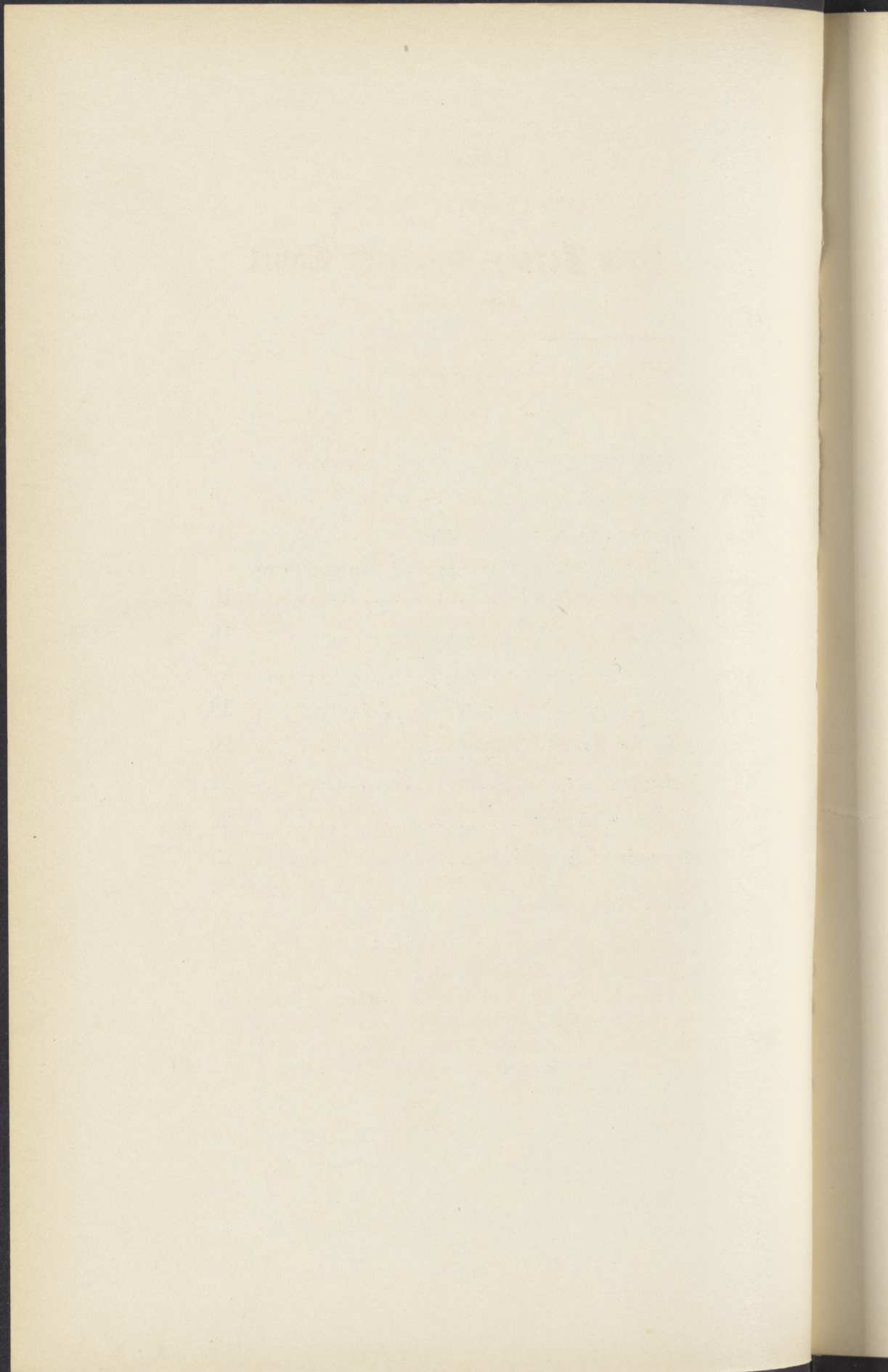


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Complaint

(Filed February 19, 1924)

New Jersey Supreme Court

Essex County

THE NEW YORK CENTRAL RAIL-
ROAD COMPANY, a corporation,
Plaintiff,

vs.

ERSELIO STANZIALE,
Defendant.

Action at
Law

10

The plaintiff, a corporation of the State of New York, having its principal office in New Jersey at Weehawken, in said State, says that:

20

FIRST COUNT

1. At the times stated in the bill of particulars hereto annexed and marked "Schedule A," the plaintiff and its connecting carriers, in the course of their business of common carriers for hire, transported certain property over their respective lines, and performed certain services necessary and incidental thereto, as set forth in said bill of particulars.

30

2. Said property was so transported and said services so performed at the request of the shipper mentioned in said bill of particulars and at its destination said property was delivered by plaintiff, or its connecting carrier, to and accepted by the defendant, as set forth in said bill

40

Complaint

of particulars, and the defendant thereupon promised to pay plaintiff the lawful rates and charges for such transportation and services.

- 10 3. At the times when said property was so transported and said services were so performed, plaintiff and its said connecting carriers were common carriers for hire, and engaged in interstate traffic, and at least thirty days prior to said transportation and services, or any thereof, had filed with the Interstate Commerce Commission, and at their stations, tariffs, classifications and regulations showing the rates and charges for the transportation and services aforesaid, and had established said rates and charges, which
- 20 they deemed reasonable and proper, as applicable to such transportation and services; and computed in accordance with the provisions of said tariffs, classifications and regulations, the charges for said transportation and services, the amount paid on account thereof, and the amount unpaid thereon, were as stated in said bill of particulars.

SECOND COUNT

- 30 1. Plaintiff here repeats and makes part of this count all of the allegations of Paragraph 1 of the First Count.
2. Said property was so transported and said services so performed at the request of the shipper mentioned in said bill of particulars, and on the arrival of said property at its destination aforesaid, notice of such arrival was duly sent
- 40 or given to the defendant in the manner and form prescribed by the rules and regulations of the

Complaint

plaintiff, and by its tariffs filed with the Interstate Commerce Commission, and plaintiff thereupon informed defendant that the charges aforesaid were due on said shipment, and must be paid before said property could be delivered to defendant.

10

3. On or about October 3, 1923, the defendant, well knowing that the plaintiff had and claimed a lien on said property for the charges aforesaid, and with the fraudulent intent of depriving the plaintiff of said lien and of appropriating said property to his own use, and without the knowledge or consent of the plaintiff, fraudulently, unlawfully and surreptitiously removed said property from the yard and premises of the plaintiff at Webster Avenue and Fordham Road, New York City, aforesaid, and thereupon defendant, by such fraudulent and unlawful removal and appropriation of said property, fraudulently contracted a debt to plaintiff or fraudulently incurred a demand in favor of plaintiff for the amount of the charges aforesaid upon said shipment.

20

4. Plaintiff here repeats and makes part of this count all of the allegations of Paragraph 3 of the First Count.

30

WHEREFORE, plaintiff demands from the defendant as damages, the sum of \$741.96 with lawful interest from October 3, 1923.

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

40

Schedule A, Attached to Complaint

SCHEDULE A

BILL OF PARTICULARS

10 1080 Lugs of Grapes, shipped by C. Conforti, from Farmington, California, September 12, 1923, consigned to E. Stanziale, destination, Webster Avenue and Fordham Road, New York City, and received by said consignee at said destination October 3, 1923.

	Freight charges	\$723.36
	Diversion at Jersey City	6.30
	Switching from Jersey City local to ice house	6.30
20	One ton ice at Weehawken, N. J.	4.00
	Demurrage at Fordham, N. Y.	2.00
	Total Due	<u>\$741.96</u>

30

40

Answer

(Filed March 5, 1924)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

10

THE NEW YORK CENTRAL RAIL-
ROAD COMPANY, a corporation,
Plaintiff,

vs.

ERSELIO STANZIALE,
Defendant.

Action at
Law

20

The defendant, who resides in the City of New-
ark, County of Essex and State of New Jersey,
respectfully says:

1. He denies Paragraph 1 of the "First
Count" of the complaint filed herein.

2. He denies Paragraph 2 of the "First
Count" of the complaint filed herein.

30

3. He denies Paragraph 3 of the "First
Count" of the complaint filed herein.

4. He denies Paragraph 2 of the "Second
Count" of the complaint filed herein.

5. He denies Paragraph 3 of the "Second
Count" of the complaint filed herein.

J. VICTOR D'ALOIA,
Attorney of Defendant.

40

Agreed Statement of Facts

(Filed December 28, 1928, as Part of the Postea)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

10

THE NEW YORK CENTRAL RAIL-
ROAD COMPANY, a corporation,
Plaintiff,

vs.

ERSELIO STANZIALE,
Defendant.

} Action at
} Law

20

It is stipulated by and between the parties to the above-entitled cause that the following is an agreed statement of facts for the purpose of the trial of said cause:

30 Plaintiff, The New York Central Railroad Company, at all the times herein mentioned, was and still is a corporation of the State of New York engaged in the business of common carrier for hire in the States of New Jersey, New York and elsewhere, and having its principal office in New Jersey, at Weehawken, in said State.

40 On or about September 12th, 1923, one C. Conforti, delivered certain merchandise consisting of 1080 lugs of wine grapes, weighing 30,240 pounds, to the Southern Pacific Company, at Farmington, California, with instructions to transport said grapes, or cause them to be transported, over the railroad lines of said Southern Pacific Company and of the plaintiff and of their connecting carriers to Fordham, New York City, New York, to

Agreed Statement of Facts

be there delivered to E. Stanziale, the defendant; and with instructions to pre-ice the car in which said grapes were to be transported, and to ice and re-ice said car at all regular icing stations to destination; and with instructions that all transportation and icing charges be collected from the consignee at destination. 10

Said Southern Pacific Company thereupon issued and delivered to said shipper a bill of lading, a true copy of which is hereto annexed, made part hereof, and marked "Exhibit A."

Said Southern Pacific Company, plaintiff, and their connecting carriers thereupon transported said grapes in accordance with said instructions and said bill of lading over their respective railroad lines to Fordham, New York City, New York, in a certain refrigerator car, known and designated by the initials and number P. F. E. 2973. 20

Pursuant to said instructions and to the provisions of said bill of lading, said car was pre-iced before said transportation commenced, and thereafter was iced and re-iced at all the regular icing stations to destination.

Said car of grapes arrived at its destination at Fordham, New York City, New York, on September 29th, 1923, was actually placed for unloading at 1 P. M. on that day, and was released at 6 P. M., October 3rd, 1923. 30

The defendant, at the time of said shipment, was the owner of said grapes, having purchased them from said shipper. The defendant was the consignee of said grapes, and he received said bill of lading from the shipper prior to the time said grapes reached their destination at Fordham, New York City. 40

After said grapes were shipped and before they reached their destination as aforesaid, the defen-

Agreed Statement of Facts

dant sold them to one Raffaele Corrado, of Fordham, New York City, and delivered said bill of lading to him, said sale being made subject to all freight charges.

10 On the 3rd day of October, 1923, with the knowledge and consent of the plaintiff, given and obtained at Fordham, New York City, New York, and upon presentation of the bill of lading to the agents and representatives of the plaintiff at said freight yard at Fordham, New York City, New York, the said Raffaele Corrado obtained delivery to himself of the said carload of grapes.

20 At the times when said grapes were transported and said services were rendered in connection therewith as aforesaid, plaintiff and its said connecting carriers were common carriers for hire and engaged in interstate traffic and at least thirty days prior to said transportation and services, or any thereof, had filed with the Interstate Commerce Commission, and at their stations, tariffs, classifications and regulations showing the rates and charges for the transportation and services aforesaid.

30 Computed in accordance with the provisions of said tariffs, classifications and regulations, the charges for said transportation and services, were as follows, viz:

Freight Charges	\$523.15
Refrigeration	105.00
Demurrage at Fordham, New York City	2.00
Total	<u>\$630.15</u>

40

Agreed Statement of Facts

No part of the above charges has been paid.

All claims for freight and other charges which accrued to the connecting carriers of the plaintiff by reason of the transportation and other services hereinbefore set forth, have been assigned to, and are now held and owned by the plaintiff.

10

Dated, October 29th, 1928.

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

J. VICTOR D'ALOIA,
Attorney for Defendant.

20

30

40

**Exhibit A, attached to Agreed Statement of
Facts**

(See page 7)

10

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"SCHEDULE A."

8 1/2 x 11 3/4 23 1927 F. D. 2526

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

UNIFORM STRAIGHT BILL OF LADING

(Prescribed by the Interstate Commerce Commission)

ORIGINAL NOT NEGOTIABLE

~~THE PENNSYLVANIA RAILROAD COMPANY~~
SOUTHERN PACIFIC COMPANY

Shipper's No. _____

Agent's No. _____

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

Farmington, Calif.

September 12

192 **3**

at **C. Conforti,**

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

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

Consigned to **E. Stanziale,
Webster Avenue, Fordham Road,
New York City.**

120 - 8th Ave., Newark, N.J.

Destination _____ State of **N.Y.** County of _____

Route **S.P., U.P., CNW Erie**

Car Initial **PFR** Car No. **2973**

(Delivering carrier)

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
1080	L.A. Lugs O.T, wine Grapes	30240		
	Pre-Iced car			
	Ice & re-ice at all regular icing stations to destn. loading method No. 2.			
		Delivered at		
	(160 lugs 4500 lbs) 9/26/23	Jersey City Local		
	Car ordered for 9/12/23	Jersey City Local Sta.		
	Car placed 7.30 A.M., 9/12/23	J.B. Smith, Agent.		
	Loading started 10 A.M., 9/12/23			
	Loading completed 7 PM, 9/12/23			
	(8x5x27)	to Webster Ave. & Fordham Rd. NYCRR Delv. 198 St.		

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

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

(Signature of consignor.)

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

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

Agent or Cashier

Per _____ (The signature here acknowledges only the amount prepaid.)

Charges Advanced:

\$ _____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE.—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

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

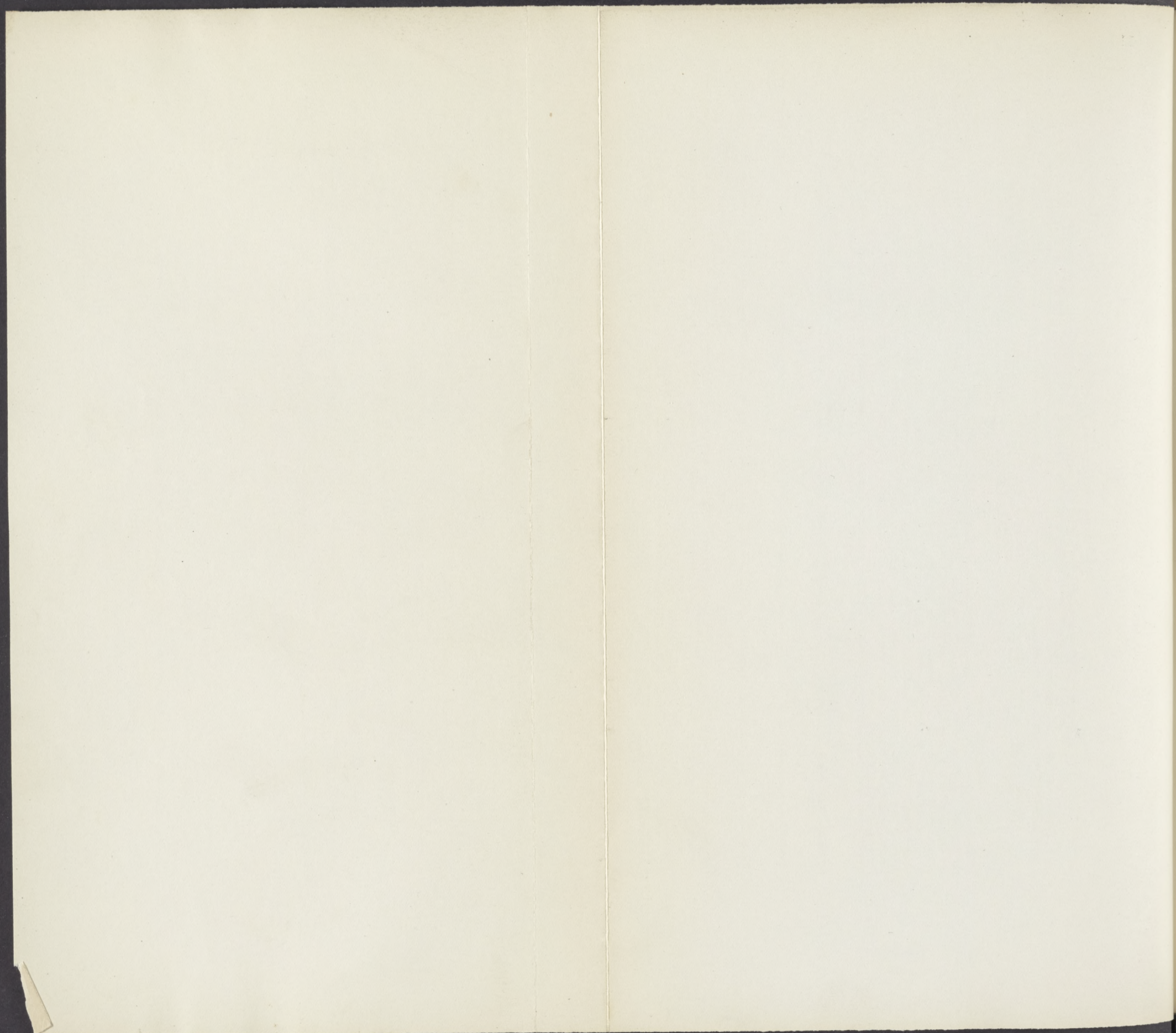
C. Conforti, Shipper

L. L. Lacey, Agent

Per _____

Per **Venduts.**

Permanent post-office address of shipper _____





CONTRACT TERMS AND CONDITIONS.

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

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

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

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

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

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

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary coverage and baling at owner's cost. Each carrier over whose route cotton or cotton linters 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 (said prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given and after placement of the property for delivery at destination has been made, may be kept in vessel car, depot, warehouse or place of delivery of the carrier, subject to the tariff charges for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored at a warehouse or warehouseman at the place of delivery or other available place, at the cost of the owner, and then held without liability on the part of the carrier, and subject to a lien for all freight and other

charges. The carrier shall have first mailed, sent, or given to the consignee notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading, if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: *Provided*, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

That the carrier shall have first mailed, sent, or given to the consignee notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading, if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published. *Provided*, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale. *Provided*, That if time serves for notification to the consignee or consignee's refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the provisions provided for in the two paragraphs last preceding is not possible, it is agreed, that nothing contained in said paragraphs shall be construed to abridge the right of the carrier as its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder 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 classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be so stored at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignee shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. 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. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) 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 all the terms and provisions of, and all the exemptions from liability contained in, the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

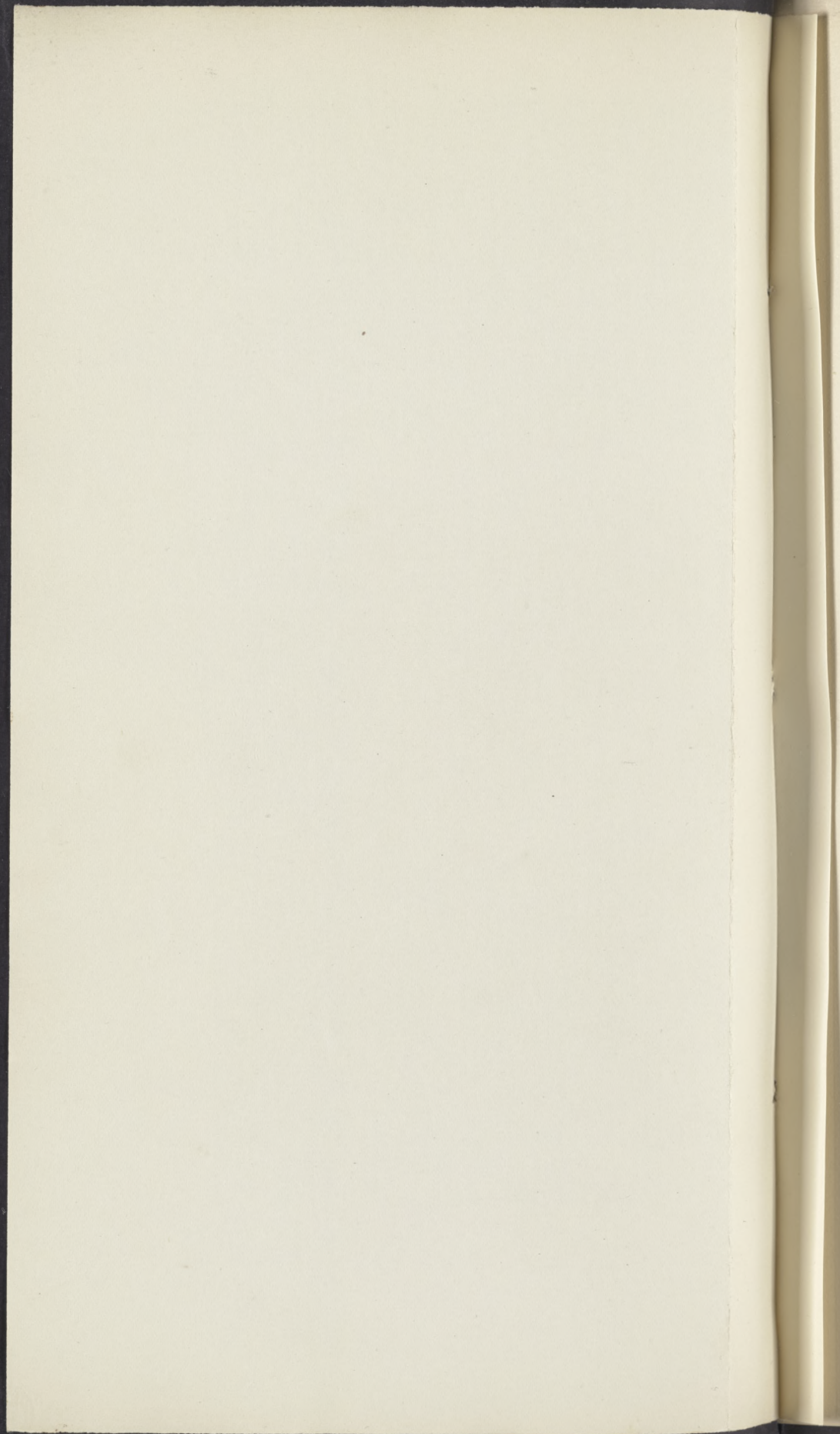
(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General average shall be payable according to York-Antwerp Rules, 1890, and, as to any matter not therein provided for, according to the law and usage of the port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees, and/or owners of the cargo shall nevertheless any salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers, the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of 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.



Findings

(Filed December 28, 1928, as part of the Postea)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

10

NEW YORK CENTRAL RAILROAD
COMPANY, a corporation,
Plaintiff,

vs.

ERSELIO STANZIALE,
Defendant.

Action at
Law

Case submitted
on agreed state-
ment of facts.

FINDINGS

20

For the Plaintiff appear MESSRS. WALL, HAIGHT,
CAREY & HARTPENCE;

For the Defendant appears J. VICTOR D'ALOIA,
Esq.

SMITH, *Circuit Court Judge.*

This case was referred to the Circuit for trial and has been submitted on an agreed statement of facts. 30

The suit is brought to recover freight and other attending charges for a shipment made by one Conforti and consigned to the defendant. After shipment was made and before delivery the defendant sold the goods while in transit to one Corrado, to whom the bill of lading was delivered, and the sale was made subject to all freight 40

Findings

charges. The plaintiff knew of this sale and delivered the goods to Corrado without collecting the freight.

10 Primarily, the consignor is liable for the payment of freight charges. *P. R. R. v. Townsend*, 90 N. J. L. 75. This liability continues regardless of the fact that the goods may have been sold by the consignor or that the railroad fails to collect the freight charges from the consignee. The railroad, of course, has the right to insist upon the payment of freight before delivery. The bill of lading contains a further provision with regard to who is liable for the freight. This is Section 7 of the contract terms and conditions contained on the back of the bill of lading. The
20 important parts of the provision are as follows:

30 "Section 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid."

40 The mere fact that the person is named a consignee or is the owner of the goods does not render him liable for the payment of freight. *P. R. R. v. Townsend, supra*. To hold the owner or consignee he must acquiesce or agree to the bill of lading by some express or implied agreement, and the exercise of dominion over the goods is sufficient to render him bound by the bill of lading.

Findings

The defendant became owner of the shipment and was the named consignee. He did not take delivery of the goods, but sold the goods subject to the payment of freight. He, of course, became bound by the terms of the bill of lading in doing this, but his liability does not extend beyond the terms of the provision of the bill of lading under which he is held liable. 10

The plaintiff knew of the sale and delivered the goods to the purchaser without collecting the freight. Section 7 of the terms of the bill of lading provides that the owner or consignee shall pay the freight, but it has the further provision in the same sentence that the railroad shall not deliver or relinquish possession at the destination of the property covered by the bill of lading until all tariff rates and charges thereon have been paid. The named consignee and owner, in disposing of the property and notifying the railroad of the sale, may rely upon this provision as protecting him against liability for the payment of the freight. 20

The case of *New York Central Railroad Co. v. Rose Lumber Company*, 230 N. Y. 261, which has been relied upon as rendering the named consignee liable where the property was delivered to a third person, is not an authority covering this case. In that case the delivery to the third person was upon order of the consignee, and it might well be that the railroad might assume that the person to whom delivery was made was merely the agent of the consignee. The Court in its opinion states, in referring to the notice which the defendant gave to the railroad company advising them as to the delivery to the third person, that the language in the letter was not contractual. 30 40

Findings

and says: "It is unnecessary to consider what would be the rights of the parties if the plaintiff had been chargeable with notice before the delivery of the goods by it, that the defendant was not the owner of the goods."

- 10 I therefore find that the defendant on notifying the railroad company that the goods had been sold subject to the payment of freight was released from liability for the payment of freight under Section 7 of the terms of the bill of lading, it being the duty of the plaintiff to collect the freight from the new owner on delivery to him, or from the consignor.

December 11, 1928.

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(Signed) WM. A. SMITH,
Circuit Court Judge.

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Exceptions

(Filed January 9, 1929)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

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THE NEW YORK CENTRAL RAIL-
ROAD COMPANY, a corporation,
Plaintiff,

vs.

ERSELIO STANZIALE,
Defendant.

Action at
Law

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Exceptions allowed to plaintiff by Hon. William A. Smith, Circuit Court Judge, to whom this case was referred for trial, to his findings and decision made herein, dated December 11, 1928, viz:

1. To the finding that plaintiff knew of the sale of the goods by defendant to Corrado, plaintiff prays an exception.

2. To the finding that defendant notified the railroad company (the plaintiff) that the goods had been sold subject to the payment of freight, plaintiff prays an exception.

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3. To the finding that the defendant, on notifying the railroad company that the goods had been sold subject to the payment of freight, was released from liability for the payment of freight under Section 7 of the terms of the bill of lading, it being the duty of the plaintiff to collect the

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Exceptions

freight from the new owner on delivery to him, or from the consignor, plaintiff prays an exception.

10 4. To the finding or decision in favor of the defendant and against the plaintiff, plaintiff prays an exception.

5. To the refusal to find or decide that the plaintiff is entitled to recover from the defendant the sum of \$630.15 with interest, plaintiff prays an exception.

20 The above exceptions numbered 1, 2, 3, 4 and 5 are allowed and noted.

Dated, December 19th, 1928.

WM. A. SMITH,
Circuit Court Judge.

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Postea

(Filed December 28, 1928)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

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THE NEW YORK CENTRAL RAIL-
ROAD COMPANY, a corporation,
Plaintiff,

vs.

ERSELIO STANZIALE,
Defendant.

Action at
Law

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This cause was tried on December 1st, 1928, by consent of the parties, at the Essex Circuit, before the Honorable William A. Smith, to whom the case was referred, without a jury, upon an agreed statement of facts, which is hereto annexed and made part hereof, and on December 11th, 1928, the Court decided the issue in favor of the defendant, Ersilio Stanziale, and against the plaintiff, The New York Central Railroad Company, a corporation as appears by the memorandum of decision and findings hereto annexed.

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Dated, December 22nd, 1928.

WM. A. SMITH,
Circuit Court Judge.

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Rule for Final Judgment

(Entered December 28, 1928)

NEW JERSEY SUPREME COURT

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ERSELIO STANZIALE,
Defendant,

ads.

NEW YORK CENTRAL RAILROAD
COMPANY, a corporation,
*Plaintiff.*Action at
Law

On Postea

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Costs \$46.00.

IT IS ORDERED that judgment be and hereby is entered in favor of defendant and against the plaintiff with costs to be taxed *nisi*.

Entered December 28, 1928. On motion of

J. VICTOR D'ALOIA,
Attorney.

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Judgment

(Entered December 28, 1928)

NEW JERSEY SUPREME COURT

<p style="margin: 0;">THE NEW YORK CENTRAL RAIL- ROAD COMPANY, a corporation, <i>Plaintiff,</i></p> <p style="text-align: center; margin: 0;">vs.</p> <p style="margin: 0;">ERSELIO STANZIALE, <i>Defendant.</i></p>	}	<p style="margin: 0;">Action at Law.</p> <p style="margin: 0;">On Postea.</p> <p style="margin: 0;">Judgment for Defendant.</p> <p style="margin: 0;">J. Victor D'Aloia, Attorney.</p>	<p style="margin: 0;">10</p>
<p style="margin: 0;">Costs \$46.00.</p>	}		<p style="margin: 0;">20</p>

Judgment entered this twenty-eighth day of December, A. D. nineteen hundred and twenty-eight, in favor of defendant and against the plaintiff for the sum of Forty-six Dollars costs.

WM. S. GUMMERE,
C. J.

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Notice of Appeal

(Filed Januray 8, 1929)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

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THE NEW YORK CENTRAL RAIL-
ROAD COMPANY, a corporation,
Plaintiff,

vs.

ERSELIO STANZIALE,
Defendant.

} Action at
Law

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To J. VICTOR D'ALOIA, Esq., *Attorney for Defen-
dant:*

TAKE NOTICE, that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in the New Jersey Supreme Court in the above stated cause, on December 28th, 1928.

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Dated, January 2nd, 1929.

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

(Endorsed)

Service of the within notice of appeal is hereby acknowledged this 3rd day of January, 1929.

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J. VICTOR D'ALOIA,
Attorney for Defendant.

It is consented that the within notice of appeal be filed as of January 5, 1929.

J. VICTOR D'ALOIA,
Attorney for Defendant.

Grounds of Appeal

(Filed January 12, 1929)

NEW JERSEY COURT OF ERRORS AND APPEALS

<p style="text-align: center;">THE NEW YORK CENTRAL RAIL- ROAD COMPANY, a corporation, <i>Plaintiff-Appellant,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">ERSELIO STANZIALE, <i>Defendant-Respondent.</i></p>	}	<p>Action at Law.</p>	10
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The appellant states the following grounds of appeal:

1. The Court found as a fact that plaintiff knew of the sale of the goods by defendant to Corrado, although such fact did not appear from the Agreed Statement of Facts.

2. The Court found as a fact that defendant notified the plaintiff that the goods had been sold subject to the payment of freight, although such fact did not appear from the Agreed Statement of Facts.

3. The Court found as a conclusion of law that the defendant, on notifying the railroad company that the goods had been sold subject to the payment of freight, was released from liability for the payment of freight under Section 7 of the terms of the bill of lading, it being the duty of

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Grounds of Appeal

the plaintiff to collect the freight from the new owner on delivery to him, or from the consignor.

10 4. The Court found in favor of the defendant and against the plaintiff.

5. The Court refused to find or decide that the plaintiff was entitled to recover from the defendant the sum of \$630.15 with interest.

20 6. The Court should have found that plaintiff was entitled to recover from the defendant \$630.15, with interest, and judgment should have been rendered accordingly.

7. The Court erred in rendering judgment in favor of defendant, and against the plaintiff.

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

Served January 11, 1929.

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NEW JERSEY COURT OF ERRORS
AND APPEALS.

NEW YORK CENTRAL RAILROAD
COMPANY, a corporation,
Plaintiff-Appellant,
—vs—
ERSELIO STANZIALE,
Defendant-Respondent,

ACTION
AT LAW.
ON APPEAL

BRIEF ON BEHALF OF
DEFENDANT-RESPONDENT

This is an appeal from a judgment rendered in the Supreme Court in favor of the defendant and against the plaintiff in the above entitled action.

The cause was submitted at the Essex Circuit to the Honorable William A. Smith, *upon an agreed statement of facts*, without a jury.

Facts

The agreed statement of facts appears on page 6 of the State of the Case and sets forth, without the necessity of repeating them here, *the admitted facts agreed upon by both sides.*

On page 5 of the Appellant's brief, under the caption "Point 1", there appears succinctly the only question involved in this case, which is: Did the New York Central Railroad Company have

knowledge and notice of the sale of the grapes, subject to all freight charges, by the defendant to Raffaele Corrado?

The trial court found the answer to this question in the agreed statement of facts (Case page 7, L. 40), wherein the following paragraph appears:

“After said grapes were shipped and before they reached their destination as aforesaid, the defendant sold them to one Raffaele Corrado, of Fordham, New York City, and delivered said bill of lading to him, said sale being made subject to all freight charges.”

In the statement of facts, the plaintiff admits knowing that the defendant had sold the grapes to Raffaele Corrado and that the sale was subject to all freight charges.

The statement of facts further sets forth, (Case page 8, L. 9), the following admitted facts:

“On the 3rd day of October, 1923, with the *knowledge* and *consent* of the plaintiff, given and obtained at Fordham, New York City, New York, and upon presentation of the bill of lading to the agents and representatives of the plaintiff at said freight yard at Fordham, New York City, New York, the said Raffaele Corrado obtained delivery to himself of the said carload of grapes.”

From these *admitted* facts, the trial court correctly concluded that the plaintiff-appellant knew of this sale and the conditions thereof at the time

it delivered the goods to Corrado. The agreed statement of facts also included a copy of the bill of lading and Section 7, of its terms, provides that the carrier shall not deliver or relinquish possession at the destination of the property covered by the bill of lading until all tariff rates and charges thereon have been paid.

The carrier admittedly knew of the sale and disposal of the property; It knew the conditions of the sale and the defendant had a right to rely upon this provision of the bill of lading as protecting him against liability for the payment of the freight charges.

“Penna. R. R. C. v. Townsend”

90 N. J. L. 75

The cases cited by the plaintiff-appellant, under Points 2, 3, 4, 5 and 6 of its brief, are not applicable to the case at bar. An examination of those cases shows that delivery was made to third parties by the carriers, *pursuant to the directions, instructions or orders* of the respective consignees.

In the case of New York Central Railroad Company vs. Ross Lumber Co., 234 N. Y. 261, cited by the plaintiff-appellant, the Court stated in its opinion (page 265) :

“It does not appear from the agreed facts that plaintiff had knowledge or notice that the defendant was not the owner.”

In the case at bar it *does appear* from the *agreed statement of facts* (Case page 7, L. 40) that the plaintiff-appellant knew the defendant was not the owner of the goods.

It further appears from the agreed statement of facts, that it knew of the sale to Corrado, and that it was made subject to all freight charges.

It also further appears, in the agreed statement of facts, that it delivered the goods to Corrado with full knowledge of the fact that the consignee named in the bill of lading had disposed of the property and was not the owner of the goods.

All these facts, admitted by the plaintiff-appellant, permit of no conclusion other than that arrived at by the trial in its findings of fact.

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT ENTERED HEREIN IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF BE AFFIRMED.

J. VICTOR D'ALOIA,
Of Counsel with Defendant-
Respondent.

New Jersey Court of Errors and Appeals 10

THE NEW YORK CENTRAL RAIL-
ROAD COMPANY, a corporation,
Plaintiff-Appellant,

vs.

ERSELIO STANZIALE,
Defendant-Respondent.

Action at Law.
ON APPEAL. 20

**BRIEF ON BEHALF OF PLAINTIFF-
APPELLANT**

This appeal brings up for review a judgment entered in the Supreme Court in the above-entitled action in favor of the defendant and against the plaintiff. 30

The trial took place at the Essex Circuit before Hon. William A. Smith, Circuit Judge, without a jury upon an Agreed Statement of Facts.

The complaint (pp. 1-4) states a cause of action for transportation charges which accrued on a shipment of grapes from California to New York City, over the lines of the plaintiff and its connecting carriers. The charges were fixed in accordance with tariffs duly filed with the Interstate Commerce Commission. The complaint contains two counts, both for the same cause of action. The second count which was based upon an 40

- 10 allegation of fraud was abandoned at the trial and the first count alone relied on.

The defendant was the owner of the grapes and the consignee named in the bill of lading. He sold the grapes while in transit subject to all freight charges, and delivered the bill of lading to the purchaser to whom the grapes were delivered on their arrival at destination. The plaintiff failed to collect the charges on delivery.

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The questions presented by this appeal are that the Court erred:

(1) In finding as a fact that the plaintiff knew of the sale by defendant to Corrado, although such fact did not appear from the Agreed Statement of Facts.

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(2) In finding as a fact that the defendant notified the plaintiff that the goods had been sold subject to the payment of freight, although such fact did not appear from the Agreed Statement of Facts.

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(3) In finding as a conclusion of law that the defendant on notifying the Railroad Company that the goods had been sold subject to the payment of freight was released from liability for the payment of freight under the terms of the bill of lading, and that it was the duty of the plaintiff to collect the freight from the new owner on delivery to him, or from the consignor.

(4) In not finding or deciding that the plaintiff was entitled to recover from the defendant the sum of \$630.15, with interest, and in not rendering judgment accordingly.

(5) In rendering judgment in favor of defendant and against the plaintiff. 10

Statement of Facts

This action was brought to recover freight, refrigeration and demurrage charges amounting to \$630.15 on a carload of grapes shipped from Farmington, California, to New York City, over the Southern Pacific Railroad, the New York Central Railroad, and connecting lines. The car left Farmington on September 12th, 1923, and arrived at its destination in New York City on September 29th. A straight bill of lading was issued by the Southern Pacific Company to the shipper at Farmington, for the transportation of the car of grapes to New York City, naming the defendant as consignee, and containing appropriate instructions for routing, and icing before and during transit. A copy of the bill of lading is annexed to the Agreed Statement of Facts and marked "Schedule A" (pp. 11-12). 20 30

The grapes were transported in a refrigerator car, and pursuant to instructions in the bill of lading, the car was pre-iced before transportation commenced, and thereafter was iced and re-iced at all regular icing stations to destination.

The defendant, at the time the shipment was made, was the owner of the grapes, having purchased them from the shipper. He received the bill of lading from the shipper before the grapes reached their destination at New York City. 40

After the grapes were shipped, and before they reached New York, the defendant sold them to

- 10 one Raffaele Corrado, of Fordham, New York City, and delivered the bill of lading to him, the sale being made subject to all freight charges.

On October 3rd, following the arrival of the grapes at New York, said Corrado presented the bill of lading to the freight agent of the plaintiff at Fordham Station, New York, and obtained delivery to himself of the said grapes.

- 20 At the time of the transportation of said grapes, plaintiff and its connecting carriers were common carriers for hire and engaged in interstate commerce, and tariffs containing the rates, classifications and regulations applicable to said transportation and the services rendered in connection therewith, had been duly filed with the Interstate Commerce Commission.

- 30 Computed in accordance with the provisions of said tariffs, classifications and regulations, the charges for said transportation and services were as follows:

Freight charges	\$523.15
Refrigeration	105.00
Demurrage at Fordham Station, New York City	2.00

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\$630.15

These charges were not collected from Corrado at the time he obtained delivery of the grapes, and no part thereof has ever been paid.

All claims for freight and other charges which accrued to the connecting carriers of the plaintiff

by reason of the transportation and other services hereinbefore set forth have been assigned to, and are now held and owned by the plaintiff. 10

POINTS

I

It does not appear from the agreed statement of facts that plaintiff had knowledge or notice of the sale of the grapes by defendant. 20

The only reference to the sale in the Agreed Statement of Facts is contained in the paragraph beginning at the bottom of page 7, which reads as follows:

“After said grapes were shipped and before they reached their destination as aforesaid, the defendant sold them to one Raffaele Corrado, of Fordham, New York City, and delivered said bill of lading to him, said sale being made subject to all freight charges.” 30

The paragraph following states that “On the 3rd day of October, 1923, with the knowledge and consent of the plaintiff, given and obtained at Fordham, New York City, New York, and upon presentation of the bill of lading,” Corrado obtained delivery to himself of the carload of grapes. The meaning of the phrase “with the knowledge and consent of the plaintiff” will be apparent on reference to Paragraph 3 of the Second Count of the Complaint (p. 3), wherein it was alleged that the defendant removed the grapes from the plaintiff’s yard “without the knowledge or consent of the plaintiff.” 40

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II

The carrier is required by law to collect all charges which accrue on interstate shipments, according to the schedules of rates and charges filed with the Interstate Commerce Commission.

20 Section 6 of the Interstate Commerce Act (Feb. 4, 1887, 41 Stat. at L. 474) requires carriers to file with the Interstate Commerce Commission schedules showing rates, fares and charges for transportation and, among other things, provides (Section 6, Subdivision [7] of said Act):

30 “(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall
40 any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.”

In the case of *Louisville & N. R. Co. v. Central Iron & Coal Co.*, 265 U. S. 59, 68 L. Ed. 900, Mr. Justice Brandies, delivering the opinion of the Court, said, at page 902: 10

“The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the Statute of Limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor.” 20 30

The Justice further said, in his opinion, at page 904:

“Under the rule of the *Fink* case, if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later. His liability satisfies the requirements of the Interstate Commerce Act.” 40

The extent to which the Courts have gone in imposing liability upon a consignee is shown in the case of *Great Northern Ry. Co. v. Hyder*, 279 Fed. 783, which held that:

10 “A consignee, who is not at any time the
owner of goods shipped, who has not
agreed with either the shipper or the car-
rier that he will pay the freight, and who
accepts the goods on the carrier’s mistaken
representation that the freight has been
prepaid, is bound by such acceptance to
pay the freight; shipper, carrier, and con-
signee all being agents and trustees for the
20 public in the matter of the enforcement of
freight rates.”

III

A consignee of an interstate shipment, upon acceptance of the property, becomes liable to the carrier for the full amount of the charges thereon, according to the lawful tariff rates.

30 To ascertain what contract was entered into between the carrier, the shipper and the consignee, we look primarily to the bill of lading, bearing in mind that the instrument serves both as a receipt and a contract. The carrier may accept the goods for shipment solely on account of the consignee, or both the shipper and consignee may be liable (*Louisville & N. R. Co. v. Central Iron & C. Co., supra*).

40 We are not concerned here with the liability of the shipper. The defendant was the consignee, and the bill of lading issued by the initial carrier and received and accepted by the defendant (pp. 11, 12) contained the following provision:

“Sec. 7. The owner or consignee shall pay the freight and average, if any, and all

other lawful charges accruing on said property.” 10

The defendant was both the owner and the consignee, and his acceptance of the bill of lading, followed by his delivery thereof to Corrado, the purchaser of the grapes, made him a party to the bill of lading, and the contract of shipment contained therein, and bound him to pay the charges due on the shipment according to the tariff rates.

The liability of a consignee of an interstate shipment for tariff charges thereon, when he accepts the property, has been conclusively established by the Supreme Court of the United States in *Pittsburgh, C., C. & St. L. R. Co. v. Fink*, 250 U. S. 577, 63 L. Ed. 1151; *N. Y. C. & H. R. Co. v. York & Whitney Co.*, 256 U. S. 406, 65 L. Ed. 1016; and *Louisville & N. R. Co. v. Central Iron & Coal Co.*, *supra*. 20

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IV

The consignee remains liable for the charges when the goods are by his direction delivered by the carrier to a third party.

Defendant was the owner of the grapes when they were shipped from California. Thereafter, and before the grapes arrived at New York he sold them to Corrado, to whom they were delivered by the plaintiff. The defendant received the bill of lading from the shipper and delivered it to Corrado. This was an act of ownership on the part of the defendant, and implied an acceptance of the shipment and of the terms of the bill of lading. 40

- 10 The following cases are directly in point, both as to the facts and the law:

In *N. Y. C. R. R. Co. v. Ross Lumber Co.*, 234 N. Y. 261, an action was brought to recover freight charges of the defendant on a car of lumber shipped from Saginaw, Michigan, to the defendant at Boston, Massachusetts. Before the arrival of the car at Boston, the defendant directed the plaintiff to deliver the car to Schieck-Johnson Company upon payment of freight charges. In compliance with this direction the plaintiff delivered the car to that company, but failed to collect the freight charges. The Schieck-Johnson Company subsequently became bankrupt. Held that the defendant was liable for the charges. The Court said (p. 264):

30 “It is not a part of the contract between consignor and carrier that the latter shall collect its bill of the consignee. The carrier may neglect to collect of the consignee and collect of the consignor. * * *

40 “But the consignee may also become liable for such charges by its own act. While no contractual relation arises between carrier and consignee by the mere designation of the latter as consignee, the consignee becomes liable for the freight charges when an obligation arises on his part from presumptive ownership, acceptance of the goods and the services rendered and the benefits conferred by the plaintiff for such charges.

“As to plaintiff, defendant stood in the relation of owner of the carload of lumber. The bill of lading designated it as consignee. That fact is in itself evidence of

ownership. It does not appear from the 10
 agreed facts that plaintiff had knowledge
 or notice that defendant was not the owner,
 or that defendant was not in fact such
 owner. The Schieck-Johnson Company
 might, for all that appears, have been the
 agent of defendant whose duty it was to
 take delivery on its behalf. As defendant
 was the presumptive owner, if it accepted
 the freight in the capacity of owner, the
 law implied a promise on its part to pay 20
 the charges (*Pittsburgh, C., C. & St. L. Ry.
 Co. v. Fink*, 250 U. S. 577), although the bill
 of lading did not come into its possession
 and it had no knowledge of its terms (*N. Y.
 C. & H. R. R. Co. v. York & Whitney Co.*,
 256 U. S. 406). When it wrote the letter
 directing the delivery without notifying the
 plaintiff that it was not the owner of the
 goods, it acted either as consignee or volun- 30
 teer. We may not assume that its letter
 was the act of a meddler. We must, there-
 fore, presume that it wrote as consignee. It
 follows that it accepted the goods by an
 act of ownership when it exercised domin-
 ion over them by giving directions for their
 delivery and the plaintiff was justified in
 treating it as owner of the goods (*Penn. R.
 R. Co. v. Titus*, 216 N. Y. 17). It thereby
 entered into the contract expressed in the
 bill of lading to pay the charges and be- 40
 came liable to pay such charges. * * *

“The carrier was not bound at its peril
 to enforce payment of freight from the
 Schieck-Johnson Company, and its right to
 resort to the defendant under the contract
 was not impaired by delivery of the freight
 under its direction.”

10 In *N. Y. C. R. R. Co. v. Federal Sugar Refining Co.*, 235 N. Y. 182, the carrier sued the defendant for freight charges on a shipment of sugar from Yonkers, N. Y., consigned to the order of the Federal Sugar Refining Co., notify Lewiston Confectionery Company, Lewiston, Maine. On arrival of the shipment at destination the carrier delivered the shipment to Lewiston Confectionery Company, which thereupon surrendered the bill of lading. The plaintiff's agent erroneously way-

20 biled said shipment as a prepaid one and as a result freight charges were not collected from the Lewiston Company on delivery. The billing was thereafter corrected and payment of the charges demanded from the Lewiston Company, but plaintiff was unable to collect same for the reason that the Lewiston Company had become insolvent. Held that the defendant was liable as consignee for the freight.

30 The Court said (p. 186):

“We can see no reason for a different conclusion in this case from that arrived at by this Court in *N. Y. C. R. R. Co. v. Ross Lumber Co.* (234 N. Y. 261). The bill of lading in that case was a straight bill of lading. The bills of lading in this case are order or notify bills of lading. The difference between the two bills of lading lies in the duty which rests upon the railroad. With a straight bill of lading when stamped ‘non-negotiable’ the carrier may deliver to the consignee with or without its production (*Colgate v. Pennsylvania Co.*, 102 N. Y. 120). Under the order bill of lading, the railroad will only deliver upon the production of the original bill of lading which in-

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dicates that the purchase price has been paid. The rule as to freight charges, however, remains the same in both cases. The railroad company may demand the amount from the consignee or it may collect from the consignor. It cannot make an election nor be held to an estoppel without violating the purpose and spirit of the Interstate Commerce Commission Act. In order to prevent preferences, it is obliged to collect its freight charges and if it cannot get them from one party it must look to the other. Delivery of the goods without collection is no release or waiver of any or either party.”

In *Dare v. N. Y. C. R. Co.*, 20 F. (2d) 379 (Circuit Court of Appeals, Second Circuit), the railroad company (the plaintiff) sued Dare (the defendant) for freight charges on twenty-eight carloads of oats shipped in interstate commerce over the plaintiff's lines, under order bills of lading which had been endorsed to the defendant. The goods were delivered to a third party pursuant to a letter of instructions from the defendant which stated: “Freight and all charges collect from Brainard Commission Company.” The plaintiff made delivery according to instructions, but failed to collect the freight.

Swan, Circuit Judge, at page 380, in the opinion said:

“It has been authoritatively established that a consignee who receives the goods becomes legally bound to pay the freight charges (*Pittsburgh, etc., Ry. Co. v. Fink*, 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151;

- 10 *L. & N. R. Co. v. Central Iron Co.*, 265 U. S. 59, 70, 44 S. Ct. 441, 68 L. Ed. 900). Such charges must coincide with the rate fixed by law, notwithstanding contractual arrangements between consignee and carrier to the contrary (*N. Y. Cent. R. R. Co. v. York & Whitney Co.*, 256 U. S. 406, 41 S. Ct. 509, 65 L. Ed. 1006). Even if it be assumed that the consignee might substitute another's obligation for his own, a mere direction in the order of delivery to collect freight from another would not be sufficient. The case of *N. Y. C. R. Co. v. Ross Lumber Co.*, 234 N. Y. 261, 137 N. E. 324, 24 A. L. R. 1160, so holds, and we concur in this view. There should be some effective substitution by novation, or otherwise, so that the new debtor would become legally bound to the carrier for freight before the consignee is freed."
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- 30

The Supreme Court of this State, in the case of *Central R. Co. of N. J. v. National Asbestos Mfg. Co.*, 127 At. 184, 3 N. J. Advance Reports, 354 (not reported in Law Reports), has held that a consignee of an interstate shipment, by an act of ownership, or the exercise of control and direction over the goods shipped, renders himself liable for the accrued freight charges. Lloyd, J., delivering the opinion of the Court, said:

40

"It has been definitely established that under the uniform bill of lading the consignee, by accepting the shipment, becomes liable for the lawful freight charges accrued thereon (Citing *R. R. Co. v. Fink*, *supra*, and *R. R. Co. v. Central Iron & Coal Co.*, *supra*). * * * The reshipment was an

exercise of control and direction over the stone and necessarily implied an acceptance. * * * The exercise of control in the reshipment constituted a receipt of the shipment as effectively as though a receipt had been signed by some authorized agent of the defendant.” 10

V

Ownership in the consignee at the time of final delivery is not essential to charge the consignee with liability for the freight charges. 20

In *Pittsburgh, C., C. & St. L. R. Co. v. Fink* (*supra*), Mr. Justice Day, delivering the opinion of the Court, said, on page 1153:

“It is alleged that a different rule should be applied in this case because Fink, by virtue of his agreement with the consignor, did not become the owner of the goods until after the same had been delivered to him. There is no proof that such agreement was known to the carrier, *nor could that fact lessen the obligation of the consignee to pay the legal tariff rate when he accepted the goods.*” (Italics ours.) 30

In *N. Y. C. & H. R. Co. v. York & Whitney Co.* (*supra*), the defendant York & Whitney Co., who was the consignee, was a commission merchant, and presumably not the owner of the goods. 40

In *N. Y. C. R. R. Co. v. Russ Lumber Company* (*supra*), the Court said in its opinion (p. 265):
“It does not appear from the agreed facts that

10 plaintiff had knowledge or notice that defendant was not the owner, or that defendant was not in fact such owner," and the Court further said: "It follows that it (the defendant) accepted the goods by an act of ownership when it exercised dominion over them by giving direction for their delivery, and the plaintiff was justified in treating it as owner of the goods."

20 That is exactly the situation in the case at bar. There was no proof that plaintiff had knowledge or was chargeable with notice, before the delivery of the grapes to Corrado, that defendant was not then the owner. The defendant accepted the goods by an act of ownership and exercised dominion over them when he delivered the bill of lading to Corrado with the intention of thereby transferring to Corrado the right to receive the goods from the plaintiff.

30 In *N. Y. C. R. Co. v. Federal Sugar Refining Co.* (*supra*), the shipment moved under an order bill of lading. The defendant was the consignor as well as the consignee. The goods were delivered to the notify party and not the consignee. In that case the notify party who held the bill of lading was presumptively the owner. The Court held, however, that the railroad company might collect from either the consignor or the consignee, and could not make an election or be held to an
40 estoppel.

In *Dare v. N. Y. C. R. Co.* (*supra*), the goods moved under order bills of lading. The defendant was an endorsee of the bills of lading and held them as pledgee for a loan and not as owner.

VI

When a consignee becomes liable for freight charges upon an interstate shipment, no act of the consignee, and no act or omission of the carrier, can release him from his obligation.

The Trial Court held that the defendant, on notifying the railroad company that the goods had been sold, subject to the payment of freight, was released from liability, and that it could look only to the new owner, or the consignor, for payment of its charges. 20

There was no proof in the case that the defendant did so notify the plaintiff, or that that fact was known to it, but irrespective of notice or knowledge on the part of the plaintiff, the defendant could not, by its own act, become released from liability which it had assumed, nor could the defendant, by any act or omission on its part release defendant from such liability. Referring again to the *Ross Lumber Co.* case, we quote from the opinion, on page 266, as follows: 30

“The liability of the consignee under these conditions is analogous to the liability of the consignor under the terms of the bill of lading that the consignee shall pay the freight. Such a direction does not exonerate the consignor from liability. The directions given by defendant neither modified the implied contract between carrier and consignee whereby the consignee assumed liability for freight charges, nor amounted to an offer to accept the goods only on condition that freight charges 40

10 should be collected of the Schieck-Johnson
Company. Doubtless plaintiff might have
refused to deliver to the Schieck-Johnson
Company and retained the goods until its
lien was satisfied by the payment of the
freight. Doubtless defendant by its in-
structions recognized such right when it
qualified its directions as to delivery. But
the directions were for the benefit of the
carrier, not for the benefit of the defendant.
20 The carrier was not bound at its peril to
enforce payment of freight from the
Schieck-Johnson Company and its right to
resort to the defendant under the contract
was not impaired by delivery of the freight
under its direction."

30 In the case of *Louisville & N. R. Co. v. Central
Iron & Coal Co.*, from which we quoted above,
Justice Brandeis, in his opinion, on page 902 (L.
Ed.), states the rule to be that freight charges on
interstate shipments, assessed in accordance with
tariffs filed with the Interstate Commerce Com-
mission, *are thus fixed by law*, and that no act or
omission of the carrier (except the running of the
Statute of Limitations) can estop or preclude it
from enforcing payment of the full amount by a
person liable therefor.

40 For all of the foregoing reasons, we respect-
fully submit that the judgment appealed from
should be reversed, and that judgment should be
directed to be entered in favor of the plaintiff,
and against the defendant, for the sum of \$630.15,
with interest from October 3, 1923.

WALL, HAIGHT, CAREY &
HARTPENCE,
Of Counsel with Plaintiff-Appellant.