of bananas do you buy and sell a year? A About 250 cars.

Q Do you sell them all? A Positively. I can't eat them.

Q Do you sell them all wholesale, all retail or both? A All sale.

Q All wholesale? A Yes.

Q What was the market price for bananas for resale on July 18th? A Well, you have the condition of the fruit.

Q Well, the bananas that you purchased from the New York Banana Sales Company? A My price $3 per cwt.

Q What did you sell them for? A What I sell them for?

Q Yes. A What you could get for them, the reason why, the condition was bad the day after.

Q You don't understand me, Mr. Galioto. What was the price of bananas for sale by you of the type of bananas that you purchased, not what you sold? A Oh, you mean I can't say I paid more or not?

Q What you would get for these bananas on the open market, what was the market price? A I got the lowest—

Q I am not asking you what you sold bananas for? A Because you have to sell them?

Q Listen to me. I am not asking you how much you got for these bananas. What I am asking you is this: now listen. A Yes.

Q What was the market price for bananas such as you bought, in good condition that day? A Well, I get some bunch $3, some bunch $2; it all depends on the size of the bunch. Probably some bunch you could get $5.

Q You bought them by the hundred weight or by the bunch? A By the weight.

Q You bought them by the weight? A Yes.

Q What is the average weight per bunch? A Well, average weight pretty near about 60 pounds, the average, some 80, some 90; average around 60.

Q How many bunches did you have in both cars? A I have to look around. I don't remember exactly after one year. I have to look around.

Q Did you make a list of the bunches that you took out of your cars? A Yes.

Q Have you that list with you? A Yes.

Joseph Galioto, direct.

By Mr. Kelly.

Q Did you make the list yourself, Mr. Galioto? A Yes.

Q All right, refer to it? A Yes.

By Mr. Kuvin.

Q Can you tell us how many bunches you had? A You want to see the amount of the bunches I sold?

Q How many bunches did you have? A I had 380 bunches in the one car.

Q What did you sell those bunches for, the ones you took out of this car? A 380 bunches.

Q Did you get one price for each bunch? A No, you can't sell them by the bunch.

Q Why? A Every one is too ripe; you have to give them away to the peddler.

Q Now I am going to ask you something, Mr. Galioto, what caused that fruit to become overripe, if you know?

Mr. Kelly: I object.

Q Do you know what caused that fruit to become overripe? A Yes.

Q What caused that fruit to be overripe?

Mr. Kelly: I object. I think it is calling for a conclusion.

The Court: Every expert, when he testifies, uses conclusions, the conclusions which are the results of his observations. I will allow the question and grant you an exception.

Mr. Kuvin: I will withdraw that question and straighten out the proposition on rejects.

Joseph Galioto, direct.

The Witness: Ripe, everything a little bit of color, probably one-half of the bunches of bananas.

Q The whole bunch is called ripe? A That is the reason you can't ship them far away, can't take them in two days.

Q Coming back to that former phase of the case, Mr. Galioto. A Yes.

Q You saw the bananas when they were loaded? A Yes.

Q You saw the bananas when they were unloaded? A Yes.

Q You said that the bananas were overripe when they were unloaded? A Yes.

Q Now, from your experience, what would you say was the cause of those bananas being overripe? A Well, there would be a lot lost on them.

By the Court.

Q Why were they overripe? A Because they stand six hours on the train or more on the delay. That is why they were overripe, they were burned.

By Mr. Kuvin.

Q Tell us how you sold these bananas and what you obtained for them, what price you obtained for them? A That is the price I got for them?

Q Yes. A Colors and half colors?

Q Yes. A 65 bunches at 90 cents a bunch; sell 8 bunches for $1.10; sell 18 for 75 cents; sell 11 for 85 cents. Sell 22 for 60 cents. Sell 16 for $1.40; sell 33 for $1.10. 5 bunches for 95 cents a bunch. 28 bunches for 80 cents.

9 bunches for $1.25. 6 bunches $2.45 a bunch. 4 bunches—wait a minute, see if I got the right line. I have 4 bunches, I think 6 bunches there was, $1.25.

By the Court.

Q Instead of 9 bunches? A Yes.

Q 9 bunches at $1.25? A Start them again, please. 65 bunches at 90 cents. 8 bunches at $1.10. 11 bunches at 75 cents. 12 bunches at 85 cents. 16 bunches at 60 cents. 33 bunches at $1.40. 5 bunches at 95 cents. 28 bunches, 80 cents. 9 bunches, $1.25. 6 bunches $2.25. 2 bunches, $2.45 a bunch. 14 bunches 75 cents. 10 bunches, $1.15. 7 bunches $2.75. 3 bunches, $1.35. 4 bunches, $2.47½. That is one car, number of the car, 31,279, 380 bunches, if I didn't make a mistake.

The Court: What was the other car? You had better read it, Mr. Kuvin.

Mr. Kuvin: 40 bunches at 77 cents. 25 bunches at $1.05. 60 bunches at 70 cents. 20 bunches at 65 cents. 15 bunches at $1.15. 25 bunches at 85 cents. 45 bunches at $1.50. 16 bunches at $1.35. 30 bunches at 55 cents, making a total realized on that car, which is No. 40,774, of $265.

By Mr. Kuvin.

Q How much did you sell the fruit from Car 31,279 for? What was the total you got for all the bunches on that? A $280.

Q Now Mr. Galioto, did you pay the freight bill? A Yes, sir.

Q How much? A Well, the full amount.

Q How much? A 21 cents a hundred pounds.

Joseph Galioto, direct.

Q Have you the bill there? A Yes.

Q How much did you pay the full amount of the freight bill? A On the one car? $43.73.

Mr. Kelly: It is in evidence.

Q What is the amount on the other one? A $43.22.

Q Did you have anybody sort out this fruit after it was delivered to your place? A No.

Q Can you tell us how much of this fruit was damaged? A Well, that is damaged, that is what I got it.

By the Court.

Q Did you sell it all? A I sold it.

Q How about the rejects? A Well, I have to sell them on the same time, the reason why—

By Mr. Kuvin.

Q I notice that on car 31,279 you show a total of 263 bunches. A Yes.

Q That pertains to the ripes which were loaded on that car; and on car 40,774 you show a total of 276 bunches which also pertains to the ripes. Did you have any losses on your rejects? A No.

Q Your rejects were O.K. in both cars, so you are not claiming anything on the rejects, merely claiming it on the ripes? A Yes.

Q If those cars were delivered at the siding at 7:45 A. M. that morning of July 18th, in your opinion as an expert, would you have had this loss?

Mr. Kelly: I object if your Honor please, to the form of the question.

The Court: Objection sustained.

Mr. Kuvin: May I have an exception?

The Court: Yes.

Cross examination by Mr. Kelly.

Q You purchased the bananas from the Banana Sales Company of New York? A Yes.

Q Where are they located? A Located?

Q Where is their place of business? A You mean our place?

Q No, the Banana Supply Company place. A The business, Pier 26, East River.

Q They loaded these cars and shipped them on over to you? A Yes.

Q They were loaded on July 17th? A Yes.

Q You got them at 11:45? A The 18th.

Q On July 18th, is that the date? A Yes.

Q When you were down there in the neighborhood of 10:30 o'clock, where were these cars then, cars No. F.G.E. 31279 and U.R.T. 40774, were they by Watsessing avenue? A No, they were at Bloomfield avenue.

Q At Bloomfield avenue at ten-thirty? A Yes.

Q You couldn't get in with your trucks? A Yes.

Q Were there other cars attached to these cars? A A couple of cars.

Q Were you there then when the engine came up and proceeded to back up nearer to Bloomfield avenue? A 10:30.

Q At 11:45 you started unloading? A Yes.

Q How long in your estimation can a ripe banana stay penned up before it becomes overripe? A It depends on the weather.

Q It may be one day or two days? A It may be after two hours.

Q After two hours the banana might go? A Yes, on account of the weather.

Q A ripe banana? A Yes.

Q Then of course the rejects, would the same thing apply to rejects? A Positively. Even the heat that you get on the green fruit usually go right through on the green fruit even in the cellar in the same way when it is heat there.

Q So that it may very well be that ripe fruit can decay within two hours? A Well, two hours, they stand all packed together, you see, packed together.

Q The price that you got for the bananas as you sold them, did that price vary according to the size of the bunch? A On the size, and the size fruit is not worth any more. That is what I consider them worth; what I sell them for; I cannot get any more. No, I try to sell for nothing?

Q You refer to 65 bunches at 90 cents. That would be a much smaller bunch than you got $1.10 for? A I don't know. It was damaged—more damaged, more ripe than the other. When bunch is small you can get more money than a bunch is big. A big man always fall before the little man.

Re-direct examination by Mr. Kuvin.

Q This time set on these papers at 10:45, was this daylight saving time, or railroad time? A Which one?

Q July 18, 1928, 11:45 A. M., was that railroad time? A No. How they going to be right the time they give it to me?

SAMUEL GALIOTO, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Kuvin.

Q Mr. Galioto, are you a member of this firm, or are you just working for them? A I was working for them at the time.

Q Where do you work now? A Same place, truck driver.

Q Do you work for Mr. Galioto? A I am a partner now.

Q You are what? A I am a partner now.

Q You were not a partner then? A No.

Q On July 17, 1928, were you over in New York with Mr. Galioto, who just testified, to see these bananas? A No.

Q What do you know about this case? A Well, I know from the time of unloading the bananas.

Q Were you down there with the truck? A I was at the freight yard.

Q What time did you get to the freight yard? A About seven to half-past seven. We had four trucks there.

Q In the morning or evening? A The morning.

Q Of what day? A I don't remember the date. We were to have two cars of bananas.

Q What freight yard were you at? A Bloomfield avenue.

Q Bloomfield avenue? A Yes.

Q What city? A Bloomfield.

Q And did you see the cars there when you got there? Did you do any unloading there right away? A At what time?

Q When you got there? A No, sir.

Q What did you do? A Just waiting around for about half an hour or an hour. We went back down to the house.

Q Did you complain to the Erie? A I did. We had a couple of drivers remain at the yard waiting for the cars, and I called up the Erie at East Orange.

Q You called them up? A I did once. Once my uncle did.

Q Did you call up the Erie Railroad? A The Erie Railroad in East Orange.

Q Did you talk to anybody there? A I talked to the agent.

Mr. Kelly: I object. He does not know to whom he was speaking, unless he can identify him.

The Court: I will allow the question.

Mr. Kelly: Exception.

Q Did you talk to anybody? A Yes.

Q On the telephone? A Yes.

Q Whom did you talk to? Did you talk with the freight agent? A With the freight agent.

Q Did he say he was the freight agent? A Yes; I asked the girl there. She said she would put him on the wire.

Q You got the girl first, and she put him on the wire? A Yes.

Q Did he give you his name? A No.

Q What did you say to him? A I told him about the two cars that were supposed to come in that morning.

Q What did he say? A He says he don't know much about it.

Q What did you do after that telephone conversation? A I came back. I went back to the house. I called up New York.

Q Whom in New York did you call up? A I can't recollect; it was someone in regards to the shipment there.

Q You mean the Banana Sales Company? A The Banana Sales.

Q Did you talk to anybody from the Erie in New York? A I didn't speak to anybody from the Erie.

Q After that conversation, what did you do? A I went up to the freight yard again.

Q What freight yard? A Erie Railroad.

Q In Bloomfield? A In Bloomfield.

Q Or in East Orange? A Bloomfield, Bloomfield avenue.

Q Then what did you do? How long did you stay there? A We waited there until about half-past ten and a little before half-past ten I went back to the house and called up the Erie in East Orange again.

Q Did you talk to the same fellow? A The same fellow. He said he was coming down.

Q Coming down where? A To the freight yard.

Q Did somebody from the Erie come down to the freight yard? A Yes.

Q Who was it, do you know? A I don't recall.

Q Do you see him in the court room here today? A I don't think so.

Q Was there anything peculiar about him, his physical makeup? A Well, I know one freight agent here, but I don't think it was he that was there that day.

Q What happened after he came down to the Bloomfield freight yard? A This fellow, he went back to the yard then and tried to get somebody.

Q Did you go with him? A No.

Q He went away again? A Yes.

Q Did he come back? A Not until about, about, I suppose, eleven o'clock.

Q He came back at eleven? In the meantime were the cars put on the siding at that freight yard? A No, not yet. About half-past nine or a quarter to ten I seen the two cars. They were drilling with the engine about a quarter of a mile away from there in the Edison or Chevrolet factory yard.

Q What happened, were there any other cars with these two? A There were other cars, merchandise from the factories they were drilling. That agent knows about it.

Q Which one? A The Erie agent.

Q From what station? A From the Erie station.

Q What station, Bloomfield or East Orange? A East Orange.

Q You called them up again? A Yes.

Q Did you see these two cars up there? A Yes.

Q What happened? A He came down and he, I suppose he sent somebody down there and told the engineer about it. He backed the two cars up special.

Q They then brought the two cars up to the siding? A Yes, but they didn't place them correctly, because we—

Q In other words, they did not spot them? A Yes.

Q Then what did they do? A After we told the agent again he went back to the office. I think he had seen the bill—

Mr. Kelly: I think he is going too far afield, what he thinks.

Samuel Galioto, direct.

Q Did you get in touch with the agent again? A Yes.

Q What happened? A He went and told the engineer.

Q Were you there when he went to the engineer? A Yes, I was there, right around the yard.

Q Did you see him go over to the engine? A No, he went there himself.

Q Did you see him go there? A I saw him go away. He left the yard.

Q Where did he go? A We remained in the yard. He went to the engineer.

Q How do you know that? A Because I seen the engine come back after fifteen minutes.

Q Did he come back with the engine, did the agent come back with the engine? A Not that I know of. I was around there a little while after.

By the Court.

Q He asked you a simple question, if the agent came back with the engine. It is either yes or no. A No.

By Mr. Kuvin.

Q Was the agent there when the engine came back? A Yes.

Q Then were the cars spotted so that you could unload them? A Yes.

Q What time was that? A A little after eleven o'clock.

Q I show you on Exhibit P. 2 and Exhibit P. 3 notations marked "Placed on Bloomfield avenue at 11:45 A. M., 7-18-28, S. Baldi." Do you know who that was that signed that? A Yes.

Samuel Galioto, cross.

Q You saw the man sign this? A Yes.
Q Who was that? A That man right there (indicating).
Q Is he the agent? A Yes.
Q Up in Bloomfield? A Yes.

Cross examination by Mr. Kelly.

Q You say you saw the cars about a quarter of a mile from Bloomfield avenue? About how many were there in the train? A There was about, I can't judge—I don't know how many there were on the train. I recognized the cars.
Q Did you recognize them by the numbers? A No, sir.
Q How did you recognize them? A By the ventilators.
Q What was distinguishing about the ventilators to you? A They were open.
Q How far away from Bloomfield avenue were the two cars at that particular time? A Well, I can't say, about a quarter mile away. I would say about ten blocks.
Q That is on a slight upgrade there, isn't it? A Where at?
Q Up by the Chevrolet place. A Well, it was by the main track where it was drilling.
Q Isn't the track on a sort of an upgrade? A Yes, on an upgrade.
Q From Bloomfield avenue it goes up over to the Chevrolet place? A Yes.
Q You say that there were a number of cars on the train? A Yes.
Q Among them were the two cars you were interested in? A Yes.
Q What time of day was that? A Well, it was from the beginning. We went up there in the morning. When I seen the cars, you mean?

Q Yes. A It was about quarter to ten.

Q And the locomotive was drilling? A Drilling with them two cars.

Q Finally the locomotive brought the two cars down to Bloomfield avenue? A Bloomfield avenue.

Q They were unloaded at 11:45? A Yes.

Q You were there when they unloaded them? A Yes.

CHARLES BALDI, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Kuvin.

Q Mr. Baldi, I show you Exhibit P. 2 and Exhibit P. 3 and ask you if those signatures C. B. are your signatures? A No, sir.

Q They are not? A No, sir.

Q Do you know whose signature that is (indicating)? A Yes.

Q Whose is it? A A man by the name of Shelton.

Q He is your assistant? A He worked there. He partly works at my station and partly in Orange.

Q This handwriting "Placed on Bloomfield avenue at 11:45" and the date and "received payment" is also in his handwriting? A Yes, I don't know about the "received payment." This party here is Smith. This here (indicating) I believe is B. S. I sent him down to inspect the cars.

Q You sent him down at the time the cars were down at the siding? A Yes.

Mr. Kelly: No cross examination.

LOUIS BRODY, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Kuvin.

Q Mr. Brody, by whom are you employed? A Banana Sales Corporation.

Q How long have you been employed by them? A Nine years.

Q In what capacity are you employed by them? A Loading supervisor.

Q Were you loading supervisor of these two cars in question in this case? A I was.

Q The two Galioto cars on the Erie Railroad on July 17th? A Yes, sir.

Q What was the condition of these bananas as you loaded them? A Ripes and rejects as we call them.

Q What do you mean by ripes? A Anything not fit to be shipped any long distance.

Q What do you mean by rejects? A Undergrade bunches.

Q What do you mean by undergrade? A Thin, broken and missing hands.

Q Is there any peculiarity as to color coming within the classification of rejects? A Not when we specify ripes in the car. Rejects are all green.

Q When you stated that ripes are bananas that are not fit for a long haul, what do you mean by a long haul? A Well, anything over the first morning delivery.

Q Anything over the first morning delivery? A Yes.

Q What time of the day was it that you loaded this car and sealed it ready for delivery? A I didn't seal it.

Q Who sealed it? A The railroad seals it.

Q And what time did you load this car, do you recall? A I started loading one car as soon as the gang started to work.

Q What time did you finish loading it? A I don't recall that.

Q Do you know who the railroad signer was in this particular case? A I do not.

Q If I show you the bill of lading, could you tell? A I know him by sight. I don't know his name.

Q Is he in court here today? A Yes.

Q Who is Mr. Volny? A He is a checker.

Q What do you mean by "checker"? A He signs the bill of lading for the railroad.

Q He was employed by whom at that time? A The Erie Railroad Company.

Q Is he the one who signed the bill of lading? A Yes.

Q When is the bill of lading signed, after the cars are closed and sealed or at the closing and sealing of the cars? A That I don't know. I am not up in the office.

Q Now, were the bananas in these cars in an overripe condition at the time they were shipped or loaded by you? A No.

Q They weren't? A No, not overripe.

Q If these bananas were delivered at the siding in Newark the following day, would you say that those bananas would become defective by virtue of a two-hour or a three-hour holdover?

Mr. Kelly: I object to the question.

Mr. Kuvin: I withdraw it.

Mr. Kelly: No cross examination.

If your Honor please, I move for a non-suit at this time on the following grounds:

First, the two shipments, that is, shipment in car F.G.E. 31,279, containing 380 bunches of bananas and shipment in car U.R.T. 40,774, containing 415 bunches of bananas, moved from Pier 26 East River, New York, having been loaded by the Banana Supply Company. They were loaded, as the testimony is given, sometime late in the afternoon of July 17th. They arrived and were delivered the following morning of July 18th, so I say that the defendant in this case is not responsible for any damage that may have occurred to the shipment en route unless it is shown that the damage complained of was caused by the negligence of the defendant;

Secondly, giving the broadest interpretation we can to the evidence, assuming, but not admitting, that the contract was made whereby the cars were to be delivered at 7 o'clock, that contract is not binding on the defendant railroad company;

Thirdly, according to the bill of lading, Section 2-A, "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch." That applies to F.G.E. 31,279 and car No. U.R.T. 40,774. The bill of lading, Section 2-A, is identical.

The second point of the third ground is that if any agent or supposed agent of the railroad company entered into a contract whereby these particular cars were to be delivered in any other manner than as prescribed in the bill of lading, it must be shown there was a special contract and there was

a consideration for that contract. Otherwise they are violating the Interstate Commerce Commission ruling which says that no undue preference can be given to any particular shipper. In other words, the railroad company is bound only by the bill of lading.

(Argument on motion made by Mr. Kelly.)

The Court: I will deny the motion.

Mr. Kelly: Exception.

DEFENDANT'S PROOFS.

THEODORE ROMAIN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Kelly.

Q Were you employed by the Erie Railroad Company as conductor during the month of July, 1928? A Yes, sir.

Q What was your run, Mr. Romain? A From Croxton to Great Notch.

Q What time of day was that? A We used to leave there around 7 o'clock in the morning.

Q Is that the first train out? A That is the first train out.

Q Did you, during July, 1928, have any night train running out from Croxton to Great Notch? A Not that I know of.

Q What time would you go on duty? A On duty at 6 o'clock.

Q 6 o'clock at night? A 6:15 in the morning.

Q Does that branch you were on lead to Bloomfield avenue, Bloomfield? A No, sir.

Theodore Romain, cross.

Q It has a spur leading to it? A There is a junction point at Forest Hill.

Cross examination by Mr. Kuvin.

Q What line are you conductor on? A Greenwood Lake Division.

Q Passenger train? A At that time I was on freight.

Q On July 17, 1928, and July 18th, you were on freight? A Yes, sir.

Q The first train that left out from Croxton on that morning, July 18th was at 7 A. M.? A About 7 o'clock we left Croxton.

Q What time did that train reach the Forest Hill junction? A Between half-past seven and eight o'clock.

Q Did that train have these two Galioto cars on it? A It did.

Q What happened to those two Galioto cars at the Forest Hill junction? A They were left there for the drill engine to pick up.

Q That was at what time? A Between half-past seven and eight o'clock.

Q That was between 7:30 and 8 o'clock on the 18th? A Yes.

Q It was left at the Forest Hill junction, is that right? A Yes.

Q Have you ever travelled on that spur from the Forest Hill junction to the Bloomfield avenue freight station? A I have.

Q How great a distance is it from the Forest Hill junction to the Bloomfield freight yard? A I would estimate it about two miles and a half.

Q Did you have any freight orders for these two cars? A No, sir.

Q Did you have any knowledge at all of what was in the two cars? A We had the regular way bills.

Q Do your way bills show that they had ripe bananas on them? A They show they were loaded with bananas.

Q Do they show what kind of bananas, were they ripe or not? A No.

Q Have you copies of these way bills with you? A No. I don't know anything about them. I turned them over.

CHARLES BOEHNER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Kelly.

Q Are you conductor for the Erie Railroad Company, Mr. Boehner? A Yes, sir.

Q Were you during July, 1928, so employed? A Yes.

Q What was your run? A My run was from West Orange to Forest Hill and return.

Q What time did you start work? A I think our time was called for eight-thirty flat, starting time.

Q You would start work at 8:30 o'clock? A Yes.

Q Was West Orange your starting point? A Yes.

Q How would you pick up cars from West Orange? A Dead head to Forest Hill.

Q Then you would pick up cars at Forest Hill? A Get our train at Forest Hill.

Q To distribute them along the line to their destination? A Yes.

Q Do you recall the two cars in question? Do you recall anything about them? A We had a message to pick up two cars of bananas at North Newark, and to take them to destination.

Q Where do you leave the cars off? A Watsessing.

Q Who picks them up from Watsessing? A Conductor Cowan.

Cross examination by Mr. Kuvin.

Q What time did you leave them off at Watsessing? A I got to Watsessing around ten, or just a little after ten, about ten-ten or ten-fifteen.

Q This is all Eastern Standard time you are talking about? A Yes.

Q And how long a run is it from Forest Hill junction to Watsessing? A It would be about a mile and three-quarters.

Q What type of engine did you have? A We had what they call a freight hog.

Q A regular switching engine? A Yes.

Q How many cars did you have that day to pick up at Forest Hill junction? A We had a train of about 18 cars, 18 to 20 cars.

Q Any other cars with fruit in them, perishable goods? A No.

Q You knew that they had a carload of perishable goods there? A By the way bill.

Q And the way bill read "rush," didn't it? A Not to my knowledge.

Q Where did you get the message to pick up these two cars, Mr. Boehner? A Forest Hill.

Q That was the first you heard of it? A Yes.

Q What time did you get into Forest Hill? A I got to Forest Hill about—well, I should judge about ten minutes of nine.

Q You made up your train at Forest Hill? A Yes.

Q And it took you from Forest Hill, which is a distance of how long—about a mile or a mile and a half? A To Bloomfield avenue?

Q No, to Watsessing avenue. A To Watsessing would be a mile and three-quarters.

Q It took you therefore about that time to get to Watsessing, you said you got there about 10:15? A Yes.

Q What did you do with the cars at Watsessing, just leave them there? A Handed them over to the conductor going east.

Q Was a new engine put on? A Yes.

Q You had to drill the cars in and out? A At Silver Lake had to switch down our car.

Q These cars were treated as ordinary freight by you? A No special movement.

Mr. Kuvin: That is all.

WILLIAM C. COWAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Kelly.

Q You are a conductor for the Erie Railroad also? A Yes.

Q Your territory includes Bloomfield avenue? A I was running between Croxton and East Orange at the date in question.

William C. Cowan, cross.

Q Do you recall picking up these two cars of fruit in question? A I do.

Q You picked them up at Watsessing? A At Watsessing.

Q You brought them over to Bloomfield avenue? A Yes.

Q Do you recall what time they were placed? A They were placed in there 11:45.

Q What time did you pick them up? A I got in about 11:35. It took us about 10 minutes to get there.

Q Did you have any drilling to do on the way up? A We had cars to switch on at Silver Lake. We had cars to deliver at West Orange, and to pick up our eastbound consignments.

Q You placed the cars for unloading at 11:40? A Yes.

Q Eastern Standard or Daylight Saving time? A Yes.

Q 11:45, that was Daylight Saving time they were delivered? A Yes.

Q Placed at Bloomfield avenue for unloading? A Yes.

Q Then you went on your business, and that is all you know about it? A Yes.

Cross examination by Mr. Kuvin.

Q Did you place these cars, spot them immediately for unloading, or did you just back them up and come back up to unload them? A We pushed them in the switch there. There was about eight or nine cars in the switch. When we pushed in there the man that had charge of the tracks there, he said that ground is high there. "We want them further over." I sent a brakeman to line the switch up and also line the track up.

Q That is true, you didn't spot them for unloading at first, but had to come back again to spot them?

Mr. Kelly: What do you mean, "spot them"?

Mr. Kuvin: Place the cars for unloading.

Mr. Kelly: Spotting is where the agent goes out in the yard and looks at the cars.

Q Then you did not push the cars on the tracks ready for unloading the first time, but had to come back again and place them for unloading? A We didn't come back. We only went in there once.

Q Did the agent go after you and place them properly for unloading? A I have to place them properly.

Q Who spotted them for unloading the second time? A There is no second time, I can't remember. We pushed in there. We were going to cut off. They told us they wanted them up two carlengths over.

Q You say that your run is from Croxton to East Orange? A Yes.

Q Is that on the same line as from Croxton to Great Notch? A No, that is the Greenwood Lake Division, the main line.

Q Are the Chevrolet and Edison plants on your line? A On the Orange branch, yes.

Q Did you stop at either one of these plants in taking these Galioto cars up to Bloomfield? A I hadn't come to them yet.

Q I understood you to testify that you picked these cars up at 11:35 at Watsessing? A Yes.

Q You were working under Daylight Saving time? A Daylight Saving time, yes.

FRANK WOLFE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Kelly.

Q Mr. Wolfe, by whom are you employed? A The Banana Sales Company.

Q During the month of July, 1928, were you employed by the Erie Railroad? A I was.

Q At Pier 26, East River, New York? A Yes.

Q Do you recall the Galioto cars? A Yes.

Q Did you keep any records over there? A Why, what kind do you mean?

Q Any records relating to cars? A Leaving time, arriving time, tugs and so forth.

Q I show you this book and ask you if you recognize it? A I do.

Q What is this? A That is the book of the time of the arrival of the tug, leaving time of the float, time it was ready and so forth.

Q Referring to cars F. G. E. 31,279 and U. R. T. 40,774, have you any record in respect to the tug coming in at that place? A I have.

Q That record was made by you? A Yes.

Q Will you refer to the record and tell me when the tug arrived? A The tug arrived that day at 3:45.

Q What day do you mean? A July 17, 1928.

Q The tug? A Shohola was the name of the tug.

Q Whose tug was that? A The Erie Railroad Company's.

Q Now, that came where? A Pier 26, East River.

Q 3:45? A P. M.

Frank Wolfe, cross.

Q Were the cars loaded with bananas then? A They were by the float. They were not ready at the present time. The cars had to be coupled up.

Q When did you finally get the shipping papers for these cars? A I don't remember the exact time—I had the final shipping papers for the entire float at 6:25.

Q That was 6:25 P. M. on the evening of July 17th? A Yes.

Q Then those cars moved from your float to Jersey City? A At 5 o'clock in the afternoon, 5 P. M.

Q These cars, that is F. G. E. 31,279 and U. R. T. 40,774, moved "shipper's load and count"? A Yes.

Q They were supposed to have a messenger in charge, do you recall that? A That was stamped on the bill of lading.

Cross examination by Mr. Kuvin.

Q Was a messenger in charge? A Why, that I don't know.

Q What do you mean by messenger in charge? A Why, that I couldn't tell you, because that is the Banana Supply Company's business, that was not the Railroad's business.

Q When the cars left the pier you checked them, didn't you? A I did.

Q You sealed them, didn't you? A I did not; I have a sealer to do this.

Q It was sealed under your supervision? A Yes.

Q When the tug took the barge away, were the cars on it? A Sir?

Q How were these cars taken off the pier? A They were taken off the pier. They were loaded on the barge.

Q And the barge was drawn off by the tug? A The tug "Shohola" of the Erie.

Q You say that there was a messenger on with these cars? A Not as I know of.

Q What time did you say these cars left? A 5 o'clock in the afternoon, 5 P. M. the float left.

Q You stamped the bill of lading at the time the cars were taken away? A Not at present. As I seen them in the afternoon, they were stamped. We did not get all the bills of lading at once.

Q Did you get the bill of lading on the Galioto cars at the time they were taken away or at some time before or some time after? A I got the bill of lading before.

Q When did you stamp, before or after? A If we got the bills of lading before, they were stamped before.

Q What is your recollection as to these, that you got them before or after the cars were taken away? A Before.

Q According to your last statement you stamped them before the cars were taken away? A Yes, sir, if I got the bill of lading.

Q That stamp will show what? A The time that the bills of lading were signed.

Q That was also done with your signature? A Yes.

Q What time is used on this stamp which you placed on the bill of lading, Daylight Saving time or Eastern Standard time? A Daylight Saving.

Q When you said the cars were taken away at 6:25, you meant Daylight Saving time? A I didn't say the cars were taken away at 6:25.

Q Pardon me, you say you got your final papers? A Yes.

Q What do you mean by final papers, bills of lading? A The final bills of lading for the entire float.

Q What time did you say you got the bills of lading on the Galioto cars? A I don't recollect.

Q I show you these bills of lading marked Exhibit P. 5 and Exhibit P. 4 and ask you if those are your signatures on the bills of lading in the circle which appears to be a clock arrangement of some sort, marked "Erie Railroad, received July 17, 1928"? A That is my signature, yes, sir. That is a clock arrangement that has no clock in it. It is turned by hand.

Q Did you turn it by hand and mark it 6 o'clock? A I did.

Q That would designate what? A That would designate I got the bills of lading after the cars left.

Q And it would designate that you got the bills of lading at 6, after the cars left and not before the cars left, as you stated before? A I don't recall that.

Q Let us not quarrel about that. You stated your recollection was you got the bills of lading before the car left.

Mr. Kelly: His recollection may have been faulty.

Mr. Kuvin: That is just what I wanted to show.

Re-direct examination by Mr. Kelly.

Q When you refer to the time the barges left, did you have any record to refresh your recollection as to that? A The only record is my seal book here.

Q Does your seal book show when the shipment left Pier 26? A It does.

Q When you testified before you refreshed your recollection from that seal book? A Yes.

Mr. Kelly: That is our case.

Mr. Kuvin: No rebuttal.

Mr. Kelly: I will renew my motion. I move for a directed verdict. Do you want me to narrate the grounds?

The Court: Yes.

Mr. Kelly: First, on the ground that it has not been shown there was any negligence against the defendant Railroad Company;

Secondly, that according to the terms of the bill of lading the shipment moved "shippers' load and count," and the defendant is therefore not liable for any damage that may have been caused by the manner in which the goods were packed;

Thirdly, assuming, but not admitting, that there was a contract whereby these cars were to be delivered at 7 o'clock, there is no evidence to that effect, although there is some innuendo. That contract is not binding on the Erie Railroad Company for the simple reason that the Railroad Company must only comply with the bill of lading and ship with reasonable dispatch, but not by any particular train and they do not have to have the goods there in time for any particular market. It has been testified that these cars were taken out on the first train from Croxton. The testimony is that the particular cars in dispute moved out of Croxton on the morning of July 18th on the first train out for Bloomfield avenue, New Jersey, and were placed there at 11:45;

Fourthly, that the plaintiff has not sustained the burden of showing that he suffered any damage, and that the Railroad Company was negligent in not placing the cars sooner than they did.

Furthermore, this shipment consisting of goods of a perishable nature, the Erie Railroad Company is not an insurer; they are not responsible for any inherent defects brought about by the nature of the goods.

(Argument on motion made by Mr. Kelly.)

The Court: I will deny your motion.

Mr. Kelly: Exception.

The Court: Do you gentlemen want an opportunity to present a memorandum?

Mr. Kelly: On what line?

The Court: As to whether or not the facts as developed would present such a case where, as a matter of fact, that the delivery was made with reasonable dispatch. You might also develop the degree of care with which the defendant is charged under circumstances such as have been brought out in this case.

I will reserve decision.

I, H. Richard Woebse, a stenographer duly appointed to report stenographically the evidence given before the District Court of the Second Judicial District of the County of Essex, in the case of Anthony Galioto and Joseph Galioto, individually and trading as A. & J. Galioto, *vs.* Erie Railroad Company, do hereby certify that the foregoing is a true and correct transcript of the evidence given on the 7th day of June, 1929,

before Hon. Anthony F. Minisi, Judge of the District Court of the Second Judicial District of the County of Essex in said matter.

In Witness Whereof I have hereunto set my hand and seal this 15th day of June, 1929.

H. RICHARD WOEBSE.

I, Anthony F. Minisi, Judge of the District Court of the Second Judicial District of the County of Essex, do hereby certify that the foregoing is a transcript of the evidence given upon the trial of the case of Anthony Galioto and Joseph Galioto, individually and trading as A. & J. Galioto *vs.* Erie Railroad Company on June 7, 1929, as certified by H. Richard Woebse, the stenographer appointed to report such evidence stenographically.

In Witness Whereof I have hereunto set my hand and seal this 19th day of September, 1929.

ANTHONY F. MINISI. (L. S.)

Exhibit P. 1.

EXHIBIT P. 1.

H A KUVIN
A. & J. GALIOTO
60 PARK PL
NEWARK. NJ

ERIE RAILROAD COMPANY

This post card acknowledges receipt of claim numbered below.

Please quote our number
B99338-4

In case you have occasion to write regarding this claim.

Your No.	Amount
X	468.71
Date	Nature
8-15-28	LOSS
Commodity	
X	

H. C. BARLOW,
Manager Freight Claims.
71 West 23rd St., New York City

Exhibit P. 2.

EXHIBIT P. 2.

Make Checks Payable to Erie R. R. Co.

FREIGHT BILL

To ERIE RAILROAD CO., Dr., For Charges on Articles Transported:

STATION, 1715 EAST ORANGE, N. J. .....

Freight

Date 7/18/28 Bill No.....

Consignee and Address—A J Galioto Destination

Way-Billed From—Pier 7 N Y C

Way-Bill Date 7/17/28 and Number 14075

Full Name of Shipper—Bananas Sales

Car Initials and No. FCE 31279

Number of Packages, Articles and Marks

380 BUNCHES BANANAS

Place on Bloomfield ave at 11:45 A M

Received Payment .....192...

Recd Payment 7/18/28

C. Voellmy S

.....Agent.

Weight		Rate
20340		21½
Freight	Advances	Total
43.73		43.73
Total		

B 105759

CASHIER'S MEMORANDUM

To ERIE RAILROAD CO., Dr., For Charges on Articles Transported:

STATION, 1715 EAST ORANGE, N. J. .....

Freight

Date 7/18/28 Bill No.....

Consignee and Address—A J Galioto Destination

Way-Billed From—Pier 7 N Y C

Way-Bill Date 7/17/28 and Number 14075

Full Name of Shipper—Bananas Sales

Exhibit P. 3.

Car Initials and No. FCE 31279
Number of Packages, Articles and Marks
380 BUNCHES BANANAS

Weight		Rate
20340		21½
Freight	Advances	Total
43.73		43.73

Total

EXHIBIT P. 3.

Make Checks Payable to Erie R. R. Co.

FREIGHT BILL

To ERIE RAILROAD CO., Dr., For Charges on Articles Transported:
STATION, 1715 EAST ORANGE, N. J. .....

Freight
Date 7/18/28 Bill No.....
Consignee and Address—A J Galoito Destination
Way-Billed From—Pier 7 N Y C
Way-Bill Date and Number—7/17/28 14070
Full Name of Shipper—Bananas Sales
Car Initials and No.—C R I 40774
Number of Packages, Articles and Marks
415 Bunches Bananas
Place on Bloomfield ave at 11:45 A M
Received Payment .....192...

Recd Payment 7/18/28
C. Voellmy S
.....Agent.

Weight		Rate
20100		21½
Freight	Advances	Total
43.22		43.22

Total

B 105759

Exhibit P. 4.

CASHIER'S MEMORANDUM

To ERIE RAILROAD CO., Dr., For Charges on Articles Transported:
STATION, 1715 EAST ORANGE, N. J. .....

Freight
Date 7/18/28 Bill No..... 10
Consignee and Address A J Galoito
Way-Billed From—Pier 7 N Y C
Way-Bill Date and Number—7/17/28 14070
Full Name of Shipper—Bananas Sales
Car Initials and No.—C R I 40774
Number of Packages, Articles and Marks
415 Bunches Bananas

Weight		Rate
20100		21½
Freight	Advances	Total
43.22		43.22

Total 20

EXHIBIT P. 4.

Uniform Domestic Straight Bill of Lading Adopted by Carriers in Official, Southern and Western Classification Territories, March 15, 1922. 30

UNIFORM STRAIGHT BILL OF LADING
(Prescribed by the Interstate Commerce Commission)
ORIGINAL—NOT NEGOTIABLE
ERIE RAILROAD COMPANY

Shipper's No. 43179
Agent's No. .....

Chicago & Erie Railroad Co.
New York, Susquehanna & Western Railroad Co.

40

Exhibit P. 4.

The New Jersey & New York Railroad Co.
Bath & Hammondsport Railroad Co.

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

At NEW YORK, N. Y. July 17th, 1928.

From BANANA SALES COR'P

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to A. & J. Galiota,

Destination—Bloomfield, State of N. J. County of.....

Route—Erie Car Initial URT Car No. 40774

Description of Articles, Special Marks and Exceptions

Exhibit P. 4.

No.
Packages
415 BUNCHES BANANAS
FREIGHT GUARANTEED
(Rubber Stamp)
ALL PLUGS OUT
VENTILATORS OPEN
AND SEALED
MESSENGER IN CHARGE
SHIPPERS LOAD & COUNT
B105759

Allowance for Hay & Packing.....lbs.
Allowance for Stove Bin & Dunnage..lbs.

If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (*See section 7 of conditions.*)

BANANA SALES CORP. S.
(Signature of Consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."
Received $.....to apply in prepayment of the charges on the property described hereon.

.....
Agent or Cashier.

Per .....

(Rubber Stamp)
ERIE R. R.
Received by
JUL 17 1928
Pier 7, E. R., N. Y.
F. S. CURRENT, AGT.
Per F. Wolfe
Receiving Clerk

Exhibit P. 4.

(The signature here acknowledges only the amount prepaid.)

Charges advanced:

$.....

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE.—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding .....per.....

BANANA SALES COR'P., Pier 26 East River

S

..... Shipper

Per .....

..... Agent

Per .....

Permanent post-office address of shipper.....

CONTRACT TERMS AND CONDITIONS.

Sec. 1. (*a*) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(*b*) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice

Exhibit P. 4.

of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(*c*) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No

Exhibit P. 4.

carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (*a*) No carrier is bound to transport said property by any particular train, or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(*b*) Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading 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; *Provided*, That if such loss, damage, or injury was due to delay or damage while being

Exhibit P. 4.

loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury, 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: *Provided,* That in case the claim on which suit is based was made in writing within six months, or nine months in case of export traffic (whether or not filing of such claim is required as a condition precedent to recovery), suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice.

(*c*) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: *Provided,* That the carrier reimburse the claimant for the premium paid thereon.

Exhibit P. 5.

EXHIBIT P. 5.

Uniform Domestic Straight Bill of Lading Adopted by Carriers in Official, Southern and Western Classification Territories, March 15, 1922.

UNIFORM STRAIGHT BILL OF LADING
(Prescribed by the Interstate Commerce Commission)

ORIGINAL—NOT NEGOTIABLE

ERIE RAILROAD COMPANY

Shipper's No. 43178
Agent's No. .....

Chicago & Erie Railroad Co.
New York, Susquehanna & Western Railroad Co.
The New Jersey & New York Railroad Co.
Bath & Hammondsport Railroad Co.

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

At NEW YORK, N. Y. July 17th, 1928.

From BANANA SALES COR'P

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any

Exhibit P. 5.

of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to A. & J. Galiota,

Destination—Bloomfield, State of N. J. County of.....

Route—Erie Car Initial FGE Car No. 31279

Description of Articles, Special Marks and Exceptions

No. Packages

380 BUNCHES BANANAS
FREIGHT GUARANTEED
(Rubber Stamp)
ALL PLUGS OUT
VENTILATORS OPEN
AND SEALED
MESSENGER IN CHARGE
SHIPPERS LOAD & COUNT
B105759

Allowance for Hay & Packing.....lbs.

Allowance for Stove Bin & Dunnage..lbs.

If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (*See section 7 of conditions.*)

BANANA SALES CORP. S.
(Signature of Consignor)

Exhibit P. 5.

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $.....to apply in prepayment of the charges on the property described hereon.

.....

Agent or Cashier.

Per .....

(Rubber Stamp)
ERIE R. R.
Received by
JUL 17 1928
Pier 7, E. R., N. Y.
F. S. CURRENT, AGT.
Per F. Wolfe
Receiving Clerk

(The signature here acknowledges only the amount prepaid.)

Charges advanced:
$.....

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE.—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding .....per.....

BANANA SALES COR'P., Pier 26 East River

S

..... Shipper

Per .....

..... Agent

Per .....

Permanent post-office address of shipper.....

Exhibit P. 5.

CONTRACT TERMS AND CONDITIONS.

Sec. 1. (*a*) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(*b*) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(*c*) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the

carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (*a*) No carrier is bound to transport said property by any particular train, or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of

the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(*b*) Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading 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; *Provided*, That if such loss, damage, or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury, 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: *Provided*, That in case the claim on which suit is based was made in writing within six months, or nine months in case of export traffic (whether or not filing of such claim is required as a condition precedent to recovery), suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice.

(*c*) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may

have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: *Provided*, That the carrier reimburse the claimant for the premium paid thereon.

FINDINGS OF DISTRICT COURT JUDGE.

September 4, 1929

Opinion in Galioto vs. Erie Railroad Company

Docket #25096

This case involves the delivery of two carloads of bananas by defendant to the plaintiffs.

Testimony shows that the said bananas were delivered at the Forest Hill junction between half-past seven and eight o'clock in the morning of July 18th; that the day was a very hot July day; that the defendant through its agents knew that the merchandise involved was of a perishable nature. In its contract with the plaintiff, the defendant agreed to deliver said merchandise with reasonable dispatch, that Forest Hill junction according to the testimony is about two miles and one-half from the Bloomfield Freight Yard where said bananas were to be delivered to the plaintiff; that same were not placed in position for unloading until about 11:45.

The evidence further show that the plaintiff did everything within his power to effectuate an early delivery. He went to the agent in East Orange; he called the New York office of the defendant; he went to the Bloomfield Yards and then returned to East Orange. He discovered the cars containing the merchandise about 10:15 A. M. and did his utmost to have said cars placed in position for unloading, and it was only after returning to East Orange and obtaining the assistance of one of defendant's agents there, who returned to Bloomfield with plaintiff, that defendant's engineer was finally induced to move

the cars to a position where they could be unloaded which was at 11:45.

I find as a matter of fact that the defendant was negligent in permitting a period of about four hours to expire between the time the merchandise was at the Forest Hill junction and the time that they were placed in position for unloading, and that said defendant did not use reasonable dispatch in delivering said merchandise.

I find for the plaintiff in the sum of $468.71.

SPECIFICATIONS OF DETERMINATIONS.

NEW JERSEY SUPREME COURT.

ANTHONY GALIOTO and JOSEPH GALIOTO individually and trading as A. & J. GALIOTO, *Plaintiffs-Appellees,* *vs.* ERIE RAILROAD COMPANY, *Defendant-Appellant.*	*Action at Law.* *On Appeal from the District Court of the Second Judicial District of Essex County.* *Specification of Determinations of District Court.*

To: Nicholas LaVecchia, Esq., attorney for plaintiffs-appellees:

TAKE NOTICE, that the following is the specication of the determinations or directions of the District Court of the Second Judicial District of Essex County with respect to which the defendant-appellant is dissatisfied in point of law.

1. At the close of the plaintiffs' case the District Court erroneously denied the motion of the defendant-appellant for a non-suit, to which ruling an exception was duly allowed; said mo-

tion should have been granted for one or more of the following reasons urged in behalf thereof:

(a) There was no negligence on the part of the railroad company or its representatives;

(b) The railroad company was not obliged to ship the cars in question in accordance with a contract to which they were not a party;

(c) The defendant was not obliged to ship in time for a particular market not having contracted to do so and, consequently, is not answerable in damages if the goods did not arrive in time for such market;

(d) There was no proof of damage before the Court.

2. At the close of the entire case said District Court erroneously denied the motion of the defendant-appellant for a direction for a verdict in its favor to which ruling an exception was duly allowed; said motion should have been granted for one or more of the following reasons urged in behalf thereof:

(a) There was no negligence on the part of the defendant;

(b) The defendant is not responsible for damages that may have been caused by the manner in which the goods were packed where the shipment moves "Shippers Load and Count";

(c) The defendant was not bound by the terms of a contract to which they were not a party and of the existence of which they had no knowledge;

(d) Plaintiffs failed to prove that they sustained any damage;

(e) Plaintiffs failed to prove that there was an unreasonable delay;

(f) Plaintiffs failed to prove that the shipments could have been transported more quickly;

Specification of Determinations.

(g) Defendant is not an insurer of goods of a perishable nature and is not responsible for defects arising from inherent nature of the goods;

3. Said District Court erroneously permitted over objection and exception duly made and taken the following questions addressed to the witness, Joseph Galioto:

"Did you designate any time that the bananas were to have been delivered?"

"Does the bill of lading specify the time of delivery?"

4. There is no basis or foundation in the evidence for the judgment as entered by said District Court.

5. Said District Court erroneously entered judgment in favor of the plaintiffs-appellees whereas judgment should have been entered in favor of the defendant-appellant.

HOBART & MINARD,
Attorneys for Defendant-Appellant.

Service of a copy of the within specification acknowledged this 21st day of September, 1929.

NICHOLAS LAVECCHIA,
Attorney for Plaintiffs-Appellees.

Opinion of Supreme Court.

NEW JERSEY SUPREME COURT.

No. 443, October Term, 1929.

(Filed January 2, 1930.)

ANTHONY GALIOTO et als.,
Plaintiffs-Respondents,

v.

ERIE R. R. Co.,
Defendant-Appellant.

On Appeal.

Submitted October Term, 1929; Decided December 31st, 1929.

Before Justices PARKER, BLACK and BODINE.

For the Plaintiffs-Respondents, MESSRS. NICHOLAS LAVECCHIA and HERBERT A. KUVIN.

For the Defendant-Appellant, MESSRS. HOBART & MINARD.

PER CURIAM:

This suit was brought in the District Court of the Second Judicial District of Essex County. It was to recover alleged damages to two carloads of bananas purchased from the Banana Sales Corp. of July 17th, 1928; shipped from Pier 26, East River, N. Y., about 5 P. M. and delivered to the

plaintiffs by the defendant at the Bloomfield Freight Yard at Bloomfield, N. J.; on the morning of July 18th, 1928, at about 11.45 A. M. Negligence in delaying the delivery of the cars is charged on account of the hot weather. The case was tried by the judge without a jury resulting in a judgment for the plaintiffs for $468.75. The trial judge filed a finding of facts in which he found as follows: "I find as a matter of fact that the defendant was negligent in permitting a period of about four hours to expire between the time the merchandise was at the Forest Hill junction and the time that they were placed in position for unloading, and that said defendant did not use reasonable dispatch in delivering said merchandise."

We concur in the findings of fact by the trial Court. The defendant filed five specifications of the determinations or directions of the District Court, with respect to which the defendant is dissatisfied in point of law. They are argued, however, under four heads in the appellant's brief. First: The trial judge erred in refusing defendant's motion for a non-suit. Second: The trial Court erroneously denied the motion of the defendant for the direction of a verdict. Third: The trial Court erred in admitting certain testimony regarding the time of delivery. Fourth: There is no basis for the judgment entered by the trial Court. These all involve questions of fact except No. three, decided by the trial Court on the evidence before that Court against the defendant. No. three, "Q. Did you designate any time that the bananas were to have been delivered? A. Yes. Q. What time did you designate and to whom did you designate the time of delivery? A. Why, I generally come down around seven o'clock in the morning. That is the time." This was not harm-

ful to the defendant. The bill of lading, Ex. P-4, provides, Section 1: "(a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided * * *" Section 2: "(a) No carrier is bound to transport said property &c. otherwise than with reasonable dispatch." So, Ex. P-5, Section 2 (a).

The findings of fact by the trial court are not reviewable if there is any testimony to support them. Lapat v. Erie R. R. Co., 71 N. J. L. 377; Upton v. Slater, 83 N. J. L. 373.

We find no substantial reason for reversing the judgment of the District Court of the Second Judicial District of Essex County. The judgment is, therefore, affirmed with costs.

Rule for Judgment.

(Filed January 17, 1930.)

It appearing that the above action was tried in the District Court of the Second Judicial District of Essex County, and a judgment entered therein in behalf of the plaintiffs, and it further appearing that said judgment was subsequently appealed from by the defendant to the New Jersey Supreme Court, and that said cause on appeal was duly argued at the October Term, 1929, of the New Jersey Supreme Court, and the Court having considered the same and finding that the judgment should be affirmed,

It is, on this 17th day of January, in the year of our Lord One Thousand Nine Hundred and Thirty, ORDERED, ADJUDGED and DECREED that the judgment of the District Court of the Second Judicial District of Essex County, removed by appeal in this cause, be affirmed with costs, and that the record be remitted to the said District Court of the Second Judicial District of Essex County, to be proceeded with in accordance with this judgment and the practice of said Court.

Entered January 17, 1930,

On motion of

NICHOLAS LAVECCHIA,
Of counsel with Plaintiffs-Appellees.

Notice and Grounds of Appeal.

(Filed March 11, 1930.)

To:

NICHOLAS LAVECCHIA, Esq.,
Attorney for Plaintiffs-Respondents.

Sir:

TAKE NOTICE that the defendant-appellant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following ground:

The Supreme Court affirmed the judgment of the District Court of the Second Judicial District of Essex County in favor of the plaintiffs-respondents, whereas said Supreme Court should have reversed said judgment of the District Court of the Second Judicial District of Essex County for one or more of the specifications of determinations filed in said Supreme Court.

HOBART & MINARD,
Attorneys of Defendant-Appellant.

Dated, March 4, 1930.

Service of a copy of the within Notice is hereby acknowledged this 6th day of March, 1930.

NICHOLAS LAVECCHIA,
Attorneys of Plaintiffs-Respondents.

NEW JERSEY

Court of Errors and Appeals

ANTHONY GALIOTO and JOSEPH GALIOTO, individually and trading as A. & J. Galioto, Plaintiffs-Appellees, vs. ERIE RAILROAD COMPANY, Defendant-Appellant.	On Appeal from Supreme Court.

BRIEF IN FAVOR OF THE ERIE RAILROAD COMPANY, DEFENDANT-APPELLANT.

(1)

Statement of Case.

This appeal is taken from a judgment of the New Jersey Supreme Court, which affirmed the judgment entered in the District Court of the Second Judicial District of Essex County in favor of the appellees (hereinafter called the plaintiffs) and against the appellant (hereinafter called the defendant) for the sum of $468.71 and costs.

The action was instituted by the plaintiffs to recover for alleged damages to two carloads of bananas, described as "ripes and rejects," purchased from the Banana Sales Corporation on July 17, 1928, and shipped from Pier 26, East River, New York, about 5 P. M. on the same day, and delivered to the plaintiffs by the defendant at

Bloomfield Avenue, Bloomfield, N. J., on the morning of July 18, 1928. The plaintiffs unloaded the shipments at 11.45 A. M. (Daylight Saving Time), carted the bananas to their place of business and sold them the following day.

The plaintiffs alleged that by reason of the defendants' "negligence, carelessness and recklessness" they lost their market and lost the profits they would have made if the goods had been delivered in perfect condition and asked for special damages. There was no agreement as to the time of delivery other than that provided for in the bills of lading, which contained the conditions that the goods were not to be delivered by any particular train, or in time for any particular market or otherwise than with reasonable dispatch.

(2)

Grounds of Appeal.

The Supreme Court affirmed the judgment of the District Court of the Second Judicial District Court of the Second Judicial District of Essex County in favor of the plaintiffs-appellees, whereas said Supreme Court should have reversed said judgment for one or more of the specifications of determinations filed in said Supreme Court, as follows:

1. Said District Court erroneously denied the motion of the defendant-appellant for a nonsuit at the close of the plaintiffs' case.

2. Said District Court erroneously denied the motion of the defendant-appellant for a direction of verdict at the close of the entire case.

3. Said District Court erroneously permitted over objection certain questions addressed to the witness, Joseph Galioto.

4. There is no basis or foundation in the evidence for the judgment as entered by said District Court.

5. Said District Court erroneously entered judgment in favor of the plaintiffs-appellees, whereas judgment should have been entered in favor of the defendant-appellant.

(3)

Brief of the Argument.

I.

It was error for the trial judge to refuse defendant's motion for nonsuit.

The state of demand alleged that the "goods as delivered to the said defendant were in good and perfect condition * * *. By reason of the defendant's negligence, carelessness and recklessness * * * plaintiffs lost the profits that they would have made if the goods had been delivered in perfect condition and asks special damages therefor."

It was incumbent on the plaintiffs to prove their allegations of negligence and show by competent evidence that the negligence of the defendant was the cause of their loss of alleged profits. At the trial it developed that the negligence charged against the defendant was an alleged delay in delivering the shipments of bananas. Before making out a case so as to put the defendant on its proof the plaintiffs had the burden of showing an unreasonable delay in the transportation of the goods

in question. Coupled with this duty the plaintiffs must show that the bananas were in good and perfect condition when shipped, and in a damaged condition when delivered, and that the damage was caused by an unreasonable delay.

As to the condition of the fruit when shipped, the testimony of the plaintiffs was not disputed. They showed the condition, but it was not "good and perfect" as alleged. The testimony of Joseph Galioto is as follows, quoting from the State of Case (p. 12, lines 11-40):

> "Q. You said they were ripe bananas and rejects? A. Yes.
>
> Q. Now, Mr. Galioto, what kind of bananas were known as rejects? A. Well, this means the colors.
>
> Q. What do you mean the colors, ripe, green or over-ripe? A. It might be some ripe.
>
> Q. The rejects are color fruits? A. The ripe mean the color fruit. You cannot ship far away on account of next morning delivery.
>
> Q. That is, the ripes? A. Yes.
>
> Q. What would be rejects? A. The rejects would be some broken bunches. A few fingers out of the hand.
>
> Q. Are they ripe, green or over-ripe? A. Very little green, little bit of color, ripe, color everything.
>
> Q. These bananas, were they all ripe, I am talking about the ripes that you purchased? A. Yes.
>
> Q. Were they ripe or over-ripe? A. When I load them they got color. When I get out the next morning, the time I get them, a little bad, too bad, the reason I have to use the next day."

These bananas were "ripes and rejects" and in such condition that they had to be delivered the morning after loading. The only conclusion to be drawn from such testimony is that the bananas were not in good condition when shipped. The description "ripes and rejects" is sufficient indication of their condition. They had to be sold early in the morning (p. 11, lines 15-18) after purchase because they were ripe bananas and liable to decay within two hours after packing (p. 23, lines 12-15).

To recover for damages to shipment during transportation by carrier, shipper must prove good condition of goods at time of delivery to carrier or a receipt from carrier acknowledging receipt of goods in good condition.

> *Gude* v. *P. R. R. Co.*, 77 N. J. L. 391;
> *McMahon* v. *American Railway Express Co.*, 141 Atl. 566, affirmed 144 Atl. 920.

The only evidence before the trial court tending to prove the cause of the alleged damage to the bananas was that given by the plaintiff Joseph Galioto, where he stated that the bananas were liable to decay within two hours after packing (p. 23, lines 12-15), and further that the damage resulted because he could not sell them the day they were received (p. 12, lines 33-37). The alleged damage was brought about by the inherent condition of the fruit and not by any negligence on the part of the defendant.

In *Feinberg* v. *D., L. & W. R. R. Co.*, 52 N. J. L. 451, at 453, the court said:

> "The rule respecting safe carriage by a common carrier is not applied in its strictness to perishable property and injuries

> caused by its intrinsic defects; nor is the carrier who undertakes the carriage of live animals answerable for damages caused by the conduct or propensities of the animals themselves. As to these excepted cases the carrier is liable only for want of due care in the transportation."

The evidence produced by the plaintiffs on the question of the condition of the shipments negatives good condition and so their case was lacking in an essential element.

The plaintiffs' case failed further with respect to their proof on the question of delay, by which it is contended that the market for the bananas on July 18th was lost and the fruit had to be sold on the following day.

The bills of lading covering these shipments provided as follows (p. 62, lines 30-34):

> "No carrier is bound to transport said property by any particular train or vessel or in time for any particular market or otherwise than with reasonable dispatch."

The inference is that the plaintiffs endeavored to make some arrangements with an employee of the Banana Sales Corporation whereby the shipments would be delivered at a time to suit their convenience. The plaintiffs did not enter into any special contract with the defendant with respect to delivery at a certain time. In the absence of a special contract as to the time of delivery the defendant is liable only for an unreasonable delay.

10 *Corpus Juris,* page 286:

> "Where the contract provides that the shipment is not to be made within any speci-

> fied time nor for any particular market the carrier is liable only for unreasonable delay."

At page 301:

> "The burden is on the shipper to show that the carrier failed to deliver the goods within a reasonable time. In other words, it devolves on the shipper to prove that a longer time was actually consumed than was necessary for the purpose. Also if the carrier was authorized to stop the goods in transit for milling in transit purposes, it devolves on the shipper to show that the unreasonable delay in transportation was not due to that cause. However, when evidence of *unusual delay* is adduced, a prima facie case of negligence is made out, etc."

The following cases lay down the rule that delay in transporting merchandise must be established by testimony showing that the time consumed was in excess of that which should have been taken upon the road of the carrier to whom the merchandise was entrusted, and the burden of proving this delay is placed on the shipper who charges negligence.

Louisville & N. R. Co. v. *Cheatwood,* 68 So. 720, 14 Ala. App. 175;
Bacon v. *Cleveland C. C. & St. L. Ry. Co.,* 155 Ill. App. 40;
Shoot v. *Cleveland C. C. & St. L. Ry. Co.,* 145 Ill. App. 532;
Kansas City Southern Ry. Co. v. *Morrison,* 146 S. W. 853, 103 Ark. 552.

In cases allowing a recovery it will be noticed that unreasonable delay had been proved; for example, in the case of *Atlantic Fruit Co.* v. *P. R. R.* Co., 130 Atl. 63, the shipment was twenty-five to

twenty-seven hours late according to schedule usually made by this particular train. Having established a time for arrival, if the shipment is delayed, the burden would be on the carrier to show, if such were the case, that the delay was not due to negligence or any fault on its part. Where, however, as was the situation in this case, the plaintiff merely proves a shipment and that he went to the terminal point at a time convenient to himself and found that the shipments had not arrived, he has not shown negligence on the part of the carrier. The court cannot arbitrarily put the defendant on proof unless and until negligence is proved or facts are shown from which negligence could be inferred. There is no proof of the time taken to transport similar shipments and nothing in plaintiffs' proofs to indicate a delay much less an unreasonable delay.

In *Penna. R. R. Co.* v. *Walker et al.,* 128 Atl. 45, at p. 46, the court said:

> "We do not find any evidence of negligent delay apart from all question as to icing. The defendant in this situation could be held liable only for delays on its own line, and it is incumbent upon the plaintiff to prove delay before the carrier is placed under the burden of justifying its time, or of proving that the delay did not cause the damage. *Hoffman* v. *Cumberland R. Co.,* 85 Md. 392, 394, 37 A. 214; *Schockley* v. *Penn. R. Co.,* 109 Md. 123, 128, 71 A. 437; *N. Y. & Baltimore Trans. Co.* v. *Baer,* 118 Md. 73, 78, 84 A. 251; *Penn. R.* v. *Clark,* 118 Md. 514, 518, 85 A. 613. The details of the time of transportation in this case were given, but delay is relative, and the record contains no evidence that faster time could be made on the journey or at any stage of it."

In the case of *William Barret* v. *Van Pelt,* 268 U. S. 85, 69 L. Ed. 857, where the questions involved were somewhat similar to those in the present case, the Supreme Court, in reversing a judgment allowing recovery, said:

> "The carload of eggs was delivered to the company at Louisville, February 23rd, and was delivered by the company to the consignee at New York, March 4. It was shown that the car was taken out of Louisville, February 23, on a train of the Pennsylvania Railroad Company, and that it should have gone to Pittsburg without transfer. There was no other evidence in respect of the intended or actual movement of the car. There was evidence tending to show that the ordinary time of a passenger train on the Pennsylvania Railroad between Louisville and New York was twenty-five or twenty-six hours. But there was no evidence that such shipments usually moved, or that this shipment could have moved, on any train making that time, or to show the time usually made by trains upon which such shipments were or could be moved. There was no evidence to show what was the customary or usual time for the transportation and delivery of such shipments. The trial judge held that such reasonable time was not more than thirty hours. We think the evidence was not sufficient to sustain that finding, or to show what was a reasonable time for such transportation and delivery. It follows that there was nothing to give rise to any inference or presumption that failure to deliver at destination within thirty hours was due to negligence, or to support a finding that there was any loss or damage due to delay caused by carelessness or negligence of the company. The evidence of market value of such eggs in New York City was as follows: February 25th, 53 cents per dozen; February 26th, 52 cents;

> March 1st, 36 cents; March 2nd, 35.5 to 36 cents; March 4th, 36.5 cents. The eggs in question were sold March 4, * * * some for 35 cents, some for 35.5 and the rest for 36.5 per dozen. There was no evidence of market value at any other time. The court directed a verdict in favor of respondent for $3,396.26, the difference between the amount for which the eggs were sold March 4 and their value calculated at 53 cents per dozen, the price prevailing February 25, with interest. The date when the eggs should have been delivered to consignee, and the market value at that time, were essential to respondent's case. In the absence of either, the amount of the loss, if any, cannot be determined. The judgment given cannot be sustained."

Cases in this state where a recovery was allowed contain proof of time required for other shipments.

> *Hanson* v. *P. R. R. Co.*, 72 N. J. L. 407;
> *Engeman* v. *D., L., W. R. R. Co.*, 88 N. J. L. 451.

At the conclusion of the plaintiffs' case the court had before it, evidence of a shipment of two carloads of bananas described as ripes and rejects, moving from Pier 26, East River, New York, about 5 P. M. on July 17th, which were liable to decay within two hours after packing and delivery of the shipment to plaintiffs at 11.45 A. M. on July 18th. The evidence with respect to condition upon arrival is contained in the testimony given by Joseph Galioto when he said that when the bananas were loaded they had color and when he got them the following morning they were a "little bad, too much bad, the reason I have to use the next day" (p. 12, lines 33-37). The defendant should not have been called on to show that it was not negligent

just because the shipments would not be in good condition the day after they were delivered to the plaintiffs and so defendant's motion for a non-suit should have been granted.

II.

It was error for the trial court to refuse defendant's motion for a direction of verdict.

The shipments moved "Shippers Load and Count" (p. 53, line 13) and the cars were selected by the shipper so that the defendant was apprised of the contents only by the description on the bills of lading. No arrangement was made for delivery at a particular time and no special contract was entered into by the parties. As it was an ordinary shipment the defendant was not bound to use extraordinary means nor to incur heavy expense in order to hasten the delivery of goods.

The cars were received by the defendant at Pier 26, East River, New York, about 5 P. M. on July 17th and had to be towed by barge to Jersey City. From this point the cars were transported to the classification yards at Croxton, New Jersey. The defense showed that there was no night train from Croxton to Great Notch (p. 34, lines 33-35). Shipments for Bloomfield are moved over this line. On the morning of July 18th, however, the two cars were taken on the first train out of Croxton. They arrived at Forest Hill Junction between 7.30 and 8 o'clock and had to be switched out of this train to be picked up by a train moving towards Watsessing Junction (p. 37, lines 1-10). From this point they were picked up by a third train and carried to destination. In plaintiffs' brief in the Supreme Court mention is made of the cars in ques-

tion being "shunted back and forth with vacant cars." This is an inaccurate statement and has no justification from the testimony. The movements were all necessary and the defendant was not obligated to let all other shipments remain at the several junction points while these two cars were rushed to destination.

The defendant could not be expected to do more than it did, yet to hold it responsible in this case is to hold that it was negligent in not according extraordinary service to hasten the delivery of the goods. The trial judge stated that he found as a matter of fact that the defendant was negligent in permitting a period of about four hours to expire between the time the merchandise was at Forest Hill and the time it was delivered. There was no basis for such a finding unless the railroad company did wrong in moving other shipments with the two in question. Mention is made in plaintiffs' brief on this point that a longer time was taken than was required by other carriers delivering merchandise to the plaintiff. This statement is unsupported by the testimony. The defendant showed that the shipments moved without delay.

10 *Corpus Juris,* page 289:

> "Where damages are sought to be recovered on the ground of delay in shipment, the delay must be the proximate cause of the loss or injury complained of. According to the weight of authority, the rule is that if the loss or the injury complained of would have occurred notwithstanding the goods had been shipped in a reasonable time the carrier is not liable."

10 *Corpus Juris,* page 287:

> "In the absence of a special contract or special circumstances which take the case

> out of the general rule the carrier is not bound to use extraordinary means to forward even perishable freight or shipments of stock. The shipper must be understood to contemplate carriage by the regular trains on the ordinary schedule, and hence, if he desires special service, he should contract for it."

At the conclusion of the entire case there was no dispute as to the facts with respect to time consumed in transporting and the condition of the fruit. There was no evidence of delay and consequently no jury question presented and no facts to support the trial court's contentions. In the Supreme Court opinion filed in this case, the court said that the findings of fact by the trial court are not reviewable if there is any testimony to support them and cited the cases of *Lapat* v. *Erie R. R. Co.,* 71 N. J. L. 377, and *Upton* v. *Slater,* 83 N. J. L. 373. In the case under discussion there was no evidence of delay and no facts to support the contention of the trial court.

This case is distinguished from *Lapat* v. *Erie* (*supra*) where no motion for a direction of verdict was made. There it was shown that goods were entrusted to the defendant and while in its keeping they were stolen. On the testimony presented there was a question whether defendant was acting as a warehouseman and whether it was negligent in protecting the goods in its freight house and further whether the plaintiff was under the proofs entitled to a reasonable time to remove his goods after the receipt of the customary notice from the defendant. These were mixed questions of law and fact and so not reviewable by the Supreme Court on appeal from the District Court where there was testimony to support the findings.

In *Upton* v. *Slater* (*supra*) the court held that where opposite conclusions might have been drawn from the testimony, that conclusion which is essential to support the judgment will be taken as found but the determination of a question of fact is final between the parties when there is legal evidence to support it. Legal evidence is required but in this case there is no such evidence to show that the time required was more than necessary or that there had been a delay in transporting the shipments.

The situation presented in this case comes under the rule stated in *Higgins* v. *Goerke Kirch Co.*, 91 N. J. L. 465, aff'd 92 N. J. L. 424, where the court held that if there is in the record no dispute upon the material facts, the Supreme Court upon appeal will review the facts where the only contention is the rule of law applicable to the conceded facts.

There was nothing in the testimony to support the findings of the trial court; neither was there any evidence from which negligence could be inferred and as it is never presumed, the defendant's motion for direction of a verdict should have been granted, and it was error for the Supreme Court to affirm the judgment on the ground that a fact question was presented.

III.

The trial court erred in admitting certain testimony regarding time of delivery.

In the absence of a special contract, where a bill of lading is issued the shipper is bound by the terms contained therein. Under the "Carmack Amendment" which is a part of Section 20 of the Interstate Commerce Act of June 29, 1906 (34 Stat. at L., p. 584, ch. 3591), the defendant was

required to furnish a bill of lading. In this case the plaintiff placed in evidence two bills of lading, Exhibit P-4 (p. 51) and Exhibit P-5 (p. 58). These bills were in accordance with the requirements of the Interstate Commerce Commission and that fact was printed on the bills. The plaintiff was, therefore, bound by the terms contained in the bills of lading.

> *Standard Combed Thread Co.* v. *Penna. R. R. Co.*, 88 N. J. L. 257.

Among other things, the bills provided that the carrier was not bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. To permit the plaintiff to give testimony as to the time "designated" for the arrival of these shipments was to vary by oral testimony the terms of the written contract. This was error on the part of the trial judge and as it later developed extremely harmful to the defendant. The testimony complained of is as follows (p. 10, lines 25-40; p. 11, line 1):

> "Q. Did you designate any time that the bananas were to have been delivered?
>
> Mr. Kelly: I object, if your Honor please.
>
> A. Yes.
>
> The Court: I will allow it.
> Mr. Kelly: I think it is immaterial whether he designated it or not. He is bound by the terms of his bill of lading.
> The Court: Does the bill of lading specify the time of delivery?
> Mr. Kuvin: No, sir, if the Court please.
> The Court: Objection overruled.
> Mr. Kelly: I ask an exception."

The witness then proceeded to vary the terms of the bill of lading by testifying as to the time he wanted to unload the bananas. The plaintiff introduced in evidence the bills of lading, which provided that the property was not to be transported in time for any particular market, and was then permitted to testify to a matter in direct conflict with the terms of the contract. This was contrary to the decisions of the courts of this state.

In *Naumberg* v. *Young,* 44 N. J. L. 331, the court held: The rule of evidence that where parties have put their contract in writing the written contract shall be the only evidence of the contract as finally concluded, and that oral testimony of what was said or done during the negotiations, will not be admitted either to contradict the written contract or to supply terms with respect to which the writing is silent, is designed to enable parties to make their written contracts the only evidence of their undertakings and to protect themselves from the hazard of uncertain oral testimony with respect to their engagements, and is a rule indispensable to the security of contracting parties.

In the case of *Church of Holy Communion* v. *Paterson &c. R. R. Co.,* 63 N. J. L. 470 at page 472, the Supreme Court said:

> "Our decisions are uniform and explicit that the sole criterion of the completeness of a writing to express the agreement of the parties is the writing itself, and that no collateral oral agreement is admissible in evidence unless it relates to some subject distinct from that to which the written agreement relates. *Naumberg* v. *Young,* supra; *Snowhill* v. *Reed,* 20 Id. 292; *Bandholz* v. *Judge,* 33 Id. 526."

The foregoing cases are sufficient to illustrate that the trial court committed error in permitting over objection any testimony regarding delivery at a specified time when the contract of carriage was reduced to writing and assented to by the parties.

IV.

There was no basis for the judgment entered by the trial court.

Where there is in the record no dispute upon the material facts, the Supreme Court, upon appeal, will review the facts where the only contention is the rule of law applicable to the conceded facts.

> *Higgins* v. *Goerke Kirch Co.,* 91 N. J. L. 465, aff'd 92 N. J. L. 424.

In this case the plaintiffs asked for special damages in that they allege they lost the profits that they would have made if the goods were delivered in perfect condition. The plaintiffs contended that they lost their market of July 18th. To sustain the judgment on such a contention, the court must have found that there was a special contract. This finding is without support. There was no evidence introduced to show that the defendant was aware of any special circumstances rendering a prompt transportation and delivery of the goods necessary.

10 *Corpus Juris,* page 315:

> "It is a rule of universal application that damages recoverable for delay in transportation must be such as might reasonably have been contemplated by the parties at the time the contract of carriage was made, and that

> special damages for delay are recoverable only in case the shipper, at or before the time he tendered his goods for shipment, informed the carrier of the special circumstances which rendered a prompt transportation and delivery of the goods at their destination necessary. The rule in its application is not limited to contracts of sale in contemplation by the shipper, but is applied to the varying phases of mercantile life, upon the theory that unless the carrier be made aware by the shipper, at the time of shipment of the urgency and the circumstances that require unusual dispatch or care in transportation, it cannot be presumed to know the facts, the existence and knowledge of which upon its part present the legal status upon which its liability for more than ordinary damages can be predicated. In every instance it is said the shipper has it within his power to protect himself against all damages, both general and special caused by delays or losses in shipment, by giving notice to the carrier when the contract is made. If he fails to avail himself of this privilege he must suffer the consequences of his own neglect. *Higgins* v. *U. S. Express Co.,* 83 N. J. L. 398."

The defendant could not have delivered the goods in perfect order when it was undisputed that the bananas were ripes and rejects and liable to decay within two hours after packing.

With respect to the claim for loss of profits. To recover on this ground it was necessary for the plaintiffs to prove that they had a ready market for their merchandise and what the market value was at the time the goods were to have been delivered. This could not be done as the contract did not provide for delivery at a specified time. The prices quoted as received for the bananas are

as of July 19th as the goods were sold on that day to anybody that came into purchase (p. 16, lines 5-10). Their mere statement that the market was lost on July 18th because it was after 12 o'clock when plaintiffs got the bananas to their store (p. 15, lines 31-35) does not prove negligence on the part of the defendant or entitle plaintiffs to an award for lost profits.

In *Bartow* v. *Erie R. R. Co.,* 73 N. J. L. 12, at page 13, the court said:

> "To justify a finding of loss of profits as a part of the verdict in a cause, the proof must be such as will show the jury with reasonable certainty what the profits alleged to have been lost would have been but for the injury to the plaintiff.
>
> Profits must be proved; they cannot be estimated by the jury without data to justify their finding. *East Jersey Water Co.* v. *Bigelow,* 31 Vroom 201."

In *Higgins* v. *U. S. Express Co.,* 83 N. J. L. 298, the court quoting from the case of *Hadley* v. *Baxendale,* 9 Exch. 341, said:

> "No recovery can be had for loss of profits in contracts of sale, made or contemplated by the shipper unless the facts and circumstances of such sale are communicated to the carrier upon shipment."

Referring again to the case of *Barret* v. *Van Pelt* (*supra*). The United States Supreme Court in rendering its opinion stated that there must be proof as to the time when the shipments should have arrived and the market value at that time and in the absence of either the amount of loss, if any, cannot be determined. This case is lacking entirely in evidence as to market value either at the time

the plaintiffs thought they should have received the shipments or at the time the shipments actually arrived. If the plaintiffs were entitled to recover their measure of damages would be the diminution in market value between the time they ought to have been delivered and the time they were in fact delivered.

In *Fox* v. *Boston & Marine R. R. Co.,* 19 N. E. 222, 1 L. R. A. 702, the court said that the general rule is that where goods are delivered in the usual way to a carrier for transportation and there is a negligent delay in delivering them, the measure of damages is the diminution in the market value between the time they ought to have been delivered and the time they were, in fact, delivered.

To the same effect:

American Ry. Express Co. v. *Ewing Thomas Converting Co.,* 292 Fed. 335;
Warren Land Co. v. *C. M. & St. P. Ry. Co.,* 195 Ill. App. 157;
Marsh L. Brown & Co. v. *C. N. & B. Refrig. Co.,* 207 Ill. App. 89;
Steinberg v. *Erie R. R. Co.,* 170 N. Y. S. 893, aff'd 172 N. Y. S. 921, 186 App. D. 939;
American Locomotive Co. v. *N. Y. C. R. R. Co.,* 179 N. Y. S. 851, 190 App. Div. 372;
William R. Mankoff, Inc., v. *Erie,* 151 N. Y. S. 346.

Applying the general rule as to damages there is no basis for the judgment since there was no proper proof with respect to the time when the goods should have arrived and the market value at that

supposed time neither was there proof of market value at the time the goods did arrive. The only testimony on value is that in reference to what plaintiffs sold the bananas for on July 19th, the day after they received them from the defendant.

No loss was claimed on the rejects (p. 21, lines 29-33). The prices alleged to have been obtained for bananas on July 19th were on the bananas described as colors and half colors (p. 19, lines 30-40). These were the rejects because the witness Joseph Galioto so described this variety (p. 12, lines 15-20) and in answer to the question, "Are they (rejects) ripe, green or over-ripe," he answered, "Very little green, little bit of color, ripe color, everything" (p. 12 lines 28-33). It is difficult to understand how the alleged damage could be estimated when the plaintiff did not sort out the fruit and was unable to tell how much of the fruit was damaged (p. 21, lines 12-15). The court had no proof before it on the question of damages caused by an alleged delay; the testimony as to prices obtained the day after receipt of goods is not legally sufficient evidence to support the judgment.

As previously stated, claim is made for special damages because the plaintiffs lost their alleged market on July 18th. In the first place, there was no proof that they did in fact have a market for the goods on July 18th, and in the second place, there was no proof of market value. Further there is not the least bit of evidence that the necessity for delivery at a particular time was made known to the defendant neither was there a special contract for delivery at a particular time.

The finding that the defendant was negligent in permitting a period of about four hours to expire between the time the merchandise was at Forest Hill Junction and the time it was placed in posi-

tion for unloading is not justified by the evidence and amounts to a finding that the defendant was liable because it did not carry the two cars of fruit from Forest Hill Junction through to destination on a special train. The train that took the cars from Forest Hill had eighteen or twenty other cars from that same junction (p. 37, lines 28-30). It was necessary to do some drilling en route from this point to make delivery of other shipments along the way to Watsessing which was the second junction point for these two cars. There was nothing to indicate negligence in the switching of cars which was a necessary incident of transportation and so the finding of the court was one of law because the facts do not warrant a finding of negligence.

In the case of *Belkin* v. *N. Y., N. H. & H. R. R. Co.,* 146 Atl. 846, the Supreme Court of Errors of Connecticut, in affirming a judgment for the defendant where four and one-half hours were taken to place a car on a public siding after notice had been given to it to so place the car, said:

> "A carrier is not an insurer against delay in the transportation of goods. Its duty is to deliver the goods within a reasonable time. This is an implied contract ingrafted by the law upon its duty to carry safely. *New England Fruit & Produce Co.* v. *Hines,* 97 Conn. 225, 229, 116 Atl. 248. The burden of establishing a breach of this contract is upon the plaintiff, and not as he suggests upon the defendant to explain the delay * * *. What is a reasonable time for delivery is ordinarily a question of fact and not reviewable on appeal, unless the finding is wholly unsupported by the subordinate facts or results from the application of an incorrect rule of law or standard of conduct * * *. We can-

> not say as a matter of law that under the circumstances its failure to move the car until the plaintiff had agreed that it might be delivered upon the public siding was a breach of its duty to the plaintiff. Nor can we say that the trial court could not reasonably find that the car was delivered upon the public siding within a reasonable time after the plaintiff had agreed to delivery at that place."

While the foregoing is not a decision of a court of this state, it is analogous to the question involved in the case under discussion. There the court held as a matter of law that the delay of four and one-half hours in delivering a car necessitating a trip of three-quarters of a mile, was not a breach of duty to make delivery within a reasonable time. Here, when it was necessary to switch some eighteen or twenty cars, and switch the two cars in question at two junction points the court without any evidence to indicate the reason for same held that to consume four hours in traversing a distance of two and one-half miles with attendant switching of other shipments en route was negligence. This finding was wholy unsupported by the evidence and should have been so declared.

CONCLUSION.

For the foregoing reasons we respectfully urge that the judgment of the Supreme Court affirming the judgment of the trial court should be reversed and a new trial ordered.

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New Jersey Court of Errors and Appeals

ANTHONY GALIOTO and JOSEPH GALIOTO, individually and trading as A. & J. GALIOTO, *Plaintiffs-Appellees,* *vs.* ERIE RAILROAD COMPANY, a corp., *Defendant-Appellant.*	*On Appeal from Supreme Court.*

PLAINTIFFS' BRIEF.

I.

This appeal is taken from the New Jersey Supreme Court, reported in 8 N. J. Misc. page 41, which Court affirmed the judgment entered in the District Court of the Second Judicial District of the County of Essex in favor of the plaintiffs therein and the appellees herein.

Plaintiffs instituted an action against the defendant railroad company, alleging that the defendant's common carriers received from defendant 2 carload lots of bananas for shipment from New York City to Bloomfield, New Jersey, further alleging that the common carrier so negligently, carelessly and recklessly transported and delivered the goods aforesaid, so that the same was greatly damaged.

The bills of lading, a bill of lading for each carload, having been given, contain the contract terms and conditions, especially the following (p. 54, ll. 26-29, and p. 55, ll. 9-16):

> "Section 1a. The carrier or party in possession of any of the property herein described shall be liable as *at common law* for any loss thereof or damage thereto * * *."

> "Section b. * * * except in case of negligence of the carrier or party in possession (*and the burden to prove freedom from such negligence shall be on the carrier or party in possession*), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper * * *."

The plaintiffs at the trial, introduced in evidence the bills of lading, freight bills, acknowledgment by railroad company of receipt of proof of loss, proved through the agent of the shipper, Mr. Brody, that the bananas in question had been properly loaded and counted and were in perfect condition at the time the cars were closed, sealed and accepted by the railroad company, defendant, agent at New York (p. 32, ll. 26-30).

Plaintiffs further proved that they have been in the habit of shipping bananas from New York on other railroads and have received the shipment at the same point of destination at 5 and 6 A. M., the morning after the delivery to the railroad company and that the 2 carloads of bananas were presented at their destination on July 18, 1928, at 11:45 A. M. That plaintiffs, upon opening each of the respective cars, found that the bananas were, as plaintiffs testified, "burned up," and as explained by plaintiffs, greatly deteriorated, decayed and damaged to the extent that they had to sell said bananas much below the market price then prevailing and had to discard considerable portions thereof at a great loss to them.

The defendant's testimony brought out by the defendant's witnesses, conductors and freight agents in charge of each step of the shipment of the above-mentioned cars, adduced the following facts:

That all of the way bills and communications to the respective agents contained upon them the notation "Perishable Goods" thus proving the fact that the defendant had knowledge of the character and condition of the merchandise entrusted to it and conveyed this knowledge to each one of its agents entrusted with the carrying out of its business.

That the cars had been delivered to Croxton sometime prior to 6:15 A. M. of July 18, 1928, and that the first conductor on the line from Croxton to Great Notch delivered the aforesaid cars to the junction at Forest Hill, a distance of 2½ miles from Bloomfield Avenue Station, the destination of the cars, at 8 A. M., starting the cars at 7:30 A. M.

That at 8:30 A. M., the conductor at the Forest Hill Junction operating the line between Forest Hill and West Orange, left the cars at Watsessing at 10 A. M.

That between Forest Hill and West Orange the plaintiffs' cars of bananas were shunted back and forth with the vacant cars in and out of the railroad sidings, adjacent to the various manufacturing plants in that vicinity.

That the weather conditions were as follows: Hot, clear and the sun very bright and strong (p. 15, ll. 36-40; p. 19, ll. 22-30). That the conductor on the line between Watsessing and Bloomfield testified that he "picked up the cars at Watsessing about 11:35 A. M., and placed them at Bloomfield Station at 11:45 A. M."

The plaintiffs testified that at 8 A. M. they applied to the station master and agent at West Orange and inquired for their cars which were

then long overdue, in accordance with the usual time that had formerly been consumed by other carriers delivering merchandise to plaintiffs, and were informed by said agent that he had no knowledge of the whereabouts of said cars. About an hour later plantiffs noticed their two cars being "shunted" back and forth in the vicinity of the Edison plant at West Orange, and called the attention of the company's agent to the fact that their cars were being "drilled" back and forth in the sun and the hot weather and that the merchandise in said cars was perishable merchandise and asked that the cars be delivered to their destination at once. In spite of this request, the cars were not delivered to their destination at Bloomfield, until 11:45 A. M.

It is true that the bills of lading were marked "shippers load and count," which means nothing more than that the railroad company is not liable for any damage to the merchandise in its cars by reason of negligent loading or a shortage in count. It further means that the contents of the car are accepted as represented by the shipper and not checked as to the method of loading and counting. There was no testimony introduced by the defendant to show that the merchandise was improperly packed and loaded and that the damage to said merchandise was directly and proximately caused by said improper loading by the shipper.

This, therefore, eliminates this consideration from the case.

I & II.

The action in the District Court was a Tort action alleging negligence on the part of the defendant, and was a Tort action arising out of contractual relationships. The defendant-appellant,

throughout its brief, proceeds with the law and argument on the theory that the above case is an action for a breach of a contract, when in fact the above case was tried and decided on the theory of negligence and was affirmed by the Supreme Court on the theory of negligence as reference to the pleadings and opinion of the said Supreme Court will clearly designate.

Plaintiffs-appellees herewith discuss Points I and II jointly.

a. Defendant has the burden of proving lack of negligence on its part.

By the terms of the contract and by authority of *Hansen* v. *P. R. R.*, 72 N. J. L. 407, and *Gude* v. *P. R. R.*, 77 N. J. L. 390, the plaintiffs having proved a prima facie case, places the burden on the defendant to prove that it used all diligence and care and was not guilty of any negligence.

The only defense to the defendant's negligence interposed by the defendant was that it did not consume more time than was necessary and ordinarily consumed in transportation of the merchandise, and that it used due diligence and care and dispatch in said shipment.

This defense the defendant has not sustained by the greater weight of the evidence, but on the contrary has failed to sustain and has strengthened the plaintiffs' case. This is brought out by the testimony of the witnesses produced by the defendant as outlined above. Five and one-half hours were consumed, in the heat of the July sun at its strongest time, to move the goods a distance of 2½ miles. Defendant had knowledge throughout the complete shipment that the goods were of a highly perishable character (p. 37, ll. 32-35), knew that ripe bananas were being

shipped, and yet its agents carelessly and recklessly delayed the said two carloads en route from Forest Hill to Bloomfield, banging the cars back and forth when pushing them in and out of sidings, coupling them on and uncoupling them from the train of empty cars that were being made up at the various sidings, permitting the two carloads aforesaid to stand in the hot sun, awaiting connections with other branch lines, knowing all the time that the goods were perishable and subject to decay under the conditions.

That testimony, coupled with the testimony introduced by the plaintiffs, that the merchandise had always been delivered to them by other routes and carriers with much quicker dispatch, and without any deterioration of merchandise, spells negligence on the part of the defendant rather than reasonable care and due diligence.

Since, as stated in the case of *P. B. & W. R. Co.* v. *Difendal*, 72 Atl. 193, on *page 198* "besides the defendant had such notice as may be reasonably inferred from the circumstances of the case, and the course of business."

b. Defendant was insurer.

Since by the terms of the contract the defendant is liable for any loss or damage as at common law, the defendant being common carriers, in contemplation of law, where there is no special contract, are insurers for the safe delivery of the goods taken by them. *Mershon, et al.* v. *Hobensack*, 22 N. J. L. 372.

In *P. B. & W. R. Co.* v. *Difendal*, 109 Md. 494, 72 Atl. 193, the rule is laid down that the carrier is required to exercise reasonable care and diligence to protect the goods from injury while in its custody *AS WELL AS TO DELIVER THEM*

WITH DISPATCH TO THE CONSIGNEE. Reference to this case will show that the plaintiffs in the case at bar are entitled to judgment. On *page 198* the Court states as follows: "As to the exercise of due diligence on the part of the defendant, in the absence of direct proof, the Court may take judicial notice of the location of two such large and important cities as Baltimore and Washington, as well as of the distance between them, and of the approximate length of time required to transport a carload of goods from one city to the other by the modern means of conveyance."

In *Hansen* v. *the P. R. R. Co.*, 72 N. J. L. 407, the Court affirmed the judgment of the District Court, on *page 408* stated as follows: "The evidence was that the crabs were shipped at Princess Anne in good condition, packed in the usual manner; that crabs so packed reached Jersey City in good condition, *if the train come in on time*, and that on the occasions in question the crabs were not in good condition on arrival, many of them being dead. *The delay during the heat of August would reasonably account for the deterioration.*"

In *Penn. Rrd.* v. *Clark*, 118 Md. 514, 85 Atl. 613, the Court makes the statement that "delay is relative."

Plaintiffs proved that the time consumed by the defendant company in transporting the merchandise in question, was at least 4 hours in excess of the time generally consumed by other carriers making a like shipment to the plaintiffs between the same points.

III.

The Supreme Court properly ruled that the testimony admitted by the judge of the said District Court was harmless inasmuch as the cause was tried in said District Court without a jury and the judge undoubtedly dismissed from his judicial mind the testimony complained of as erroneously admitted.

Under this point the defendant-appellant again argues a point of contract law when in fact the case was tried and decided on the theory of negligence.

IV.

Defendant-appellant cites the case of *Higgins* v. *United States Express Co.*, 83 N. J. L. 398, when in fact this case is favorable to the plaintiffs-appellees. The case cited was an action instituted to recover damages upon a contract entered into between the parties and the defendant in that case sought to invoke the rule of limited liability as applicable to carriers and it was decided there that the rule did not apply, due to the fact that the limitation of liability was not brought home to the notice of the plaintiff in that case.

It is respectfully urged by the plaintiffs-appellees that the Court carefully read over the whole case of *Higgins* v. *United States Express Co.*, and this Honorable Court will readily see that the Supreme Court correctly and properly affirmed the judgment of the District Court.

On page 401 of this case last cited, Justice Minturn states as follows:

> "What is a reasonable time is dependent upon the circumstances. *Coffin* v. *Railroad*

> *Co.*, 64 Barb. 379; *Missouri Pac. Railway* v. *Hall*, 66 Fed. Rep. 868 * * *"
> * * * "the measure of damages therefore, under such a *status* is not the value of the goods, since the bailor still retains his ownership, but the loss proximately caused by the delay. *Hale Car.* 408; *Scovill* v. *Griffith*, 12 N. Y. 509; *Fox* v. *The Railroad Co.*, 148 Mass. 220; *The Caledonia*, 157 U. S. 124."

and on page 402, continuing, says:

> "We must assume that in rendering judgment the trial court was necessarily influenced by this circumstance, and found the delay under the circumstances to be inordinate and unnecessary, and that by reason thereof, the repairs made by the plaintiff to his machinery became imperative and were the direct and proximate consequence of the delay in shipment."

From a reading of the whole case, it is evident that that case, based on contract, is not applicable on the theory of damages to the case at bar, the case at bar being in negligence and the plaintiff in this case being entitled to the damages which naturally and proximately flowed as a direct result of the defendant's negligence and carelessness, the authorities in this State being too numerous to cite herein for this proposition.

c. Appeal should be dismissed and judgment affirmed.

A judgment rendered in the District Court upon the finding of the judge upon mixed questions of law and fact, will not be reversed on appeal. The presumption is that the judge found such facts as will support the judgment that was rendered. Such findings are not reversible if there was any testimony or any inferences legally to be drawn from such testimony to support them. *Lapat* v. *Erie R. R. Co.*, 71 N. J. L. 377.

The findings of fact by the trial court or judge, based on conflicting evidence, will not be reversed on appeal. *Hyatt Roller Bearing Co.* v. *Penn. R. R. Co.*, 92 N. J. L. 94.

On appeal from a judgment of the Distirct Court rendered by the judge sitting without a jury, where opposite conclusions might have been drawn from the testimony, that conclusion which is essential to support the judgment will be taken as found. Upton v. *Slater*, 83 N. J. L. 373.

CONCLUSIONS.

It is therefore respectfully submitted that the plaintiffs by the terms of their contract, and the law of this State applicable to cases such as the one at bar, have proved a prima facie case of negligence against the defendant.

The burden, by the same authorities, was upon the defendant to prove freedom from negligence.

The defendant has failed to prove such freedom from negligence as would exculpate it under the circumstances and the testimony and evidence produced at the trial.

The judgment for the plaintiffs and against the defendant in the sum of $468.71, which was the amount of damage proved by the plaintiffs as sustained by them by reason of the defendant's negligence, together with interest from July 18, 1928, to date of judgment, and costs should be affirmed.

Respectfully submitted,
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On Brief.