Ad 621- 1914

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NEW JERSEY

Court of Errors and Appeals

Andrew Spada et al., Partners Trading &c., *Plaintiffs–Appellees,* *vs.* The Pennsylvania Railroad Company, *Defendant–Appellant.*	Action at Law. On Appeal from Hudson County Circuit Court.

Brief of Defendant—Appellant.

Plaintiffs caused to be shipped nine carloads of watermelons from various points in the south to Jersey City, N. J., which is the wateremlon market for New York and vicinity (Case, p. 222), during July, 1912. The defendant, The Pennsylvania Railroad Company, received these various shipments at Edgemoor, Delaware, from The Philadelphia, Baltimore and Washington Railroad Company, the connecting carrier. (Case, p. 62.) Under the most favorable circumstances the shipment could have been transported from Edgemoor to Jersey City in about seven hours. (Case, p. 63.) Delivery of these shipments, however, was delayed for periods in excess of that time, owing to a strike at The Pennsylvania Rail-

New Jersey State Library

roads Company's piers, Nos. 27, 28 and 29, in New York City. (Case, pp. 184, 185, 211.) The strike began on July 9th, 1912, and continued about eleven or twelve days. (Case, pp. 211, 271, 329, 330.) During that period perishable fruit, which otherwise would have been delivered at pier 29, New York City, coming in over the Pennsylvania lines, congested at points along the road until every available foot of trackage and storage facilities from the Hudson river, west, to the Meadows at Harrison and beyond, was filled and clogged with accumulated freight. (Case, pp. 212, 214, 237, 257, 297.) This congestion continued until about August 1st. (Case, pp. 212, 237, 296.)

Herculean efforts were made by The Pennsylvania Railroad Company to prevent and relieve the congestion, but it was unable to restore normal conditions before the time indicated. (Case, pp. 238, 246, 247, 250, 252, 264, 266, 270, 271.) Most of the perishable fruit consigned to New York city was diverted to the Jersey City terminus, where every available facility was used to effect delivery without damage and without delay. (Case, pp. 217, 220, 250.) In spite of all that was done in this respect, however, some of the perishable fruit deteriorated and spoiled before it could be moved to points at which it could be unloaded and delivered. Among the freight which was thus damaged were the nine carloads of watermelons of plaintiffs.

Defendant produced evidence showing that all of these consignments were interstate shipments and that bills of lading or shipping receipts had been issued by the initial carriers to the shippers. (Case, p. 191, exhibits D-4, D-5, D-8, D-11, D-14, D-17, D-19, D-20½, D-23.) By the conditions of these bills of lading the carrier was relieved of liability for loss or damage accruing from strikes among its own employees, or from causes beyond its control.

Evidence was also produced by the defendant showing that the strike was not caused by any act of the

defendant, or because of any grievance which its employees had against it, but through the pressure brought to bear upon its employees by threats of violence and by economic pressure on the part of the striking employees in other railroad and steamship systems, who thus compelled defendant's employees to strike as a part of the general movement. There was evidence of intimidation and violence, too, as well as interference with the employees of defendant, and expressions of fear of further violence and injury to them in case they failed to comply with the demands of the general strikers, and join with them in the sympathetic movement. (Case, pp. 245, 246, 247, 249, 250, 255, 330, 333-336.)

Having thus proved the exception in the bill of lading which exempted the defendant from liability, the defendant contended that it was incumbent upon the plaintiffs to show negligence on its part if it was to be held liable.

> *Clarke* v. *Barnwell, 12 Howard (U. S.) 273, 280.*

Defendant thus contending that no negligence had been shown, moved for the direction of a verdict in its favor at the close of the whole case. (Case, p. 337.) This motion was denied, and the case was submitted to the jury.

Defendant thereupon requested the court to charge the jury, *inter alia,* as set forth in the state of the case at pages 359 to 362. The court refused to charge requests Nos. 4, 5, 7, 8, 9, 10, 11, 12, 13, 15 and 16, and submitted the case to the jury practically under the rule laid down in *Hill* v. *Adams Express Company, 82 N. J. Law 373* (Case, p. 344), charging the jury in this respect as follows:

> *a.* "That the burden was on the defendant company to show a special contract limiting its liability, otherwise the presumption would be

that the shipments were made subject to the common law liability;

b. "That it was for the jury to say whether the bills of lading which were admitted in evidence in the case were binding upon the plaintiffs.

c. "That it was for the jury to say whether the bills of lading likewise were binding upon the question of the measure of damages;

d. "That the strike proved by defendant was not a sufficient defense to relieve the defendant from liability unless the jury should find as a fact that the bills of lading were issued in such a manner as to be binding upon the parties.

The jury found a verdict in favor of the plaintiffs for $1,634.27. (Case, p. 24a.)

I.

It is incontrovertible that these were all interstate shipments, and hence are governed exclusively by the Interstate Commerce Acts of the Federal Congress.

C. & A. R. R. Co. v. *Kirby, 225 U. S. 155;*

Adams Express Co. v. *Croninger, 226 U. S. 491;*

C., B. & Q. Ry. Co. v. *Miller, 226 U. S. 513;*

C., St. P. & C. Ry. Co. v. *Latta, 226 U. S. 519;*

Bd. of Fhds. v. *N Y. C. & H. R. R. Co., 227 U. S. 248;*

Well Fargo & Co. v. *Neiman-Marcus Co., 227 U. S. 469;*

Kansas City, &c., Ry. Co. v. *Carl, 227 U. S. 639;*

Mo., K. & T. R. R. Co. v. *Harriman, 227 U. S. 657;*

Erie R. R. Co. v. *Wanaque Lumber Co. 75 N. J. Law 878.*

Section 1 of the Interstate Commerce Act provides, *inter alia,* that:

> "The provisions of this act shall apply to * * * any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad * * * from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, * * * and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation for those entitled thereto. * * *"

Section 3, in part, provides that—

> "Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines

and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines. * * *"

Section 7 provides that—

"* * * It shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act."

And that portion of Section 20 which is applicable to this shipment, commonly called the "Carmack Amendment," provides—

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier railroad or transportation company from the liability hereby im-

posed: *Provided,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

24 Statutes at Large (U. S.) 379;
25 " *855;*
26 " *743;*
28 " *643;*
34 " *584;*
34 " *838;*
35 " *60;*
35 " *648;*
36 " *539;*
37 " *566.*

See Compilation of said Acts, entitled "The Act to Regulate Commerce (as amended);" etc., published by the Interstate Commerce Commission, revised to September 1, 1912; Government Printing Office, Washington, D. C.

Under Section 20, commonly called The Carmack Amendment, the initial carriers were obliged to issue receipts or bills of lading to the shippers, and the shippers were bound by the stipulations or conditions contained in those bills, regardless of whether or not they were issued in such a way as to make them binding under the rule in *Hill* v. *Adams Express Company.*

International Watch Co. v. *D., L. & W. R. R. Co., 80 N. J. Law, p. 553; Aff'd in 82 N. J. Law, p. 528.*

It is irrefutable, also, in view of the recent decisions in the United States Supreme Court, cited *supra,* that all State laws, regulations and decisions have been superseded by the interstate commerce legislation of the Congress of the United States.

Being thus binding upon the shipper, the measure of damage should have been charged to be the value at the place of shipment, where that stipulation appeared in the conditions; and the price for which the shipments were sold at destination, less freight charges, where that stipulation applied. Where the conditions were silent in this respect, it is submitted that the value at place of shipment is the true measure of damages under present conditions and that the rule should be so laid down, in keeping with the stipulation or condition in the "Uniform Bill of Lading," (*Exhibit D 4*), for that expresses the present thought of the most expert men in railroad and transportation circles. It is the result of the council of transportation men, of shippers, and of the Interstate Commerce Commission, under whose supervision it was framed and incorporated in the "Uniform Bill of Lading."

II.

The filing of the tariffs and classifications or schedules with the Interstate Commerce Commission conclusively charged the shippers with knowledge of their contents. And this is true whether they were posted in the stations of the carriers or expressly brought to the attention of the shippers or not.

Tex. & Pac. Ry. Co. v. *Abilene Cotton Oil Co., 204 U. S. 426;*

Tex. & Pac. Ry Co. v. *Mugg, 202 U. S. 242;*

Ill. Cen. R. R. Co. v. *Henderson Elevator Co., 226 U. S.;*

P. R. R. Co. v. *Quinn & Co., 37 N. J. L. J. 47.*

Indeed, as was stated by Mr. Commissioner Harlan, in *Poor Grain Company* v. *C., B. & Q. Ry. Co., 12 I. C. C. Rep. 418:*

> "When once lawfully published, a rate, so long as it remains uncancelled, is as fixed and unalterable either by the shippers or by the carrier, as if that particular rate had been established by a special act of Congress. When regularly published, it is no longer the rate imposed by the carrier, but the rate imposed by law.
>
> "It is as little open to question in an action at law as though it were prescribed by an act of Congress."
>
> *60 U. of P. Law Review, and Amer. Law Register, No. 1, p. 7.*

The rate specified in the tariffs on file with the Interstate Commerce Commission governing these nine shipments fixes the liability assumed by the carriers in this action. It is the liability under the carrier's bill of lading. It could not be the carrier's liability as at common law, because that is wiped out by the Interstate Commerce Act and the Southern classification, and in its place has been substituted what is designated as "the carrier's liability." This carrier's liability is apparently the same as the one-time "common law liability," but in order to charge the carrier with that liability it is necessary for the shipper to make a special contract therefor, and for him to pay an additional rate of ten per cent. higher than the ordinary rate fixed by the tariffs. (*Exhibit D 31.*)

The burden is upon the shipper to show that this extra ten per cent. was paid if he is to procure the advantage of the carrier's liability, for otherwise it would permit the shipper to obtain a discriminatory advantage forbidden by the act. The only way he can get that advantage is by paying for it; and if he paid for it, he must show it; otherwise, the regulation

in the filed schedules automatically places the shipment under the liability imposed by the carrier's bill of lading. (Cases cited, *supra.*)

III.

It is submitted that these propositions are irrefutably established by the cases cited, and that therefore the motion of defendant for a directed verdict, and the requests to charge, which were refused by the trial court, were proper, and should have been granted; and that the charge of the court submitting the case under the theory of *Hill* v. *Adams Express Comany* was erroneous.

IV.

The defendant on the trial objected to certain questions propounded to witnesses whose testimony had been taken *de bene esse,* and which was read in evidence. (Case, pp. 33, 53, 55.) These objections should have been noted when the depositions were taken, and it was too late to object at the trial.

V.

The trial court struck out certain evidence of the defendant's witness, Christie. (Case, p. 263.) It was clearly competent for the witness, who was on the ground, mingling with the men, receiving reports of the progress of the strike, and keeping in constant touch with the situation, to testify as to the existence of a general strike. It was unmistakable. It was all around him. He knew.

VI.

The weight of the various cars of melons had already been testified to by the witnesses, whose testimony was

taken by deposition (Case, pp. 30, 37, 42, 42, 43, 44, 45, 46), and the rate applicable had also been put in evidence by the witness, Butler. (Case, pp. 225–228.) It was perfectly competent, therefore, to ask the witness, Phillips, the hypothetical questions to fix the amount of freight. (Case, pp. 327–329.)

VII.

The questions propounded to the witness, Hall, touching the authority of Carl Rountree, were competent to show the authority in question. If he knew, he could testify; and there was nothing interposed by plaintiff to show that he did not know. (Case, pp. 56–61.)

VIII.

The trial court erred, therefore, and the judgment of the Circuit Court should be reversed, set aside, and for nothing holden, and a *venire de novo* awarded, or judgment directed to be entered in favor of the defendant and against the plaintiffs.

Respectfully submitted,

VREDENBURGH, WALL & CAREY,
Attorneys for and of Counsel with
Defendant-Appellant.

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Notice of Appeal.

Filed February 8, 1914.

Hudson County Circuit Court.

ANDREW SPADA and DOMINICK SPADA, Partners, doing business as ANDREW SPADA & Co.
Plaintiff-Appellees,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.
Defendant-Appellant.

Action at Law

Notice of Appeal

To
QUEEN & STOUT,
Attorneys for Plaintiffs:—

TAKE NOTICE:—that the defendant appeals to the New Jersey Court of Errors and Appeals, in the last resort in all causes, from the whole of the Judgment entered in this cause.

Dated February 6, 1914.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Notice of Appeal

Indorsed 1498.

HUDSON COUNTY CIRCUIT COURT.

ANDREW SPADA, *et al.*, Partners, etc.
Pltffs.-Appellees.

VS.

THE PENNSYLVANIA RAILROAD COMPANY,
Deft.-Appellant.

Action at Law.

NOTICE OF APPEAL.

Vredenburgh, Wall & Carey,
Attorneys,
1 Exchange Place,
Jersey City, N. J.

(Service Acknowledged February 7, 1914.)

Grounds of Appeal.

Filed February 16, 1914.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ANDREW SPADA, *et al.*, Partners trading, &c., *Plaintiffs, Appellees,* *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *Defendant. Appellant.*	On Appeal from Hudson County Circuit Court. Grounds of Appeal.

The following are the grounds upon which defendant appeals to the New Jersey Court of Errors and Appeals from the judgment of the Hudson County Circuit Court:

First: Said judgment was entered in favor of plaintiffs and against defendant, whereas it should have been in favor of defendant and against plaintiffs.

Second: Said Circuit Court erred in refusing to grant a non-suit at the close of plaintiff's case, when thereupon moved so to do by defendant.

Third: Said Circuit Court erred in refusing to direct a verdict in favor of the defendant and against the plaintiffs, at the close of the whole case, as to counts 4, 5, 6 and 7, when thereupon moved so to do by defendant.

Fourth: Said Circuit Court erred in refusing

to direct a verdict in favor of the defendant and against the plaintiffs, at the close of the whole case, generally, when thereupon moved so to do by defendant.

Fifth: Said Circuit Court erred in refusing to charge the jury, when thereunto duly requested by defendant, as follows:

"4. That the damage for which the defendant carrier is liable in this case is to be computed on the basis of the value of the property at the place and time of shipment."

"5. That the measure of damages under the bills of lading introduced in evidence as Exhibits D-11, D-14, D-17, D-19, and D-20, is the amount the goods were sold for by the defendant, less the expense of the sale."

"7. That Rule 1 of the classification in evidence provides that the reduced rate specified therein will apply on property shipped subject to the conditions of the carrier's bill of lading, and the evidence showing that the water melons in question were shipped at such reduced rate, therefore the shipments in this suit were shipped subject to the conditions of the bills of lading introduced in evidence."

"8. That the burden is on the plaintiff to show that the water melons in question were shipped at the higher rate and at the carrier's liability, as provided for in Rule 1 of the classification in evidence."

"9. The shipments involved in this action are interstate shipments and are governed solely by the Acts of Congress of the United States, commonly designated as the Inter-State Commerce Acts."

"10. When classifications and tariffs are filed by a carrier with the Interstate Com-

merce Commission, or a carrier has signified its intention to become a party to them, shippers and carriers are charged conclusively with notice of what they contain, and when made out and filed they are conclusive notice, whether they are posted in the carrier's stations or expressly brought to the shipper's attention or not."

"11. The carrier at the time of accepting goods for transportation is bound to issue a bill of lading therefor, to the shipper, and its issuance will be conclusively presumed in the absence of proof to the contrary; and the burden of proving that none was issued is upon the plaintiff."

"12. Acceptance of the bill of lading by the person delivering goods to the carrier for transportation is an acceptance of the terms and conditions of such bill of lading and is binding upon the shipper and his assigns unless it is shown that such conditions were expressly not excepted, and the burden of showing such non-acceptance is upon the plaintiff."

"13. The Interstate Commerce Acts of Congress supersede all State regulations, policies and rules governing interstate shipments and bring all interstate shipments under the uniform rule provided in the Acts of Congress?"

"15. If an express contract between the shipper and carrier is shown by which the shipments were to be governed by the carrier's common law liability at the 10% increased rate provided in the filed tariffs and classifications (and the burden of proving it is upon the plaintiff), then they must be conclusively presumed to have been made subject to the reduced rate provisions of the tar-

iffs and classifications and subject to the terms and conditions of the carrier's bill of lading."

"16. The rate charged by the carrier, in the absence of proof that another rate was expressly agreed upon by shipper and carrier at the time of shipment (and the burden of proving such agreement is upon the plaintiff), fixes and determines the nature of the carrier's liability, and that liability must be according to that specified in the filed tariffs and classifications as the liability which that rate imposes."

SIXTH. Said Circuit Court erred in charging the jury in the following respects:

(a) That the burden was on the defendant company to show a special contract limiting its liability, otherwise the presumption would be that the shipment was made subject to the common law liability.

(b) That it was for the jury to say whether the bills of lading which were admitted in evidence in the case became binding under Hill vs. Adams Express Company.

(c) That it was for the jury to say whether the bills of lading were likewise binding in disposing of the question of the measure of damages.

(d) That the strike proved by defendant was no defence unless the jury should find as a fact that the bills of lading were issued in such a manner as to be binding upon the parties under Hill vs. Adams Express Company.

Seventh. Said Circuit Court erred in permitting plaintiffs to object to certain questions pro-

pounded to witnesses whose testimony was taken by deposition, and in sustaining said objections.

Eighth. Said Circuit Court erred in striking out the testimony of the defendant's witness Christie, as to the existence of a general strike.

Ninth. Said Circuit Court erred in excluding the freight bills covering the shipments involved in this action, when offered in evidence by the defendant.

Tenth. Said Circuit Court erred in sustaining plaintiffs' objections to certain hypothetical questions propounded by defendant to the witness John A. Schug, based upon the weight of the melons as shown by the depositions, and the tariffs in effect which governed the respective shipments.

Eleventh. Said Circuit Court erred in sustaining plaintiffs' objection to the questions propounded to the witness Hall, taken by deposition as follows:

"Q. State whether or not he was authorized in July, 1912, to sign the name of W. B. Roddenbery."

"Q. State if the name W. B. Roddenbery appears on the original bill of lading covering this car of melons signed 'C. R.', whether or not it was signed by your bookkeeper Carl Rountree."

"Q. State whether or not he was authorized in July, 1912, to sign the name of W. B. Roddenbery."

"Q. State if the name W. B. Roddenbery appears on the original bill of lading covering this car of melons, signed 'C. R.', whether or not it was signed by your book-keeper Carl Rountree."

"State whether or not he was authorized in July, 1912, to sign the name of W. B. Roddenbery."

"Q. State whether or not Carl Rountree was in the employ of W. B. Roddenbery as bookkeeper and stenographer and state whether or not he was authorized to accept bills of lading for shipments made by W. B. Roddenbery, of water melons or any other shipment."

Twelfth. Said Circuit Court erred in divers other respects.

Dated February 16, 1914.

VREDENBURGH, WALL & CAREY,
Attys. for Defendant-Appellant.

(*Indorsed.*)

NEW JERSEY COURT OF ERRORS AND APPEALS.

ANDREW SPADA, *et al.*, Partners, &c.,
Pltffs.-Appellees.

vs.

THE PENNSLYVANIA RAILROAD COMPANY,
Deft.-Appellant.

On Appeal from Hudson Circuit Court.

GROUNDS OF APPEAL.

VREDENBURGH, WALL & CAREY,
Attorneys,
1 Exchange Place,
Jersey City, N. J.

Service Acknowledged February 16, 1914.

Filed February 16, 1914.

Complaint.

Filed March 8, 1913.

STATE OF NEW JERSEY, County of Hudson, } ss.

CIRCUIT COURT.

Holden in and for said County.

ANDREW SPADA and DOMINICK SPADA, Partners, doing business as ANDREW SPADA & Co.
Plaintiffs.

vs.

THE PENNSYLVANIA RAILROAD COMPANY.
Defendant.

The defendant was summoned to answer unto said plaintiffs therein in an action at Law upon the following complaint:

Plaintiffs, Andrew Spada and Dominick Spada, partners doing business as Andrew Spada & Co., who resides in the City and State of New York say that:

First Count—1. On July 18th, 1912, at Oaktown in the State of Georgia the plaintiffs caused to be delivered to the defendant, who was then and now is a common carrier of goods for hire between Oaktown aforesaid and Jersey City in this State, one carload of water melons of the value of five hundred dollars which the defendant then and and there accepted and received, as such common carrier to be transported to the plaintiffs at Jersey City aforesaid within a reasonable time, for a reward.

2. The defendant did not transport the said carload of water melons within a reasonable time but on the contrary unreasonably and negligently delayed the transportation thereof for a period of three days and during said delay the said water melons decayed and spoiled, all to the damage of the plaintiffs, five hundred dollars.

Second Count—1. On July 9th, 1912, at Cherokee in the State of Georgia the plaintiffs caused to be delivered to the defendant, who was then and now is a common carrier of goods for hire between Cherokee aforesaid and Jersey City in this State, one carload of water melons of the value of five hundred dollars which the defendant then and there accepted and received, as such common carrier, to be transported to the plaintiffs at Jersey City aforesaid within a reasonable time, for a reward.

2. The defendant did not transport the said carload of water melons within a reasonable time but on the contrary unreasonably and negligently delayed the transportation thereof for a period of four days and during said delay the said water melons decayed and spoiled, all to the damage of the plaintiffs, five hundred dollars.

Third Count—1. On July 12, 1912, at Ashford in the State of Alabama the plaintiffs caused to be delivered to the defendant, who was then and now is a common carrier of goods for hire between Ashford aforesaid and Jersey City in this State, one carload of water melons of the value of five hundred dollars which the defendant then and there accepted and received, as such common carrier, to be transported to the plaintiffs at Jersey City aforesaid within a reasonable time, for a reward.

2. The defendant did not transport the said carload of water melons within a reasonable time but on the contrary unreasonably and negligently delayed the transportation thereof for a period of six days and during said delay the said water melons decayed and spoiled, all to the damage of the plaintiffs five hundred dollars.

Fourth Count—1. On July 12, 1912, at Cairo in the State of Georgia the plaintiffs caused to be delivered to the defendant, who was then and now is a common carrier of goods for hire between Cairo aforesaid and Jersey City in this State, one carload of water melons of the value of five hundred dollars which the defendant then and there accepted and received, as such common carrier, to be transported to the plaintiffs at Jersey City aforesaid within a reasonable time, for a reward.

2. The defendant did not transport the said carload of water melons within a reasonable time but on the contrary unreasonably and negligently delayed the transportation thereof for a period of four days and during said delay the said water melons decayed and spoiled, all to the damage of the plaintiffs five hundred dollars.

Fifth Count—1. On July 13th, 1912, at Cairo in the State of Georgia the plaintiffs caused to be delivered to the defendant, who was then and now is a common carrier of goods for hire between Cairo aforesaid and Jersey City in this State, one carload of water melons of the value of five hundred dollars which the defendant then and there accepted and received, as such common carrier, to be transported to the plaintiffs at Jersey City aforesaid within a reasonable time, for a reward.

2. The defendant did not transport the said carload of water melons within a reasonable time

but on the contrary unreasonably and negligently delayed the transportation thereof for a period of six days and during said delay the said water melons decayed and spoiled, all to the damage of the plaintiffs five hundred dollars.

Sixth Count—1. On July 13th, 1913, at Cairo in the State of Georgia the plaintiffs caused to be delivered to the defendant, who was then and now is a common carrier of goods for hire between Cairo aforesaid and eJrsey City in this State, one carload of water melons of the value of five hundred dollars which the defendant then and there accepted and received as such common carrier, to be transported to the plaintiffs at Jersey City aforesaid within a reasonable time, for a reward.

2. The defendant did not transport the said carload of water melons within a reasonable time but on the contrary unreasonably and negligently delayed the transportation thereof for a period of five days and during said delay the said water melons decayed and spoiled, all to the damage of the plaintiffs five hundred dollars.

Seventh Count—1. On July 13th, 1912, at Cairo in the State of Georgia the plaintiffs caused to be delivered to the defendant, who was then and now is a common carrier of goods for hire between Cairo aforesaid and Jersey City in this State, one carload of water melons of the value of five hundred dollars which the defendant then and there accepted and received, as such common carrier, to be transported to the plaintiffs at Jersey City aforesaid within a reasonable time, for a reward.

2. The defendant did not transport the said carload of water melons within a reasonable time but on the contrary unreasonably and negligently delayed the transportation thereof for a period of

six days and during said delay the said water melons decayed and spoiled, all to the damage of the plaintiffs five hundred dollars.

Eighth Count—1. On July 19th, 1912, at Cairo in the State of Georgia the plaintiffs caused to be delivered to the defendant, who was then and now is a common carrier of goods for hire between Cairo aforesaid and Jersey City in this State, one carload of water melons of the value of five hundred dollars which the defendant then and there accepted and received, as such common carrier, to be transported to the plaintiffs at Jersey City aforesaid within a reasonable time, for a reward.

2. The defendant did not transport the said carload of water meolns within a reasonable time but on the contrary unreasonably and negligently delayed the transportation thereof for a period of six days and during said delay the said water melons decayed and spoiled, all the damage of the plaintiffs five hundred dollars.

Ninth Count—1. On July 20th, 1912, at Pinepark in the State of Georgia the plaintiffs caused to be delivered to the defendant, who was then and now is a common carrier of goods for hire between Pinepark aforesaid and Jersey City in this State, one carload of water melons of the value of five hundred dollars which the defendant then and there accepted and received, as such common carrier, to be transported to the plaintiffs at Jersey City aforesaid within a reasonable time, for a reward.

2. The defendant did not transport the said carload of water melons within a reasonable time but on the contrary unreasonably and negligently delayed the transportation thereof for a period of seven days and during said delay the said water

melons decayed and spoiled, all to the damage of the plaintiffs five hundred dollars.

QUEEN & STOUT,
Attorneys of Plaintiff.

Filed
Clerks Office,
Mar. 8, 1913.
Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

Stipulation.

Filed April 11, 1913.

It is hereby stipulated and agreed by and between the attorneys for the respective parties,

1. That no affidavit of merits need be filed by the defendant.

2. That the defendant's time to answer be extended to and including April 8th, 1913.

Dated March 24, 1913.

QUEEN & STOUT,
Plaintiffs' Attys.

VREDENBURGH, WALL & CAREY,
Defendant's Attys.

Filed
Clerks Office,
April 11, 1913.
Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

Stipulation.

Filed April 11, 1913.

It is hereby stipulated and agreed by and between the attorneys for the respective parties,

That defendant's time to answer be extended to and including April 11, 1913.

Dated April 7, 1913.

QUEEN & STOUT,
Plaintiffs' Attorneys.

VREDENBURGH, WALL & CAREY,
Defendant's Attorneys.

Filed
Clerks Office,
Apr. 11, 1913.
Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

Answer.

Filed April 11, 1913.

The defendant Corporation answers as follows:

Defendant, a body corporate organized under the laws of the State of Pennsylvania, says that:

First Defense:

(1) It denies the truth of the matters contained in the complaint and each and every count thereof.

(1) Defendant without admitting that the goods and property were delivered to it and accepted by it, to be transported in the manner averred in the complaint, avers that if such property did come to the hands of the defendant thereof, it did so under an express agreement between the plaintiff and

the defendant, whereby the defendant was to be relieved from any and all liability for damage to the said goods and property resulting from delay in the transportation and delivery thereof, if such delay was caused by strikes among defendant's employees; and defendant asserts that a strike did take place among its employees and continued from the 9th day of July, 1912, to the 21st day of July, 1912, which strike was the cause of the alleged delay at all occured as alleged in said complaint.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Filed
Clerks Office,
Apr. 11, 1913.
Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

Reply.

Filed April 16, 1913.

The plaintiffs deny every allegation in the answer.

QUEEN & STOUT,
Attorneys for Plaintiffs.

Filed
Clerks Office,
Apr. 16, 1913.
Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

Order Striking Out Interrogatories.

Filed June 3, 1913.

Due notice having been given of a motion to strike out the interrogatories served on defendant in the above stated cause on May 16th, 1913, and said motion coming on to be heard pursuant to said notice,—Vredenburgh, Wall & Carey appearing in support of said motion, and Queen & Stout *contra*—and the Court having permitted said notice to be amended so as to particularly specify the interrogatories to which the objections therein stated refer;

It is thereupon, on this 23rd day of May, A. D., 1913, ORDERED that Interrogatories 1, 2, 3, 4, 5, 11, 19, 28, 37, 45, 54, 62, 71 and 79 be and the same hereby are stricken out and that said motion be and the same hereby is denied as to the remaining interrogatories, but without costs to either party as against the other.

AND IT IS FURTHER ORDERED that said defendant have ten days further time in addition to that allowed by law, in which to answer said remaining interrogatories.

WILLIAM H. SPEER,
Judge.

On motion of
VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Filed
Clerks Office,
June 3, 1913.
Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

To
MESSRS. QUEEN & STOUT,
Attorneys for Plaintiff.

Notice.

Filed Sept. 17, 1913.

PLEASE TAKE NOTICE:

That on Friday, the 23rd day of May, 1913, we shall move before the Honorable William H. Speer, Judge of the above stated court at the Court House, in the City of Jersey City, New Jersey, at ten o'clock in the forenoon or as soon thereafter as counsel may be heard, for an order to strike out the interrogatories in above case served upon the defendant on May 16th inst., on the ground that said interrogatories are irrelevant, incompetent, immaterial and are not necessary to the sustaining of the plaintiff's case, but are directed to matters pertaining to the defendant's case, and pry into matters of defense.

Yours respectfully,

Dated May 21, 1913.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Filed
Clerks Office,
Sep. 17, 1913.
Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

Amended Answer.

Filed Sept. 24, 1913.

Defendant, a body corporate organized under the laws of the State of Pennsylvania, having a place of business and office at No. 26 Exchange Place, Jersey City, Hudson County, New Jersey, says that:

Amended Answer

First defense:

(1) It denies the truth of the matters contained in the complaint and each and every count thereof.

Second defense:

(1) Defendant, without admitting that the goods and property were delivered to it and accepted by it to be transported in the manner averred in the complaint avers that if such property did come to the hands of the defendant for the purpose of the transportation thereof, it did so under an express agreement between the plaintiff and the defendant whereby the defendant was to be relieved from any and all liability for damage to the said goods and property resulting from delay in the transportation and delivery thereof if such delay was caused by a strike or strikes among defendant's employees; and defendant asserts that a strike did take pace among its employees and continued from the ninth day of July, nineteen hundred and twelve, which strike was the cause of the alleged delay, if any delay at all occurred as alleged in said complaint.

Third defense:

(1) Defendant, without admitting that the goods and property were delivered to it and accepted by it to be transported in the manner averred in the complaint, avers that if such property did come to the hands of the defendant for the purpose of the transportation thereof, it did so under an express agreement between the plaintiff and the defendant whereby the defendant was to be relieved from any and all liability for damage to the said goods and property resulting from or occasioned by an accumulation of freight at any point, or to any other causes over which the de-

fendant had no control; and defendant asserts that an accumulation of freight did occur at Jersey City, New Jersey, the point to which the shipments mentioned in the complaint were consigned and at which they were to be delivered, and continued from the ninth day of July, nineteen hundred and twelve to the thirty-first day of July, nineteen hundred and twelve, over which accumulation the defendant had no control, and which accumulation was the cause of the alleged delay, if any delay at all occured as alleged in said complaint.

Fourth Defense:

(1) Defendant, without admitting that the goods and property were delivered to it and accepted by it to be transported in the manner averred in the complaint, avers that if such property did come to the hands of the defendant for the purpose of the transportation thereof, it did so under an express agreement between the plaintiff and the defendant whereby the defendant was to be relieved from any and all liability for damage to the said goods and property resulting from or occasioned by any cause over which the defendant had no control; and defendant asserts that a strike took place among its employees and continued from the ninth day of July, nineteen hundred and twelve, to the twenty-first day of July, nineteen hundred and twelve, over which strike the defendant had no control, and which strike was the cause of the alleged delay, if any delay at all occurred as alleged in said complaint.

Fifth defense:

(1) No claim for the loss or damage to the goods or property mentioned in the complaint was made in writing to the agent of the defendant at

the point of delivery or consignment of said goods and property by said plaintiff within ten days after the delivery of said property, or after due time for the delivery thereof, by the defendant to the plaintiff, although at the time when said goods and property were delivered to and accepted by the defendant for transportation in the manner averred in the complaint, if ever delivered to or accepted by said defendant for the purpose aforesaid, it was expressly agreed between the plaintiff and defendant that in case of loss or damage to said property claim therfor should be so made within the time and at the place and in the manner mentioned.

Sixth defense:

(1) No claim for the loss or damage to the goods or property mentioned in the complaint was made in writing to the defendant at the point of delivery or at the point of origin of said goods and property by said plaintiff within four months after the delivery of said property, or after a reasonable time of delivery thereof had elapsed, by the defendant to the plaintiff, although at the time when said goods or property were delivered to and accepted by the defendant from transportation in the manner averred in the complaint, if ever delivered to or accepted by said defendant for the purpose aforesaid, it was expressly agreed between the plaintiff and defendant that in case of loss or damage to said property claim therefor should be made within the time and at the place and in the manner mentioned or that, if not so

made, the defendant should not be liable for such loss or damage.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Filed
In Open Court,
Sept. 24, 1913.
WM. H. SPEER, *Judge.*

To
QUEEN & STOUT, ESQ.,
Attorneys for Plaintiff.

Notice.

Filed Dec. 22, 1913.

PLEASE TAKE NOTICE:

That we will apply to Hon. William H. Speer, Judge of above stated court, at the Court House, in Jersey City, New Jersey, on Friday, December 19th, 1913, at 10 o'clock in the forenoon, or as soon thereafter as counsel may be heard, for an order to discharge the Rule to Show Cause why the verdict rendered in above stated cause should not be set aside and a new trial granted, allowed by said Court in said cause on October 10, 1913, reserving exceptions. Yours, Etc.,

VREDENBURGH, WALL & CAREY.

Dated December 11, 1913.

Filed
Clerks Office,
Dec. 22, 1913.
Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

Order to Show Cause.

Filed Dec. 22, 1913.

Application therefor having been made to me within six days after the rendering of the verdict in the above stated cause; it is, on this tenth day of October, 1913, on motion of Vredenburgh, Wall & Carey, attorneys for the defendant. ORDERED that the above named plaintiffs show cause before this Court on Friday, November 7th, 1913, at ten o'clock in the forenoon, at the Court House in Jersey City, why the verdict rendered in the above stated cause should not be set aside and a new trial granted.

AND IT IS FURTHER ORDERED, that the said defendant have leave to reserve its exceptions or objections noted by way of exception.

WM. H. SPEER,
Judge.

Filed
Clerks Office,
Dec. 22, 1913.
Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

Order Discharging Order to Show Cause.

Filed Dec. 22, 1913.

It appearing that a rule to show cause why the verdict rendered in the above stated action should not be set aside and a new trial granted, was granted on the tenth day of October, nineteen hundred and thirteen, and the matter now coming before the court on motion of Vredenburgh, Wall and Carey, attorneys for defendant, on notice to and in the presence of Queen & Stout, attorneys for plain-

tiffs, for an order to discharge the said rule to show cause and counsel for the respective parties having been heard and the court having considered the matter; and the said parties having consented thereto;

It is on this twenty-second day of December, nineteen hundred and thirteen, on motion of Vredenburgh, Wall & Carey, attorneys for defendant, ORDERED and ADJUDGED that the said rule to show cause granted on the tenth day of October, nineteen hundred and thirteen, be and the same is hereby discharged but without giving any force or effect to the said rule to show cause by reason of this order and without prejudice to any of the rights of the said plaintiffs.

WM. H. SPEER,
Judge.

Filed
Clerks Office,
Dec. 22, 1913.
Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

Order Staying Execution.

Filed Dec. 23, 1913.

It appearing that judgment in favor of plaintiffs and against defendant has been heretofore entered in the Hudson County Circuit Court in above stated cause; that execution has been issued thereon; and that notice of appeal to the New Jersy Supreme Court from the whole of said judgment has been served and filed;

IT IS THEREUPON ORDERD that said defendant-appellant have ten days from the date

hereof within which to file recognizance in error or appeal, pursuant to the statute, and that all further proceedings under said execution be stayed until the further order of this court.

IT IS FURTHER ORDERED that uncertified copies of this order may be served upon the Sheriff of Hudson County and the attorneys for plaintiffs.

Dated December 22, 1913.

F. J. SWAYZE,
J.

On motion of
Vredenburgh, Wall & Carey,
Attorneys for Defendant-Appellant.
Filed
Clerks Office,
Dec. 23, 1913.
Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

Judgment.

This action was tried before Judge William H. Speer, with a Jury at the Hudson Circuit, on Sept. 25th, 1913.

The cause having been heard and submitted the Jury, they return their verdict as follows:— They say they find the defendant guilty as in the plaintiff's complaint is charged upon it, and the assess the damages of the plaintiff on occassion of the premises at the sum of one thousand six hundred and thirty-four dollars and twenty-seven cents ($1,634.27).

Whereupon it is adjudged that the plaintiff re-

cover of the defendant the sum of one thousand six hundred and thirty-four dollars and twenty-seven cents ($1,634.27) and his costs which are taxed at the sum of sixty-eight dollars and twenty-six cents ($68.26) making in the whole the sum of one thousand seven hundred and two dollars and fifty-three cents ($1,702.53).

Judgment entered this 4th day of October, 1913.

WILLIAM H. SPEER,
Judge.

Attest:
JOHN F. CROSBY, *Clerk.*

Return.

The answer of William H. Speer, *Esquire,* Judge of the Circuit Court holden in and for the County of Hudson, and within named the record and proceedings of the plaint whereof mentioned is within made with all things touching the same I send to the Justices of Our Supreme Court of Judicature at Trenton, N. J., at the day and year within contained in a certain appeal to this writ annexed as within I am commanded.

WM. H. SPEER,
Judge.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

ANDREW SPADA *et al.*

vs.

PENNSYLVANIA RAILROAD COMPANY.

Tried Monday, September 22, 1913, before Hon. WM. H. SPEER, *Circuit Judge*, and a jury.

QUEEN & STOUT, Esqs., for the plaintiff.
VREDENBURGH, WALL & CAREY, Esqs. (Mr. HARTPENCE), for the defendant.

Mr. Hartpence: We should like to move to amend our answer in both these cases (the case on trial and the case of Albrecht v. P. R. R. Co.) Originally we pleaded the general defense and also a special defense of a strike, which was an excepted cause in the uniform bill of lading. When we came at the last moment to make our final preparations for trial we discovered that all the bills were not uniform; therefore we desire to amend our answer so as to plead not only strike but causes beyond our control, and things of that sort, to make it conform, which really we think is a matter of verbiage rather than substantial difference.

We also desire to plead the special defense that

no claim for loss or damage was made by the plaintiffs within the time required by the bills of lading, and I understand Mr. Stout on that point claims surprise.

Mr. Stout: I have this to say, that all of these defenses which the Pennsylvania Railroad Company desire to interpose at this time, at this late hour, were known by them at the time they filed their original answer. It is not an amended answer in a strict sense of an amendment; it is inserting new defenses; and furthermore we think it comes at a pretty late hour; but we are certainly surprised as to the new defenses in reference to the question of our not serving notice as required, as they say, by cetrain bills of lading under which these shipments were made. This suit is brought on the common law liability, and we are not suing on the special agreement, and we were given notice Saturday afternoon about five o'clock that the motion would be made.

The Court: I suppose there is no doubt, even though you are suing on the common law liability, that they have a right to interpose these defenses.

Mr. Stout: Yes; any defense that is germane to the issue.

The Court: Are you quite positive that the defense attempted to be interposed by way of amendment now is not a defense that might be interposed under the general issue as filed? Is it a complaint and answer?

Mr. Stout: Camplaint, answer and reply.

The Court: Oh, I see. I thought if it was general issue you could probably put it in under that.

Mr. Hartpence: The new practice act requires us to specify that.

The Court: Well, are you specially claiming that you are surprised in order that the matter may go over until you can get a chance to prepare

your defense, or are you claiming surprise altogether so that you can have it ousted altogether?

Mr. Stout: That would be my argument for the motion, that it would be a complete surprise, not for the purpose of getting it off.

The Court: But if that goes in you want it off because you cannot go on if you are surprised?

Mr. Stout: I am inclined to think this, Your Honor, that if we are permitted at this late hour to serve the defendant with notice to produce certain papers in their custody, which would be applicable to these new defenses, that we will consent to the amended answer being filed.

The Court: Well, I will make it a condition of filing the answer that those shall be produced; otherwise the answer will not be considered as interposed.

Mr. Stout: Then there are a few minor amendments in the complaint which I have spoken to Mr. Hartpence about and he will consent to those and they will be taken up at the proper time when the papers are before us.

The Court: Don't you think it would be wise to put on the record now what the amendments are so that I may rule on them?

Mr. Hartpence: They relate specifically to the designation in the different counts of the car numbers. These suits involve nine shipments, and under the new act instead of bringing suits for the separate shipments they are all included in the one, and several of the counts while designating the date of the shipment and the place from where the shipment originated, do not designate the car numbers, and several have the same date and same point of shipment and there is nothing to show, for instance, whether the sixth count relates to car No. 6082 or 6486, and Mr. Stout wants to insert those car numbers.

The Court: All right.

Mr. Stout: And furthermore, depositions were taken in these cases in the south, and as your Honor knows, before those depositions can be offered we must prove that the witnesses whose testimony was taken in the south are now out of the State, and Mr. Hartpence consents to waive that requirement.

The Court: He consents to have it considered as though it were proven that they are out of the State?

Mr. Stout: Yes. And as to the serving of notice upon him that we took these depositions, which I think is a necessary preliminary—

The Court: Well, you consider that all the formalities of taking of the depositions were complied with?

Mr. Hartpence: Yes.

(Jury called and sworn. Mr. Stout opens for the plaintiff. Mr. Hartpence opens for the defendant.)

Mr. Stout: I desire to make a motion to amend the complaint filed in these particulars:

First, by striking out the word "Oaktown" in the first paragraph of the first count and inserting the word "Oaklawn." The depositions and interrogatories in the case refer to Oaklawn instead of Oaktown.

Further, by amending each count by inserting the number of the car in the first paragraph of each count after the word "watermelons." The first count will read: "One car load of watermelons in car A. C. L. 30943;" the second count in the first paragraph will read: "one carload of watermelons in car A. C. L. 35,449;" the third will

read "one carload of watermelons in car A. C. L. 30698;" the fourth count, in the first paragraph, will read "one carload of watermelons in car A. C. L. 34,794;" the fifth count, in the first paragraph, will read "one carload of watermelons in car A. C. L. 24,480;" the sixth count, in the first paragraph will read "one carload of watermelons in car A. C. L. 23,761;" the seventh count, in the first paragraph, will read "one carload of watermelons in car A. C. L. 18,316;" the eighth count, in the first paragraph, will read "one carload of watermelons in car A. C. L. 25,968;" and the ninth count, in the first paragraph, will read "one carolad of watermelons in car A. C. L. 28,548."

The Court: All right; those amendments will be allowed.

Mr. Stout: I now offer depositions that have been taken in this case. I understand that all formal objections have been waived by Counsel for the Defendant.

In this case, may it please the Court and gentlemen of the jury, certain witnesses were examined by the plaintiff in the south, these witnesses testifying to the condition of the goods when shipped and the time of shipment.

(Mr. Stout reads depositions as follows:)

Deposition of HENRY C. COPELAND, a witness on behalf of the plaintiff, being duly sworn according to law to speak the truth, the whole truth, and nothing bu the truth, So Help Me God, deposes and says:

Direct-examination by R. C. Bell, attorney for plaintiffs:

Q. Mr. Copeland, your name is Henry C. Copeland? A. Yes, sir.

Q. Where do you reside? A. Metcalfe, Georgia, in the County of Thomas, State of Georgia.

Q. In what business were you engaged during the month of July, 1912, whether you were engaged in the buying, selling, shipping and loading melons? A. I was engaged in the buying, selling, shipping and loading of melons.

Q. Were you engaged in the watermelon business on your own account or for others? A. For others.

Q. By whom were you employed during the month of July, 1912? A. W. B. Roddenbery.

Q. State whether you had anything to do with shipment of melons in July, 1912, in Car A. C. L. #35449. A. Yes.

Q. State whether you loaded or had loaded or saw loaded such a car with anything during the month of July, 1912. A. Yes, loaded with watermelons.

Q. Where was it loaded, A. Stringer, Florida.

v. Do you know when it was loaded? A. On the 9th of July, 1912.

Q. Did you see it loaded? A. Yes, I was there almost all the time while they were loading.

Q. You saw the loading as it was in progress? A. Yes.

Q. State whether you supervised the loading of it. A. I did.

Q. Do you know how many melons were placed in this car at that time? A. About 1000 melons.

Q. And what do you say was the average weight of these melons? A. About twenty-seven or twenty-eight pounds.

Q. Mr. Copeland, what experience have you had in the business of handling, grading and shipping melons? A. I have been in the business about fifteen or twenty years, raised them, bought them, graded them, and all.

Q. Continuously or at frequent intervals at that time? A. Continuously.

Q. Then you would qualify as an expert in the matter of grading melons? A. Yes.

Q. I will ask you to state what was the condition of the melons which was placed in the car in question at the time the car was loaded? A. They were in fine shape, they were raised within a half mile where the car was loaded, and was cut from the vines on the day they were loaded.

Q. What do you say as to whether these melons were not ripe enough or over-ripe? A. I think they were in good shape.

Q. You have had experience in shipping melons long distances have you, say to New York, Pennsylvania, and other points of that distance? A. Yes.

Q. And you say these melons were in excellent shape at the time they were loaded for shipment say to Jersey City, N. J.? A. Yes.

Q. What do you say as to the quality of the melons placed in this car as you have testified about? A. They were good.

Q. State whether they were melons taken indiscriminately or were they select? A. They were select.

Q. You made a careful examination of these melons, did you, as they were being loaded? A. Yes.

Q. And you were there present at the time they were loaded? A. Yes.

Q. What was done with this car after it was loaded? A. It was billed out according to Mr. Roddenbery's instructions.

Q. To what railroad company was the car delivered as the initial carrier? A. Florida Central Railroad Company.

Q. Do you know to whom that shipment was made? A. I do not recollect.

Q. Do you recall whether the shipment was mdae to some one at the destination, Jersey City, N. J.? A. Yes, I think it was as well as I recollect.

Q. On what date was it delivered to the Florida Central Railroad Company? A. On the 9th day of July, 1912.

Q. Do you know whether the car was immediately pulled out and removed on toward destination by that company? A. Yes.

Cross-examination by W. J. Willie, attorney for defendants (read by Mr. Hartpence):

Q. Mr. Copeland, state whether or not Stringer is a non-agency station. A. It is.

Q. To whom at Stringer was the car delivered, to what agent of the Florida Central Railroad Company? A. To the conductor.

Q. To whom did the conductor deliver the railroad receipt to, if any? A. To myself.

Q. State whether or not you signed the consignor's, W. B. Roddenbery, name to the railroad receipt covering car of melons A. C. L. #35449. A. I think I did as agent.

Q. You might state whether or not you were authorized to sign the consignor's, W. B. Roddenbery, name to this railroad receipt.

Mr. Stout: I object to that question on the ground that the witness is not qualified to testify as to his own authority. He can testify as to the facts but he cannot testify whether he was authorized or not.

The Court: Your objection is that that would be a conclusion?

Mr. Stout: Yes.

Mr. Hartpence: I understand the objections should be made at the time the deposition is taken and then are renewed at the trial. There does not appear to be any objection made on the taking of the deposition.

The Court: I do not think that is the rule, that the objection must be made at the time the deposition is taken. The party who takes the deposition has no authority or power to rule on it in any way.

Mr. Hartpence: But as I understood the objection should be made and noted and the objection then renewed at the trial for the trial court to rule upon.

The Court: I think, Mr. Stout, I will admit that question and answer. You see it would be only proper—I do not know whether there is any rule in this State on that subject. I have never heard of one, but it would seem to me to be only proper that the party who intends to object at the trial to the admission of testimony should indicate that objection to the examining counsel or to the magistrate who is taking the testimony at the time the testimony is taken, because it would probably permit him then, having been warned of the fact that the objection is to be made, to obviate the objectionable feature; and furthermore it would seem to be very much better practice to have some limit placed upon the admission of testimony by way of depositions when you come into court rather than to have every question objected to anew after all the chance that counsel has to go through it and scan it and consider it and spring new objections which probably would not have occurred to him at the time the examination was made. If you have any authority on it I would like to hear it.

Mr. Stout: I haven't any authority on the point as to when the objection should be entered. I only have authority on the point that it is not a proper question.

The Court: I think there is no very great doubt but that that amounts to a conclusion. He states what his real notion is with respect to the existence or non-existence of authority, and that is a conclusion; but I think there should have been some objection made at the time the testimony was taken so that it might have been brought to the attention of counsel and he might have obviated it. I have not any doubt at all that if some one had stood up and said: "Now I object to that question because it involves a conclusion of law," that the examining counsel would have said, "Well, what was said between you and your employer at the time you were engaged?" That was of course a proper question which should have been asked, and the court and jury could then determine from that answer whether he was authorized. I think in the light of the fact that there was no objection noted at the time that I will permit it.

Mr. Stout: There was a general objection made by the attorney who represented the plaintiff, but as I recall it, it only applied to other cars; it does not apply to this particular car.

The Court: What is the nature of the general objection?

Mr. Stout: "The plaintiff objects to any testimony of the witness"—it applies to Hall, who was another witness. There is no use reading that.

The Court: Oh! And that furthermore would seem to indicate that Counsel had it in mind that he ought to object when an objection was necessary, because he did interpose it with respect to that witness and did not with respect to this one. I think I will permit that question.

Henry C. Copeland, for Plaintiff—Redirect

Q. You might state whether or not you were authorized to sign the consignor's, W. B. Roddenberry, name to this railroad receipt. A. I was.

Q. State whether or not you have any interest in the outcome of this suit. A. None at all.

Redirect-examination by R. C. Bell, attorney for plaintiff (read by Mr. Stout):

Q. You state that Stringer, Florida, was a non-agency station? A. Yes.

Q. The Florida Central Railroad Company habitually received shipments from that point? A. Yes.

Q. And did receive this shipment from that point by and through its conductor then in charge of the train which took up and carried off this car? A. Yes.

Q. The Florida Central Railroad Company was on July 9th, 1912, a common carrier engaged in the shipment of commodities for the public generally? A. Yes.

Q. And received the shipment in question at Stringer, Fla., to be shipped to Jersey City, N. J.? A. Yes.

Q. Mr. Copeland, you say that there is a station on the Florida Central Railroad by the name of Cherokee, is there or is there not? A. There is a mill on the road known as Cherokee.

Q. Was this particular car delivered by you in behalf of W. B. Roddenbery at Cherokee? A. No, at Stringer.

Q. And if it were billed out from Cherokee instead of Stringer state whether or not that was a correct statement as to the point from which the car was originally moved. A. The car was loaded at Stringer.

Q. The bill of lading may have been issued under the name of Cherokee, Fla.? A. It may have been.

Q. Do you know whether Cherokee is an agency station? A. It is not.

Q. The conductor's receipt which was issued to you at Stringer was issued as for a shipment to Jersey City, N. J.? A. Yes.

Q. Was Florida Central Railroad a common carrier and doing business as such July 9th, 1912? A. Yes.

Deposition of DANIEL P. WARD, a witness on behalf of the plaintiffs, being duly sworn according to law to speak the truth, the whole truth, and nothing but the truth, So Help Me God, deposes and says:

Direct-examination by R. C. Bell, attorney for plaintiffs (read by Mr. Stout):

Q. Mr. Ward, your full name is Daniel P. Ward? A. Yes.

Q. Where do you reside? A. Pine Park, in Grady County, Georgia.

Q. In what business were you engaged in the month of July, 1912? A. Farming.

Q. What was your business with reference to raising, buying, selling or handling in any way watermelons? A. I raised melons.

Q. You raised melons during the year 1912? A. Yes.

Q. On your own account? A. Yes.

Q. State whether or not you disposed of any watermelons during the year 1912 in the month of July. A. On the 20th of July, 1912, I sold Mr. W. B. Roddenbery a carload of watermelons.

Q. Who loaded the melons which you sold him on the 20th day of July, 1912? A. I packed and loaded them myself.

Q. In what car, if any car, did you load them? A. A. C. L. Car #28548.

Q. A railroad car? A. Yes.

Q. What kind of melons with reference to the name? A. Watson's.

Q. Where was this carload of melons loaded? A. At Pine Park, Ga.

Q. On what line of railroad? A. Atlantic Coast Line Railroad Company's line of road.

Q. How many melons were loaded in this car? A. 982.

Q. What was their average weight? A. Average 28 pounds.

Q. What was done with this carload of melons? A. It was sold to Mr. Roddenbery.

Q. By yourself? A. Yes.

Q. To what railroad company was this carload of melons then delivered, if any? A. To Atlantic Coast Line Railroad Company.

Q. On the same date, July 20, 1912? A. Yes.

Q. With whom named as the shipper? A. W. B. Roddenbery.

Q. To what destination were they shipped? A. They were shipped to Spade & Company.

Q. Do you remember whether Jersey City, N. J., was the destination? A. Yes.

Q. State whether these melons were immediately pulled out and moved on the same date by the Atlantic Coast Line Railroad Company. A. Yes, they were taken out that night.

Q. How long have you been in the melon grading business? A. 22 years.

Q. You have had considerable experience during this period in the purchasing, the grading and the shipping of melons? A. Yes.

Q. State whether you have made shipments at frequent intervals during this period of time to any distant points as long as the distance from Pine Park, Ga., to Jersey City, N. J. A. Yes.

Q. State whether you are thoroughly acquainted with the melon business and with the business of grading melons for long distant shipments, and are qualified to testify as an expert as to the condition and quality of the melons in question at the time they were shipped on July 20, 1912. A. Yes.

The Court: The other side might well have objected to that on the same ground.

Mr. Stout: Yes.

Q. What do you say as to the condition of the melons which you say you loaded on A. C. L. Car #28548 on July 20, 1912? A. They were good.

Q. What do you say as to whether they were under-ripe or over-ripe as for shipment such as was made of them? A. They were just right for shipping.

Q. For shipping that distance? A. Yes.

Q. Melons to be shipped for a long distance, say from Pine Park to Jersey City, N. J., state whether they should be so ripe as if they were to be shipped a much shorter distance, say a few hundred miles. A. No, sir; they should be riper if shipped near by.

Q. Regarding the distance of this shipment, state whether they were in perfect condition for such shipment. A. Yes, they were.

Q. State what was the quality of these melons as to whether they were picked generally or indiscriminately, or as to whether they were well selected melons. A. I picked them myself the evening before and tried to pick them just as uniform as could be.

Q. What do you say as to whether they were select melons? A. They were well selected.

Cross-examination by W. J. Willie, attorney for defendants (read by Mr. Hartpence):

Q. Mr. Ward, state to whom did you deliver this car of melons, A. C. L. Car #28548 for shipment. A. To Mr. John Hall.

Q. You delivered them to Mr. John Hall? A. Yes.

Q. State whether or not the agent at Pine Park delivered you the receipt for the shipment of the car. A. No, I think he delivered it to Mr. Hall.

Q. State whether or not you signed the consignor's name, W. B. Roddenbery, to the receipt? A. No.

Q. Are you positive you did not get the receipt from the railroad agent at Pine Park? A. I do not know, I might have gotten it and sent it to Mr. Hall.

Q. Relative to this car of melons, state whether or not you were acting as agent for the shipper, Mr. W. B. Roddenbery. A. No, Mr. Hall was the man acting as agent.

Q. State whether or not you gave the agent at Pine Park any instructions relative to the shipment of this particular car of melons. A. I cannot remember about that just now.

Q. State whether or not you had any conversation with the A. C. L. agent at Pine Park relative to this shipment. A. No, I am satisfied I did not do that.

Q. Would you say that you did not sign Mr. Roddenbery's name? A. Yes, I say I did not do that.

Q. State whether or not Mr. Ward, you have any interest in the outcome of this suit between these parties. A. No.

Q. None at all? A. No.

Deposition of JOHN E. HALL, a witness on behalf of the plaintiffs, being duly sworn according to law to speak the truth, the whole truth, and nothing but the truth, So Help Me God, deposes and says:

Direct-examination by R. C. Bell, attorney for plaintiffs (read by Mr. Stout):

Q. Mr. Hall, your name is John E. Hall? A. Yes.

Q. Where do you reside? A. Cairo, Grady County, Georgia.

Q. In what business were you engaged during the month of July, 1912? A. I was buying and shipping melons at that time.

Q. Upon your own account, or agent for someone else? A. As agent for W. B. Roddenbery.

Q. You were in the employ then of W. B. Roddenbery in the business of handling melons generally during the month of July, 1912? A. Yes.

Q. State whether you had anything to do with a carload of melons loaded in A. C. L. Car 30943. A. Yes, I bought this car.

Q. As agent for Mr. Roddenbery you bought it? A. Yes.

Q. From whom? A. From G. T. Carter.

Q. This car #30943 A. C. L. which I have mentioned was then to your knowledge loaded with watermelons for shipment by W. B. Roddenbery as consignor in July, 1912? A. Yes.

Q. Do you know on what date? A. On July 8, 1912.

Q. Did you see this carload of melons loaded? A. I did.

Q. With what kind of melons was it loaded? A. Watson variety.

Q. Where was it loaded, Mr. Hall? A. Oak Lawn, Ga.

Q. On what line of railroad? A. Georgia Northern Railroad.

Q. To what company was the carload of melons then delivered, to the same company, Georgia Northern Railroad Company? A. Yes.

Q. On the date which you mentioned, July 8, 1912? A. Yes.

Q. State whether the melons were removed forward to destination immediately by said company. A. I suppose they were, they were still on the track when I left there.

Q. When did you leave? A. The same date.

Q. They were delivered to said company on July 8, 1912, properly loaded? A. That is my recollection.

Q. State to whom, if you know, this carload of melons was consigned and its destination. A. I do not know about that.

Q. What do you say as to what the bill of lading will show? A. The bill of lading will show to whom they were shipped.

Q. State how long you have been in the watermelon business. A. 13 years.

Q. State what experience you have had, Mr. Hall, in the grading, loading and shipping of melons. A. I have had about 12 years experience.

Q. State whether you are qualified as an expert as to the grading and condition of melons, especially with reference to the particular car now in question? A. I would.

Q. What do you say as to the condition of the melons which were loaded in this car #30943 at the time it was loaded? A. They were in sound prime condition.

Q. What do you say as to whether they were not ripe enough, or over-ripe for a long distance shipment, say from Oak Lawn, Ga., to New Jersey? A. They were just right, I think.

Q. Mr. Hall, what do you say as to the quality of these melons as to whether they were indiscriminately taken or whether they were well selected? A. They were well graded.

Q. Do you know how many melons were loaded in this car? A. About 986.

Q. What was the average weight of these melons? A. 26 pounds.

Q. Mr. Hall, I will ask you whether you had anything to do with or any knowledge of a shipment of melons in A. C. L. Car 30698 any time in July, 1912? A. I did.

Q. Do you remember the loading of this car? A. Yes.

Q. State whether you saw it loaded. A. I did.

Q. Where was it loaded? A. At Cowarts, Ala.

Q. Near Ashford, Ala? A. Yes.

Q. State whether you bought these melons for anyone. A. I bought them for W. B. Roddenbery.

Q. State in whose name they were shipped. A. W. B. Roddenbery's.

Q. Do you remember the date on which this car was loaded? A. July 12, 1912.

Q. To what railroad company was this carload of melons then delivered? A. Atlantic Coast Line Railroad Company.

Q. On what date, July 12, 1912? A. Yes.

Q. With shipping instructions? A. Yes.

Q. To what destination? A. That car went to Andrew Spada & Company.

Q. That is your recollection? A. Yes.

Q. Do you know how many melons this car contained? A. 950.

Q. Do you remember what was the average weight? A. 28 pounds.

Q. What was the condition of these melons? A. They were in good condition.

Q. What do you say as to whether they were under ripe or over ripe for a long distance shipment? A. I considered them just right.

Q. State whether you have had experience in making long distance shipments of melons and are acquainted with what should be their condition at the time of loading. A. I have.

Q. Do you remember the variety? A. Watson variety.

Q. State what was the quality of these melons as to whether they were indiscriminately taken or well selected melons. A. Well selected.

Q. Mr. Hall, state whether you had anything to do with, or any knowledge of a shipment of melons in A. C. L. Car #24480 any time in July, 1912. A. I did.

Q. Where was this car loaded? A. Loaded on spur near Cairo, Ga.

Q. State whether you saw it loaded. A. I did.

Q. On what date? A. On July 13th, 1912.

Q. State whether that is the date the shipment of these melons was made. A. Yes.

Q. State to what company as the initial carrier were these melons delivered. A. Atlantic Coast Line Railroad.

Q. State what was the condition of these melons at the time they were loaded and delivered to the A. C. L. Railroad Company. A. They were in sound, fine condition.

Q. What do you say as to their condition, whether or not it was proper and suitable for a long distance shipment? A. They were.

Q. How many melons were in this car? A. 1125.

Q. What was the average weight of these melons? A. 24 pounds.

Q. What do you say as to the quality of these melons? A. Good quality.

Q. State whether they were indiscriminately selected or well selected melons. A. Well selected melons.

Q. State whether they were uniform in size. A. They were.

Q. State whether you had anything to do with, or any knowledge of a shipment of watermelons in A. C. L. Car #23761 any time in July, 1912. A. I did.

Q. State whether you know that this car was loaded with water melons during the month of July, 1912. A. They were.

Q. Where? A. Cairo, Grady County, Georgia.

Q. Do you remember the date? A. July 13, 1912.

Q. State whether you saw them loaded. A. I did.

Q. How many melons did this car contain? A. About 1120.

Q. What was their average weight? A. 25¾ pounds.

Q. What do you say as to the condition of these melons at the time they were loaded? A. They were in good, sound condition.

Q. With special reference to a long distant shipment, say from Cairo, Ga., to Jersey City, N. J., what was their condition? A. Good condition.

Q. What do you mean by good condition, Mr. Hall? A. Well, they were good and sound and just right for shipping.

Q. What do you say as to whether they would stand well a shipment of that distance and as to what ought to be their condition upon arrival under a reasonable length of time? A. They should be in good condition upon arrival.

Q. State what variety. A. Watson variety.

Q. What do you say as to the selection of these melons, their quality? A. They were well selected, good quality.

Q. State to what railroad company this car of melons was delivered. A. Atlantic Coast Line Railroad Company.

Q. On what date? A. On July 13, 1912.

Q. For shipment to destination? A. Yes.

Q. Do you know what was the destination of this car of melons? A. I do not.

Q. Mr. Hall, state whether you had anything to do with, or any knowledge of a shipment of melons in A. C. L. Car #18316 during the month of July, 1912. A. I did.

Q. State whether to your knowledge this car was loaded with melons during the month of July, 1912. A. It was.

Q. Where? A. Cairo, Grady County, Georgia.

Q. State whether you saw it loaded. A. I did.

Q. How many melons were loaded in this car? A. 1115.

Q. What was the average weight of these melons? A. 28 pounds.

Q. On what date was this car of melons loaded? A. July 13, 1912.

Q. To what line of railroad was the car then delivered? A. The Atlantic Coast Line Railroad Company.

Q. On the same date? A. Yes.

Q. State whether you know what was the destination of that shipment. A. I do not recollect about that.

Q. State what was the condition of the melons which were loaded in this car #18316. A. They were in good, sound condition.

Q. What do you say as to whether their condition was good for shipment from Cairo, Ga., to Jersey City, N. J. A. They were good.

Q. What do you mean by saying they were good for such a shipment? A. Well, they were in good, sound condition.

Q. Judging from their condition at the time they were loaded what should have been their condition upon arrival at destination within a reasonable time? A. Should have been good.

Q. What variety were these melons? A. Round Blues or Triumph.

Q. Do you mean that either Round Blue or Triumph answered for the name of that variety? A. Yes.

Q. Mr. Hall, state whether you had anything to do with, or any knowledge of a shipment of water melons in A. C. L. Car #25968 during the month of July, 1912. A. I did.

Q. State whether you saw this car loaded. A. I did.

Q. Where was this car loaded? A. Cairo, Grady County, Georgia.

Q. How many melons were loaded in this car? A. 1037, 30 pounds average.

Q. On what date was this car loaded? A. July 19.

Q. What year? A. 1912.

Q. To what railroad company was this car delivered after being loaded, if to any? A. Atlantic Coast Line Railroad Company.

Q. On what date? A. On July 19, 1912.

Q. State what the destination of this car was, if you know. A. I do not know.

Q. State what was the condition of the melons which were loaded in this car at the time they were loaded. A. They were in good, sound condition.

Q. With reference to a long distance shipment, say from Cairo, Ga., to Jersey City, N. J., what was their condition? A. They were in good condition for such a haul.

Q. From their condition at the time of loading what should have been their condition upon arrival at destination? A. They should have been in good condition.

Q. What was the variety of melons loaded on this car? A. Round Blue or Triumph, either; known by both names.

Q. What do you say as to the quality of these melons with reference to their selection? A. Good quality and well selected.

Q. In my questions I have sometimes referred to melons and in your answers you have spoken of melons, what kind of melons have you referred to in your answers to all of my questions? A. Watermelons.

Q. In whose name were the various cars shipped which I have mentioned and which you have mentioned? A. W. B. Roddenbery's.

Q. What do you say as to whether the several cars were in proper condition for a long distant shipment, say from Cairo, Ga., to Jersey City, N. J.? A. I considered them all in good condition.

Cross-examination by W. J. Willie, attorney for defendants (read by Mr. Hartpence):

Q. Now, Mr. Hall, let's go back to A. C. L. car #30943 loaded at Oak Lawn, Ga. State whether or not you delivered this car yourself to the Georgia Northern Railroad Company and received the railroad company's receipt for the shipment. A. I do not recall.

Q. State whether or not this shipment was made through W. B. Roddenbery to Spada & Company. A. I am not certain about that.

Q. If you received this receipt state whether or not it was your custom to sign the consignor's name on the bill of lading. A. It is when I give instructions.

Q. If the name of W. B. Roddenbery appears on the bill of lading covering A. C. L. Car #30943, state whether or not you are prepared to admit or deny the genuineness of the signature. A. I cannot admit or deny unless could see the bill of lading.

Q. State whether or not you were authorized to sign the consignor's, W. B. Roddenbery, name to

any particular bill of lading covering this shipment. A. I do not recollect whether I was or not, if I gave instructions on it I was, but I do not remember whether I gave instructions on that particular car or not.

Q. In the shipment of water melons to Spada & Company from W. B. Roddenbery state whether or not you are the authorized agent of W. B. Roddenbery in any shipment you have made?

Mr. Stout: Your Honor, I think that we have probably in objecting covered this question. There is a general objection noted by the attorney representing the plaintiff to all the testimony of the witness Hall, and the objection is as follows: "Plaintiff objects to any testimony of witness John E. Hall as to the authority of Carl Rountree to sign the name of W. B. Roddenbery to any bill of lading, on the ground that he could not be authorized to sign such a document unless his authority were evidenced in a writing executed with the same formality which the bill of lading which he undertakes to sign for W. B. Roddenbery was executed." I do not think there is anything in that objection.

The Court: I agree with you that there is nothing in it.

Mr. Stout: "That his authority to sign such a document would necessarily have to be in writing to be binding against W. B. Roddenbery or in favor of any one and the writing evidencing such authority would be the best evidence thereof." There is nothing in that. "And we object to the same testimony of John E. Hall on the further ground that it is not shown that his testimony upon the authority of Carl Rountree is the best evidence of such authority, but that his testimony suggests higher authority, and for these

grounds of objections we move to rule out all of the testimony of John E. Hall as to the authority of Carl Rountree to sign any of the bills of lading for any of the shipments testified about by him." The question is "State whether or not you are authorized as agent for W. B. Roddenbery to sign his name as shipper on the bill of lading covering this car." The question is whether the objection, which is not very well stated, would be sufficient to raise a question as to the competency of this question,—whether he was authorized. He speaks of "higher authority." In other words, I suppose he means that there is better evidence. That is this man Hall testifying as to whether he was an authorized agent.

The Court: No; I think what he means, from the long statement of ineffective objection he made at the start is that the higher authority would be authority in writing. He seems to have been obsessed by it in the first two parts, and then he goes on and says there should have been a higher authority. I think he meant an authority in writing in that part also. I think I will admit that and let it stand, because it would not be any higher authority, so far as I can see. If this man knew that there was an agency, why he was no higher authority of it or any lower authority than anybody else who knew it.

Mr. Hartpence: The objection was also to a different question from this. I think it was as to the authority of C. L. Rountree, who appears farther on in the testimony. I should like to have it noted on the record—

The Court: This is not that man?

Mr. Hartpence: No.

(Mr. Hartpence continues reading of deposition:)

A. I was.

Q. Did you deliver Atlantic Coast Line Railroad Company's agent at Cowarts, Ala., a car of melons in A. C. L. Car #30698; if so did you receive of the agent a bill of lading for the same? A. I did.

Q. State whether or not you signed the shipper's name to the bill of lading. A. My recollection is I did.

Q. State whether or not you are authorized as agent for W. B. Roddenbery to sign his name as shipper on the bill of lading covering this car. A. I was.

Q. State whether or not you delivered to the Atlantic Coast Line Railroad Company's agent at Cairo a car of melons in A. C. L. Car #24480, if so state whether or not you signed the name of the shipper, W. B. Roddenbery, to the bill of lading. A. I did not sign the bill of lading; that is my recollection.

Q. State whether or not you are a member of the firm of W. B. Roddenbery Hardware Company. A. I am a member of Roddenbery Hardware Company.

Q. State whether or not Carl Rountree was under the employ as bookkeeper of the Roddenbery Hardware Company in July 13, 1912. A. He was.

Q. State whether or not he was authorized to receive bills of lading for any shipment of watermelons from W. B. Roddenbery to Andrew Spada & Company.

Mr. Stout: The question is, State whether or not he, Carl Rountree—this is Hall who has been testifying—was authorized to receive bills of lading for any shipment of watermelons from W. B. Roddenbery to Andrew Spada and Co. Now a well known rule of law is that one agent cannot testify as to

the powers and authority of another agent.

The Court: Why not?

Mr. Stout: Why, he can testify as to the facts.

The Court: Yes; your objection simply is that this amounts to a conclusion on the facts.

Mr. Stout: And furthermore it is incompetent unless the witness shows the source of his knowledge. In other words, Hall testified that he is an agent of Roddenbery in this transaction. Now he is testifying that Carl Rountree, who presumably is also an agent of Roddenbery, was authorized to sign things, without showing how he knows that; and what would be the source of his knowledge except what Roddenbery told him? And that would be hearsay evidence. How can one agent testify as to the authority of another agent?

The Court: I can answer your last objection with absolute conclusiveness. It is not at all necessarily hearsay, because he may have been present when the agent was engaged actually by the principal to do the work, and he may have heard the contract entered into, so it would not be hearsay at all.

Mr. Stout: I admit that. So he must show the source of that knowledge.

The Court: There is not any question about the propriety of your objection. I have held to it all through, one agent cannot come forward and say another agent has authority, and so forth. That is a clear conclusion of law; but the question is whether you have preserved an objection which entitles you at this time to raise an objection to this testimony.

Mr. Stout: Only in that objection of "higher authority," whether higher authority refers to a writing or whether it means that Roddenbery—and I think there is this futher objection—"We again object to the testimony of John E. Hall that Carl Rountree was authorized to sign bills of lading for W. B. Roddenbery on the ground that the testimony of W. B. Roddenbery would be the best evidence as to the authority of any one to act for him, and on the ground that such authority would necessarily have to be in writing." That last part I do not care anything about.

The Court: That last part is not true. The testimony of W. B. Roddenbery would not be any better than the evidence of the party with whom the engagement was made, or any better than that of the party who was present when the engagement was made. They would all be of the same grade.

Mr. Stout: But it would be better than the testimony of this agent who is asked to testify as to what Roddenbery's agent was authorized to do.

The Court: It would not be if the agent had knowledge.

Mr. Stout: But Roddenbery is a principal.

The Court: There is nothing that makes the evidence of a principal any more sacred than that of the agent or of a bystander who might hear it.

Mr. Stout: But the principal knows whether he is his agent or not.

The Court: Yes; and I presume the agent knows whether he is his agent or a man who was standing by knows whether he is his agent.

Mr. Stout: But there is no evidence that Hall was present or heard——

The Court: There is no question about that, but the only proposition you are arguing now is as to whether or not you have preserved a proper objection to this testimony, and I do not see any objection here that meets that proposition, because the testimony of this man may be of just as great value as either that of Roddenbery or that of the agent. For instance, to make the thing perfectly plain, suppose he were here on the stand and suppose the question were asked of him, "Had Carl Rountree authority to sign this bill of lading?" and suppose you did not make any objection to it except that this presupposes that this man has higher authority or that there is higher evidence than this; now that is not better evidence, because he may have been present when the transaction occurred. I think that attorney who was present has not preserved the proper objection.

Mr. Queen: I would like to look at the evidence act.

The Court: If you can find any authority on that, I will go back and strike out the questions which I refused to strike out.

Mr. Stout: I find no authority construing the 52nd section of the evidence act, which applies to objections. The section reads: "Any deposition or examination taken under this act shall be subject to be excluded or overruled, wholly or in part, according to the opinion of the court upon any objection taken to the competency of the witness, the materiality or competency of the evidence given or the regularity of the questions put." The statute does not say when it shall be noted.

The Court: That would seem to me, Mr. Hartpence, to indicate that there is no necessity to preserve an objection before the magistrate. That is the way the language would strike me.

Mr. Hartpence: It has always been my understanding the other way in the rule of practice, and I think Dickinson outlines it in his Notes.

The Court: It is undoubtedly so in chancery, and I do not know but that is in pursuance to rules that have been adopted in the court of chancery.

Mr. Hartpence: He states that it is under the same——

Th Court: You see there isn't any reason in the world why where power as broad as that is given in the evidence act to the court to deal with a depositon in whole or in part, especially with respect to the materiality and competency of testimony, why we should engraft in that practice act the notion that somebody must preserve an objection before a man who hasn't any authority to pass upon it. I know in chancery you generally thresh those things out before the trial. You take your objections and you go before the court and thresh them out. Sometimes a fellow refuses to answer a question on the ground that it is immaterial, irrelevant and incompetent, and you have to go before the Chancellor and compel him to answer; and my own notion from the language of that statute would be that I ought to exclude it here. I think I will hold, and I shall hold, that this statute requires me to pass upon the objections here whether there is any note made at the taking of the testimony of objection or not, because it says here

that any depositon or examination taken under this act shall be subject to be excluded or overruled, wholly or in part, according to the opinion of the court upon any objection taken to the competency of *the evidence,*—not of the question asked, but of the evidence given. That seems to indicate that the evidence is in and the objection then comes to the evidence given; and it seems to me that if language has any meaning whatever it is that the court shall pass upon the materiality or competency of evidence which has been given. So I shall hold on that theory of it that I ought to pass here on any objection raised to any evidence which has been given and returned here in a deposition, and I will give you an exception to that, and if I am wrong about it we will find out what the practice is in this State anyway.

So that ruling results in my striking out the evidence which I heretofore admitted with respect to the other witnesses who swore that these persons had authority to sign the bill of lading, I think it was, and then Mr. Hartpence may preserve an objection on the record to that ruling.

Mr. Hartpence: I think, however, the objection now interposed to the question read does not apply. The question is, "State whether or not he was authorized to receive bill of lading for any shipment of watermelons from W. B. Roddenbery to Andrew Spada."

The Court: Well, he only could be authorized by virtue of some facts, and those facts would be that Roddenbery had said something to him which warranted his doing it or that by a course of dealings between the par-

ties he had come to have such authority; and what should have been proven was not a conclusion of this man as to whether those things amounted to authority or not, but the statement of that man as to what the facts were. This simply calls for his conclusion as to whether or not this man was an agent to do that thing. So I think I shall sustain the objection to that question.

Mr. Hartpence: The next question is:

Q. State if the name W. B. Roddenbery appears on the original bill of lading A. C. L. car #24480 signed by W. B. Roddenbery, C. R., who was or who is C. R.? A. Carl Rountree.

Q. He is the bookkeeper you just spoke about? A. Yes.

Q. State whether or not you delivered the agent of the Atlantic Coast Line Railroad Company in Cairo a car of melons in A. C. L. Car #25761? A. I did not deliver this car.

Q. State if the name W. B. Roddenbery appears on the original bill of lading covering this car of melons signed "C. R." whether or not it was signed by your bookkeeper Carl Rountree.

Mr. Stout: We object to that, Your Honor.

The Court: What is the objection to that? He only asks the fact as to whether it was signed at the time.

Mr. Stout: The original bill of lading is not presented; in other words this witness is asked to testify if John Jones' name appears on a certain paper is that John Jones' name?

The Court: Your objection is that no writing was shown him and that therefore there was no ground upon which he could make the identification?

Mr. Stout: Yes.

Mr. Hartpence: The only thing I might say is that this is the cross-examination of a witness produced by the plaintiff in whose possession the bill of lading was, and I suppose in the taking of these depositions there is a wider latitude in the taking of it and in the form of it than when taken in open court, and the only thing the cross-examiner could do in laying the basis for the future production of that bill of lading in court was to ask whether if the name W. B. Roddenbery, C. R. appeared on the bill it referred to Carl Rountree.

The Court: He could ask him whether or not on the bill of lading which he had in his possession he observed the handwriting and if that was the handwriting of Carl Rountree; but he does not ask him that, he says "If it does appear?" and it has not yet been shown that it does appear. He simply says "If it does appear is it his handwriting?" It hardly seems to me to be a fair method of examination. Now if this man had said, "When I had this bill of lading it was signed "C. R." then I think he could have asked him, "Well, was that signature which you had in your possession on that bill of lading the signature of Carl Rountree?"

Mr. Hartpence: It strikes me that this question appearing as it does in this deposition taken in this form, is precisely the same as though the bill of lading had been produced from the possession of the other side and had been shown the witness and he was asked for the purpose of identification to state whether or not that was signed by Carl Rountree. It is difficult to accomplish in the taking of depositions *de bene esse* that which can be done in open court.

The Court: But the difficulty is you have not laid any foundation whatever for asking this man that question, but you ask him whether in case the name appeared on the bill of lading it was the name of Carl Rountree, nor have you asked him if when he had it in his possession that signature was there. It may be when you produce the bill of lading a name put on after he saw it, C. R., would be the name he identified. I agree with you that it may be that you would have latitude enough under the circumstances under which these questions are asked to ask him when he had it if that name was signed by Rountree, but to ask him if it was his name without asking him whether or not he ever saw it is to ask him to speculate; in other words you do not show that this man ever saw any name there or anything. You simply ask his judgment, if it is there did Rountree sign it? So I think that is a bad question.

Mr. Stout: Furthermore the previous testimony shows that he did not deliver this car and that he never saw this bill of lading.

The Court: I am taking it as far away from that as possible because even assuming that he had possession of it once there is nothing to show that when he had possession of it it was signed.

Mr. Hartpence: We would like to have an objection noted.

The Court: Yes.

Q. State whether or not he was authorized in July, 1912, to sign the name of W. B. Roddenbery.

The Court: Same ruling in regard to that. I will rule that out.

Mr. Hartpence: Objection.

The Court: My point about it is, so that we

can get it squarely on the record, that it is not necessary on the taking of depositions to note an objection to the evidence which is objected to at the trial of the cause, and therefore I hold that in this case the plaintiff is entitled and the defendant, too, to object to any evidence which they conceive, in the language of the statute, to be either immaterial or incompetent, and those objections having been made, without any note having been made at the time the evidence was taken, I rule that they are properly made at this time when I rule the questions out that I have ruled out. You might just as well have that question decided. It is a very important question in practice. It comes up every once in a while here and the Court above might just as well rule on it, and then we will know just what their practice will be.

Mr. Hartpence: The next question refers practically to the same situation,—"State whether or not you delivered the agent of the Atlantic Coast Line Railroad Company in Cairo a car of melons in A. C. L. Car #18316. A. I did not deliver this car."

Q. State if he name W. B. Roddenbery appears on the original bill of lading covering this car of melons, signed "C. R.," whether or not it was signed by your bookkeeper, Carl Rountree.

Mr. Stout: I object to that.

The Court: Same ruling.

Mr. Hartpence: Objection.

Q. State whether or not he was authorized in July, 1912, to sign the name of W. B. Roddenbery.

Mr. Stout: I object to that.

The Court: I sustain the objection on the ground that that calls for a mere conclusion

of law on the part of the witness. The inference as to whether or not he was authorized should be drawn here and not by the witness.

Mr. Hartpence: We ask to have an objection noted.

Q. State whether or not you delivered the agent of the Atlantic Coast Line Railroad Company in Cairo a car of melons in A. C. L. Car #25968. A. I did not deliver this car.

Q. State if the name W. B. Roddenbery appears on the original bill of lading covering this car of melons, signed "C. R.," whether or not it was signed by your bookkeeper Carl Rountree.

Mr. Stout: We object.

The Court: I sustain the objection to that. It is the same question.

Mr. Hartpence: We ask that an objection be noted.

The Court: The objection may be noted.

Q. State whether or not he was authorized in July, 1912, to sign the name of W. B. Roddenbery?

Mr. Stout: The same objection.

The Court: Same ruling.

Mr. Hartpence: We ask that an objection be noted.

The Court: Your point, Mr. Hartpence, is that the objection cannot be raised at this time?

Mr. Hartpence: Yes, that is my particular point, that the objection should be made and noted; and the Commissioner has followed that by: "Let the objection be noted and made a part of the record."

Q. State whether or not Carl Rountree was in the employ of W. B. Roddenbery as bookkeeper

and stenographer, and state whether or not he was authorized to accept bills of lading for shipments made by W. B. Roddenbery of watermelons or any other shipment.

Mr. Stout: I object to that.

The Court: I sustain the objection. The ground of the objection is, I suppose, the same as the others, that it calls for a conclusion.

Mr. Stout: The question of authority. Part of that question I suppose might be admissible.

The Court: Part of it cannot be admissible. The question stands or falls as a question.

Mr. Hartpence: We ask that an objection be noted.

(Mr. Stout reads as follows:)

Objection of Mr. Bell for the plaintiffs. We again object to the testimony of John E. Hall that Carl Rountree was authorized to sign bills of lading for W. B. Roddenbery on the ground that the testimony of W. B. Roddenbery would be the best evidence as to the authority of anyone to act for him, and on the ground that such authority would necessarily have to be in writing in order to be binding for the performance of such duties and for these grounds of objections we move to rule out the last answer of John E. Hall.

Noted and made a part of the record. Mercer L. Ledford.

Mr. Stout: That completes the depositions.

Mr. Stout: May it please the Court, and gentlemen of the jury: There were eighty-two interrogatories propounded in this case. On motion of the defendant's counsel certain of the interrogatories were stricken out,—interragtories 1, 2, 3, 4,

5, 11, 19, part of 21, all of 28, part of 30, all of 37, 45, part of 47, all of 54, 62, part of 64, all of 71, 79 and part of 81.

(Interrogatories and answers thereto were read by Mr. Stout as follows:)

6th. Did you during the month of July, 1912—this question being addressed to the Pennsylvania Railroad Company—receive and accept from a connecting carrier at any point on your railroad a car ACL 30943 containing watermelons to be transported to Andrew Spada & Company at Jersey City, N. J.? If yes(state the name of the connecting carrier and when and where you received and accepted said car. A. to 6th. Yes, the connecting carrier was the Philadelphia, Baltimore & Washington Railroad Company and the car was received by the Pennsylvania Railroad Company, at Edgemoor, Delaware, on July 13, 1912, at 12:30 o'clock P. M.

Q. Were you at the time when you received and accepted said car ACL 30943 and at the time of bringing this action, a common carrier for hire from the point where you received and accepted said car ACL 30943 to Jersey City, aforesaid? A. Yes.

Q. Did you as a common carrier for hire transport the said car ACL 30943 to Jersey City aforesaid from the point where you received and accepted it? A. Yes.

Q. Did you deliver or tender delivery of said car ACL 30943 to Andrew Spada & Company at Jersey City aforesaid? If yes, state at what place in Jersey City aforesaid? A. Yes, the Pennsylvania Railroad delivery yards at Second and Henderson Streets.

Eleventh——

Mr. Hartpence: Tenth.

Mr. Stout: We are going to omit the tenth, and the eleventh is out too.

Twelfth: What was the usual or customary time to transport by freight train, without delay in transportation, a car of watermelons over your line of railroad from said point where you received and accepted said car ACL 30943 to Jersey City aforesaid. A. Under the most favorable circumstances about seven hours.

We are going to omit the 13th.

Fourteenth: Did you during the month of July, 1912, receive and accept from a connecting carrier at any point on your railroad a car ACL 35449 containing watermelons to be transported to Andrew Spada & Company at Jersey City, N. J.? If yes, state the name of the connecting carrier and when and where you received and accepted said car. A. Yes, the connecting carrier was the Philadelphia, Baltimore & Washington Railroad Company and the car was received by the Pennsylvania Railroad Company at Edgemoor, Delaware, on July 13, 1912, at nine o'clock P. M.

Q. Were you at the time when you received and accepted said car ACL 35449 and at the time of bringing this action, a common carrier for hire from the point where you received and accepted said car ACL 35449 to Jersey City aforesaid? A. Yes.

Q. Did you, as a common carrier for hire, transport the said car ACL 35449 to Jersey City aforesaid from the point where you received and accepted it? A. Yes.

Q. Did you deliver or tender delivery of said car ACL 35449 to Andrew Spada & Company at Jersey City aforesaid? If yes, state at what place in Jersey City aforesaid. A. Yes, at the Pennsyl-

vania Railroad delivery yard at Second and Henderson Streets.

Q. When and where in Jersey City aforesaid did you place said car ACL 35449 for delivery to said Andrew Spada & Company? A. On July 17, 1912, at the public delivery yard of the Pennsylvania Railroad Company at Second and Henderson Streets.

Q. Was said car——

Mr. Hartpence: The 19th was stricken out.

Twentieth: What was the usual or customary time to transport by freight train, without delay in transportation, a car of watermelons over your line of railroad from said point where you received and accepted said car ACL 35449 to Jersey City aforesaid. A. Under the most favorable circumstances, about seven hours.

Q. Did you sell or dispose of the watermelons contained in said car ACL 35449? Yes, upon refusal of Andrew Spada & Company, on July 17, 1912, said watermelons were sold.

Omit the 22nd.

Twenty-third: Did you during the month of July, 1912, receive and accept from a connecting carrier at any point on your railroad a car ACL 30698 containing watermelons to be transported to Andrew Spada & Company at Jersey City, N. J.? If yes, state the name of the connecting carrier and when and where you received and accepted said car. A. Yes, the connecting carrier was the Philadelphia, Baltimore & Washington Railroad Company and the car was received by the Pennsylvania Railroad Company, at Edgemoor, Delaware, on July 17, 1912, at 6:55 o'clock A. M.

Q. Were you at the time when you received and acepted said car ACL 30698 and at the time of bringing this action, a common carrier for hire

from the point where you received and accepted said car ACL 30698 to Jersey City aforesaid? A. Yes.

Q. Did you as a common carrier for hire transport the said car ACL 30698 to Jersey City aforesaid from the point where you received and accepted it? A. Yes.

Q. Did you deliver or tender delivery of said car ACL 30698 to Andrew Spada & Company at Jersey City aforesaid? If yes, state at what place in Jersey City aforesaid. A. Yes, at the Pennsylvania Railroad delivery yard, at Second and Henderson Streets.

Q. When and where in Jersey City aforesaid did you place said car ACL 30698 for delivery to said Andrew Spada & Company? A. On July 23, 1912, on the public delivery tracks of the Pennsylvania Railroad Company at Second and Henderson Streets.

The 28th is out.

Twenty-ninth: What was the usual or customary time to transport by freight train, without delay in transportation, a car of watermelons over your line of railroad from said point where you received and accepted said car ACL 30698 to Jersey City aforesaid? A. Under the most favorable circumstances about seven hours.

Q. Did you sell or dispose of the watermelons contained in said car ACL 30698? A. Yes, upon refusal of Andrew Spada & Company, on July 23, 1912, said watermelons were sold.

Thirty-second: Did you, during the month of July, 1912, receive and accept from a connecting carrier at any point on your railroad a car ACL 34794 containing watermelons to be transported to Andrew Spada & Company at Jersey City, N.

J.? If yes, state the name of the connecting carrier and when and where you received and accepted said car. A. Yes, the connecting carrier was the Philadelphia, Baltimore and Washington Railroad Company, and the car was received by the Pennsylvania Railroad Company at Edgemoor, Delaware, on July 16, 1912, at five o'clock P. M.

Q. Were you, at the time you received and accepted said car ACL 34794 and at the time of bringing this action, a common carrier for hire from the point where you received and accepted said car ACL 34794 to Jersey City aforesaid? A. Yes.

Q. Did you as a common carrier for hire transport the said car ACL 34794 to Jersey City aforesaid from the point where you received and accepted it? A. Yes.

Q. Did you deliver or tender delivery of said car ACL 34794 to Andrew Spada & Company at Jersey City aforesaid? If yes, state at what place in Jersey City aforesaid? A. Yes, at the Pennsylvania Railroad delivery yard at Second and Henderson Streets.

Q. When and where in Jersey City aforesaid did you place said car ACL 34794 for delivery to said Andrew Spada & Company? A. On July 20, 1912, on the public delivery tracks of the Pennsylvania Railroad Company, Second and Henderson Streets.

The 37th is out.

Thirty-eigth: What was the usual or customary time to transport by freight train, without delay in transportation, a car of watermelons over your line of railroad from said point where you received and accepted said car ACL 34794 to Jersey City aforesaid. A. Under the most favorable circumstances about seven hours.

39th omitted.

Fortieth: Did you, during the month of July, 1912, receive and accept from a connecting carrier at any point on your railroad a car ACL 24480 containing watermelons to be transported to Andrew Spada & Company at Jersey City, N. J.? If yes, state the name of the conecting carrier and when and where you received the and accepted said car. A. Yes, the connecting carrier was the Philadelphia, Baltimore & Washington Railroad Company, and the car was received by the Pennsylvania Railroad Company at Edgemoor, Delaware, on July 17, 1912, at 6:55 o'clock A. M.

Q. Were you at the time when you received and accepted said car ACL 24480 and at the time of bringing this action, a common carrier for hire from the point where you received and accepted said car 24480 to Jersey City aforesaid? A. Yes.

Q. Did you as a comon carrier for hire transport the said car ACL 24480 to Jersey City aforesaid from the point where you received and accepted it? A. Yes.

Q. Did you deliver or tender delivery of said car ACL 24480 to Andrew Spada & Company at Jersey City aforesaid. If yes, state at what place in Jersey City aforesaid. A. Yes, at the Pennsylvania Railroad delivery yard at Second and Henderson Streets.

Q. When and where in Jersey City aforesaid did you place said car ACL 24480 for delivery to said Andrew Spada & Company? A. On July 23, 1912, on the public delivery tracks of the Pennsylvania Railroad Company, at Second and Henderson Streets.

The 45th is out.

Forty-sixth: What was the usual or customary

time to transport by freight train, without delay in transportation, a car of watermelons over your line of railroad from said point where you received and acepted said car ACL 24480 to Jersey City aforesaid? A. Under the most favorable circumstances about seven hours.

Q. Did you sell or dispose of the watermelons contained in said car ACL 24480? A. Yes, upon refusal of Andrew Spada & Company, on July 23, 1912, said watermelons were sold.

The 48th is out.

Forty-ninth: Did you, during the month of July, 1912, receive and accept from a connecting carrier at any point on your railroad a car ACL 23761 containing watermelons to be transported to Andrew Spada & Company at Jersey City, N. J.? If yes, state the name of the connecting carrier and when and where you received and accepted said car. A. Yes, the connecting carrier was the Philadelphia, Baltimore & Washington Railroad Company, and the car was received by the Pennsylvania Railroad Company, at Edgemoor, Delaware, on July 17, 1912, at 3:50 o'clock P. M.

Q. Were you, at the time when you received and accepted said car ACL 23761 and at the time of bringing this action, a common carrier for hire from the point where you received and accepted said car ACL 23761 to Jersey City aforesaid? A. Yes.

Q. Did you as a common carrier for hire transport the said car ACL 23761 to Jersey City aforesaid from the point where you received and accepted it? A. Yes.

Q. Did you deliver or tender delivery of said car ACL 23761 to Andrew Spada & Company at Jersey City aforesaid? If yes, state at what place in Jersey City aforesaid. A. Yes, the Pennsyl-

vania Railroad delivery yard at Second and Henderson Streets.

Q. When and where in Jersey City aforesaid did you place said car ACL 23761 for delivery to said Andrew Spada & Company? A. On July 22, 1912, on the public delivery tracks of the Pennsylvania Railroad Company at Second and Henderson Streets.

Q. What was the usual or customary time to transport by freight train, without delay in transportation, a car of watermelons over your line of railroad from said point where you received and accepted said car ACL 23761 to Jersey City aforesaid? A. Under the most favorable circumstances about seven hours.

Omit 56.

Fifty-seventh: Did you, during the month of July, 1912, receive and accept from a connecting carrier at any point on your railroad a car ACL 18316 containing watermelons to be transported to Andrew Spada & Company at Jersey City, N. J.? If yes, state the name of the connecting carrier and when and where you received and accepted said car. A. Yes, the conecting carrier was the Philadelphia, Baltimore and Washington Railroad Company, and the car was received by the Pennsylvania Railroad Company at Edgemoor, Delaware, on July 17th, 1912, at 8:30 o'clock A. M.

Q. Were you, at the time you received and accepted said car ACL 18316 and at the time of bringing this action, a common carrier for hire from the point where you received and accepted said car ACL 18316 to Jersey City aforesaid? A. Yes.

Q. Did you as a common carrier for hire transport the said car ACL 18316 to Jersey City aforesaid from the point where you received and accepted it? A. Yes.

Q. Did you deliver or tender delivery of said car ACL 18316 to Andrew Spada & Company at Jersey City aforesaid. If yes, state at what place in Jersey City aforesaid. A. Yes, at the Pennsylvania Railroad delivery yards, Second and Henderson Streets.

Q. When and where in Jersey City aforesaid did you place said car ACL 18316 for delivery to said Andrew Spada & Company? A. On July 22, 1912, on the public delivery tracks of the Pennsylvania Railroad Company, at Second and Henderson Streets.

The 62nd is out..

Sixty-third: What was the usual or customary time to transport by freight train, without delay in transportation, a car of watermelons over your line of railroad from said point where you received and accepted said car ACL 18316, to Jersey City aforesaid. A. Under the most favorable circumstances about seven hours.

Q. Did you sell or dispose of the watermelons contained in said car ACL 18316? A. Yes, upon refusal of Andrew Spada & Company, on July 23, 1912, said watermelons were sold.

The 65th is omitted.

Sixty-sixth: Did you, during the month of July, 1912, receive and accept from a connecting carrier at any point on your railroad a car ACL 25968 containing watermelons to be transported to Andrew Spada & Company at Jersey City, N. J.? If yes, state the name of the connecting carrier and when and where you received and accepted said car. A. Yes, the connecting carrier was the Philadelphia, Baltimore & Washington Railroad Company, and the car was received by the Pennsylvania Railroad Company, at Edgemoor, Delaware, on July 24, 1912, at 5:15 o'clock A. M.

Q. Were you, at the time when you received

and accepted said car ACL 25968 and at the time of bringing this action, a common carrier for hire from the point where you received and accepted said car ACL 25968 to Jersey City aforesaid? A. Yes.

Q. Did you as a comomn carrier for hire transport the said car ACL 25968 to Jersey City aforesaid from the point where you received and accepted it? A. Yes.

Q. Did you deliver or tender delivery of said car ACL 25968 to Andrew Spada & Company at Jersey City aforesaid? If yes, state at what place in Jersey City aforesaid. A. Yes, at the Pennsylvania Railroad delivery yards, Second and Henderson Streets.

Q. When and where in Jersey City aforesaid did you place car ACL 25968 for delivery to said Andrew Spada & Company? A. On July 29, 1912, on the public delivery tracks of the Pennsylvania Railroad, Second and Henderson Streets.

The 71st is out.

Seventy-second: What was the usual or customary time to transport by freight train, without delay in transportation, a car of watermelons over your line of railroad from said point where you received and accepted said car ACL 25968 to Jersey City aforesaid? A. Under the most favorable circumstances about seven hours.

Omit the 73rd.

Seventy-fourth: Did you, during the month of July, 1912, receive and accept from a connecting carrier at any point on your railroad a car ACL 28548 containing watermelons to be transported to Andrew Spada & Company at Jersey City, N. J.? If yes, state the name of the connecting carrier and when and where you received and accepted said car. A. Yes, the connecting carrier was the Philadelphia, Baltimore and Washington

Railroad Company, and the car was received by the Pennsylvania Railroad Company at Edgemoor, Delaware, on July 24, 1912, at 2:45 o'clock A. M.

Q. Were you, at the time when you received and accepted said car ACL 28548 and at the time of bringing this action, a common carrier for hire from the point where you received and accepted said car ACL 28548 to Jersey City aforesaid? A. Yes.

Q. Did you as a common carrier for hire transport the said car ACL 28548 to Jersey City aforesaid from the point where you received and accepted it? A. Yes.

Q. Did you deliver or tender delivery of said car ACL 28548 to Andrew Spada & Company at Jersey City aforesaid? If yes, state at what place in Jersey City aforesaid. A. Yes, at the Pennsylvania Railroad delivery yard, Second and Henderson Streets.

Q. When and where in Jersey City aforesaid did you place said car ACL 28548 for delivery to said Andrew Spada & Company? A. On July 31, 1912, on the public delivery tracks of the Pennsylvania Railroad Company, Second and Henderson Streets.

The 79th is out.

Eightieth: What was the usual or customary time to transport by freight train, without delay in transportation, a car of watermelons over your line of railroad from said point where you received said car ACL 28548 to Jersey City aforesaid? A. Under the most favorable circumstances about seven hours.

Q. Did you sell or dispose of the watermelons in said car ACL 28548? A. Yes, upon refusal of Andrew Spada & Company, on July 31, 1912, said watermelons were sold.

Omit the 82nd.

Andrew Spada, for Plaintiff—Direct

ANDREW SPADA, sworn.

Direct-examination by Mr. Stout:

Q. What is your name? A. Andrew Spada.

Q. You are one of the plaintiffs in the suit of Andrew Spada & Co. against the Pennsylvania Railroad Company? A. Yes, sir.

Q. You are a member of the partnership of Andrew Spada & Company? A. Yes, sir.

Q. Who is the other member? A. Dominick Spada.

Q. He is the other plaintiff in this suit? A. Yes, sir.

Q. Where do you reside? A. 584 Broome Street, New York.

Q. What is the business of Andrew Spada & Company? A. Wholesale produce merchants.

Q. How long has Andrew Spada & Company been engaged in that business? A. About 5 years.

Q. Where? A. In New York City.

Q. Where in New York City? A. 204 Franklin Street—Fruit Auction Building.

Q. What produce do you handle in your business? A. General produce, especially potatoes and watermelons.

Q. Were you handling watermelons during the month of July, 1912? A. Yes, sir.

Q. Where? A. At the Pennsylvania Railroad.

Q. Pennsylvania Railroad where? A. Jersey City, Second and Henderson Streets.

Q. At the freight yard there? A. Yes, sir.

Q. Were you handling these melons in connection with your New York business? A. Yes, sir.

Q. What part of your business in reference to these watermelons was transacted in the Henderson street yard in Jersey City? A. The watermelon business.

Q. All of it? A. Yes.

Q. Did the Pennsylvania Railroad Company during the month of July, 1912, deliver or tender delivery to you at the Henderson street yard in Jersey City a car of watermelons ACL 30943? A. Yes, sir.

Q. Upon what date? A. July 15, 1912.

Q. Do you recall what hour of the day? A. About 7 o'clock.

Q. Seven o'clock in the morning or the evening? A. A. M. .

Q. In the morning? A. Yes, sir.

Q. When were you notified that this car was on the delivery track for you? A. On the morning of July 15, on the same morning.

Q. Was that the first notice you received of the arrival of this car? Do you understand the question? A. No, sir. Explain a little better.

Q. Was that the first notice that you received of the arrival of this car?

The Court: Was that the first you knew your car was there?

A. Yes, sir.

Q. How were you notified? A. I was notified in the morning—we asked the delivery clerk if he had anything for us and he gave us the number and then we know what we got.

Q. Did you examine this car on July 15, 1912? A. Yes, July 15, 1912.

Q. What kind of a car was it? A It was a regular watermelon car; you know, ventilation from both sides and doors.

Q. Was it known as a ventilated car? A. Yes, sir.

Q. What was the size of the car if you recall? A. 36 feet car.

Q. Did you examine the contents of this car? A. Yes, sir.

Q. What did it contain? A. Watermelons.

Q. What was the condition of these melons? A. A portion of the melons was rotten, bad condition.

Q. Do you know how many were rotton? A. Not at that time.

Q. Are you using a book there? A. Yes, sir.

Q. What is that book? A. That is my regular book for the entire season, from that time I started until the end of the season.

Q. The season of 1912? A. Yes, sir.

Q. Who made those entries in that book? A. I did.

Q. When did you make them? A. At the day when the car was disposed—each car was disposed of.

Q. Now can you tell us about how many rotten melons or decayed melons there were in that car? A. Yes, sir.

Q. How many? A. 200.

Q. How do you know there were 200? A. Because I made an entry at the time the car was all out.

Q. Did you see the rotten melons counted? A. I supervised it, yes, sir.

Q. After you ascertained the condition of these melons did you notify anybody? A. Yes, sir.

Q. Whom did you notify? A. I went to the freight agent of the Pennsylvania Railroad and I spoke to either Mr. Halleck—he is the chief clerk,—or Mr. Phillips, who was the assistant freight agent, and told that condition of the car, how it was at the time I examined it.

Q. What did they say? A. They told me to go to the delivery clerk to tell him to take notice of it,—that car—

Q. To what? A. To take notice of my complaint. They sent me to the delivery clerk in the yard to make this report.

Q. You say that you were sent to the delivery clerk? A. To the delivery clerk, yes, to report about this car.

Q. What was next done? A. Well, next done, I went to the delivery clerk and I told him this car was in bad condition and I wanted a special report made of it in order to file a claim later on.

Q. Did the Pennsylvania Railroad Company send anyone there to inspect the car that you know? A. Yes, yes, sir.

Q. Who did they send? A. There were two fellows in charge, one fellow by the name of Robert Furer and another fellow Dominick Burns.

Q. What did they do? A. They stayed until the car was unloaded,—to check a count of the car?

Q. What did they do while they were there? A. They were supervising the counting of the melons to find out how many good melons in the car and how many bad ones.

Q. Who saw this car on its arrival besides yourself? A. Mr. Ureles.

Q. What is his first name? A. I know him by Mr. Ureles. His first name I do not know.

Q. What did you do with these melons? A. These melons? I sold.

Q. You sold them? A. Yes, sir.

Q. At private or public sale? A. Public sale.

Q. You mean by that other dealers in the yard? A. Dealers in the yard, yes, sir.

Q. When did you offer them for sale? A. On the morning of July 15th.

Q. How is the watermelon business carried on in the Henderson Street yard? A. Carried on in what?

Q. How do you do business in the Henderson Street yard? A. Well, I am received there, you see, and go in the morning, half past six or seven o'clock, and there is a considerable amount of

buyers, maybe ten, fifteen or twenty, different kind of buyers; and I open the car and say, "Here is the car." You ask the price. Suppose I ask you $400, well maybe the highest man gets the car. That is the way we do business there.

Q. You sell by wholesale? A. Wholesale cars.

Q. To the dealers who come in the yard? A. But at times, it very seldom happens, I can't dispose of a car at wholesale. Then naturally I have to retail them out as best I can.

Q. Do you know who bought this car? A. Yes, Mr. Ureles.

Q. What did you receive for these melons? A. $225.

Q. Was that the best price you could get for them? A. Yes, sir.

Q. After you sold these melons did you see them unloaded? A. Yes.

Q. When were they unloaded? A. During the day. You mean where?

Q. When? A. During the day of July 15th.

Q. And these men, Furer and Burns and Ureles, were present when the melons were being unloaded? A. Yes, sir.

Q. Do you know what the market value was per car for sound, select watermelons of the variety contained in this car on July 13, 1912, at the Henderson Street yard?

Mr. Hartpence: I object. The proper measure of damages in this case is not the difference between what the melons brought at a sale and their value at the Henderson street yard, but their value at the place of shipment.

The Court: Where do you find that?

Mr. Hartpence: The goods in this case were shipped under what is known as the uniform bill of lading. That bill of lading provides

specifically as one of the terms of shipment that the valuation shall be the valuation—

The Court: There is no bill of lading in evidence at present.

Mr. Hartpence: I understand that.

The Court: Then how can I assume that a bill of lading which is not in evidence and which I have not ever seen, provides anything?

Mr. Hartpence: Still I must make my objection to the measure of damages as the plaintiff is attempting to bring it out at this time.

The Court: What is the use of making an objection if I cannot rule on it? I suppose in the absence of any bill of lading the common law rule would prevail, and as I understand it the measure of damages would be the difference between what he actually got for it and what it was worth at the time and place where it should have been delivered. Now until the bill of lading comes in I am obliged to assume that the common law would prevail. If after you produce the bill of lading it contains some provision of that character, I presume that then there would have to be some evidence introduced to show what the value was at the place of shipment, if the bill of lading provides that. I suppose it would save some time if the bill of lading is to be introduced if Mr. Stout would not only find out what the value was in the yard on that morning but also find out what the value was at the place of shipment.

Mr. Stout: We do not know that. We do not assume that the bills of lading show that there was a binding contract in this case.

The Court: I do not assume you do. I said

it might possibly save some time if you asked that question.

Mr. Stout: We are not prepared for that.

The Court: All right, go ahead.

Mr. Stout: And furthermore if they are going to set up such a defense as that as to the measure of damages, wouldn't it have to be set up in their answer?

The Court: I don't know. I am not going to discuss a thing that is not up yet. When we get to that point I will decide it.

(Question repeated.) A. Yes, sir.

Q. What were they selling for? A. From $385 to $400 per car.

Q. What would this car of melons have sold for at the Henderson street yard on July 13, 1912, if the melons had been in sound condition?

Mr. Hartpence: I object.

A. Not less than $385.

Mr. Hartpence: I object unless this witness in some way qualifies himself to testify as to what they would have sold for. He might say they would have sold for a thousand dollars.

The Court: You may cross-examine if you please. I think there has been evidence enough to enable him to testify as an expert. He says he has been in the business for some time and it is his practice to go over there and sell these carloads to dealers who come there and purchase them, and I suppose if that is what he has been doing he ought to know something about the price of melons at that place at that time. If you want to you may cross-examine him.

Cross-examination by Mr. Hartpence as to qualification:

Q. Did you examine from time to time or acquaint yourself from time to time with the market values of watermelons? A. Positive yes.

Q. In what way? A. Because I was there selling the melons and buying at the same time.

Q. Did you have any other method of ascertaining what the market value was? A. No other method than buying and selling. That is the only method that we use.

Q. Simply at the Jersey City yard? A. Jersey City yard, yes, sir.

Q. And you have no knowledge of the general market price of watermelons in that vicinity? A. In the yard?

Mr. Stout: I object to that.

The Court: Just at present I think that would be irrelevant and immaterial.

Mr. Hartpence: In that vicinity, I said.

The Court: Well, you may ask him about that, in that general vicinity.

A. Yes, sir, I know the general market condition; yes, sir.

Q. And how did you ascertain or acquaint yourself with that general market value? A. It all depends to the supply and demand, that is how.

Q. How long had you carried on the particular business of selling watermelons in the Jersey City yard at that place? A. At that place, about five years.

Q. And when you offered the melons for sale to the highest bidders, as you have testified, just where did you do that? A. At Henderson Street, Pennsylvania Railroad, on the track that our car happened to be.

Q. And in whose presence? A. In the presence of all the buyers.

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Q. That had gathered there? A. Yes, sir; looking for the commission merchants and wholesale dealers to come down there and sell their things. They speculate right down in the yard. They buy from us and from dealers right in the same line.

Q. And your offers were made to those men who were gathered there generally,—the market as you regarded it? A. Yes.

Q. How did you offer it? A. We opened the car and they examined the car, and they ask me how much I want. I can ask $500, any price I want. They say, "I will give you $300, $200." The highest bidder gets the car.

Mr. Hartpence: All right.

Direct-examination by Mr. Stout resumed:

(Question repeated.) A. $385. I give you the lowest market value on that day.

Q. Did you make that note in your book at the time? A. Yes, sir.

Q. That you could have gotten $385? A. Well, I made it in the office, just as soon as I got in the office.

The Court: That is time enough.

Q. I call your attention to car ACL 35449— A. Yes, sir.

The Court: We will adjourn until 2 o'clock.

RECESS.

Q. I call your attention to car ACL 35449. Did the Pennsylvania Railroad Company during the month of July, 1912, tender delivery to you of car ACL 35449 at its delivery tracks in the Henderson street yard, Jersey City? A. Yes, sir.

Q. When did it tender delivery of this car? A. July 17, 1912.

Q. What time of the day? A. 7 o'clock.

Q. A. M. or P. M.? A. A. M.

Q. Did you examine the car? A. Yes, sir.

Q. What kind of a car was it? A. Regular watermelon car with ventilation from both ends and from the doors.

Q. How large a car, do you know? A. Thirty-six feet car.

Q. Did you examine the contents of this car? A. Yes, sir.

Q. What did it contain? A. Watermelons.

Q. When did you make this examination? A. On the morning of July 17, just as soon after I was notified that the car was on the track.

Q. In what condition— A. It was in a very—

Q. Just a minute. In what condition did you find the watermelons? A. In a very rotten condition.

Q. How extensive was your examination? A. Thoroughly, from one end of the car to the other, and I took off some melons from the top to see how the condition was on the bottom of the car on the first tier.

Q. After you ascertained their condition what did you do next? A. I went to the freight office of the Pennsylvania Railroad and spoke to Mr. Halleck about the condition of the car, and I told to him that the car was in such a bad condition that I could not realize the freight, and therefore was obliged to refuse them.

Q. And that was at the freight agent's office in the Henderson Street yard, Jersey City? A. Yes, sir.

Q. After you notified Mr. Halleck of the condition of this car what did you do next? A. He make me sign a refusal slip.

Q. Made you sign a refusal slip? A. Made me sign a slip for the condition of the car and so forth.

By the Court:

Did you leave that slip with him after you signed it? A. Yes, he made me.

Q. He had the slip and made you sign it and he kept the slip after you signed it? A. Yes.

Q. And that refused the acceptance of the car because of the condition of the melons? A. Yes.

By Mr. Stout:

Q. Do you know what the market value was for sound, select melons of the variety contained in this car,—what they were selling for on July 15, 1912? A. Yes, sir.

Q. What were they selling for? A. Selling from $350 to $400.

Q. What could you have received for this car of melons at the Henderson street yard on July 15, 1912, if it had arrived in sound condition? A. The lowest price would have been $350, the lowest price.

Q. You could at least have received— A. At least $350 without any doubt.

Q. I call your attention to car No. ACL 30698. Did the Pennsylvania Railroad Company tender delivery to you of this car at its delivery office at Henderson Street yard in Jersey City during the month of July, 1912? A. Yes.

Q. On what day? A. July, 23, 1912.

The Court: July 24th?

A. 23rd.

Q. July 23rd? A. Yes, sir.

Q. Did you examine the car? A. Yes, sir.

Q. What kind of a car was it? A. It was a regular watermelon car with a ventilation from both ends and the doors.

Q. How large a car? A. A 36 foot car.

Q. Did you examine the contents of this car? A. Yes, sir.

Q. What did it contain? A. Watermelons.

Q. When did you make this examination? A. In the morning of July 23rd.

Q. In what condition did you find the watermelons? A. Also in bad—in rotten condition.

Q. How extensive was your examination of the melons? A. Thoroughly, from one end of the car to the other, and also examined the first row in the car.

Q. After you ascertained their condition what did you do next? A. I went over to the freight agent—I mean to the freight agent's office—and I spoke to Mr. Halleck about the condition of this car, that it was in such rotten condition that I was also obliged to refuse, that I could hardly get the freight out of the car, and Mr. Halleck did the same thing that he did with the car 35449.

Q. What do you mean by the same thing? A. Well, he made me sign the refusal slip.

Q. Made you sign a refusal slip? A. Yes.

Q. You signed this slip and left it with Mr. Halleck? A. Yes, sir.

Q. At the office in the yard? A. Yes, sir.

Q. Do you know what the market value was for sound, select melons of the variety contained in this car, what they were selling for on July 18th, 1912? A. Yes.

Q. What were they selling for? A. From $300 to $350.

Q. In the Henderson street yard at Jersey City? A. Yes, sir.

Q. And what could you have obtained for this car if the melons had arrived in good condition on July 18, 1912? A. At least $325.

Q. I call your attention to car No. 34794 ACL. A. Yes.

Q. Did the Pennsylvania Railroad Company during the month of July, 1912, tender delivery,

or deliver to you, at the Henderson street yard, Jersey City, a car of watermelons ACL 34794? A. Yes, sir.

Q. On what date? A. July 20, 1912.

Q. July 20th? A. Yes, sir.

Q. At what hour of the day? A. 7 A. M.

Q. Were you notified that this car was on the delivery track for you? A. Yes, sir.

Q. Is that true of the preceding cars that you have testified about, that you were notified by the Pennsylvania Railroad Company? A. I do not understand the question.

Q. You have testified to three other cars? A. Yes.

Q. Were you notified by the Pennsylvania Railroad in reference to those three cars, as to when they were placed on the delivery track? A. Yes, sir.

Q. And you were notified on the day that you examined the cars? A. Yes, sir.

Q. Did you examine this car 34794? A. Yes, sir.

Q. What kind of a car was it? A. Regular watermelon car, you know, like the rest, ventilated from both sides and doors.

Q. Were all the cars in this suit ventilated cars? A. Yes, sir.

Q. What was the size of this car? A. Thirty-six feet also.

Q. Did you examine the contents of this car? A. Yes, sir.

Q. What did it contain? A. Watermelons.

Q. What was their condition? A. A portion of the melons were rotten.

Q. Do you know how many were rotten, in numbers? A. Yes.

Q. How many? A. I know after the car was unloaded, but not at the time that I did examine the car. You mean to say how many rotten melons?

Q. Yes. A. 267.

Q. After you ascertained the condition of the melons in this car, what did you do next? A. I went to the freight office and spoke to either Mr. Halleck or Mr. Phillips.

Q. What did you say to them? A. I told them that the condition of the car was badly and I wanted to have them to take notice of it and make a special report on this car—which they did.

Q. Did they send anyone to examine the car? A. Yes, sir.

Q. Whom did they send? A. A fellow by the name of Mean or Meare—I think it is Meare.

Q. What did he do? A. He took account of the output of the car.

Q. When was this examination made by Meare? A. During the day of July 20, 1912.

By the Court:

Q. Did you have to sign anything with respect to that car at any time? A. Yes; when you accept the car they make you sign just like the car was accepted in good condition, but at the same time they make a notation on some remarks that they will make a special report as to the true condition.

Q. Then with respect to all these cars with respect to which you have testified and are about to testify, did you on each occasion sign? A. Not on those I refused. I sign the refusal slip but I did not sign a receipt that I had accepted those cars.

Q. Then when you accepted a car you signed a receipt for it and when you refused a car you signed a refusal slip? A. Yes, sir.

Q. And that was taken by the agent of the Company after you had signed it? A. Yes, sir.

By Mr. Stout:

Q. What did you do with this car? A. I sold.

Q. Public or private sale? A. Public sales—

many different sales I made on this car,—small lots.

Q. You sold it then to various dealers? A. Yes, because I offered the car to wholesalers and the speculators were afraid to buy that car because it was in bad condition and I was obliged to go ahead and get a helper and myself and sell this car to the small dealers.

Q. What did you realize for these melons? A. The total amount?

Q. Yes. A. $165.35.

Q. And that was the best price that you could get for them? A. Yes, sir.

Q. When did you sell them? A. July 20th, the same day that it was delivered.

Q. Do you know what the market value was per car for sound, select watermelons of the variety contained in this car on July 17, 1912, at the Henderson street yard, Jersey City? A. Yes.

Q. What was the market value? A. The 17th was about $350.

Q. Could you have obtained $350 for this car of melons if it had arrived on July 17th, 1912, in good condition? A. Well, I think I could, but positive it will not been sold less than $300 anyway. I have got a notation in the book marked to this effect.

Q. You say then you could have obtained at least $300? A. At least $300.

Q. But melons on that day were selling from $300 to $350? A. $300 and $350 and more than that,—some cars.

Q. I call your attention to car No. 24480. Did the Pennsylvania Railroad Company during the month of July, 1912, tender delivery to you of this car at its delivery tracks at Henderson Street yard, Jersey City? A. Yes, sir.

Q. When did it tender delivery? A. July 23, 1912.

Q. July 23rd? A. 23rd, yes.

Q. What time in the day? A. 7 A. M.

Q. Did you examine the watermelons in this car? A. Yes.

Q. What was their condition? A. Very rotten condition.

Q. How thorough was your examination? A. Thoroughly from one end of the car to the other one the same as I did the other cars.

Q. After you ascertained their condition what did you do next? A. I went to the freight agent's office and I told to Mr. Halleck about this car, and I told him I could not accept it because I hardly could realize half of the freight, so he made me sign a refusal slip.

Q. And you signed a refusal slip and delivered it to the agent at the Henderson street office? A. To Mr. Halleck, who I think is the chief clerk of the Pennsylvania Railroad at that station.

Q. Do you know what the market value for sound, select melons of the variety contained in this car was, what they were selling for on July 18, 1912? A. Yes, sir.

Q. What were they selling for? A. $300 to $350 that were ripe.

Q. $300 to $350? A. Yes, sir.

By the Court:

Q. How many carloads of melons were sold in there in a morning? A. In a morning? Oh, sometimes I sold myself as high as 15 to 20 cars. In June I would not be surprised some mornings if they sell 100 cars, all the commission merchants and everyone. It just depends on how many they get. If they get out of town trade some mornings they sell 200,—that is to go out of town or to other cities.

Andrew Spada, for Plaintiff—Direct (Resumed)

By Mr. Stout:

Q. What could you have received for this carload of melons if it had arrived in good condition at the Henderson street yard on July 18, 1912? A. No less than $300, I put the lowest value on the car.

Q. I call your attention to car No. 23761. Did the Pennsylvania Railroad during the month of July, 1912, deliver to you at the Henderson street yard this car of watermelons? A. Yes, sir.

Q. On what date? A. July 22.

Q. At what hour? A. 7 A. M.

Q. When were you notified that this car was on the delivery track? A. The same morning.

Q. And that was the first notice that you received? A. Yes, sir.

Q. Did you examine the watermelons in this car? A. Yes.

Q. What was their condition? A. A portion of their contents were rotten.

Q. How many were rotten? A. 158.

Q. After you ascertained their condition what did you do next? A. Went to the freight office and notified either Mr. Halleck or Mr. Phillips about the condition of the car and asked them to make special report on this car,—which they did.

Q. What did you do next? You signed a receipt? A. Yes.

Q. For these melons? A. Yes, sir.

Q. Then what did you do? A. Then they sent somebody to this—to this particular car. I did not mark who the checker of the Pennsylvania Railroad was, but I am positive they sent some one in their employ to check out the car.

Q. Did you then offer them for sale? A. Yes, sir.

Q. What do you mean by checking out the car? A. Checking out—I mean counting the melons.

Q. The good melons and the bad melons? A. Yes, sir.

Q. Did you offer this car for sale? A. Yes.

Q. When? A. On the morning of July 22.

Q. To whom? A. To different dealers, and they would not buy it because it was rotten, and then I had to start to retail it myself with the help of another party, to sell to the small trade.

Q. What did you realize for the car? A. $165.

Q. Was that the best price that you could obtain for these melons? A. Yes, sir.

Q. Do you know what the market value was per car for sound, select watermelons of the variety contained in this car on July 18, 1912, at the Henderson street yard? A. Yes, sir.

Q. What was the market value? A. From $300 to $350.

Q. What would this carload of melons have sold for at the Henderson street yard on July 18, 1912, if the melons had been in sound condition? A. No less than $300.

By the Court:

Q. How did you work the retail sale of them, Mr. Spada? A. The retail trade—the small dealers come and see the melons and ask you how much you want for them, and I put a price and they go for whatever they think they are worth. Some people take 100 melons and some 200.

Q. Well, they come right to the yard? A. Yes, a regular trade. They come right to the yard.

By Mr. Stout:

Q. All of these melons that you sold were sold right at the Henderson street yard? A. Yes.

Q. How frequently were you in the Henderson street yard during the month of July, 1912? A. Every day excepting legal holidays.

Andrew Spada, for Plaintiff—Direct (Resumed)

Q. What were you doing there? A. Looking after my watermelon business, selling and buying.

Q. Did you make any complaints to the Pennsylvania Railroad about these cars? A. Yes, sir.

Q. To whom did you make complaints? A. Some cars I made to Mr. Halleck. As a matter of fact when I refused the car I made it direct to Mr. Halleck because he is the one in charge of the department.

Q. I mean did you make complaints to the Pennsylvania Railroad before the cars were delivered? A. On two particular cars I did, yes, sir, because they were overdue and I notified them to that effect.

By the Court:

Q. How did you make that notification? A. In writing.

Q. Sent them a letter? A. Sent them a letter because those cars ought to have been there a certain day, and the market in fine condition, and I notified them to deliver in the proper time, and so forth.

Q. Do you remember what two cars they were? A. Yes, sir.

Q. What were they? A. Car 30943 and car 35449. I have not got the letter, but I can—

Q. You sent the letter to the railroad company and kept a copy yourself? A. Yes, sir.

By Mr. Stout:

Q. And as to these other cars that were delayed in transit, did you say anything to anybody about those? A. Yes.

Q. To whom? A. Wrote a letter also—besides calling their attention each morning to the fact that they were—I called their attention to the fact that those cars were in bad condition and that I had to refuse. They kept their own record also

to that effect. And I notified them by letter also of which cars I was going to put claims. If I am not wrong that letter was on July 31st, the last day that I had the last car sold.

Q. Then you were in the Henderson street yard every day looking after the cars that you had shipped to you there? A. Yes, sir.

Q. And which you expected to arrive? A. Yes, sir. As a matter of fact the first two cars were already sold to arrive for $350 a car, and my letter shows that I notified the railroad to that effect and also I requested them that they should make notice of the market condition when those cars would come in that were late already.

Q. I call your attention to car 18316 ACL. A. Yes.

Q. Did the Pennsylvania Railroad Company during the month of July, 1912, tender delivery to you of this car at its Henderson street yard, Jersey City? A. Yes.

Q. When? A. July 23rd.

Q. At what time of the day? A. 7 A. M.

Q. Did you examine the melons in this car? A. Yes.

Q. When did you examine them? A. The same morning that the car was delivered, July 23rd—was tendered for delivery.

Q. What was the condition of the melons? A. Very rotten condition.

Q. Did you notify the freight agents at the Henderson street freight yard of the condition of these melons? A. Yes, sir.

Q. When did you notify them? A. The same morning, July 23rd.

Q. Whom did you notify? A. Mr. Halleck.

Q. What did you say to him? A. I told him the car was in rotten condition, that I could not realize the freight, that I was obliged to refuse.

Q. Did you sign a refusal order? A. Yes, sir.

Q. Did you leave that with Mr. Halleck? A. Yes, sir.

Q. Do you know what the market value of sound, select melons of the variety contained in this car was, what they were selling for on July 18th, 1912? A. Yes, sir.

Q. What were they selling for? A. From $300 to $350.

Q. What could you have obtained for this car at the Henderson street yard on July 18, 1912, if the watermelons had been delivered in good condition? A. $325.

Q. I call your attention to car No. 25968 ACL. Did the Pennsylvania Railroad Company deliver to you at the Henderson street yard, Jersey City, this car of melons during the month of July, 1912? A. Yes, sir.

Q. Do you remember the date? A. Yes, sir.

Q. What was the date? A. July 29th.

Q. What time of the day? A. 7 A. M.

Q. When were you first notified that this car was there for you? A. There for me on the delivery track you mean?

Q. When were you first notified that this car was on the delivery track? A. The same morning, July 29th.

Q. Did you examine the contents of this car? A. Yes, sir.

Q. What did it contain? A. Well, a portion of the melons were rotten.

Q. You do not understand my question; what did the car contain? A. Oh! Watermelons.

Q. What was the condition of the watermelons in this car? A. A portion of the melons were rotten.

Q. Do you know how many? A. Yes, sir.

Q. About how many? A. 206.

Q. After you learned their condition what did you do next? A. I went to the freight agent—the freight office, and notified either Mr. Halleck or Mr. Phillips of the condition of this car, and requested them the same morning to make a special report, as is customary on those cars that are damaged,—which they did, and then they sent somebody to check the car out.

Q. And what did you do with these melons? A. Sold them in small lots.

Q. Private or public sale? A. Public sale, people come in the yard there and sell in small lots.

Q. What did you realize for them? A. $125.

Q. Was that the best price you could get for them? A. Yes, sir.

Q. Do you know what the market value was per car for sound, select watermelons of the variety contained in this car on July 25, 1912, at the Henderson street yard? A. Yes, sir.

Q. What was it? A. $250 to $300.

Q. What could you have realized? A. $300.

Q. If they had come in sound condition? A. Yes, sir.

Q. Car No 28548 AC. Did the Pennsylvania Railroad Company during the month of July, 1912, deliver or tender delivery to you of this car at its Henderson street yard, Jersey City? A. Yes, sir.

Q. On what day? A. July 31st.

Q. July 31st? A. Yes, sir.

Q. At what hour of the day? A. 7 A. M.

Q. When were you first notified that this car was on the delivery track? A. The morning of July 31st.

Q. Did you examine the watermelons in this car? A. Yes.

Q. What was their condition? A. Very rotten condition.

Q. How thorough was your examination? A.

Thoroughly from one end of the car to the other.

Q. After you ascertained their condition what did you do? A. I went to the freight office and notified Mr. Halleck of the condition of that car and I refused the car.

Q. You signed a refusal slip? A. Yes.

Q. Did you leave it with Halleck? A. Yes, sir.

Q. Do you know what the market value of sound, select melons of the variety contained in this car was, what they were selling for on July 25th, 1912? A. $250 to $300.

Q. How much could you have realized for this car had it come in good condition on July 25th? A. $300.

Q. For this car? A. Yes, sir.

Q. How much? A. $300.

Q. Mr. Spada, from your experience, how long would watermelons shipped in ventilated cars, the kind containing the watermelons in this suit, keep without rotting during the month of July? A. Five or six days.

(Adjourned to September 23, 1913.)

Q. Mr. Spada, who examined with you these nine carloads of watermelons involved in this suit? A. Mr. Ureles and a representative of the Pennsylvania Railroad.

Q. When were those examinations made by Mr. Ureles? A. At the same time that each car were delivered, the morning the car was delivered.

Q. Who is Mr. Ureles? A. That fellow there (indicating).

Q. This gentleman (indicating)? A. Yes, sir.

Q. During the month of July, 1912, was there any fluctuation in the market at the Henderson street yards in melons of the variety contained in these cars involved in this suit? A. Very little.

Q. To what extent? A. Well, I must look in my

book to see the entire month. I sold melons during that month $250 to $425.

Q. Then from the 12th of July to the 31st of July the prices ranged from $250 to $425? A. Not from then. It was from $250 to $400 from the 12th of July to the last; but the first part of the month you know I sold some for $425, before these cars arrived. I have three cars at that price here.

Cross-examination by Mr. Hartpence:

Q. Mr. Spada, referring to car ACL 30943, which was the first car on which you were questioned in your direct examination, will you state whether or not you purchased that car of melons and shipped it?

Mr. Stout: I object to that as immaterial, as to who purchased it.

The Court: If he purchased it he would know what conditon the goods were in probably at the time he purchased it, whether they were delivered in the first instance to the carrier in good condition.

Mr. Stout: The depositions in the case prove the condition of the melons when delivered to the initial carrier.

The Court: They do not conclusively prove it. You have a witness who swore to it. Because you put a witness on who swears they were in good condition does not foreclose the other side from showing they were in bad condition; otherwise he would have no defense.

A. I purchased the car but did not ship it.

Q. And where did you purchase it? A. I purchased it through correspondents in Georgia.

Q. Just where in Georgia? A. Cairo, Georgia.

Q. Who was your correspondent there? A. W. B. Roddenbery.

Q. Did you see that car of melons before it was delivered to the carrier for shipment in Georgia? A. Certainly not. How could I see from New York to Georgia?

Q. When did you first see it. A. At the time the car was delivered.

Q. Delivered where? A. At the delivery track of the Pennsylvania Railroad at Second and Henderson Street.

Q. And when was that? A. On July 15th.

Q. Of what year? A. 1912.

Q. How do you recall that it was on July 15th, 1912? A. Because I made the entry in my regular book.

Q. You made an entry at that time? A. As I told you, when I went to the office at the same day, yes sir.

Q. And in stating that you saw it first on July 15, 1912, you do that after reference to your record book, is that true? A. Yes sir.

Q. And not upon your own recollection, aside from the book? A. Well, I recollect positive because I used this custom in my business every day. Day by day what I do there today I put in my book, day by day, and I have on my book July 15th, that day.

Q. Are you quite sure it could not have been July 13th? A. No sir.

Q. And why are you sure it could not have been July 13th? A. Why, for the reason that the car was not on the delivery track on July 13th.

Q. And you remember that, do you? A. Yes.

Q. And how do you remember that? A. Because it is on my book.

Q. And you base your statement then of the time you first saw this car solely, do you not, on the record that you made at the time? A. From the record that I made, yes sir, and also I think

that the Pennsylvania Railroad has got a record of the same day that I examined the car.

Q. What was that? (Answer repeated).

Q. Was there any representative of the Pennsylvania Railroad present when you examined the car. A. Yes sir.

Q. Who was it? A. Robert Furer and Dominick Barns.

Q. I believe you stated in your direct examination that this car was a ventilated car of the usual type for watermelon transportation. A. Yes sir.

Q. And that there were about 200 watermelons which were spoiled in this car? A. Yes sir.

Q. How many melons were there altogether in the car. A. 1061.

Q. 1061? A. Yes.

Q. Now when you offered that car for sale how did you offer it, as it stood there or with the spoiled melons removed? A. I sold the car as it was there—in the condition it was.

Q. Just as it was? A. Yes.

Q. And I think you said that you sold it for $225; is that correct? A. Yes sir.

Q. That represented the value, I suppose of the good melons, the difference between 200 melons and 1061 melons? A. In that condition—I didn't sell by count; I sold the entire car to that man and he examined the car in what condition it was and I sold it for $225 as it was.

Q. What was the proportionate value of the melons that were in good condition to the total value of the car. A. I cannot understand this question.

(Question repeated.) A. $225.

Q. And how do you reach that conclusion? A. Why, because I offered the car to different speculators there and $225 was the highest I could get for the car.

Q. In other words, you got $225 for the car when you sold it, is that true? A. Yes sir.

Q. And so you say that was the proportionate value of the good melons to the value of the entire car? A. What was that? (Question repeated.) A. Yes sir. But I mean in the condition that it was.

Q. You could have sold those melons, couldn't you, by taking them out of the car and separating them from the spoiled ones, in less than carload lots? A. Yes, but it was not my custom to do that. I was strictly a wholesaler there. The only time I did that was when the wholesalers in the yard refused to buy my cars, then I had to retail them out; but I was doing a strictly wholesale business.

Q. But you did sell retail from time to time, did you not? A. As I already explained to you the reason why I had to do it.

Q. Well, you could have done it on that occasion if you had to, couldn't you? A. Well, if I did not consider that the market—the price offered to me was not sufficient for that price, I would have done so. That was the time I did retail, when I thought they offered me less than the goods were worth..

Q. Did you receive a freight bill for that car? A. Yes sir.

Q. What was the amount of it? A. My record shows I paid $134.14.

Q. You paid that, did you? A. I paid to the railroad $134.14 for freights.

Q. How did Mr. Roddenbery come to purchase that car for you? A. Because I have been doing business with that man.

Q. He purchased it then on your instructions, did he? A. Yes sir.

Q. And as your agent in the south? A. Purchased it outright.

Q. He did that for you, did he not? A. He bought that car—I bought the car from him.

Q. You bought it from Roddenbery? A. From Roddenberry.

Q. How did you come to buy it from Roddenbery? A. Because he is a dealer in melons and I bought the car. He offered me the cars at certain prices and I bought it.

Q. When you went to the freight yard of the Pennsylvania Railroad at Second and Henderson Street after being notified that car 30943 was there, how did you locate the car. A. I located it —I asked the delivery clerk where the car was and he gave me the track number and I went and located the car.

Q. You had been advised prior to that time by Roddenbery that the car had been shipped, had you not? A. Certainly I was.

Q. When did you receive that advice from Roddenbery? A. On July 8th.

Q. And was that car turned over to you by the Pennsylvania Railroad Company agents at the yard in Second and Henderson Street when you applied for it? A. Not at the time. It was turned over to me, the car was consigned straight to me and it was my car and I got the car at the time it was delivered to me.

Q. How did you know what car to ask for? A. Well, because didn't I have my number? I had my number of the car expected to arrive.

Q. Where did you get that number? A. I got —originally I got it from Mr. Roddenbery.

Q. Well, how did you get it from him? A. By sending an invoice, a regular invoice.

Q. What do you mean by invoice? A. Invoice is a car of melons and so forth shipped on such and such a date. A regular invoice.

Q. You mean his bill? A. His bill.

Q. Did you present that bill to the railroad company agents at Second and Henderson Street when you went for your car? A. No sir, I did not present that bill.

Q. What did you present to them when you asked for the car? A. Nothing to the railroad. I did not present anything.

Q. How did you know which car to get? A. How do I know? I had the numbers. I expect such and such a car to arrive here, and if the cars are shipped to you consigned to you the railroad knows that I am, for example, Andrew Spada and they gave the keys to me; but if the car is shipped "Order Notify" then you have to produce some papers before you get the car.

Q. Shipped how? A. Shipped "Order Notify" to the railroad. Don't you know what I mean? If I ship you and you think I am responsible you send the car to me, Andrew Spada, direct, and as far as payment is concerned it is up to you, but if you don't want to trust me you go ahead and send the car to me "Order Notify." That means I can't get the car unless I produce a certain paper to the railroad.

Q. What paper? A. Well, shipping receipt or whatever they call it.

Q. Or bill of lading. Didn't you present the shipping receipt to the Pennsylvania Railroad Company when you went for the car on July 15, 1912? A. I presented on one car out of the entire nine, but I do not know if it was on this car or another one. I did not make a notation, but I presented bill of lading on one of the cars, I don't know which one it is.

Q. Just confine your attention to this car ACL 30943 which you say was delivered to you on July 15, 1912, at Second and Henderson Street. Didn't you present a bill of lading or a shipping receipt

to the agent of the company or someone representing the company? A. Well, I am not positive if it is this car. If you show it to me I will know if it is this car. The rest of the cars I know positive they were all consigned straight. I did not have to produce any paper, but on this car, which was the first car—one of the first cars that I had from Roddenbery—and he don't know me very well, and he send the car that way and mailed me the receipt.

Q. Then are you ready to say that you did not present a shipping receipt for this car 30943? A. Well, as I say, I am not positive if it was this car or some other cars; possibly I did this car, but I am not sure to testify to that.

Q. Did you have a bill of lading for this car? A. I had a shipping receipt.

Q. And you had the shipping receipt which was issued at the time the shipment was made——

Mr. Stout: I object to that.

Q. ——by the Georgia Northern Railroad, on July 8, 1912, at Oak Lawn, Georgia, did you not?

Mr. Stout: I object to that unless the witness knows of his own knowledge.

The Court: He was asked if he had the shipping receipt. I would presume he would know of his own knowledge if he had it, unless he was doped or something.

Mr. Stout: He was asked if he had the receipt issued by a certain railroad.

The Court: I presume your objection is that the question contains an assumption of fact, that such a receipt was issued on such a date. If that is the ground of the objection I sustain it.

Mr. Stout: All right.

Q. You had, did you not, Mr. Spada, a shipping

receipt or bill of lading for that car, ACL 30943? A. I do not recollect, as I told you before.

Q. You do not recollect whether you ever had one or not. A. As I told you before, I do not recollect positive if I had or not. I think I had.

Q. Have you such a receipt now in your possession? A. In my possession? No sir.

Q. Are you not the holder of a shipping receipt or bill of lading issued by the initial carrier when the shipment in ACL car No. 30943 was made? A. Not me.

Q. You are not? A. I am not.

Mr. Hartpence: Then I have a motion to make, to dismiss the suit as to this count because on his own admission he is not entitled to maintain the action under section 20 of the Interstate Commerce Act, which of course covers this shipment, it being an interstate shipment. It is provided in that section that any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss or damage or injury, etc. Now the act conclusively, it seems to me, puts upon the person who seeks to maintain the suit upon that bill of lading the necessity of being the lawful holder, because under the terms of the act the company is liable to the lawful holder, and certainly it could not be held to a double liability which might result if an action were permitted in favor of one not holding the bill of lading and then later on the bill of lading being produced by a lawful holder the liability would result under the statute, so that under Mr. Spada's statement that he is not the lawful

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holder of such a bill of lading it seems to me he is not entitled to proceed so far as this first count in the declaration is concerned.

The Court: What do you gentlemen say about it?

Mr. Stout: I do not think that Mr. Spada has testified that he is not the lawful holder of the bill of lading. I do not think that is his testimony; and furthermore there isn't any evidence in this case that a lawful bill of lading has been issued, and furthermore I think that the Federal Act applies to those cases where the action is brought on the special count and not where you are suing on the common law liability.

The Court: I think I will deny your motion, Mr. Hartpence. There isn't any evidence yet in the case that Mr. Spada is not the lawful holder of it. All that he has denied, as I understood, is that he has possession of it.

Mr. Hartpence: I thought I asked him if he was the lawful holder of the bill.

The Court: If you did I would overrule the question. That involves a conclusion of law.

Mr. Stout: To elucidate this point,—the bills of lading or shipping receipts, if any such bills of lading or shipping receipts were issued, are in our possession, in the possession of counsel.

The Court: That is the very point I am holding, that this man may not have the manual possession of it but he may be the lawful holder of it. It might be in his safe in New York. There is not any evidence that requires me at this point in the case to dismiss this suit simply because he says that he has not physical possession of it.

Mr. Hartpence: May we have an objection noted to that ruling,—refusal to dismiss?

The Court: You may have an objection noted, but I do not see what good it will be, because the case is not in yet and it is not ripe for a decision of that kind, but it may be noted. Under the present practice I do not see how I can well help having it noted. It all goes down unless I order it stricken out.

Mr. Hartpence: Will you produce, Mr. Stout, the original bill of lading issued July 8, 1912, for the shipment in ACL car 30943 consigned to Spada & Co.?

The Court: Won't you read that statute again?

(Mr. Hartpence again reads section 20 of the Interstate Commerce Act.)

The Court: I think there is another ground on which your motion may be overruled, and that ground is that this suit is not against the carrier who issued the bill of lading or receipt but is against the connecting carrier.

Mr. Hartpence: Still, the situation as against the initial carrier is carried over.

The Court: We will take that up when we reach it. That carrier does not appear in any way in this suit except in the evidence. I think that is another reason why the motion ought to be overruled.

Mr. Hartpence: Will you produce, Mr. Stout, the original bill of lading for ACL car 30943, pursuant to notice served on September 20?

Mr. Stout: You gave us notice that if we did not produce such a bill of lading you would offer secondary evidence.

Mr. Hartpence: You decline to produce such bill?

Mr. Stout: We do not know if there is any such bill.

Mr. Hartpence: I understood counsel to say he had such bill.

Mr. Stout: I said if any such bill was issued.

Q. I show you what purports to be a copy of a shipping receipt or bill of lading dated July 8, 1912, for car ACL 30943, for a consignment to Andrew Spada & Company, Jersey City, issued by the Georgia Northern Railroad Company, and ask you if you can say after looking at it that you ever saw the original of which that purports to be a copy. A. I think I have.

By the Court:

Q. You think you have? A. Yes, sir.

By Mr. Hartpence:

Q. And can you state where the original now is? A. Not positive.

Q. Well, state as best you can. A. Well, if the original exists it is in the possession of my lawyer.

Q. It has been in your possession, has it not, some time since the date of issue, July 8, 1912?

The Court: I think you can assume that it has if he saw it.

(Paper marked D-1 for identification.)

Q. Did you ever assign or transfer that bill of lading to any other person? A. No sir.

Q. Or did your firm? A. What was that?

Q. Or did your firm ever assign or transfer it to any other person? A. No sir.

Q. To whom did you give that bill of lading, or hand it, when it left your possession?

Mr. Stout: I again object to this testimony on the ground that there is no evidence that

a bill of lading was issued in this case in reference to this car. He has been talking about a copy of a certain paper that might have been in the possession of this witness, but there is not any evidence here that shows that there was a bill of lading. A bill of lading means something. A bill of lading must have been issued by a proper party, not a mere paper that might have come into the—

The Court: Well, he has asked you to produce this bill of lading and you have given him an evasive answer. You put him in a position where he has to flounder and stagger and stumble around to try and get some proof. You won't say that you have it or haven't it. Now I am going to give him the utmost latitude I can to prove it by secondary evidence unless you have it and produce it. If it is in existence and you have it it ought to be produced in accordance with the notice that was given. If I were trying his case I would put you on the stand and ask you if you have it, and if you had it I would cause it to be produced. Therefore the objection you now make is overruled.

Mr. Stout: The point we make is that we do not know that the initial carrier—and that was the carrier that issued the bill of lading if one was issued—did issue the bill of lading for this car.

The Court: You know if you have the paper that purports to be that thing and you have been asked to produce it.

Mr. Stout: We have been asked to produce the bills of lading under which these shipments were made, not what purports to be that, and we do not know whether these are the bills of lading under which these shipments were made.

The Court: I will permit the question. I think there is enough to let the jury determine that the paper which he got and in accordance with which the goods came is the bill of lading, and I will permit the question.

A. To my lawyer.

Q. To Mr. Stout? A. Yes, sir.

Q. When? A. I do not recollect the time.

Q. You stated, Mr. Spada, according to my recollection, that after car ACL 30943 was tendered to you, or delivered to you at the Jersey City freight station, you communicated with the agent or man representing the company at that station regarding the condition of the car; is that correct? A. Yes, sir.

Q. Did you communicate verbally or in writing? A. I communicate verbally and then they put it in writing themselves.

Q. Yes. A. At the day, I mean. At that date, after July 15th—after July 15th, then I communicated in writing with them in reference to the car.

Q. I show you a letter that purports to have been signed by Andrew Spada & Company, addressed to Mr. E. Butler, Freight Agent, Pennsylvania Railroad Company, dated August 6, 1912, and ask you if that is the letter, or a letter, which you wrote concerning this car. A. Yes, sir.

Q. And do you know who made that signature? A. Myself.

(Marked D-2 for identification.)

By the Court:

Q. When you had purchased, through your correspondents in Georgia, carloads of melons, what was the regular practice with respect to your receiving bills of lading or shipping receipts for those? A. To receive it by mail.

Q. You received them by mail, did you? A. Yes, sir.

Q. And with respect to each car you did receive a bill of lading or shipping receipt? A. Or a shipping receipt, yes, sir.

Q. And did you receive any other shipping receipt in respect to the car mentioned in this copy which Mr. Hartpence has shown you, than the one which you say resembles the one that was shown you here? A. That is the only one.

Q. That is the only one you got with respect to that car? A. Yes.

By Mr. Hartpence:

Q. And after the date upon which delivery was tendered to you of this car you also presented a claim, did you not, to the company? A. Yes, sir.

Q. Is that (showing witness a paper) the claim which you presented? A. Yes.

(Paper marked D-3 for identification.)

Mr. Queen: What is the date of it?

Mr. Hartpence: August 6, 1912.

Q. Now in regard to the car mentioned in the second count of the complaint, ACL 35449, do you recall just when that was tendered to you for delivery? A. Yes, sir.

Q. When? A. July 17, 1912.

Q. And did you examine that car personally? A. Yes, sir.

Q. What sort of a car is that? A. Regular watermelon car, you know, ventilated from both sides.

Q. A ventilated car? A. Yes, sir.

Q. Did you purchase that carload of watermelons yourself? A. Yes, sir.

Q. Where? A. I purchased myself through correspondents.

Q. Who was your correspondent for that car? A. The same party, W. B. Roddenbery.

Q. And where was that shipped from? A. Shipped from Georgia.

Q. And was this car purchased in the same general way that the other car was? A. Yes, sir.

Q. And when did you first learn that this car had been shipped to you? A. July 9, 1912.

Q. And how did you learn of that? A. I got notice from the shipper that such had been shipped to me.

Q. And who was the shipper? A. W. B. Roddenbery.

Q. And what was the nature of that notice? A. Regular bill of it you know—invoice or whatever you call it.

Q. And that was accompanied by a bill of lading or shipping receipt, was it not? A. That I can't tell you, if it was accompanied in the same letter or afterward. I cannot tell; I do not know it.

Q. Did you ever receive a bill of lading or shipping receipt for this car ACL 35449?

Mr. Stout: I object to the form of that question. If the question was whether he received a paper which purported to be a bill of lading—but there is no evidence here that a bill of lading was issued for this car.

The Court: I will permit this question. He said himself in response to a question that I asked him, that he always got a bill of lading or a shipping receipt with every car, through the mail, so that there is some evidence that a bill of lading did issue relative to this car. Furthermore the objection is overruled on the ground that it does not assume that he did; it asks if he did.

(Question repeated.) A. Yes, sir.

Q. Have you that bill of lading or shipping re-

ceipt in your possession now? A. If I have got it in my possession now? No, sir.

Q. After you received it did you or did the firm ever assign it or transfer it to any other person? A. No, sir.

Q. What became of it after it left your possession? A. I filed it—what became of the bill of lading?

Q. Yes. A. Well, I think I gave it to my lawyer.

Q. And do you recollect when that was? A. Not the time, no, sir.

Q. Was it long ago or recently? A. Well, it has been after—I can't tell exactly, but it has been a few months ago, yes, sir.

Mr. Hartpence: Mr. Stout, will you produce bill of lading of ACL Car 35449, shipped at Cherokee, Ga.?

(Paper produced.)

Mr. Stout: Your Honor, we are going to produce what purports to be the bills of lading in this case, and I want to say to your Honor that I do not intend to be captious in this matter. That notice reads, as I have already pointed out to your Honor, that these are the bills of lading, and the reason why we refused to honor this notice was because we thought this notice might be binding upon us, that it would be an admission on our part that these were the bills of lading under which these shipments were made; but if these papers purport to be the bills of lading we gladly produce them.

The Court: Then as I understand it there is no objection on your part to producing papers which you do not admit to the bills of lading but which purport to be such in all these cases.

Mr. Stout: Yes.

The Court: All right.

(Original of paper purporting to be bill of lading for car ACL 30943 marked D-4 for identification, in lieu of paper previously marked D-1 for identification.)

Q. Mr. Spada, I show you what purports to be a shipping receipt or bill of lading of the Florida Central Railroad Company, dated July 9th, 1912, at Cherokee, Ga., for car ACL 35449, from W. B. Roddenbery to Andrew Spada & Co., Jersey City, and ask you if that is the bill of lading which you received from Roddenbery for that shipment? A. Yes, sir.

(Paper marked D-5 for identification.)

Q. And with regard to this car you presented or communicated a letter to the Pennsylvania Railroad Company— A. Yes.

Q. —following the time of the delivery of the car? A. Yes, sir.

Q. I show you what purports to be a letter from Andrew Spada and Co. to E. Butler, Freight Agent, Pennsylvania Railroad Company, dated August 6, 1912, and ask you if that is a letter which you so communicated? A. Yes, sir.

Q. And whose signature appears? A. Mine.

Q. Andrew Spada & Company? A. Yes, sir.

Q. And made by you? A. Yes.

(Paper marked D-6 for identification.)

Q. And you also presented a claim for the loss on car 35449 to the Pennsylvania Railroad Company? A. Yes.

Q. I show you a paper dated August 6th, 1912, and ask you if that is the claim you presented? A. Yes, sir.

(Paper marked D-7 for identification.)

Q. In this car 35449 were there any good melons at all? A. Well, there were some, yes.

Q. Do you recall how many? A. No, sir.

Q. Or about how many? A. No, sir.

Q. How closely did you examine that car? A. Thoroughly from one end to the other.

Q. How many tiers of melons were there in the car? A. Four.

Q. What became of them? A. I refused the car to the railroad.

Q. Did you offer it for sale before you refused it? A. No, sir.

Q. Did you sell any other cars of melons that day, July 17th? A. I do not recollect.

Q. Do you recall whether you saw any other cars sold by anybody else there at Second and Henderson Street that day of the same type and variety as those contained in car 35449? A. You mean if other parties sold some?

Q. Yes, whether you heard any cried off or sold? A. Yes.

Q. How many? A. That I could not tell.

Q. What did they sell for, do you remember? A. What sold that day?

Q. Melons of the same type and variety as contained in this car?

Mr. Stout: On what date?

Mr. Hartpence: July 17, 1912.

Mr. Stout: I do not think that is material in this case. The question is, what were melons selling for in the Henderson Street yard on the day that this car arrived? Now we are going on the theory in this case that he is entitled to the value of the melons on the day they should have arrived, and they should have arrived on the 13th, taking the answers to the interrogatories and giving them sufficient time, seven hours, to move

them from Edgemoor to Jersey City. Now what melons sold for on some other day it seems to me is immaterial.

The Court: I think it is a material, relevant and competent question on this theory: this man has qualified as an expert and as one who is competent to testify to the value of melons on various days. Now on cross-examination your opponent has the right to find out the full extent of his knowledge of market conditions for the purpose of finding out what he knows about the sales and purchases on every day when he was there. That he has a clear right to do. Now what his object is I do not know, but that is a legitimate object and the testimony would be proper on that theory. Now it might also be that he will claim when the time comes that the measure of damages is different from that you claim, or it may be—and this will be perfectly legitimate—that he will claim and put in evidence to show that this car in the ordinary course of business should not have arrived until a day different from the one when you claim it should have arrived, and therefore evidence produced by him would tend to make this evidence very legitimate and proper and relevant. You see, he cannot put it all in right at once, but he has a perfect righ to exhaust this witness on the subject matter on which he has been examined to test his knowledge, to test his accuracy, and furthermore to lay the basis for evidence which he will produce tending to show when the car should have arrived. I make this last suggestion because you will remember when you read your interrogatories and the answers to them the answer is that under the most favorable

conditions the car should have arrived on a certain date. Now he may claim that the conditions were not most favorable and that they very likely were most unfavorable, but that under ordinary conditions and given ordinary facts of transportation they should have arrived later than that; and under those circumstances then the testimony would be relevant.

Mr. Stout: I withdraw the objection.

A. From $300 to $350.

Q. Did you see any other melons—any melons of this type and variety contained in car 35449, sold at the Second and Henderson street yard on July 13, 1912? A. Yes, sir.

Q. How many cars? A. I can't tell how many.

Q. Well, few or many? A. Well, there were not many at that time.

Q. And do you recall what they sold for? A. Yes, sir.

Q. What? A. From $385 to $400.

Q. And how were they sold as compared with the manner in which you sold them? A. The same manner in which I was selling mine, the same method.

Q. Did you get a freight bill for this car, 35449? A. No, sir.

Q. And you never paid the freight on this car? A. No, sir.

Q. Do you know of your own knowledge what the amount of the freight was on the car? A. I don't know it.

Q. How long does the watermelon season last, —the speculator's season at Second and Henderson street? A. You mean how long for the whole, entire season?

Q. Yes. A. Well, they start about the middle

part of May, about the 20th or some time, and finish up about this time of the year.

Q. I think you stated in your direct examination that the year 1912 you were present in the Henderson street yard on that particular business every day in July. A. Yes, sir.

Q. And how often were you present during the rest of the season from May until about the middle of September, 1912? A. I recollect that that season I stayed until it ended, until practically all the melons were out.

Q. And were you purchasing and selling melons during all that time? A. Yes.

Q. How many years have you been doing that at this same place? A. Well, about five years, since I have been in the business.

Q. And how long have you been carrying on this business with W. B. Roddenbery, or Roddenbery & Co. as your correspondents in Georgia? A. How long?

Q. Yes. A. I must look in my book. I carried on from—during the Georgia season.

Q. Well— A. During the time that there could be melons from Georgia.

Q. Well, what is that time? A. It all depends to the condition of the weather; sometimes they start a little before the 4th of July; sometimes they are liable to start at the 15th of June.

Q. Do you remember when it started in 1912? A. Yes.

Q. When? A. I'll tell you in a minute—the first car I got from Roddenbery was on July 1st, shipped from there.

Q. And when was the last one? A. July 31st.

Q. Had you transacted business with Roddenbery in previous years? A. Yes, sir.

Q. For how many years previously to 1912? A. I do not recollect exactly, but I think it was one or two years ahead.

Q. And you carried it on through all those seasons in much the same way as you did during the year 1912? A. No, sir.

Q. How did you do it differently? A. I do not understand the question.

(Question repeated.) A. As to what?

Q. You carried on your business relations with Roddenbery in much the same way in the previous years as you did during the year 1912? A. Yes, sir.

Q. He acted for you in the south and you looked after the melons when they reached here in Jersey City; isn't that true? A. Well, I would buy the melons from him and I would sell them here when they would get here.

Q. Now, Mr. Spada, with regard to car ACL 30698, referred to in the third count of the complaint— A. 30698?

Q. 30698. This also I recall your having stated was a ventilated car. A. Yes.

Q. The usual watermelon car? A. Yes, sir.

Q. And where did you first see that car? A. You mean when or where?

Q. Where. A. At the Henderson street yard of the Pennsylvania Railroad.

Q. Did you purchase this car—you or your firm —in the south? A. Yes, sir.

Q. Did you purchase it yourself? A. Yes, sir.

Q. In the south? A. Not in the south; right from here I bought it.

Q. Who shipped it from the south? A. W. B. Roddenbery.

Q. And when did you first learn that it was shipped? A. July 12, 1912.

Q. How did you learn of the shipment? A. I got an invoice for the car.

Q. And did you also get a bill of lading or shipping receipt for that car? A. Yes, sir.

Q. Sent on by W. B. Roddenbery? A. Sent by him, yes, sir.

Q. Sent by W. B. Roddenbery.

Mr. Hartpence: Mr. Stout, will you product, please, A. C. L. 30698 bill of lading, or what purports to be a bill of lading, from Cowarts, Ala., to Spada and Co.?

Mr. Stout: It is impossible. This is the only car of the nine that we haven't the bill of lading for. It was not turned over to us by Mr. Spada. I do not know whether he ever received it or not. We would produce it if we had it.

Q. What did you do with that bill of lading, referring to ACL 30698 car, after you received it? A. I delivered it to the Cashier of the Pennsylvania Railroad.

Q. When did you do that? A. I did that about July 20, a few days before that car arrived. Possibly it has been, I think, just a few days before the car arrived.

Q. Where did you do that? A. At the Cashier's office at the Henderson street yard.

Q. Have you ever seen that bill of lading since? A. No, sir; it was delivered to them and they kept it.

Q. So far as you know it is still in their possession? A. Yes, sir.

Q. Did you ever assign or transfer that bill of lading to any person, either you or the firm? A. No, sir.

Q. I show you what purports to be a copy of a bill of lading or shipping receipt for ACL Car 30698, from Cowarts, Alabama, dated July 12, 1912, from W. B. Roddenbery, consigned to W. B. Roddenbery, Jersey City, and ask you if you recall having seen the original that that purports to be a copy of?

Mr. Stout: I object.

The Court: You object on the ground that the question implies that there is an original of which that purports to be a copy?

Mr. Stout: My objection is that the original, if one was issued, is in the possession of the Pennsylvania Railroad and they cannot give secondary evidence as to a bill of lading in their possession.

The Court: I think that probably Mr. Hartpence and you are both laboring under a misapprehension. I think that what he produces here is not a copy at all; I think that what he produces here from your possession is a duplicate original.

Mr. Stout: The impression of it?

The Court: Yes; I think that the practice in all railroads and amongst all shipping concerns is to make out a bill of lading in triplicate, and they send one copy to the railroad company and one to the party to whom it is intended to send the goods and keep one themselves; and each one of those is an original document, and therefore when you and he are talking about copies I think you are really talking about an originial. If I am wrong about that of course I stand open to correction, but my impression is that if you have this paper, sent to you by the original shipping railroad, that that is *the* bill of lading. It is the original; it is not a copy. I think there are numerous decisions on that point.

Mr. Stout: We assumed that the attorneys representing the Pennsylvania Railroad knew whether it was a copy or an impression.

The Court: I would assume so, and I presume they do. I am only giving you my recollection of it.

Mr. Stout: My objection is that if they are trying to prove this by secondary evidence, that they can't do it.

The Court: I think that objection would be well taken if the fact is so. In the 64th article of Stephen on Evidence you will find that where a document is executed in several parts, each part is primary evidence of the document. Where the document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is evidence as against the parties making it. Where the documents are made by printing, lithography or photography each is primary evidence of the contents of the rest. That was my clear understanding of the contents of the law. I do not know what your proof is going to be, but my impression would be that if they send out these duplicates of bills of lading, that each one is primary evidence of the contents of all. So inasmuch as you all are dealing with this paper now being used as a copy I shall sustain your objection made upon the ground that it is a copy until it is shown to be an original.

Mr. Hartpence: I think I fell into the error of using the word "copy" rather than "duplicate".

The Court: If it is a duplicate it is the original. There is no question about that. I have had that question up a lot of times and I have always ruled the same way, that where three copies of a document are made out, as I understand is the practice with bills of lading, and sent to the different parties, each one is the original and each one is primary evidence. So, if you will just clear that matter up—

Mr. Hartpence: I cannot clear it up with

the witness except by changing the form of my question.

The Court: I would be almost impelled to hold now from what the witness has already said, that he gets the bill of lading through the mail, that if this is the thing he got that probably would be the original instead of a copy, but you all insist on calling it a copy.

Mr. Hartpence: I might have substituted the word "duplicate" so far as that is concerned. We can only state to the Court that the bill of lading which would naturally have been in the possession of the consignee, and which we demanded in our notice, having been turned in to our company, on the testimony of Mr. Spada, which I haven't any reason to doubt is correct,—that notwithstanding that fact we simply have the duplicate.

The Court: If you show it is a duplicate, that is sufficient.

(Question repeated as follows:)

Q. I show you what purports to be a duplicate of a bill of lading or shipping receipt for ACL Car 30968, from Cowarts, Alabama, dated July 12, 1912, from W. B. Roddenbery, consigned to W. B. Roddenbery, Jersey City, and ask you if you recall having seen the original that that purports to be a copy of?

Mr. Stout: I think it is necessary for the Pennsylvania Railroad Company to show how these bills of lading were issued, whether they were impression copies or duplicate copies or what not. They have got to show the origin. I understand if he is going to offer for identification a certain paper the question is—

The Court: Where did this paper come from? I did not hear the evidence.

Mr. Stout: It came from the possession of the Pennsylvania Railroad.

The Court: And is it identified as one which was returned by Mr. Spada to the Pennsylvania Railroad?

Mr. Stout: No.

The Court: Does the evidence show where the Pennsylvania got it?

Mr. Stout: No.

The Court: Then for the present I will have to overrule this question, until it is shown that it is a duplicate or in some way the nature of its origin, because all you have now is that it came from the custody of the Pennsylvania Railroad. If you want to interrupt the order of the trial you may withdraw this witness and put somebody on to show what it is.

Mr. Hartpence: I think that my question might be re-read.

(Question repeated.)

Mr. Hartpence: I am merely asking there if he recalls having seen the original that that purports to be a duplicate of.

The Court: Is there any objection to that?

Mr. Stout: No.

Q. Did you get the question? A. Yes, I know the general idea. I did.

(Paper marked for identification D-8.)

Q. Did you accept car ACL 30698? A. No, sir.

Q. What became of it? A. Refused.

Q. Did you examine the contents of that car personally? A. Yes, sir.

Q. To what extent did you examine it? A. Thorough examination.

Q. Were there some good melons in it? A. There were some good melons yet.

Q. Can you state what proportion generally? A. Very small proportion.

Q. When was that car placed at your disposition? A. July 23rd.

Q. Did you sell any other melons on July 23, 1912, of the type and variety of those contained in ACL car 30698? A. No, sir.

Q. You did not? A. No, sir.

Q. Did you sell any others on July 18, 1912, of that same type or variety? A. I did not.

Q. Did you see any others sold on July 18th by other parties at Second and Henderson street? A. Yes, sir.

Q. And did you see any others sold of that same type or variety at Second and Henderson street by other parties on July 23? A. Yes, sir.

Q. How many on July 18th? A. I cannot tell how many.

Q. How many on July 23rd? A. I cannot tell you.

Q. Did you communicate in writing with the Pennsylvania Railroad Company thereafter regarding the condition of ACL car 30698? A. Yes, sir.

Q. I show you what purports to be a letter from Andrew Spada & Company to Mr. E. Butler, Freight Agent of the Pennsylvania Railroad Company, dated August 6, 1912, and ask you if that is the communication that you sent? A. Yes, sir.

Q. Who signed the letter? A. I did.

(Paper marked D-9 for identification.)

Q. Did you present a claim for the loss on car 30698? A. Yes, sir.

Q. I show you what purports to be such a claim, dated August 6, 1912, and ask you if that is the claim which you presented? A . Yes, sir.

(Marked D-10 for identification.)

Q. I call your attention now to car ACL 34794, referred to in the fourth count of the complaint, and ask you if that car was delivered or tendered to you? A. What is that?

Q. If that car was delivered or tendered to you by the Pennsylvania Railroad at Jersey City? A. Yes.

Q. When? A. July 20th.

Q. July 20th, 1912? A. Yes. You mean car 34794?

Q. Yes. What sort of a car was that? A. Regular watermelon car, like the others.

Q. Ventilated? A. Yes.

Q. What was the condition of that car, the contents of that car? A. A portion of the melons were rotten.

Q. What proportion? A. Well, the proportion —I have got marked how many rotten there were in the car.

Q. How many were there? A. 267.

Q. How many were there in the car altogether? A. There were 267 rotten and 690 good ones.

Q. How many good ones? A. 690.

Q. 69? A. 690, but not what you call good ones if the car should be all in entirely good condition, you know. I want you to take notice of that.

Q. You accepted that car, did you not? A. Yes, sir.

Q. Was there a freight bill for that car? A. Yes, sir.

Q. How much? A. $121.55.

Q. And did you pay that? A. Yes, sir.

Q. Did you get a freight bill for the preceding car, ACL 30698? A. No, sir.

Q. Where did this car ACL 34794 come from? A. Georgia.

Q. Through whom was it purchased in Georgia? A. I bought from W. B. Roddenbery.

Q. And in the same manner as the preceding cars? A. Yes, sir.

Q. When did you first learn that this car had been shipped to you? A. July 12th.

Q. And how did you learn it? A. Through the regular way, got an invoice for it, either invoice or telegram, don't you know? That is how I make that correction in all my testimony,—either invoice or telegram.

Q. And did you get a bill of lading or shipping receipt for this car from Roddenbery? A. Yes, sir.

Q. Have you that bill or receipt in your possession now? A. No, sir.

Q. What became of it? A. My lawyers have it.

Q. Did you assign it or transfer it or did the firm to any other person? A. No, sir.

Mr. Hartpence: Mr. Stout, will you produce that one, car ACL 34794, Spada & Co., Cairo, Ga.

Mr. Stout: I do not know whether that (indicating) is the original or not. That is the only one that I have. It looks like a typewritten copy.

Mr. Hartpence: They may have been made out on a typewriter.

Q. I show you what purports to be a bill of lading, Atlantic Coast Line Railroad Company, dated July 12, 1912, from W. B. Roddenbery to Andrew Spada & Company, Jersey City, for ACL car 34794, and ask you if that is the bill that you received? A. Yes, sir.

Mr. Stout: I object to that—I withdraw the objection.

Q. Did you thereafter communicate in writing with the Pennsylvania Railroad Company regard-

ing the condition of car ACL 34794? A. Yes, sir.

Q. I show you what purports to be a letter from Andrew Spada & Company, to Mr. E. Butler, Freight Agent, Pennsylvania Railroad Company, dated August 6, 1912, and ask you if that is the communication that you sent? A. Yes, sir.

(Marked D-12 for identification.)

Q. And did you also present a claim to the Pennsylvania Railroad Company for the loss on that car? A. Yes, sir.

Q. I show you what purports to be such a claim, dated August 6, 1912, and ask you if that is the claim which you presented? A. Yes, sir.

(Marked D-13 for identification.)

Q. I call your attention next to car ACL 24480 referred to in the 5th count of the complaint, and ask you if that car was ever delivered to you in Jersey City, or delivery tendered? A. Yes, sir.

Q. When? A. July 23rd.

Q. What was the condition of that car? A. Very rotten condition.

Q. What sort of a car was that? A. Regular watermelon car like the rest.

Q. Were there any good melons in that car? A. There were some.

Q. Do you recall just what proportion of the carload? A. A very small proportion.

Q. Did you accept that car? A. No, sir.

Q. What became of it? A. Refused.

Q. Had you ever seen that car and its contents before July 23rd, 1912? A. No, sir.

Q. Where did it come from? A. Georgia.

Q. Do you know whereabouts in Georgia? A. Cairo, Georgia.

Q. And did you purchase the car? A. Yes, sir.

Q. Through whom or from whom? A. From W. B. Roddenbery.

Q. And when did you first learn that it had been shipped? A. July 13th.

Q. How did you learn of its shipment? A. Get invoices from him and a wire that the car was shipped.

Q. From Roddenbery? A. Yes, sir.

Q. And did you receive a bill of lading or shipping receipt for that carload? A. Yes, sir.

Q. Have you that bill of lading now in your possession? A. Not in my possession.

Q. Did you or the firm assign or transfer it to any other person? A. No, sir.

Q. What became of it? A. The bill of lading?

Q. Yes. A. My lawyers have got it.

Mr. Hartpence: Mr. Stout, will you produce bill of lading for car ACL 24480?

Mr. Stout: I produce what purports to be.

Q. I show you what purports to be a bill of lading or shipping receipt of Atlantic Coast Line Railroad Company, dated July 13, 1912, Cairo, Georgia, for car ACL No. 24480, from W. B. Roddenbery to Andrew Spada & Co., Jersey City, and ask you if that is the bill which you received for this car? A. Yes, sir.

(Marked D-4 for identification.)

Q. What was the value of that car of melons, 24,480—

Mr. Stout: I object to that.

Mr. Hartpence: I withdraw the question.

Q. On July 23rd, 1912, did you sell any other melons of the type and variety contained in this car ACL 24480 at Henderson and Second streets, Jersey City? A. No, sir.

Q. Did you on July 18, of that same year sell any melons of similar type and variety at Second and Henderson streets? A. No, sir.

Q. Did you get a freight bill for that car? A. No, sir.

Q. Have you paid the freight on that car? A. No, sir.

Q. Did you at any time thereafter communicate with the Pennsylvania Railroad Company in writing regarding the condition of that car? A. Yes, sir.

Q. I show you what purports to be a letter from Andrew Spada and Co., per A. Spada, to E. Butler, Freight Agent, Pennsylvania Railroad, dated August 21, 1912, and ask you if that is the letter that you have just referred to? A. Yes.

Q. And whose signature is that? A. Mine.

(Marked D-15 for identification.)

Q. And did you thereafter present a claim to the Pennsylvania Railroad Company for the loss? A. Yes, sir.

Q. I show you what purports to be such a claim, dated August 6, 1912, and ask you if that is a claim you presented? A. Yes, sir.

Q. Referring back for a moment to the preceding car, ACL 34794, did you sell any of the melons which were in that car? A. Yes, sir.

Q. How did you sell them? A. Small lots.

Q. Did you sell any other melons of the same type or variety on that day? A. No, sir.

Q. Did you sell any other melons of that same type or variety at Second and Henderson street on July 17th? A. I can't catch your idea.

(Question repeated.) A. No, sir.

Q. Now, Mr. Spada, directing your attention to car ACL 23761, referred to in the 6th count of the complaint, was that car delivered to you or delivery tendered by the Pennsylvania Railroad Company? A. Yes, sir.

Q. When? A. July 22, 1912.

Q. Where? A. Henderson street yard.

Q. Had you ever seen that car prior to that time, or its contents? A. No, sir.

Q. Where did they come from? A. Georgia.

Q. Do you recall what point in Georgia? A. Cairo.

Q. Were you the purchaser of that car? A. How is that?

Q. Were you the purchaser of that car of melons? A. I purchased it from New York, yes, sir.

Q. From whom? A. W. B. Roddenbery.

Q. Were they shipped from Georgia to you? A. Yes, sir.

Q. When did you first learn of their shipment? A. July 13th.

Q. And in what manner did you learn of the shipment? A. The usual manner, the usual business manner.

Q. And did the usual bill of lading come along for that car? A. Yes, sir.

Q. Have you that bill of lading still in your possession? A. No, sir.

Q. Do you know where it is, Mr. Spada? A. My lawyer has got it.

Q. Did you or the firm ever assign it or transfer it to any other person? A. No, sir.

Mr. Hartpence: Will you produce it, Mr. Stout, please,—ACL 23761?

(Paper produced.)

Q. I show you what purports to be a bill of lading or shipping receipt of the Atlantic Coast Line Railroad Co., dated July 13, 1912, Cairo, Ga., for car ACL 23761, from W. B. Roddenbery to Andrew Spada and Co., Jersey City, and ask you if that is the bill that you received for that car? A. Yes, sir.

(Marked D-17 for identification.)

Q. What was the condition of that car of melons? A. A portion of the melons were rotten.

Q. Did you accept the car? A. Yes, sir.

Q. And what became of the melons? A. Sold in small lots.

Q. How did you sell those? A. To the regular trade.

Q. Did you sell them in small lots or by the car? A. Small lots; small lots.

Q. Did you sell any other melons that same day of the same type and variety? A. Which day?

Q. July 22? A. No, sir.

Q. Did you sell any other melons of that same type or variety at the Henderson street yard on July 18th? A. No, sir.

Q. Did you afterwards communicate with the Pennsylvania Railroad regarding the condition of this car, in writing? A. Yes, sir.

Q. I show you what purports to be such a claim, dated August 6, 1912, and ask you if that is the claim you presented? A. Yes, that is the claim.

(Marked D-18 for identification.)

Q. Turning next to car ACL 18316, was that car delivered to you, or delivery tendered by the Pennsylvania Railroad at Jersey City? A. Yes, sir.

Q. When? A. July 23.

Q. 1912? A. Yes, sir.

Q. Did you see the car that day? A. Yes, sir.

Q. Had you ever seen it before? A. No, sir.

Q. Where did it come from? A. Also from Cairo, Ga.

Q. And did you purchase the car of melons? A. Yes, sir.

Q. From whom? Or through whom did you purchase it? A. From W. B. Roddenbery.

Q. Was it shipped by Roddenbery to you from Cairo, Ga.? A. Yes.

Q. When did you learn of the shipment? A. July 13.

Q. And how? A. Usual manner.

Q. By communication from Roddenbery? A. Yes.

Q. And did you get a bill of lading for that car? A. Yes, sir.

Q. Have you that bill now? A. No, sir.

Q. Did you or the firm assign it or transfer it to anyone? A. No, sir.

Q. What became of it? A. My lawyer has got it.

Mr. Hartpence: Mr. Stout, will you produce bill of lading, ACL 18316?

(Paper produced.)

Q. I show you what purports to be bill of lading or shipping receipt of the Atlantic Coast Line Railroad Co. dated July 13, 1912, Cairo, Ga., for ACL Car 18316, from W. B. Roddenbery to Andrew Spada & Co., and ask you if that is the bill that you received for that car? A. Yes.

(Marked D-19 for identification.)

Q. Did you thereafter present a claim for loss and damage to that car? A. Yes, sir.

Q. I show you what purports to be such a claim, dated August 6, 1912, and ask you if that is the claim you presented for car ACL 18316? A. Yes, sir.

(Marked D-20 for identification.)

Q. What was the condition of the contents of that car? A. Very rotten condition.

Q. All of them? A. A portion—a good portion of them.

Q. Can you recall just what proportion? A. What proportion of what,—sound or rotten?

Q. What proportion were rotten? A. Well, the majority of the car.

Q. Did you get a freight bill for this car? A. No, sir.

Q. Did you sell any melons of the same type and variety contained in car 18316 at Henderson and Second streets on July 23rd? A. No, sir.

Q. Or on July 18th? A. No, sir.

Q. Did you get a freight bill for the preceding car, 23761? A. Yes, sir.

Q. What was the amount of the freight? A. $136.98.

Q. Did you pay it? A. Yes, sir.

Q. With regard to car ACL 25968, referred to in the 8th count of the complaint, was that car delivered to you or delivery tendered by the Pennsylvania Railroad Company at the Jersey City yard, Second and Henderson street? A. Yes.

Q. When? A. July 29, 1912.

Q. Did you see the car that day? A. Yes, sir.

Q. What sort of a car was it? A. Regular watermelon car like the rest.

Q. And what was the condition of the contents? A. A portion of the melons were rotten.

Q. Do you recall what proportion? A. Well, a fairly good portion.

Q. How many melons did that car contain? A. Altogether?

Q. Yes. A. Including rotten and good?

Q. Yes. A. I got 1065.

Q. Will you refer back for a moment to ACL 23761, and tell me how many melons were in that car? A. What car?

Q. 23761. A. How many altogether?

Q. How many altogether? A. I will have to figure that—1113.

Q. What became of the melons that were in car ACL 25968? A. Sold.

Q. Did you sell them yourself? A. With the help of another man, yes, sir, I did sell them.

Q. How did you sell them? A. Sold it in small lots.

Q. Did you sell any other melons of the same type or variety that same day in the Henderson street yard? A. No, sir.

Q. Did you sell any other melons of the same type or variety on July 25th in the Henderson street yard? A. No, sir.

Q. When did you first learn of the shipment of this car 25968? A. On July 15, 1912.

Q. In what manner did you learn of it? A. In the same manner.

Q. And did you get a bill of lading from W. B. Roddenbery for that shipment? A. Yes.

Q. Have you that bill? A. No, sir.

Q. Did you or the firm assign it or transfer it to any other person? A. No, sir.

Q. Where is it now? A. Mr. Stout has it.

Mr. Hartpence: Will you produce, Mr. Stout, what purports to be bill of lading for car A. C. L. 25968?

(Paper produced.)

Q. I show you what purports to be bill of lading or shipping receipt of Atlantic Coast Line Railroad Company, dated July 19, 1912, for car ACL 25968, from W. B. Roddenbery, Cairo, Ga., to Andrew Spada & Co., Jersey City, and ask you if that is the bill that you received for that car. A. Yes, sir.

(Marked D-20½ for identification.)

Q. Did you thereafter communicate with the Pennsylvania Railroad in writing regarding the condition of that car? A. Yes, sir.

Q. And present a claim for the loss? A. Yes, sir.

Q. I show you what purports to be a letter from Andrew Spada & Co. to Mr. E. Butler, Freight Agent, Pennsylvania Railroad, dated August 6, 1912, and ask you if that is the communication that you sent? A. Yes, sir.

Q. I show you what purports to be a claim dated August 6, 1912, and ask you if that is the claim you sent? A. Yes, sir.

(Letter marked D-21 for identification; claim marked D-22 for identification.)

Q. In regard to car ACL 28548, referred to in the ninth count of the complaint, was that car delivered to you or delivery tendered by the Pennsylvania Railroad Company at Jersey City? A. Yes.

Q. When? A. July 31st.

Q. Did you see the car that day? A. Yes, sir.

Q. Had you seen it before? A. No, sir.

Q. Where did it come from? A. From Georgia.

Q. Do you remember from what point in Georgia? A. Pine Park.

Q. Who shipped it? A. W. B. Roddenbery.

Q. Were you the purchaser of that carload and contents? A. Yes, sir.

Q. And did you purchase it from or through W. B. Roddenbery? A. Yes.

Q. In the usual manner? A. Yes, sir.

Q. When did you first learn of the shipment? A. July 20.

Q. How did you learn of it? A. Usual way.

Q. By communication from Roddenbery? A. Yes, sir.

Q. Did you get a shipping receipt or bill of lading from Roddenbery? A. Yes, sir.

Q. Have you that bill of lading? A. No, sir.

Q. Did you or your firm transfer it or assign it to anyone? A. No, sir.

Q. What became of it? A. My lawyer had it.

Mr. Hartpence: Will you produce it,—ACL 28548?

(Paper produced.)

Q. I show you what purports to be a bill of lading or shipping receipt of Atlantic Coast Line Railroad Company, dated July 20, 1912, Pine Park, Ga., for ACL Car 28548, W. B. Roddenbery Company to Andrew Spada & Co., Jersey City, and ask you if that is the bill that you received at that time? A. Yes, sir.

(Paper marked D-23 for identification.)

Q. What was the condition of the contents of that car when you first saw it? A. Very rotten condition.

Q. Were there any good melons in it at all? A. Some.

Q. What became of that car? A. Refused.

Q. Did you afterwards communicate with the Pennsylvania Railroad Company regarding the condition, in writing? A. Yes.

Q. And did you present a claim regarding your alleged loss? A. Yes, sir.

Q. I show you what purports to be a letter from Andrew Spada & Company to E. Butler, Pennsylvania Railroad Company, dated August 6, 1912, and ask you if that is the communication you have referred to? A. Yes, sir.

Q. I show you what purports to be a claim for car ACL 28548, dated August 6, 1912, and ask you if that is the claim you presented? A. Yes, sir.

Q. On the day that you first saw that car, July 31, 1912, do you remember whether you sold any melons of the same type and variety as those contained in that car at the Henderson street yard? A. I did not sell any.

(Letter and claim marked respectively D-24 and D-25 for identification.)

Q. Or whether you sold any of the same type and variety at the Henderson street yard within the three or four days preceding July 31, 1912? A. Am I not testifying on car 18548?

Q. 28548. A. I refused this car, I said.

Q. Did you sell any melons of the same type and variety say on July 26th or 27th? A. July 25th.

Q. That was the last? Did you get a freight bill for this car? A. On July 25th? It was July 29th.

Q. Did you get a freight bill for car 28548? A. No, sir.

Q. That freight has not been paid? A. It has not been paid, no, sir.

Q. Did you get a freight bill for car 25968, the preceding car? A. Yes.

Q. What was the amount of it? A. $166.62.

Q. Has that been paid? A. Yes, sir.

Q. Mr. Spada, does the number of melons which the car contains have anything to do with the price when it is sold in bulk,—carload lot? A. Well, it does to a certain extent.

Q. Well, is that number always stated to the purchaser? A. No, sir.

Q. They simply use their own eyes? A. Their own eyes and judgment.

Q. And exercise their own judgment? A. Yes, sir.

Q. When you refused car ACL 35449 you stated on your direct examination, did you not, that you signed a refusal slip? A. 35449?

Q. Yes. A. Yes, sir.

Q. I show you what purports to be such a refusal slip and ask you if that is the refusal slip

which you presented or signed? A. Yes, sir; I signed that.

Q. You signed the slip? A. Yes, sir.

(Paper marked D-26 for identification.)

Q. And car ACL 30968, did you sign a refusal slip for that car? A. Yes, sir.

Q. I show you what purports to be such a slip and ask you if that is the slip that you signed? A. Yes, sir.

(Paper marked D-27 for identification.)

Q. Car ACL 24480, did you sign a refusal slip for that? A. Yes, sir.

Q. I show you what purports to be such a refusal slip and ask you if you signed that? A. Yes, sir.

(Paper marked D-28 for identification.)

Q. ACL 18316, did you sign a refusal slip for that? A. Yes, sir.

Q. I show you what purports to be such a refusal slip and ask you if that is the one you signed? A. Yes, sir.

(Marked D-29 for identification.)

Q. Car ACL 28548, did you sign a refusal slip for that car? A. Yes.

Q. I show you what purports to be such a slip and ask you if that is the one you signed? A. Yes, sir.

(Marked D-30 for identification.)

Q. What did you do with those slips after you signed them? A. I left them with the man who was in charge of them, Mr. Halleck it was.

Q. At the freight station? A. Freight station, yes, sir.

Q. Second and Henderson street yards? A. Yes, sir.

Q. During the time, Mr. Spada, that you carried on these business transactions with W. B. Roddenbery relating to the melon cars, did you ever go south into Georgia and personally communicate with Roddenbery or his people? A. If I was to the south during that time?

Q. Yes; during any of your business transactions did you ever go south yourself? A. Yes, sir.

Q. How often? A. I was there once.

Q. Only once? A. Only once through the south.

Q. When was that? A. I cannot recollect the year but I think it was either a year before or two years previous, I cannot really recollect, but I know I was there once.

Q. So that Roddenbery or his business house attended to all of your purchasing work in the south, did they not? A. No, sir.

Mr. Stout: I object to that.

Mr. Hartpence: I will withdraw the question.

Q. Did Mr. Roddenbery carry on his business alone or did he have some partner with him, if you know? A. I don't know it.

Q. You do not know? A. No, sir.

Q. Did you have any personal acquaintance with any other person than Mr. Roddenbery, who was in the employ of Mr. Roddenbery?

Mr. Stout: I object to that unless these men that Mr. Hartpence is referring to are the men whose testimony has been taken in the south. It is immaterial whether he knew someone else in the employ of Roddenbery who had nothing to do with this case.

The Court: I suppose he can find out what

knowledge he has of the extent of Roddenbery's connection with certain persons.

Mr. Stout: But he does not designate the persons. It is his general knowledge whether he knew anybody in Roddenbery's employ.

The Court: I will permit the question.

A. No, sir.

Q. On the occasion when you went south did you meet Mr. Roddenbery personally? A. Yes, sir.

Q. And did you not meet any person in his office or in his employ at that same time? A. Possibly I have, but I did not took no notice of it.

Mr. Hartpence: That is all.

Redirect-examination by Mr. Stout:

Mr. Stout: Will you produce letter dated July 13, 1912, written by Spada & Co. to Mr. E. Butler, Freight Agent, Pennsylvania Railroad, at Jersey City?

(Paper produced.)

Q. I ask you, Mr. Spada, whose signature that is (indicating)? A. Mine.

QYou placed the signature on this paper? A. Yes, sir.

(Paper offered in evidence and marked Exhibit P-1.)

Mr. Stout: "New York, July 13, 1912. Mr. E. Butler, F. A., Penn. R. R., Jersey City, N. J. Dear Sir: We wish to call your attention that cars of watermelons 30943, 35449 have been shipped from Georgia on Monday, July 8th. These two cars should have arrived here yesterday. We were in hopes that they should arrive today, much more considering that yesterday we requested your Mr. Halleck to trace these cars, but evidently they have

not shown up. We doubt if these cars will arrive on Monday in good condition, and also doubt if the market will be as good. Kindly take notice of the present market condition; also that of Monday, and on receipt of the two cars we kindly ask you to have one of your representatives inspect these cars and see if the condition of same is sound or how much damage. We certainly regret to have any claims, but in this case if the goods arrive in bad condition and on a broken market, we must be protected, as if they had arrived yesterday or to-day we would have made a handsome profit. Yours, truly, Andrew Spada & Company."

Q. Mr. Spada, when a carload of melons arrives and part of the melons are in a rotten condition, are those which are not visibly rotten affected? Do you understand the question? A. Yes, sir.

Q. Well, yes or no? A. What was the question?

(Question repeated.)

Mr. Hartpence: I object. It seems to me it is taking up a matter on redirect-examination that has not been touched upon in cross-examination.

Mr. Stout: It was touched upon in cross-examination in this way, that Mr. Hartpence asked a question as to whether those melons that were good represented the proportionate value of that car, inferring by that that the melons that were sold were in good condition and that they represented the proportionate value of that car if the whole car had been in good condition.

The Court: That is true. How does this question bear upon that?

Mr. Stout: This question is to the effect as to whether those melons that were sold for $225 were in as good condition as they would have been if the whole car had arrived in good condition.

The Court: I do not know as I quite get your point.

Mr. Stout: If there were a thousand melons in this car and two hundred of them were rotten, then the rotten melons would bear the proportion of one-fifth the whole car. Now then if the answer of Mr. Spada was yes to Mr. Hartpence's question as to whether the melons that he sold represented the proportionate value of the car, then if the melons were worth $350 on a certain date he should have realized four-fifths of that value. Now I am going to show that the melons, even though four-fifths of them were good, were not in a condition that he could realize the full market value for them.

The Court: You may show that if you can.

Mr. Stout: I will add to my question,—

Q. Whether the sound melons are affected by the rotten condition of the others?

The Court: You do not mean that; you mean whether the price of them was affected.

Mr. Stout: First we will have to find out whether they were in a damaged condition to a certain extent although not visible, to show that the price must necessarily be less.

Mr. Hartpence: That is the very basis of my objection. There was no testimony brought out on examination in chief touching the condition of the melons which were testified to be good. The testimony only was that a certain number of them were rotten and the rest of them were all right. Now he is getting

back to the question as to whether a certain number of those that were accepted were perhaps not in first-class condition.

The Court: I think he has a right to ask that in order to show how it would affect the price.

Mr. Hartpence: In this question it seems to me he should be specific as to the melons in this particular car.

Mr. Stout: I withdraw the question.

Q. Were these melons in car ACL 30943, ACL 34794, ACL 23761, and ACL 25968, which are the cars of melons which you have testified that you accepted,—was the market value of those melons that were in apparently god condition affected by the rotten melons in those cars? A. Yes, sir.

Q. In what manner? A. In what manner, because you can't take all the rotten melons from a car and therefore if you bring a buyer to buy those melons he sees a dozen or half a dozen rotten melons in front of the pile, he will run away, he won't take those melons, and also the melons are not perfectly sound, you know; always there is some spot more or less in the melons which makes the price different.

Q. And then that affects the market value? A. Yes, sir, and the only people that buys them are the peddlers, not the good people.

Q. It affects the market value of the melons which appear on the surface to be sound? A. Yes, sir.

Recross-examination by Mr. Hartpence:

Q. It would be possible though, would it not, Mr. Spada, to separate the rotten melons from the others entirely and then offer the other melons for sale? A. It could be possible, yes.

Q. And if they were done and when they were

exposed for sale if the purchaser saw nothing but the apparently good melons, then the effect of the presence of the rotten melons would be overcome, would it not? A. Well, he would see the effect on the melons.

Q. Will you kindly answer my question?

(Question repeated.)

A. No, sir.

Q. Why not? A. Because the good melons would show that they had been mixed up with the rotten melons; there would be some spots showing in the melons.

Q. But I understood you to say in answer to my question that you could separate them so that that would not show. A. Well, you understand that it is natural you open the car and start to sell your hundred or two hundred, whatever you have to sell, the rotten melons would be thrown outside.

Q. My question was, and I will ask it again: it would be possible, would it not, to clean out the rotten melons, separate the good ones from the rotten ones, and offer the good ones in the same way for sale so that it would never appear that they were contaminated by the presence of the rotten melons? A. I say that be possible.

Q. It would be possible? A. But it would appear, according to the question now.

Q. You did not do that when you sold any of these melons in the four cars which you accepted? A. I do not recall.

Q. Well, you did not remove the rotten melons from the cars and offer the other melons free from the presence of the rotten melons? You did not do that, did you? A. Sure, I removed the rotten melons from the good ones first.

Q. Before you sold the cars? A. Naturally, because when they buy a load of melons, say eight

hundred melons, there will be fifteen or twenty rotten melons; you can put those aside, don't you know?—remove them. I call that "remove."

Q. But did you do that with these four cars that you accepted? A. Sure.

Q. (By the Court.) What the counsel means is before you sold the melons to any person did you remove the rotten melons from the good ones or did you remove them after the bargain was made. A. After the sale had taken place.

Bores Ureles, sworn.

Direct Examination by Mr. Stout:

Q. What is your full name? A. Bores Ureles.

Q. Where do you live? A. 871 Amsterdam Avenue, New York City.

Q. What is your business? A. Produce business,—muskmelons, watermelons, bananas and grapes.

Q. Where are you engaged in business,—or where is your place of business? A. New York City.

Q. Do you buy and sell watermelons in the Henderson street yard, Jersey City? A. Yes, sir.

Q. Were you engaged in buying and selling watermelons in Henderson street yard in Jersey City, during the month of July, 1912? A. Yes.

Q. Did you examine these cars that are involved in this suit? A. Yes, sir.

Q. With whom did you examine them? A. With Mr. Andrew Spada.

Q. Do you know what the condition of car ACL 30943 was on July 15, 1912? A. What number?

Q. 30943? A. Yes.

Q. What is that book you have there. A. It was on July 15th—I bought this car.

Q. Just a minute. Answer my question. What is that book you have there? A. That is a book if I bought a car I put it in my book. I keep track of all the cars.

Q. In your own handwriting? A. Yes, sir.

Q. When were those entries made in that book? A. The day when I bought the cars or I sell the cars I put it in the book.

Q. Did you examine the contents of this car ACL 30943? A. Yes, sir.

Q. What was the condition of the contents of that car. A. It was some rotten ones in there.

Q. Some rotten what? A. Rotten melons.

Q. Do you know how many? A. About 206 specked ones—rotten ones.

Q. Two hundred and what? A. Two hundred and six rotten ones.

Q. Do you know what watermelons of the variety and kind contained in this car, if in good condition, were selling for in the Henderson street yard on July 15, 1912. A. Yes, sir.

Q. Do you know what the market value was on July 13, 1912? A. Yes, sir.

Q. What was the market value on July 13, 1912?

Mr. Hartpence: I object.

A. It was from $350—

The Court: Just a moment. What is the point of your objection?

Mr. Hartpence: I do not think he has qualified this witness at all to testify as to value.

The Court: He has not? He said his business is that of selling watermelons, muskmelons, grapes and bananas and that he carries on his business at Second and Henderson street. I think that is sufficient to qualify him as to the price of melons.

Mr. Hartpence: I do not think he has stated how long he had been in that business.

Q. How long have you been in the watermelon business? A. Three years.

Q. (By the Court.) At that place? A. Yes, sir.

Q. At the Henderson street yard? A. Yes, sir.

Q. And during that time have you—

The Court: Go ahead and ask him the question how much they were worth.

Q. What were melons of this variety worth on July 13, 1912? A. On July 13, 1912, it was from $350 to $375.

Q. From $350 to $375 in the Henderson street market in Jersey City? A. Yes; that was what I paid for melons at this time.

Q. You paid that on that date? A. Yes, sir.

Q. How high a price did you pay on that day? A. On that day, $360.

Q. And melons were selling as high as $375 to your knowledge? A. Yes.

Q. I call your attention to car ACL 35449. A. Yes, sir.

Q. Did you examine the watermelons—A. Yes, sir.

Q. Just a minute. —contained in that car on July 17, 1912? A. Yes, sir.

Q. What was their condition? A. It was a very rotten car.

Q. Very rotten condition? Yes, sir.

Q. Do you know what the market value of watermelons of the kind and variety contained in this car, if in sound condition, was on July 15, 1912? A. The would run from $325 to $350.

Q. I call your attention to car ACL 30698; did you examine the watermelons contained in this car on July 23, 1912? A. Yes, sir.

Q. What was their condition? A. It was rotten —very rotten.

Q. Very rotten? A. Yes.

Q. What would melons of the variety and kind contained in this car, if in good condition, have sold for on July 13, 1912, at the Henderson street yard, Jersey City? A. July 18th?

Q. Yes; July 18th. A. Well this car I examined July 23rd.

Q. But I am asking you as to what they would bring on July 18? A. From three to three and a quarter.

Q. From three hundred to three hundred and a quarter? A. Yes, sir.

Q. What in your opinion would this carload of melons, if they had been in good condition on July 18th, 1912, have sold for in the Henderson street market in Jersey City? A. That batch?

Q. Yes. A. $300 at least; not less than $300.

Q. At least $300? A. Yes.

Q. I call your attention to car ACL 34794; did you examine the watermelons contained in that car on July 20, 1912? A. Yes, sir.

Q. What was their condition? A. There was a pretty few rotten ones—there were very few rotten ones.

Q. You say—

The Court: "There were very few rotten ones."

Q. Do you know how many? A. No, I do not know how many there were.

Q. What was the market value of watermelons of the kind and variety contained in this car if in good condition, what were they selling for in the Henderson street market on July 17, 1912? A. The same value, $300 to $325.

Q. I call your attention to car ACL 24480. A. No; I did not examine this car. No, no, it is not in my book.

Q. I call your attention to car 23761. The date

when this car arrived was on July 22, 1912. A. 23761?

Q. Yes. A. Yes, sir.

Q. Did you examine the watermelons contained in this car on July 22, 1912? A. Yes, sir.

Q. What was their condition? A. It was rotten.

Q. How rotten? A. Oh—

Q. How many of them were rotten? A. I can't tell you how many. There were a few rotten. I do not know how many was rotten in this car.

Q. What were watermelons selling for in the Henderson street market on July 18, 1912, of the kind and variety contained in this car, if in sound condition. A. $325.

Q. $325? A. Yes.

By the Court:

Q. What effect would it have had on the price if this whole carload had been good and they had sold it there, on the price of melons in the whole yard. A. In good condition?

Q. Yes; if you had sold this car that morning, wouldn't it have affected the price generally,—if the whole carload had been in good condition? A. If they are in good condition they always bring from $300 to $350.

Q. Well, the price depends upon the supply? A. Yes.

Q. Well suppose that morning you had put in another whole car of sound melons, wouldn't that have affected the price any? A. No, that wouldn't.

Q. It wouldn't? A. No.

By Mr. Stout:

Q. You say there were a few rotten melons in this car; what do you mean,—two or three? A. Oh, a couple of hundred.

Q. Well! I call your attention to car 18316, a car which was delivered on July 23, 1912. Yes, sir.

Q. Do you find it? A. Yes.

Q. Did you examine the watermelons contained in this car on July 23, 1912? A. Yes, sir.

Q. What was their condition? A. Very rotten.

Q. Very rotten? A. Yes.

Q. Do you know what watermelons of the kind and variety contained in this car, if in good condition, were selling for in the Henderson street yard on July 18, 1912? A. Yes, from $300 to $325.

(Recess.)

Q. I call your attention to car ACL 25968. A. 25968?

Q. 25968. The car arrived on July 29th. A. No; I have not got any such car—no.

Q. You haven't got it? A. No.

Q. Do you recall how many cars you examined with Mr. Spada during the month of July 1912, in the Henderson street yard. A. Eight cars.

Q. Well, this is the second car you say you haven't any data on. A. What number was the other one.

Q. Do you know whether you examined this car or not? A. I don't remember.

The Court: Don't you think you would save time if you let him indicate in answer to a general question what cars he did examine and what he found in connection with them?

Mr. Stout: There is only one more car.

Q. Do you remember whether you examined a car of watermelons for Andrew Spada on July 29th, 1912? A. I do not remember.

Q. You do not remember? A. No.

Q. I call your attention to car ACL 28548. A. Yes.

Q. What was the condition of the melons in this car? A. It was very rotten.

Q. Did you examine that car on July 31, 1912? A. Yes, sir.

Q. How thorough was your examination? A. Why, I was in the car.

Q. You were in the car? A. Yes, sir.

Q. Do you know what the market value was per car for melons of the kind and variety contained in this car, if in good condition, on July 25th, 1912, in the Henderson street yard, Jersey City? A. $300.

Q. Would this car of melons if in good condition have brought that in the Henderson street market on July 25, 1912? A. Yes, sir.

Cross-Examination by Mr. Hartpence:

Q. Mr. Ureles, what do you base your statement upon that the carload of melons ACL 30943 was worth from $350 to $375 on July 13, 1912? A. What basis?

The Court: Why do you say that is the value?

A. Oh, because I bought cars on the same day and I paid $360 for the same cars.

Q. Is it for the same reason that you say car ACL 35449 was worth from $325 to $350 on July 15, 1912? A. Yes, sir.

By the Court: Well, what is the reason? A. Well, because the melons coming in good condition in the same car it was of the same value.

Q. No; he wants to know why you say on that day those melons were of that value? A. They were selling the same date, same price.

Q. You sold and bought them that day? A. Yes; the market was not the same.

Q. Then it was not for the same reason you said it about the other? A. No, no.

By Mr. Harepence:

Q. You did not buy any yourself on that day and pay from $325 to $350? A. On the 13th-

Q. On the 15th. A. No; I bought on the 13th and I paid $360.

Q. Did you see any, or observe any, sold on the 15th for the amount of $325 to $350,—Georgia melons? A. Yes, sir.

Q. At the Second and Henderson street yard, Jersey City? A. Yes, sir.

Q. In your experience there in the Jersey City yard, Mr. Ureles, have you ever seen a publication called the Producers' Price Current? A. No.

Q. Never have seen it? A. No.

Q. Don't you know as a matter of fact that there is a market price list published every day for the Second and Henderson street fruit market? A. No, I do not know that. I never saw that. We do not go by the price list; we look at the values of the goods.

Q. And you did not know as a matter of fact in that price list on July 15th the same melons were quoted at from $200 to $275? A. Well, probably there was some cars, difference grade; a small melon they do not pay so much as they do for a big melon.

Q. I say, you did not know it was quoted in this price list I have referred to for that day at that amount? A. No.

Q. Now with regard to ACL 30698, which you say on July 18th was worth from $300 to $325, did you not know that those same melons were quoted in the Producers' Price Current of that day from $150 to $225? A. No, sir.

Mr. Stout: I can hardly see how this is proper cross-examination unless this paper that Counsel is using contains prices on the same kind of melons.

The Court: That is what the question indicated. He said "for this same kind of melon." The question cannot possibly hurt you unless he proves that these prices current were prices current amongst dealers at that place at that same time, and for the same grade of goods. If he doesn't, it cannot hurt you.

Mr. Stout: That is right.

Q. And did you not, Mr. Ureles, know that on July 17, when you say that the value of ACL 34794 was from $300 to $325, that this same type of melon was quoted in the Producers' Price Current at from $150 to $225? A. No.

Q. And that on July 18th, car 23761, which you say was valued at $325,—that on that same day the same type of melon was quoted in the Producers' Price Current at from $150 to $225. A. No.

Q. And the same for 18316, which on July 18th you say was quoted at $300 to $325, that the Producers' Price Current quoted it at from $150 to $225? A. No.

Q. That on July 25th, when you say car ACL 28548 was worth on the market $300, it was quoted in the Producers' Price Current at from $125 to $200? A. No.

Q. Now when you say that the condition of car ACL 35449 was very rotten, what do you mean by that? A. 35449?

Q. 35449. A. Yes.

Q. What do you mean by "very rotten?" A. Well, it was not solid ones; you could hardly find any good ones there.

Q. Do you mean that those melons which were rotten were very rotten or that the general condition of the car was rotten? A. The car was very rotten, the whole car.

Q. And when you used the term "rotten" as you did with car ACL 30698, what do you mean by that,—that they were just rotten? A. Yes; that was in the same condition as was the first car.

Q. So that that refers to the condition of the individual melons rather than to the carload, or the other way? A. I couldn't understand that.

Q. Does it refer to the condition of the individual melon as being rotten or do you refer to it as the car alone being generally rotten? A. The melons was rotten, yes.

Q. Now for instance in ACL car 30943, the first car, there were some good melons in that car, were there not? A. Yes, sir.

Q. The biggest portion of them were good, were they not? A. Yes.

Q. Now what was the condition of those that you term good? A. What the conditon was? Well, they was good.

Q. They were good? A. Yes; those that was good was good.

Q. They were salable, were they not, as good melons? A. Yes.

Q. Did you examine those to see whether there were any indications of deterioration in those that were good? A. I examined this car because I bought this car and I sold this car.

Q. And you bought—the proportion that were good, you bought real good melons, didn't you? A. I claimed the price for it was good because this car was bought for me myself at $350. When they came in I refused, I did not want to pay so much. I paid $225 for the same car.

Q. Now take ACL car 34794. A. Yes.

Q. The larger portion of those melons were good, were they not? A. No; there was too many rotten ones in them.

Q. How many? A. I can't tell you exactly how many there is, but there was too many there.

Q. Those that were good were good, were they not? A. Those melons that were good were good. There was some good ones; and the rotten ones were rotten. I can't tell you how many good ones and how many rotten there was in this car.

Q. Those that were rotten were rotten and those that were good were good, were they not? A. Yes, sir.

Q. And that also was true of all the cars that had rotten melons in? A. Yes.

Q. Those that were good were good and those that were rotten were rotten? A. There was some cars you could not find any good ones,—very few.

Q. Those were refused? A. Yes. I say "very few." They would find in some cars good ones.

Q. Now what was the method of your examination of those cars; how did you go about it? A. I tried to buy them cars.

Q. How did you examine them? A. When they opened the cars I tried to buy the cars and then went into the cars to see.

Q. How many tiers of melons are packed in those cars? A. Four high and about 20 long, or 22.

Q. Did you go through the cars and look at all the tiers? A. Yes, both ends and in the front.

Q. So that you made a thorough examination of them? A. Yes, sir.

Q. And you found some were good and some were rotten? A. Yes, some were good and some were rotten.

Q. And like the little girl who when she was good was very, very good, when the melons were very, very good when they were good? A. Yes.

Q. And when they were bad they were horrid? A. Yes, very bad.

Redirect-examination by Mr. Stout:

Q. Taking melons that appear to be sound from a car where there are a lot of spoiled melons, are those melons that appear to be good as good as melons that are taken from a car where there are no bad melons? A. No; that is the worst of it.

Q. What? A. Them melons get worser. They get spoiled from the rotten ones.

Q. So then they are to a certain extent deteriorated by being with the other melons? A. Yes.

Recross-examination by Mr. Hartpence:

Q. How is that deterioration communicated from the bad melon to the good melon, Mr. Ureles? A. Well, they lay together; the good ones get spoiled from the bad ones.

Q. And the good one becomes infected from the contact with the bad melon? A. Yes, sir.

Q. Then that itself is a bad melon, isn't it? A. Yes, sir.

Q. The one that is infected itself becomes a bad melon, doesn't it? It has a speck in it, a rotten part? A. So long as they are together, certainly; you can't sell them for good melons when they come in a solid car; they get effect from the bad ones, yes.

Q. But when the decay from the bad melon is communicated to the good melon it comes in contact with, that other melon becomes infected itself in that respect and at that place of contact? A. I can't understand such high word. I can't understand that.

Q. I want you to explain to me if you will just how a bad melon affects a good melon so as to cause it to deteriorate. A. Yes, the bad melon specks the good melons.

Q. How does it do it? A. Because they get overheated.

Q. Then how do they affect the good melon after they are overheated? A. Because the good melons get overheated and begin to spoil.

Q. Then they become spoiled? A. Who,—the good melons?

Q. Yes. A. Sure.

Q. Now you say you found in the car those which were spoiled and those which were not? A. Yes.

Q. And those which were not spoiled were good melons? A. They were good melons if you sell right away. You can't keep them another day. In a day or two they will get worse and worser.

(Plaintiff rests.)

DEFENDANT'S TESTIMONY.

D. W. Ellison, sworn.

Direct-examination by Mr. Hartpence:

Q. Mr. Ellison, what is your occupation? A. Freight conductor on the Pennsylvania Railroad.

Q. Were you a freight conductor in July, 1912? A. Yes, sir.

Q. And where did you run? A. Between Jersey City and Edgemoor, Delaware.

Q. Did you keep any record in the course of your occupation of trains and cars that were moved from Edgemoor to Jersey City? A. Yes, sir.

Q. Have you the record with you that you kept in the month of July, 1912? A. Yes, sir.

Q. Will you turn to that record and see if you have any note of car (on July 13th) A. C. L. 30943?

A. I had that car on that date from Edgemoor to Jersey City,—Harsimus Cove.

Q. At what time did you receive it at Edgemoor?

Mr. Stout: I object to that. It is already in evidence in the interrogatories when this car was received by the Pennsylvania Railroad at Edgemoor.

The Court: Well, do you contend that the answers to the interrogatories are conclusive on the defendant?

Mr. Stout: It is their answer under oath.

The Court: Yes, and it is this man's answer under oath.

Mr. Stout: Well, can they deny the truthfullness of these answers?

The Court: Why, I should think you would want them to. If I were you I should think that if a man was to have a half dozen different answeres under oath the jury would be inclined to believe that nobody was telling the truth on that phase of the case.

Mr. Hartpence: I will withdraw the question.

Q. Does that record show at what time that car left Edgemoor?

Mr. Stout: I would like to cross-examine the witness before he answers any more questions,—with respect to the record.

The Court: You may do that.

Cross-examination by Mr. Stout:

Q. Whose record is this? A. Mine.

Q. When was it made up? A. At the time I took the numbers on the train.

Q. And as to this particular car, when was it made up? A. At the same time.

D. W. Ellison, for Defendant—Direct (resumed)

Q. What date was that? A. July the 13th.

Q. Did you see the car yourself? A. Certainly.

The Court: In all likelihood his evidence will conform to what you have because they in all likelihood got it from him. It will simply substantiate and support what you already have by way of answers to the interrogatories.

(Question on direct examination repeated.)

Direct-examination by Mr. Hartpence Resumed:

A. Yes, sir; at 12:30 P. M. on July 13th.

Q. And how far through did you carry that car? A. To Harsimus Cove.

Q, Where is Harsimus Cove? A. At the foot of 5th—no, 4th street—at the foot of 3rd or 4th street, Jersey City.

Q. At what time did you arrive at Harsimus Cove? A. 8:30 P. M.

Mr. Stout: I object to that. As the case now stands how is it material when he got to Harsimus Cove? The plaintiff contends, and his testimony shows, that they were to carry these melons from the point where they received them to Jersey City within a reasonable time. Now if he got there four or five days after he left the point where he accepted them, I do not see where it is material as the case now stands.

The Court: Well, what is a reasonable time?

Mr. Stout: The evidence in the case is that it is seven hours.

The Court: It says that under the most favorable circumstances the time is seven hours.

Mr. Stout: I then understand if he is going to modify that he has got to show some excuse for not getting to Harsimus Cove—

The Court: Maybe he is going to do that. He is simply going to show how long it took him to get there, and then show why he did not get there sooner. I think I will permit it.

Q. At what time did you arrive at Harsimus Cove? A. At 8:30 P. M. on the 13th of July.

Q. Where did you leave it? A. Left the car—left that portion of the train, at Harsimus Cove. We were through then.

Cross-examination by Mr. Stout:

Q. What part of Harsimus Cove did you leave this car? A. Well, I do not know exactly what part of the yard; I could not say that. Sometimes we pull in on some of the receiving tracks and sometimes we pull in down towards the foot of Second street. We do not make no record of that. We simply keep a record of the arriving at Harsimus Cove. A. After you left that car at Harsimus Cove you do not know anything further about its movements outside of that? A. Nothing further.

Q What is Harsimus Cove, what kind of a yard is it? A. It is a freight yard.

Q. Is it a delivery yard? A. No; it is a general receiving yard.

Mr. Stout: I object—well, he has answered the question.

JOHN H. WILKINSON, sworn.

Direct-examination by Mr. Hartpence:

Q. What is your occupation? A. Freight conductor for the Pennsylvania Railroad between Wilmington—or Edgemoor—and Jersey City.

Q. And were you in that position in July, 1912? A. Yes, sir.

Q. Did you keep a record of the movements of the trains and cars that you had charge of at that time? A. Yes, sir.

Q. Have you that record with you? A. Yes, sir.

Q. Will you produce it, please? Produce it and see if it contains a record of the movement of car ACL 35449 on July 13, 1912. A. 35449?

Q. Yes. A. Yes, sir.

Q. Does the record state what time that car left Edgemoor? A. Yes, sir.

Q. What time? A. 9 P. M.

Q. On what day? A. 13th.

Q. Where was it carried from Edgemoor by you? A. To Harsimus Cove.

Q. What time did it reach Harsimus Cove? A. 3:50 A. M. on the 14th.

Q. And where did you leave that car? A. Harsimus Cove.

Cross-examination by Mr. Stout:

Q. After you left the car at Harsimus Cove you knew nothing of its movements after that? A. No, sir.

Q. You did not put it on the delivery track? A. No, sir.

J. R. Pedrick, sworn.

Direct-examination by Mr. Hartpence:

Q. What is your occupation? A. Freight conductor on the Pennsylvania Railroad.

Q. And were you in that position in July, 1912? A. Yes, sir.

Q. And where did you run at that time? A. Edgemoor to Jersey City.

Q. Did you keep a record of the trains and cars that you had charge of and the movements? A. Yes, sir.

Q. Have you that record with you? A. Yes sir.

Q. Will you produce it please and state whether or not you have a record on July 17, 1912, of car ACL 30698? A. Yes, sir.

Q. Where did you receive that car? A. I received the car at Edgemoor.

Q. And what time did you leave Edgemoor with that car? A. I left Edgemoor at 6:55 A. M.

Q. On July 17th? A. July 17th.

Q. And where did you carry it? A. I carried it as far as the Meadows, N. J.—Jersey City.

Q. And what time did you reach there? A. 7:30 P. M.

Q. And where are the Meadows in Jersey City located? A. Why, so far as I can tell you, between Newark and Jersey City proper.

Q. And will you state whether you have a record on that same date, July 17, 1912, of ACL car 24480? A. Yes, sir, I have.

Q. Where did you receive that car? A. I rereived that car at Edgemoor, Delaware.

Q. What time did you leave there? A. 6:55 A. M.

Q. Where did you carry that car? A. I carried it to the Meadows, Jersey City.

Q. What time did you reach there? A. 7:30 P. M.

Q. On what date? A. 17th of July.

Q. What did you do with those two cars when you reached the Meadows, 30698 and 24480? A. Left them in the receiving yard—freight yard.

Cross-Examination by Mr. Stout:

Q. You did not place either car on the delivery track in the Henderson street yard? A. No, sir.

WILLIAM W. MCCAULEY, sworn.

Direct-Examination by Mr. Hartpence:

Q. What is your occupation? A. Conductor on the Pennsylvania Railroad.

Q. Freight conductor? A. Yes, sir.

Q. And were you in that position in July, 1912? A. Yes, sir.

Q. And where did you run at that time? A. Between Edgemoor and Jersey City.

Q. Did you keep a record of the movements of your trains and cars? A. Yes, sir.

Q. And have you that record with you? A. No, sir; my car was out on the road yesterday and I could not get it.

Q. You have not that record. Did you in the course of your employment also make copies of that record? A. Yes, sir.

Q. And what was done with those copies? A. One was turned into the car record office and one was turned into the yard master.

Q. Of the Pennsylvania Railroad Company? A. Of the Pennsylvania Railroad.

Q. I show you what purports to be a copy of the car record— A. That's mine.

Q. —made by you, and ask you if you made that copy? A. That is my report, sir.

Q. And does that show the correct record of the movement of your train on the date which is indicated on that record? A. Yes.

Q. Now does that show the movement on July 16, 1912, of car ACL 34794? A. Yes, sir.

Q. And where did you receive that car? A. Edgemoor, Delaware.

Q. Where did you carry the car from Edgemoor? A. Harsimus Cove.

Q. What time did you leave Edgemoor? A. 5 o'clock P. M.

Q. On what date? A. 7th, 16th, 1912.
Q. July 16th, 1912? A. Yes.
Q. And what time did you reach Harsimus Cove? A. 7th, 16th, 1912, 11:30 P. M.
Q. 11:30 P. M. July 16th? A. No—I beg your pardon—that is another—4:50 A. M. on the 17th.
Q. And where did you leave the car? A. I left that car at the Cove.
Q. You mean Harsimus? A. Yes, sir.

Cross-Examination by Mr. Stout:
Q. You did not deliver this car or did not place this car on the delivery tracks at the Henderson street yard of the Pennsylvania? A. No, sir.
Q. You left it there and after that you knew nothing of its movements? A. No, sir.

JOHN B. MULLEN, sworn.

Direct-Examination by Mr. Hartpence:
Q. What is your occupation? A. Freight Clerk, —conductor Pennsylvania Railroad.
Q. And were you in that position in July, 1912? A. Yes, sir.
Q. And where were you running? A. Between Edgemoor, Delaware and Jersey City.
Q. And did you keep a record of the cars and trains received and handled by you? A. I do.
Q. Have you that record with you? A. Yes, sir.
Q. Will you produce it, and state whether or not it shows a record on July 17, 1912, of car ACL 23761? A. I have a record of that car.
Q. Where did you receive it? A. Edgemoor, Delaware.

Q. And where did you carry it? A. To the Meadows, N. J.

Q. Near Jersey City? A. Auxiliary yard, three mile out from Jersey City.

Q. What time did you leave Edgemoor? A. 3:50 P. M. on July 17th.

Q. What time did you reach the Meadows? A. 3:20 A. M. July 18th.

Q. Where did you leave the car? A. Where did I leave the car?

Q. Where did you leave the car? A. On the Meadows.

Cross-Examination by Mr. Stout:

Q. You did not place this car on the delivery tracks of the Pennsylvania yard at Second and Henderson street? A. No, sir.

Q. And after you left it in the Meadows on July 18th you knew nothing of its movement after that? A. Nothing further.

GEORGE J. STEWART, sworn.

Direct-Examination by Mr. Hartpence:

Q. What is your occupation? A. Freight conductor on the Pennsylvania Railroad.

Q. And were you in that position in July, 1912? A. I was.

Q. And where did you run? A. Between Wilmington, Delaware—or Edgemoor, Delaware—and Jersey City.

Q. Did you make and keep a record of the trains and cars in your charge on those runs? A. I do.

Q. Have you that record with you? A. I have.

Q. Will you produce it please and state whether

it shows a record on July 17th, 1912, of car ACL 18316? A. Yes, sir; I had that car.

Q. Where did you receive that car? A. Edgemoor, Del.

Q. And where did you carry it? A. To Hackensack Meadows.

Q. Where? A. Hackensack Meadows, the receiving yard, this side of Jersey City three mile out.

Q. And what time did you leave Edgemoor? A. 8:25 A. M.

Q. On what day? A. 17th July, 1912.

Q. And what time did you reach the Meadows? A. 8:30—6:30 P. M. on July 17th, 1912.

Q. And where did you leave the car? A. At the Hackensack Meadows.

Cross-Examination by Mr. Stout:

Q. After you left this car at the Hackensack Meadows do you know anything about its movements after that? A. No, sir; not after that.

Q. You did not place it then on the delivery track in the Henderson street yard? A. No, sir; I placed it on the receiving track on the Meadows.

CHARLES C. LINN, sworn.

Direct-Examination by Mr. Hartpence:

Q. Mr. Linn, what is your occupation? A. Freight conductor.

Q. For the Pennsylvania Railroad? A. Pennsylvania Railroad.

Q. And were you in that position in July, 1912? A. Yes, sir.

Q. And where did you run? A. From Edgemoor, Del., to Jersey City.

Q. And did you keep a record of the trains and cars received and carried by you? A. Yes, sir.

Q. Have you that record with you? A. Yes, sir.

Q. Will you produce it please and state whether or not it contains a record for July 24, 1912, of car ACL 25968? A. Yes, sir; I have that record.

Q. Where did you receive that car? A. Edgemoor.

Q. And to what point did you carry it? A. To the Meadows, N. J.

Q. Where are the Meadows located? A. In the receiving yard, freight receiving yard.

Q. Near Jersey City? A. Yes, sir.

Q. What time did you leave Edgemoor? A. 5:15 A. M., July 24, 1912.

Q. And what time did you reach the Meadows? A. July the 24th at 2:20 P. M., 1912.

Q. And where did you leave that car? A. At the freight yard in the Meadows, the receiving yard.

Cross-Examination by Mr. Stout:

Q. Just where are these Meadows that you speak of? A. Well, they are about—they are between Newark and Jersey City, they are about three or four mile out.

Q. Three or four miles from Jersey City? A. Yes.

Q. And after you left the car in the Meadows on July 25, 1912, you know nothing of its movements after that? A. I did not leave the car on July 25th.

Q. July 24th; and you did not see the car after that? A. No, sir.

Q. And did not place it on the delivery track in the Henderson street yard? A. No, sir.

ROBERT T. ELDER, sworn.

Direct-Examination by Mr. Hartpence:

Q. Mr. Elder, what is your occupation? A. Railroad conductor, freight conductor.

Q. Pensylvania Railroad? A. Yes, sir.

Q. And were you in that position in July, 1912? A. Yes, sir.

Q. And where did you run? A. From Edgemoor, Delaware, to Jersey City.

Q. Did you keep a record of the trains and cars that you received from day to day? A. Yes, sir.

Q. Have you that record with you? A. Yes, sir.

Q. Produce it please and state whether or not it contains a record on July 24, 1912, of the movement of car ACL 28548. A. Yes, sir.

Q. Where did you receive that car? A. Edgemoor.

Q. And to what point did you carry it? A. To Waverly.

Q. What time did you leave Waverly? A. 2:45 A. M.

Q. What date? A. July 24th.

Q. What time did you reach Waverly? A. 9:45 A. M.

Q. What date? A. July the 24th.

Q. Where did you leave that car? A. Waverly yard—freight yard.

Q. And where are the Waverly yards located? A. East of Newark—west of Newark.

Q. How far? A. About ten miles out.

Q. Ten miles from Newark? A. From Jersey City.

Q. About ten miles out from Jersey City? A. Yes, sir.

Cross-Examination by Mr. Stout:

Q. After you left this car on July 25th at Waverly do you know anything about its movements after that? A. I did not handle it on the 25th; it was on the 24th.

Q. As I understood you, the car left Edgemoor on July 24th at 2:45 A. M. A. 2:45 A. M., yes, sir.

Q. And when did you reach Waverly? A. I arrived at Waverly at 9:45 A. M. on the same day.

Q. Then after you left the car at Waverly on July 24th, 1912, you did not see it after that, with its contents? A. No.

Q. And you did not place it on the delivery tracks at the Henderson street yard? A. No, sir.

JOHN L. COMAN, sworn.

Direct-Examination by Mr. Hartpence:

Q. Mr. Coman, what is your occupation? A. Freight conductor of the Pennsylvania Railroad.

Q. And were you in that position in July, 1912? A. Yes, sir.

Q. Where did you run? A. Run between the Meadows and Harsimus Cove.

Q. Did you keep a record of the trains and cars that you handled from day to day? A. No, sir.

Q. You did not keep any record? A. No, sir.

Q. Who did keep the record of the running of your trains? A. Why we just simply made out these Rileys and made a copy of them and sent one to the yardmaster and sent one with the train to Harsimus Cove.

Q. You made out what? A. Made out these Rileys.

Q. A Riley? A. Yes, the Riley of the train.

Q. The Riley was your record? A. Yes, sir.

Q. And you made that out to show the running of each train? A. Yes, sir.

Q. And the cars? A. Yes, sir.

Q. I hand you a paper and ask you if that is what you refer to as a Riley?

Mr. Stout: What is a Riley?

A. A Riley is a copy of the train that we make in taking it to the destination.

Mr. Stout: And is this copy in your handwriting?

A. Yes, sir.

Q. Does that show the operation or movement on July 21, 1912, of car ACL 30698? A. Yes, sir.

Q. Where did you receive that car from, Mr. Coman? A. Received it on the Meadows.

Q. And to what point did you carry it? A. To Harsimus Cove.

Q. What time did you receive it on the Meadows? A. 9:30 P. M.

Q. What date? A. July the 21st, 1912.

Q. What time did it reach Harsimus Cove? A. July 21, 11:55 P. M.

Mr. Stout: What time did it leave the Meadows?

A. It left the Meadows at 9:30 P. M. and reached Harsimus Cove 11:55 P. M.

Q. And where did you leave the car? A. Harsimus Cove.

Q. And does that record also show the movement on July 21, 1912, of car ACL 24480? A. Yes, sir.

Q. Where did you receive that car? A. On the Meadows.

Q. And to what point did you carry it? A. Harsimus Cove.

Q. What time did you receive it at the Meadows? A. 9:30 P. M.

Q. And what time did you reach Harsimus Cove? A. 11:55 P. M.

Q. And where did you leave the car? A. At Harsimus Cove.

Q. And does that record also show the movement on July 21, 1912, of car ACL 18316? A. Yes, sir.

Q. Where did you receive that car? A. On the Meadows.

Q. And to what point did you carry it? A. Harsimus Cove.

Q. What time did you leave the Meadows? A. 9:30 P. M.

Mr. Stout: What date?

A. July 21.

Q. What time did you reach Harsimus Cove? A. 11:55 P. M.

Q. Same date? A. Yes, sir.

Q. And where did you leave the car? A. In Harsimus Cove.

Cross-Examination by Mr. Stout:

Q. You did not place any of these cars on the delivery track in the Henderson street yard, Jersey City? A. No, sir.

Q. And after you brought them into the Harsimus Cove you knew nothing of their movements after that? A. No, sir.

HORACE W. WINNEY, sworn.

Direct-Examination by Mr. Hartpence:

Q. Mr. Winney, what is your occupation? A. Yard master, Pennsylvania Railroad.

Q. And yard master at what point? A. What is known as the Meadow yard.

Q. And where is that located with respect to Jersey City? A. About three miles out of Jersey City.

Q. On what division of the Pennsylvania Railroad? A. On the New York Division.

Q. Are you familiar with the method of preparing records and of keeping records of the movements of freight trains by the conductors of the trains? A. Yes, sir.

Q. What sort of a record is kept of those movements? A. A report known as a 1033 report, made by the conductor. At the end of his trip it is forwarded to the Superintendent of transportation.

Q. And does that record show the cars that were in a particular train moved by that conductor? A. All cars moved in that particular train and where from and where to.

Q. And does it also show the time? A. The time and date.

Q. Of the leaving of the point of origin and the time of arrival at the point of destination? A. Yes, sir.

Q. Now in the usual course of the system do those reports reach you as yardmaster? A. They go through my office.

Q. And by you are transmitted to whom? A. They are transmitted from my office to the Superintendent of Transportation.

Q. So that in the system of transmission from the freight conductor to the Superintendent they pass through your hands, is that true? A. A great many of them through my hands.

Q. Did you know a freight conductor of the Pennsylvania Railroad Company who was in that position in July, 1912, named Joseph Fallon? A. Yes, sir.

Q. And how long had you known him? A. About 20 years.

Q. And had you ever seen his handwriting? A. Yes, sir.

Q. Is Mr. Fallon now alive? A. Now dead.

Q. And are you familiar with his handwriting? A. Yes, sir.

Q. I show you what purports to be a report of a train movement on July 19, 1912, of car ACL 23761, and ask you if you recognize the handwriting in which that report is made out? A. Yes, sir; that is Mr. Fallon's handwriting.

Q. Mr. Joseph Fallon? A. Mr. Joseph Fallon.

Q. And what is the nature of that paper? What is it? A. That is his car record report made for train movements from the Meadows to Harsimus Cove.

Mr. Hartpence: Have you any objection to my asking him about that?

Mr. Stout: If that is the record there is no objection.

Mr. Hartpence: Is the Court satisfied with the proof of Mr. Fallon's handwriting?

The Court: I do not see any reason why I should object to it. He says he recognizes it.

Mr. Stout: We do not object to it.

The Court: There is no objection to it, and I do not see how any objection could be made to it. If a man makes a report in the usual course of his business and it becomes a regular record of the company there are dozens of cases which hold such a thing to be legal evidence.

Q. Will you state whether or not that sheet or record shows the movement of ACL car No. 23761? A. Yes.

Q. And on what date? A. July 19.

Q. Of what year? A. 1912.

Q. Does it show from what point the movement was made? A. From the Meadows.

Q. And to what point? A. To Harsimus Cove.

Q. And what time does it show the car left the Meadows? A. It left the Meadows at 3:20 P. M. on July 19, 1912.

Q. And what time did it reach Harsimus Cove? A. Arrived at Harsimus Cove at 3:36 P. M. July 19, 1912.

Cross-Examination by Mr. Stout:

Q. That record does not show the movement of this car after it reached Harsimus Cove? A. No, sir.

DAVID WHITTICK, sworn.

Direct-Examination by Mr. Hartpence:

Q. What is your occupation? A. Freight conductor of the Pennsylvania Railroad.

Q. And were you in that position in July, 1912? A. Yes.

Q. And where did you run? A. From the Meadows to Harsimus Cove.

Q. Did you make any sort of a record of the running of your trains and cars? A. Only on the regular form of the company which we turn in to the Superintendent's office.

Q. Did you make that—

Mr. Stout: We will admit the authenticity of the record.

Q. Is that such a record as you made (showing witness a paper)? A. Yes, sir.

Q. Did you make that record? A. Yes, sir.

Q. Is that in your handwriting? A. Yes, sir.

Q. Does that show the movement of car ACL 28548 on July 28, 1912? A. Yes, sir.

Mr. Stout: Movement on what date?

A. July 28, 1912.

Q. Where did you receive that car? A. Meadow Yards.

Q. And to what point did you carry it? A. Harsimus Cove.

Q. What time did you leave the Meadows? A. 6:40 P. M. July 28, 1912.

Q. What time did you reach Harsimus Cove? A. 7:55 P. M. July 28, 1912.

Q. Where did you leave the car? A. At Harsimus Cove.

Q. At Brunswick street and Newark avenue? A. Yes.

Q. And does that sheet or record also show movement on that same date of car ACL 25968? A. Yes, sir.

Q. And from what point was that moved? A. From the Meadow yards to Harsimus Cove.

Q. What time did it leave the Meadows yard? A. 6:40 P. M. July 28, 1912.

Q. What time did it reach Harsimus Cove? A. 7:55 P. M. July 28, 1912.

Q. Where did you leave the car? A. Brunswick and Newark avenue—Harsimus Cove.

Cross-Examination by Mr. Stout:

Q. After you left these cars at Harsimus Cove on July 28, 1912, you know nothing of their movements after that? A. No, sir.

WILLIAM F. TAYLOR, sworn.

Direct-Examination by Mr. Hartpence:

Q. What is your occupation? A. Yardmaster.

Q. Where? A. Jersey City Terminal, Pennsylvania Railroad.

Q. How long have you occupied that position? A. Ten years about. Nine years I guess—nine years.

Q. What are your duties as yardmaster with respect to freight trains and freight cars that come to your yard? A. Distributing the cars as they arrive to the different destinations.

Q. And do you keep any records of the cars that come in and are thus distributed? A. We keep a record of each and every car as it arrives or goes out of the yard.

Q. Do you keep a record of the time of placing an incoming car for delivery on the delivery track? A. No, sir; we keep no records of the yard movements.

Q. Have you with you, Mr. Taylor, your records as yardmaster which will show the movement on July 13th, 1912, of ACL Car 30943? A. Yes, sir.

Q. Will you state what time that reached the yard at Jersey City? A. At 8:25 P. M. July the 13th, Conductor Ellison.

Q. And what did you do with the car after it arrived? A. It was placed in the delivery yard the same date.

Q. Have you the time it was placed in the delivery yard? A. Not that time on the records.

Q. Whose record will show that? A. Mr. Butler, the agent at that time, he keeps all such records of the cars being placed.

Q. And you have no record with you, have you, that will show the time that that car No. 30943 was placed in the delivery yard except on the same

date on which you received it? A. Our records show it as going to the delivery yard that same evening.

Q. Have you a record with you of car ACL 35449? A. Yes, sir.

Q. And what time did that reach the yard at Jersey City? A. 3:50 A. M. July 14th.

Q. And what did you do with that car? A. It was placed on the storage track temporarily.

Q. Where is the storage track located? A. Known as the Slate Dock Yard or Pier 3 Yard. It is in the vicinity of the Jersey delivery yard.

Q. And is that in the general Harsimus Cove yard of the Pennsylvania Railroad? A. Yes, sir; it is in the Harsimus Cove yard. Our record shows the car coming to the delivery yard on the morning of the 17th of July.

Q. Do your records show the movement of car ACL 30698? A. Yes, sir.

Q. And what time did that reach the Jersey City yard? A. 12:05 A. M. July 22nd, and to the delivery yard on the morning of July 23rd.

Q. And do your records show the movement of car ACL 34794? A. Yes, sir.

Q. What time did that reach the Jersey City yard? A. 6:10 A. M. July 19th, and to the delivery yard in the early morning of July 20th.

Mr. Stout: When did that car reach the yard?

Mr. Hartpence: I object.

The Court: Objection sustained.

Q. Do your records show the movement of car ACL 24480? A. Yes, sir.

Q. And at what time was that car received? A. Arriving at Harsimus Cove yard at 12:05 A. M. July 22nd, and to the delivery yard in the early morning of the 23rd.

Q. And do your records show the movement of car ACL 23761? A. Yes.

Q. And what time did that reach the Jersey City yard? A. 3:40 P. M. July 19th.

Q. And at the delivery yard—? A. In the early morning of the 22nd.

Q. Do your records also show the movement of car ACL 18316? A. 18316?

Q. Yes. A. 12:05—arriving 12:05 July 22, and to the delivery yard in the early morning of the 23rd.

Q. And do your records also show the movement of car ACL 25968? A. Yes, sir.

Q. What time did that reach the Jersey City yard? A. Arriving at 7:55 P. M. July 28th and to the delivery yard in the early morning of the 29th.

Q. Do your records also show the movement of car ACL 28548? A. Yes, sir.

Q. What time did that arrive at the Jersey City yard? A. 7:55 P. M. July 28th, and to the delivery yard in the early morning of the 31st.

Q. Now will you refer back on your record to car ACL 34794? A. Yes, sir.

Q. You stated that the car was received at the Jersey City yard July 19 at 6:10. A. Yes, sir.

Q. Will you state whether that was 6:10 A. M. or P. M.? A. 6:10 A. M.

Q. And with regard to all these cars does the time at which you have stated they were received at the Jersey City yard indicate the time at which the cars were turned over to you by the conductors? A. Yes. It should call it Harsimus Cove yard. That is what it should be mentioned. There is where the conductors bring the car into the yard where I take charge of it.

Q. And the Harsimus Cove yard is the freight terminal at Jersey City? A. That is where they arrive.

Q. At the Hudson River waterfront, is it not? A. Yes, sir.

Q. And then from the Harsimus Cove yard incoming cars consigned to Jersey City are moved to what point? A. To different points, New York and Brooklyn.

Q. No, consigned to Jersey City. (To the stenographer: Repeat the question.)

(Question repeated.)

A. Drilled right to the Jersey City delivery yard.

Q. And it is the delivery yard that is usually referred to as the Jersey City yard? A. The Jersey City yard.

Q. Is there any duty in the usual course of the system upon the freight conductor to notify you in any way of the arrival of his train or car?

Mr. Stout: I object.

The Court: What is the objection to that?

Mr. Stout: "Duty." I think he can testify to the fact of what these men did, but duty it seems to me calls for a conclusion.

The Court: I will sustain the objection to it. It does import a conclusion. You may show what their orders are, how they have been instructed, anything of that sort.

Q. What is the course of procedure in your system with regard to the incoming freight trains at Harsimus Cove? A. A train will arrive at Brunswick street. The conductor reports what he has, also delivers the tickets that travel with the cars that he has to some of my assistants, then he gets his instructions what to do, whether to pull the train further or cut off and go out.

Q. Mr. Taylor, about the time of the arrival of these nine cars to which reference has been made, at the Harsimus Cove yard—the Jersey City Yard—was there any delay or congestion in the yard?

Mr. Stout: I object to that. What of it if there was a congestion in the yard?

The Court: What is the point of the objection? I am not answering questions.

Mr. Stout: The point of the objection is this, that we are suing under the common law liability, and the mere fact that there was a congestion at the delivery yard or in Jersey City would not relieve the carrier of its obligation to carry the goods to the point of delivery within a reasonable time, and I cannot see where a congestion at this point is material.

The Court: What is your contention about that, Mr. Hartpence?

Mr. Hartpence: The comomn law duty, if we were to rest upon that, as I understand it, of a carrier was simply to carry within a reasonable time. and the carrier is not an insurer as to the time of delivery unless there is a special contract for delivery in a special time, and any act or condition which was beyond the control of the carrier would operate as a sufficient excuse for the delay in transmission—at least it would be admissible to sustain the proposition that it was a reasonable ground for the delay in the transmission or transportation, and if there was a congestion—

The Court: My own impression would be that the facts concerning the transportation of the goods from the point of embarkation to the point of debarkation of them would all be admissible, and then it would be a question for the jury to say whether in the light of all the circumstances the transportation of the goods was accomplished within a reasonable time or not. I do not think that the rail-

road company is debarred from introducing evidence tending to show the circumstances that confronted them throughout the whole course of the transportation of the goods, and I do not know of any case which says that they are debarred from introducing evidence that way. It may very well be, Mr. Stout, you know, as a matter of law, that if there was a congestion and that congestion was due to the negligence of the railroad company or was due to their lack of expedition, that it would be necessary for the court to decide as a matter of law that such congestion could not be —or the time during which such congestion delayed them could not be considered as an element in determining what was a reasonable time, but if you have any authority let us hear it. In other words, what authority have you to show what is a reasonable time?

Mr. Stout: I understand on the question of reasonable time that is always a question for the jury—the question of reasonable time, unless the facts are not disputed.

The Court: Well, that must be upon the theory that both sides are going to offer evidence upon that point then.

Mr. Stout: Yes.

The Court: Then why should I eliminate from the consideration of the jury evidence tending to show all the facts that occurred during the course of the transmission of the cars?

Mr. Stout: For this reason, that the law only recognizes certain excuses for delay.

The Court: Well, what are those excuses?

Mr. Stout: Why, act of God and the public enemy. We are suing under the common law liability, but it does not recognize a con-

gestion on the road or an accumulation of freight, as I understand the law.

The Court: I have never seen a case which says that delay is always to be attributed in order to excuse the company to the act of God or the public enemy.

Mr. Stout: I think I have a case right in point.

The Court: They are responsible for injuries done to the goods where those injuries arise from any other cause than the act of God or the public enemy. Well, I will let him introduce this testimony anyway—this particular question and answer—and then we will adjourn until the morning.

(Question repeated.)

Mr. Stout: May I not retain the position to object to this question tomorrow morning if I submit an authority—

The Court: Oh, yes. I will permit you to move to strike out that in the morning if you find any authority. I simply permit it to be introduced now because I am in some doubt myself. When you are in doubt in a card game you know what you do, and when you are in doubt here you just admit it. I probably will have something to say about it myself in the morning, but I will admit this question now, and then you can submit that in the morning.

(Adjourned to Wed., Sept. 24, 1913.)

(Case resumed Sept. 24, 1913.)

The Court: Mr. Stout, you wanted to say something about the point that was raised last night as to evidence, you said.

Mr. Stout: The authority I had in mind,

the case of Illinois Central Railroad Co. *vs.* Carl, 64 Ill., 128, where the principal cause of delay in transporting grain by a railroad company was an accumulation of its cars at all its sidings, and the fact that the company had undertaken to carry more freight than it could manage successfully—it was held that even if the company and its agents were in some degree at fault in not forwarding the grain more promptly it would not excuse the company for a delay in shipping grain to the plaintiff.

The Court: That would seem to be against you.

Mr. Stout: The case of Sherman *v.* Penn. R. R. Co.—"It is the duty of common carriers to ship the goods to the point of delivery without unavoidable delay, and aside from the conditions in the bill of lading they are liable for loss for any cause save the act of God or the public enemy."

The Court: Liable for loss, yes. There is a vast difference between loss and delay.

Mr. Stout: I do not intend to push my objection any further. I think the time for objection is when the cause is shown for the delay.

The Court: Do I understand you withdraw the objection?

Mr. Stout: Yes.

The Court: I have looked at the cases over night, such as I had facilities for looking at —but I have not the slightest doubt in the world that I ruled absolutely correctly last night on the subject; and one case which is on all fours with the case now being tried and which cites the case favorable to the view against you which you have cited in your

favor, the Illinois case, is Joynes *v.* P. R. R. Co., 83 Atlantic Rep., 1017, and that goes all over the question and lays it down as the indubitable proposition that the railroad company can show what the circumstances were which caused the delay, and then it becomes a question of fact for the jury as to whether that delay was reasonable or unreasonable; and then I found a very interesting case in your own brief which seems to settle the question absolutely. Under the letter "C" of your brief, page 4, I find this, under the title "Must deliver goods with dispatch"—"The carrier is not an insurre of perishable goods which themselves contain the elements of destruction occasioning their own loss or deterioration, but is required to exercise reasonable care and diligence to protect the goods from injury while they are in their custody as well as to deliver them with dispatch to the consignee or connecting carrier." That would seem to indicate that what the carrier is obliged to do is to use reasonable care to deliver them with disptach, and it does not insure that they shall be delivered before the perishing takes place; and you will find in this Joynes case a complete discussion of it, where the circumstances were precisely similar to the circumstances here. There they had a yard for delivery that was for the convenience of men who did not have a warehouse, and they let them use the yard and keep the cars there for 48 hours without charge, and afterwards upon paying a demurrage charge, and somebody shipped the goods who already had cars in the yard, and the Supreme Court of Pennsylvania said that it was a question which should have been submitted to the jury

whether the congestion was due to the fault of the railroad company or not, and they reversed the decision however upon the ground that the trial judge had made the error of saying that it was probably the fault of the shipper himself who already had cars in the yard, and the Court said "It cannot possibly be his fault when he has a legal right to keep them there, because fault is based upon a neglect of duty, and here he had a clear right and could not have neglected a duty." I will permit my ruling to stand, that the question is admissible.

(Question repeated.) A. There was a congestion.

Q. What was the cause of it, Mr. Taylor? A. Principally due to labor troubles at the New York piers, which caused the freight to back up on this side of the river.

Mr. Stout: May I be permitted to ask the witness what he means by "labor troubles"?

The Court: I suppose you can ask him that.

By Mr. Stout:

Q. What do you mean by labor troubles? A. Strike.

Mr. Stout: On that ground I move to strike out his answer, on the authorities that I have here—quite a number of them. We are suing —as the case now stands it is on the common law liability. Beginning at the bottom of page 8 of the brief—this New York case—a railroad corporation is responsible for damages resulting from a delay to transport freight in the usual time, which was caused by a number of its servants suddenly and

wrongfully refusing to work. Of 168 engineers in the employ of the railroad company 140 suddenly and by concert abandoned their engines for the purpose of compelling the company to rescind a reasonable regulation. Held: that although the superior officers were without the slightest fault, the corporation was responsible for the damages caused by delay in transporting property which resulted from the strike. Then there is the Sherman case which says that they are liable for all damages except the act of God and the public enemy, and it goes on to say that the defendant as common carrier is liable for any interruption to the transit caused by refusal of servants to perform their duty, which occasions a loss to the plaintiff. And the Illinois case; Pittsburgh *v.* Hazen. It is doubtless the law that the railroad companies cannot claim immunity from damages resulting in such cases—strikes—from the misconduct of their employees, whether such conduct be willful or merely negligent. If employees of a common carrier suddenly refuse to work and the carrier cannot promptly supply their places with other employees and injury results from the delay the carrier is responsible. Then there are a number of cases cited under this principle: The carrier is liable for the wrongful act of the servants during the course of their employment, and therefore if employees go on strike, abandoning their duty, and cause damage or delay to good in their charge or control, the carrier is liable, the delay being due to the employees' wrongful act.

The Court: Well, I will hear the other side on that.

Mr. Hartpence: At this point there is no

evidence to show that the labor troubles, or strike referred to by this witness, were labor troubles—

The Court: That it was a strike of the men of this company?

Mr. Hartpence: Yes. It may be they were intimidated—

The Court: I will refuse at present to strike that out. You may ask if it was the men of this company and then renew your motion.

By Mr. Stout:

Q. Do you know whose—

Mr. Hartpence: I object to the interrogation of this witness at this time. It seems to me that is purely cross-examination.

The Court: I will permit it. The matter of the order of evidence is purely in the discretion of the trial judge. I will permit this question.

By Mr. Stout:

Q. Were these employees of the Pennsylvania Railroad that were on the strike? A. They went on a strike, yes sir.

Q. The employees of the Pennsylvania Railroad? A. Yes, sir.

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

By the Court:

Q. And was this congestion that you speak of due to their strike? A. The strike—they went out in sympathy with other strikers.

Q. Well, the congestion of your freight was due to the strike of your men? A. Yes, sir.

Mr. Stout: I renew my motion.

The Court: Now I will hear you, Mr. Hartpence.

Mr. Hartpence: The strike in this particular instance was of such a far-reaching character and involved so many different phases that it does not seem to me with the testimony that is now in, and particularly with regard to the testimony brought out by Mr. Stout's questions, that I am in a position to argue it at all.

The Court: I apprehend that if the delay was caused by a strike of far reaching extent and was contributed to in a substantial degree by the servants of this company, that that would not be an excuse to this company for the non-delivery of the goods in the absence of an express contract, and I do not know of any case which says that it would. If you have any such authority I am ready to hear it.

Mr. Hartpence: Then if we can interrupt the further examination of this witness at this time we will call for the bills of lading which have been produced in the case and offer them in evidence.

Mr. Stout: We object to their offer.

The Court: You do not object to their offer; you object to their receipt.

Mr. Hartpence: We offer them.

Mr. Stout: We object to their receipt.

The Court: I will permit them to go in because there is absolutely no reason stated for their non-reception, and I will permit them to go in evidence.

Mr. Stout: The objection is this—

The Court: The objection has been made and I have ruled on it. It has been stated in all the cases that a mere objection without reason is not sustainable. You have made your objection and I have overruled it.

Mr. Stout: I had a reason.

The Court: But you did not state it.

Mr. Stout: Does Your Honor think he ought to take advantage of our laxity in not stating it quickly? I had stated my objection——

The Court: You stated your objection and did not state the reason. Then your thoughts were quickened by my suggestion that you had not stated a reason and then you say you have one. I cannot wait several minutes after a man has apparently ceased and then assume that he is going to say something more.

Mr. Stout: I think that I have in the course of this trial made other objections and Your Honor has said, "What is the ground of your objection?"

The Court: That was purely a gratuity on my part. I am not going to say "Are you going to comply with the rules of law?" That is your fault and not mine.

Mr. Stout: I may have been in the wrong, but since I was depending upon Your Honor pursuing the same course in this case as in the others, I did not state my ground until Your Honor said "What is your ground?"

The Court: If that is what counsel is going to do I shall insist upon my ruling here, so that that practice will be stopped. I have done it several times because I have felt that you ought to have an opportunity to state a reason; otherwise the objection would be entirely unavailing, and otherwise the ruling on my part would probably be reversed.

Mr. Stout: Then I appeal to Your Honor to reconsider your decision in order that I may state my reasons.

The Court: Well now, you may state them, and this is the last time. I am not going to

permit that to be done any more. The rules of the court are absolutely settled by every case that has dealt with the subject to the slightest degree that an objection without a reason stated is entirely unavailing and that if it is overruled the party who made it is entirely without a remedy and entirely without a foot to stand on. Now it would be a great practice if counsel could stand up and say, "Why I relied on the fact that the court would tell me that I should state a reason, and if he didn't tell me I would be deeply aggrieved." Now this time you may state your reason, but this is the last time.

Mr. Stout: My objection to these bills of lading going into evidence is that under the case of Hill *v.* Adams Express Co. no presumption will be indulged in as to goods being shipped under a bill of lading. In other words—

The Court: I remember the ruling in the Hill case.

Mr. Stout: Therefore there is no evidence in this case that the bill of lading so far as it might be a contract has been established. There is no proof that these bills of lading were legally issued, in other words there is no proof that the bill of lading in each instance was issued by the initial carrier, and since no presumption can be indulged in, there must be proof that these bills of lading were issued. The mere fact that Roddenbery might have sent these bills of lading to Spada is no proof that they had a legal inception. He might have made copies and sent them to Mr. Spada.

The Court: As against that objection I overrule the objection. It seems to me to

be perfectly clearly settled that the practice which was testified to by your client, Mr. Spada, was that the bill of lading did accompany the goods, or precede them, and that it was received by him always through the mail; that he got no other bill of lading; and he himself calls these things the bill of lading for the goods, and they purport on their face to be bills that were issued by the initial carrier, the railroad company, by which they were shipped from Cairo, Georgia, or wherever they came from; and it seems to me that that is enough evidence to permit the jury to draw the inference that they are the bills of lading in the case, given by the initial carrier to the agent of Mr. Spada, who shipped the goods from their place of embarkation; and if they are not those bills of lading, why you may show that. Furthermore I might state this, that they are clearly admissible as part of the res gestae of the transaction there and part of the facts of the transaction, received by this man and accepted by him and dealt with him as such and retained and handed to his counsel as such. They are a piece of the transaction itself.

Mr. Stout: Yes, Your Honor, insofar as these bills of lading are shipping receipts. A bill of lading consists of two parts, a receipt—

The Court: I know all that and agree to that. What is the point of it?

Mr. Stout: Under the Hill case, it says the mere receipt by the shipper of a paper containing the liability of the carrier does not import the shippers' assent to any such limitation.

The Court: I am not holding anything as

to the effect of it when it is in. I am holding that it shall go in. The only question is whether this is evidence in the case. Now what its effect is I will deal with when I come to it.

Mr. Stout: I haven't any quarrel with that.

The Court: That is all I can do now. If they do not connect it up and make a case, of course I will have to rule against them. The only question before me now is, Shall I admit them? And I shall. Your objection may be noted to their admission so that whatever there is wrong about it I may be corrected in if I am wrong.

(Bills of lading received in evidence, D-4, D-5, D-8, D-11, D-14, D-17, D-19, D-20½, D-23.)

Mr. Hartpence: We also offer in evidence the official classifications filed with the Interstate Commerce Commission and duly certified by the Secretary of the Interstate Commerce Commission, which under the provisions of the Interstate Commerce Act, are to be received as evidence in the form in which we present them.

Mr. Stout: I object to the receipt of this official classification of rates, on the ground that the defendant in its answer has not laid any foundation for the receipt of this report in evidence.

The Court: Do these bills of lading refer to these schedules?

Mr. Hartpence: I am not certain that the bills of lading refer to them, but the Interstate Commerce Act itself and the decision of the United States Supreme Court in the case of an interstate shipper eliminated everything else except the procedure under the

Interstate Commerce Act, and it is not necessary, it seems to me, to have set forth in the answer as to what we proposed to put in in the way of evidence.

The Court: Oh no, you are not obliged to plead your evidence. There is no question about that, but what is the precise relevancy, as you consider it, of these schedules—that is, with reference to your defense?

Mr. Hartpence: The relevancy is that the schedules become part of the law the very minute they are filed with the Interstate Commerce Commission, and are just the same as though they were read into the Act itself.

The Court: But what is the effect of them in substantiating your defense?

Mr. Hartpence: They are notice, by the mere filing with the Secretary of the Interstate Commerce Commission, of everything they contain.

The Court: It is a large book of schedules, but what do they contain that has any bearing on this defense?

Mr. Hartpence: These schedules contain the rates and the routing for the shipment and the rate paid is the conclusive test of the contract under which they are shipped, and the schedules or tariff rates and these schedules from the Interstate Commerce Commission show just what those terms were.

The Court: Well, what does the rate charged for the shipment of these watermelons—assuming it to be the rate that they have a right to charge and do charge—what effect has the rate on this defense?

Mr. Hartpence: The rate determines whether or not the shipment is made under one of two possible arrangements for ship-

ment. A certain rate is paid if the shipment is under the carrier's common law liability; another rate is paid which is a reduced rate from that if it is shipped according to the contract between the parties, and the rate paid determines, in the absence of everything else that might ordinarily and heretofore have entered into the consideration and the question and the facts accompanying this contract of shipment—the rate paid determines the contract, regardless of what the parties say—of what the shippers say. The carrier says "once it is shown that a certain rate is paid for this shipment, then we hark back to the contract, which the tariffs and the schedules say must have been the contract under that rate"; and then the Supreme Court of the United States steps in and says that that is conclusive, it is irrefutable, it is irrebuttable, otherwise the very discrimination, the very favors which carriers were said to have accorded to those that were in their favor, would be permitted.

The Court: Now assumng that to be so, assuming the goods to have been shipped under the second rating which you say makes a special contract and does away with shipments under the common law regulations, what is the contract and where do we find its terms?

Mr. Hartpence: The contract then is the bill of lading.

The Court: Where is the provision of law which says that?

Mr. Hartpence: Shall I read it to your Honor?

The Court: Yes; I would like to hear it.

(Mr. Hartpence reads Rule 1, page 1, of the Official Classification.)

The Court: Is the uniform bill of lading in that schedule?

Mr. Hartpence: Yes.

The Court: And your contention is that these bills of lading conform to the uniform bill of lading?

Mr. Hartpence: They may either conform to the uniform bill or they may be a special bill of lading issued by the carrier other than the uniform bill.

The Court: Yes, but this provision says that this limited liability only attaches if they conform to the uniform bill of lading.

Mr. Hartpence: Yes.

The Court: Then if they do not conform to the uniform bill of lading you are cast back upon the situation as it was evidenced in Hill *v.* Adams Express Co. and must show that there was a knowledge on the part of the person who received this of the contents of the bill of lading and an assent, express or implied, to the terms of it, before he can be bound by it.

Mr. Hartpence: But this is only a portion of the classification.

The Court: I understand.

Mr. Hartpence: Now there is a still further provision in the subsequent classification, or the classification that accompanies this. They were certified separately. It provides that the reduced rates specified in this classification will apply only on property shipped subject to the conditions of the carriers' bill of lading.

The Court: And by the carrier's bill of lading is meant the uniform bill of lading provided in your schedule.

Mr. Hartpence: Not necessarily so. "Property not carried subject to the provisions of the carriers' bill of lading will be at the carriers' liability, limited only as provided by common law," etc.

The Court: What classification is it which lets him go according to the carrier's bill of lading?

Mr. Hartpence: It is what is called the Southern classification.

The Court: Then there are three classifications apparently of rates?

Mr. Hartpence: Yes; and one classification permits the carrier to use the uniform bill. Another classification permits him to use such bill as he may.

The Court: What in the name of common sense is the reason for any such classification as that?

Mr. Hartpence: That is beyond me, but that seems to be the provision as made by the Interstate Commerce Commission.

The Court: What is the rate which is chargeable if he may use his own bill of lading and limit the liability in accordance with its terms?

Mr. Hartpence: It is the reduced rate, 10% lower than the second.

The Court: Now is it your contention that the rate charged here was 20% lower than the rate that would be charged for the common law liability?

Mr. Hartpence: No, sir; 10%.

The Court: Then what is the difference between the classification for the uniform bill of lading and the classification for the bill of lading put out by the carrier himself?

Mr. Hartpence: None whatever.

The Court: Then how do you distinguish between the two?

Mr. Hartpence: That is beyond me, as I stated before.

The Court: But the language of the provision that you read was that under all circumstances where a rate 10% lower was charged it should be in accord with the uniform bill of lading.

Mr. Hartpence: And some of the shipments in this case are under what appear to be uniform bills, and others may not be uniform bills.

The Court: What I want you to point out to me is how you distinguish between the uniform bill of lading provision and the carrier's bill of lading; how can you tell? You cannot tell by rates; you admit that.

Mr. Hartpence: No, sir.

The Court: Then how do you tell? Just tell me that.

Mr. Hartpence: The ony difference is—

The Court: The only difference is that you evade the provision which says that all carrying shall be by the uniform bill, by some apparent hocus pocus in the Act itself.

Mr. Hartpence: The difficulty in this case really grows out of the form in which this action is brought. There are nine counts in the complaint, referring to nine different cars, and the proof in each count is not the same. Some of these shipments were shipped under the uniform bill and some were shipped under the carriers' bill. Now the classification which applies to the carrier's bill would apply and be relevant as to the carrier's bill. The classification which applies to the uniform bill would be applicable and relevant to the uniform bill.

The Court: Won't you read me the provision of the law which says that a carrier can have his liability limited by his own bill of lading, differing from the uniform bill of lading, by reason of any rate that is charged? I would like to see that.

Mr. Hartpence: The law that permits that?

The Court: Yes.

Mr. Hartpence: The law is the schedule itself which has been approved and adopted by the Interstate Commerce Commission under the authority of the Interstate Commerce act and sustained by the United States Supreme Court.

The Court: Where is the decision of the Court that sustains that third classification? I refer to the so-called Southern rate as you call it.

Mr. Hartpence: The so-called Southern classification?

The Court: Yes.

Mr. Hartpence: Well, the cases in the United States Supreme Court dealing with this situation are Adams Express Co. v. Cronin; and Chicago, Burlington & Quincy v. Miller; and Kansas City Southern R. R. v. Carl, and several others; and those cases all deal with the carrier's bill of lading and they all sustain the provision of the carrier's bill of lading and the relation of the carrier's bill to the classification as filed. Now in order to clarify this situation so far as it is possible for me to do so, I will withdraw the offer of the official classificaton whch I tendered, and I wll offer the so-called Southern classification No. 38 and its rates, duly certified in the manner prescribed by the Act of Congress and ask that it be received in evidence.

Mr. Stout: I object to the receipt of the Southern classification. I do not see where there is anything before the court as stated by counsel that would apply to this case. Why, I think it is an unusual proceeding that the counsel for the defendant company be permitted at this time to set up a defense of this kind. He should have apprised us in this answer that these goods were shipped under a uniform bill of lading—according to the Southern classification—and apprise us that we hadn't any case. It might have raised an issue of law right then and there; but here he comes into court at this late hour and swamps us with a lot of classifications. We do not know what he is talking about and have not had any opportunity to prepare on it, and the answer does not say anything about it.

Mr. Hartpence: The answer says that there was a contract between the parties by the terms of which the defendant was to be relieved from liability in case of strike or in case of occurrences beyond its control, and the very voluminous interrogatories which were submitted by the plaintiff to the defendant among other things contained an interrogatory as to whether or not that contract was a contract in writing, and the answer to that interrogatory if the Court please was omitted in the reading.

Mr. Stout: It is not in evidence.

Mr. Hartpence: I am merely arguing now on the answer. The answer to that interrogatory was given to the plaintiff and he had every opportunity of interrogating further, of examining these contracts, of calling for the production, if we had them; and not only did

he not do that, but when it came time to read the answers to the interrogatories the very answer which gave him the information he was after was omitted.

The Court: I think that the answer does raise this question. First of all, all contracts float in a sort of atmosphere of law, and wherever the contract itself is silent or where there is a gap in it, the law goes into the interstices and fills it up. Now in this case we have first of all an Interstate Commerce Act; we have the fact admitted at the basis of this suit that this was an interstate commerce shipment; therefore the counsel could very well have been apprised that the law applicable to interstate commerce shipments would be relied upon by the attorneys for the railroad company. That being so, the law itself provides that the companies may file these schedules, and when filed those schedules became operative and of the same force and effect, popularly speaking, as the law itself. They are things of which persons dealing with companies must take notice and by which they are bound. Now these schedules according to the evidence now offered were filed. They were notice to all the world that the schedule had been prepared and filed and that all shipments were in accordance with those schedules or were at least bound by the schedules thus filed, and the legal consequences growing out of such filing.

Now then the defendant files an answer in which he says these goods were shipped in accordance with an express contract. That express contract, he now claims, as I assume he did in his interrogatory—I am not placing any reliance upon that at all; I simply state that

in passing to show that there could not have been much surprise about it—that express contract is what he claims is the bill of lading, —what we will call, to differentiate it from the uniform bill of lading, the carrier's bill of lading. That was the contract. Now then, under the decision in our State in Hill v. the Express Co., and afterwards in Higgins v. the Express Co., in 85 Atlantic, it is true that those contracts are not binding under the siuation and circumstances that were before the Court in those cases, unless the party had notice of them and in effect either impliedly or expressly assented to the terms of them; and the burden of establishing such binding quality of those contracts rests on the railroad company. But here a new element is added which was not found in either the Higgins or the Hill case, and that element is the element of whether or not the filing of this schedule and conformity with the schedule on the part of the railroad company with respect to the carrier's bill of lading and the effect of the Interstate Commerce Act as the law of the land binding upon everybody, does not make a change in the situation from that which was found in the Hill case and in the Higgins case. That is the situation which we are confronted by now, and that is the only thing, it seems to me, that we have got to argue very much about. I presume that is your contention.

Mr. Hartpence: Yes.

Mr. Stout: I object further to their receipt on the ground that there is no evidence that the bills of lading which have been received in evidence are issued according to the Southern rate.

The Court: Well, you see the bill of lading will show that, and that is in evidence. The rate is published and the bill of lading is in evidence. The rate is offered in evidence now, —a certified copy of it pursuant to the Interstate Commerce Act. You compare the rate in the carrier's bill of lading with the rate in the schedule and if there is conformity why then this is an applicable provision. If there is no conformity it is not. Or, to put the other view of it, if you cannot determine from the bill of lading whether the carrier's bill is in conformity with the Southern rating, why then there must be evidence to show there is conformity. Otherwise the jury could not find it; otherwise I would not let them attempt to find it.

Mr. Stout: Furthermore, there is no evidence in this case as to what rate was agreed to be paid.

The Court: What rate, by whom?

Mr. Stout: By the shipper—well, agreed between the shipper and the initial carrier.

The Court: I suppose there is this evidence, which is the most conclusive kind of evidence you can have; that rate was agreed to be paid which was actually paid.

Mr. Stout: No, I beg your pardon. In most of the cars the freight was not paid.

The Court: But the shipment was made and the company has made its charge, hasn't it?

Mr. Stout: The evidence in the case is that Spada never received the freight bill from the Pennsylvania Railroad for these shipments.

The Court: That is Spada personally.

Mr. Stout: Well, Spada & Company.

The Court: I mean Spada & Company.

Whether his correspondent did I do not know, and if the company is going to bring itself under the provisions of this schedule I think the company would be obliged to show what the rate charged was. Wouldn't that be the normal situation?

Mr. Stout: Yes.

The Court: And if they do not do that, and there is nothing to show what rate was charged, why manifestly the schedule is just as inapplicable as the wind which blows outdoors.

Mr. Stout: And further we come back to the question which I raised a moment ago: there is no proof that these bills of lading were issued by the initial carrier.

The Court: I think there is some evidence of that. I have ruled on that already.

Mr. Stout: I mean so far as there is a contract which would bind the shipper to the rate. Take for example a bill of lading, to a certain extent, it has its proper inception, is negotiable. Take for example we had a promissory note, which is a negotiable instrument; the mere fact that Roddenbery had sent a promissory note to Mr. Spada, Mr. Spada's mere production of that promissory note in court would not change a contract; he would have to prove the signature of the maker to make it binding upon the maker; and there isn't any proof here that the agent, or the initial carrier, ever authorized the signing of that bill of lading or that the name on that bill of lading which purports to be the name of the agent was put there by the agent.

The Court: Now you assert that with a great deal of vigor, but I think with not quite so much strength. Suppose I were to go to

the office of the express company and I were to find a man apparently in charge, and I were to send some package by express, and I were to receive from that man thus apparently in charge and who took my package, a freight receipt; do you mean to say I would have to prove the signature of the man? I would have to prove the facts, that the man apparently was in charge, that he took the package and that the package in due course was taken by the express company and I received this receipt. I do not care who signed it. If they want to show then in the light of that prima facie case that the man who signed it was not their agent that is their burden, but I have shown enough.

Mr. Stout: That you are entitled to those goods.

The Court: All right. Now what happened here?

Mr. Stout: I am trying to dissert that bill of lading, putting that part which is a receipt on one side and the contract on the other.

The Court: There is no difficulty about dissecting it. We all know that. Where the company simply acknowledges the receipt of the goods and describes those goods thus received, that simply amounts to a receipt and is open to refutal. Where the contractual elements come in, that is a contract and you cannot refute it. I understand those things; they are all in the books.

Mr. Stout: Now Spada we will say goes to the freight office of the Pennsylvania Railroad with this bill of lading; he goes there to get his goods; he produces this bill of lading which evidences that they are the initial carrier, received certain goods to be shipped

to a certain point; but the mere fact that he exhibits that bill of lading does not import that he is bound by a contract that might be on it.

The Court: I have not said that it does yet. I think that you are all the while arguing as if we were determining the effect of these instruments. The question that is before me is not the effect of them; it is the admissibility of them. I do not know what effect they will have, and nobody can know what effect they will have except the party offering them until it is determined upon all the evidence in the case.

Mr. Stout: Then before your Honor determines whether these goods were shipped under a bill of lading is it permissible that these schedules shall go in which are based upon the fact that a bill of lading must have been issued?

The Court: I do not know as I quite understand what you are arguing. I do not determine anything. I am not determining anything. I am simply saying whether an instrument offered here, in the light of the issues raised, is evidence. I am not determining that these are bills of lading even. I am not determining and do not have to determine that these bills of lading have anything to do with these schedules. I cannot determine that. Eventually that is a question which the jury will have to determine, in all likelihood, if there is evidence to go to them. If when all evidence is in it shall appear that these bills of lading are conspicuously inapplicable to the schedules, or the schedules to them, why you ask me to determine as a matter of law that there is nothing for the jury to pass upon

there and to relieve them of consideration of that subject matter at all, and I have to do that if there is no evidence. If there is evidence I have to leave it to them to say. But I am not determining anything except the admissibility of a schedule, of a document. When it is in what effect it will have will be determined by all the rest of the evidence that is in. When all the evidence is in you make your proper motion and say, "I move your Honor to direct a verdict here because the defendant has offered no proof that these watermelons were shippd under any instrument whatever that is borne upon by the schedules in the Interstate Commerce Act," and if there is no proof I have to do it. If there is proof that is doubtful I submit it to the jury. If the evidence is without dispute at all and no two inferences can be drawn from it, why then I take it from the jury and determine it myself. It is a mere question of the order of the trial.

Mr. Stout: I see your point.

The Court: I want to hear you fully. The questions are all new; we have nothing in this State on it. I am only too glad of argument. I like to talk myself if there is anything to be gained by it, and I am not at all averse to hearing others talk if there is anything to be gained by it. The question now pending is the tender of the Southern schedule, and the objection was made to that on the ground that there was not anything to show what the rate was in the bills of lading offered, and I was endeavoring to assert that while that probably was true, that unless they did produce something to show that there was some connection between the rates charged and the schedules, the schedules had nothing to do

with the case and would not hurt you. So I will admit those schedules, Mr. Hartpence. (Marked D-31.)

Mr. Stout: I ask that my objection be noted.

The Court: Yes, it is all down. These things have to be passed upon by the upper court and this is a good time. I am happy in the reflection that if I am wrong it will not hurt anybody permanently. The Court above will simply prance on me and that will end it.

Mr. Hartpence: Now, if the Court please, the bills of lading which have been offered and received in evidence for these nine shipments involved in the suit contain these provisions—

The Court: Is it your claim, Mr. Hartpence, that the rates have yet been established with respect to these bills of lading?

Mr. Hartpence: No, sir; we will have to produce an expert to pick them out of the schedule and tell what they are, and then the law itself makes those rates conclusive. We could not change them if we wanted to. It would not make any difference whether we changed them or didn't, the law says that they are the rates and that settles it.

The Court: And what is the criterion by which you determine that you ship either according to the Southern rate or the uniform bill of lading rate or the common law? What particular thing is there by which you fix on any paritcular thing and say "Now this was shipped under that schedule"?

Mr. Hartpence: The only thing we could do would be to show as a matter of fact what the rate charged was.

The Court: That was my impression. You see I guessed right that time.

Mr. Hartpence: The carrier's bills under

which these shipments were made, five of them, contain the provision that the carrier shall not be liable for any injury to or decay of fruits or vegetables or other perishable freight due to detention or delay occasioned by an accumulation of freight at any point or the breaking down of engines or cars or to any other causes over which the carriers have no control; and that is specially pleaded in the amended answer filed in this case.

The Court: Is there an amended answer? I have been looking at the old one.

Mr. Hartpence: In the four shipments the bill differs slightly but provides with very nearly the same effect, that except in case of negligence of the carrier or party in possession the carrier or party in possession shall not be liable for loss or damage or delay occurring while the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request, or resulting from a defect or vice in the property—which is a sort of conclusion of the propensity of fruit to decay or animal life to deteriorate or to injure itself and others—in the property, or from riots or strikes.

The Court: Which is also a propensity of animal life to injure others.

Mr. Hartpence: That was specifically pleaded in the answer, not only in the amended answer, but in the original answer, and it was because of our discovery at a late date that the bills did differ that we were compelled to set forth an amended answer. Now that becomes an exception as we understand it under all the rules of law,—an exception in the bill of lading, to sustain which the carrier is entitled to submit his proof.

The Court: What do you mean,—under all the rules of law?

Mr. Hartpence: I mean whether you take the state rules—which we now claim have been obviated—

The Court: That a strike proposition becomes an exception?

Mr. Hartpence: It is an exception in the bill of lading.

The Court: You said under all the rules of law.

Mr. Hartpence: I meant under any system. Whether we are bound by the State rules or by the Federal rules under the interstate decisions or by the common law or what not, it seems that an exception in a bill of lading, where such an exception is admitted, is an exception to prove which the carrier may produce evidence. Then if he sustains that exception he is entitled to the benefit of it. If the other side sweeps it away that is the end of it; and at this moment all that we are doing and all that we are seeking to accomplish in the question propounded to the present witness at the time of interruption was to show that those facts exist which will sustain the exception in the bill of lading.

The Court: I understand that.

Mr. Hartpence: Therefore we submit that the question propounded is material. That brings me right back to where we started from when we were interrupted.

The Court: I do not think there is any interruption now. We admitted the evidence and the schedules are in and the claim is that these bills of lading as I understand it are under the Southern rating and that therefore this party is bound by them outside of, even

in contravention of the rule laid down in Hill v. the Express Co., and so on. The only point now is that until you have shown that the bills of lading are in some way binding upon these plaintiffs that you cannot prove any exception, under any system of law, to use your own language, whether it is common law or State decisions or interstate commerce law. You have got to show that there is something that binds the plaintiffs to these bills of lading.

Mr. Hartpence: I presume that in order to connect that up still more closely we will have to call a witness who will testify as to what the rates are in this schedule, and then show that the rates which were charged are the rates applicable to the carrier's bill of lading. Once that is done, in view of the provision in the Interstate Commerce Act which makes it obligatory upon the initial carrier to issue a bill of lading, in connection with the testimony as it now exists—

The Court: What is the penalty if he does not?

Mr. Hartpence: The penalty is anywhere from, I think, one thousand to twenty thousand dollars fine or two or three years in State's prison for the individual.

The Court: That seems to indicate that he may not do it.

Mr. Hartpence: But the presumption is that he did do it.

The Court: No; the presumption is that he will do it; because every man is presumed to obey the law and not incur a criminal charge.

Mr. Hartpence: But the presumption isn't in this case because it is already testified—

The Court: But suppose that he did not do

it, and suppose that he charged a rate that would bring him under the Southern schedule, what effect would that have upon the relationship which existed between the parties as governed by the common law?

Mr. Hartpence: It is incumbent upon the other side to show that the bills are not issued.

The Court: Where do you get that?

Mr. Hartpence: The presumption is in favor of the issuing of the bill because the statute requires it.

The Court: But what bill?

Mr. Hartpence: Well in this case there are bills.

The Court: I understand, but you said that the presumption was in favor of the issuance of a bill. Now under this third section what presumption would you make?

Mr. Hartpence: If the carrier produces a bill after the shipment has been proven and that bill is produced from the custody of the plaintiff and that plaintiff testifies that it is a bill of lading which he received for that shipment, it seems to me—

The Court: That is another proposition; that is a question of what the evidence shows. You were talking about presumptions just now, and under the third classification there would be no presumption that any kind of a bill was issued except that a bill was issued and the burden would be on the carrier to show what bill.

Mr. Hartpence: We have shown that a bill was issued.

The Court: Go ahead and ask your questions then.

Q. What kind of freight on the Pennsylvania

Railroad goes to piers 27, 28 and 29, New York? A. All commodities—all kinds of freight.

Q. And in order to reach piers 27, 28 and 29 in New York the freight coming in over the New York division must take what course? A. Float.

Q. From what point? A. Harsimus Cove.

Q. And does all that freight then go through Harsimus Cove yard at Jersey City? A. Yes, sir; Harsimus Cove and Jersey City; there is two yards there.

Q. Harsimus Cove Jersey City yard? A. Yes, sir.

Mr. Stout: May it please the Court, this testimony, it seems to me, is on the question of congestion that was produced by a strike. Now we still maintain that this evidence is not admissible. It is only admissible under the bills of lading, and there isn't any proof to my mind that the bill of lading so far as it is a contract has been proved.

The Court: As binding upon these parties? That is perfectly true. But the bill of lading is in. He is simply putting in evidence of a strike. If he does not show it is binding on the parties it cannot hurt you. I would direct against him if there was no evidence that it bound these parties. It is simply a matter of order of getting the proof in. It is simply putting the cart before the horse. I am not saying that by way of criticism. Everybody does it.

Mr. Stout: I did not understand it that way.

Q. When did the labor troubles to which you have referred start, Mr. Taylor? A. July 9th.

Q. Of what year? A. 1912.

Q. And how long did they continue? A. Until July 21, 1912.

Q. And during that time was there any accumulation of freight as a result of the trouble which you have referred to?

Mr. Stout: I object as leading and it imports a conclusion, whether there was an accumulation of freight. I think he ought to testify as to what the condition was in a certain yard.

Mr. Hartpence: I will withdraw that.

Q. What was the result, or what occurred with regard to the freight traffic from those labor troubles to which you have referred? A. It caused a congestion in the Harsimus Cove yard.

Q. How far did that congestion extend? A. I do not think we reached the normal conditions until about August 1st.

Q. What do you mean by not reaching normal conditions? A. That we had cleared up the accumulation that we had for the New York piers and were working in a normal condition.

Q. Did the congestion that you have referred to extend over any greater area than Harsimus Cove yard? A. It caused cars to be held on the Meadows when our yard go so full that we could not take in any more.

Q. Then what happened when your yard got so full that you could not take in any more? A. Held it up on the Meadows.

Q. And what is the nature of the Meadows which you have referred to, what sort of conditions do you find there with regard to traffic? A. I do not just understand that.

Q. When you refer to the Meadows, what is it? A. Oh! The Meadows?

Q. Yes. A. It is a receiving yard for—generally for cars to be classified for different points between the Meadows and Jersey City, and then

mixed trains that have part of their train for Harsimus Cove, will stop at the Meadows and classify such cars out of it to come to Harsimus Cove.

Q. And how many tracks are there at the Meadows? A. I cannot exactly answer that question.

Q. Do you know how large an area the yard covers there? A. No, sir.

Q. How large an area does the Harsimus Cove yard cover? A. I have about 235 tracks at Harsimus Cove.

Q. How large an area does the Jersey City freight yard cover? A. They have 28 tracks in that yard.

Q. And do you konw of your own knowledge what the means of communication are between the Meadows yard and the Harsimus Cove yard? A. Yes, sir.

Q. What? A. As I said, trains are classified on the Meadows and the yard master on the Meadows instructed to send those trains in when we can take them.

Q. Who gives those instructions? A. It comes through the train master's office.

Q. And do you have anything to do with that yourself, Mr. Taylor? A. No, sir.

Q. What is your business with regard to those trains? A. If there is any freight on the Meadows that I want I notify the train master's office to order such train in.

Q. And then the train master transmits that to the Meadows? A. Yes, sir.

Q. And what do you mean when you say if there is any freight on the Meadows that you want? A. I may have reduced the accumulation of a certain class of freight in my yard so that I can take in a portion of that that they have on the Meadows.

Q. (By the Court). What you mean is that as

fast as you get room you select what freight you want in the Meadows and have that brought in to take the place of that which has been unloaded and the cars sent out? A. Yes, sir.

Q. And you personally have charge of that part of the work in the Harsimus Cove and Jersey City yard, is that true, Mr. Taylor? A. Yes, sir.

Q. Now Mr. Taylor, can you state whether or not the cars involved in this present suit, or any of them, were in any way affected or held up by the congestion to which you have referred? A. All cars that arrived between July 9th and 21st, or up to July 21st, would be affected ,and even after that, up to about August the 1st, as I stated.

Q. Do you know about how many cars were actually affected and held up by that congestion during the period you have referred to? A. No, sir.

Q. Do you know of your own knowledge the actual storage capacity of the Harsimus Cove yard? A. Yes, sir.

Q. What is it? A. 1500 cars.

Q. And is that exclusive of the capacity of the Jersey City freight yard? A. Yes, sir.

Q. What is the capacity of that yard? A. About 200 cars.

Q. And that was also its capacity in June of 1912? A. Yes, sir.

Q. And that is also true of the capacity of Harsimus Cove yard in 1912, what you have stated? A. Yes, sir.

Q. Do you know what the storage capacity of the Meadows yard is? A. No, sir.

Q. Is there any particular order or system followed in the placing of watermelons in the Jersey City yard for delivery?

Mr. Stout: I object to the question on the ground that he cannot prove a system in this

way in reference to the watermelons. He has to prove the way in which they are handled from one point to another.

The Court: Why can't he prove the system? He is the yard master in the yard.

Mr. Stout: Asking what is the system?

The Court: Yes, asking what the system is, if there is a system.

Mr. Stout: I think that that imports a conclusion.

The Court: Well, a great many things import a conclusion. You ask, Is a person in love? Is he angry? Was a horse going fast? Those are all conclusions.

Mr. Stout: I withdraw the objection.

A. The system is to place all cars of watermelons as they arrive, as long as we have track room for them. When the tracks get full then they go to the storage tracks where they are ordered in by the agent. He instructs me to fill up the tracks again.

Q. And what tracks do you refer to when you say they are placed until they are full? A. The tracks in the Jersey City yard. We generally use six tracks for melons.

Q. What are those tracks called? Are they the delivery tracks? A. The delivery tracks, yes, sir.

Q. Now is there any particular time of day for the placing of watermelon cars on those delivery tracks? A. We endeavor to have them placed by 7 o'clock in the morning.

Q. And is there any special reason why you follow that system or order? A. To have them ready for these consignees; that is the reason.

Q. How as to the watermelon cars that come in to the Harsimus Cove yard, or in to the Meadows during the late afternoon or evening preceding the

placing? A. We make no effort to place them in the afternoon. It is considered the market is closed and we do not pay particular attention to them in the afternoons. Q. And are they held over then until the following morning? A. Till the following morning.

Q. Were any efforts made or means taken, Mr. Taylor, to relieve the congestion and hasten the delivery of the accumulated cars you have referred to? A. At Jersey City or the New York piers?

Q. At Jersey City? A. Yes, sir; every effort was being made to place every car that possibly could be placed.

Q. What sort of effort? A. By using all track space we possibly could give for it.

Q. Did you use any extraordinary track space that you do not customarily use? A. Well, there were days when we used additional tracks, yes, sir.

Q. And how about as to points of delivery; were any new points of delivery opened up? A. No, sir; not for watermelons.

Q. Did you make use of any additional sidings or anything of that sort in addition to your regular place of delivery? A. Not for watermelons.

Q. For anything? A. Peaches.

Q. And were they part of the accumulation that you have referred to? A. Yes, sir.

Q. Now my question was as to whether any extraordinary means were taken to relieve the congestion in that respect? A. There was, by using additional sidings, tracks and sidings.

Q. Anything else done to hasten the relief of that congestion? A. That is about all that I know of.

Q. Was there any extra motive power placed in the yard to your knowledge? A. No, sir.

Q. Who would have charge of that? A. Myself.

Q. As a result of this congestion that you have

referred to, Mr. Taylor, were deliveries made at Jersey City of New York as well as New Jersey shipments? A. There was delivery made of New York freight in Jersey City, yes.

Q. And do you you know why that was? A. Because they would not handle it in New York.

Q. And how was it handled in Jersey City? A. Trucked from the cars.

Q. And what did the New York shippers do in respect to that? A. Sent truckmen over for it.

Q. Was that for the peaches you have referred to? A. Yes, sir; peaches and vegetables.

Q. Chiefly the perishable freight? A. Yes, sir.

Q. That is all, Mr. Taylor.

The Court: Where do you find, Mr. Hartpence, in this classification or schedule anything which indicates when a shipment is to be taken as shipped under the Southern classification?

Mr. Hartpence: When it is shipped from a Southern port.

The Court: That does not make it. Nothing that you have said and nothing that you have read indicates in the slightest degree that that is true. My impression is from reading this Southern classification in the general rules that are laid down here, where you have marked the place, that the Southern classification only applies when the property is carried subject to the carrier's liability, and whether it is carried so or not depends upon the agreement between the party and the carrier.. If you can find anything that militates against that view of it I would like to see it.

Mr. Hartpence: I think if the Court will bear with us until we put the witness on the stand he will explain those tariff schedules as an expert.

The Court: Of course he cannot give any conclusion with respect to the tariff schedules that it will make it mean anything different from what the Court concludes. If it is not found in the book what he says does not go; if it is found in the book it goes because it is in the book, and his construction of the language of that will be just as indifferent to me and as idle as though he hadn't said it.

Mr. Hartpence: If Your Honor will wait until I put him on.

The Court: Very well.

Cross-examination by Mr. Stout:

Q. Mr. Taylor, you said on your direct examination that commodities of all kinds were delivered at pier 28? A. 27, 28 and 29.

Q. And you say that now as a fact, do you? A. Yes, sir; except watermelons.

Q. Except watermelons? A. Yes, sir.

Q. Well, that is very vital. And they do not go to New York at all, do they? A. No, sir.

Q. What was the nature of the employment of these employees of the Pennsylvania Railroad that were on strike over in New York? A. I could not answer that question.

Q. Pardon me? A. I have no way of knowing what was the trouble.

Q. You do not know whether they handled freight or what they did?

Mr. Hartpence: I object to that question.

A. They handled freight, yes, sir.

Mr. Hartpence: Wait a minute. The previous witness has not testified on direct examination anything in regard to the freight men in New York except the fact that they were employees of the Pennsylvania Railroad, and that there was a strike, and I do not think

that this witness can be cross-examined as to an intimate knowledge of who they were and what they did and all that sort of thing, because he has not professed to know anything about it.

The Court: Yes; you asked him whether those men on strike delayed the handling of this freight and whether they were responsible, or the strike was responsible, for the congestion. Now they have a perfect right to find out what he knows about the whole situation.

Q. Isn't it a fact, Mr. Taylor, that these employees of the Pennsylvania that were on a strike at pier 29 were engaged before this strike in unloading peaches? A. I cannot answer that question because I do not know.

Q. You do not know? A. No, sir.

Q. During this period from July 9th to 21st, peaches that were billed to pier 29 were delivered at the Henderson street yard, Jersey City? A. Yes, sir.

Q. And those peaches that were billed to pier 29, New York City were placed upon the tracks in the Henderson street yard, which were usually used for watermelons, isn't that a fact? A. Yes, sir.

Q. Then isn't it also a matter of fact that watermelons are unloaded by the consignees of the watermelons or the owners? A. Yes, sir.

Q. And not by the employees of the Pennsylsylvania Railroad? A. Yes, sir; not by the employees.

Q. Then during the period of this congestion which you say was produced by the strike, the tracks in Jersey City which were usually used for watermelons where the dealers in watermelons were in the custom of selling them in the yard,

those tracks which were used for that purpose were used for peaches? A. Not all, some of them.

Q. Some of them, and a large proportion of them? A. Some of them were.

Q. And the watermelon tracks are tracks 15, 16, 17, 18, 19 and 20? A. No, sir; 16, 17, 18, 19 and 20.

Q. Not 15? A. I'll agree with you; 15, 16, 17, 18, 19 and 20; six of them; that's right.

Q. And during that period of time the cars of peaches that were billed to pier 29 were placed on these watermelon tracks and there unloaded by the dealers in peaches into trucks and taken to New York, as was customary before that to be done with watermelons? A. Yes sir, but these peaches were handled commencing at 11 o'clock at night and a majority of them were trucked away before 7 o'clock in the morning.

Q. Then do you mean us to understand that the placing of the peach cars on the watermelon tracks did not delay the bringing in of the watermelons? A. No, sir.

Q. Then I understand if they did unload them during the night or during another period it did contribute to this congestion, did it not? A. It contributed to this congestion, yes, sir.

Q. Did you keep peaches on these delivery tracks that were customarily used for watermelons as late as ten o'clock in the morning? A. Yes, sir, sometimes.

Q. Then that would interfere with the watermelons? A. Yes, sir.

Q. You do not now, do you, Mr. Taylor, just when these cars of watermelons involved in this suit were placed on the delivery track accessible to Spada & Company? A. No, sir; I do not keep such records.

Q. The last record that you have of them was when they left Harsimus Cove for the delivery yard? A. Yes, sir.

Q. And the delivery yard in Jersey City is the yard that you refer to as the Jersey City yard? A. We have a Jersey City yard further over and then we have the Jersey City delivery yard. We call it the ball ground.

Q. Well, the yard at the foot of—what is it?—Henderson and Second street? A. Second and Henderson.

Q. You testified something about the Jersey City yard; is that what you meant by the Jersey City yard? A. No, sir; in answering the capacity of the Jersey City yard I mentioned both.

Q. You did not mean the delivery yard? A. I mentioned both.

Q. What is the capacity of the delivery yard at Henderson and Second street? A. I answered, about 200 cars.

Q. And that is what you mean by the Jersey City yard? A. Jersey City delivery yard.

Q. And this yard known as Harsimus Cove yard contains storage tracks, does it not? A. Yes.

Q. That is the object of the Harsimus Cove yard,—storage yard? A. Yes, sir.

Q. And these watermelons were held for some time on the storage tracks in the Harsimus Cove yard? A. The records show some of them were.

Q. That is what I mean, some of them; and then others were held in the Meadows yard? A. Yes, sir.

Q. And one car at Waverly? A. Yes, sir.

Q. At those places the watermelons were not accessible to Andrew Spada & Company? A. Not to unload them, no, sir.

Q. Isn't it also a fact, Mr. Taylor, that during this period from July 9, 1912, to July 21, 1912, that watermelons as well as other commodities were shipped backward and forward on these tracks in the Henderson street yard? A. Yes, sir.

Q. And at certain times of the day you could

get watermelons there and at other times of the day you could not? A. Yes, sir.

Q. Do you know as a matter of fact whether when we speak of the watermelon market we mean Jersey City, in this community? A. Yes, sir.

Q. Because no melons are delivered in carload lots at New York City? A. No, sir; Wallabout is the only place that they go outside of Jersey City yard.

Q. That is in Brooklyn? A. Yes, sir.

Q. And watermelons have not been sent over to New York for six or seven years? A. I think it is fully that time.

Redirect-examination by Mr. Hartpence:

Q. And Mr. Taylor they are sent to the Jersey City market in Second and Henderson street yard even though they are consigned to New York? A. Yes; we frequently get cars billed to New York. We pay no attention to the New York billing but ship to the Jersey City yard.

Q. And shippers and consignees generally in that business understand that? A. They understand that.

Q. And they go to the Jersey City yard for their melons? A. Yes, sir.

Q. As a matter of fact, Mr. Taylor, they not only go to the Jersey City yard for their produce, but they buy it and sell it there, do they not? A. Yes, sir; they have a regular auction there in the morning.

Q. As the cars stand upon the track? A. Yes, sir.

Q. And isn't it also true that that is sometimes done with the cars over in Harsimus Cove yard on storage? A. They sell a great number of cars on the storage track. They know where those storage tracks are and they go there every morning and

have this auction there as well as down in the yard.

Q. And some of those cars on the stoarge tracks consigned to Jersey City or New York as a matter of fact never reach the Jersey City yard, do they? A. Numbers of them never reach Jersey City yard. Just as soon as they are sold the freight agent will give me a bill order showing the disposition of such cars, whether they are to go to Perth Amboy, Paterson, Wallabout or where.

Q. Sometimes they go out through the New England States and all over, do they not? A. Oh, a great many of them go on the New Haven Road.

Q. And isn't it also true that very often carloads of melons that are placed on the delivery track are not emptied at once? A. They are diverted right from the delivery track, a great many of them.

Q. They are what? A. Diverted to some other point.

Q. And the cars are shifted from place to place at the request of the consignees or purchasers, are they not, very frequently? A. From one track to another in the yard?

Q. No; from one place in the yard to another, and directed to be held? A. Not taken out of the delivery yard once they are put in there. They are not taken out to be held.

Q. Are they never taken from the delivery yard back to the storage yard and held there pending sale. A. No, sir.

Q. But they do remain on the delivery tracks, do they not, sometimes for prolonged periods? A. I would say two or three days. The agent can best answer that.

Q. But to your knowledge you have seen it done, have you not? A. I have seen it done.

Q. And do you know why they are thus held? A. No, sir.

Q. Aren't they held as a matter of fact by the consignee while they are speculating in the market with them? A. That is my understanding.

Recross-examination by Mr. Stout:

Q. Mr. Taylor, prior to July 9, 1912, you never saw an auction sale of peaches on the watermelon tracks in the Henderson street yard? A. For pier 29?

Q. No? A. Yes, sir, I have.

Q. During the watermelon season? A. Yes, sir. The cars that would be laying around the ice house, which is the Jersey City delivery yard, or was until this summer,—the consignees would bring buyers over there and open up the car and show it to them and sell it to them from those tracks.

Q. Now if these tracks were generally used for watermelons if you had watermelons enough to fill those tracks you would not put on peaches to the exclusion of watermelons, would you, and have an auction sale conducted there? A. No, sir.

Q. Do you know of your own knowledge whether Andrew Spada & Company ever had any cars diverted from the Henderson street yard?

Mr. Hartpence: I object to that question.

A. No, sir.

Mr. Hartpence: I object because the witness has already stated that they were never diverted from the Jersey City yard once they were placed for delivery.

The Court: I will permit the question.

A. No; I do not know who the car belongs to after the ticket leaves me and goes to the agent.

Q. There was no strike that you know of on the lines of any railroad between the shipping points and the delivery yard, Jersey City, during this period? A. No, sir.

Q. The only strike that you know of was the one over at pier 29? A. Yes, sir.

DAVID K. BUTLER, sworn.

Direct-examination by Mr. Patterson:

Q. What is your full name, Mr. Butler? A. David K. Butler.

Q. And whom are you employed by? A. Pennsylvania Railroad Company, Division Freight Agent's office, New York.

Q. And are you familiar with the tariffs governing shipments from the South? A. Reasonably so.

Q. Will you by looking at those tariffs, Mr. Butler, tell us the freight rate, the regular tariff rate, from Oaktown, Georgia, to Jersey City, New Jersey, in force July 8, 1912?—Oaklawn, I think it is, instead of Oaktown. A. What we know as Hinton's ICC No. A-38, page 31, item 29; 46.6 cents per hundred pounds.

Q. That is on watermelons. A. On carloads of watermelons with a minimum of 24,000.

Q. I show you bill of lading Exhibit D-1, covering car ACL 30943, car Oak Lawn, Ga., to Jersey City, and ask you, applying the rate that you have just mentioned, what would be the freight charge for that car? A. I have not the weight of that document. The consignee's paid freight bill ought to show that.

Q. That rate, Mr. Butler, is what? A. 46.6 cents per hundred pounds.

Q. Now I show you bill of lading Exhibit D-5 covering a carload of melons shipped via Stringer, Ga., covering car ACL 35449, and ask you for the freight rate covering that shipment. A. The same

tariff as given before; 49½ cents per hundred pounds.

Q. (By the Court.) What is the minimum freight? A. The same minimum, the uniform, 24,000 pounds.

Q. Covering all cars of watermelons? A. That is all cars, I will say, all cars involved in this case.

Q. (By the Court.) But it does not cover them unless the minimum is that, does it? A. They are all in one tariff.

Q. (By the Court.) What effect has the minimum regulation upon it then? A. It has no effect unless the amount shipped in any particular car is less than that.

Q. (By the Court.) That is what I thought. There is no evidence here as yet what the weight was in any of these cars.

Q. I show you bill of lading covering a car of watermelons, ACL 30698 from Cowarts, Ala., to Jersey City, N. J., and ask you what the freight rate is covering that shipment. A. The same tariff as before; 48.1 cents per hundred pounds, minimum weight, 24,000.

Q. I show you bill of lading covering car ACL 34794, from Cairo, Ga., to Jersey City, N. J., and ask you what the freight rate is covering that shipment. A. Same tariff as mentioned before; 46.75 cents per hundred pounds, minimum weight, 24,000.

Q. I show you bill of lading covering a car 24480, from Cairo, Ga., to Jersey City, N. J., for car of watermelons, and ask you what the rate is covering that shipment. A. On the same tariff as before mentioned, 46.75 cents per hundred pounds; minimum 24,000.

Q. I show you another bill of lading covering car ACL 23761, from Cairo, Ga., to Jersey City, and ask you what the freight rate is covering that

shipment. A. The same tariff as mentioned before, 46.75 cents per hundred pounds, minimum weight 24,000 pounds.

Q. I show you another bill of lading covering car ACL 18316, watermelons from Cairo, Ga., to Jersey City, and ask you what the rate is on that car. A. Same tariff as before; 46.75 cents per hundred pounds, subject to a minimum of 24,000 pounds.

Q. I show you another bill of lading covering car ACL 25968, containing watermelons, also shipped from Cairo, Ga. to Jersey City, and ask you the rate on that car. A. The tariff as mentioned before; 46.75 cents per hundred pounds, minimum weight, 24,000 pounds.

Q. I show you a bill of lading covering car ACL 28548, covering shipment from Pine Park, Ga., to Jersey City, and ask you what the freight rate is on that car. A. The same tariff as was mentioned before; 46 1-3 cents per hundred pounds, minimum weight 24,000 pounds.

Q. Now, Mr. Butler, how do you determine the classification and tariffs affecting cars of watermelons shipped from the points about which you have just testified? A. The tariff that I have just quoted from shows on the face of it under the caption "Classification,"—"Governed by Southern Classification No. 37; agent W. I. Powers, ICC No. 13, supplements thereto and re-issues thereof."

Q. And that applies to the Southern Classification that is adopted, is that true? A. It does; No. 38, it is a re-issue of No. 37. 38 is a re-issue of 37.

Q. How do you determine that a shipment is affected by those classifications? Just what do you do? How do you determine whether the Southern classification applies or any other classification? A. Why, for any movement of freight a tariff has

to be published covering the rate from and to. In any such publication it is necessary and obligatory to show the clasification governing, whether Southern, Official or Western. That is a requirement of the Interstate Commerce Commission.

Q. There are only three classifications? A. Generally speaking.

Q. And just how are they distinguished? A. The Southern classification usually applies on shipments to and from points south of the Ohio River gateways and the Virginia gateways; the Western classification generally speaking applies on shipments to or from points west of the Mississippi River; the Official classification applying on shipments in the Central Freight Association territory, taking in points north of the Ohio River gateways, west of the Virginia gateways and east of the Mississippi River; south of the Canadian border, of course.

Q. And these are the only tariff classifications which affect the cars of watermelons about which you have just testified? A. Yes, sir.

Cross-examination by Mr. Stout:

Q. How can you determine, Mr. Taylor, by looking at these bills of lading, that they were issued under the Southern classification? A. As I understand it, a bill of lading has nothing to do with the classification governing the movement of the shipment.

Q. I do not think you are answering my question.

(Question repeated.)

Mr. Hartpence: I object to the question in that form. It seems to me it should be made more specific or the bills should be exhibited to the witness so that he may determine each one.

The Court: He is asking this respecting all of them. He says they all came under that classification as I understood his testimony. Now he asks him how he can tell they all did.

A. I would like permission to look at one of them.

The Court: Let him look at all of them. How could you tell, for instance, with respect to the first one you looked at just now?

A. I could not tell whether the bill of lading in hand were to be used in connection with the Southern classification or the Official classification or any other.

Q. Then as I understand you, such bills of lading as these might be issued under some other classification than the Southern classification? A. In order to answer your question I would have to make the statement that a bill of lading is issued for a movement—

Q. I insist upon having my question answered.

(Question repeated.)

Q. Yes or no is the answer to that question.

A. I do not understand that a bill of lading is issued under any particular classification.

Mr. Stout: I move to have that answer stricken out as not responsive.

Mr. Hartpence: I think it is. He says really in effect that he does not know.

Mr. Stout: Then let him say so.

By the Court:

Q. I gather then from what you say that by looking at a bill of lading you cannot tell anything at all about the classification of the goods to be shipped under it? A. Judging from the bill of lading, no, you cannot.

The Court: That was what you wanted to get at, wasn't it?

Mr. Stout: Yes.

By Mr. Stout:

Q. Now what effect does the minimum weight have upon the rate charged? A. What effect, did you say?

Q. Yes; what effect would it have upon the rate? A. The rates that are quoted in the tariff that I have just given are all covered by a minimum weight of 24,000.

By the Court:

Q. What you mean by that is, if the weight of the carload of merchandise does not come up to or over the minimum rate the rate has no application? A. It has no application.

Redirect-examination by Mr. Hartpence:

Q. How do you determine whether a shipment comes under the Southern classification or not? How do you determine that?

Mr. Stout: I object to that as being improper redirect-examination.

The Court: Objection sustained. It is not redirect-examination.

Mr. Hartpence: The witness testified on cross-examination that from the bill of lading he could not tell. Now this is a question, "How do you tell?"

The Court: He has not yet told how he told. He was not asked on direct examination how he told. That was not examined on at all. He was simply asked on cross-examination whether the bills of lading gave him any means by which he could tell, and he said "No." This has not been examined on either directly or on cross-examination.

Mr. Hartpence: My recollection was that he was asked on direct-examination how he determined whether or not it came under the Southern classification or under which classification.

The Court: If he was it is clearly unnecessary to ask him now.

Mr. Hartpence: We will ask the Court's discretion now to permit this to be asked.

The Court: If you forgot to do it I will permit it now. Then the other side will have the right to cross-examine on it.

(Question repeated.)

A. With any shipment that is offered the first thing to do is to find what tariff carries rates from the point of origin to the point of destination. After that fact has been determined—in this case the Hinton 38—such tariff would always indicate on the front page thereof the particular classification governing—in this case Southern classification.

Recross-examination by Mr. Stout:

Q. But you do not know whether these bills of lading were issued under the Southern classification; you do not know as a matter of fact? Yes or no. If you do not know, say so. A. I cannot answer that question. In railroad language, I can't answer it.

WILLIAM M. WATSON, sworn.

Direct-examination by Mr. Hartpence:

Q. What is your occupation? A. General foreman, Pennsylvania Railroad, Second and Henderson streets, Jersey City.

Q. And as general foreman what are your duties? A. General supervision of the track at the station and yards.

Q. How long have you been in that business? A. About fifteen years.

Q. And stationed there at Jersey City during all that time? A. Yes, sir.

Q. Are you familiar with the area and extent and surroundings of the Pennsylvania Railroad terminal yard at Jersey City, Harsimus Cove? A. Yes, sir.

Q. What were the facilities in July, 1912, in the Jersey City yard at Second and Henderson street for the delivery of watermelons? A. We set aside about six tracks covering about 86 cars.

Q. And how many delivery tracks were there there at that time? A. There was about 20—well, including the house there was about 28 tracks in the yard.

Q. All delivery tracks? A. No, there were four —five tracks that you could not term delivery tracks; they are used exclusively for house work, that is the less than carload shipments that come in there and are delivered at Jersey City as merchandise.

Q. And what you refer to as delivery tracks, were they used exclusively for carload lots? A. Yes, as a rule.

Q. And is that the general delivery yard of the Pennsylvania Railroad Company in Jersey City? A. They have two yards, delivery yards; what is termed Jersey City yard and the ball grounds yard. The ball grounds yard is the perishable delivery yard,—delivery during the perishable season.

Q. And where is the ordinary merchandise delivered. A. During the perishable season about all of the perishable merchandise except less than

carload shipments is delivered in Jersey City yard, which is down Steuben street a considerable distance from the ball ground yard.

Q. Where is the ball ground yard? A. The ball ground yard is from 2nd to 4th and Henderson.

Q. And that is within the general area isn't it, of the Harsimus Cove and terminal yard of the Pennsylvania Railroad? A. Yes, sir.

Q. What is the method of delivery there of watermelons that come in in carload lots? A. Well, they are put down in the ball ground yard and turned over to the speculators or merchants who market them. Sometimes they hold them; sometimes they make the delivery promptly or rather sell their cars promptly. Other times they hold them for several days waiting for the market to please them.

Q. And are they placed there in the ball ground yard for delivery? A. Yes, sir.

Q. And what is the method of notifying consignees that the cars are placed for delivery? A. Well, the consignees come to the ball ground yard every morning.

Q. At what time? A. Anywhere from five o'clock in the morning till noontime. They go to our ball ground office and find out what cars there are for them and they go in and sign for the cars and sell them to whom they please or hold them as they see fit.

Q. Is there any other method in use there for notifying the consignees? A. If the consignee does not appear each morning we notify them by telephone and follow it up by a regular notification, a regular notice of arrival.

Q. Do you know Andrew Spada, one of the plaintiffs in this case? A. Very well.

Q. And you have seen him from time to time in the ball ground yard in the watermelon trade there? A. Yes, sir.

Q. How long and how often? A. Well, he is there every day, about, during the early part of the season.

Q. And for how many seasons have you observed him there? A. Well, I cannot just exactly recall. There has been several seasons that I have seen Mr. Spada there.

Q. And can you state whether or not he followed the usual custom of consignees of appearing and asking for the cars that were ready for him? A. Yes, Mr. Spada came there every day as a rule to see what he had there and to dispose of his cars.

Q. Is it at that place that you have designated as the ball ground yard that melons are speculated in, where the market is carried on? A. Yes, sir.

Q. Does the ball ground yard include the storage tracks in Harsimus Cove yard? A. No, sir.

Q. Do you know whether or not any of the negotiations for the purchase and sale of melons are ever carried on over there? A. In the ball ground yard?

Q. In the Harsimus Cove storage tracks? A. Yes, sir, they are.

Q. What is the method employed for the designating or placing of cars— A. I did not get that.

Q. What is the method for designating or placing of the cars in the ball ground yard for delivery. A. Well, under ordinary circumstances if the melons are only running so that they can all be placed, they are simply put down as they run; but where there is congestion, where there is an over-supply and we cannot make room for them in the yard, then they are placed on these storage tracks and from those storage tracks are ordered as we can take them.

Q. And who orders them to be placed there? A. One of my men, under my jurisdiction.

Q. That comes under your department. A. Yes, sir.

Q. So that your department really has control of the delivery tracks, is that true? A. Yes.

Q. In your experience there, Mr. Watson, have you become familiar in any way with the market operations of the watermelon market? A. Well, in what way do you mean?

Q. In any way. A. Why, I know that there are lots of these gentlemen from New York who have melons come in there to them, consigned to them. Some of them are consigned to them on commission; others are bought by these gentlemen and delivered in the Jersey City yard, and when they arrive there they come over there in the morning and if the market suits them they sell them.

Q. Have you ever seen them carry on their operations in selling? A. Oh yes, every day, every day.

Q. And in that way have you acquired any familiarity at all with the market operations? A. Well, yes.

Q. Have you acquired any familiarity with the market prices from time to time? A. No; I am not prepared to state any market prices.

Q. Can you state whether or not the accumulation or congestion of melons which you have referred to has any effect upon the market price there at Second and Henderson street? A. Well, yes.

Q. What effect? A. If there is a great supply of melons of course a market is way down. I have seen them when they would sell them for—for instance this year we have had cases where melons were shipped in there that if they had got in there when melons were scarce they would probably have got a couple of hundred dollars more a car for them than they did get coming in there when there was a glutted market.

Q. And have you noticed in your experience there whether or not when there is a congestion such as you have referred to, it has any effect upon the holding of the cars that have been placed upon the delivery track? A. Well, a natural congestion, that is due to the shippers sending them in very fast, why they ordinarily try to get rid of them as quickly as they can. Sometimes there —it will depend entirely upon the market. I have seen cars that have been held there for some of these speculators who have paid six or eight or ten dollars demurrage on a car, holding them for a proper market.

Q. Waiting for the market to go up? A. Yes.

Q. What do you mean by demurrage? A. After 48 hours there is a charge of a dollar a car for each car on those tracks; that is after the car has been placed and is ready for delivery.

Q. So that the congestion of the watermelon market which required you to store the excess of cars also had the effect of holding up cars that were already on the delivery tracks, is that true? A. I did not get that exactly.

(Question repeated.)

A. Yes; that would have a tendency to hold them out.

Q. Then the consignees would pay the demurrage while they waited for a higher market? A. That has been the case, yes, sir.

Q. And meantime the watermelons came right on coming in and were placed on the storage tracks? A. Yes, sir.

Q. Now Mr. Watson, you have referred to the ordinary congestion; what do you mean by ordinary congestion? A. Well, when there are no strikes or anything of that sort to bother us in our regular work.

Q. Now do you recall any congestion in the Jersey City yard or Harsimus Cove yard in July of 1912 that you would not designate as an ordinary congestion? A. Yes, sir.

Q. What was the nature of that? A. The congestion was due largely to labor troubles on our New York piers, and in fact all along the river front, steamship lines as well.

Q. And how did that reflect upon the situation at the Harsimus Cove and Jersey City yards? A. It simply meant a backing up of the business. We could not make our deliveries at the New York piers and naturally it would back up all along the line.

Q. Is there no other way out from the Jersey City yard? A. There are other ways, but you could not get the cars to New York. You could not get them over there. If they went over there they would simply lay and rot away because they could not handle them.

Q. I mean no other way except to float them to New York? A. No.

Q. And if they did not go there they would have to clog up in the Jersey City yards? A. Yes, and right on back on the line.

Q. When did that period of congestion begin? A. It began on July 9, 1912.

Q. And how long did it continue? A. Until July 21, I think, 1912.

Q. And what do you mean by continuing to July 21, 1912? A. Well, that was the period of the labor trouble. The actual normal conditions did not come back until I should say long after the first of August.

Q. And why was that? A. Because we were simply blocked all the way out.

Q. All the way out where? A. Anywhere they could find a place to store them between Edgemoor and Jersey City.

Q. Have you any personal knowledge of what the conditions were at that time at the Meadows yard with regard to congestion? A. I do not know about the Meadows yard; I know that we were in bad condition at Jersey City and could not get our —in fact it was almost impossible to make merchandise delivery at all. They gave the perishable preference throughout and left out the merchandise.

Q. Now during that period from July 9th until August the 1st, what efforts were made at the Jersey City yard to move the accumulation of freight? A. Well, the Jersey City yard, or the ball ground yard as we call it, at that point it was simply a continuous performance. We worked 24 hours a day to try to relieve the conditions. We also used the streets where they had provided sidings; we used those during the night to make delivery of peaches that would under ordinary conditions have gone to New York. Naturally that bothered us during the day.

Q. Was any extra force of men put on to your knowledge? A. Well, you see, the delivery of the carload perishable does not require a labor force; it is simply a clerical force to handle it exclusively. Those solid cars, they have to back up to them and take the perishable stuff away. All we require is a clerk there to get the seals and to see that the proper party gets his cars.

Q. In other words, the consignee unloads? A. Yes; and we did not undertake to handle anything except perishable stuff, canteloupes and peaches that should have gone to pier 29.

Q. Did that entail any extra duties on your regular force? A. Yes, it made a lot of extra work for everybody.

Q. Do you know whether or not it required any extra motive power in the yards to handle it? A.

Well, it naturally required a great deal more drilling, that is placing the loaded cars and taking away empties, then re-filling the tracks with loaded cars.

Q. What became of the empty cars as they were emptied? A. Put out in the general yard and from there taken to the Meadows.

Q. And did they have to go back over the same line over which the loaded cars were coming in? A. Yes, sir.

Q. Mr. Watson, have you any congestion or difficulty in the delivery of watermelons at the Jersey City yard during the present season? A. There has only been, I think, two days this whole season that we have had to put any cars on the storage tracks.

Q. And have there been any of the labor troubels that you referred to this year? A. No, sir; there have not.

Q. Who delivers the cars to you from the storage tracks as you call for them or make requisition for them? A. Mr. Taylor, the yardmaster.

Q. Is he the gentleman who testified here this morning in the same case? A. Yes, sir.

Cross-examination by Mr. Stout:

Q. Mr. Watson, this strike among the employees of the Pennsylvania Railroad at pier 29 was among that class of employees generally known as longshoremen, was it not? A. I believe that to be the case. I was not over there and of course I do not know just what men were out, but that is the way I have understood it.

Q. You said on your direct examination that the strike largely contributed to the congestion. A. Very greatly, yes, sir.

Q. What other causes contributed to it? A. Well, we had—I do not know that there was any

real necessity for congestion except the strike. In other words, we had very little trouble during the season except during the strike period.

Q. Then what did you mean when you said "largely?" A. Well, I don't know; that was just the manner in which I expressed myself, that was all.

Q. A slip of the tongue. (No answer.)

Q. Spada & Company to your knowledge did not hold any of the cars involved in this suit in the Henderson street yard for a better market, did they? A. I cannot tell you as to that. Of course you understand my duties are in a general way; I have no time to—

The Court: In order to make this thing short, I will overrule that question, because it has been ruled on four or five times in several cases I have looked at that if a railroad company provides a plan whereby the cars are housed or given room for a certain period free of charge and afterwards demurrage is charged and the cars are permitted to remain there for and in consideration of demurrage charges, that that is a perfectly legitimate transaction and cannot be charged as negligence against the persons whose cars are there. So there is no need of our wasting time on that proposition. It cannot hurt you; and if you had objected when Mr. Hartpence asked it I would have overruled it. It has no connection with the case except to show that there were cars there. It has no reference to the case.

Mr. Stout: I did not see the relevancy of it, but my impression was this: a certain impression has been given to the jury and I wanted to show that Andrew Spada did not hold up his cars.

The Court: If Andrew Spada was keeping his cars there on their track he cannot be charged with any negligence. They were there because the railroad company agreed they should be there, and the reason for the rule is perfectly proper. If the railroad company has regulations of that kind and it results in congestion it is the fault of the railroad company and not of Spada. There is no need of wasting time on that.

Q. Tracks 15, 16, 17, 18, 19 and 20 in the Jersey City yard at Henderson street were used during the watermelon season for watermelons? A. Yes, and during a greater part of the season even 14 was used.

Q. Pardon? A. We used 14 also a good portion of the time when we could get it.

Q. Those are the tracks that the dealers came to to receive delivery of watermelons? A. Well, the fact is that anywhere—we consider that anywhere—you understand our yard is paved from one side, from one end, to the other. Wherever we can place a car so that it is on a delivery track, regardless of whether it may be on 15, 16, 17, 18, 19 or 20, even if it was on No. 5 track, if it was on the stones as we call it, where a truck could take the melons out, it was on a delivery track.

Q. But these tracks were known as watermelon tracks? A. They were designated of course as watermelon tracks.

Q. And you say there were six tracks of that description which held 86 cars? A. Well, I would not like to say as to the 6 tracks. I know that we had 86 cars in that yard during that period and I think we covered 14 at the time. I have the record but not with me. I have got just how many cars—

Q. That is all on that. And during the period of this strike these tracks which were designated for watermelons were used for shipments of other goods, peaches for example? A. Well, during the night, yes.

Q. Peaches consigned to pier 29, New York? A. I presume they were. That was handled of course at night when I was not there. I know that they used every available space they could to get rid of peaches.

By the Court:

Q. When you say during the night were the empties in which the peaches had been taken away and the tracks made vacant for the reception of watermelon cars in the morning? A. Yes, sir.

Q. That is the way you did it? A. Yes, sir.

By Mr. Stout:

Q. Then did you clear these watermelon tracks for the watermelons in the morning? A. Yes, sir; just as early as possible.

Q. Then how was it that the watermelons were held up? A. Because there was more than we could get in on those tracks.

Q. Well, if every day you cleaned the tracks which were usually used for watermelons, of peaches— A. There were days of course when the delivery would not be completed of the peaches until along during the morning, and we would get them out just as early as we possibly could. Of course we would not take the loaded cars out until we had a place to put them.

Q. Well, the fact is that by putting cars containing peaches on these watermelon tracks it delayed the delivery of the watermelons? A. Oh yes, yes sir.

THOMAS J. CHRISTIE, sworn.

Direct-Examination by Mr. Hartpence:

Q. What is your occupation? A. Dock Superintendent, piers 27, 28, and 29, North River, New York.

Q. And employed by what company? A. Pennsylvania Railroad Company.

Q. And what are piers 27, 28 and 29, New York? A. Why, they are piers for the handling of merchandise and perishable fruit to consignees in New York, in that territory.

Q. Which come in over the Pennsylvania Railroad east bound? A. Which come in over the Pennsylvania Railroad and connections, yes sir.

Q. Does the freight to which you have referred go to those piers indiscriminately or is there some system of selection? A. Well, they are classified. The LCL merchandise is classified here in the yard and sent on separate floats and the carloads are sent on separate floats and then the perishable, which is all handled at night, during the night, is classified and put on other floats. The perishable are also classified. Peaches are classified on one float. Cantaloupes are classified on floats by themselves and potatoes and beans and cauliflower and miscellaneous vegetables are classified all together on the floats.

Q. And do they go to any one of these piers particularly according to the classification? A. Yes, sir; the LCL merchandise would go to pier 27.

Q. What do you mean by LCL merchandise? A. Well, various marks.

Q. What does LCL mean? A. Well, less than carload.

Q. Less than carload lots? A. Less than carload. They may have a hundred different con-

signees, and a carload is consigned to one man, or one firm; and the perishable the same way. The perishable is all classified as perishable freight and loaded accordingly. Peaches are loaded on separate floats because they go to a certain territory. They are unloaded in the west bound section during the night and when we come in it is all gone.

Q. Where in New York on these piers that you have referred to is the perishable freight disposed of? A. Why, on the bulkhead, pier 29, the bonnets in the street and the asphalt out on West street as far as the cartrack.

Q. Was that true also in the month of July, 1912? A. Yes, sir.

Q. And is pier 29 the market in New York for that class of— A. Pier 29 is known in New York as the market for the fruit and veegtables of New York City.

Q. And as such dealers in those commodities resort to that vicinity for the purpose of purchasing and selling the commodities that are shipped there? A. Yes, sir.

Q. What do you use pier 28 for? A. Solid carloads of—well, steel, iron—canned goods; general merchandise in carloads.

Q. And where does the general merchandise go in less than carloads? A. On pier 27.

Q. How many men are employed there at the New York piers that you have referred to? A. Well, that goes according to the seasons. During the perishable season we hire at night from 400 to 500 men, at night, and the day work will run from 340 to 360 the year around in the day time.

Q. Do you know about how many men were employed there in July, 1912, prior to the 9th of July? A. Yes, sir.

Q. How many? A. 426 at night and 343 daytime.

Q. How many were employed, if you know, after that time in the month of July? A. Well, after the labor troubles we put on an extra force, I should judge 40 or 50 at night, and about—

Q. What were the labor troubles that you refer to? A. Why, on the evening of the 9th of July when we went out to call our men to work they failed to respond. Instead of coming in on the piers as they usually do to go to work, they marched across the street and scattered around in groups and refused to work, and on the morning of July 10th our day men done the same thing.

Q. Had you had any notice from the men prior to that time of their intended action? A. No, sir; because we had no knowledge of any intention on their part to strike.

Q. Had they communicated with you before that time in any way that would show a discontent on their part? A. No, sir; we had no knowledge of any intent on their part for any such action.

Q. Do you know why they did fail to go to work on the 9th of July—the night of the 9th of July and the morning of the 10th? A. Well, we had an idea that it was a sympathetic strike. The strike originated among the seamen, and the firemen, of the steamship lines, and to strengthen their cause they were parading up and down West street, on both sides of New York, the North and the East River, to excite the men and inspire them to join their ranks, and they had their delegates out from different branches to interview the men from time to time, and anything that was done outside of our jurisdiction, and the first ones to go after the seamen was a few of the steamship lines, the Morgan Line and the Clyde Line, I

believe. Their freight handlers went out on strike, and it so followed on down the line to all the railroads, all the P. R. R. stations, the D. L. & W., the Erie, the Lackawanna, and in fact all of them were involved. It seemed to be a general strike.

Q. Among the— A. Among the freight handlers, in sympathy with the seamen.

By the Court:

Q. The freight handlers are unionized, are they not? A. Well, some of them are and others are not. You can't tell anything about it. If they belong to the union they do not let you know.

Q. Those that did belong to the union went out, I suppose, because they did belong, and those who did not belong went out because they were afraid to stay in? A. They were afraid of getting their heads cracked.

By Mr. Hartpence:

Q. Did any of the men who constituted your usual working force and who failed to respond on the night of July 9th and the morning of July 10th, communicate to you thereafter the reasons why they did go out? A. Well, there was quite a few that while the strike was on—some of the men that had been working around there for a number of years we would meet there from time to time. They would gather in groups out in the street, and I asked several of them what was the matter, what they were on strike for, and they did not know; and quite a number of them appeared to be willing to come back and go to work, only they were afraid; they all lived in about the same location and they were all acquainted with one another, and if they found any of them not doing right they would line them up.

Q. (By the Court): They would be worked

upon by the "Entertainment Committee"? A. That's the idea.

Q. Do you know of any particular instances where they were so worked upon? A. Yes; we had one man especially; he lived in one of the tenements around there, and when he came out to go to work in the morning he had a skull and cross bones tacked on his door and calling him a son of a bitch of a scab and other names of that description, and telling him that if he didn't stop going to work, why, they would knead him and harm him.

Q. Did you see any actual scrimmages of that kind? A. Why, yes; there was scrimmages all along the waterfront. During the time that the strike was on every once in a while you would see the policemen getting around with their night-stick and breaking up a crowd. After the crowd dispersed you would probably see a fellow lying on the sidewalk with his head bleeding.

Q. Then would the ambulance come? A. The ambulance would come right up and pick him up and take him away and—(witness shrugs his shoulders).

Mr. Stout: I do not see the materiality of all this testimony.

The Court: He wants to show that there was a real strike.

The Witness: It was a genuine strike.

The Court: Almost any strike amongst longshoremen would be apt to be just about like that.

(Recess.)

Q. Mr. Christie, did you observe any other demonstrations other than that which you have referred to? A. There were demonstrations all the time. It was a common occurrence to see

the ambulance along there picking up a man that was beaten up and made useless.

The Court: Well, is there any question, gentlemen, that there was a strike there which involved the men on these docks?

Mr. Stout: No, I do not know of any. The only question as to the strike is the testimony of the preceding witness as to the extent of the strike, and he said he knew of no strike except the strike at pier 29, and I think the present witness has—

The Court: He has involved the whole waterfront. The present witness has said there was a sympathetic strike starting with the steamship men and running down through all the railroads and tying them up. If you have any evidence to contravene that, all right. I do not want you to admit anything except if you cannot dispute it. What is the use of wasting a lot of time in proving that there was a strike there?

Mr. Hartpence: I had about exhausted that line.

The Court: I am not complaining about you. If you are going to prove the strike you have to prove it.

Mr. Stout: We are going to contest the extent of the strike.

The Court: All right; go ahead, Mr. Hartpence.

Q. When the men failed to report, Mr. Christie, on the evening of July 9, 1912, what steps were taken by you to supply their places? A. Why, it was reported to our Superintendent that the men had struck and he took action right away to endeavor to secure men to fill the places of the men who had refused to work.

Q. What steps were taken, do you know? A. Why, yes; they sent us men that they procured from employment agencies and along the road, trackmen, quarrymen, and wherever they could get a hold of any men.

Mr. Stout: I object on the ground I want to know whether this witness is testifying of his own knowledge.

By the Court:

Q. You had charge of the docks, didn't you? A. Yes, sir.

Q. And these men came from those places to work for you? A. Yes, sir.

The Court: Of course he cannot know, unless he was with the men that were scouring them up, that they scoured them up, if that is what you mean.

By Mr. Hartpence:

Q. When did those men come in? A. We got some on the second day after the trouble commenced, and then they kept adding to them; as fast as they got them they distributed them to us and to other piers.

Q. And about how many did you have? A. Well, some days we would have in the neighborhood of 450 to 500. Several days we had more in comparison than we would have our regular men because these men were inexperienced, and in many cases it would take three of these men to do the work of an ordinary man because of course they did not understand it and had no knowledge about handling of freight.

Q. Did you make any efforts to procure experienced men to take the place of the strikers? A. There was no experienced men to be had; they were all on strike, and those that were willing

to work were afraid to take a chance to come and get work.

Q. Did you succeed at all in organizing these new men into a working force? A. Why, yes; we got them pretty well under way, the best we could do with them—non-English speaking men, the majority of them, and through the co-operation of those who could speak English we interpreted the wants to the other fellows and in that way we got along pretty well, but no comparison to what our regular men would accomplish.

Q. Did they succeed in handling any freight there at piers 27, 28 and 29? A. Why, yes; they handled some freight.

Q. Of what nature? A. Well, of the merchandise and of the carloads—some of the perishable commodities—potatoes.

Q. Did they handle any perishable freight other than potatoes? A. No, we had no other than a few potatoes. Of course an embargo was placed on the perishable for pier 29 delivery at the time of the strike.

Q. When was the embargo placed? A. I believe the day after the strike took place; I cannot say just when it was placed; that was done by the Superintendent's office.

Q. What was that embargo upon? A. On perishable freight for pier 29 delivery.

Q. And to what point, if at all, was that freight diverted? A. At Edgemoor.

Q. To what point was it diverted from pier 29 for delivery? A. I do not know; a good many of them were diverted to Jersey City.

Q. To the Pennsylvania Railroad yards in Jersey City? A. The Pennsylvania yards, because they handle a lot of that produce over there, and they diverted the stuff they had on the way to 29 to Jersey City for delivery there by team and truck.

Q. (By the Court): By embargo you mean refused to receive any more at that point because they had no facilities for handling it? A. We had no facilities for handling it.

Q. (By the Court): Prohibition; you call an embargo a prohibition of delivery? A. Prohibition of delivery.

Q. And were notices sent out to shippers and agents generally in regard to that? A. Yes.

Q. How long did the strike or the labor disorder continue? A. Until the morning of the 17th, and then quite a few of—or more than half of our regular men came back to work. Of course the men were scattered around in different parts of the city and they did not know just when it was going to break, but on the morning of the 17th quite a number of them reported that were ready to go to work.

Q. But did you get your regular force back? A. Oh, we did not get our regular force back until, well, it must have been around the 15th of August. They came in in dribs and drabs, some of them went away out of town and got other positions, and they came back gradually.

Q. During all this period was the perishable fruit season on—continued? A. The embargo was released for the night of the 21st, Sunday night was the first night that we were in working condition to handle perishable. You see the accumulations from the time they first went out until they returned, the accumulation was quite large and to overcome that accumulation—there was not really dock space to put it all on; it had to be handled in sections. You see we unload from the docks and they come down and take it to the stores or wherever they want the goods.

Q. Was all this during the usual period of the perishable fruit season that you referred to? A.

Why, only between July 9 and the 21st; of course we were not working normally—

Q. No, but was that period in—

The Court: We will all notice that it was the fruit season—July.

A. Oh, yes; that was the height of the fruit season. We were handling about 240 to 250 cars a night of fruit and vegetables.

Q. (By the Court): That is on the docks? A. On the docks, yes sir, and in the street.

Q. (By the Court): I mean the street in front of the docks—West street. A. Any place we could get.

Q. Did you make any efforts to permit the striking employees to return during that period? A. Why, two or three days after the strike had occurred we noticed the men were gathered around in groups, and I was acquainted with a whole lot of the men and I went out to the men and asked them what was the matter, and there did not appear to be any head or tail to any of them. I asked them what they were striking for, what grievance they had, and some of them thought they ought to have 25 cents an hour, some of them had an idea that they ought to have 21 cents, and others thought that the night men ought to have more money than the day men because they were working at night, and they wanted 30 cents; but there was no demand of any kind or no committee. There was no head or tail to it; and I said to the men and explained to them, "Don't you think it is a funny way of doing business? You lay right down on the company, give them no notice, give them no intent that you are going to do anything like this. If you had a grievance why didn't you have a committee and wait on the railroad and state your grievance and then

give them a suitable time to give an answer?'' Well, they all got me in a pocket around there and the policemen in around there, and they all seemed to think that what I was telling them was pretty near right, and they even assented to return to work, and we started across the street, I guess about 150 or 200 men behind me, all ready and willing to go to work, that they would get a committee together and state a grievance and put it before the authority and wait for an answer, and there appeared to be two men whom we found out afterwards were delegates from the Seamen's Union, and they jumped in there and in some tongue unknownst to us, why they just turned around and switched them the other way and they left me just as fast as they joined me.

Q. Did you have any other negotiations with them after that? A. That was the only negotiations they had, and they returned to work just the same as they went out.

Q. And without any increase in wages? A. Without any increase. They did not know what they went out for and they came back the same way. Many of them were very anxious to get back, and of course there was quite a few at the end that did not get back because the places had been filled. They did not know that the strike had been broken and they tarried around, and in the meantime others came in and filled their places.

Cross-Examination by Mr. Stout:

Q. Mr. Christie, this was a money strike then instead of a sympathetic strike? A. Sir?

Q. This was a money strike instead of a sympathetic strike? A. We don't know what kind of a strike it was.

Q. You said in the early part of your direct

examination that it was a sympathy strike, and now in the latter part of your examination you testify that it was because your employees wanted more money.

The Court: No, he did not say that.

A. No, no.

The Court: He said he could not get head or tail of it. He said some men wanted 25 cents an hour, some men wanted 21 cents an hour, some other men that worked at night wanted more money than those that worked in the day, but they never formulated any demand.

A. There was no demand made of any kind. They just walked out and walked back under the same conditions.

Q. So you never learned what the true cause of the strike was? A. They did not know to this day.

Q. What was the nationality of these men that went out on strike? A. You mean at our place or the other places?

Q. At your place. A. Why, we had Irishmen, we had some Swedes—mostly Italians.

Q. And those men had been long in your employ? A. Well, they come and go; some of them had been there for a year or two years, others for two or three months.

Q. They were longshoremen? A. Yes, longshoremen—employed as longshoremen.

Q. And it did not need very much experience to do the class of work that they were doing, did it? A. Why, yes. Of course we can't tell to look at a man what he is capable of doing. Now we will hire men this morning and this afternoon they will either be dropped out or they will drop

out themselves. It is more of a physical game, the handling of freight than anything else. Some men are adapted to it and some are not.

Q. Any man who was strong enough to do the work did not have to have very much brains to follow this employment? A. Well, he would have to use his brains also.

Q. Well, not very much. Any man with physical strength could do the work? A. Well, not altogether. He is directed to go to certain places. He must understand what you tell him. Marks and numbers we put on packages to direct a man to a certain place, he has to know just where to go, and he is directed by men.

Q. You would not call it skilled labor? A. No, he is not a mechanic.

Q. Wouldn't it be a very easy matter to get men to take the place of these strikers? A. No, sir. There was none to be gotten.

Q. But you got some, didn't you? A. Well, from other sources.

Q. I say from any source. Weren't there sources from which you could get men to fill these places? A. Not that I knew anything about.

Q. Didn't you get men? A. Our Superintendent got men from other sources, but they did not fill the bill.

Q. Why not? A. Why, they did not understand it, and it takes time, some little time, for any man to acquire his duties in any position that he is in, no matter how trival they are.

Q. After the strike began you had more men working on these piers than before the strike, did you not? A. Some days, yes. At some times—we had a night force and we had a day force.

Q. Well, the days when you had the greater number of men couldn't they do as much work as the smaller number of men? A. No; they accomplished less.

Q. Why? A. Well, they did not understand the handling of freight. A man that is out on a railroad handling tracks and ties, when he gets hold of what we call a Limerick engine—a hand truck—is not very handy at it.

Q. If you had gotten more men of the kind you did get couldn't they have done the work? A. No; they would be in each other's way.

Q. The embargo that was placed upon pier 29, or 27, 28 and 29, operated from Edgemoor, did it not? A. Yes, sir.

Q. Not to receive any goods at Edgemoor for these piers? A. Yes, sir.

Q. Do you know whether there was an embargo placed on goods for Jersey City? A. I could not say.

Q. During the period of the strike did you handle any non-perishable freight at piers 27, 28 and 29? A. Yes, we handled some.

Q. How much? A. Well, some days we would average 35 or 40 cars.

Q. To the exclusion of perishable stuff? A. No; perishable freight is handled at night and the other freight is handled in the daytime. There is two divisions, there is the night and the day force. The night force handles all the perishable. It is unloaded for early market delivery. They might open the market up at 3 o'clock; they might open the market at 4 o'clock; they might open at 5 o'clock, according to the season of the year and according to the amount of business on hand.

Q. You then did not have any non-perishable stuff on the tracks during the period which was generally used for perishable stuff? A. Oh, yes; we had lots of it.

Q. You did? A. Yes, sir; it was accumulated all the time. We never got rid of it.

Q. If that had been delayed or kept back you

might have found room on these piers for perishable stuff? A. It was not a question of room; we had lots of room for all the perishable stuff that ever came in. We have still. There was no change in the room; there is lots of room for it; but the freight in the market section has to be unloaded at a certain hour in the morning, whatever hour the trade agree upon. If it is a one o'clock market the freight is to be unloaded not later than three o'clock; if it is a three o'clock market it is not to be unloaded later than five o'clock; see? There are certain hours to have it unloaded, and that is the way we are governed. Now we get advice like tonight, we will have so many cars of market freight, and we will put on men accordingly.

Q. The men that were used to unload the non-perishable freight were used to unload the perishable freight? A. No, sir.

Q. A different class of men? A. A different class of men altogether; a night and a day shift.

Q. That is all of that. Do you know where this perishable freight which would naturally have gone to piers 27, 28 and 29 was diverted to? A. No, sir.

Re-Direct-Examination by Mr. Hartpence:

Q. It was pier 29, wasn't it, to which the perishable fruit went? A. No; he wanted to know where it was diverted to from pier 29.

Q. I say it was at pier 29 that the perishable freight was delivered? A. Yes, pier 29; of course that embraces the streets and the bonnets.

Q. And piers 27 and 28 were not involved in perishable freight? A. No, they were not involved in the perishable at all.

Q. And what was the reason for placing the embargo upon pier 29 for perishable freight?

The Court: He has given that already; he said it was because they did not have any force to handle it.

A. We did not have a force to handle it. We did not know what force we would be able to get.

Q. But you afterwards got men? A. Yes; we got men—such as they were.

Q. Did the strike have any effect upon the market over there for perishable freight?

Mr. Stout: I object to that. I do not see where that has anything to do with the market in Jersey City. That is the market that we have been testifying about.

Mr. Hartpence: I mean by "market" not so much the market price but the gathering there of the patrons of the market.

A. Oh, yes.

Mr. Stout: I do not see the materiality of that.

The Court: I can see the materiality of it. If all the patrons came around and wanted to take the stuff away in great numbers they would take it away much faster than they would if there were just a few there.

Mr. Stout: But the testimony is that no watermelons were delivered over there.

The Court: I am not talking about melons. We are talking about perishable freight, and if you have followed the evidence you will remember that the charge was made that the congestion on the piers in New York caused a congestion in New Jersey. Now then the relief of the congestion in New York on the other hand would tend to relieve the congestion in New Jersey.

Mr. Stout: Yes.

The Court: Then if they had a big market in New York, the people taking away all the stuff that was put on the dock there, manifestly the congestion would be relieved very much quicker than if there was a small market and the stuff not taken away.

Mr. Stout: I did not see it that way.

Mr. Hartpence: That was what I had in mind.

A. It would have an effect, while there was nothing there for these men to buy they would naturally go where they could buy it.

Re-Cross-Examination by Mr. Stout:

Q. You say that no perishable stuff was delivered at pier 28? A. No perishable at 28.

Q. Weren't cantaloupes delivered at pier 28? A. Well, they are at the bulkhead; that is known as the 29 market. That is one thing.

Q. It is part of pier 29? A. It is all one station, 28 and 29.

Q. Then you did accept some perishable stuff at 28? A. We handled on the bulkhead peaches and cantaloupes, but that is in conjunction with the 29 market; it is all one market, all one and the same thing. We handle them out in the street just the same thing.

Q. How do you know that employees of other companies went on this strike—other railroad companies? A. Just from reports that went around. We knew the Morgan Line went out; we knew the B. & O. went out.

Q. How did you know it, from what somebody told you? A. Yes; it was generally known. The newspapers had it; it was in evidence.

Mr. Stout: I ask that that be stricken out; what this man got from the newspapers and what he heard is not competent evidence.

The Court: What do you say about it? It sems to be hearsay.

Mr. Hartpence: I might ask him whether he did not know generally that this condition existed.

The Court: He says he did know generally, but that his knowledge is derived from the newspapers and what people told him. You may ask him if you please when he went up and down the streets if he did not see them.

A. You could not tell where they were out from. You could see men up and down the streets all the time. You would not know what pier they worked at. You would get a report today that the Morgan Line was out and you would hear tomorrow that the B. & O. was out.

The Court: I think I will have to strike it out. It seems to be just mere reports that were circulated.

By Mr. Hartpence:

Q. During the progress of the strike, Mr. Christie, what did you do, if anything, towards ascertaining whether the strike extended beyond your pier? A. Why, as I said before, we would hear through the different men, men coming to our piers for freight, the drivers and the men around there doing business with the station—why, that is the way we would hear that this line went out or that line went out, whatever line did go out.

Q. Did you know any of the men who were ordinarily employed at these other places you have referred to? A. No, I do not.

Q. Did you discuss the situation with any of the men in charge of those piers? A. No, I had no connection with them whatsoever.

Q. How did you get to and from the Pennsylvania Railroad piers? A. How did I get to and from?

Q. Yes. Q. Why, I live in Lafayette. I would go down on the trolley and over the boat, and sometimes we would bring some of the men over in a tugboat and I would come over on the boat with them, and get off at the Adams Express pier and go out and take a car.

Q. Would you go up and down the waterfront at all during the course of your duties? A. No; I did not have any business up and down the waterfront. We had all I could take care of at our own place.

Q. Were you following the progress of the strike? A. Well, yes, generally. You would hear one thing today and tomorrow you would hear something else. It was general information all around that you would hear from time to time.

Q. Did you take any steps to procure any information regarding the progress of the strike? A. Why, no.

Q. How did your information come in? A. We knew it was on, as I explained, the men walking around the piers. The drivers coming in would bring in the news—"Well, the Morgan Line went out today," or "The D. L. & W. went out today." We heard the different—

Q. You saw it in the air? A. Yes; we knew positively that they were on strike at pier 34 and at pier 5; those were our own stations; we would have more chance to verify that than we would the other.

Mr. Stout: I renew my motion to strike out this testimony with reference to the extent of the strike.

Mr. Hartpence: I do not see that I can ask him anything further on that matter. It seems

to me, if the Court please, that there is sufficient in his testimony and in his statement of general conditions there to indicate that it must have been apparent to anyone who was on the ground.

The Court: It was not apparent to him, he says. I think the evidence must have some other source than the air—"in the air".

Mr. Hartpence: It seems to me that hardly anybody under those circumstances could do anything else except to keep themselves informed as to the progress of the strike.

The Court: This witness says he did not except as the men who drove trucks would tell him.

Mr. Hartpence: The different men who came in from the surrounding country. Now those were the reports that came to them and they depended on those reports.

The Court: Those are the clearest kind of hearsay. The men who told him were under no duty to tell him and he was in the pursuit of no duty on his part to ascertain or inquire, he says.

Mr. Hartpence: Nevertheless it was the general expression of the situation existing and in that way the knowledge came to his mind.

The Court: That is not one of the exceptions to hearsay that I have ever seen in any text book or any decided case. If they had dealings with other concerns themselves—the railroad company—and in the course of those dealings it appeared that they could not do something or some business was stopped and the reason given was because the strike was on, that would be a part of the res gestae of that tranasction that would be validated as

evidence under the case of Luce *v.* Jones, Vroom; but I know of nothing which permits a mere cursory talk by truck drivers, who are under no duty to talk, with a man who is under no duty to inquire about what is going on; so I think I will strike it out.

Mr. Hartpence: It seems to me the mere statements of the men at the time they walked out that they were afraid not to go out—

The Court: I have stricken out his testimony that they were out on other docks. I have not stricken out what they said when they went out, and furthemore I do not want to give you any false reliance. That is not evidence of the fact that those men were out on the other docks because these men said they were! it is simply evidence that they said they were and gave that reason.

Abraham B. Plant, sworn.

Direct-Examination by Mr. Hartpence:

Q. Mr. Plant, what is your employment? A. Freight trainmaster of the Pennsylvania Railroad, Manhattan Division.

Q. Where are you stationed? A. On pier D, Adams Express Dock, Jersey City.

Q. Where were you stationed in July, 1912? A. At the same point.

Q. How long have you been in the position? A. Since February 1st, 1909.

Q. And in July of 1912, do you recall any labor disturbance or strike on piers 27, 28 and 29, in New York? A. Yes, about 7:15 on the 9th of July I was notified at my house in Elizabeth that there was a strike at pier 29 by my office, and as

near as I can remember I took a train leaving Elizabeth at 8:17 and came to Jersey City and got in touch with the agent who was on the pier.

Q. Who was that? A. And found that the men were on strike.

Q. Who was that agent? A. Agent Miflin. I found that the men were on strike and I immediately got in touch with the firm of Stillman, Dolley, Head & Ferris to furnish such men as they could get, and to the best of my memory it was the following afternoon they furnished the first instalment of some 60 odd men, and the next day I think 72 men, making a total of 132 men, which I procured through this firm.

Q. And where were those men sent? A. Why, I understood they were picked up on the east side of New York.

Mr. Stout: I object to that.

Q. Where were they sent? A. They were sent to Pier D and from there to Pier 29 by tugboats.

Q. And did you make any other efforts to secure men? A. No, sir; not after that. The matter was taken out of my hands by the Superintendent's office, who after that stage of the strike looked after the employment of the men.

Q. On that evening of the 9th of July from where did you work upon the question of procuring men? A. I was at my office continuously from about 9 o'clock on the 9th of July up until Sunday, the following Sunday. I went home on a Sunday night and I came down again Monday morning, and to the best of my memory I was on duty then until Wednesday night continuously. That is, I slept at my office, what sleep I got.

Q. During that period what connection, if any, did you have with the placing of those men, the supplying of them, or in any way? A. The charge

I had of them was bringing the men in tugboats to and from the pier and also seeing that the provision was promptly sent to them to feed them, and we also housed a number of the men right in my office in Jersey City, put cots there as well as on ferryboats at the Hoboken depot, and took care of the men.

Q. Did it involve anybody else in your department except yourself in extra duty? A. Yes, my assistant was on duty a greater part of the time with me as well as some clerical force. They were not on duty as a rule during the night but they were during the daytime in connection with this work.

Q. Did it require the placing of any extra service men at all aside from the laborers or strike breakers? A. Why, only in the way of special officers. There were special officers assigned by our inspector of police to see that these men were not interfered with in going to and from the tug.

Q. And where were they fed and taken care of? A. A number of them were housed and fed in a room on the upper floor right on Pier D, and in addition to that, as I said before, there were some of them taken to Hoboken and housed and slept on the ferryboats at that point.

Q. Do you know why they were transported by tug across the river in that way? A. Yes; we were told by the pier people at Pier 29—

Mr. Stout: I object to what was told him as hearsay.

The Court: I will permit the evidence as part of the res gestae of the transportation of the men. It is part of the reason for their being taken away.

A. I was told by the agent at Pier 29 that it would be necessary to take care of these men at other

points than New York as he did not consider it would be safe for the men to attempt to take them out in the street or to their homes.

Q. Did you during that period see any evidence of violence or disturbance? A. None whatever on the Jersey City side.

Q. You met them on the Jersey City side? A. Yes, sir.

Q. Do you know whether or not it involved any extra service men among the clerical force at that time? A. Yes; I furnished two or three men from my office as checkers at pier 29 as well as taking three men from our float bridge force and sending them to pier 29 to act as checkers during that time.

Q. And did that in any way interfere with the operation of your department during that time? A. No, sir; not at that time on account of the float business being curtailed considerably at this time due to this disturbance. We did not need the clerical force.

Q. And did it require any extra service on the part of the men other than those who were employed regularly, to your personal knowledge? A. Not to my personal knowledge.

Q. Did you pay these men that were hired to take the place of the strikers? A. No, sir; I did not. I, however, made the agreement with this firm to procure these men that I furnished. He notified me what it would cost per man to get them, and I told him to go ahead and get the men.

Q. And what was the cost? A. The cost was five dollars a man to the labor agency. Of course then the men had to be paid outside of that, what rate of pay I cannot say. They were paid, I think, at the pier.

Q. You did not pay them yourself? A. I did not pay them at all.

Q. (By the Court): Were these what you call strike breakers? A. Yes, sir; it was a man by the name of Pellegrini—I do not know his address —somewhere on the East Side of New York. He furnished the men that I got.

Cross-Examination by Mr. Stout:

Q. You only endeavored on July 9th to procure men to take the place of those strikers? A. On the night of July 9, yes sir.

Q. That was the only occasion? A. That was the only occasion that I had any personal—

Q. And from one concern? A. Yes, from one concern.

Q. You did not try any other concerns? A. No; that was turned over to somebody else.

Q. And you do not know what effort was made after July 9, 1912, to procure men, of your own knowledge? A. Only indirectly I know what was done.

Q. Of your own knowledge? A. I did not do any more, but I know of other men that were furnished.

Q. How do you know that? A. Because they were sent to the pier and I had charge of transporting them over on tugs.

Q. You transported men after that? A. After that, yes sir. There were a number of men brought some time later in the week from the Trenton Division, that is running from Trenton to Phillipsburg, some 175 men brought over.

Q. How do you know that those men were employed to take the place of the strikers? A. Because they were brought over and sent over for that purpose.

Q. How do you know they were? A. Because I sent them over there.

CHARLES W. GLENN, Jr., sworn.

Direct-Examination by Mr. Hartpence:

Q. What is your occupation? A. Chief Clerk to the Division Superintendent.

Q. Of the Pennsylvania Railroad? A. Manhattan Division, Pennsylvania Railroad.

Q. And where are you stationed? A. Pennsylvania Station, New York City.

Q. Who is the Division Superintendent? A. C. S. Krick.

Q. How long have you been in that position? A. A little over three years in the present occupation.

Q. And had you been in the employ of the railroad service prior to that time? A. Yes, sir.

Q. In other positions? A. Yes, sir.

Q. How long? A. 28 years.

Q. In the vicinity of Jersey City and New York? A. No, sir.

Q. Where? A. Philadelphia.

Q. Do you recall any labor disturbance or strike on the New York piers 27, 28 and 29, in July, 1912? A. I do.

Q. When did it first come to your attention? A. About midnight of July 9th, just a little before midnight. That is, I was home at the time.

Q. After it was brought to your attention at that time did you have any connection with the progress of it at all? A. I came into the office on the first train. I do not recall just what time it was now, but we wanted to get our track forces to pier 27, 28 and 29—of course that is all one station there—and we took what track men—that is men working on the track—that we could get down to the pier, in addition to which we secured a number of track laborers from the New York Division, that is the line running between Jersey

City and Philadelphia, and then we got in touch with some labor adjusters; do you wish the names of them?

Q. Yes, with whom did you get in touch? A. Now I do not know whether these—

Q. I might ask you whether you made records at the time of these transactions? A. Yes. This is a general outline of the persons we dealt with aside from our own employes: Robert Maunette, he is a labor adj—

Mr. Stout: Did you make this record?

The Witness: Yes, sir.

Mr. Stout: And when was it made?

The Witness: Well, I haven't got the exact dates here that they were made, but this is an outline of what was done during the strike period in order to furnish labor at the various piers.

Mr. Stout: Made by whom?

The Witness: Made by myself.

Mr. Stout: And how near to the time the strike was going on was the record made, from day to day as the strike progressed—this record by yourself?

The Witness: Yes, we have a record, but I haven't that detailed record here. This is a general outline.

Mr. Stout: Then I object to the witness testifying from this because it is not the record; it is a copy of something which he says is a record.

The Court: Objection sustained.

Q. Do you recall with whom you had negotiations?

The Court: Well, the names are a matter of slight consequence. If he dealt with four or five let him say that. What difference does

it make whether the name was McGinty or Pelligrini?

A. We had them with various firms in New York and Philadelphia. We also got some men from up on the Belvidere Division of the Pennsylvania.

Q. Do you know about how many men you procured? A. I cannot tell you exactly how many.

Q. Can you tell generally? A. But we did have at pier 28 at various times from 300 to 400 and possibly over of men to take the place of our regular men, that we employed for that one pier alone—that is 27, 28 and 29.

Q. And when did you take charge of the procurement of these men, do you recall? A. Well, I got into it the first day in a general way.

Q. How long did you continue? A. Until Sunday I was on duty continuously from the time I got in on Wednesday morning, that was the day after the strike, until Sunday.

Q. Until the following Sunday? A. Yes, sir.

Q. And did it involve any extra service on the part of other men in your department or in other departments? A. It did.

Q. In what way? A. Well, we kept a couple of clerks on duty day and night. Of course they would have been on duty in the daytime, but we kept others on at night and we sent a number of men from other departments down to the piers to help out in the way of checking and clerical work. For instance we sent some of our ushers from the Pennsylvania Station down there and men in other capacities, office clerks, clerks from other offices.

Q. Did you have any further connection with the progress of the strike? A. Well, in a general way. I had a hand in a little of everything that went on, yes.

Q. Did you have anything to do with hiring

these men that came in? A. Except as to directing how they should be handled, where they should be housed and in regard to ordering in a general way their food.

Q. You worked in conjunction with Mr. Plant in that respect, or did you follow him? A. Mr. Plant was the man whom we appointed to look after the food, to see that the matter was properly taken care of.

Q. How long did the condition continue that you have referred to? A. Why, I think until about the 17th—16th or 17th.

Q. Did you have anything further to do with it after that time? A. No, except as I said before, in a general way we took hold of anything that might turn up in order to relieve the situation.

Q. Did it involve any extra service or any extra service men after the strike was over on the 17th? A. Well, for a few days, yes.

Q. And did your department make every effort that you could to relieve that situation?

Mr. Stout: I object to it on the ground that it asks for a conclusion whether they did all that they could have done. Proof is admissible as to what they did, but not if they did everything that they could do.

Mr. Hartpence: I will withdraw the question.

The Court: How do you think the jury can conclude that they did all that could be done if they do not know what the extent of the labors of his department was? In other words, a conclusion is generally admitted in the testimony which sums up a congeries of facts which if the jury had them all themselves—

Mr. Stout: I withdraw the objection.

A. We did.

Cross-Examination by Mr. Stout:

Q. Did you in the course of your work get in touch with every employment agency that could furnish men? A. That we could locate, yes sir.

Q. Every concern that you could locate; and from all of those concerns you got how many men? A. Well, we had from three to five hundred men at pier 28—when I speak of pier 28 I refer to the three piers—we went so far as to go to Philadelphia; I do not recall how many men we got in Philadelphia, but we got in touch with the labor—

Q. Did you go to Philadelphia yourself? A. I did not go to Philadelphia myself, but I made the arrangements to send to Philadelphia.

Q. How many agencies did you get in touch with, without referring to— A. Well, about eight.

Q. And those were the only eight that you knew of? A. That is all.

Q. How extensive were your inquiries to find out these agencies? A. Well, these men in a general way would apply to us, and then we looked up other agencies and we found out that we could not use any more men than what these fellows furnished us.

Q. Well then you got all the men that were necessary? A. Yes.

By the Court:

Q. These agencies of which you speak, they were agencies that furnished men for service during trouble between employer and employee? A. Yes, that is it, labor agencies—strike breaking agencies.

Q. I suppose the reason for that is you could not get the ordinary men to work for fear of harm that might come to them in going to and returning from their work? A. That is the idea.

By Mr. Stout:

Q. You say that during the period of the strike you had sent to pier 28 some extra clerks? A. Yes, sir.

Q. Were you doing a greater volume of business at pier 28 during the strike than before the strike? A. Some of the checkers went out.

Q. Some of the checkers went out on this strike? —How many checkers went out? A. I cannot answer that question.

Q. And you do not know how many you substituted? A. No; we sent down—we simply got together all the clerks we could. Probably there were thirty or forty of them, perhaps more than that.

Q. Well, how did the volume of business during the strike compare with your usual volume of business there? A. Well, I think that the agent could answer that question better than I.

Q. Well, didn't you have supervision over it? A. As regards the amount of business handled—

The Court: He was running the strike and not taking charge of the business.

Q. (By the Court): Wasn't that your function there? A. Yes.

Q. You sent your clerks down to substitute for the clerks that went out? A. That is the idea, yes sir—and additional clerks to be used in case it was necessary. Of course the men we sent down were not familiar with the work and it probably took two men we sent down whereas one of the regular men could handle the business.

JOHN A. SCHUG, sworn.

Direct-Examination by Mr. Hartpence:

Q. What is your occupation? A. Accountant, Pennsylvania Railroad, Freight Station, Jersey City.

Q. In what department there are you employed? A. Freight Department.

Q. What are your particular duties there? A. The fixing of accounts, issuing of freight bills for in and out bound freight, adjusting of claims and other various divisions of the accounting work.

Q. And you had charge of making up and issuing of freight bills? A. I had charge of the clerks that issue them.

Q. Were you employed in that capacity in July, 1912? A. Yes.

Q. Have you with you the freight bills for cars consigned to Andrew Spada and Co. in July, 1912, for cars ACL 30943— A. I have that one.

Q. —and for ACL 35449? A. Yes, sir.

Q. And for ACL 30698? A. Yes, sir.

Q. And for ACL 34794? A. Yes, sir.

Q. ACL 24480? A. Yes, sir.

Q. ACL 23761? A. Yes, sir.

Q. ACL 18316? A. Yes, sir.

Q. ACL 25968? A. Yes, sir.

Q. ACL 28548? A. Yes, sir.

Q. What was the weight and the amount of freight of car ACL 30943?

Mr. Stout: I object to this on the ground that it must be shown by this witness before this testimony is admissible that the car was weighed and who weighed it. The mere fact that it appears in the freight bill is not proof.

The Court: Where is the freight bill?

Mr. Stout: He has the freight bill in his hand that he is testifying to. The weight is contained in the freight bill.

The Court: Has the freight bill been offered in evidence yet?

Mr. Stout: No.

The Court: I do not see how you can do that yet, Mr. Hartpence.

Mr. Hartpence: I will withdraw that question.

Q. Are these the original freight bills that you have with you for those shipments? A. The original freight bills are for four cars—five cars—the others are carbon impressions that were made at the same time as the originals were made. The originals are presumably in possession of the consignee.

Q. And were those bills made in your department? A. Yes, sir.

Q. Under your supervision? A. Yes, sir.

Q. (By the Court): What is the course when you send these freight bills? You keep one? A. Why, the freight bills come in folds, and one portion is stamped "Freight Bill;" that goes to the consignee when he gets his charges. Another is stamped "Notice of Arrival;" that is sent out when the car arrives, and there is an agent's office file and there is another portion, a delivery receipt, on which we obtain a receipt from the consignee, and all these bills are made out at the one operation.

Q. (By the Court): I see. A. On four cars I have the office file, the original being in the possession of the consignee, or should have been at that time. Where it is now of course I am not in a positoin to say.

Q. (By the Court): Now these bills are made out from what data? A. From the waybills furnished us by the Southern lines from whom we received the cars.

Q. (By the Court): And by a waybill you mean they call a bill of lading? A. No; a waybill is issued from one railroad to the other covering the charges on a shipment. A bill of lading is the proof of ownership issued by the initial line to the man that does the shipping.

Mr. Hartpence: I would like to offer those bills in evidence, if the Court pleases.

Mr. Stout: I object to four of these so-called freight bills on the ground that they are immaterial because the freight has been paid. They are not entitled to an allowance. I cannot see the materiality.

The Court: If those are the freight bills and the bill actually has been paid, it would seem to me that they would be quite material on the question as to the contents of those bills which were paid, as binding upon the party who paid them—admissions of the correctness of the contents of the bill by the party who recognized their correctness on the day of making payment.

Mr. Stout: If these bills are introduced for the purpose of showing the amount of freight charged that would be one matter; if they are introduced for the purpose of showing the weight that is another matter.

The Court: Yes; the weight and amount are two different matters. I admit that.

Mr. Stout: I want to object to all of these so-called freight bills on the ground—

The Court: Well, let's take one thing at a time.

Mr. Stout: I am on the ground now of the weight. I am objecting now to the bills—

The Court: I mean you make a statement as to a differentiation between two different matters. What difference does it make? The

question is whether or not by any facts that have been proven in the case or that are admitted by counsel or otherwise, those freight bills represent aynthing that is binding upon your client. Now if it is once admitted that those are freight bills, that those freight bills have been delivered to and paid by your client, then that is at least a prima facie admission of the truth of all the contents of the freight bills, because he admits their truth by paying them and recognizing their validity. Now if one of the facts represented in such a bill is the fact of the weight and if the testimony already shows, as it does show apparently, that the freight bill is predicated upon weight, and payments are made in accordance with weight of cargo, why manifestly that is an admission that he recognizes that as the correct weight, because he pays the bill for it.

Mr. Stout: Then I will withdraw my objection as to those four that are paid. Now as to the five that are not paid, I object to these on the ground that they are made up from another record. The authenticity of that record has not been proven.

The Court: What does the other side say about that?

Mr. Hartpence: The weight of the cars is not so much a material part of the offer of these bills, although that is involved; but they are offered more particularly to show the rate that was charged, and that rate is based upon a fixed tariff, and the amount of the bill of course naturally involves the weight because it is based to a certain extent upon that weight.

The Court: But where do these bills come from? We do not know that they ever reached

Mr. Spada's firm. There is nothing to show anywhere that those bills were ever intended to be paid by Mr. Spada's firm.

Mr. Hartpence: The witness testified that these bills were made out in his department and under his supervision for consignments of freight to Spada & Company.

The Court: And where were they made out?

Mr. Hartpence: In his department in Jersey City.

The Court: Well, you see those bills were made out after the bill of lading had been made out by the original carrier and had been sent to the consignee. It would seem to me that you cannot change the original contract in respect to the bill of lading by sending in a bill several days afterward. It seems to me that if you are going to have a contract which will bind the parties to any provisions of that Interstate Commerce Law the contract must be made when the bill of lading is issued, because as I recall that offer that you made this morning, or the statement of the offer, the matter is determined by the bill of lading that is issued by the carrier. Manifestly something that happened several days afterwards with respect to fastening the rate cannot go back and change the character of the original bill of lading. That would seem to me to be a monstrous proposition, because otherwise the carrier would take a chance on getting it paid, and when it should not turn out well he would say, "Well, we will change the rate and put it under the Southern rate."

Mr. Hartpence: No sir; the carrier could not do that because the law prohibits and forbids it.

The Court: How does the law forbid it?

Mr. Hartpence: Whether the carrier takes any action in that respect or not, the charge accrues.

The Court: The law does not prohibit any such things. The law, according to your argument this morning, permits just that situation. There are two tariffs that are chargeable. The company may bring itself under one or under the other. Now the law does not demand that he bring himeslf under either one of them.

Mr. Hartpence: But the law forces him—

The Court: Under which one?

Mr. Hartpence: Forces him under the reduced rate unless he makes a special contract to ship under the carrier's common law liability.

The Court: I do not remember any such evidence or anything in the note you read this morning which has any such bearing. I understand that there are three different classifications; one classification is where no uniform bill of lading is issued, there the party is presumed to be under the common law except as the common law may have been changed by the statute of the United States in reference to that; the second classification is where a uniform bill of lading is issued by the carrier, and in such an event the charge is 10% less than the rating that would be charged if the party came under the common law; the third rating is known as the Southern rating, and that is where there is a special bill of lading between the shipper and the carrier; the rate is precisely the same in that particualr as it is where there is a uniform bill of lading. The difference between the two depends on the wording in the bill of lading. Now I do not know of anything at all which you have

cited that anywhere changes that situation, and I do not think you have anything there that you can cite that will change it. I have looked at that very carefully; I have looked at the decisions that you handed up in pursuance of it; I have looked at the provisions of the schedule. Now if you have anything that militates against that view of it I would like to see it.

Mr. Hartpence: The Southern classification, which is the only classification that is in evidence in this case, under which it has been testified the shipments were made—

The Court: All that schedule there is in evidence.

Mr. Hartpence: —provides that the reduced rates specified in this classification will apply only on property shipped subject to the condition of the carrier's bill of lading.

The Court: Precisely. Now that indicates that the carrier must issue a bill of lading and in some way bring himself under that classification.

Mr. Hartpence: Yes, but if he does not do that, property carried not subject to the conditions of the carrier's bill of lading will be at the carrier's liability—that means the carrier's common law liability—limited only as provided by the common law and by the laws of the United States and of the several states in so far as they apply. The property thus carried will be charged 10% higher, subject to a minimum increase of one cent per hundred pounds than though shipped subject to the conditions of the carrier's bill of lading.

The Court: Yes.

Mr. Hartpence: Now the materiality of these freight bills is to show the tariff really assessed or the charge on these shipments.

The Court: There was no tariff assessed or charged by the original or initial carrier according to your statement. This was made out by the Pennsylvania Railroad.

Mr. Hartpence: Yes, but the Pennsylvania Railroad Company acts in that position for the initial carrier.

The Court: All right; let's assume that it does, but no tariff was made out until after the original bill of lading was issued, and I think that if you are going to bring yourself under one of those three classifications there has got to be some definite means by which it is done, and if you are going to charge a ten per cent less rate it ought to be understood between the parties that you are charging that rate. I do not believe you can leave that all open and make out a bill several days later and say, "This is the thing we are going under;" because under such circumstances they might never make out a bill until they found out if the stuff was delivered on time or not and then make it out. To make the argument quite plain, what was there, in other words, to prevent you charging the 10% higher?

Mr. Hartpence: The mere fact that the shipper when he shipped did not agree to pay 10% higher.

The Court: Why, he did not agree to pay 10% lower; he did not agree to pay anything.

Mr. Hartpence: Automatically, by doing nothing except to accept—

The Court: He agreed to let the railroad company charge him the lowest rate?

Mr. Hartpence: We charged him the lower rate. There are only two rates we can charge.

The Court: Exactly.

Mr. Hartpence: Either the reduced rate or the extra rate of 10%.

The Court: Where is there anything there that says if nothing is said the lower rate necessarily applies?

Mr. Hartpence: There cannot be any other rate to apply.

The Court: Why?

Mr. Hartpence: Because the higher rate cannot apply unless the agreement is made that it shall apply.

The Court: Why?

Mr. Hartpence: The Interstate Commerce Law prohibits its being done.

The Court: I do not recall that. Where is it? Where is there any provision of that kind?

Mr. Hartpence: Well, the purpose of the Interstate Commerce Act, the whole philosophy of it is—

The Court: It does not require charges at all, Mr. Hartpence—the Interstate Commerce Act—it limits charges, and within the boundaries of those charges the railroad company can fasten its charges. It does not compel them to make that charge.

Mr. Hartpence: It compels them to do it or to suffer a very extreme penalty.

The Court: Certainly; but there is nothing that will impose a penalty on him if he charges the higher fee fixed by the Interstate Commerce Commission.

Mr. Hartpence: But he could not collect the higher fee if he charged it.

The Court: You say that with a great deal of vigor and you say it numerously and strenuously, but I do not find anything you have quoted or read yet that says so.

Mr. Hartpence: We will take the position that the operation of the Interstate Commerce Act and of the classification as filed with the Interstate Commerce Commission bring about that effect; and furthermore, whether the rate is fixed at the time of the shipment or whether it is fixed five months after the shipment or one year after the shipment, the carrier not only can collect it but is obliged to collect it, and it makes no difference whether it was made three days afterwards in the office of the Pennsylvania Railroad Company, fixed there after the shipment was made at the south, or whether it was made at the time; and that if the Pennsylvania Railroad Company in these cases were to bring suits to collect the amount of unpaid freight upon proof of the tariff and of the shipment there would be absolutely no defense on the part of the shipper or the consignee to the payment of that freight, whether it was made at the time of the shipment or five months afterward; there is no escape from it; and when this provision of the classification reads that property carried not subject to the conditions of the carrier's bill of lading—which as I understand it means when it is carried subject to the common law liability—the property thus carried will be charged 10% higher than if shipped subject to the conditions of the carrier's bill of lading, the Pennsylvania Railroad Company, or any other company, has no more right to impose that 10% higher rate without special agreement than it has to ignore the charging of any rate, and inasmuch as they cannot impose that without a special agreement, and inasmuch as the law imposes upon them the duty of charging a rate, which they cannot escape, there is

nothing else for them to do but to automatically drop into the lower rate. That is our position and that is our argument.

The Court: They could charge a less rate if they saw fit.

Mr. Hartpence: Not without violating the Act.

The Court: Yes they could if they treated everybody alike.

Mr. Hartpence: Not after the tariff is once filed with the Interstate Commerce Commission.

The Court: Not after the tariff is filed, no.

Mr. Hartpence: But this tariff is filed.

The Court: And I am not so sure also that they could not charge a less rate even then, by agreement. However, that is a matter that is merely academic. We won't discuss that. What do you say about this, Mr. Stout?

Mr. Stout: This discussion as to the Act—I am frank to say, I do not know very much about it. I think that Your Honor has read the authorities, and I cannot advance any arguments against the Act further than the one I pressed this morning, when we were talking about bills of lading and the application of this Act, and I still contend that there is no proof that there was a binding contract whereby this Act would apply—a binding contract so far as a bill of lading is concerned. And so far as the charges are concerned, speaking of the freight bills, they must have been determined at the time that the bills were issued, if bills were issued for these shipments. These freight bills that are tendered here are predicated upon better evidence. The better evidence is, as to whether these cars were weighed, who determined that amount of the

weight of these cars. It comes to this man secondarily.

The Court: Mr. Hartpence, if you are trying to show that the rate was charged and you are insisting that automatically by the fact of receiving these goods as they were received the tariff filed attaches, then the freight bills become conspicuously unnecessary, because the rate is fixed, according to your argument; the rate is fixed by the tariff and the bills are unnecessary to prove it. Now with respect to the weight, it seems to me that these are the self-serving declarations of a party to the suit. They have never been handed to the firm of Spada & Co. They are simply bills made out in the Freight Department of the Pennsylvania Railroad Company, and there is no evidence that he ever received them; there is no evidence that they ever were sent to him. They are simply statements issued by a party to the suit, offered by that party. Now you say you are not particularly interested in the matter of the weight and the rate is the matter you are after. Now if the rate is fixed and the weight is a matter of indifference, then I rule out these bills.

Mr. Hartpence: No, I do not mean to convey the impression to the Court that the weight was wholly a matter of indifference. I said it was indirectly involved and perhaps not of so much importance as the rate and—

The Court: Well, it is a matter of extreme importance; that is the difficulty. First of all, it is a matter of extreme importance along the proposition that if it is less than minimum weight the rates do not apply, because if the cargo of the car weighs less than 24,000 pounds then the rate is entirely inapplicable

according to the testimony of Mr. Butler and according to the tariff itself. Consequently the weight is of the utmost importance, and I do not think that you have a right to manufacture that sort of evidence. When I say "manufacture" I use it in the good sense, not that you framed it up, but that you haven't a right to make it on a piece of paper yourselves and offer it as part of your case. So I rule out the evidence with respect to the bills that have not been paid by Mr. Spada. With respect to the bills that have been paid by Mr. Spada, that objection is withdrawn and those bills are admitted, and they were admitted on the ground that Mr. Spada having paid the bills and practically affirmed the weight by paying the bills, they amount to admissions on his part of the fact of the correctness of the amount and the correctness of the weight.

Mr. Hartpence: We will ask to have the four marked which are admitted by the Court, and to have our objection noted as to those that are excluded.

The Court: I don't udnerstand—I think you would better put your own reasons on the record as to why you think those bills which have never been seen by Mr. Spada or in any way assented to by Mr. Spada should be admitted, when you made them out in your own freight office. If you have a reason for that it ought to be on the record.

(Freight bills admitted in evidence marked respectively D 32, D-33, D-34 and D-35.)

Q. Mr. Schug, are you familiar with the method by which the weight of a shipment or cargo is fixed and determined by the carriers? A. Invari-

ably cars that are received at large stations in the south have scales or have means whereby they can weigh these cars. Some of the smaller stations have no means and the cars are forwarded with instructions either on the waybill or the car waybill that travels with the car to have the car weighed and designating the place it is to be weighed at—invariably the nearest scale to the point of shipment.

Q. Who are in charge of those scales? A. Those scales are under the supervision and inspection of the Southern Weighing and Inspection Bureau of that territory.

Q: Are they operated by the employees of the carrier, of the railroad company? A. They are certified to, at least the work is witnessed by employees of the carriers, but the work is actually done, so far as my knowledge serves me, by the Southern Weighing and Inspection Bureau representatives.

Q. Does the shipper have anything to do with the weighing of those cars? A. He has nothing to do with the weighing—he might have at a station where there is a scale.

Q. And when the cars are thus weighed what sort of a record is made of it? A. Why, the people, the clerks or inspectors that do the weighing, they record it, and they also record the facts derived from this weighing on the bill of lading, the waybill, that is forwarded by the forwarding carrier or receiving carrier.

Q. What is that waybill that is issued by the receiving or forwarding carrier? A. It is the waybill made out from the bill of lading for the recording of the different roads that the car travels, recording their earnings and revenues.

The Court: Well then that is for the exclusive use of the railroads?

A. Of the railroads.

Q. And in addition to the information gleaned from the bill of lading is the weight of the car placed on there when it has thus been officially weighed? A. If the car has been weighed before it has left destination and before the shipper has taken his bill of lading away, it is placed on the bill of lading; but where they have no facilities they cannot place it on the bill of lading; the car possibly is weighed at a place six or eight miles from the point of shipment, at the next scale.

Q. Then where is that weight placed? A. Placed on the billing for the railroad's information, and charges assessed accordingly.

Q. And when the terminal carrier receives the car and receives the waybill—does the waybill also come to the terminal carrier? A. The waybill does except in cases where there is no through billing arrangement; and in this particular case there is through billing arrangement in effect from point of shipment to destination, and consequently we get the original billing.

Q. Do you know whether or not the original waybills involved in these shipments were received at your office? A. There is presumptive evidence that we did get them, for the simple reason that the freight bills we made out must have been taken from that waybill. They could not have been manufactured from hearsay or any other information.

Mr. Stout: I object to that answer and ask to have it stricken out, as to the presumptive evidence.

Mr. Hartpence: I consent that it be stricken out and ask that the question be repeated.

The Court: It will be stricken out.

(Question repeated.)

Q. Do you understand that question? A. Yes.

Q. I will withdraw the question.

Q. Where do you get the information from which to prepare the freight bills which are submitted to the consignee? A. From waybills received from connecting lines when cars originate on connecting lines, and from our own lines when they originate on our own lines.

Q. Then the information from which the freight bill is made up comes from the waybills? A. Yes.

Q. And you have no other way of ascertaining it, have you? A. No sir; we receive a car without a waybill and then the form of bill we make out has that information on it to show that there is an estimated charge assessed.

Q. Can you state whether or not you received waybills at your department in the regular course of business for these shipments involved in this case? A. We did receive waybills for these shipments, for these nine cars in question.

Q. When a car is shipped from a southern point on a through routing and you get the waybill from the initial or connecting carrier, do you as the terminal carrier also weigh that car? A. No, except upon request, and then there is a charge assessed for that re-weighing.

Q. Upon request of whom? A. From the consignee or the shipper who might take exception to the weight as charges are assesed, claiming it to be erroneous. Upon request only do we re-weigh cars. Then there is a charge made for that re-weighing.

Q. Can you state whether or not those five bills involving five cars in suit were prepared in your department under your supervision? A. They were.

Q. One moment—from the waybills for this shipment?

Mr. Queen: Don't answer the question.

Mr. Stout: I object to this question on the ground that the freight bills are predicated on waybills. The freight bills having never been tendered to the plaintiffs in this suit, therefore on your Honor's previous ruling the question should be excluded.

Mr. Hartpence: There is no evidence that they have never been tendered.

The Court: Of course I suppose if you are going to offer them as admissions there must be some evidence that they have been tendered, produced by your side.

Mr. Hartpence: There is no evidence that they were not tendered.

The Court: There is none that they were.

Mr. Hartpence: It seems to me that the question itself as it is framed does not ask this witness to do anything except to state whether or not the bills were made out from those waybills, which does not carry it to any objectionable point.

The Court: If Mr. Stout had asked to cross examine on that, which I thought he would do, I would permit him to do so, as to whether he ever saw the waybills himself and whether he knows of his own knowledge that the items in the freight bills were made up from the items in the waybills. If not, I will rule on the question as it stands.

Mr. Stout: My objection is—

The Court: I understand your objection. You can now either cross examine or I will rule.

Mr. Stout: I have stated my objection.

(Question repeated.)

A. They were.

Q. And do those bills correctly state the weight of the respective cars and the tariff charged on the respective shipments?

Mr. Stout: I object to that on the ground that if these freight bills were made up from the waybills they speak for themselves; and furthermore he cannot state from his own knowledge that the rate and the weight are correct unless he knows whether any cars were weighed or not.

The Court: Well, I do not know whether he can or not, so I suggest that it might be wise to cross examine him. I do not know whether he knows or not. He may have been there for all I know.

Q. (By Mr. Stout.) Do you know whether the nine cars involved in this suit were weighed, of your own knowledge?

Mr. Hartpence: I object as not proper cross examination. The transaction was as to the five bills, not as to the nine.

Q. (By Mr. Stout.) Well, as to the five bills? A. Not of my own knowledge that they were weighed, no.

Q. (By the Court.) Did you ever see the waybills yourself for those five cars? A. I cannot remember whether I have seen them or not. I could not testify as to that—these individual cars. I can testify to the correctness of the weight used, that is all.

The Court: Well, I will sustain the objection, Mr. Hartpence.

Mr. Hartpence: I will re-offer the bills on the testimony taken since they were offered before and ask that they be admitted in evidence, on the ground that the testimony of

this witness now shows that the method of weighing cars is through the medium of an official weighing agency over which neither the carrier nor the shipper has any specific control, although either or both may be present at the time when it is done and observe it or verify it, and that a certificate of that weight is issued and that thereupon the weight is placed upon the waybill and that that waybill is used in the regular course of business in the operation of the system and forwarded through to the terminal carrier, and that the terminal carrier from the information which it contains prepares the freight bill based upon the weight and the tariff, and that this witness has testified that these bills were made from those waybills and that they are correct.

The Court: I will overrule the offer upon these grounds: First of all, all that you have stated might be evidence to admit the waybill itself if it were here—I say it might be, because I do not desire to go as far as saying it would be—it might be, because it might be a document containing entries made in the usual course of the business of a railroad company by an officer entrusted with that business who had no reason to misrepresent the fact or to disregard the truth in the making of it. The object however of the waybill is not to affect the consignee with its contents, but the object of the waybill, as testified to by the witness now on the stand, is to enable the railroad company to compute its earnings and it is for the exclusive use of the railroad company. The authorities in this State I think are quite clear that a mere bill made out by a person for charges which he

claims are due from somebody else is inadmissible for almost any purpose. We have one case of Marotta v. Sullivan, 31 Vr. where the party attempted to prove the value of a thing by offering a bill that was given by the person who sold the article to him for the article itself. The court held that it was the mere hearsay statement of the party who made it; and I see slight, if any, difference between these freight bills which are offered here, which have never been presented to the plaintiff in this suit, according to the evidence—or probably to be more accurate, which are not proven to have ever been presented to the plaintiff in this suit or in any way recognized by him, assented to by him, aproved by him. All we have is just simply a statement that a freight bill has been made out from a waybill and that freight bill is offered in evidence. I cannot conceive of any ground upon which it is admissible. It is not a part of the res gestae of anything I can see so far. There is absolutely no satisfactory foundation laid for showing its authenticity. The witness says that he never saw or does not recollect that he ever saw the original waybill—assuming that they might be admitted if the foundation were properly laid.—He is not proven to have seen the original waybill and he does not know whether this freight bill is accurately transcribed from that bill or not, and consequently I canot see, whether we look upon it as being lacking in foundation or whether we look upon it as entirely incompetent as evidence from any standpoint—I cannot see why it should be admitted. For these seasons, and for others that may suggest themselves to me and to others later, I overrule this offer.

Mr. Hartpence: I ask that the usual objection be noted.

The Court: Oh yes, that will be noted.

The Court: I always like if I can to have the ground upon which the offer is made stated so that the court above may see that it was before me when I was ruling, and I confess in this case I do not quite see the ground upon which you rest the offer.

Mr. Hartpence: I did the best I could to prove the weight of that car through the official method.

The Court: I am not criticising you.

Mr. Hartpence: I thought I had made a resume of the reasons of my offer. I think I stated that the weighing had been made under the supervision of the official weigher.

The Court: That would be ground I think then only for admitting the waybill itself and not the freight bill which was copied from the waybill.

Mr. Hartpence: And I was about to ask lieve when I had finished with this witness to produce the waybill and such other—

The Court: I am not going to foreclose you from putting in everything you have, if you have it. As I said in deciding this motion, I have not decided, nor do I intimate, that I think the waybill if here would be admissible. I say if anything were admissible it would be the waybill rather than the mere freight bill made out from the waybill.

Mr. Hartpence: Well, reserving the right to recall this witness after the production of such other documentary evidence as we may procure, in addition to the waybill, we are through with him and turn him over to cross examination.

(No cross examination.)

H. W. Winney (recalled), for Defendant—Direct

HORACE W. WINNEY, recalled.

Direct Examination by Mr. Hartpence:

Q. Mr. Winney, I believe you have already stated that you were stationed at the Meadows yard in Jersey City. A. Yes sir.

Q. What are your duties particularly there? A. Oversee all the movements of the yard.

Q. How long have you been stationed there? A. In that position five years.

Q. And what is your present position? A. Yardmaster.

Q. Just where are the Meadows yards located with respect to Jersey City? A. On the Kearny meadows between the Hackensack and Passiac rivers about three miles outside of Jersey City.

Q. And what is the extent in area of the yards? A. I did not quite get the question.

The Court: How big is the yard?

A. My yard is about a mile and a half long and about a quarter of a mile wide.

Q. And is that area filled with tracks? A. About all filled.

Q. Those tracks are used for what purpose? A. Storing and classifying cars for different points east of Newark and making up trains of empty cars to go west.

Q. How many freight tracks are there running from the Meadows yard into Harsimus Cove yard, Jersey City, if you know? A. Two tracks.

Q. Two tracks? A. Two tracks.

Q. One eastbound and one westbound? A. One eastbound and one westbound.

Q. Do you recall any labor disorder in the Pennsylvania Railroad system in the vicinity of Jersey City and New York in July, 1912? A. Only from what I heard.

Q. Well, do you know whether or not there was a strike or other labor disturbance there?

Mr. Stout: I object to that.

The Court: Objection sustained. All he knows is from what he heard, and what he heard was hearsay and that is inadmissible.

Q. In July of 1912 was there any period of congestion in the traffic in the Meadows yard? A. Yes, there was, from July the 9th until in the first part of August.

Q. And what was the nature of that congestion? A. It was caused by my instructions to hold back all freight for New York piers, and later instructions to hold all watermelons for delivery in Jersey City and different classes of freight for points in Jersey City delivery.

Q. From whom did those instructions come? A. The freight train master.

Q. Who is the freight train master? A. Mr. M. F. Thompson—through his office.

Q. And does his department have charge of the moving of the freight which comes into the Meadows yards? A. They give me the instructions in regard to moving it.

Q. Do you move freight eastward from that yard without any such instructions? A. Some classes.

Q. What classes? A. Freight for the Erie Railroad, freight for the Jersey City Lumber Yard and other points when there has been no embargo placed on it or no hold orders.

Q. Was there an embargo placed during that period? A. I have stated before there was a hold order—the same thing, an embargo.

Q. That is what you designate or mean by an embargo? A. Yes, to hold these different classes at the meadows.

Q. How much of a congestion was there at that time? A. The yard was filled to almost its full capacity during this whole time.

Q. What is its capacity? A. About 2300 to 2400 cars.

Q. And from what direction do the cars come as they go into that yard for delivery? A. From the west.

Q. Continuing on their eastward journey toward New York is there any way of moving them except by the tracks running into Harsimus Cove? A. No sir.

Q. Were any cars moved eastward from that yard at all after the 9th of July and during the period succeeding up until the first of August? A. Yes sir.

Q. Were they moved every day? A. Some moved every day.

Q. How did the number moved at that time compare with the number ordinarily moved when there was no period of such congestion? A. Much smaller—smaller movements. Some classes of freights were moved every day.

Q. When did you first begin to move the normal amount? A. About the—I should say from the 20th to the 25th of July the movements began to get heavier.

Q. And from that time on you gradually cleared out the accumulation in the yard? A. Until along the first part of August we gradually cleared up to a normal condition.

Q. Now in the course of your work there, Mr. Winney, do you prepare and keep records of the cars that pass through the Meadows yard on their way east? A. I have assistants for that purpose.

Q. Have you with you any records pertaining to the movement of the cars involved in the present suit? A. Yes, sir.

Q. And what will those records show with regard to the movements of those cars? A. The time of the cars arriving at the Meadows and leaving the Meadows.

Q. Will you turn to your record and state whether or not it shows a note or record of ACL car 30943? A. No sir.

Q. On July 13, 1912? A. No, sir, it does not.

Q. Does your record show the movement of car ACL 35449? A. Yes sir.

Q. It does? A. Yes sir.

Q. Will you state what time the car arrived in the Meadows and what time it left? A. It arrived at the Meadows at 5:50 A. M. July 29th. Left the Meadows at 10:45 P. M. August 1st.

Q. Does your record show ACL car 30968? A. Yes sir.

Q. What time did that arrive and what time did it leave? A. Arrived at the Meadows at 7:30 P. M. July 17th; left the Meadows at 9:10 P. M. July 21.

Q. Have you car ACL 34794? A. Yes sir; arrived at the Meadows at 11:40 P. M. July 16; left the Meadows at 3:35 A. M. July 19.

Q. Have you car ACL 24480? A. Arrived at the Meadows at 7:30 P. M. July 17; left the Meadows at 9:10 P. M. July 21.

Q. Have you car ACL 23761? A. Arrived at 3:20 A. M. July 17; left the Meadows at 10:45 A. M. July 19.

Q. Have you car ACL 18316? A. Arrived at 7:30 P. M. July 17; left the Meadows at 9:10 P. M. July 21.

Q. Have you car ACL 25968? A. Arrived at the Meadows at 2:45 P. M. July 24; left the Meadows at 6:40 P. M. July 28.

Q. Have you car ACL 28548? A. Arrived at the Meadows 2 P. M. July 24; left the Meadows at 6:40 P. M. July 28.

H. W. Winney (recalled), for Defendant—Cross

Q. Were those cars moved from the Meadows on their eastward journey by your order or direction? A. Yes sir.

Q. And did you make the order or direction on the superior order of the freight train master? A. On the order of the freight train master.

Cross-Examination by Mr. Stout:

Q. When did you say car ACL 35449 left the Meadows? A. At 10:45 P. M. August the 1st.

Q. August the 1st? A. August the 1st.

Q. Containing watermelons? A. That is the record I have for it.

Q. Don't you know as a matter of fact that that car was delivered to Andrew Spada and Co. on July 17th? A. July 17th?

Q. That is the testimony in the case. A. I don't know about the delivery date. This is the only record I have of that car.

Q. Well, it evidently would not be delivered before it arrived at the Meadows, would it? A. This must be another trip of the car.

Q. Who made up that record? That is made from our regular records.

Q. Made from your regular records? A. Yes sir.

(Adjourned to Sept. 25.)

Re-Direct Examination by Mr. Hartpence:

Q. Mr. Winney, do the records which you have produced with you show the movement of the car ACL 35449 through the Meadows yard on July 13 and 14, 1912?

Mr. Stout: I object to this. He was examined on that point yesterday.

The Court: I will permit it. There was some doubt yesterday when the case closed as to whether he had that trip or some other trip of that car.

A. My answer is we have not a record.

Q. I cannot hear you. A. I haven't a record.

Q. You have, have you not, a record of the movement of that same car, ACL 35449 on a later day than July 13 and 14, have you not?

Mr. Stout: I object as immaterial.

The Court: I permit it. If there was some mistake in putting testimony in the case before, they can explain it now.

A. I have a later record.

Q. And was it that later record to which you referred yesterday in your testimony concerning this car number? A. It was.

Q. Now, Mr. Winney, when the cars are brought into the Meadows yard and the reports are made or taken of their arrival, do you know what time is reported by the conductor? A. The conductor uses the time of when his engine actually stops at the switch.

Q. And is there any difference between that and the time reported by your records? A. Very frequently.

Q. What time do your records report usually? A. In a great many cases the time the conductor arrives in the office with his time cards.

Q. Do you know what time the conductor reports the departure from the yard? A. I could not state positively in all cases.

Q. Usually? A. In most cases they report the time they start to leave the yard with the engine.

Q. And how does that compare usually with the time which you report for the departure of the train? A. That varies with my time quite frequently. The time is taken from the throwing of the switch at the point where the train leaves the yard. He uses the time the train clears the yard.

H. W. Winney (recalled), for Defendant—Recross
William B. Phillips, for Defendant—Direct

Re-Cross Examination by Mr. Stout:

Q. What kind of freight was stored in this Harsimus yard, Meadow yard rather? A. All classes of freight.

Q. Perishable and non-perishable? A. Except highly perishable freight.

Q. Except highly perishable? A. Yes sir.

Q. And during the period from July 9 to July 21 how much non-perishable freight was there in the Meadows yard in comparison with perishable freight? A. There was very litle perishable freight and the majority of the freight was non-perishable.

Q. And during this period from July 9, 1912, to July 21, 1912, and later during the month, you moved a great deal of the non-perishable freight from that yard on to Jersey City and New York City? A. Yes sir.

William B. Phillips sworn.

Direct Examination by Mr. Hartpence:

Q. What is your occupation? A. Agent, Pennsylvania Railroad.

Q. Where are you located? A. Second and Henderson street, Jersey City.

Q. Are you the general freight agent there in charge of that station? A. Not the general freight agent, but in charge of that station.

Q. How long have you been in that position? A. Since February the 1st this year.

Q. And what experience have you had in like occupation prior to that time? A. Well, I have been—

Mr. Stout: I object.

A. —in this line of business—

Mr. Hartpence: One moment.

Mr. Stout: We withdraw the objection.

A. I have been in this line of business for the past 18 years.

Q. And as the result of your experience have you attained any familiarity with freight rates and the method of computing freight rates for transportation of goods over the Pennsylvania Railroad Company's lines? A. Some, yes.

Q. And are you familiar with the filed tariffs and schedules of the Pennsylvania Railroad and other carriers that are involved in the transportation of freight? A. In a general way. Of course I do not know all of our rates.

Q. Well, you are familiar with the method of determining the freight from those rates? A. I think so.

Q. I show you exhibit D-31, page 31, item 29, and call your attention to the provision, "Rates in dollars and cents per car of 24,000 pounds, excess in proportion," and ask you if you can state what that provision means?

Mr. Stout: I object, first on the ground that in my opinion this witness has not qualified as an expert to testify from these schedules, and secondly that it is the province of the court and jury to say what those schedules mean; that this witness cannot read into those schedules what he thinks ought to be there.

The Court: What have you to say, Mr. Hartpence, as to the second objection? It is improperly stated because the jury have nothing whatever to do with construing a document; the Court has.

Mr. Hartpence: I understand that any doocument may be explained by testimony.

The Court: What is there requiring explanation?

Mr. Hartpence: There is some doubt in this case—

The Court: Any ambiguous document can be explained. I do not see any ambiguity there. We have already had it explained to us. I understand it. If you do not that is not my fault. I do not think it requires any expert to tell you what a schedule means once you see it there.

Mr. Hartpence: There was some doubt expressed during the progress of the case yesterday—

The Court: By whom?

Mr. Hartpence: —as to whether or not the rate applied if it was less than 24,000 pounds.

The Court: It has already been testified in the case that it did not, by your own witness; that that is the minimum rate.

Mr. Hartpence: But I do not think that that witness testified that the rate did not apply if it was less than 24,000 pounds.

The Court: He testified absolutely conclusively on that point, that it was the minimum rate, and if the term minimum rate means anything at all that is what it means.

Mr. Hartpence: What we want to show by the witness is that the 24,000 minimum rate means this, that whether the carload weighs less than 24,000 or any weight up to 24,000 the minimum rate applies, but for over 24,000 they are charged in proportion to the excess. Now I really felt that the Court did not get that view of it from the testimony yesterday.

The Court: I got an entirely reverse view from your own witness.

Mr. Hartpence: And we should like to get the correct view of what that means.

The Court: You may cross-examine, Mr. Stout, to find out what this man knows about that and where he got his knowledge from on that subject.

Cross-Examination by Mr. Stout:

Q. What is your knowledge as to minimum rates—what is the source of your knowledge as to minimum rates?

Mr. Hartpence: *Weights,* Mr. Stout.

A. If I understand this right—

By the Court:

Q. Not this weight. What do you know about minimum rates generally? Where did you get any knowledge on the subject? A. I got it in the tariff.

Q. Point out in the tariff where you got it. A. The tariff states very plainly here that this special rate is obtained on a mimimum of 24,000 pounds, which means that the shipper or consignee will pay for 24,000 pounds to obtain this special rate, whether it weighs 20,000 of 22,000. He will pay for 24,000 to gain this special rate on a carload.

Q. To gain the rate? A. Well, to obtain the rate.

Q. How does he express his consent to take such a rate as that? A. Well, otherwise, if he did not obtain this special rate, he would pay a much higher rate on a less than carload shipment.

Q. What indicates that he wants that rate rather than a higher rate for a less amount? A. It is to his advantage.

Q. It might not be. Supposing he was going to send five pounds? A. That is his privilege, to take the less than carload rate if he so desires.

Q. How is he going to take it? A. In shipping his goods with the agent at the point of shipment—

Q. How does he indicate it? What does the railroad company do to find out if he is going to take the higher or less rate? A. I would say this: If he has a car of melons to ship he obtains the rate from the agent at the shipipng point.

Q. And if he does not obtain the rate? A. I would say it is his business to obtain it.

Q. Supposing he does not, then what—and he ships the car? A. I would imagine that it was better for the railroad compay to give him the benefit of the cheaper rate at all times, but it is customary for him to—

Q. Which rate applies if he does not obtain it from the company? A. The rate that is placed on the bill of lading and accepted by the shipper.

Q. Then unless the shipper accepts a bill of lading why there is no rate fixed between the company and him? A. Well, the shipper does accept the bill of lading on all shipments if I am not mistaken.

Q. He takes it; he has a bill of lading, but unless he accepts the terms, why there is no rate between them at all, is there? A. He is supposed, as I understand it, to get a bill of lading or receipt for all goods shipped, and if he accepts the bill of lading he accepts those terms.

Q. That is your understanding of it? A. Yes.

Q. I suppose you are perfectly well aware that the Court of Appeals of the State has held differently on the subject? A. I am not as well up on the law as I—

Q. All right.

By Mr. Stout:

Q. Mr. Phillips, you haven't any connection with the Interstate Commerce Commision? A. No sir.

Q. And your testimony then is an interpretation of this schedule—

Mr. Hartpence: I object.

Q. —of something that you know nothing of of your own knowledge?

Mr. Hartpence: I obejct. It is not in interrogative form.

The Court: "Is it not?" Put that in and make it interrogative.

A. Let's hear that again.

(Question repeated with the words added—"Is it not?")

A. Well, I felt that I knew something about it, having handled the rates to some extent. The court rules that there is something in the law that I do not already know.

The Court: I do not rule that. I simply asked you whether you knew it to be a fact.

Q. Well, your knowledge of rates is what you have gathered from that book and your interpretation of it? A. Yes, sir.

Q. And further than that you know nothing about it? A. No sir.

By Mr. Hartpence:

Q. Well, you have had experience with the handling of those rates, have you not? A. Yes, sir.

Q. And in transacting your ordinary business you handle them all the time, do you not? A. I cannot say at the present time that I am handling them all the time, but I have handled them at various times in the past ten years.

The Court (after examining schedule): I am inclined to think the witness is right about it myself. If you will read that top there, you will see—on the right hand side in the

little box, just below the rate indicated, you will find out that up to 24,000 the minimum rate applies and the excess is to be in proportion. The witness is right about it and I was wrong about it.

Mr. Stout: We were misled about it by what the other witness said.

The Court: I think the witness is telling the truth about it and it is right.

Mr. Stout: But, Your Honor, on that point, I think the schedule speaks for itself and it is not for this witness—

The Court: If you want to strike out what the witness says I will strike it out and I will rule it means just what it says there and what he says it says; so there is no difficulty about it. The interpretation of it is for the Court and the wtiness has helped the Court; and without having looked at that page I would have said it was as the other witness said, because I had not looked at it; but this witness is right about it.

By Mr. Hartpence:

Q. During your experience in the railroad service in the past eighteen years, what, if any, has been your experience with regard to the computing of freight on the shipments—the amount of freight, in the making out of freight bills? A. My experience has been in using the tariffs and rates on inbound shipments for the past eighteen years, to see if the rate and extension was correct, having the freight bill made from the waybill.

Q. And what is the usual course of procedure when a freight bill is thus made out by the terminal carrier; what disposition is made of it; what becomes of it? A. Of the freight bill?

Q. Yes. A. It is presented to consignee for payment.

Q. Have you with you the freight bills, or any of them, which were made out in pursuance of the shipments involved in this present suit between Andrew Spada and the Pennsylvania Railroad? A. I have five. (Witness produces papers.)

By the Court:

Q. Were these bills actually sent to Andrew Spada & Company? A. Not in this particular case here because as I understand it Andrew Spada & Co. refused these five.

Q. Refused the cars? (No answer.)

By Mr. Hartpence:

Q. What is the usual procedure with regard to the freight bills when cars are refused by consignee? A. The procedure of the freight bill?

Q. The disposition of the freight bill? A. It is held by us and after turning the refused car over to a commission house to sell for whom it may concern and they render account sales less their commission, and so forth, it is applied to that freight bill.

Q. And do you know, Mr. Phillips, whether or not the car ACL 35449, car ACL 18316, car ACL 28548, car ACL 30698 and ACL car 24480 containing shipments of watermelons to Andrew Spada & Company and reaching Jersey City yards for delivery between the dates of July 13 and July 31, 1912, were sold after they were refused?

Mr. Stout: I object. It is already in evidence. The answers to the interrogatories state that they were sold.

The Court: I permit this question. The mere fact that there is some evidence on the subject does not prevent other evidence from being put in on the same point.

A. They were sold.

Q. And do you know by whom they were sold? A. By Phillips and Sons, commission merchants located at 277 Washington street, New York.

Q. After they were sold were accounts sales rendered for the sale and proceeds? A. Yes.

Q. And have you those account sales with you? A. I have.

Mr. Stout: I object to this.

The Court: I permit the question.

Q. Were you present at the time the cars were sold. A. I cannot say that I was when these particular cars were sold.

Q. Do you know who did have particular charge of that for your company?

Mr. Stout: I object to all of this as being improper, on the ground that interrogatories were asked in reference to whether these cars were sold. Your Honor permitted that part of the interrogatory to stand, but this part of the interrogatory was stricken out: "If yes, state the date of said sale; whether said sale was private or public and the selling price." And Your Honor held at that time that it was immaterial as to what the selling price was because if the Pennsylvania Railroad Company was liable on these cars they were liable for the value at a certain time and what the Pennsylvania Railroad company got for them was not material as far as the case was concerned.

The Court: Yes, I remember that as though it was yesterday morning. You gentlemen agreed right in front of me that that was the proper disposition to make of that part of the interrogatory, so that I was not called upon to express any legal opinion as

to the admissibility of evidence of that character. I simply held that I would rule the way you agreed. Now assume for the sake of the argument that the evidence is not admissible on the question of the amount of damages to be recovered, it does not at all go to show that it is not admissible on other phases of the case which were not brought up and were not discussed at that time, and I can see one or two particulars in this case where this evidence would be admissible, and for that reason I admit it.

A. I had charge of it for our company.

Q. But who conducted particularly the sale itself? A. The salesman for Phillip & Son.

Q. And do you know who that was? A. Yes, a party by the name of Hellman.

Q. Do you know his full name? A. I know his initial, I do not know his full name. M. Hellman.

Q. Do you know anything concerning his present whereabouts? A. Yes, I am advised he is in Chicago since last Saturday.

Q. And have you made any effort to ascertain definitely his whereabouts within the past week? A. Yes.

Q. And with whom did you communicate for that purpose? A. I sent a representative to Phillips and Sons.

Q. And where are they? A. They are located at 277 Washington street, New York.

Q. Now will you produce, Mr. Phillips, the account sales rendered to the Pennsylvania Railroad Company by Phillips & Sons relating to the sale of car ACL 35449? A. I have the sale.

Q. And was that account sales received at your office from Phillips & Sons? A. From Phillips & Sons, yes.

Q. In the usual course of business? A. Yes, sir.

Q. And have you had custody of it ever since it came in? A. Yes, to the best of my knowledge.

(Marked D-36 for identification.)

Q. And have you the similar account sales for car ACL 18316? A. I have.

Q. And was that received and preserved in the same way as the preceding account sales? A. Yes.

(Marked D-37 for identification.)

Q. And have you the similar account sales for car ACL 28548? A. I have.

Q. And was that received and preserved in the same way as you have already stated? A. Yes.

(Marked D-38 for identification.)

Q. And have you a similar account sales for car ACL 30698? A. I have.

Q. And was that received and preserved in the manner already stated? A. Yes.

(Marked D-39 for identification.)

Q. And have you a similar account sales for car ACL 24480? A. I have.

Q. And was that received and preserved in the manner already indicated? A. Yes.

(Marked D-40 for identification.)

Q. Do those account sales form any part of the records of your office? A. Well, to this extent, to show us how much money we received for the sale of the goods.

Q. And they are preserved by you as records for that purpose? A. Yes.

Mr. Hartpence: I offer in evidence the refusal slips already marked for identification on the examination of Mr. Spada, of cars ACL 35449, 30698, 24480, 18316, 28548.

Mr. Stout: No objection.

(D-26, 27, 28, 29 and 30 received in evidence.)

Mr. Hartpence: I offer in evidence the accounts sales, or accounts rendered, by Phillips & Sons for account of the Pennsylvania Railroad for the sale of cars ACL 35449, 30698, 24480, 18316 and 28548.

Mr. Stout: I object to the receipt of these so-called account sales in evidence on the ground that the sales were, according to the testimony of this witness, made by Phillips & Sons, that he was not present, he does not know of his own knowledge whether these sales were made, and these account sales evidently are made up from the records of Phillips & Sons. There is no testimony here that they are a correct statement of those account sales. I think they merely amount to a mere letter of communication to the Pennsylvania Railroad without any authenticity for their origin.

Mr. Hartpence: Before replying to Mr. Stout I should like to propound one other question to Mr. Phillips.

The Court: You may.

By Mr. Hartpence:

Q. Can you state from your own recollection what these five cars of melons respectively were sold for by Phillips & Sons? A. No.

Mr. Hartpence: The offer is made as the best possible evidence obtainable under the circumstances as to what the cars were sold for.

The Court: I would like to ask, Mr. Stout, who do you think the firm of Phillips & Sons were hired for when they made those sales? Whose agents were they in the last analysis?

Mr. Stout: I think they were the agents of the Pennsylvania Railroad.

William B. Phillips, for Defendant—Cross

The Court: How do you brush aside the decision of the Court of Errors and Appeals in Higgins v. Adams Express Co. in 85 Atlantic, where the Supreme Court in this State—and that has not been overruled by any case that I know of—holds that no delay in delivery amounts to a conversion on the part of the carrier? Now if that is so, why then when Spada & Co. refused to receive the car and the Pennsylvania Railroad Company, not having converted it or gotten the title to it, proceeded to sell it, why doesn't it follow that the Pennsylvania Railroad Company was acting as agent for Spada & Co. in disposing of the car?

Mr. Stout: My reply to that is this: in the case of *Higgins* v. *Adams Express Co.* there was not any evidence that the machine was in damaged condition, but the testimony of the—

The Court: The difficulty with your argument is that it was not a machine at all; it was a part of a machine that was to be sent from Flemington, N. J., to some point to be repaired so that it might be brought back and inserted in the machine in which it belonged, and it never did get there in time to be inserted, but they brought another part and put the part in, so that the part that was sent away became absolutely useless, and they refused to take it; and the Court said that no amount of delay in delivery amounted to a conversion on the part of the railroad company and that consequently the title did not pass. Now then the delay in the delivery of these melons did not amount to a conversion of the melons on the part of the railroad company and Mr. Spada was not justified in refusing to receive them, and if he did not receive them and the Pennsylvania Railroad

Company upon his suggestion that he would not take them sold them I think all the course of the decisions in this State is to the effect that the Pennsylvania Railroad Company acted as the agent of Spada in disposing of the melons and that the title still remained in Spada and they disposed of them for him

Mr. Stout: Going back to the Higgins case, I concede that to be the law, but the cases hold that where goods are presented in such a damaged condition that the shipper or the consignee cannot realize the freight he is then justified in refusing to accept the goods and if the carrier afterwards sells them it is a conversion for which the carrier must respond in damages .

The Court: The difficulty with that argument would clearly be this, that it could not possibly be a conversion on the part of the railroad company after Spada had refused to receive them, because they were simply doing then what they would be required to do by the law itself, to wit, dispose of them and charge him with the difference between what they got and the amount of freight due on the shipment; and furthermore, let us take the other case that we are discussing in this State. How much do you suppose the concern in Flemington could have gotton for an unfittable part of a machine if they sold it in the market? They would have got the price of junk for it, and the amount of the freight on the shipment was something like, I think, $123.

Mr. Stout: I would like to call Your Honor's attention—

The Court: I would like to hear what you

have to say about it. I am only arguing with you on your own ground, that is all.

Mr. Stout: "A carrier which upon refusal of the owner to accept goods because of delay in transportation disposes of the same is guilty of a conversion which will render it liable to the owner for their value."

The Court: What does that case suggest as the most happy thing for the carrier to do when the shipper refuses to receive them,—dump them in a lot or put them on the street, or what? The shipper says "I won't take these goods; I'll have nothing to do with them." Now the case you are reading says that the carrier is guilty of a conversion. Is he obliged to store them for the rest of his natural life or what?

Mr. Stout: Why no; the same result is reached as though Spada in this case had sold the watermelons and sued the railroad company for the difference between what he got for them and what he should have gotten for them if they had arrived on time.

The Court: The same result is not reached. In the one case the title always remained in Spada, and according to the decision you have just read a conversion took place and the title went over to the other party.

Mr. Stout: Well, that is the decision in that case. That is the case of Rock Island & Pacific R. R. Co. v. Pfelfer, 119 Southwestern. Here is another case: "Where a carrier upon refusal of a consignee to accept damaged goods has sold them their full value may be recovered. The same result is reached as if the consignee received the goods and sued for the damages."

The Court: I agee writh that. That is true.

The same result is reached of course; precisely the same result is reached. He gets payment in full for the goods, in one case one way and in the other another. He gets compensation. The same result is reached financially speaking.

Mr. Stout: But the shipper is still entitled to the difference between what the goods sold for and the value or the price that he would have received for them—

The Court: Precisely. He gets compensation, and the same result is reached because in the one case he gets full value—that is on the suit he gets full value. In the other case he gets part of the value on the sale and the balance of the value on the suit.

Mr. Stout: Then the railroad would be entitled to turn over to the plaintiff the money they had realized on the sale plus the difference between the money they realized and the value of the goods when they should have arrived.

The Court: After the deduction of freight.

Mr. Stout: After deduction of freight. Then what is the difference between putting it on that score or putting it on the score that he is entitled——

The Court: There is not any difference. The only question I am asking you is whether or not the railroad company in doing what they did under the circumstances in which they did it were not acting as the agent of Spada & Company.

Mr. Stout: Well, under that one authority it would seem not. That case says it is tantamount to a conversion.

The Court: Well, our own Supreme Court says it is not.

Mr. Stout: Well, in that case there were not damaged goods,—whether that makes any difference.

The Court: In that case there were damaged goods, damaged so that it could not be used at all. In this case, a little more favorable to your side—or the other side—because the melons were not entirely destroyed and he refused entirely to receive them.

Mr. Stout: There is another authority I desire to read to Your Honor: "Where by a carrier's negligence a machine is so damaged in transportation that the cost of repairing it would equal the price of a new machine, a consignee is justified in refusing to receive it and may recover from the carrier its value and the amount paid for its carriage with interest from the time it should have been delivered." That is a Wisconsin case. I have two New York cases. I will read the case of Mondy v. the Railroad Company: "In the event of a partial damage the better rule seems to be that where the goods were injured through a cause for which the carrier is not responsible, the consignee is not justified in refusing to receive them but should accept them and hold the carrier responsible for the injury, it being the policy of the law to impose upon the consignee the obligation to mitigate so far as possible the loss to which the carrier must respond. In those cases where the measure of damage consists in depreciation in the value of the goods arising from mere delay in delivery the rule in this State is settled that the consignee must in all but extreme cases accept the goods and recover in an action at law. Where, however,

the partial damage is a result of injury to the goods themselves in the course of transportation, the expressions of the courts are not uniform. It has been said that the consignee has the election to reject the property and hold the carrier liable for its value or that he may accept the property and dispose of it to the best advantage and hold the carrier responsible for the difference between the sum realized from the sale of the property and the sum it would have been worth had it been delivered in good order."

Further, on the receipt of these so-called account sales, assuming that the Pennsylvania Railroad was acting for Spada & Co. as agent, I think the same reason would apply to the inadmissibility of these account sales in evidence because there is no proof here that these sales were made by Phillips & Sons and that the amount realized here is correct. This man hasn't any knowledge of that. He says he does not know what they were sold for; he only shows here as the account of sales a paper that is presumably made up from the books of Phillips & Sons.

The Court: I think in this case I will admit the accounts of sales. We will assume for the sake of the argument and for the sake of the decision that Spada & Co. were justified in refusing to receive these carloads of melons that they say they did refuse to receive, although I may say in passing that I do not think that any of the cases that were cited by counsel have any reference to the situation of affairs developed in this case with respect to the melons. Those cases seem to be authority for the proposition that if the melons that were spoiled were practically the

whole of the shipment or so much so as to render the value of the remaining melons less than the amount due for freight or certainly less than the half of the amount of the whole shipment, that then the party would be justified in refusing. That seems to be the line of decisions that you have cited. In this case the evidence seems to indicate, at least in some of the cases, that that condition of affairs does not exist in respect to the melons. I only say that in passing. I do not think it has much bearing on the case anyway, but I say they are inapplicable on that ground in my judgment. But I do not base my ruling on that phase of the case at all. I am satisfied that the Higgins case is clear authority for the proposition that the mere delay in delivery does not amount to a conversion. I am satisfied furthermore that assuming for the sake of the argument that the sale of the property by the railroad company upon the refusal by Spada to receive them did amount to a conversion, the mere fact of conversion does not change the title to the property. The title is only changed when, if a man converts, a suit is brought and recovery is had and the judgment is paid. Then the title passes by the fact of the payment of the judgment, because the party has the payment of his money on the one hand and the person who converted the goods has the goods, and that works a change of title; but the title always in this case remained in Spada & Company. Whether they refused to receive them or not the title was theirs as evidenced by the bill of lading and as evidenced by the fact that nobody in the case indicates that the title ever got out of them from the time the goods

were shipped by Roddenbery, their correspondent in Georgia, up to the time they refused to receive them; so that what was being sold in effect was the goods of Spada & Co. They were being sold by the railroad company because Spada & Co. had refused to receive them. Now in the light of that situation what is the legal effect? The legal effect is simply this: that whether Spada & Co. had a right to refuse them or not, it seems to me that the Pennsylvania Railroad Company was acting with respect to Spada's property for Spada's benefit. If Spada & Co. had no right to refuse to receive them, why then manifestly when they did refuse to receive them and the railroad company sold them upon their refusal, the railroad company clearly was acting for them. If Spada & Co. had a right to refuse to receive the goods and Spada & Co. did refuse to receive them in pursuance of that right and the railroad company sold them, then we will assume for the sake of the argument that they were guilty of a conversion in so doing. Still they converted them in pursuance of the necessity created by the refusal of Spada & Co. to receive them; and what were they to do after Spada & Co. refused, whether Spada & Co. had the right or not to refuse? They only had one thing that they could do, and that was to use due care to mitigate the damages. That is the indubitable rule with respect to all cases of that kind. Now in order to mitigate the damages they were obliged to use due care to dispose of those goods at the best price to some buyer. Now the only legitimate way that they could do that it seems to me would be to engage some person in that line of busi-

ness, a commission merchant, to sell those goods, and when they should receive the proceeds of the sale to devote first the proceeds of the sale to the payment of the freight, and if any balance remained over to remit that balance to Spada & Co. It seems to me that that is the common sense of the thing as it is the common law and the business of it, and it is every day's practice that everybody knows all about. Now in this case therefore it seems to me that it is perfectly clear that the railroad company did this act, prompted to it and impelled to it by the act of Spada & Co. in refusing to receive the cars. Consequently they did the act for Spada & Co. Now it is perfectly manifest that when a commission firm sells goods in the manner in which these were sold—and the Court will judicially notice that that is the fact—they will render an account of sales. The account of the sales is a direct outcome of the sales and consequently is a part of the *res gestae* of the sales; and the evidence in this case is that these bills were issued by Phillips & Company and sent to the Pennsylvania Railroad Company to evidence the fact of the sales by the agents employed by them to make the sales, and they are therefore a piece of the whole transaction and constitute, if anything can constitute, what is known in the law as the *res gestae;* and upon these reasons I admit the accounts sales.

(D-36, 37, 38, 39 and 40 admitted in evidence.)

By Mr. Hartpence:

Q. I show you exhibit D-36 and ask you if you will state that that exhibit shows that the con-

tents of car 35449 were sold for? A. It shows that the contents of that car were sold for $46.80.

Mr. Queen: Don't they speak for themselves?

Mr. Hartpence: I suppose they do.

Mr. Queen: There isn't any objection to putting it right in the record.

Q. You mean by that that it shows that to be the net proceeds of sale? A. No, the net proceeds turned over to us is $43.06, there being $3.74 commission deducted.

Q. And I show you exhibit D-39 and ask you to state what the carload 30698 was sold for and what the net proceeds were. A. It shows that the contents of this car were sold for $40 less commission of $3.20; the net proceeds were $36.80.

Q. I show you exhibit D-40, and ask you to state what car 24480 sold for and what the net proceeds were. A. Sold for $40, less commission of $3.20; net proceeds $36.80.

Q. I show you exhibit D-37 and ask you to state what car 18316 sold for and what the net proceeds were. A. The contents of this car sold for $40, less commission of $3.20; net proceeds $36.80.

Q. I show you exhibit D-38 and ask you what car 28598 sold for and what the net proceeds were. A. Sold for $40, less commission of $3.20; net proceeds $36.80.

Q. Mr. Phillips, if the weight of the cargo of watermelons shipped from Cherokee or Oaklawn, Ga., by way of Stringer, Florida, in car ACL 35449 was 28,000 pounds and the tariff or rate for that shipment was 49½ cents per hundred weight, shipped to Jersey City, N. J., can you state what the amount of freight chargeable on that shipment would be?

Mr. Stout: I object to that on the ground

that that is a matter of multiplication, 28,000 times 49½.

The Court: Well if that is a matter of multiplication I will let the witness answer it.

Mr. Stout: Furthermore that the fact that a shipment was made from Stringer, Florida, to Jersey City—there is no evidence showing over what lines it came. I do not see what force that would have as to the issues in this case; and furthermore there is no evidence as to how many pounds was in a certain car or any car.

The Court: Well, if the answer is a mere matter of multiplication how do your last two grounds find any basis whatever in fact?

Mr. Stout: Well, I may have overreached myself when I said a mere multiplication. There are other serious reasons why the question is not proper.

The Court: If it is once admitted that it is a matter of mere multiplication—

Mr. Stout: I withdraw that part of my objection.

The Court: Well, I will sustain the latter part of the objection until the ground is laid to show what the course of transit was, if he knows what the course of transit was. I presume you can ship from Cherokee, Georgia, by way of California.

Mr. Hartpence: The tariff classifications which are in evidence show and it is testified by Mr. Butler that there was a through rate fixed for that shipment from Oaklawn or Cherokee to Jersey City, and that tariff is the law governing that rate.

The Court: All right; then if that is so there is no need of our asking this witness that. All we have got to do is to look at the tariff and find out what the rate is.

Mr. Hartpence: I thought perhaps it might illuminate the situation and render it more easy for the Court and jury.

The Court: I will strike out the illumination. The question is open to the objection suggested by Mr. Stout and I am going to sustain that objection.

Q. Do you know, Mr. Phillips, the route by which car ACL 35449, to which you have referred in your testimony, was shipped from Oaklawn or Cherokee, Georgia, to Spada & Co., Jersey City? A. Well, I could not say that. I have not followed that particular car on that trip.

Q. What would show it? A. The waybill would show it.

Q. Have you that waybill with you for that shipment? A. No, I haven't; that is in the hands of our auditor.

Q. Do you know, Mr. Phillips, whether or not in the fixing of the rate or tariff on a shipment such as has been referred to from Oaklawn or Cherokee, Georgia, to Jersey City upon a through rate, it makes any difference how it is routed or sent?

Mr. Stout: I object.

A. That rate is based on the—

Mr. Stout: One minute.—No objection.

A. That rate is based on a certain routing. The tariff will show that—upon which the rate was obtained.

Q. Do you know what they refer to when they refer to the Southern classification? A. On carloads of melons I do not think it is covered by the Southern classification; I think it is covered by a special watermelon tariff.

Q. Do you know where to refer to that in ex-

hibit D-31? A. I have not looked it up, this particular car.

Q. Will you look at it at this time? See if you can? It is already in evidence. I will re-frame the last question. Will you look at this time at exhibit D-31 at page 31, item 29, and state whether or not a shipment being made at the rate therein expressed would cover any particular routing, and if so what? A. I might say that this tariff here does not—

Q. Will you answer the question please? A. I did not catch the question.

(Question repeated.) A. What was the point?

Q. Point of shipment item 29, destination Jersey City, N. J. A. It would show that this shipment should travel from the Georgia & Northern Railway—but there is additional information to be obtained,—"The territorial location to be based in connection with basis rates on pages 49 to 77."

Q. Can you state from that information what the particular routing that shipment would be that you have just referred to, from the Georgia & Northern Railway?

Mr. Stout: I object to this. This book itself shows. If that is all he knows about it, doesn't the book show? He has testified before here to-day that he does not know anything about schedules except as he gets it from that book and his interpretation of it. Why doesn't the schedule itself show the routing, if there is such a routing?

The Court: I will permit him to answer the question. I imagine it might be well for us to know what the book does show, and even for you if you have to prepare a case in some other court, to know what it does show. I would like to know and I think the jury would like to know.

(To the witness:) Now just tell us about it, Mr. Phillips, if you have got it.

The Witness: Just one moment, please. Well, I must admit from this tariff that I cannot tell you the entire route.

Q. Very well, that is all there is to it, Mr. Phillips, that answers the question.

Mr. Hartpence: If the Court please, we submit that the hypothetical question propounded to the witness for the purpose of computing freight is a proper question and should be sustained on the ground that—

The Court: I have sustained it and he cannot answer it. He cannot answer it from that tariff. I permitted the question long ago and I have been waiting here for some answer.

Mr. Hartpence: I understand that. The question which was propounded for the purpose of determining the freight regardless of whether or not the specific routing can be shown.

The Court: Well, the routing would make some difference, would it, in your determination as to what the rate would be?

The Witness: Not from that tariff I do not think it would, after looking at the tariff. That tariff there tells you from the point and the originating carrier but it does not tell all the route all the way to Jersey City.

By the Court:

Q. But the route would make a difference, wouldn't it, in the tariff? A. I would not like to say about that. There are some points in the south where it comes on the A. C. L. or the Seaboard Airline where they are the same. Others it is different.

Q. And you would have to know which way it

would come before you could answer accurately? A. Before I could answer thoroughly I would have to have further information.

The Court: I overrule the question.

Mr. Hartpence: We would like an objection noted.

The Court: Of course.

Mr. Hartpence: Do I understand the court's ruling then to include the statement—

The Court: I have ruled on the question and I have ruled it out. I have ruled it out in the light of the testimony of the witness that the routing would make a difference in the matter. He cannot testify without knowing what the routing was. In effect that is what he said and I have ruled your question out on the strength of it.

Mr. Hartpence: But the question propounded—I do not like to be persistent in the matter—

The Court: Well, that is the question I have ruled on and I stand by the ruling.

(The following question was repeated by the stenographer: "Q. Mr. Phillips, if the weight of the cargo of watermelons shipped from Cherokee or Oaklawn, Ga., by way of Stringer, Florida, in car ACL 35449 was 28,000 pounds and the tariff or rate for that shipment was 49½ cents per hundred weight, shipped to Jersey City, N. J., can you state what the amount of freight chargeable on that shipment would be?")

Mr. Hartpence: That was the part I did not get quite clear. I understood your Honor to say that you had sustained the hypothetical question.

The Court: I said I had ruled out this last question.

Mr. Hartpence: I desire my objection noted to the overruling of the hypothetical question.

The Court: It is noted long ago.

Q. Mr. Phillips, if a carload of watermelons shipped in ACL car 30698 from Cowarts, Ala., on or about July 12, 1912, consigned to Jersey City, N. J., weighed about 26,000 pounds, and the tariff or the freight rate per hundred pounds is 48.2 cents; can you state, or will you state, what the amount of freight would be chargeable on that shipment?

Mr. Stout: I object to that on the same ground as to the previous hypothetical question.

The Court: It can be stated, Mr. Phillips?

A. Yes, it can, by multiplying the numbers of hundred pounds of the weight by the rate?

The Court: Well, what is the objection, Mr. Stout?

Mr. Stout: There is no evidence how many pounds there were in the car shipped—speaking of a certain car. There is no evidence of how many pounds there were in it, and he is taking a certain rate, and he has testified that the freight would depend upon the route, and he does not know the route this car was carried.

The Court (to the witness): How could you do it without a route?

A. The question as it was put to me was the weight and rate. He says at such a rate, stating that the tariffs called for that weight and rate, and my reply to that would be—

The Court: Well, this is a mere matter of multiplication?

A. Yes.

The Court: All right; I will overrule the question on the ground that the jury is just as capable of multiplying as the witness is.

Mr. Hartpence: We ask that an objection be noted. We should like, to shorten the matter, to submit the same interrogatory as to the other cars.

The Court: All right.

Mr. Hartpence: Car 24480 ACL, weight 37,000 pounds, rate 46¾ cents per hundred weight; 28548 ACL, weight 21996 pounds, rate 46 1/3 cents per hundred weight; 18316 ACL, weight 31220 pounds, and the rate 46¾ cent per hundredweight.

JOSEPH MIFFLIN, sworn.

Direct-examination by Mr. Hartpence:

Q. What is your occupation? A. Freight agent, Pennsylvania Railroad.

Q. Where are you stationed? A. Piers 27, 28 and 29, North River, New York.

Q. Are you in general charge of the New York freight station? A. Yes, sir.

Q. Do you recall in July, 1912, any labor disturbance or strike that took place there at piers 27, 28 and 29? A. Yes, sir.

Q. And when did it first begin? A. The night of the 9th of July, 1912.

Q. How long did the strike continue? A. Eleven or twelve days.

Q. And during that time did you notice any particular instances of disorder or violence? A. Quite a number of them.

Q. On the part of whom? A. Strikers we supposed, of course, directed against men that had taken their places.

Mr. Stout: To shorten it, we admit that there was a strike at pier 29.

The Court: I asked you that yesterday and you said you were going to contest the extent of the strike.

Mr. Stout: The extent of the strike on other lines.

Mr. Hartpence: That is all we are going to show by this witness.

Q. Do you know what the nature of that strike was? Why did it occur? A. Why did it occur?

Q. Yes. A. Well, we had every reason to believe there was a case of intimidation as far as our men were concerned. The strike started at other points and our men were forced to go out through fear.

Q. Was the strike in progress at other points before your men went out? A. Yes.

Q. Do you know whether it continued in effect at other points after your men came back? A. I am not clear on that. I am under the impression it did, but I am not clear on it.

Q. Can you state any other point or points at which the strike was in effect during the period between July 9th and July 18th? A. Several of the steamboat lines and several of the railroad lines.

Q. Located where? A. The Morgan Line for instance—a steamboat line. It originated with the steamboat lines, amongst the seamen and not the ordinary freight helpers. It started among the seamen and spread to the helpers.

Q. Were these strikes located on the North River? A. North River. My knowledge of the Morgan Line would be that they never said that they could not take freight. Many teams came there on the Morgan Line every day. Instead of

being able to ship that freight ordinarily they loaded a barge up and held it at the pier for days and days until that strike was relieved.

Q. That was done by you in the ordinary course of your business there as a freight agent? A. In the ordinary course of business we delivered it by team direct to the end of their pier.

Q. No—

The Court: He said the Morgan Line had freight to deliver and they never said they could not deliver it and they loaded it on a barge until the strike was over.

Q. Do you know of any other places where the strike took place? A. May I look at my record? By the Court:

Q. Did you make the record at the time? A. Yes.

Q. You may refresh your mind from that, if you made it at the time. A. Part of the station operations—I visited a number of these places myself—the strike was so pronounced, so well known to everybody, that it was part of the station operation at pier 28 to have all of the stations called up practically every morning to know if there was any change in the situation from the day before.

By Mr. Stout:

Q. Was this record made from what somebody told you? A. Yes.

Q. By whom was it made? A. By one of my young men, at my direction, at the request of the Superintendent of the Manhattan Division that wanted this information given to him every morning.

Mr. Stout: I object to this testimony. I do not see how it is competent. It is hearsay. I do not think he is any better qualified than

the man yesterday. All he knows is what some one told him.

The Court: He is much better qualified, for he got the information himself. If you have a strike on at your dock and all your deliveries and all that sort of thing depend on your knowing when it is relieved, and in the ordinary course of business you call up to find out if the strike is relieved at different points in order that you may make your deliveries, those are inquiries made in the ordinary course of business and constitute a part of the *res gestae* of the business itself and it is clearly and indubitably evidence. But the difficulty is that this witness did not make the inquiries. Now if you gentlemen state that you intend to show that this strike was not widespread along the docks I will sustain this objection and give Mr. Hartpence an opportunity to show that it was widespread along those docks.

Mr. Stout: We have one witness as to the Erie. The testimony of Christie yesterday was that it extended to the Erie line and all the railroads, and we have a witness who was receiving shipments at that time over the Erie line, who says there was not a strike,—on the pier end over at New York.

The Court: What pier is that?

Mr. Stout: Pier 20 and 21. That is in the adjacent vicinity.

The Court: That is all you have to show the lack of the extent of the strike, that the Erie was not involved?

Mr. Stout: I think so, because there has not been any proof yet that the strike did occur anywhere else.

The Court: Oh, yes, there is, right now, from this witness.

Mr. Stout: Well, this is the first.

The Court: There is proof absolutely that it did not originate at pier 29, that it originated at the Morgan Line, that it did not originate among longshoremen, that it originated among other laborers. We have that absolutely in the case.

Mr. Stout: I mean the strike as to railroads.

The Court: What do you mean, as to railroads?

Mr. Stout: Why, the witness yesterday, Christie, attempted to testify as to a strike on other lines of railroads and we were going to bring a witness to show that it wasn't.

The Court: I will overrule this particular thing. I dare say you can get out of this witness about these strikes without any difficulty at all.

By Mr. Hartpence:

Q. What personal knowledge did you have, or what personal investigation did you make, of the existence of any strike or labor disorder at any other place than that which you have already testified to, at that time? A. Of course everything I did practically was through employees. You can understand, stationed at three piers, with four hundred men, I could not do all this work myself and I had to delegate someone to do it. The young man I delegated to do this was a young man named Wilson, in our employ for a number of years and up until recently, when he entered the employ of Mr. Phillips in Jersey City. Of course I delegated that to somebody else and I cannot tell you much of my own knowledge except-

ing that I interviewed people on West street, some of them evidently employees of other stations, and I interviewed our own people to find out what their grievance was, to try to get them to come back to work and state under what conditions they would come back to work.

Q. What knowledge did you have of the existence of the strike or disorder at any other place than those places to which you have already referred? A. It is a common practice for me to wander along West street for ten or twelve blocks. I frequently get off the elevated station one or two stations before reaching Desbrosses street, which is my station, and it is a common practice for me to walk along West street ten or twelve blocks; and several times during the progress of this strike I walked along the Morgan Line, Clyde Line and other points to see what was going on, and I would find a great deal of disorder in West street. Many times after the crowd dispersed they would bring up the ambulance, a man having been assaulted, and you would hear all sorts of reports as to who he was. You could not identify him as belonging to any particular station. Many doors would open along the piers and I would talk with the men at the different stations. They would state the progress of the strike and as to how many of their old men they had back and so on. That happened several times, and this matter was a daily occurrence.

Q. What other places than those to which you have already referred did those occurrences have relation to? A. I did not hear you.

Q. What other places than those you have already referred to, your own place and the Clyde Line and the Morgan Line, did those disorders have relation to, at any other lines? A. I could not say that the disorders actually applied to us.

It would not occur on the piers, except in one instance on the Morgan Line steamship a man was assaulted and pretty nearly killed, but in other instances they were out on the street, and you could not tell where the employee belonged; but it was a strike and it was just as evident as a tornado or a snowstorm in New York City.

Q. Have you any knowledge of the existence of a labor strike or disorder at any other points than those you have already given? A. Yes.

Q. Where? A. While the D. L. & W. didn't actually have their men go out, they made a concession to their men to keep them in.

Q. Where else? At any other place besides that? A. The Lehigh Valley, 34.

Q. Where else? A. The New York Central was affected.

Q. Who else, if anybody? A. The B. & O. I am quite positive was.

Q. Anybody else? A. That is about all of us.

Q. How long did it take after the strike itself had subsided, about eleven days after the 9th as you stated, before the orderly course of business was resumed on piers 27, 28 and 29? A. You mean resumed, or we attempted to resume?

Q. The orderly course of business. A. Oh, it probably took us ten days to get straightened out.

Q. And during that period of the strike and disorder what efforts did you make, if any, to handle the freight that was coming in? A. We hired all available men we could get—in some instances a greater number than we would under ordinary conditions; a greater number of unskilled men than we would skilled men to expedite the work, and then probably could not accomplish half the result.

Q. Why didn't you get skilled men to do it? A. Skilled men are not available during strike times. The skilled men were on strike.

Cross-examination by Mr. Stout:

Q. Did you know any of the employees in the employ of the Lackawanna? A. Do I?

Q. Did you at that time, the employees that you say were on strike? A. I did not say that they were on strike in the Lackawanna.

Q. They made concessions? A. No, I didn't; I said the Lackawanna made concessions to their employees as a result of the strike to prevent them from going on strike.

Q. I see. Did the Pennsylvania make any concessions to the employees? A. The Pennsylvania had no opportunity. They struck before we knew they had any demands to make, or before they made any demand.

Q. Did any of them make any demands for higher money? A. No, sir; after the strike was in progress a day or two I went out on West street where there were probably one hundred and fifty of our men—am I at liberty to make this statement?

(Question repeated.) A. At what stage of the game do you mean?

Q. At any time during the strike? A. Not definitely, no.

Q. You do not know whether there was any strike among the employees of the Erie Railroad, do you, at this point? A. I am inclined to think there was not.

Q. You think there was not? A. That is at pier 21. I am inclined to think there was not.

Redirect-examination by Mr. Hartpence:

Q. Were there any demands made by the employees of the Pennsylvania at piers 27, 28 and 29 for more money prior to the strike when it occurred July 9th? A. No, sir.

Q. And did the men return, when they did return, at their same scale of wages? A. As before.

Mr. Hartpence: We offer in evidence the following exhibits, marked for identification: D-15, 16, 18, 20, 21, 22, 24 25, 26, 27, 29, 10, 12, 13, 3, 2.

Mr. Stout: No objection.

(Above exhibits received in evidence.)

(Defendant rests.)

Mr. Stout: I ask you to produce letter of July 31, 1912, written by Andrew Spada & Co. to Butler.

Mr. Hartpence: That is a letter we could not find despite all our efforts to do so.

Mr. Stout: You have no objection to the copy being offered in evidence?

Mr. Hartpence: I have no objection to its being offered as secondary evidence.

Mr. Stout: I offer it,—letter from Andrew Spada & Co. to E. Butler, dated July 31, 1912.

(Marked Exhibit P-2.)

(Testimony closed.)

(Recess.)

Mr. Hartpence: If the Court please, we desire to move for the direction of a verdict in favor of the defendant as to count 4 of the complaint, on the ground that there is no proof in this action that the melons contained in the car mentioned in the 4th count, ACL 34794, were in good condition at the time of their shipment from Cairo, Ga., on July 12, 1912, and that the plaintiff fails to make out a case with respect to that car and with respect to that count unless he shows that the melons were in good condition at the time of

shipment; and we move for a direction of a verdict generally in favor of the defendant and against the plaintiff on the ground that the evidence shows conclusively that there was a strike upon the road of the defendant company at the time itself, and the effects of which continued throughout the time mentioned in the plaintiff's case as the time when the delays occurred which he alleges caused the damage, and that that strike was an excepted cause in the bills of lading in evidence in the case, under certain of them specifically as a strike and in certain others as a cause beyond defendant's control, and that that condition having been shown, the strike and the congestion that resulted from it, it became incumbent upon the plaintiffs to establish by the burden of proof upon them to do so that the defendant had been guilty of negligence before they could charge the defendant with liability, and that they have not met that burden.

As to counts 4, 5, 6, and 7, we move for a direction of a verdict in favor of the defendant on the ground that there is no proof that claims in writing were filed within ten days as required in the bills of lading produced in evidence as exhibits D-11, 14, 17, and 19, and that a verdict therefore should be directed in favor of the defendants as to those cars.

We further move for a direction of a verdict in favor of the defendant as to counts 4, 5, 6, 7 and 8 on the ground that the measure of damage in those counts and upon the shipments involved in those counts is to be based on the amount realized from the sale of the cars involved in those shipments, the net proceeds thereof, and that it conclusively appears

that they were sold for a sum less than the freight charges, and that the carrier was entitled to apply that amount realized from the sales to the freight charges, not being answerable to the plaintiff for any amount whatever under condition 6 of the bills of lading, that "if any carrier transporting this shipment shall deem it necessary to dispose of same en route or after delivery has been tendered to or refused by consignee, in order to protect the interest of the owner and the charges of transportation, such carrier is hereby empowered to act as the agent of the owner in such transaction and will not be held responsible for more than the net proceeds of the sale after deducting all legitimate expenses."

Those are all the grounds of our motion to direct a verdict.

Mr. Stout: As to the first ground, as to car 34794, that there is no evidence as to the condition of this car when shipped, count four of the complaint, the receipt for the goods in this car is in evidence and that receipt states that the goods were in apparent good order when received, and under the authorities I think that that remains until it is disputed by the connecting carrier.

As to the strike, as to all the cars, I think that it has not been proven that there was a contract limiting the shipper's liability, and if it has been proven the question as to whether the strike was the proximate cause for the delay is a question that should go to the jury,—the question whether the Pennsylvania Railroad had a right to use watermelon tracks for peaches and so forth.

As for the ten-day clause as applying to

counts 4, 5, 6 and 7, I make the objection that I did as to the strike, that there is no proof of a contract limiting the carrier's liability, and secondly if such a contract has been proven that the defendant has set it up as a defense and the burden is upon him to show that the ten-day clause has not been complied with. It is not up to us to show that it has been complied with, because he who alleges must prove; and furthermore, as to these counts, there is in evidence the refusal orders which might be tantamount to a claim, and there is also a letter written by the plaintiff on July 31, which is within ten days from the time of arrival of these cars, and the jury might say that that is tantamount to a claim; and there is also a letter in evidence written July 13, whereby the plaintiff says that if certain cars do not arrive on a certain day claim will be put in.

As to the measure of damages as to counts 4, 5, 6, 7 and 8, we there say that if there is a stipulation in a bill of lading it has not been shown that the shipper was bound by that bill of lading, and if so the defendant would have to plead that limitation, which he has not done, and show it as an affirmative defense; otherwise he has waived it. Furthermore, the law in reference to giving notice of a claim in cases of delay—the general proposition is these notices are regarded as limitations of the carrier's liability and therefore as ineffectual as against a claim for loss or injury due to the carrier's negligence, which stipulations have been held not applicable to depreciation in the property due to delay in transportation nor to a case where the consignee refuses to receive the property

on the ground that it has not tendered it in proper condition.

The Court: I think in this case I must refuse to direct a verdict either on the 4th count or on any of the counts or on all of them, for the reasons stated:

First of all, I would be ready and willing to hold if the facts warranted me in doing so, that if the carrier, the initial carrier, had duly filed his schedule of rates and had also duly filed his limitation of liability with the Interstate Commerce Commission, and these were known either as the Southern rates or as the Watermelon rates, or as what not—for it seems to be rather doubtful in the case now whether Southern rates or Watermelon rates applied, from the testimony of the two witnesses, who conflicted on that subject—I would have been willing to hold that the rates thus filed and the limitations thus filed were conclusively presumed to be known to and to be compulsive upon both the carrier and the shipper. The carrier could not charge or collect more, and the shipper would be bound by the charge as well as by the limitations. The principle, however, as I understood the law, and as it is laid down in Kansas City R. R. Co. *vs.* Carl in the U. S. Supreme Court, which you cited to me, is that if the limitations are filed—I think the wording of the cases is this, that if the limitations of liability are not filed by the initial carrier with the Interstate Commerce Commission they do not constitute part of the rate, and consequently the mere fact of the fixing of the rate itself, the limitations not having been proved to have been filed, would not be a part of the rate, and consequently the party would not

be affected with notice of them. It seems to me, therefore, that your case fails, not for any reason stated by my brother here, but for that reason, because the basis upon which the party is to be affected with the notice is conspicuously not proven. If, however, I say, those things had been established and it had been shown that these limitations which you are now seeking to rely upon were filed with the Commission so as to be brought home by the fact of the filing to the notice of the shipper, then I would be justified in holding that he was conclusively presumed to have knowledge of them. In fact it is in that Carl case itself where the Court holds that the man cannot aver that he has no knowledge of those things if they were filed. Whether they were brought to his notice or not, he knows them, the law says; and of course this is an interstate shipment admittedly; it is an interstate commerce act of Congress of the United States, and it has been construed by the Supreme Court of the United States and as such would be binding upon me whatever our Court of Errors and Appeals might have held when that matter was before it with respect to what presumptions would arise in cases where their attention has been called to the Act.

Then I would have been also ready to hold —for I think the case is perfectly clear on this point—that whatever limitations had been filed by the initial carrier would have been limitations of which the present carrier would have been warranted in taking advantage. I think if the Georgia Northern Railway Company had filed its limitations with its rates, that those limitations would have

bound the shipper in this case in favor of the Pennsylvania Railroad, which is a connecting and succeeding carrier.

I would have been also inclined to hold that the shipper is conclusively presumed—this is a mere re-statement of what I said before—conclusively presumed to have knowledge of those rates. I would also have held that when such rates are filed, then the carriage is to be subject to the carrier's bill of lading, if they are the watermelon rates, and he would not come under the common law liability; and I would have gone very much further than the other side has argued I should go in favor of the railroad company in this matter. I would have held in direct contradiction to what has been argued by the plaintiff in this case, that if the rates had been filed that there was not any burden at all further upon the railroad company than to show that they were filed, and that there was no necessity to go further and show they were brought home to the notice of the shipper. That is presumed once the fact of the filing is established by the evidence. Those things I think are things that I would have been obliged to hold under the cases that have been submitted to me and that I have had the opportunity to read since the case commenced, which I think state the law which would have guided me in the decision of the case.

But in this case I think that the evidence does not establish or tend to establish that any limitation at all was filed, and that therefore from the fact of a certain rate being charged it cannot be inferred that any limitation attached by reason of the charging of that rate. That I think is perfectly necessary

as a logical inference from the reading of the cases which I have read. That then causes us to revert to the law as it stands in our State outside of the interstate commerce law, and with respect to that I am obliged to rely on the case of Hill *vs.* The Adams Express Company, which is found in 53 Vroom at page 373 and the following pages; and in that case the law seems to me quite clear that where a common carrier undertakes to transport merchandise the presumption is that he does it subject to the common law liability. This presumption remains until it is overcome by the proof of a special agreement, and the burden of showing that agreement limiting the common law liability of the carrier rests upon the carrier.

Now whether or not you have shown such limitation of liability by reason of these so-called bills of lading, I think under the decisions I must leave to the jury. Has either of you anything to say on that point? It seems to me that the law seems quite clear on the proposition I must leave that question to the jury.

Mr. Stout: That is my understanding of it.

The Court: All the cases I have seen seem to say so and I do not know anything to the contrary. Now if I am obliged to leave the question of the existence of a special limitation to the decision of the jury, *a fortiori* I must leave to the jury the question of whether if that thing is established the railroad company has shown that it comes within any of the provisions of such limiting contract; and therefore, holding these views, I must deny the motion to direct a verdict.

I meant to say also in disposing of your

motion—so that I may be understood to have dealt with every point raised by you—that with respect to the motion to direct a verdict for the defendant as to count 4 on the ground that there was no proof that the melons in that car were in good condition at the time of shipment, I think that thing is governed by the *Ayres* case in 5 Dutcher, where the Court holds that the statement in a shipping receipt that articles are in good condition is *prima facie* evidence of the fact of their condition, and therefore I deny the motion on that point on that ground.

(Defendant asks that an objection be noted to the refusal of the Court to direct a verdict on each of the grounds stated in the motion.)

Judge's Charge.

GENTLEMEN OF THE JURY:

This suit is brought by Andrew Spada and Dominick Spada, partners trading as Andrew Spada & Company, against the Pennsylvania Railroad Company, and the object of the suit is to recover damages for what the plaintiffs claim was an unreasonable and negligent delay in the delivery of watermelons which had been shipped from some points in the south to Jersey City to be delivered to Andrew Spada & Company as consignees.

First of all, gentlemen, the mere fact of the shipment in this case is complicated somewhat, but not very much, by the fact that this shipment did not come entirely over the road of a single carrier but it came over the roads of successive carriers or connecting carriers; and with respect

to the law governing such a situation as that our courts have laid down this rule:

> "Where goods are transmitted by two or more successive carriers, it is the prevailing doctrine in this country that if it be shown that the goods were delivered to the initial carrier in good condition and that they were subsequently delivered to the consignee by the connecting or terminal carrier in bad condition, the presumption of the law is, when such last named carrier is made defendant, that the goods were received by such carrier in the same condition as they were delivered to the initial carrier, and the burden is upon the defendant carrier of proving that such goods came to its possession in a damaged condition, by way of defense."

Now to make that perfectly manifest, if it is required to be made any more manifest than those plain words make it, simply amounts to this: that if these goods were shipped with the Northern Georgia Railroad Company, for instance, as the initial carrier, and subsequently through successive carriers came to the Pennsylvania Railroad Company to be delivered to Andrew Spada & Company in Jersey City, and if it shall have been proven by the plaintiff—and the burden rests upon the plaintiff to prove it by the greater weight of the evidence—that when the goods were delivered to the Northern Georgia Railroad Company they were in good condition, the law will presume, in the absence of evidence to the contrary, that when those goods came into the possession of the Pennsylvania Railroad Company they were in the same good condition they were in when they were delivered to the initial carrier, the Northern Georgia Railroad Company; and the burden

would then rest upon the defendant company, the Pennsylvania Railroad Company in this case, of showing that the goods were not damaged while they were in the possession of the Pennsylvania Railroad Company, or if the charge was that they were damaged by reason of unreasonableness in the time of transportation, that the unreasonableness was not chargeable to them.

Now I say the burden first of all rests upon the plaintiff, Andrew Spada & Company, to show that the goods were delivered to the initial carrier in good condition. If they have shown that, then the presumption attaches that they were in the same good condition when they were delivered to the Pennsylvania Railroad Company.

Now the burden, gentlemen, of the charge in this case made by the plaintiff against the Pennsylvania Railroad Company is that they delayed unreasonably and negligently the delivery of these cars to Andrew Spada & Company, the consignees, and the burden of making out that charge rests upon the plaintiffs, Andrew Spada & Company, and they must make it out by the greater weight of the evidence.

Now where there is no time mentioned in any special contract within which goods shall be delivered, the law steps in and supplies by implication what the parties have neglected to express, that the goods shall be delivered within a reasonable time, and what is a reasonable time depends upon the circumstances of each case as those circumstances are developed in the evidence. Now the charge having been made by Andrew Spada & Company that the Pennsylvania Railroad Company negligently and unreasonably delayed the delivery of these watermelons, the burden rests upon Andrew Spada & Company to prove by the greater weight of the evidence that the Pennsyl-

vania Railroad Company did negligently and unreasonably delay the delivery of these watermelons. Now you have heard the evidence in the case, both that which comes in by way of documents and that which has come from the witnesses on the stand. There is some evidence to the effect that under the most favorable circumstances goods could be transported from Edgemoor, Delaware, where the Pennsylvania Railroad Company admittedly took charge of these consignments of watermelons, to Jersey City, in seven hours. What the most favorable circumstances are we are left to infer, but it would mean, I suppose, that there should be no delay due to any cause, but that there were to come in in the fastest possible time; but the problem for you is not whether these watermelons were delivered under the most favorable conditions; the problem for you is whether or not they were delivered by the Pennsylvania Railroad Company within a reasonable time in the light of all the circumstances developed by the evidence in the case. If they were, why manifestly the Pennsylvania Railroad Company is not liable. If they were not, why then the Pennsylvania Railroad Company would be liable, unless the Pennsylvania Railroad Company had established by the greater weight of the evidence—and the burden would rest upon them so to establish this situation—that they have a defense for a delay which otherwise would be unreasonable; and the Pennsylvania Railroad Company allege that they have such a defense, and the allegation is that the defense of delay rests first upon the ground of the existence of a strike which congested traffic and prevented reasonable delivery of the watermelons, and secondly I understand that the ground of the defense is that the Pennsylvania Railroad Company were required or com-

pelled by circumstances beyond their control to deliver the goods when they did and not sooner; and thirdly they claim by way of defense that no notice was served upon them of the claim which is made in this suit within ten days from the time when the goods should have been delivered.

Now first of all, gentlemen, it is necessary for you to bear in mind that where no statement is made or no contract is made between the parties at the time a consignment of goods is delivered to the common carrier, no special contract arises between them. In other words, the law has laid down this rule:

> "Where a common carrier undertakes to transport merchandise, the presumption is that he does it subject to the common law liability, and this presumption remains until it is overcome by proof of a special agreement. The burden of showing an agreement limiting the comomn law liability of the carrier rests upon the carrier."

That is to say that until the carrier, the Pennsylvania Railroad Company in this case, has established by the greater weight of the evidence that there is some special agreement limiting the company's liability, the company would be liable under the rules of the common law, and those rules are, so far as they are applicable here, that the carrier is responsible for all damage arising to goods save from the act of God or the public enemy. Now in this case the claim of the Pennsylvania Railroad Company is that they have established this special liability. They claim that it grows out of the fact that bills of lading were delivered by the initial carrier to the agent of Andrew Spada & Company and that those bills of lading contain provisions which exempt the

company from liability on the grounds which I have indicated the company in this suit is defending upon. Now in this State the law has laid down this rule:

> "The delivery by an express company [or in this case by a railroad company] to a shipper and his acceptance without dissent of a shipping receipt containing a clause of limited liability based on value, will raise a presumption that the shipper knew of and assented to the restriction, in which latter case he would be bound by it; but such presumption is not conclusive and may be rebutted by evidence negativing such knowledge and assent."

Now the burden is upon the defendant company, the Pennsylvania Railroad Company, to show the existence of such a special contract, that it was delivered to the shipper by the initial carrier and that it was accepted by the shipper without dissent or without objection to the terms which it contained. If it has shown that by the greater weight of the evidence, then a presumption would arise that the shipper knew of the contents and acquiesced in and was bound by them, and the burden would then be cast over upon the shipper to show that he did not understand or did not know and did not assent to the terms of the limitation contained in such a bill of lading.

Now those are the rules, gentlemen, which would govern with respect to that situation.

If the Pennsylvania Railroad Company has made out by the greater weight of the evidence that there was such a special contract of limitation, then you come to the question as to whether or not this strike was the proximate cause of the

delay of these watermelons; and the burden of establishing that the strike was the proximate cause of the delay in the delivery of the watermelons rests upon the defendant company. If it is not made out that it was, why then the strike does not exempt the company from liability on that ground.

Secondly, they would be obliged to make out by the greater weight of the evidence that the causes which were beyond their control, which they contend prevented the delivery of these watermelons, were the proximate cause for their non-delivery on time. If they have made that out, why that would be a defense and the company would not be responsible. If they have not, of course it would not be a defense and they would be responsible.

Lastly, they would be obliged to make out that the claims for the damages which are sought in this suit were not presented within the ten days limited by the bill of lading, and if they have not made that out it would not bar a recovery in this suit. If they have, it would. Whether such claims were presented or not you have got to gather from all the evidence in the case, and the question is peculiarly one for you to determine.

Now on these phases of the question which I have been talking to you about I have been asked to charge certain requests by the defendant, and I purpose charging those which I think are aplicable and which I think state the rules of law.

I am first requested to charge:

> That if the delay was due to a strike which was an excepted cause in the bills of lading introduced in evidence as exhibits D-1, D-5, D-8 and D-23, and if no negligence on defendant's part was shown, then the defendant is not liable, and the burden of proving such negligence is on the plaintiff.

Second, I am requested to charge:

That if the delay was due to causes beyond the defendant's control and therefore within the exception in the bills of lading introduced in evidence as exhibits D-11, D-14, D-17, D-19 and D-20, if no negligence of defendant be shown, then the defendant is not liable, and the burden of proving such negligence is on the plaintiff.

I am next requested to charge, and do charge, as I do these previous two:

That if the strike was a matter beyond the control of the defendant and an excepted cause in the bills of lading introduced in evidence, and if reasonable efforts were used to relieve the situation, the defendant would not be liable.

The fourth request I refuse to charge. I charge you, however, generally, that if it shall have been made out that the bills of lading were accepted by the plaintiff in this case and are binding upon the plaintiff in this case, then I charge you that under those bills of lading the damages would be computed by the rule that the damage for which the defendant carrier is liable is to be computed on the basis of the value of the property at the place and time of shipment. That you see is the rule that prevails if the bills of lading are binding in this case upon the plaintiff. If not, why then the measure of damages will be as I will state to you in a moment.

Next I am requested to charge, and do charge, if the bills of lading are made out under the rules which I have given you,

That the measure of damages under the bills of lading introduced in evidence as ex-

hibits D-11, D-14, D-17, D-19 and 20, is the amount the goods were sold for by the defendant less the expenses of the sale.

You see there are two classes here, one class of cases where the goods were accepted, in which event the rule which I stated in the fourth request to charge would be the governing rule; second, where the goods were refused and sold by the defendant company upon that refusal, and the measure of damages there would be as stated in the bill of lading, if the bill of lading is governing in the case; it would be the amount that the goods were sold for by the defendant less the expenses of the sale.

I am sixthly requested to charge:

That if no claim was filed with the defendant at the point of delivery for loss or damage to the watermelons shipped under the bills of lading marked in evidence as exhibits D-11, D-14, D-17, D-19 and D-20 within ten days from date of arrival, that defendant is not liable as to these shipments, and the burden of proving that the claims were filed within that time is, not as is claimed here, on the plaintiff, but it is on the defendant, for the matter is a defense and they would be obliged to show that; and that only in case the bills of lading are shown under the rules which I have given you to have been binding upon the plaintiffs in the suit.

I am next requested to charge:

That the connecting or terminal carrier is the agent of the initial carrier and all the rights to which the initial carrier is entitled inure to the benefit of the connecting or terminal carrier, the defendant in this action.

Those are all that I have been requested to charge that I will charge.

Now then, gentlemen, the rules which will govern with respect to the assessment of damages in case the bills of lading are established by the defendant to be binding upon the plaintiffs in this case I have read to you from these requests to charge. If the bills of lading are not established to be binding upon these plaintiffs under those rules, the measure of damages would be this, that the plaintiff is entitled to recover the entire value of the melons at the time and place when they should have been delivered, with respect to those cars which were not accepted by him; and with respect to the cars which were accepted by him he would be entitled to recover the entire value of the cars at the time and place when they should have been delivered minus the amount that he sold them for as proven by evidence in the case; that is to say, in case of injury to the goods the place of destination is to be taken as the basis for determining the damage, the measure being the difference between what the goods were worth at the place of destination as injured and what they would have been worth if delivered in good order.

Now you will take the case, gentlemen, under these rules, and decide it.

(The jury retire.)

The Court: I think I will let the jury come back for a moment and I will correct the sixth request with respect to the burden of proof.

Mr. Hartpence: May we also ask your Honor to state that the carrier is not an insurer as to perishable freight?

The Court: Yes.

(The jury are called back.)

The Court: I charged you a moment ago, gentlemen, this request:

That if no claim was filed with defendant at the point of delivery for loss or damage to the watermelons shipped under the bills of lading marked in evidence as exhibits D-11, D-14, D-17, D-19 and D-20, within ten days from date of arrival, that defendant is not liable as to these shipments, and the burden of proving that claims were filed within that time is on the defendant.

I wish to correct that and say that the burden of proving that no claim was filed is on the plaintiff.

And I wish to charge you furthermore, as I am requested,

That the carrier is not an insurer of perishable goods which themselves contain the elements of destruction occasioning their own loss or deterioration, but 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 or connecting carrier.

(The jury again retire.)

Mr. Hartpence: We desire to interpose some objections to the charge.

Defendants object to that part of the Court's charge which stated that the presumption is that the shipment is made under the common law liability and that the burden is on the carrier to show there was not a contract limiting the common law liability, and that portion which followed.

The Court: Well, you would better point

out what portion. That is precisely the language in Hill *vs.* Adams Express Co. in 53 Vroom.

Mr. Hartpence: "And that otherwise the carrier is only relieved from liability because of an act of God, the act of the shipper or the public enemy." Those are the three that I recall that you stated.

The Court: Well, I said that the common law rule was that the carrier was responsible except for loss occasioned by the act of God or the public enemy.

Mr. Hartpence: Yes.

The Court: And that is the common law rule.

Mr. Hartpence: We also desire to object to that portion of the charge which states that the delivery by the railroad of a receipt and an acceptance thereof by the shipper is presumptive evidence of the shipper's assent thereto, but that the burden is on the carrier to show it was so delivered without any express dissent by the shipper.

The Court: I did not say "express dissent." If I did I will change it.

Mr. Hartpence: "Without dissent."

The Court: That is another proposition; and I do not think I used the word "dissent." I used some language to the effect that if it was received by the shipper without dissent or objection, or words to that effect. I used the language found in Hill *vs.* Adams Express Co. I do not know what the language was now, but that part I am perfectly willing to give you an objection to. Here is what I said: "The delivery by an express company—or as in this case a railroad company —to the shipper, and his acceptance without

dissent, of a shipping receipt containing a clause of limited liability based on value, will raise a presumption that the shipper knew of and assented to the restriction, in which latter case he would be bound by it, but such presumption is not conclusive and may be rebutted by evidence negativing such knowledge and assent." Then I went on to say that the burden was upon the railroad company to show that the bill of lading was received by the shipper under such circumstances as implied his assent to the restriction. If I did not say that, I will call them back and say it.

Mr. Hartpence: That was what I thought you said. That is the portion of the charge to which I desire an objection.

Now we desire to object to that portion of the Court's charge which stated that the strike or congestion as matters beyond the control of the defendant were not a defense unless the bills of lading introduced in evidence were found to be an existent contract between these parties.

The Court: Yes, I said that. I say I said that—I said in effect that. My point simply was, and this was what I had in mind, so that there will be no doubt about it: I simply wanted to indicate that it was my clear conviction that at common law a strike by a company's own employees is not an excuse for the non-delivery or delay in the delivery of goods, and that is what I in effect told the jury.

Mr. Hartpence: And we desire to except to the concluding portion of the charge stating the measure of damages to be the market value at the place of destination as to those cars which were refused and the market value

less the amount realized upon the sale as to those cars which were accepted. We are not excepting to the language; we are trying to shift back in this case the measure of damage to the value at the point of shipment.

The Court: You do not object to what I stated as the general rule as we have been charging it all along; your objection is that I should have taken the time and place of shipment and not the time and place of destination?

Mr. Hartpence: Yes; that is not because the cases on which you based your charge do not so hold, but because that not only is the rule in the bill of lading but we believe that eventually it will be laid down as the rule whether it is in the bill of lading or not.

The Court: All right.

Mr. Hartpence: And we object to that portion of the charge which left it to the jury to say whether or not the bills of lading offered in evidence are contracts between the shipper and the carrier. As I understand it, you left it to the jury to find as a fact whether there was a contract.

The Court No; I left it to the jury to say whether or not those bills of lading had been so accepted under such circumstances as to be binding upon the shippers, not that they constitute contracts, because if they are so accepted they are contracts.

Mr. Hartpence: Yes; that is the portion of the charge to which we except.

The Court: Your exception does not involve the notion that I left it to them to determine whether the thing was a contract or not?

Mr. Hartpence: No, sir.

The Court: But I left it to them to determine whether or not those things were accepted under such circumstances as would bind them.

Mr. Hartpence: Yes; that is the way it was done.

That, I think, constitutes all our objections to the charge itself. Then we desire to object to the refusal of the Court to charge as requested except in so far as he did so charge.

DEFENDANT'S REQUESTS TO CHARGE.

1. That if the delay was due to a strike which was an excepted cause in the bills of lading introduced in evidence as exhibits D-1, D-5, D-8, and D-23, and if no negligence on defendant's part was shown, then the defendant is not liable, and the burden of proving such negligence is on the plaintiff.

2. That if the delay was due to causes beyond the defendant's control and therefore within the exception in the bills of lading introduced in evidence as exhibits D-11, D-14, D-17, D-19 and D-20, if no negligence of defendant be shown, then the defendant is not liable, and the burden of proving such negligence is on the plaintiff.

3. That the strike was a matter beyond the control of the defendant, and an excepted cause in the bills of lading introduced in evidence, and if reasonable efforts were used to relieve the situation, the defendant is not liable.

4. That the damage for which the defendant carrier is liable in this case is to be computed on the basis of the value of the property at the place and time of shipment.

5. That the measure of damages under the bills of lading introduced in evidence as exhibits D-11, D-14, D-17, D-19 and D-20 is the amount the goods were sold for by the defendant less the expenses of the sale.

6. That if no claim was filed with defendant at point of delivery for loss or damage to the watermelons shipped under the bills of lading, marked in evidence as exhibits D-11, D-14, D-17, D-19 and D-20 within ten days from date of arrival that defendant is not liable as to these shipments and the burden of proving that the claims were filed within that time is on the plaintiff.

7. That Rule 1 of the classification in evidence provides that the reduced rate specified therein will apply on property shipped subject to the conditions of the carrier's bill of lading, and the evidence showing that the watermelons in question were shipped at such reduced rate, therefore the shipments in this suit were shipped subject to the conditions of the bills of lading introduced in evidence.

8. That the burden is on the plaintiff to show that the watermelons in question were shipped at the higher rate and at the carrier's liability, as provided for in rule I of the classification in evidence.

9. The shipments involved in this action are inter-state shipments and are governed solely by the Acts of Congress of the United States, commonly designated as the Inter-state Commerce Acts.

10. When classifications and tariffs are filed by a carrier with the Inter-State Commerce Commission, or a carrier has signified its intention to become a party to them, shippers and carriers are charged conclusively with notice of what they contain, and when made out and filed they are

conclusive notice whether they are posted in the carrier's stations or expressly brought to the shipper's attention or not.

11. The carrier at the time of accepting goods for transportation is bound to issue a Bill of Lading therefor to the shipper, and its issuance will be conclusively presumed in the absence of proof to the contrary; and the burden of proving that none was issued is upon the plaintiff.

12. Acceptance of a Bill of Lading by the person delivering goods to the carrier for transportation is an acceptance of the terms and conditions of such Bill of Lading and is binding upon the shipper and his assigns unless it is shown that such conditions were expressly not accepted, and the burden of showing such non-acceptance is upon the plaintiff.

13. The Inter-State Commerce Acts of Congress supersede all State regulations, policies and rules governing inter-state shipments and bring all inter-state shipments under the uniform rules provided in the Acts of Congress

14. The connecting or terminal carrier is the agent of the initial carrier and all the rights to which the initial carrier is entitled inure to the benefit of the connecting or terminal carrier, the defendant in this action.

15. If no express contract between the shipper and carrier is shown by which the shipments were to be governed by the Carrier's Common Law Liability at the 10% increased rate provided in the filed tariffs and classifications (and the burden of proving it is upon the plaintiff), then they must be conclusively presumed to have been made subject to the reduced rate provisions of the tariffs and classifications and subject to the terms and conditions of the carrier's Bill of Lading.

16. The rate charged by the carrier, in the ab-

sence of proof that another rate was expressly agreed upon by shipper and carrier at the time of shipment (and the burden of proving such agreement is upon the plaintiff) fixes and determines the nature of the carrier's liability, and that liability must be according to that specified in the filed tariffs, and classifications as the liability which that rate imposes.

Stipulation.

(Filed February 3rd, 1914.)

NEW JERSEY SUPREME COURT.

ANDREW SPADA, *et al.*, Partners, trading, etc., *Plaintiffs-Appellees,*	Action at Law.
vs.	On Appeal from Hudson Circuit Court.
THE PENNSYLVANIA RAILROAD COMPANY, *Defendant-Appellant.*	Stipulation.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties to the above stated suit, that the appeal from the Hudson County Circuit Court to the New Jersey Supreme Court, heretofore taken by the above named defendant in above stated cause, be dismissed without costs and without prejudice to either party, and that a rule to that effect may be entered in the Minutes of the said Supreme Court; provided the said defendant take an appeal from the judgment in said Hudson County Circuit Court, in said cause, to the Court of Errors and Appeals of the State of New Jersey, without delay, and bring the same on for argument, or submission on brief, at the March Term, 1914, of said Court of Errors and Appeals.

IT IS FURTHER STIPULATED, that the recognizance on appeal heretofore filed by said defendant in the Hudson County Circuit Court in said cause, be regarded as and stand for a sufficient and legal recognizance on said appeal to the Court of Errors and Appeals, without the necessity of

entering into other or further recognizance on said appeal.

Dated January 31, 1914.

QUEEN & STOUT,
Attorneys for Pltffs.

VREDENBURGH, WALL & CAREY,
Attorneys for Deft.

PLAINTIFF'S EXHIBITS.

Exhibit P-1.

Telephone: Office, 1214 Franklin
R. R. Yard, 6496 Murray Hill
Code: A. B. C. 4th Edition

ANDREW SPADA & CO.,

Wholesale Produce Commission Merchants
Car-Lots a Specialty
Fruit Auction Building (Room 403)
Cor. Washington & Franklin Streets
References:
Aetna National Bank; Walden Nat. Bank of Walden, N. Y.; Mercantile Agencies.

New York, July 13, 1912.

Mr. E. Butler, F. A. Penn. R.R.
Jersey City, N. J.

Dear Sir:—

We wish to call your attention that cars of watermelons #30943, #35449 have been shipped from Georgia on Monday, July 8th. These two cars should have arrived here yesterday. We were in hopes that they would arrive to-day, much more considering that yesterday we requested your Mr. Hallock to trace these cars, but unfortunately they have not shown up. We doubt if these cars will arrive on Monday in good condition and also doubt if the market will be as good.

Kindly take notice of the present market condition, also that of Monday and on receipt of the two cars, we kindly ask you to have one of your representatives inspect these cars and see if the condition of same is sound or how much damaged. We certainly regret to have any claims but in this case if the goods arrive in bad condition and on a broken market we must be protected, as if they had arrived yesterday or to-day we would have made a handsome profit.

Yours very truly,
ANDREW SPADA & CO.

Dic. A. S./C

Exhibit P-2.

July 31, 1912.

Mr. E. Butler, F. A.
Penn. R. R. Co.,
Jersey City, N. J.

Dear Sir:—

We beg to advise you that we will enter claims on the following cars of watermelons as soon as we have the papers ready:

cars #30943
#35449
#30698
#34794
#24480
#23761
#18316
#25968
#28543

Kindly take notice of this and oblige

Yours very truly,

(Signed) ANDREW SPADA & CO.

Dic. A. S./C

DEFENDANT'S EXHIBITS.

Exhibit D-4.

Standard Form

GEORGIA NORTHERN RAILWAY COMPANY

This Memorandum is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

Shipper's No..... Agent's No. 66

Received, subject to the classifications and tariffs in effect on date of receipt by the carrier of the property described in the Original Bill of Lading
at Oaklawn, Ga., 7/8, 1912, from W. B. Roddenbery, 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 agree to carry to its usual place of delivery at said destination, if on its line or road, 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, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of freight from Oaklawn, Ga., to Jersey City, N. J., is in Cents per 100 Lbs.

If Times, 1st Class, ——

If 1st Class, ——

If 2d Class, ——

Exhibit D-4.

If Rule 25, ——
If 3d Class, ——
If Rule 26, ——
If Rule 28, ——
If 4th Class, ——
If 5th Class, ——
If 6th Class, ——
If Class A, ——
If Class B, ——
If Class C, ——
If Class D, ——
If Class E, ——
If Class H, ——
Per Bbl. if Class F, ——
If Special Per 46.6.
(Mail address—Not for purposes of delivery)
Consigned to Andrew Spada & Co.
Destination, Jersey City, State of N. J., County of
Route, A. C. L.
Car Initial, A. C. L.
Car No. 30943.
No. Packages, ——
Description of Articles and Special Marks—Melons. S. L. C.
Weight (Subject to Correction), ——
Class or Rate, ——
Check Column, ——
If charges are to be prepaid, write or stamp here, To be prepaid."—C. O. D.
Received $..... to apply in prepayment of the charges on the property described hereon.
.....Agent or Cashier.
Per .....
The signature here acknowledges only the amount prepaid.
Charges Advanced: $.....
E. McKINNON, Agent.
Per.....

Exhibit D-4.

CONDITIONS

SECTION 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of 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 differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of 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 request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes; or for country damage on cotton. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence.

In case of quarantine the goods may be discharged at risk and expense of owners into quar-

antine depot or elsewhere, as required by quarantine regulations, or authorities, or for the carrier's despatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when goods are so discharged, or goods may be returned by carriers at owner's expense and risk to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or be a lien thereon. The carriers shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required by quarantine regulations or authorities, even though same may have been done by carrier's officers, crew, agents or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

SEC. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law.

SEC. 3. 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, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be

the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification of tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss 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.

SEC. 4. All property shall be subject to necessary cooperage or baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator

may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

SEC. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars

are attached to and after they are detached from trains, or until loaded into and after unloaded from vessels.

SEC. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

SEC. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

SEC. 8. The owner or consignee shall pay the freight, and average if any, and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

SEC. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no such carrier or party in possession shall be liable for any loss or damage resulting from fire, or for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from vermin, leakage, chafing, breakage, heat, frost,

wet, explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances, whether existing prior to, at the time of, or after sailing; or unseaworthiness, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at any port or ports, to tow and be towed, to transfer to transship, to lighter, to load and discharge goods at any time, and assist vessels in distress, and to deviate for the purpose of saving life or property. Such water carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry such property upon deck.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors when perfomed by the rail carrier, and the liability for such lighterage shall be governed by the other sections of this instrument.

SEC. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Exhibit D-5.

Form D-4.

Arrangements of colors and forms in manifolding on Straight shipments: (1) Shipping Order (white); (2) Bill of Lading (white); (3) Memorandum (white).

FLORIDA CENTRAL RAILROAD COMPANY

Straight Bill of Lading—ORIGINAL—Not Negotiable.

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

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,
at Cherokee, Ga., 7/9, 1912.
From W. B. Roddenbery, 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 agrees to carry to its usual place of delivery at said destination, if on its road, 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, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns.

(Endorsed: Copy)

The Rate of Freight from.....
to .....is in Cents per 100 Lbs.
If Times, 1st Class, ——
If 1st Class, ——
If 2d Class, ——
If Rule 25, ——

Exhibit D-5

If 3d Class, ——
If Rule 26, ——
If Rule 28, ——
If 4th Class, ——
If 5th Class, ——
If 6th Class, ——
If Class A, ——
If Class B, ——
If Class C, ——
If Class D, ——
If Class E, ——
If Class H, ——
Per Bbl. if Class F, ——
If Special Per.....
(Mail address—Not for purposes of delivery)
Consigned to Andrew Spada & Co.
Destination, Jersey City, State of N. J.
Route, ACL. Car Initial, ACL.
Car No. 35449.
No. Packages, 1.
Description of Articles and Special Marks, Car Melons. S L & C. Rel.
Weight (Subject to Correction), ——
Class or Rate, ——
Check Column, ——
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 . . . .
(The signature here acknowledges only the amount prepaid.)
Charges Advanced: $.....
Issued in lieu of bill of lading, Condr's Receipt No. 4630. From Stringer to Cherokee, 7/9, 1912.

P. F. WHITE, Agent.
Per D. A. DIXON, JR.

W. B. RODDENBERY, Shipper.
Per H. C. ALLEN.

Conditions—Same as D-4.

Exhibit D-8.

3 22-11. 2000 M. C 10117 Form 156

Standard Form Straight Bill of Lading

ATLANTIC COAST LINE RAILROAD COMPANY

Straight Bill of Lading—ORIGINAL—Not Negotiable.

Shipper's No. —— Agent's No. ——

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,
at Cowarth, Ala., 7/12/12
from W. B. Roddenberry, 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 agrees to carry to its usual place of delivery at said destination, if on its own 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, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from.....
to .....is in Cents, per 100 lbs.
If Times, 1st Class, ——
If 1st Class, ——
If 2d Class, ——
If Rule 25, ——
If 3d Class, ——

Exhibit D-8

If Rule 26, ——
If Rule 28, ——
If 4th Class, ——
If 5th Class, ——
If 6th Class, ——
If Class A, ——
If Class B, ——
If Class C, ——
If Class D, ——
If Class E, ——
If Class H, ——
Per Bbl. if Class F, ——
If Special Per.....
(Mail address—Not for purposes of delivery)
Consigned to W. B. Roddenberry.
Destination, Jersey City, State of N. J.
Route, —— Car Initial, ACL. Car No., 30698.
No. Packages, 1.
Description of Articles and Special Marks, Car Melons. S L & C.
Weight (Subject to Correction), 24000.
Class or Rate, ——
Check Column, ——
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 .....
(The Signature here acknowledges only the amount prepaid.)
Charges Advanced: $.....
H. H. HODGE, Agent.
W. B. RODDENBERRY,
By HALL.
(Endorsed: Copy)

Conditions—Same as D-4.

Exhibit D-23.

Form 156

Standard Form Straight Bill of Lading

ATLANTIC COAST LINE RAILROAD COMPANY

Straight Bill of Lading—ORIGINAL—Not Negotiable.

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

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,
at Pine Park, Ga., A. C. L. Loc., July 20th, 1912.
from W. B. Roddenberry Co., 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 agrees to carry to its usual place of delivery at said destination, if on its own 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, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from.....
to .....is in Cents per 100 Lbs.

If Times, 1st Class, ——
If 1st Class, ——
If 2d Class, ——
If Rule 25, ——
If 3d Class, ——

Exhibit D 23

If Rule 26, ——
If Rule 28, ——
If 4th Class, ——
If 5th Class, ——
If 6th Class, ——
If Class A, ——
If Class B, ——
If Class C, ——
If Class D, ——
If Class E, ——
If Class H, ——
Per Bbl. if Class F, ——
If Special Per.....
(Mail address—Not for purposes of delivery)
Consigned to Andrew Spada & Co.
Destination Jersey City, State of N. J.
Route, —— Car Initial, A. C. L. Car No. 28548
No. Packages, 1.
Description of Articles and Special Marks, C. L. Melons. S. L. C.
Weight (Subject to Correction), 24000.
Class or Rate, S-46 1/3.
Check Column, ——
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.
Frt guaranteed by shippers.

.....
Agent or Cashier.
Per . . ..
(The Signature here acknowledges only the amount prepaid.)
Charges Advanced: $.....
J. L. FULLER, Agent.
(Copy)

Conditions—Same as D-4.

Exhibit D-11.

4-18-10 100 M. C 3168 Form 192
Standard Form Straight Bill of Lading

ATLANTIC COAST LINE RAILROAD COMPANY

Bill of Lading for Berries, Fruits, Vegetables and Melons.

Straight Bill of Lading—ORIGINAL—Not Negotiable.

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

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,
at Sideing N-702, July 12th, 1912,
from W. B. Roddenberry, 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 agrees to carry to its usual place of delivery at said destination, if on its own 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 of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from.....
to .....is in Cents
——— per Crate 32 qts.
——— per Bushel Box, Basket or Crate.
——— per ½ Bbl. or 1½ Bushel Box, Basket or Crate.

Exhibit D-11

——— Standard Bbl. or Barrel Crate.
——— per Box 80 lbs.
——— per 100 lbs.
——— per C. L.———lbs. excess in proportion
——— per .....
Refrigeration Charge, $.....
in addition to the rate named herein.
(Mail Address—Not for purposes of Delivery)
Consigned to Andrew Spada & Company.
Destination, Jersey City, State of N. J.
Route, —— Car Initial, A. C. L. Car No., 34794.
No. Packages, 1.
Description of Articles and Special Marks, C. L. Melons. S. L. & C. Charges Guaranteed. W. B. Roddenberry. C. R.
Weight (Subject to Correction), ——
Class or Rate, ——
Check Column, ——
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 .....

(The signature here acknowledges only the amount prepaid.)
Charges advanced: $.....

H. W. LAWSON, Agent.

Per.....

W. B. RODDENBERRY,
C. R.

Exhibit D-11

CONDITIONS

1. In consideration of the rate at which the freight is taken for carriage, and the special service to be performed, it is agreed by and between the carriers and the shipper, as owner or agent for owner, that the said freight is not to be carried and delivered for or with reference to any particular market or market hour at destination, nor in any specified time, but only with such reasonable despatch with reference to other business of the carrier as the general business permits; that the carriers shall not be liable for any injury to, or decay of, fruits and vegetables or other perishable freight, due to detention or delay occasioned by an accumulation of freight at any point, or to the breaking down of engine or cars, or to any other causes over which the carriers have no control; nor for damage or deterioration in value due to detention at any point, where such detention is due to or incurred at the request of the consignor, the consignee or their agents or representatives.

2. It is agreed by the shipper, as owner or agent for owner, that in issuing this bill of lading through to destination, when such destination is on or over connecting lines, the initial carrier acts only as agent, and assumes no liability as principal as to the carriage of said freight beyond its own lines; and that the liability of said initial carrier in regard to the said freight shall terminate upon delivery thereof, in good order and within a reasonable time, to the next succeeding carrier. In case of loss or damage liability therefor shall be attached to only that carrier in whose custody the said freight was at such time of loss or damage.

3. No carrier shall be responsible for any loss

or damage resulting directly or indirectly from change of route or destination made under the provisions of this contract. If any such change in route or destination shall be made, the shipper, owner or consignee shall pay, in addition to the rate named herein and the charges advanced, all expenses incurred thereby, including freights for transportation over lines and parts of lines not included in the route for which said rate is named.

4. If all or any part of said property is carried by water, such water carriage shall be performed subject to statutory acts and to all conditions, whether printed or written, contained in this bill of lading, including the condition that no carrier by water shall be liable for any loss or damage resulting from explosion, accidents to boilers or machinery, or from any latent defects in hull, machinery or appurtenances, existing before, at the time, or after shipment or sailing on the voyage, or unseaworthiness, provided the owners have exercised due diligence to make the vessel seaworthy; nor shall negligence be presumed against any carrier.

5. No carrier shall be liable for loss or damage arising from legal process, claims or ownership by third parties; want of proper cooperage, or insufficiency of packages in strength or otherwise, nor for the condition of packages or deficiency in contents thereof if receipted for by the consignee in good order; nor for wrong carriage or wrong delivery of goods imperfectly marked. All property shall be subject to necessary cooperage, boxing and repairs at owner's cost.

6. If any carrier transporting this shipment shall deem it necessary to dispose of same en route, or after delivery has been tendered to and refused by consignee, in order to protect the in-

terest of the owner and the charges of transportation, said carrier is hereby empowered to act as the agent of the owner in the transaction, and will not be held responsible for more than net proceeds of sale, after deducting all legitimate expenses.

7. This bill of lading is signed for the different carriers who may engage in the transportation, severally but not jointly, each to be bound by, and have the benefits of, the provisions thereof; and in accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, whether printed or written.

8. Claims for loss or damage shall be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than ten days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event.

Exhibit D-14.

4-18-10 100 M. C 3168 Form 192
Standard Form Straight Bill of Lading

ATLANTIC COAST LINE RAILROAD COMPANY

Bill of Lading for Berries, Fruits, Vegetables and Melons
Straight Bill of Lading—ORIGINAL—Not Negotiable

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

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,
at N. 701 Cairo, Ga., July 13th, 1912, from W. B. Roddenberry, 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 agrees to carry to its usual place of delivery at said destination, if on its own 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, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from.....
to..... is in Cents
——— per Crate 32 qts.
——— per Bushel Box, Basket or Crate

Exhibit D-14

——— per ½ Bbl. or 1½ Bushel Box, Basket or Crate
——— Standard Bbl. or Barrel Crate
——— per Box 80 lbs.
46¾ per 100 lbs.
——— per C. L.———lbs. excess in proportion
——— per .....
Refrigeration Charge, $..... 10
in addition to the rate named herein.
(Mail Address—Not for purposes of Delivery)
Consigned to Adrew Spada & Co.
Destination, Jersey City, State of N. J.
Route, —— Car Initial, A. C. L. Car No., 24480.
No. Packages.....
Description of Articles and Special Marks, C. L.
Melons. Freight Charges Guaranteed.
(Copy)
Weight (Subject to Correction), —— 20
Class or Rate, ——
Check Column, ——
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 30
(The signature here acknowledges only the amount prepaid.)
Charges advanced: $.....
H. W. LAWSON, Agent.
Per.....
W. B. RODDENBERRY,
C. R.

Conditions—Same as D-11. 40

Exhibit D-17.

4-18-10 100 M. C 3168 Form 192
Standard Form Straight Bill of Lading

ATLANTIC COAST LINE RAILROAD COMPANY

Bill of Lading for Berries, Fruits, Vegetables and Melons

Straight Bill of Lading—ORIGINAL—Not Negotiable

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

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,
at Cairo, Ga., July 13th, 1912, from W. B. Roddenberry, 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 agrees to carry to its usual place of delivery at said destination, if on its own 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, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from.....
to ..... is in Cents
——— per Crate 32 qts.
——— per Bushel Box, Basket or Crate

Exhibit D-17

——— per ½ Bbl. or 1½ Bushel Box, Basket or Crate
——— Standard Bbl. or Barrel Crate
——— per Box 80 lbs.
——— per 100 lbs.
——— per C. L.———lbs. excess in proportion
——— per .....
Refrigeration Charge, $..... 10
in addition to the rate named herein.
(Mail Address—Not for purposes of Delivery)
Consigned to Adrew Spada & Co.
Destination, Jersey City, State of N. J.
Route, —— Car Initial, A. C. L. Car No., 23761.
No. Packages, 1.
Description of Articles and Special Marks, C. L. Melons. S. L. & C. Charges Guaranteed. W. L. Roddenbery.
(Copy) 20
Weight (Subject to Correction), ——
Class or Rate, ——
Check Column, ——
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. 30
Per .....
(The signature here acknowledges only the amount prepaid.)
Charges advanced: $.....
H. W. LAWSON, Agent.
Per.....
W. B. RODDENBERRY,
C. R.

Conditions—Same as D-11. 40

Exhibit D-19.

4-18-10 100 M. C 3168 Form 192

Standard Form Straight Bill of Lading

ATLANTIC COAST LINE RAILROAD COMPANY

Bill of Lading for Berries, Fruits, Vegetables and Melons

Straight Bill of Lading—ORIGINAL—Not Negotiable

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

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

at Cairo, Ga., July 13th, 1912, from W. B. Roddenberry, 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 agrees to carry to its usual place of delivery at said destination, if on its own 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, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from.....

to .....is in Cents

——— per Crate 32 qts.

——— per Bushel Box, Basket or Crate

——— per ½ Bbl. or 1½ Bushel Box, Basket or Crate

Exhibit D-19

——— Standard Bbl. or Barrel Crate
——— per Box 80 lbs.
46¾ per 100 lbs.
——— per C. L.———lbs. excess in proportion
——— per .....
Refrigeration Charge, $.....
in addition to the rate named herein.
(Mail Address—Not for purposes of Delivery)
Consigned to Adrew Spada & Co.
Destination, Jersey City, State of N. J.
Route, —— Car Initial, A. C. L. Car No., 18316.
No. Packages, ——
Description of Articles and Special Marks, C. L. Melons. S. L. & C. Freight Charges Guaranteed.
(Copy)
Weight (Subject to Correction), ——
Class or Rate, ——
Check Column, ——
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 .....

(The signature here acknowledges only the amount prepaid.)
Charges advanced: $.....

H. W. LAWSON, Agent.

Per.....

W. B. RODDENBERRY,
C. R.

Conditions—Same as D-11.

Exhibit D-20½.

4-18-10 100 M. C 3168 Form 192

Standard Form Straight Bill of Lading

ATLANTIC COAST LINE RAILROAD COMPANY

Bill of Lading for Berries, Fruits, Vegetables and Melons

Straight Bill of Lading—ORIGINAL—Not Negotiable

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

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,
at Cairo, Ga., 7-19-1912, from W .B. Roddenberry, 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 agrees to carry to its usual place of delivery at said destination, if on its own 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, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from.....
to .....is in Cents
——— per Crate 32 qts.
——— per Bushel Box, Basket or Crate
——— per ½ Bbl. or 1½ Bushel Box, Basket or Crate

Exhibit D-20½

——— Standard Bbl. or Barrel Crate
——— per Box 80 lbs.
——— per 100 lbs.
——— per C. L.———lbs. excess in proportion
——— per .....
Refrigeration Charge, $.....
in addition to the rate named herein.
(Mail Address—Not for purposes of Delivery)
Consigned to Adrew Spada & Co.
Destination, Jersey City, State of N. J.
Route, —— Car Initial, A. C. L. Car No., 25968.
No. Packages, 1.
Description of Articles and Special Marks, C. L.
Melons. S. L & C. Freight chgs. guaranteed.
By shipper. W. B. Roddenberry.
(Copy)
Weight (Subject to Correction), ——
Class or Rate, ——
Check Column, ——
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 .....

(The signature here acknowledges only the amount prepaid.)
Charges advanced: $.....

H. W. LAWSON, Agent.

Per .....

W. B. RODDENBERRY,
CARL ROUNTREE.

Conditions—Same as D-11.

Exhibit D-2.

Telephone: Office, 48 Franklin.
R. R. Yard, 6496 Murray Hill

Code: A. B. C. 4th Edition

ANDREW SPADA & CO.,

Wholesale Produce Commission Merchants
Car-Lots a Specialty
Fruit Auction Building (Room 403)
Cor. Washington & Franklin Streets

References:
Aetna National Bank; Walden Nat. Bank of Walden, N. Y.; Mercantile Agencies.

New York, August 6, 1912.

Mr. E. Butler, F. A.
Penn. R. R. Co.,
Jersey City, N. J.

Dear Sir:—

We enclose herewith bill for damages on car watermelons A. C. L. #30943, amounting to $125.00.

This car was shipped from Oaklown, Ga., on July 8th and was delivered here on July 15th, after eight days in transit. This car should have arrived not later than July 12th.

We enclose herewith account sales of the car, original bill of lading, paid freight bill, affidavit from the man to whom we had this car sold under the condition that the car would not arrive no later than the 13th and on account of the extra delay and rotten condition refused to accept same at the original price, thus making an entire loss of $125.00. Also we enclose a bill by which you will note that the same party on July 12th, bought a car for $385.00 which evidently proves the actual market condition at the time.

Exhibit D-2

We wish to call your attention that on July 12th we informed your Mr. Hallock of the situation and begged him to try to put a tracer so that the cars would be in the following morning, but much to our regret no cars arrived and on July 13th we notified you we would hold you responsible for the loss on this car. Also on car #35449.

Hoping to have an early remittance to cover this claim, we beg to remain

Yours very truly,

ANDREW SPADA & CO.

Dic. A.S./C

Exhibit D-3.

Telephone: Office, 1214 Franklin
R. R. Yard, 6496 Murray Hill
Code: A. B. C. 4th Edition

ANDREW SPADA & CO.,

Wholesale Produce Commission Merchants
Car-Lots a Specialty
Fruit Auction Building, 204 Franklin Street
Cor. Washington & Franklin Streets

New York, August 6, 1912.

PENN. R. R. Co.,
Jersey City, N. J.

Loss on car watermelons A.C.L. #30943..$125.00

578868 AUG22'12
Claim Department
Register No. 9745
Pennsylvania R. R.
Jersey City
Freight Station

Exhibit D-6.

(Same letter-head as D-2.)

New York, August 6, 1912.

Mr. E. Butler, F. A.
Penn. R. R. Co.,
Jersey City, N. J.

Dear Sir:—

We enclose herewith bill for damages on car watermelons A.C.L. #35449 amounting to $220.30.

On July 12th we notified your Mr. Hallock that this car was sold and that if the car was not delivered during Saturday, the following day, we were in fear that same would arrive in bad condition and that the buyer no doubt, would refuse to accept same at the original purchase of $350.00. This car was shipped on July 9th from Cherokee, Ga., and should have arrived no later than Friday or at least Saturday July 13th but instead it was delivered on July 17th in such a rotten condition that the car had to be refused. We enclose herewith account sales, original bill of lading, affidavit of the man who bought the car, and also affidavit from the shipper by which you will note the car was shipped in good condition. The same party to whom we had this car sold was obliged to buy another car from another party and you will note by the enclosed bill that he paid $360.00, this proving the actual condition of the market.

Hoping to have an early remittance from this claim, we beg to remain

Yours very truly,

ANDREW SPADA & CO.

Dic. A.S./C

Cherokee Ga S-w-675-7/11 Reced. 7/13.

Exhibit D-7.

(Same bill-head as D-3.)

New York, August 6, 1912.

PENN. R. R. Co.,
Jersey City, N. J.

Loss on car watermelons A.C.L. #35449..$220.30

578865 AUG22'12
Claim Department
Register No. 9744
Pennsylvania R. R.
Jersey City
Freight Station

Exhibit D-9.

(Same letter-head as D-2.)

New York, August 6, 1912.

Mr. E. BUTLER, F. A.
Penn. R. R. Co.,
Jersey City, N. J.

DEAR SIR:—

We enclose herewith bill for $90.00 covering cost of car of watermelons A.C.L. #30698. This car was shipped July 12th and was delivered July 23d in such a rotten condition that much to our regret we were obliged to refuse same.

We enclose herewith invoice of the shipper, also affidavit by which you will note the car was shipped in perfect condition, we wish to call your attention that you hold the bill of lading for this car.

Exhibit D-9

Hoping we may be favored with your voucher promptly to cover this claim, we beg to remain

Yours very truly,

ANDREW SPADA & CO.

Dic. A.S./C

W. Roddenburg, Cowarts, Ala.

Sav-D-1-7/12-7/22.

Exhibit D-10.

(Same bill-head as D-3.)

New York, August 6, 1912.

PENN. R. R. Co.,
Jersey City, N. J.

Cost of car watermelons A.C.L. #30698...$90.00

The above car had to be refused on account of the rotten condition of same.

581614 AUG28'12
Claim Department
Register No. 9743
Pennsylvania R. R.
Jersey City
Freight Station

Exhibit D-12.

(Same letter-head as D-2.)

New York, August 6, 1912.

Mr. E. Butler, F. A.
Penn. R. R. Co.,
Jersey City, N. J.

Dear Sir:—

We enclose herewith bill for $58.74 to cover damages on car of watermelons A.C.L. #34794.

This car was shipped on July 12th and was delivered July 20th in a bad condition and we were obliged to call the attention of the yardmaster to this fact. On this car we lost 267 melons at an average cost of 22c. each and you have a record of same.

We enclose herewith account sales, original invoice from shipper, bill of lading, paid freight bill, affidavit from the shipper by which you will note that the car was shipped in sound condition.

Hoping to be favored with your voucher promptly to cover this claim, we beg to remain

Yours very truly,

ANDREW SPADA & CO.

Dic. A.S./C

Exhibit D-13.

(Same bill-head as D-3.)

New York, August 6, 1912.

PENN. R. R. Co.,
Jersey City, N. J.

267 Watermelons rotten in car A.C.L. #34794 @ 22c. ea..... $58.74

578872 AUG22'12
Claim Department
Register No. 9746
Pennsylvania R. R.
Jersey City
Freight Station

Exhibit D-15.

(Same letter-head as D-2.)

New York, August 21, 1912.

Mr. E. BUTLER, F. A.
Penn. R. R. Co.,
Jersey City, N. J.

DEAR SIR:—

In accordance with your request of the 20th inst., we herewith enclose separate claims on cars, #24480, 23761, 18316. We wish to call your attention that we consolidated the claims on these three cars for the simple reason that they were all shipped the same day from one station, and invoiced on the same bill head for the three cars, and we enclose herewith same to prove to you the cost of the goods.

Exhibit D-15

Car #24480, the claim is sustained with bill of lading, affidavit of shipper and claim bill. We cannot furnish the paid freight bill as this car was refused as we already stated in our letter of the 6th inst.

Car #23761, claim is sustained with bill of lading, paid freight bill, affidavit of shipper and account sales, and also claim bill.

Car #18316, claim is sustained with original bill of lading and claim bill. This car was also refused and we cannot furnish paid freight bill. We are of the opinion that considering the shipments were from same station, purchase was one, the claims should be investigated at once for the three cars, anyway you can investigate same as you think best.

Yours very truly,

ANDREW SPADA & CO.
A. SPADA.

Exhibit D-16.

(Same bill-head as D-3.)

New York, August 6, 1912.

PENN. R. R. Co.,
Jersey City, N. J.

Cost of car watermelons #24480 A.C.L....$50.00

583395 SEP-3'12
Claim Department
Register No. 9910
Pennsylvania R. R.
Jersey City
Freight Station

Get S/B

Exhibit D-18.

(Same bill-head as D-3.)

New York, August 6, 1912.

PENN. R. R. Co.,
Jersey City, N. J.

136 Watermelons rotten in car #23761
A.C.L. at average cost 18c. each..... $24.48

584272 SEP-5'12
Claim Department
Register No. 9911
Pennsylvania R. R.
Jersey City
Freight Station

Exhibit D-20.

(Same bill-head as D-3.)

New York, August 6, 1912.

PENN. R. R. Co.,
Jersey City, N. J.

Cost of car watermelons A.C.L. #18316...$40.00

583349 SEP-3'12
Claim Department
Register No. 9909
Pennsylvania R. R.
Jersey City
Freight Station

Get S/B

Exhibit D-21.

(Same letter-head as D-2.)

New York, August 6, 1912.

Mr. E. Butler, F. A.
Penn. R. R. Co.,
Jersey City, N. J.

Dear Sir:—

We enclose herewith bill for $81.62 covering our damages on car watermelons A.C.L. #25968.

This car was shipped on July 19th and delivered July 29th in a bad condition so we were obliged to sell this car for $125.00 which amount is less than freight charges. Herewith find account sales, original bill of lading, paid freigth bill and the original invoice from the shipper, by which you will note that our loss is $81.62.

Hoping to have an early remittance to cover this claim, we beg to remain

Yours very truly,

ANDREW SPADA & CO.

Dic. A.S./C

Exhibit D-22.

(Same bill-head as D-3.)

New York, August 6, 1912.

PENN. R. R. Co.,
Jersey City, N. J.

Loss on car melons A.C.L. #25968.....$81.62

578873 AUG22'12
Claim Department
Register No. 9747
Pennsylvania R. R.
Jersey City
Freight Station

Exhibit D-24.

(Same letter-head as D-2.)

New York, August 6, 1912.

Mr. E. BUTLER, F. A.
Penn. R. R. Co.,
Jersey City, N. J.

DEAR SIR:—

We enclose herewith bill for $65 cost of car watermelons A.C.L. #28548. This car was shipped on July 20th and delivered on July 31st in such a rotten condition that we were compelled to refuse same.

We enclose herewith original bill of lading and invoice from the shipper.

Trusting you will favor us with a prompt remittance to cover this claim, we beg to remain

Yours very truly,

ANDREW SPADA & CO.

Dic. A.S./C
Pine Pk., Ga. Sav. 8-9-7/20. July 29.

Exhibit D-25.

(Same bill-head as D-3.)

New York, Aug. 6, 1912.

PENN. R. R. Co.,
Jersey City, N. J.

Cost of car #28548 A.C.L.....$65.00

578630 AUG22'12
Claim Department
Register No. 9748
Pennsylvania R. R.
Jersey City
Freight Station

Exhibit D-26.

J. C. 7/17.

E. BUTLER, Agt.,
We hereby refuse to accept A.C.L. 35449 Watermelons account of lading being rotten account of delay.

ANDREW SPADA & CO.

Exhibit D-27.

Jersey City, July 23, 1912.

E. BUTLER, Agt.,
I hereby refuse to accept A.C.L. 30698/lading Watermelons, account of same being in rotten condition and inability to realize freight charges.

ANDREW SPADA.

Exhibit D-28.

Jersey City, July 23, 1912.

E. BUTLER, Agt.,

I hereby refuse to accept A.C.L. 24480/lading Watermelons, account of same being in rotten condition and inability to realize freight charges.

ANDREW SPADA.

Exhibit D-29.

Jersey City, July 23, 1912.

E. BUTLER, Agt.,

I hereby refuse to accept A.C.L. 18316/lading Watermelons, account of rotten condition and inability to realize freight charges.

ANDREW SPADA.

Exhibit D-30.

Jersey City, N. J., July 31, 1912.

Mr. E. BUTLER, Agt.

We hereby refuse to accept A.C.L. 28548/lading Watermelons, account of rotten condition of lading and inability to realize freight charges.

ANDREW SPADA & CO.

Exhibit D-31.

Classifications and Tariffs on file with Interstate Commerce Commission.

Extract from Southern Classification, No. 38.

Southern Classification

General Rules

1. The reduced rates specified in this classification will apply only on property shipped subject to the conditions of the Carrier's Bill of Lading.

"Property carried not subject to the conditions of the Carrier's Bill of Lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several states, in so far as they apply. Property thus carried will be charged ten (10) per cent. higher (subject to a minimum increase of one (1) cent per hundred pounds) than if shipped subject to the conditions of the Carrier's Bill of Lading."

Exhibit D-32.

A. D. 8899 9 21 1911

AGENT'S MEMO. BILL

No. 107138 Date 7/15/12

Consignee, Andrew Spada.

To Pennsylvania Railroad Company, Dr.

For charges on articles transported to Henderson & 2nd Street, Jersey City, N. J., Station, from Boston, Ga.

Waybill No. 40. Date 7/8/1912. .....

A.C.L. Car No. 30943.

Shipper, W. B. Roddenburg.

Original Point of Shipment, Date, Original Car, Connecting Line Reference, Oaktown, Ga.

Description of Articles and Marks, Melons.

Weight, 26200

Rate and Authority, 46.6.

Freight Charges, ——

Advances, ——

Prepaid, ——

Total, 13414.

B O 9456. Reg. claim 9745.

Totals, ——

Rd. 7/17/12.

Exhibit D-33.

AGENT'S MEMO. BILL

A. D. 8875 800 B 6 24 1912
No. 112073 Date 7/20/12
Consignee, Andrew Spada.

To PENNSYLVANIA RAILROAD COMPANY, Dr.

For charges on articles transported to Henderson and 2d Streets, Jersey City, N. J., Station, from Cairo, Ga.
Waybill No. 31. Date 7/18/1912. .....
A.C.L. Car No. 34794.
Shipper, W. B. Roddy.
Original Point of Shipment, Date, Original Car, Connecting Line Reference, A. C. D. via Savh.
Description of Articles and Marks, Melons.
(Frt. chgs. gtd. by shipper.)
Weight, 26000.
Rate and Authority, 46¾.
Freight Charges, ——
Advances, ——
Prepaid, ——
Total, 12155.
B O 9457. Reg. claim 9746.
Totals, ——

Rd. 7/22/12.

Exhibit D-34.

AGENT'S MEMO. BILL

A. D. 8875 800 B 6 24 1912
No. 112587 Date 7/20/12
Consignee, Andrew Spada.

To Pennsylvania Railroad Company, Dr.

For charge on articles transported to Henderson and 2d Streets, Jersey City, N. J., Station, from Cairo, Ga.
Waybill No. 36. Date 7/13/1912. .....
A.C.L. Car No. 23761.
Shipper, W. B. Roddy.
Original Point of Shipment, Date, Original Car, Connecting Line Reference, A. C. D. via Savh.
Description of Articles and Marks, Melons.
The frt. gtd. by shipper.
Weight, 29300.
Rate and Authority, 46¾.
Freight Charges, ——
Advances, ——
Prepaid, ——
Total, 13698.
B O 10230. Reg. claim 9911.
Totals, ——

Rd. 7/24/12.

Exhibit D-35.

AGENT'S MEMO. BILL

A. D. 8742 800 3 14 1912
No. 120726 Date 7/29/12
Consignee, Andrew Spade X Co.

To Pennsylvania Railroad Company, Dr.

For charges on articles transported to J. City Station, from Cairo, Ga.
Waybill No. 56. Date 7/19/12. .....
A.C.L. Car No. 25968.
Shipper, W. B. R.
Original Point of Shipment, Date, Original Car, Connecting Line Reference, A. C. D. via Savh. Ga.
Description of Articles and Marks, Melons. S L C
Chgs. gtd. by shipper.
Weight, 33500.
Rate and Authority, 46¾.
Freight Charges, ——
Advances, ——
Prepaid, ——
Total, 15662.
Totals, ——

Rd. 7/31/12.
B O 9458. Reg. claim 9747.

Exhibit D-36.

Established 1867.

PHILLIPS & SONS,

COMMISSION (38) MERCHANTS
Importers & Exporters.
277 Washington Street,
New York.

Cable Address:—PRENDIDO
National League of Commission Merchants of the United States.
Tel. 4200 Cortlandt

Received via Car 35449 Sales of

Sold for and on account of Penn. R. R. Co.
A. Spader

Received July 22 312 @ .15..... 46.80

Car almost worthless, rotten, sound brought above, balance dumped.

Commission ..... 3.74——

Net Proceeds..... 43.06

Exhibit D-37.

(Same bill head as D-36.)

Received via Car 18316

Received July 24th, Car Melons.....		40.00
Commission	3.20	
Net Proceeds		36.80

Exhibit D-38.

(Same bill head as D-36.)

Received via Car 28548

Received Aug. 1st, Car W. Melons....		40.00
Commission	3.20	
Net Proceeds		36.80

Exhibit D-39.

(Same bill head as D-36.)

Received via Car 30698 Sales of

Received July 24th,		
July 24th, Car Melons.....		40.00
Commission	3.20	
Net Proceeds		36.80

Exhibit D-40.

(Same bill head as D-36.)

Received via Car 30698

Received July 24th, Car Melons.....		40.00
Commission	3.20	
Net Proceeds		36.80

NEW JERSEY

Court of Errors and Appeals.

ANDREW SPADA ET AL., *Plaintiffs–Appellees,* *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *Defendant–Appellant.*	*Action at Law. On Appeal from Hudson County Circuit Court.*

Brief for Plaintiffs–Appellees.

STATEMENT OF THE CASE.

This action was brought to recover damages for deterioration to nine carloads of watermelons due to delay in transportation. The watermelons were shipped from points in Alabama and Georgia to Jersey City, New Jersey, and consigned to the plaintiffs. The defendant was the delivery carrier. The shipments were received by the defendant from the Philadelphia, Baltimore and Washington Railroad Company, the connecting carrier, at Edgemoor, Delaware (case, p. 62). The watermelons were in sound condition when delivered to the initial carrier, and when placed on the delivery tracks at Jersey City were in a bad and damaged condition. The deterioration took place while the watermelons were delayed in transportation by the defendant. The usual or customary time to transport shipments from Edgemoor to Jersey City, without delay in transportation, was about seven hours (case, p. 63). The actual time from the date the defendant received the watermelons at Edgemoor, Delaware, to the date when they were placed on the delivery

tracks in Jersey City, was from three to seven days. The watermelons were to be delivered to the plaintiffs at the Second and Henderson street yard of the defendant (case, p. 64, l. 5), and was known as the Jersey City Delivery Yard (case, p. 221, l. 20). Six tracks in that yard (Nos. 15, 16, 17, 18, 19, 20) were used for the delivery of watermelons and they were known as the Watermelon tracks (case, p. 220, l. 7). The portion of the yard occupied by these tracks was the Watermelon Market of New York and vicinity and was used by these consignees and others as a market place and was so recognized by the defendant (case, p. 222, l. 5). Carloads of watermelons were delivered to the consignees on these tracks in the early morning (case, p. 76, l. 37) and sold by them at auction (case, p. 226, l. 20). The watermelons were unloaded by the consignees or the owners (case, p. 219, l. 30).

There was a strike among the longshoremen (case, p. 254, l. 33) employed by the defendant at Pier 29, New York City, which lasted from July 9th, 1912, to about July 21st, 1912 (case, p. 211, l. 36). Pier 29 was used by the defendant for the delivery of peaches, canteloupes and other perishable fruit (except watermelons), and was known as the New York Fruit Market (case, p. 224). At this pier peaches and other fruits delivered there were unloaded by the longshoremen employed by the defendant (case, p. 224-245). No watermelons had been delivered at Pier 29 for more than six years (case, p. 222, l. 13). During the strike certain shipments of peaches billed to Pier 29 were diverted by the defendant to the Jersey City Delivery Yard and placed on the watermelon tracks for delivery (case, p. 219, l. 22 29). Other shipments of peaches billed to Pier 29 were embargoed at Edgemoor, Delaware, against delivery at Pier 29 (case, p. 256, l. 11), but

were received by the defendant at Edgemoor for delivery at the Jersey City Yard, and were also placed for delivery on the watermelon tracks (case, p. 250, l. 29-40). The use of the watermelon tracks, for the delivery of peaches delayed the transportation of watermelons and prevented their delivery (case, p. 242, l. 36). The nine carloads of watermelons were received by the defendant at Edgemoor, Delaware, after July 9th (the beginning of the strike) (case, pp. 62, 63, 64, 66, 67, 68, 69, 70, 71), and no embargo was placed on them for transportation and delivery at the Jersey City Delivery Yard.

During the strike there was a congestion of freight at the meadows, at Harsimus Cove and at the Jersey City Delivery Yard, which was the result of the delivery at the Jersey City Delivery Yard of peaches and other fruits billed to Pier 29, New York City, and of embargoing perishable freight at Edgemoor, Delaware, billed to Pier 29, New York City, and receiving it for delivery at the Jersey City Delivery Yard. The congestion could have been relieved by placing at Edgemoor, Delaware, a complete embargo on peaches and other fruit billed to Pier 29.

The plaintiffs contend that these facts make a case for which the defendant is liable under the common law liability for damages due to delay in the transportation of the nine carloads of watermelons.

The defendant contends that these shipments, being interstate shipments, are governed exclusively by the Interstate Commerce Law and that it is conclusively presumed, in the absence of proof to the contrary, that the shipments were made under a contract limiting the common law liability of the carrier.

POINT I.

No contract was made between the initial carrier and the shipper under the Interstate Commerce Law limiting the common law liability of the initial or any succeeding carrier.

(1). There is no presumption that the watermelons were shipped subject to the limited liability of the carrier's bill of lading.

Rule I. of the Southern Classification admitted in evidence provides:

> "The reduced rates specified in this Classification will apply only on property shipped subject to the conditions of the Carrier's Bill of Lading.
>
> Property carried not subject to the conditions of the Carrier's Bill of Lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several States, in so far as they apply. Property thus carried will be charged ten (10) per cent. higher (subject to a minimum increase of one (1) cent per hundred pounds) than if shipped subject to the conditions of the Carrier's Bill of Lading."

It is obvious that under the above rule the carrier may make a contract limiting its liability to the conditions of the Carrier's Bill of Lading.

But what is the so-called Carrier's Bill of Lading? What are its conditions? The evidence does not show. The bills of lading in evidence are not so designated and their conditions limiting the

liability of the carrier are different. It cannot be any bill of lading the carrier sees fit to issue. Evidently the carrier could not under the Interstate Commerce Law contract for a different limitation of liability based upon the same rate for that would work a discrimination.

It is, therefore, insisted that the limitation of liability of the so called Carrier's Bill of Lading must be uniform and filed with the Interstate Commerce Commission to become presumptively binding upon the shipper under the Interstate Commerce Act.

In the case of Adams Express Co. vs. Croninger 226 U.S., 491, the Carrier had filed with the Interstate Commerce Commission a schedule of rates based upon a graduated value and had limited its liability to $50 where the rate specified between certain points was twenty-five cents and to $125 where the rate specified between the same points was fifty-five cents. The value declared in the bill of lading was $50 and the rate charged was twenty-five cents. The Court said that the shipper was presumed to know that the rate was based upon the value from the terms of the bill of lading and of the published schedules filed with the Interstate Commerce Commission.

It is to be noted that in this case the rate and the limitation of liability appear in the bill of lading and also in the schedules on file with the Interstate Commerce Commission.

To like effect are the cases of Chicago B. & Q. Ry., Co. vs. Miller, 226 U.S., 513, and Chicago St. P. M & O. Ry. Co. vs. Latta, 226 U. S , 519.

In the case at bar, there is no evidence that the initial carrier filed with the Interstate Commerce Commission the conditions of its liability under the

so-called Carrier's Bill of Lading based upon a reduced rate in accordance with Rule I. of the Southern Classification nor does the rate appear in the bills of lading.

The evidence does not show that the shipper agreed to pay the reduced rate, or the higher rate specified in Rule I. of the Southern Classification. In fact, no rate based upon a limitation of liability was brought to the knowledge of the shipper either actually or constructively as was done in the Croninger case, the Miller case and the Latta case, supra.

In order to give presumptive notice to the shipper of the conditions of the so-called Carrier's Bill of Lading under the Interstate Commerce Act, the carrier must file with the Interstate Commerce Commission not only its schedule of tariff rates, in accordance with the Southern Classification but also its limitation of liability based on the reduced rates. If the carrier failed to file either its schedule of tariff rates, or its limitation or liability there would be no presumption that the shipment was made in accordance with the limited liability of the so-called Carrier's Bill of Lading.

II.

2. There can be no presumption that the Bills of Lading are the so-called Carrier's Bill of Lading because their conditions are inconsistent with that portion of Section 20 of the Interstate Commerce Act known as the Carmack Amendment.

One form (case p. 370, l. 21), provides:

> "Sec. 2. In issuing this bill of lading this company agrees *to transport only over its*

own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage or injury not occuring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law."

The other form (case p. 383, l. 26), provides:

"2. It is agreed by the shipper, as owner or agent for owner, that in issuing this bill of lading through to destination, when such destination is on or over connecting lines, *the initial carrier acts only as agent*, and assumes no liability as principal as to the carriage of said freight beyond its own lines; and that the liability of said initial carrier in regard to the said freight shall terminate upon delivery thereof, in good order and within a reasonable time, to the next succeeding carrier. *In case of loss or damage liability therefor shall be attached to only that carrier in whose custody the said freight was at such time of loss or damage.*"

The Carmack Amendment provides as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury

> to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed." * * *

In the case of Travis vs. Wells Fargo & Co , 79 N. J. L., 86, it was held :

> "The liability imposed by the act (the Carmack Amendment) is a liability for a loss by a connecting carrier or carriers to which it (the initial carrier) had delivered goods to complete transportation. It is from that liability that the receiving carrier cannot, under the statute, exempt itself by contract. The statute means that instead of a common carrier being liable as at common law for any loss caused by itself, it shall not only be liable for such loss, but for any loss caused by a connecting carrier to which it has delivered its goods."

In the case of Atlantic C. L. R. R. Co. vs. Riverside Mills, 219 U. S., 186, the Court said:

> "Reduced to the final results, the Congress has said (by the Carmack Amendment) that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one State, to be transported to a point in another, involving the use of a connecting carrier for some part of the way,

to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to his own negligence."

And it is also said in this case that:

> "It must be conceded that the effect of the act in respect of carriers receiving packages in one state for a point in another, and beyond its own lines, is to deny to such an initial carrier the former right to make a contract limiting liability to its own line."

It cannot be denied that the conditions of these bills of lading offend against the provisions of the Carmack Amendment as interpreted in the above-cited cases, and, therefore, there can be no presumption that they were issued in accordance with the requirements of that Act.

(3.) To bind the shipper under Rule I. of the Southern Classification to a limited liability of the carrier, it is necessary that the shipper expressly release the carrier from its common law liability.

The Rules and Regulations of the "Watermelon Tariff No. 2 (I. C. C., No. A-38, Note 4)," which are a part of the Southern Classification admitted in evidence (Exhibit D 31) (Mr. Butler's testimony case, p. 225, l. 24) provide:

> "The rates shown herein are conditioned on the *execution by shippers of release* shown in bill of lading for melon shipments. When this is not done, a charge for

transportation will be 20% greater than the rates shown herein."

This "Watermelon Tariff No. 2" contains the following headline on pages 4 to 47:

"Rates on Watermelons, *released*, minimum weight twenty-four thousand pounds."

Evidently the above Watermelon Tariff from which Mr. Butler testified (case, pp. 225-227) applies only to shipments where the shipper releases the carrier from the Carrier's Liability, which is its common law liability.

No such release was executed by the shipper in the case at bar.

In the case of Charles Albrecht vs. The Pennsylvania Railroad Company, No. 112 of the present list of causes of this Court, which is similar to the case at bar and is submitted on this brief, W. H. Buckenhurst, an expert on classifications and tariffs, produced by the defendant, at page 196, line 38, of the State of Case, testified as follows:

THE COURT—So as to get it down clearly on the record, won't you tell us again in just a few words, when that watermelon rate applies? Just in your own words put that down. A. Well, this watermelon rate applies when the bill of lading is made out, ordinary bill of lading made out and signed *by the agent and by the shipper*, then the rate quoted in the tariff on file is the rate that applies.

THE COURT—And you also told us that when the bill of lading contained on it a notation,—to what effect? A. If the bill of lading has a notation, "not released,"

then we must apply the 10 per cent. higher rate in accordance with the Southern Classification.

THE COURT—And when the bill of lading contains a notation on it "released," then it is understood that the lower rate applies? A. The lower rate applies.

THE COURT—And then the transportation is subject to the carrier's bill of lading? A. Yes.

Rule 6 of the Southern Classification provides that:

"Where the classification provides for a reduced rate, based on a certain fixed valuation, the following special release, containing the agreed valuation, *must be written and signed by the shipper or owner upon the face of the bill of lading or shipping receipt.*

"The value of the shipment covered by this contract is fixed by the shipper at ; which is accepted by the carrier as the real and true value thereof and the rate of freight is charged in accordance therewith, and the carrier assumes liability only to the extent of such valuation and no further."

Such a release was signed by the shipper in the case of Kansas City S. R , Co. v. Carl, 227 U.S., 639.

It was incumbent upon the initial carrier to obtain a release of its common law liability from the shipper in order to subject the shipper to the limited liability of the Carrier's Bill of Lading because watermelons can only be carried subject to the con-

ditions of the Carrier's Bill of Lading when the shipper releases the carrier as required by the rules and regulations of the Watermelon Tariff. The rates shown in the Watermelon Tariff are the reduced rates specified in Rule I. of the Southern Classification applying to the Watermelon Shipments.

If the bill of lading is not signed by the shipper and does not show that the shipment was released then the reduced rates specified in Rule I. of the Southern Classification do not apply and the bill of lading is not evidential of a contract between the shipper and the carrier limiting the common law liability of the carrier under the Interstate Commerce Law. In such case the higher rates specified in Rule I. apply and the bill of lading is then only evidential of the receipt of the goods for transportation subject to the common law liability of the carrier.

(4). The bills of lading do not show that the watermelons were shipped in accordance with the limited liability of the Southern classification.

(a) The bills of lading do not show whether the reduced rate or the higher rate was charged.

(b) The bills of lading do not show the weight of the shipments which is necessary under the Southern Classification to determine the rate.

(c). The bills of lading do not show that they were issued in accordance with a limited liability of the carrier on file with the Interstate Commerce Commission.

(d). The bills of lading do not show that the shipper expressly released the initial carrier of the "Carrier's Liability" (in effect its common law liability) as required by the rules and regulations of

the Watermelon Tariff, which are a part of the Southern Classification.

David K. Butler, a witness produced by the defendant as an expert on classifications and tariff rates affecting watermelon shipments under the Interstate Commerce Law, testified that the bills of lading did not show that the goods were shipped under any particular classification.

Mr. Butler testified (case, p. 228) that there were three classifications; the Southern Classification, the Western Classification and the Official Classification; that these are the only tariff classifications which affect these cars of watermelons.

On page 229, line 13, he says:

> "I could not tell whether the bills of lading in hand were to be used in connection with the outhern Classification or the Official Classification or any other."

He further says, line 35:

> Q. "I gather from what you say that by looking at the bill of lading you cannot tell anything at all about the classification of the goods to be shipped under it?
> A. Judging from the bill of lading you cannot.

At page 231, line 28, he says :

> Q. But you do not know whether these bills of lading were issued under Southern Classification? You do not know as a matter of fact? Yes or no? If you do not know, say so.
> A. I cannot answer that question. In railroad language, I can't answer it.

Mr. Butler read from the "Watermelon Tariff No. 2," on file with the Interstate Commerce Commission, under the Southern Classification. He was then shown a bill of lading and was asked (page 225, line 31), what would be the freight charge for that car, and he answered: "I have not the weight of that document; the consignee's paid freight bill ought to show that."

To determine the watermelon rate under the Southern Classification, it is not only necessary to know the point of shipment and the point of delivery, but also the weight of the shipment. The Southern Classification is based upon a minimum weight of twenty-four thousand pounds (case, p. 225, l. 26).

Without the weight of each shipment Mr. Butler could not say what rate applied, or whether the shipments were made under the Southern Classification. Mr. Butler's testimony only amounts to this, that he was stating what was contained in the schedules of Watermelon Tariff rates, without showing any application to the shipments in this case.

In the cases cited by the appellant in its brief on the limited liability of a carrier under the Interstate Commerce Acts, the bills of lading showed on their face that the shipments were made in accordance with a certain tariff rate and a certain limitation of liability on file with the Interstate Commerce Commission. The question before the Court in those cases was not whether a contract had been made under the Interstate Commerce Law limiting the liability of the carrier, but the validity and effect of such a contract.

(5.) There is no evidence that the shipper signed the bills of lading.

It is true that some of the bills of lading contain

the name of W. B. Roddenbery, but there is not any evidence that W. B. Roddenbery signed them, or that they were signed by some one for him, or that any one had the right to sign his name, or that the name of W. B. Roddenbery appearing at the foot of these bills of lading is the W. B. Roddenbery who is the consignor of the shipments involved in this case.

In the case of Kansas City vs. Carl, supra, it was *proved* that the *shipper actually signed* a release by by which he released the carrier from his common law liability.

In the case of Chicago, B. & Q. R. Co. vs. Miller, supra, it was *proved* that the bill of lading *was signed* by the agent of the shipper.

In the case of Chicago St. P. & C. R. Co. vs. Latta, 226 U. S. 519, it was *proved* that the bill of lading *was signed* by the shipper.

POINT II.

The interstate commerce acts do not prohibit the shipper and the carrier from making a contract subject to the common law liability of the carrier.

Under Rule I. of the Southern Classfication which is a part of the Interstate Commerce Law the initial carrier may make a contract limiting its common law liability and it may make a contract subject to its common law liability.

In other words the Interstate Commerce Acts and the rules and regulations of the Interstate Commerce Commission do not compel the shipper to make a contract with the initial carrier limiting the common law liability of the carrier to the conditions of the so called Carrier's Bill of Lading, nor

prohibit them from making a contract subject to the common law liability of the carrier.

POINT III.

The case was properly submitted to the jury.

We contend that there is no presumption that these shipments were made subject to the conditions of the so-called carrier's bill of lading or that the shipments were made subject to the carrier's liability, limited only as provided by common law and the lawsof the United States and the several States, in so far as they apply.

Whether the bills of lading were so accepted by the shipper as to make them binding contracts or whether the shipments were made subject to the common law liability of the carrier were questions of fact and were properly submitted to the jury.

If the loss or damage was due to the negligence of the defendant (and this was a jury question) the defendant would be liable whether the bills of lading were binding or not.

Where a shipper delivers goods to a carrier in one State to be transported to another State, and the carrier, without asking the value of the goods, assesses the charges thereon on the minimum value set forth in the schedule filed by the carrier under the Interstate Commerce Act, and the goods are subsequently lost by *the negligence of the carrier*, the shipper has a right of action based on the *negligent breach* of a duty imposed by law on the carrier, and the latter will be liable for the full value of the goods, although the bill of lading limits the liability to the amount stated in the contract as the value of the goods.

Dodge vs. Adams Express, 51 Pa. Super Ct., 481.

POINT IV.

A common carrier is liable at common law for damage resulting from delay in the transportation of freight caused by a strike among its employes.

Blackstock vs. N. Y. & E. R. Co., 20 N. Y., 48.

Stierman vs. Penn. R. Co., 21 Fed., Cases No. 12,769 (Pa).

Pittsburg &c. R. Co. vs. Hazen, 84 Ill., 36.

Reade vs. St. Louis &c. R. Co., 60 Mo., 199.

Whether the bills of lading were binding contracts was a jury question. If the jury found that the bills of lading were not binding contracts then the strike was not a defense. If the jury found that the bills of lading were binding contracts then it was for the jury to determine:

1. Was the strike the proximate cause of the delay?

2. Was the diversion of peaches billed to Pier 29, to the Jersey City Watermelon Yard the cause of the delay?

3. Had the defendant a right to use the watermelon tracks for the delivery of peaches to the exclusion of watermelons?

4. Was the congestion of freight a cause beyond the control of the defendant?

5. Did the defendant do all it could under the circumstances to deliver the watermelons within a reasonable time?

6. Was the delay in the transportation of the watermelons due to any negligence of the defendant?

POINT V.

When a carrier cannot furnish immediate transportation, it should embargo goods tendered for shipment.

Tierney vs. N. Y. C. & H. R. R. Co., 76 N. Y., 305.

Helliwell vs. Grand Trunk Ry., 7 Fed., 68.

Joynes vs. Penn. R. Co., 83 Atlantic, 1016 (Pa).

Carr vs. D. L. & W. R. Co , 81 N. J. L., 532.

We have already pointed out that all of these shipments were received by the defendant at Edgemoor, Delaware, for transportation to Jersey City, after the strike began.

POINT VI.

The measure of damages.

The value of the watermelons at the point of destination on the day they should have arrived was proved by plaintiffs' witnesses, Spada and Ureles.

The value of the watermelons at the place and time of shipment was shown by Exhibits D2, D3, D6, D7, D9, D10, D12, D13, D15, D16, D18, D20, D21, D22, D24 and D25.

The net proceeds of the sale of the carloads of watermelons, not accepted by the plaintiff and sold by the defendant, was shown by Exhibits D36, D37, D38, D39 and D40.

From these facts the jury could determine the value of the watermelons at the time they should have arrived at their destination and also their value at the place and time of shipment.

The Court properly charged the jury in each class of cases.

The Court charged (case, p. 352, l. 23):

That if it shall have been made out that the bills of lading were accepted by the plaintiff and are binding upon him then under the bills of lading the damages would be computed on the basis of the value of the property at the place and time of shipment.

This part of the charge applied to the shipments under bills of lading (Exhibits D4, D5, D8 and D23) which contain the provision that the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment (e. g. case, p. 371, l. 5).

The Court also charged (case, p. 352, l. 37):

If the bills of lading are made out under the rules which I have given you, the measure of damages under the bills of lading introduced in evidence as Exhibits D11, D14, D17, D19 and D20 is the amount the goods were sold for by the defendant less the expenses of the sale.

This charge applied to the shipments which were not accepted by the plaintiffs. The bills of lading for these shipments contain the provision that the defendant would not be held responsible for more than the net proceeds of the sale after deducting all legitimate expenses (e. g., case, p. 385, l. 6).

The Court also charged the jury (case, p. 354, l. 19):

"If the bills of lading are not established to be binding upon these plaintiffs under those rules, the measure of damages would be this, that the plaintiff is entitled to recover the entire value of the melons at the time and place when they should have been

delivered, with respect to those cars which were not accepted by him; and with respect to the cars which were accepted by him he would be entitled to recover the entire value of the cars at the time and place when they should have been delivered minus the amount that he sold them for, as proven by the evidence in the case; that is to say, in case of injury to the goods the place of destination is to be taken as the basis for determining the damage, the measure being the difference between what the goods were worth at the place of destination as injured and what they would have been worth if delivered in good order."

The general rule of the measure of damages is the difference between the market value at the time and place where the goods should have been delivered and their market value at the time and place of actual delivery if there has been a depreciation.

Scott vs. Boston &c. Steamship Co., 106 Mass., 468.

Cutting vs. Grand Trunk Co., 13 Allen (Mass.), 381.

Ingledew vs. Northern R. Co., 8 Gray (Mass.), 86.

Sherman vs. Hudson River R. Co., 64 N. Y., 254.

Holden vs. N- Y. Central R. Co., 54 N. Y., 662.

Ward vs. N. Y. Central R. Co., 47 N. Y., 29.

Petersen vs. Case, 21 Fed., 886.

The Golden Rule, 9 Fed., 334.

Milne vs. Doglass, 5 McCrary (U. S.), 368.

POINT VII.

It was proper for the Court to consider the materialty and competency of the evidence of the witnesses taken de bene esse, although no specific objections to the evidence were noted when the depositions were taken.

At the trial objection was made to the materialty and competency of certain questions propounded to witnesses whose depositions had been taken de bene esse. No specific objection had been noted when the depositions were taken and specific objections were first made when the depositions were offered in evidence (case, pp. 53, 55).

Section 52 of the Evidence Act (P. L. 1900, pp. 367, 377) provides:

> "Any deposition or examination taken under this act shall be subject to be excluded or overruled, wholly or in part, according to the opinion of the court, upon any objection taken to the competency of the witness, of materialty or competency of the evidence given, or the regularity of the questions put: * * * *,"

The language of this provision clearly indicates that the court may pass upon the materialty and competency of the evidence given in the deposition when the deposition is offered in evidence. The provision does not state when the objection shall be taken but the objection is taken to the materialty or competency of the *evidence.* The depositions are not *evidence* until they are offered and received in evidence. Furthermore the court has the power to exclude immaterial or incompetent evidence on its own motion whether any objection is made or not.

In the case of Page vs. Parker, 40 N. H., 47, it was held that incompetent evidence in a deposition may be first objected to at the trial of the case.

In the case of Palmer vs. Crook, 73 Mass., 418, it was held that objections to the competency of answers in a deposition taken under a commission may be first made at the trial.

In Johnson vs. Matthew, 5 Kan., 118, it was held that a party who does not object while the deposition is being taken to the testimony of a witness on the ground that it is, or may be at the trial, incompetent, does not thereby waive his right to make such objection at the trial. It seems that this is the only proper time for such objection.

POINT VIII.

The hearsay evidence of defendant's witness, Christie, was properly excluded.

This witness testified (case, p. 259) that he knew that employes of other Railroad Companies were on a strike from reports that went around and from the newspapers. The court permitted the witness to testify to the facts within his own knowledge and that gathered by him in the course of his employment but excluded his testimony as to the reports that went around and what he gathered from the newspapers.

POINT IX.

The hypothetical questions propounded to the defendant's witness, Philips, were properly overruled.

The witness was given the weight of a carload of watermelons and a rate per hundred pounds and was then asked what the amount of freight would be on the shipment (case, pp. 327, 329).

When questioned by the court the witness admitted that this was a mere matter of multiplication. Whether the weight of the melons and the rate applicable were in evidence or not was of no consequence because, as the court properly said, the jury was as capable of multiplying as the witness.

POINT X.

The Court properly sustained plaintiffs' objection to certain questions profounded on cross-examination to the witness, Hall, whose testimony was taken de bene esse.

The witness was asked this question (case, p. 58, l. 36, p. 59, l. 36, and p. 60, l. 24):

Q. State whether or not he (Carl Roundtree) was authorized in July, 1912, to sign the name W. B. Roddenbery.

This question was properly excluded because it called for a conclusion.

The witness was asked this question (case, p. 59, l. 29, p. 60, l. 13):

Q. State if the name W. B. Roddenbery appears on the originial bill of lading covering this car of melons, signed "C. R.," whether or not it was signed by your bookkeeper Carl Roundtree?

This question was properly overruled on the ground that the bill of lading from which the witness was asked to testify was not before him and could not be identified.

The witness was asked the following question (case, p. 60, l. 39):

Q. State whether or not Carl Roundtree was in the employ of the said W. B. Roddenbery as bookkeeper and stenographer, and state whether or not he was authorized to accept bills of lading for ship-

ment made by W. B. Roddenbery of watermelons or any other shipments?

This question was properly overruled on the ground that it called for a conclusion.

POINT XI.

The judgment of the Hudson County Circuit Court should be affirmed.

March Term, 1914.

Respectfully submitted,
QUEEN & STOUT,
Attorneys for and of Counsel
with Plaintiffs–Appellees.