New Jersey Court of Errors and Appeals

KELLS MILL & LUMBER CO., INC., a corporation, *Plaintiff-Appellee,* *vs.* THE PENNSYLVANIA RAILROAD COMPANY, a corporation, *Defendant-Appellant.*	In Replevin On Appeal from Supreme Court.

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BRIEF OF DEFENDANT-APPELLANT.

Facts.

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This was a replevin suit instituted in the First District Court of Jersey City to recover possession from the defendant of certain lumber mentioned in the writ (case p. 5).

The plaintiff was a New York corporation and its place of business was at Greenpoint, Brooklyn, New York.

The lumber was shipped by Roper Lumber Co. from Norfolk, Va., to the plaintiff at Brooklyn, New York, and was therefore an interstate shipment, the defendant being the terminal carrier. The initial carrier accepted the lumber at Norfolk, consigned to plaintiff at Brooklyn, and issued a bill of lading therefor (see Exhibit D-2). On arrival defendant sent to plaintiff a freight bill with an order blank on the back for delivery of the goods (see Ex. D-1). The plaintiff filled out the blank with an order for delivery to Leary's Dock, Greenpoint, Brooklyn, N. Y. (see Ex. D-1).

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New Jersey State Library

Pursuant to the order, on Thursday, July 29, 1915, at 1:30 P. M., defendant's lighter arrived at Leary's Dock, and reported to Mr. Kells, plaintiff's secretary and treasurer, who advised the captain of the lighter that they were too busy to receive the lumber. (Testimony of Mr. Kells, p. 13, l. 23 to 39.)

The demurrage rules filed with the Interstate Commerce Commission (Exhibit D-3) provide, in
10 part, that

When a lighter reports, consignee *must* provide a berth, and 48 hours after such reporting, demurrage shall accrue at the rate of $10. per day.

No berth was provided when the captain reported to Mr. Kells. However, defendant's captain at 9:30 A. M., July 30, 1915, in order to help plaintiff, fastened the stern of his boat to a corner of Leary's Dock near an 8-foot space, leaving the
20 rest of the boat, some 77 feet, lying across a slip with a line on the adjoining (Logan's) dock. Lumber was then passed out, over the cabin, and handed to plaintiff's men, a slow process. About noon, Saturday, the captain notified Mr. Kells that the free time would expire at 1:30 P. M. and stated that he was unable to unload any more in that space. Kells told him to go over to Logan's Dock. (Testimony of Mr. Kells, p. 19, l. 16-18; p. 19, l. 29-32.) The lighter was moved to Logan's
30 Dock, a public dock for the use of which wharfage is charged. Mr. Kells made such arrangements that at 1:00 the captain was permitted to start unloading at Logan's Dock. He worked until 1:30 P. M., taking off about 900 or 1000 feet of lumber, and then stopped and demanded the demurrage which accrued under the Interstate rules. Plaintiff refused to pay demurrage and the lighter lay there ten days while negotiations were carried on, and the lumber was then taken to Jersey City
40 and stored, and a storage charge made, pursuant to storage rules (Ex. D-4).

The plaintiff then took the lumber from the defendant, under the writ of replevin issued in the case.

At the trial defendant contended it had the right of possession of the lumber until the charges which had accrued under the Interstate Tariff had been paid.

The Court decided that no charges had accrued, and awarded plaintiff possession of the lumber and $80. damages for detention, and costs of suit. 10

From that judgment defendant appealed to the New Jersey Supreme Court, where the judgment was affirmed, and from that judgment (98 Atl. Rep. p. 309) defendant now appeals.

Nature of Shipment.

This is admittedly an interstate shipment, and the charges which accrued are governed exclusively by the provisions of the Interstate Commerce Act (U. S. Comp. Stat. Sec. 8563-8604) and the tariffs filed with the Interstate Commerce Commission in pursuance thereof although the trial Court specifically refused to so find (State of case—Request to find p. 68 l. 13-18; p. 69 l. 7—Refusal to find p. 71 l. 36-40; Objection to refusal p. 73 l. 19-22). 20

Adams Express Co. v. *Croninger,* 226 U. S. 491; 56 L. Ed. 315; 30

Boston & Maine v. *Hooker,* 233 U. S. 97; 58 L. Ed. 868 L. R. A. 1915, B 450; 34 Sup. Ct. 526;

Louisville & Nashville v. *Maxwell,* 237 U. S. 94; 59 L. Ed. 494;

Spada v. *Pennsylvania* R. R., 86 N. J. L. 187;

International Watch Co. v. *D. L. & W. R. R.,* 82 N. J. L. 459; 528;

Wanaque Lumber Co. v. *Erie R. R.,* 75 N. J. L. 878. 40

Olivit v. *P. R. R.*, 96 Atl. 587-589.
Carr v. *P. R. R.*, 96 Atl. 588.

I.

The Supreme Court erred in affirming the judgment of the District Court which held that no demurrage accrued and hence plaintiff was entitled
10 **to possession of the lumber.**

The tariff provision governing the present case (Ex. D-3) provides:

"DEMURRAGE CHARGES ON LIGHTERS, BARGES OR CAR FLOATS CARRYING FREIGHT UNDER EXPORT AND DOMESTIC BILLS OF LADING.

When a car float, lighter or barge reports at its
20 destination, shipper, consignee, ship owner or ship agency permitting or receiving the same, as the case may be, must provide a berth and 48 hours from the time the car float, lighter or barge reports (Sundays and full holidays excepted) shall be deemed lay days without charge, after which demurrage shall accrue against the shipper, consignee, ship owner or ship agency, as the case may be, at the following rates per day of 24 hours or a fraction thereof.

30 Car Floats	$25.00
Steam Hoisting Barges, when handling shipments any piece of which weighs up to 25 tons	20.00
Heavy Hoisting Derricks, when handling shipments any piece of which weighs over 25 tons to 40 tons, inclusive	40.00
Heavy Hoisting Derricks, when handling shipments any piece of which weighs over 40 tons	50.00
40 Other Lighters or Barges	10.00

Or, at the option of the Pennsylvania Railroad Company, if no berth is provided or the vessel is not unloaded within the lay days, the property will be removed to and stored in any public or licensed Warehouse in New York Harbor, at the cost of the owner and without liability on the part of the Pennsylvania Railroad, and subject to a lien for all lawful charges.

Delivery of the property when covered by domestic bills of lading will only be made upon the payment or satisfactory guarantee of demurrage charges." 10

The uncontradicted evidence is that the defendant's lighter reported at its destination, Leary's Dock, on Thursday July 29, 1915 at 1:30 P. M., and that it was not completely unloaded at 1:30 P. M. Saturday July 31, 1915. At that hour the free time expired and under the tariffs the demurrage accrued unqualifiedly in favor of the defendant 20 at the rate specified therein.

Demurrage is a charge made for the use or withholding of the carrier's vessel or car which if released could be used for the benefit of other shippers and earn other profits for the owner.

> *The Appolon*, 22 U. S. 362-378; 6 L. Ed. 111;
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> *Two Hundred and Seventy-five Tons of Mineral Phosphates* (U. S. 9 Fed. 209;
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> *The Conqueror*, 17 Sup. Ct. 510; 166 U. S. 110; 41 L. Ed. 937; 30
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> *Cross* v. *Beard*, 26 N. Y. 85.

These facts appearing in evidence upon the trial in the court below, it was incumbent upon that court to find in favor of the defendant. The demurrage accrued automatically and the court had no choice but to so find. The statute is inexorable. No other course was open. The free time had elapsed and the tariff rule applied, *ex propria vigore.* 40

Sec. 6 of the Interstate Commerce Act provides for the preparing and filing of tariffs of rates and charges, and when filed, directs that the carrier shall not deviate therefrom, nor refund or remit in any manner or by any device any portion of the rates, fares and charges so specified.

Once the tariffs and regulations are thus filed with the Interstate Commerce Commission they become as fixed and unalterable as the laws of
10 the Medes and Persians and neither shipper nor carrier can deviate therefrom in any particular, so long as the Interstate Commerce Commission shall not declare them to be unreasonable. Indeed, they become part of the statute itself.

Poor Grain Co. v. *C. B. & Q. Ry.*, 12 I. C. C. 418.

The rule is summarized in the case of *Louisville & Nashville Railroad Co.* v. *Maxwell,* 237 U.
20 S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665, as follows:

"Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an
30 excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases; but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

In *Armour* v. *U. S.*, 209 U. S., 56, 83; 52 L. Ed. 681; 28 Sup. Ct. Rep. 438, the U. S. Supreme Court
40 said:

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay, and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

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And again, in *P. R. R.* v. *International Coal Mining Co.,* 230 U. S. 184; 57 L. Ed. 1446; 33 Sup. Ct. Rep. 893, the Supreme Court said:

"*The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate;* nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper."

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Boston & Maine R. R. v. *Hooker,* 233 U. S. 97; *supra.*

The great purposes of the act to regulate commerce were to prevent unjust and unreasonable rates, to secure equality of rates to all and to destroy favoritism.

N. Y. & H. R. R. Co. v. *I. C. C.,* 200 U. S. 361, at p. 391.

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As was said in the case last cited by Mr. Justice White, the present Chief-Justice:

"In view of the positive command of the second section of the Act, that no departure from the published rate shall be made, 'directly or indirectly' how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier

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has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all."

"The rates were fixed by the tariff filed and could not be departed from. The law did not intend that the railroad and shipper could alter these charges, because that would do away altogether with the purpose sought by the act. It was known by the Steel Company what the charges were, and the law was violated by reducing those charges by the settlement between the railroads and the Steel Company, thus allowing the carrier and the shipper to determine in each case whether the tariff should be observed or not."

Lehigh Valley R. R. v. *United States*, 188 Fed. p. 887.

"The presumption is that the defendant carrier has obeyed the law and filed and published its rates. Until otherwise held by the Interstate Commerce Commission such rates must be held *prima facie* reasonable, and so treated by the courts.

Under the statute the carrier has the pri-

mary right to fix rates, and, so long as they are acquiesced in by the commission, the carrier and shipper are alike bound to treat them as lawful. Where the action is based upon unreasonable charges, there is no law fixing what is unreasonable, and the whole scope of the statute shows that it was intended that the commission and not the courts should pass upon that question."

Geraty v. *Atlantic Coast Line*, 211 Fed. p. 227. 10

Not only are shipper and carrier prohibited from in any way nullifying or disregarding the tariff provisions but courts and juries are likewise bound by the regulations when once filed with the Interstate Commerce Commission.

Otherwise, the invariableness of the law, which is the pole star in its administration, would be left to the possible variance of a jury's finding or 20 a court's ruling. The whole object and purpose of the act would thus be set at naught.

Mitchell v. *P. R. R.*, 230 U. S. 247; 57 L. Ed. 1472; 33 Sup. Ct. 916.

The Supreme Court and the District Court considered the facts as to whether a berth was provided in *ample time* for unloading, whether adequate facilities were provided for unloading, the hiring of extra men, whether the boat was unload- 30 ed rapidly enough, etc., wholly ignoring the tariff provision that the berth must be provided *when* the boat reports. This was error. Such questions were administrative questions for the Interstate Commerce Commission to pass on. If a berth could be provided any time consignee saw fit and the hiring of extra men was necessary, consignee could wait until the last one-half hour of the forty-eight, and force the carrier to hire a dozen or so men, because that number could pos- 40

sibly unload the boat in that time; the alleged duty of the carrier being to go to extra expense to keep the consignee from demurrage charges after it had failed to provide a berth at the specific time required in the rule.

The Supreme Court held that the legal efficacy of the rule and its application were not challenged. We do not agree. According to the tariff demurrage accrued, and the result is that the Court has 10 permitted the plaintiff to have the lumber without payment, a most effective challenge of the rule. The judgment is an indirect attack on the interstate tariffs. The sum accrued and must be paid.

The evident purpose of the tariff rule is to force the lumber dealers to expedite delivery, release the carrier's equipment, and avoid demurrage. There is no tariff rule requiring the carrier to unload but there is an apparent duty on the consignee, who is charged with notice of the tariff, 20 to avoid demurrage by seeing that 48 hours do not elapse after a boat reports. There is no duty mentioned in the rule on the part of the carrier to hire extra men or extra equipment.

In *Peale, etc.* vs. *C. R. R. of N. J.*, 18 I. C. C. p. 25, the Commission held:

> In the framing of demurrage regulations, the object sought is the prompt release of cars. It is not intended that they should be so liberal as to defeat the end sought to be 30 attained, but their purpose is to stimulate the shipper to aid the carrier in serving all shippers.
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> The primary object of demurrage regulations is to release cars after a certain period, not to reward a shipper for releasing in less than that period.

This was not an action for delay. No question 40 was raised that the goods were not transported

in a reasonable time. In fact, the carrier reported that he was ready to deliver in accordance with plaintiff's written instructions and plaintiff said, "it was too busy to receive the lumber" and in fact it was at least 42 hours later when the defendant was able to deliver some of the lumber. There was no injury to plaintiff except it be the *demurrage which accrued* and which it should not have permitted to accrue,—*the tariff specifically requiring it to provide a berth when the boat reported.* There was no remedy for plaintiff except it proceed before the Interstate Commerce Commission, asking that body to modify or change the tariff and pass on the administrative question regarding facilities. The court cannot do this, indirectly or otherwise. It is an administrative question. The *court can only say that the essential facts to fix the charge appear and apply the the tariff.* To proceed further to hear and determine administrative questions is beyond its power. 10 20

We think it is clear, therefore, that the charges accrued and that the court erred in not so holding.

For these accrued charges defendant had a lien upon the cargo, and plaintiff could acquire no right to take the cargo out of the possession of the defendant either by action at law or otherwise until the charges had been paid.

In *Texas* v. *Mugg,* 202 U. S., p. 242, 50 L. Ed. p. 1011, the U. S. Supreme Court said:

> "The carrier's lien on the goods is by force of the Act of Congress for the amount fixed by a public schedule of rates and charges, and this lien can be discharged and *the consignee can become entitled to the goods only by the payment or tender of payment of such amount.* Such is now the Supreme law, and by it, this and the courts of all other States are bound." 30

And again in *Kansas Southern Ry.* v. *Carl,* 227 U. S. 629, the same court said: 40

"The shipper's knowledge of the lawful rate is conclusively presumed, *and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid.*"

Boston & Maine R. R. v. *Hooker,* 233 U. S. 97, *supra.*

10 The Supreme Court erred in affirming the judgment of the District Court and we contend the judgment should be reversed with direction to enter judgment for defendant.

II.

Jurisdiction of Trial Court.

20 The trial court was bound to find that demurrage accrued and that defendant was entitled to possession of the lumber as soon as the tariffs were introduced in evidence and it appeared that the 48 hours free time had elapsed from the time the lighter reported to plaintiff.

In hearing and determining questions not contemplated in the tariff, it exceeded its power and usurped the functions of the Interstate Commerce Commission as such questions were administra-
30 tive.

Assuming the positions of the parties were changed and had plaintiff paid the charge and secured its lumber and then brought an action in the District Court for return of the amount paid, the court would have been obliged to examine the terms of the tariff, and finding nothing therein which sustained plaintiff's contention it should have held that 48 hours free time had elapsed and as it had no power to say who should unload
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or how many men should be hired or any other fact which could change the strict letter of the tariff, it must have dismissed plaintiff's suit on the ground that such questions were for the Interstate Commerce Commission and until that body had laid down rules it had no power to act.

That plaintiff was seeking through the medium of this replevin suit relief from a practice (against which the Interstate Commerce Commission alone could give relief), is shown plainly 10 by the very statement of plaintiff's attorney during the trial in the District Court, which is as follows: (State of Case, p. 22, l. 9-16.)

> "I expect to show that this has been a regular scheme; I don't blame the Pennsylvania Railroad, except that the Pennsylvania has been having some pretty rotten men, and there has been a regular scheme on the part of these people to delay the delivery of the goods for the purpose of making demurrage 20 charges against consignees."

Such questions as involved in this case are dealt with continually by the Commission in numerous cases, a few of which are as follows:

In *Reiter* v. *N. Y. S. & W. R. R.*, 19 I. C. C. 290, the Commission said, upon considering facts as to the assessment of demurrage charges:

> "We see in these facts no grounds upon which we may properly award damages to 30 complainants. Even if it may be said that an interstate carrier is required by law to enlarge its facilities in order to meet the special needs of a single shipper, on a given occasion, a proposition that is obviously untenable * * * we find in the record no indication of any wilful delay on its part or of any purpose to wrong the complainants, or any fact upon which we may predicate legal liability on the part of the defendant to re- 40

fund the demurrage charges assessed against complainants in accordance with the published tariffs of the defendant. * * * The complaint must be dismissed.''

In *Beekman Lumber Co.* v. *Missouri Pacific Ry. Co.*, 37 I. C. C. 400, (Decided Dec. 21, 1915), it appeared that complainant was engaged in the lumber business and had shipped a car of lumber 10 from Pawnee, La., to Kansas City, upon which demurrage charges were collected by defendant. Complainant contended that the charges were unreasonable because they accrued by reason of the defendant's delay, and asked for reparation. The Commission said:

''The shipper, therefore, was in no way responsible for the delay. We find that the demurrage charges collected were unlawful; that the shipment was tendered by complain- 20 ant and held by the Iron Mountain, as described; that complainant paid and bore the unlawful demurrage charges theeron and has been damaged in the amount of the charges so paid, and that it is entitled to reparation from the Iron Mountain in the sum of $18 with interest from March 30, 1914. An order will be entered accordingly.

In *Beekman Lumber Co.* v. *Tremont & Gulf Ry.* 30 36 I. C. C. 368, the Commission considered a complaint that demurrage charges should be held unreasonable and reparation awarded because the charges accrued by reason of the carrier's negligence in not properly handling re-consignment orders. The Commission after hearing the case dismissed the complaint because defendant's negligence was not shown.

In *Hanley Milling Co.* vs. *P. Co.*, 19 I. C. C. 475, the Commission held that reparation should be 40 awarded where demurrage accrued as the result

of defendant's (carrrier's) failure to re-consign according to instructions.

The Commission, in *Riverside Mills* vs. *C. & W. C. Ry.,* 20 I. C. C., 153, considered facts regarding the assessment of demurrage charges where there was delay in unloading due to a flood, and denied reparation.

In *American Creosoting Works* vs. *I. C. C.,* 15 I. C. C. 16, the Commission considered facts relative to the act of carrier in "bunching" cars delivered to the consignee, resulting in demurrage because the consignee could not take delivery fast enough, and denied reparation. 10

In *Northern Wisconsin Produce Company* vs. *M., St. P. & Ste. M. Ry. Co.,* 21 I. C. C. 197, the Commission considered facts relative to the carrier's refusal to place a car, although consignee was prepared to accept delivery, which resulted in the assessment of demurrage charged. In this case the Commission held that the charges were improperly assessed, and granted reparation. 20

Crows Nest Pass Coal Company vs. *Great Northern R. R.,* 32 I. C. C. 473.

Picher Lead Co. vs. *St. Louis & S. F. R. R.,* 35 I. C. C. 45.

In the matter of the Investigation and suspension of advances in demurrage charges, etc., 25 I. C. C., 314, the Commission states the theory and reason for demurrage and fixes penalty for holding equipment of carrier for storage purposes. 30

In re demurrage investigation, 19 I. C. C. 469, the Commission also discussed the reason for demurrage and approves certain rules relative to demurrage.

In *M. Mosser & Co.* v. *Penna. R. R. Company,* decided June 10, 1910, 19 I. C. C. Rep. 30, Clarke, *Commissioner,* said:

> Complaint, a lumber dealer at Wallabout Basin, within the lighterage limits of New York Harbor, complained of defendant's 40

practices. "The substance of the complaint is that lumber shipments consigned 'New York Lighterage free,' are unduly delayed after arrival of the cars in Jersey City; that defendant enforces an unreasonable and unduly prejudicial rule in its requirement that upon notification of the arrival of such cars, the consignee shall specify a particular lighterage destination, and upon arrival of the
10 lighter at such destination provide a dock berth for such lighter; that after the consignee has specified a berth destination, in case that pier is fully occupied when the lighter arrives, the servants of the carrier will not make delivery at adjacent unoccupied piers; that the result of these regulations and practices is damage to the complainant by reason of delay of its consignments and of the unreasonable imposition of demurrage charges.

20 The case involves the lighterage rules in the New York Harbor. The complainant is mainly interested in the application of those rules in the Wallabout Basin, but the evidence is not convincing that the situation with respect to pier space and the conditions of lighterage are so different that special rules should be established, applicable only to that particular portion of New York Harbor. * * * The lighterage rules of defendant are similar to the
30 regulations of other lines touching New York Harbor, and are substantially the same as are in force at Philadelphia and Baltimore.

The principal rule to which complainant makes objection is as follows:

When a car float, lighter or barge reports at its destination, the shipper, consignee or ship owner must provide a berth, and two days (48 hours) from the time the car float, lighter or barge reports (Sundays and holi-
40 days excepted) shall be deemed lay days,

without charge, after which demurrage shall accrue at the following rates per day of twenty-four hours or a fraction thereof:

Car floats ....$25.
Steam hoisting barges .... 20.
Other lighters or barges, ... 10.

This demurrage rule applies to all lighterage services on all bulk freight, and at all possible destinations in the harbor. The actual practice with respect to lumber is as follows: When the car is received at Jersey City it is run out to the yards in the Meadows, and notification of its arrival is sent to the consignee. Within 48 hours of such notification consignee is required to designate to defendant a pier destination. When this instruction has been furnished, the car is switched to defendant's docks at Harsimus Cove and the lumber is transferred from the car to the lighter, barge or boat for delivery. The testimony indicates that the average loading of these lighters is from four to five carloads of lumber, but that occasionally as much as ten carloads may be lightered in one barge. As soon as practicable the lighter is towed to the pier named by the consignee, and on arrival at that pier the consignee is expected to provide a berth for the lighter * * *.

When a lumber lighter arrives at a crowded pier and finds no berth available, the consignee is notified and the lighter is tied to the dock. As soon as a berth becomes available, the lighter is warped or hauled into the berth thus secured. The free time begins to run from the time the lighter is tied to the dock or pier designated by the consignee, and personal notice is given such consignee at once. There is some evidence that occasionally lumber is unloaded by crossing boats or lighters

which lie between the lumber lighter and the pier, but as this practice depends upon the willingness on the part of the intermediate boat to cooperate, it need not be here considered.

This complainant contends that it should be allowed to designate piers of delivery in the alternative. In other words, that it should be allowed to say "deliver car No.———— at
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either pier 1 or 4 Wallabout Basin." * * * The effect of an alternative delivery order would be, in case both piers were fully occupied, to impose upon the carrier the duty of determining at which pier it could earliest obtain a berth, and, in order to avoid disputes, of keeping a tug there to shift lighters from pier to pier as the situation changed.

If the obligation were imposed upon the
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carrier to find a berth before the free time began to run against the consignee, it would be possible for consignees who desired storage of their shipments to regularly designate the more congested piers and thereby obtain the use of the carrier's equipment.

Upon consideration of all the facts in this case, we do not find that the rules and regulations of the defendant are unreasonable, unjust or unduly prejudicial to this complainant,
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and it follows that the complaint must be dismissed."

Peale vs. *Cent. R. R. of N. J.*, 18 I. C. C., 25;

Lynch & Read vs. *B. & O. R. R.*, 18 I. C. C. 38.

The court can only apply the law as to whether or not there has been a departure from the tariff or statute, strictly construed. Fuller Interstate Commerce, p. 327-331, citing Federal decisions.
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Under the Interstate Commerce Act (U. S.

Comp. Stat. Sec. 8563-8604) certain specific remedies are afforded an injured party against the carrier. (Sec. 8, 9, 16, 20 and 22.)

Under Sections 8 and 9 the U. S. District Court or the Interstate Commerce Commission is alone given jurisdiction, at the election of the injured party. No state court can act.

Under Section 16, after the Interstate Commerce Commission has made an order, which has not been complied with, it may be enforced by action in either the United States Circuit (now District) Courts or in any State Court of general jurisdiction.

Under Section 20, the Carmack Amendment, the State Courts have taken jurisdiction, although perhaps not specifically vested with it, of common law actions arising from loss or damage to property for which bills of lading are issued pursuant to its provisions.

Under the proviso to Section 22, existing common law and statutory remedies are preserved in addition to those provided in the Act.

Texas &c. Ry. v. *Abilene Cotton Oil Co.*, 204 U. S. 426; 27 Sup. Ct. 350; 51 L. Ed. 553;

So. Ry. Co. v. *Tift*, 206 U. S. 429; 27 Sup. Ct. 709; 51 L. Ed. 1124;

Baltimore & O. R. R. v. *Pitcairn Coal Co.*, 215 U. S. 481; 30 Sup. Ct. 164; 54 L. Ed. 292;

Robinson v. *B. & O. R. R.* 222 U. S. 506; 32 Sup. Ct. 114; 56 L. Ed. 288;

Morrisdale Coal Co. v. *P. R. R.*, 230 U. S. 304; 57 L. Ed. 1494; 33 Sup. Ct. 938;

Mitchell v. *P. R. R.*, 230 U. S. 247; 57 L. Ed. 1472; 33 Sup. Ct. 916;

P. R. R. v. *International Coal Min. Co.*, 230 U. S. 197; 57 L. Ed. 1451; 33 Sup. Ct. 893;

P. R. R. v. *Puritan Coal Co.,* 237 U. S. 121; 59 L. Ed. 484.

Sec. 9. "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either *make complaint to the commission* as hereinafter provided for, *or may bring suit* in his or their own behalf for the recovery of the
10 damages for which such common carrier may be liable under the provisions of this act *in any district or Circuit Court of the United States of competent jurisdiction,* but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt" * * *.

20 This provision has been construed to mean that when there is an administrative question even the U. S. District Court has no jurisdiction. There is no jurisdiction in any event for a state court.

Montgomery v. *Chicago B. & Q. R. R.,* 228 Fed. 616, Circuit Court of Appeals, 8th and cases cited therein.

The *Spada, Olivit* and *Carr* cases, decided by this Court, cited by the Supreme Court dealt with
30 the loss of or damage to the goods. The present case seeks to avoid a tariff charge.

The United States Supreme Court in the case of *Loomis* v. *Lehigh Valley R. R. Co.,* 240 U. S. 43-60, L. Ed. 228, decided January 24, 1916, and after the present case was presented to the Supreme Court of this State, has, we think, passed on a situation of the same character as the present one.

Plaintiffs, who were shippers of grain, were
40 compelled to construct inside doors or bulkheads

in the cars supplied them by the railroad company because the railroad had discontinued to supply the lumber or to supply cars prepared for the shipment of grain. Plaintiffs sued for the amounts expended, $322.07, without resort to the Interstate Commerce Commission, on the theory that the carrier had failed to perform its common law duty to furnish adequate cars.

Defendant challenged the court's jurisdiction over claims incident to interstate shipments, be- 10 cause its filed tariffs fixed the rate for transportation, but did not provide for payment or allowances for grain doors and that its rates were reasonable and had not been held otherwise by the Interstate Commerce Commission. The New York Court of Appeals held that the common law imposed upon the railroads the duty of furnishing cars equipped with inside doors for the transportation of grain unless local or Federal Statutes had established different rules. Having con- 20 sidered the statutes, it held that the local act created no bar to recovery on intrastate shipments, but that Congress had assumed such control over interstate shipments as to deprive the State courts of power to consider claims arising out of them. 208 N. Y. 312; 101 N. E. 907. A writ of error was then sued out to obtain a review by the U. S. Supreme Court.

Mr. Justice McReynolds said:

> "No serious dispute exists concerning the 30 facts. The applicable duly filed interstate rate schedules made no reference to allowances for grain doors or bulkheads and the circumstances under which these were installed, together with their cost, are not controverted. Whether there was jurisdiction in the State court to pass upon the carrier's liability incident to the interstate traffic is the sole point demanding consideration.

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Speaking through Mr. Justice Lamar in the *Minnesota Rate Cases,* 220 U. S., *supra,* we further said (p. 419):

> The domination purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it
> 10 would be destructive of the system of regulation defined by the statute if the court, without the preliminary action of the Commission, were to undertake to pass upon the administrative questions which the statute had primarily confided to it.

And in *Texas & P. R. Co.* v. *American Tie & Timber Co.,* 234 U. S., *supra,* the rule was thus stated (p. 146):

> 20 It is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that, for the preservation of the uniformity which it was the purpose of the
> 30 act to regulate commerce to secure, the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission.
>
> An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, *or character of*
> 40 *equipment which it must provide,* or allow-

ances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. *Atchison, T. & S. F. R. Co.* v. *United States,* 232 U. S. 199, 220, 58 L. ed. 199, 576, 34 Sup. Ct. Rep. 291. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by 10 the Interstate Commerce Commission before it may be submitted to a court. See *Pennsylvania R. Co.* v. *Puritan Coal Min. Co.,* 237 U. S. pp. 128, 129, 59 L. ed. 871, 872, 35 Sup. Ct. Rep. 484; *Pennsylvania R. Co.* v. *Clark Bros. Coal Min. Co.,* 238 U. S. pp. 469, 470, 59 L. ed. 1412, 35 Sup. Ct. Rep. 896.

If, in respect to interstate business, the courts of New York may determine, as original matters, rate-making problems, those in 20 other states have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted."

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The judgment of the New York Court of Appeals was affirmed.

The above case is on all fours with the present case when it is realized that plaintiff's contention is that defendant *did not provide adequate facilities for unloading,* sufficient men to unload, etc. The trial court and Supreme Court sustained this view. Whatever common law rights there may be are superseded by Congressional Act and the 40

State Court was without primary power to hear such matters.

In *Clement* v. *Louisville & N. R. Co.*, 153 Fed. 979 (Circuit Court, E. D. Louisiana), Plaintiff sued for damages for refusal of defendant to deliver 3 cars of lumber unless plaintiff, consignee, would pay certain interstate car service charges. The Court said:

> "If the charge is made according to a regu-
10 lar tariff, and that tariff does establish an unfair and illegal discrimination in making the charge complained of, then the proper and fair way to correct the discrimination is to correct it at the same time as to every one affected by it. This can be done only by proceeding before the Interstate Commerce Commission. When complaint is made to the Commission, it may decide that the charge is proper and should be allowed.
20 An opposite conclusion might be reached in this suit. The result then, would be to establish for a while an unfair discrimination in favor of this plaintiff.
> I am convinced that the plaintiff cannot maintain the present suit, and the judgment of the court heretofore pronounced, dismissing the suit, is therefore maintained."

In *Mitchell Coal & Coke Co.* v. *Pennsylvania*
30 *Railroad Co.*, 230 U. S. 247; 57 L. ed. 1472, the United States Supreme Court said:

> "The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a law suit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts, with different juries, the result would not only
40 vary in degree, but might often be opposite

in character,—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute.

4. The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in *Abilene, Pitcairn* and *Robinson* cases, and is referred to here because this record and that in *Pennsylvania R. Co.* v. *International Coal Min. Co.,* just decided (230 U. S. 184, *ante* 1446, 33 Sup. Ct. Rep. 893) furnish a striking illustration of the results which would follow if reasonableness of an allowance could be decided by different tribunals.'' * * *

''It is argued that this conclusion ignores §§ 9 and 22, which give the shipper the option of suing in the courts or applying to the Commission. The same argument was made and answered in the *Abilene* case by showing that to permit the suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would repeal the many provisions of the statute requiring uniformity and equality. For, manifestly, such uniformity and equality cannot be secured by separate suits before separate tribunals, involving the reasonableness of a rate or practice. The evidence might vary, and, of course, the verdicts would vary; with the result that one shipper would succeed before one jury and another fail before a different jury, where the reasonableness of the same practice was involved. Manifestly, different verdicts would occasion inequality between the two shippers, and it is equally manifest that if the Commission had made one order of which both could avail themselves, there would have been one finding, of

which one, two, or a score of shippers could equally avail themselves. The claim that this conclusion nullifies § 9 is concretely answered by the fact that the court has just decided to the contrary in *Pennsylvania R. Co.* v. *International Coal Min. Co. There the carrier insisted that a suit for damages occasioned by rebating could not be maintained without preliminary action by the Commission. This*
10 *contention was overruled and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commision, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such cases the*
20 *whole scope of the statute shows that it was intended that the Commission, and not the courts, should pass upon the administrative question. When such order is made, it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice.* Section 9 gives the plaintiff the option of go-
30 ing before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable, and therefore illegal and prohibited." * * *
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In *Adams Express* v. *Cronninger, supra,* the court said regarding section 22, preserving state rules and regulations:

"It has been argued that the non-exclusive character of this regulation is manifested by the proviso of the section, and that State legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing 10 State law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to.

What this Court said of the 22nd section of this act of 1906 in the case of *Abilene Cotton Mills* vs. *Texas & Pac. Ry.*, 204 U. S. 426, is 20 applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this Court said of that contention what must be said of the proviso in the 20th section, that it was "evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by State statute, 30 or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act." Again, it was said, of the same clause, in the same case, that it could "not in reason be construed as continuing in a shipper a common law right the existence of which would be inconsistent with the provision of the act. In other words, the act cannot be said to destroy itself. To construe this proviso as preserving to the holder of any such bill of 40

> lading any right or remedy which he may have had under existing Federal law at the time of his action, give to it a more rational interpretation than one which would preserve rights and remedies under existing State laws, for the latter view would cause the proviso to destroy the Act itself."

This whole transaction took place in Brooklyn 10 in the State of New York and clearly illustrates a situation which the Federal Act was meant to correct. The New York Court has in effect decided against the plaintiff by the *Loomis* case, *supra*, and it comes into New Jersey to secure a different ruling.

The trial court held, P. 71 of Case, l. 37-40:

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> "If the plaintiff is entitled to recover I do not think there is any such limitation upon any Court to deal with issues such as this, as suggested by counsel for the defendant."

Denying defendant's contention that the shipment was controlled by the Interstate Commerce Act and that the Court had no jurisdiction to determine administrative questions. Its ruling was error and the Supreme Court erred in affirming 30 such ruling. The Court's action was limited to finding whether the 48 hours mentioned in the tariff elapsed and whether there was a departure. There was no departure from the act or tariff by defendant and the 48 hours did elapse and the tariff was binding. The Court erred in hearing and determining facts as to the facilities, equipment, practices, method of unloading, whether a berth was provided in *ample* time, etc. It had no power to pass on such matters sitting either as a 40 court of law or as a jury, the Interstate Commerce Commission alone having jurisdiction.

The judgment rendered against defendant upon a consideration of such matters should be reversed with direction to find for defendant.

III.

DAMAGES.

The trial court erred in awarding damages to plaintiff because the defendant obeyed the tariff, and the Supreme Court erred in affirming the judgment. 10

The carrier is not liable in such a case.

Ill. Cent. v. *Henderson El. Co.,* 226 U. S. 441;
Kan. City So. v. *Carl,* 227 U. S. p. 653;
Texas &c. Co. v. *Mugg,* 202 U. S. 242;
R. R. Co. v. *Hefley,* 158 U. S. 98.

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There was no loss or injury to the property. The detention was due to the fact that plaintiff refused to pay legally accrued charges.

The plaintiff may not set up a counter claim against tariff charges.

Ill. Central v. *Hooper,* 233 Fed. 135;
Chicago v. *Stein,* 233 Fed. 716.

IV.

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The judgment affirmed by the Supreme Court was contrary to law and contrary to the evidence.

For the reasons urged under points I, II and III the judgment of the District Court, affirmed by the Supreme Court, was contrary to law and contrary to the evidence in the case, and the trial court has no power to determine whether defendant used reasonable and proper diligence in un- 40

loading the lighter. (Grounds of Appeal 2, 3 and 9, State of Case pp. A2-A3 and A4).

Plaintiff should apply to the Interstate Commerce Commission for reparation.

V.

The Supreme Court erred in not reversing the District Court for refusing to find as requested by defendant.

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Defendant not only placed its contention squarely on record by its claim (p. 8 and 9 of case) but it presented certain findings to the trial court (Grounds of Appeal 4, 5, 6, and 7 pp. A2 and A3) which the court refused to find (p. 71 l. 36-40; p. 72 l. 23-25; objection to refusal p. 73 l. 19-22.)

The request in ground No. 4, p. A-2 is as follows:

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> "The shipment in question was an interstate shipment and controlled by the acts of Congress commonly known as the Interstate Commerce Acts and schedules of rates and charges filed with the Interstate Commerce Commission pursuant to said acts."

The refusal to find this request was error, and the Supreme Court erred in not reversing.

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> *Spada* v. *P. R. R. supra;*
> *Olivit* v. *P. R. R. supra;*
> *Carr* v. *P. R. R. supra.*

The request in ground No. 5, p. A-2 is as follows:

> "The shipment of lumber in question was carried to Leary's dock in Brooklyn and was reported to the plaintiff by the captain of the lighter Breed & Preston at 1:30 P. M., Thurs-

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> day, July 29th, 1915; that pursuant to Rule 19 of the demurrage tariff of the defendant, demurrage at the rate of ten dollars per day accrued forty-eight hours after the time the captain of the lighter reported to the plaintiff; that the period of forty-eight hours mentioned in said demurrage tariff expired at 1:30 P. M. Saturday, July 31st, 1915, and that demurrage thereupon became a charge upon the lumber which had not then been delivered, and the defendant had a lien for the demurrage charges and the right of possession to such undelivered lumber until said demurrage charge was paid."

The trial court erred in not so finding, and the Supreme Court should have reversed the trial court.

The facts set forth are those necessary to fix the application of the tariff rule involved in the case and were admitted by the plaintiff. The rule spoke for itself. The finding became one of law on undisputed facts and law, and it seems to us the trial court was in error in not finding as requested.

The request in Ground No. 6 p. A3 was one of law, as follows:

> "That under said Rule 19, it was necessary for the plaintiff to pay the demurrage charges which had accrued, and if the plaintiff disputed the assessment of said demurrage charges, complaint should have been made under the provisions of the interstate commerce act to the Interstate Commerce Commission or to any District Court or Circuit Court of the United States, asking for reparation."

It was necessary for plaintiff to pay the accrued charges to obtain its lumber, as the charges

accrued according to tariff rule. Any dispute with regard to assessment of charges or the rule itself, where there is no departure from the tariff should have been taken to the Interstate Commerce Commission.

The Supreme Court erred in not reversing the trial Court for the failure to find as requested, for the reasons urged under Point II.

The request in Ground No. 7 p. A3, is as fol-
10 lows:

> "That this Court will not take jurisdiction of the question of whether said demurrage charge was properly assessed or not, that question being for the determination of the Interstate Commerce Commission."

For the reasons urged under Points 1 and 2, all the trial Court could say was that the undisputed facts showed that the charges accrued un-
20 der the tariff—any other question as to the assessment of the charges was for the Interstate Commerce Commission. If that body declared the rule or charges unreasonable and that plaintiff was entitled to reparation, it could grant it. The trial Court's jurisdiction was limited by the rule and when undisputed facts appeared, showing that the rule fastened itself on to the transaction and that charges accrued in the sum specified in the rule, the Court could go no further.

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VI.

It is respectfully submitted therefore that the judgment of the Supreme Court affirming the judgment of the First District Court of Jersey City, should be reversed, set aside and for nothing holden, and that judgment should be directed to be entered in the District Court in favor of defendant for possession of the lumber.

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

JOHN A. HARTPENCE,
of Counsel.

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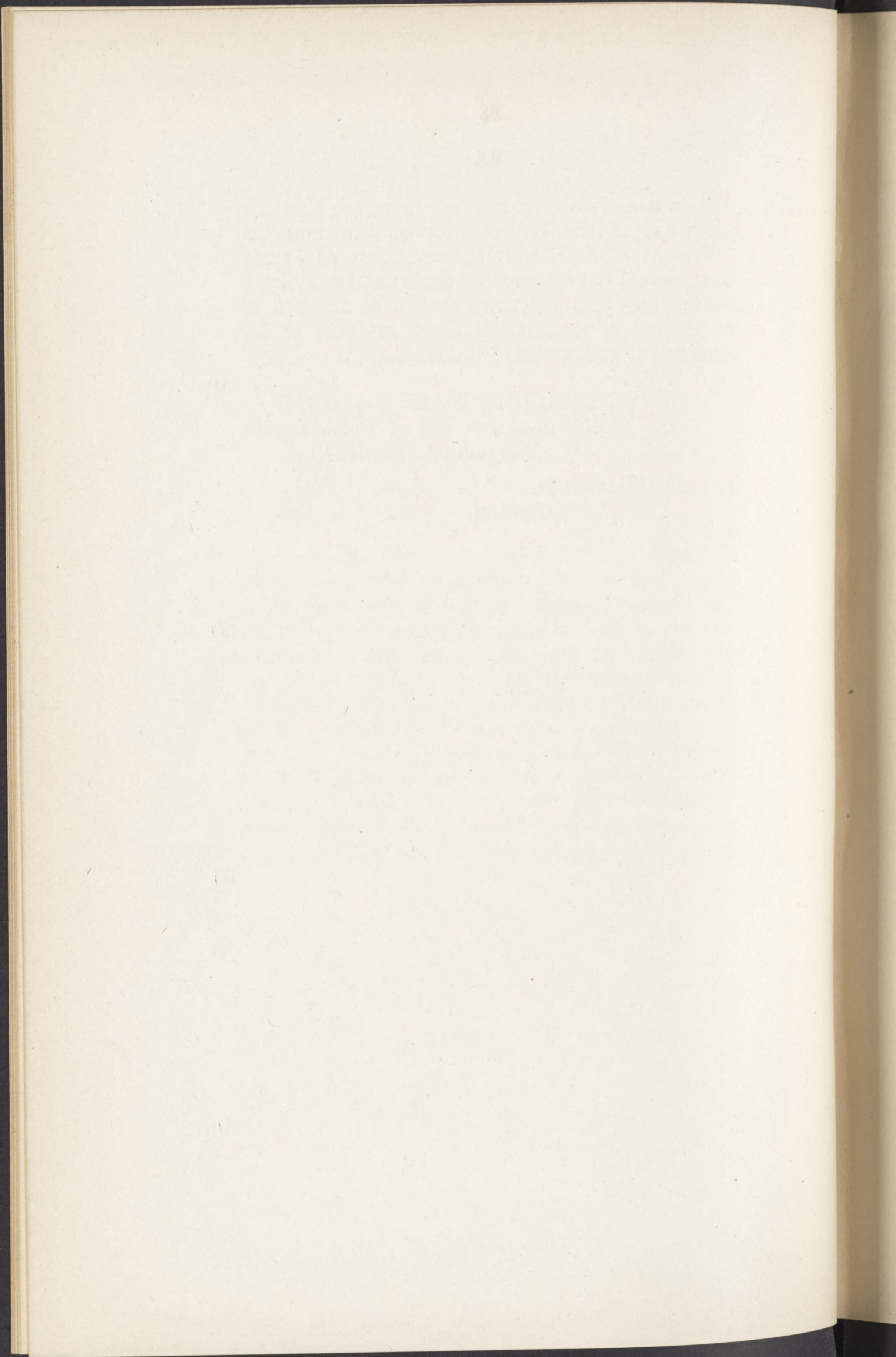

New Jersey Court of Errors and Appeals

Kells Mill & Lumber Co., Inc., a corporation, *Plaintiff-Appellee,* *vs.* The Pennsylvania Railroad Company, a corporation, *Defendant-Appellant.*	In Replevin. On Appeal from Supreme Court.

10

BRIEF OF DEFENDANT-APPELLANT IN REPLY TO BRIEF OF PLAINTIFF-APPELLEE.

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I.

There is no evidence to warrant the finding of the District Court material to the legal issues involved, and hence the case is open to review in this court on the facts.

II.

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It is not a question of whether the plaintiff has attacked the regulations of the Interstate Commerce Commission or the rules of the defendant company with reference to transportation, delivery or demurrage, but whether or not those regulations and rules apply to and are dispositive of the case as brought by the plaintiff. Plaintiff cannot by its own choice evade the tariff provi-

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sions and schedules applicable by essaying to place itself in a position of a plaintiff in a mere common law action for a common law tort. This seems to be plaintiff's contention. See pp. 3-4 & 5 of Brief for plaintiff-appellee.

The case of *Pennsylvania R. R. Co.* v. *Puritan Coal Mining Co.,* 237 U. S. 121, which is relied upon by plaintiff-appellee as ruling the case at bar in its favor, does not apply in the manner
10 which plaintiff claims. In that case the tariff provision expressly provided the number of cars which should be furnished the shipper. The testimony showed that the carrier had failed to supply the number of cars so provided. This was a clear departure on the part of the carrier from the obligation imposed by its own tariff provision and gave to the shipper an undoubted right to sue for relief in the first instance without application to the Interstate Commerce Commission;
20 but in the case at bar no departure from the tariff provision is shown, nor did any such departure in fact exist. There is nothing in the present demurrage rule which requires the carrier to unload the cargo within any specified time nor to furnish any specific equipment or number of men to accomplish the unloading. So far as the rule is concerned the carrier might take unlimited time for this purpose without in any way departing from the terms of the tariff provision. After the
30 forty-eight hours free time had elapsed the demurrage therein imposed would automatically and inexorably accrue. If in such a situation hardship or damage resulted to a consignee through the neglect, lack of diligence or arbitrary action of the carrier, then the consignee's remedy is to apply to the Interstate Commerce Commission for a modification or amendment of the tariff provision, which would require the carrier to exercise a certain degree of diligence or to provide a cer-
40 tain number of men or to unload within a fixed

period, or some similar provision, to prevent the accruing of the demurrage against the consignee because of the carrier's act. It is purely administrative and the Interstate Commerce Commission is the tribunal to remedy any situation of hardship if such a situation exists. On the other hand it is to be noted that there is a positive duty on the consignee by this tariff provision to furnish proper facilities for unloading and, in fact, to unload if he is to avoid the demurrage imposed. 10

Bill of Lading, Sec. 5, Case p. 78.
Spada vs. P. R. R., *supra*.

III.

Plaintiff has invoked the application of the Fifth Amendment to the Constitution of the United States (see Brief, p. 10), but does not state in what manner this amendment is applicable to the case at bar. If plaintiff means to 20 suggest that the Fifth Amendment would prevent Congress from abrogating the common law right of action theretofore existing, it seems to us that such a position cannot be sustained. So long as plaintiff has recourse to a legal tribunal having the power to adjudicate its legal rights it could not be said to have been deprived of its property without due process of law. This rule has so often been enunciated that it would seem to be unnecessary to cite authorities in support of it. 30

IV.

It is respectfully submitted that the judgment below under review should be reversed.

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

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JOHN A. HARTPENCE,
of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

KELLS MILL & LUMBER CO., INC.,
Plaintiff-Respondent,
vs.
THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellant.

On Appeal from Supreme Court.

Brief for Plaintiff-Respondent.

Facts.

This is an action of replevin for part of a car load of lumber which the defendant refused to deliver to the plaintiff under these circumstances: A car load of lumber, consigned to the plaintiff, was received by the defendant in transportation from Norfolk, Virginia, to Brooklyn. The lighterage from Jersey City to Brooklyn was done for the defendant by The J. R. Wortendyke Lighterage Company, by means of a canal boat. This canal boat arrived at the plaintiff's dock in Brooklyn, on July 29, 1915, at 1.30 P. M.

Under the rules regulating this transportation, and the agreement, the plaintiff had forty-eight hours within which to have this lumber unloaded, before any claim could be made for demurrage (Case, p. 80). This period accordingly expired on July 31, 1915, at 1.30 P. M. It was the duty of the defendant to unload the lumber; the plaintiff's duty being to supply a berth which would enable the lumber to be unloaded by the time mentioned. The place of delivery was on the dock (p. 14 l. 28)

If this lumber were unloaded by the usual method it would have taken three to four hours

to unload it (Kells, p. 16, l. 33; Reid, p. 33, l. 12; McCarthy, p. 25, l. 25; Hoffman, p. 29, l. 30); the usual method being to have two men unloading (Kells p. 15, l. 24; Reid, p. 33, l. 12, McCarthy, p. 25, l. 25), The captain of the canal boat was notified to start in on the morning of Saturday, the 31st of July, 1915, and the plaintiff sent its trucks down at seven thirty o'clock on that morning, to take the stuff off (McCarthy,
10 p. 23, l. 18).

The captain and his one man did not start to work until nine-thirty o'clock, and the plaintiff's trucks carted off the lumber as fast as it was put upon the dock. After working with the other man for fifteen to twenty minutes, the captain discharged him, and (Kells, p. 15, ll. 10 to 23; McCarthy, p. 23, l. 32), started to do the work alone, although there were a large number of men on the dock whom he could have hired to do the
20 work (Reid, p. 33, l. 25; McCarthy, p. 24, l. 18). This continued until eleven thirty A. M., when he pulled over to another dock, still working alone, the plaintiff taking away the lumber as fast as it came on the dock.

At one o'clock the captain refused to deliver any more lumber unless he were paid $10.00 for demurrage (Kells, pp. 15 and 16).

The testimony of Kells, McCarthy, Hoffman
30 and Reid is all to the effect that if the captain had worked with the proper amount of diligence, he could have had the lumber off in from three to four hours from the time that he began work.

It appeared in the testimony of the lighterage captain that out of every $10.00 his employers collected for demurrage, they paid him $1.00 (p. 51, l. 12 ff.).

The District Court found as a fact that the defendant could with reasonable diligence have
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unloaded the lumber in time, that it had failed to unload the lumber with reasonable diligence, and that it had no claim to demurrage. It accordingly entered judgment for plaintiff for a return of the goods and damages, which judgment was affirmed by the Supreme Court.

I.

The facts are not open to review in this court. 10

There was ample evidence, to warrant the finding of the District Court (p. 72), that the lighterage captain, the agent of the defendant, did not unload with reasonable diligence, and it is so well settled, that no citation is necessary, that this Court will not review conflicting evidence on an appeal from a law court.

II. 20

The only question left in the case is the question of the jurisdiction of the District Court, and this question was rightly determined in the Supreme Court.

It would seem that we could well rely in this Court on the clear and concise opinion of Mr. Justice Kalisch in the Supreme Court. The defendant however, has apparently entirely misconceived the issue in this case, and we have thought it advisable to devote a little consideration to the extremely voluminous brief which it has submitted and the many cases which it has cited. 30

It must always be borne in mind that the plaintiff does not in any way attack the regulations of the Interstate Commerce Commission, nor the rules of the defendant company with reference to transportation, delivery or demurrage. 40

The plaintiff admits, for the purposes of this case, that the regulations of the Interstate Commerce Commission and the rules of the defendant company, which are in evidence in this case, are entirely reasonable. We do not for a moment claim that there has been any discrimination practised against us, such as is forbidden by the Interstate Commerce Act. We claim that the act of the defendant in unreasonably delaying the
10 delivery of this cargo and in refusing to deliver it up unless demurrage was paid was a failure to live up to its own rules and this delay constitutes a common law tort and nothing else.

There is nothing in the language of the Interstate Commerce Act which in any way can be construed to oust the state court of its jurisdiction.

The ninth section of the Interstate Commerce Act, (Federal Statutes Annotated, Volume 3, p.
20 833), reads as follows:

> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable *under the provisions of this act,* in any district or circuit court of the United States of
> 30 competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure hereinafter provided for he or they will adopt."

The 13th section which deals with the procedure in cases where application is made to the Interstate Commerce Commission reads thus, (Fed. Stat. Ann., Vol. 3, p 842):

40 "That any person, firm, corporation or as-

> sociation or mercantile, agricultural or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act *in contravention of the provisions hereof,* may apply to the said Commission by petition," etc.

An examination of the Interstate Commerce act discloses that the grievance of the plaintiff is not at all one of the acts for which the common carrier is made liable to prosecution under that act or is an act which is specially forbidden by it. The action of the plaintiff was not brought for a violation of that act. The defendant's tort was not one that was created by the Interstate Commerce act, but was a wrong which existed independently of that act and existed long before that act ever came into existence. It is a plain violation of duty irrespective of the provisions of the Interstate Commerce act. **10** **20**

The object of the Interstate Commerce Act was essentially to secure just and reasonable charges for transportation, to prohibit unjust discriminations and undue preferences, to abolish pools and combinations.

> *Interstate Commerce Com. v. B. & O. R. R.,* 145 U. S., 262, 276.

The plaintiff does not claim that there was any discrimination against it, any preference to anyone else, any unlawful combination, or anything that the Interstate Commerce Act forbids. Its claim was one at Common law to recover its goods and damages for their detention, under circumstances that have constituted an actionable wrong from the early days of the common law, and so it has been held by the United States Supreme Court that damage caused by failure to deliver goods is in no way traceable to a viola- **30** **40**

tion of the statute and is not within the ninth section of the act.

Galveston, H. & S. A. Ry. Co. v. Wallace, 223 U. S., 481, 489;
See also *Atlantic Coast Line v. Riverside Mills* 219 U. S., 186, 206.

An examination of the cases in the defendant's brief will show that only a single one of them is
10 in point upon this case, and that one (*Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U. S., 121) is direct authority for our contention. With that exception each and every one of them is distinctly a case where there was either a charge of discrimination or an attack upon the schedules which had been framed by the Interstate Commerce Commission, and not a single one was a case such as the present one, where a common law action is brought independently of the statute.
20 A typical case, and one which is much relied upon by the defendant is *Texas & Pacific Railway Company v. Mugg*, 202 U. S., 242, in which Chief Justice White, in referring to the case of *Railroad Company v. Hefley* 158 U. S., 98, uses this language:

> "The clear effect of that decision was to declare *that one who has obtained from a common carrier transportation of goods from one State to another at a rate specified in*
> 30 *the bill of lading, less than the published schedule rates* filed with and approved by the Interstate Commerce Commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, that whatever may be the rate agreed upon, the carrier's lien on the goods
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is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment, or tender of payment of such amount. Such is now the supreme law, and by it this and the courts of all other States are bound. * * *."

The very recent case of *Loomis v. Lehigh Valley Railroad Co.,* 240 U. S., 43, which counsel insists is like the present case, is entirely different, because in that case the question as to who was to construct the bulkheads directly involved the schedule of rates which the Railroad Company had a right to charge. 10

Again, we call the Court's attention to the fact that our case involves not a question of rates or reasonableness of regulations, but the fact that the Railroad Company did not live up to its own rules. 20

A case almost exactly in point is the case of *Pennsylvania Railroad Company v. Puritan Coal Mining Company,* 237 U. S., 121, (see pages 132, 133 and 134), in which the shipper complained that the carrier was unfair in its distribution of coal cars. Mr. Justice Lamar says, on page 132:

"In the present case the pleadings contained no reference to the Commerce Act. 30 The damages grew solely out of the fact that the Puritan Company failed to receive the number of cars to which it was entitled. The plaintiff's right and measure of recovery would have been exactly the same if the cars had been furnished to a Manufacturing plant, instead of to the Berwind-White Coal Company. The plaintiff's cause of action and damages would have been the same if the failure to receive the cars had been due to the fact that the carriers negligently allowed empty cars to stand on side tracks, or, if 40

by reason of a negligent mistake they had been sent to the wrong point. The motive causing the short supply of cars was therefore wholly immaterial, except as corroboration of other evidence showing an actual shortage of cars, so that, if we ignore the plaintiff's characterization of the defendant's conduct, and consider the nature of the case, alleged in the first count and established by the evidence, it will appear that the Puritan Company was entitled to recover because of
10 the fact that the carrier failed to comply with its common law liability to furnish it with a proper number of cars. What was a proper supply was a matter of fact."

And on page 133, 134:

"In many cases the determination of such an issue would call for the exercise of the regulating function of the Commission. That was true in *Morrisdale Coal Co. v. Pennsylvania Railroad,* 230 U. S., 304, 312-
20 314. There the plaintiff admitted that it had received all the cars to which it was entitled under the carrier's rule, but insisted that the rule itself was unreasonable and unjustly discriminatory since it took no account of private and foreign cars controlled by the mining Company. The reasonableness of the rule was a matter for the Commission.

"The present suit, however, is not of that nature. It is not based on the ground that the Pennsylvania Railroad's rule to distribute in the case of car shortage on the
30 basis of mine capacity, was unfair, unreasonable, discriminatory or preferential. But, as shown above, the plaintiff alleged it was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled. In support of that issue of fact the plaintiff relied on the carrier's own rule as evidence. That rule, and the carrier's distribution sheets, showed the number of cars to which the plaintiff, the Berwind-White Company and other coal companies in the
40 district, were each entitled. The evidence

further showed that the plaintiff did not receive that number of cars to which by rule it was thus entitled. So that on the trial there was no administrative question as to the reasonableness of the rule, but only a claim for damages occasioned by its violation in failing to furnish cars. *Penna. R. R. Co. v. International Coal Co.,* 230 U. S., 197. *The state and federal courts had concurrent jurisdiction of such claim against an interstate carrier without a preliminary finding by the Commission.*" 10

This language distinctly shows the difference between an attack on the reasonableness of a rate or a regulation, and an action for the carriers violation of its own rule. The decision in that case was an affirmance of the Supreme Court of Pennsylvania, the case in that court being reported under the name of *Puritan Coal Mining Company vs. Pennsylvania Railroad Company*, 237 Pa., 420; 85 Atl., 426. That case cites the 20 case of *Missouri Pacific Railway Co. v. Larabee Flour Mills,* 211 U. S., 612, and both cases lay down the doctrine that

> "if Congress has not legislated with reference to the particular act complained of, the jurisdiction of the state courts remains unimpaired."

Some cases in the state courts which point the distinction between violation of the Interstate Commerce Act, which are only cognizable in the 30 federal courts, and common law actions, where the state and federal courts have concurrent jurisdiction, are:

> *Banner v. Wabash Railway Co.,* 131 Iowa, 405; 108 N. W., 759;
>
> *Pittsburg, etc., R. R. Co., v. Wood,* 45 Ind. Appeals, 1; 84 N. E., 1,009;
>
> *Wabash v. Sloop,* 200 Mo., 198; 98 S. W., 607. 40

Whether or not the Interstate Commerce Commission has sought to deal with cases of this kind cannot affect this question in any way.

And it may be noted that the provisions of the Interstate Commerce Act carefully safeguard common law rights of action.

The act provides (Sec. 22, Federal Statutes Annotated, Vol. 3, p. 851):

10

> "And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

And Congress had no power to take away the plaintiff's right of action.

The 5th Amendment to the Constitution of the United States, which is the restriction on Congress, provides inter alia: "Nor shall any 20 person be deprived of life, liberty or property without due process of law."

III.

The Court having properly found that the defendant wrongfully detained plaintiff's property, damages for that detention necessarily followed.

We respectfully urge that the judgment of the 30 Supreme Court be affirmed.

M. T. Rosenberg,
Of Counsel.

40

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Notice of Appeal and Grounds of Appeal

(Filed August 4, 1916)

NEW JERSEY SUPREME COURT

KELLS MILL AND LUMBER CO. INC., *Plaintiff-Appellee,* *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *Defendant-Appellant.*	In Replevin. Notice of Appeal.

10

To:

M. T. ROSENBERG, Esq.,
Attorney for Plaintiff-Appellee.

20

TAKE NOTICE:

That the Defendant-Appellant 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 the New Jersey Supreme Court in this cause, upon the following grounds: 30

1. That the said Supreme Court erred in affirming the refusal of the First District Court of Jersey City to direct judgment for the defendant at the close of the whole case, for possession of the lumber replevined in the above entitled cause, although duly moved to do so by defendant.

2. That the said Supreme Court erred in affirming the judgment of the First District Court of 40

Jersey City, which judgment was contrary to law.

3. That the said Supreme Court erred in affirming the judgment of the First District Court of Jersey City, which judgment was contrary to the evidence.

10 4. That the said Supreme Court erred in affirming the refusal of the First District Court of Jersey City to find as requested by defendant, the following:

> "The shipment in question was an interstate shipment and controlled by the acts of Congress commonly known as the Interstate Commerce Acts and schedules of rates and charges filed with the Interstate Commerce Commission pursuant to said acts."

20

5. That the said Supreme Court erred in affirming the refusal of the First District Court of Jersey City to find as requested by defendant, the following:

> "The shipment of lumber in question was carried to Leary's dock in Brooklyn and was reported to the plaintiff by the captain of the lighter Breed & Preston at 1:30 P. M. Thursday, July 29th, 1915; that pursuant to Rule 19 of the demurrage tariff of the defendant, demurrage at the rate of ten dollars per day accrued forty-eight hours after the time the captain of the lighter reported to the plaintiff; that the period of forty-eight hours mentioned in said demurrage tariff expired at 1:30 P. M. Saturday, July 31st, 1915, and that demurrage thereupon became a charge upon the lumber which had not then been de-

30

40

Notice of Appeal and Grounds of Appeal

livered, and the defendant had a lien for the demurrage charges and the right of possession to such undelivered lumber until said demurrage charge was paid."

6. That the said Supreme Court erred in affirming the refusal of the First District Court of Jersey City to find as requested by defendant, the following: 10

"That under said Rule 19, it was necessary for the plaintiff to pay the demurrage charges which had accrued and if the plaintiff disputed the assessment of said demurrage charges, complaint should have been made under the provisions of the Interstate Commerce Act, to the Interstate Commerce Commission or to any District Court or Circuit Court of the United States, asking for reparation." 20

7. That the said Supreme Court erred in affirming the refusal of the First District Court of Jersey City to find as requested by defendant, the following:

"That this Court will not take jurisdiction of the question of whether said demurrage charge was properly assessed or not, that question being for the determination of the Interstate Commerce Commission." 30

8. The Supreme Court erred in holding that the District Court had jurisdiction to determine the cause.

9. The said Supreme Court erred in affirming the judgment of the First District Court of Jersey City in holding that said First District Court of Jersey City had power to determine whether the 40

Notice of Appeal and Grounds of Appeal

defendant used reasonable and proper diligence in unloading the boat in question, on July 31, 1915.

10. The said Supreme Court erred in affirming the judgment of the said First District Court of Jersey City, which judgment held that no demurrage accrued against the undelivered lumber replevined in the above suit.

10

11. That said Supreme Court erred in affirming the judgment of the First District Court of Jersey City, which judgment awarded damages to the plaintiff for the detention of the lumber replevined in this suit.

Dated July 31, 1916.

Yours respectfully,

20

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

Endorsed:

Service of a copy of the within notice of appeal is hereby acknowledged this third day of August, 1916.

M. T. ROSENBERG,
Attorney for Plaintiff-Appellee.

30

40

Rule for Judgment

(Filed July 28, 1916).

NEW JERSEY SUPREME COURT.

KELLS MILL AND LUMBER CO. INC., *Plaintiff-Appellee,* vs. THE PENNSYLVANIA RAILROAD COMPANY, *Defendant-Appellant.*	On Appeal from First District Court of Jersey City Rule for Judgment.

10

This cause coming on to be heard at the November Term, 1915, of this Court, and having been argued by counsel of the respective parties, and the Court having taken time to consider the same, and being now of opinion that there is no error in the judgment of the First District Court of Jersey City removed by this appeal, and that said judgment should be affirmed,—

20

IT IS ORDERED that said judgment be and the same is in all things affirmed, and that judgment of affirmance be entered in favor of said plaintiff-appellee against said defendant-appellant, with costs to be taxed, including costs of printing points.

30

Entered July 28, 1916.

On motion of

M. T. ROSENBERG,
Attorney of Plaintiff-Appellee.

40

Opinion of Supreme Court

(Filed July 22, 1916).

NEW JERSEY SUPREME COURT.

November Term 1915.

10

KELLS MILL AND LUMBER CO. INC., a corporation, *Plaintiff-Appellee,* *vs.* THE PENNSYLVANIA RAILROAD COMPANY, a corporation, *Defendant-Appellant.*	}

20 On Appeal from First District Court of Jersey City.

Before Justices Parker, Minturn and Kalisch.
For the appellant, Vredenburg, Wall & Carey.
For the appellee, M. T. Rosenberg.
The opinion of the court was delivered by Kalisch, *J.*:

30 Judgment was given, in the First District Court of Jersey City, in an action of replevin, in favor of the plaintiff and against the defendant. From that judgment the defendant company has appealed to this court. The replevin action grew out of the refusal of the appellant company, through the captain of a canal boat to deliver certain lumber unless a demurrage charge was paid. Whether or not a demurrage charge had accrued was in dispute between the 40 parties. The court found from the testimony that no demurrage charge had accrued.

The appellant further contended that the facts show that the shipment of the lumber was interstate and therefore the case was not cognizable in the state courts but only in the Federal courts or by the Interstate Commerce Commission.

The shipment was interstate and consisted of about 14,000 feet of white cedar lumber. It was shipped by Roper Lumber Company, from Norfolk, Va., to the plaintiff at Brooklyn, the appellant company being the terminal carrier. The lighterage from Jersey City to Brooklyn was done for the appellant by a lighterage company by means of a canal boat. This canal boat arrived at the plaintiff's dock in Brooklyn on July 29, 1915, at 1:30 P. M. The plaintiff under the rules regulating this transportation and agreement had forty eight hours within which to have its lumber unloaded, before any claim for demurrage could be made. The time, therefore, for unloading expired on July 31, 1915, at 1:30 P. M. The carrier, concededly, was to do the unloading. The lumber was not unloaded within the forty eight hours and the captain refused to continue the unloading, after the expiration of the 48 hours unless he were paid a demurrage charge of ten dollars.

Before taking up the consideration of the jurisdictional question raised by the appellant, we will turn our attention, briefly, to the controversy relating to the demurrage charge.

In the schedule filed by the appellant company relating to freight shipments with the Interstate Commerce Commission, there appears a rule, which among other things, provides that a consignee of goods must provide a berth to receive them, and that forty eight hours from the time the car, float, lighter or barge reports (Sundays and full holidays excepted) shall be deemed lay days

without charge, and that after the expiration of the forty eight hours demurrage shall accrue etc., and according to the rates fixed in the schedule.

The legal efficacy of this rule and its application to the shipment in this case are not challenged. The facts, however, upon which the attempted collection of the demurrage tax, provided for by the
10 rule, was claimed, were in dispute. The dispute presented two controverted questions of fact. For the appellant it was insisted that the consignee, the plaintiff below, failed to provide a berth for the boat, so that it could unload the lumber within forty eight hours after it was reported and that that was the reason why the demurrage accrued.

This was denied by the plaintiff below who claimed that it had provided a dock for the delivery of the lumber in ample time for the captain
20 of the boat, if he had used reasonable diligence, to have unloaded it within forty eight hours after the boat was reported.

The trial judge found that the plaintiff below provided a dock in ample time, after the boat was reported for the captain to have delivered the lumber within forty eight hours, and that the cause of his failure to do so was due to the fact that he did not use reasonable diligence in unload-
30 ing.

If there is any testimony to support the findings of the trial judge, they will not be disturbed, under the decision of the courts of this state. An examination of the record shows that there was testimony tending to establish that the plaintiff below provided a berth for the delivery of the lumber, and notified the captain of the boat to start unloading the lumber at that berth on Saturday morning at 7:30 o'clock, and that the plaintiff be-
40 low would have its teams there at that time to haul

the lumber away; that the teams of the plaintiff below were at the dock on Saturday morning, at the time mentioned, but the captain of the boat did not start to unload until two hours later, and that the lumber was hauled away as fast as it was unloaded. There was also testimony to the effect that the boat could have been unloaded by two men working with reasonable diligence within 10 three or four hours. This testimony supported the findings of the trial judge.

We now turn to a consideration of the challenge made by the counsel for appellant to the jurisdiction of the state court to entertain the present action.

The argument advanced by counsel for appellant is, in substance, that the shipment being interstate, the demurrage which was claimed to have 20 accrued is governed exclusively by the provisions of the Interstate Commerce Act (U. S. Comp. Stat. Sec. 8563-8604) and the tariff filed with the Interstate Commerce Commission in pursuance thereof, hence, the state court is without jurisdiction because it was not within the power of the state court to decide whether demurrage had or had not accrued under the schedule filed by the appellant, but that that power was exclusively conferred by Congress upon the Interstate Commerce Commis- 30 sion or the Federal Court. This position is manifestly untenable. The cases cited, by counsel for appellant, to sustain the novel proposition urged upon us not only utterly fail in that respect, but on the contrary clearly recognize the jurisdiction of the state courts to deal with matters, which are or, may be, in a measure regulated and governed by the Interstate Commerce Act or the Carmack Amendment. The courts of this state have repeatedly dealt, unquestioned, with matters govern- 40

ed by these Federal Acts. *Spada* v. *Penn. R. R. Co.,* 86 N. J. L. 187; *Olivit Bros.* v. *Penn R. Co.,* 96 Atl. 582; *Carr et al.* v. *Penn. R. Co.* 96 Id. 585.

There is nothing in either of the Federal acts invoked which either expressly or impliedly forbids the state court from entertainting jurisdiction in a case like the one under discussion. The
10 fallacy of the theory that the state court is without jurisdiction lies in the failure to properly distinguish between actions which are brought for violation or enforcement of the provision of the Federal statutes referred to and which for that reason are only cognizable in the Federal tribunal, and actions at law brought independently of the Federal statutes for some wrong done, and the Federal statutes come incidentally into operation by reason of some regulatory provision contained
20 therein, as in the case *sub judice.* In the former class of actions there is no doubt but that the Federal courts and Interstate Commerce Commission have exclusive jurisdiction, but not so in the latter.

The action which the plaintiff below instituted was not one dealing with discrimination in rates or the like, but that the appellant's charge for demurrage in this particular case was not warrant-
30 ed by its own regulation, that is, that it charged for something not contracted for.

This was, obviously, not assailing the legal efficacy of the rule or tariff regulation. If the carrier had delivered the lumber and sued for demurrage is there any question but that the state court could have entertained jurisdiction? We think not.

Having dealt with the reasons solely relied on in the appellant's brief for a reversal of the judgment, and finding them to be without merit, the
40 judgment will be affirmed, with costs.

Recognizance on Appeal

Filed August 5, 1916.

NEW JERSEY SUPREME COURT

KELLS MILL AND LUMBER CO. INC., *Plaintiff,* *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *Defendant.*	In Replevin. Recognizance

10

STATE OF NEW JERSEY,
County of Hudson,

20

BE IT REMEMBERED that on this fifth day of August, A. D. nineteen hundred and sixteen, appeared before me Pierre F. Cook, one of the Supreme Court Commissioners of the State of New Jersey, at Jersey City in said State, THE PENNSYLVANIA RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania, by Albert C. Wall its Attorney-in-fact on its behalf, as principal, and the American Surety Company of New York, a corporation of the State of New York, by Walter P. Gardner its resident Vice President, on its behalf, as surety, who jointly and severally did acknowledge said companies to be indebted to KELLS MILL AND LUMBER CO., INC., a corporation, in the sum of One Thousand Dollars, to be made and levied of their respective goods and chattels, lands and tenements and real estate, if default be made in the following conditions:

30

The conditions of the above recognizance are such that,

40

Recognizance on Appeal

Whereas, Kells Mill and Lumber Co., Inc., lately recovered judgment against The Pennsylvania Railroad Company, in an action for replevin, in the First District Court of Jersey City, for possession of the goods replevied in the above entitled suit, valued at the sum of two hundred and ninety-eight dollars and forty-two cents, and ninety-five dollars and fifty cents damages and costs, as by the record thereof will appear; and

Whereas, the Pennsylvania Railroad Company thereafter appealed from said judgment to the New Jersey Supreme Court, and said New Jersey Supreme Court has rendered a judgment of affirmance of the judgment of the First District Court of Jersey City, with costs amounting to the sum of twenty-five dollars and seventy-five cents, and,

Whereas, The Pennsylvania Railroad Company has taken an appeal from said judgment of the New Jersey Supreme Court to the New Jersey Court of Errors and Appeals, in the last resort in all causes;

Now, therefore, if the said The Pennsylvania Railroad Company shall prosecute the said appeal with effect, and also pay and satisfy, if the said judgment be affirmed, all the damages and costs in the former judgment, and all costs and damages to be awarded for delay of execution, then this recognizance to be void, else to be and remain in full force.

THE PENNSYLVANIA RAILROAD COMPANY,
By ALBERT C. WALL,
Attorney-in-fact.

Recognizance on Appeal

Taken and acknowledged this
5th day of August A. D.
1916.
PIERRE F. COOK,
Supreme Court Commissioner
of New Jersey
AMERICAN SURETY CO. OF N. Y.
By W. P. GARDNER, 10
Resident Vice President.
Attest:
HENRY A. GIEGOLD,
Resident Assistant Secretary.
(Seal)
Approved as to form and sufficiency of surety.
PIERRE F. COOK,
Supreme Court Commissioner
of New Jersey.
20

30

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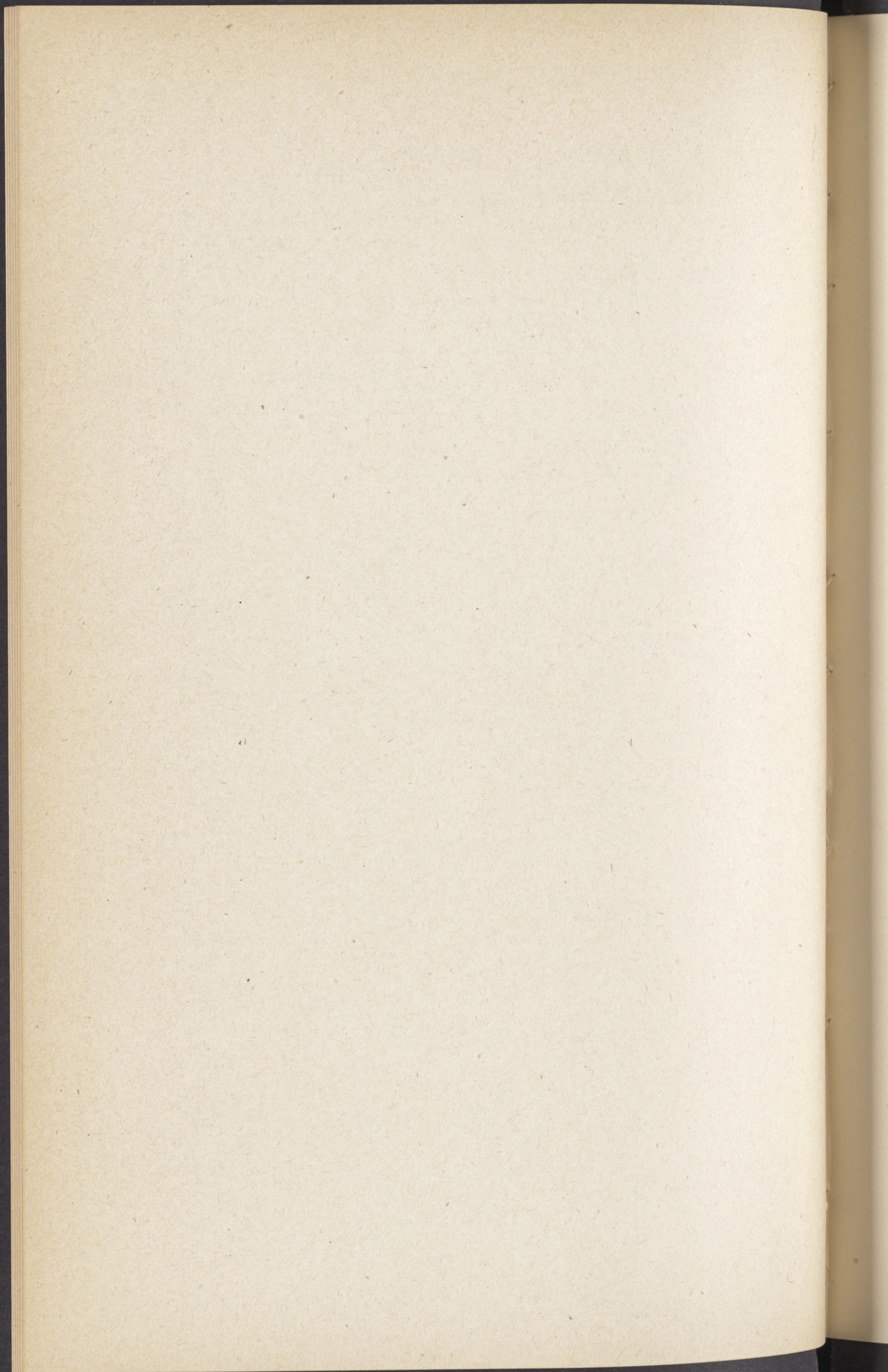

Notice of Appeal.

(Filed September 25-1915)

FIRST DISTRICT COURT OF JERSEY CITY.

KELLS MILL & LUMBER CO., Inc., a corporation, *Plaintiff*, vs. THE PENNSYLVANIA RAILROAD COMPANY, a corporation, *Defendant*.	In Replevin.

10

To

M. T. ROSENBERG, Esq.,
Attorney for Plaintiff.

20

SIR:

PLEASE TAKE NOTICE that the defendant, The Pennsylvania Railroad Company, hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court of Jersey City rendered in the above entitled cause on the sixteenth day of September, nineteen hundred and fifteen.

Dated September 22, 1915.

30

Yours respectfully,
VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

Service of a copy of the within notice of appeal is hereby acknowledged this twenty-third day of September, 1915.

M. T. ROSENBERG,
Plaintiff's Attorney.

40

Specifications of Causes of Error.

(Filed September 27-1915)

NEW JERSEY SUPREME COURT.

KELLS MILL & LUMBER CO., Inc., a corporation, *Plaintiff-Appellee* vs. THE PENNSYLVANIA RAILROAD COMPANY, a corporation, *Defendant-Appellant*	In Replevin. On Appeal from First District Court of Jersey City.

10

THE PENNSYLVANIA RAILROAD COMPANY, the above named appellant, specifies the following determinations or directions of the First District Court of Jersey City in the above entitled cause, with which it is dissatisfied in point of law:

20

1. Because the trial judge erred in refusing to direct judgment for defendant for possession of the lumber replevined in the above entitled cause, although duly moved to do so by defendant.

2. Because the judgment of the trial court was contrary to law.

30

3. Because the judgment of the trial court was contrary to the evidence.

4. Because the trial court refused to permit defendant to introduce in evidence a plan of the docks mentioned in the testimony where the plaintiff's place of business was located and where the defendant's boat lay while the demurrage in question in the above case is claimed to have accrued.

40

Specifications of Causes of Error

5. Because the trial court refused to find as follows, although duly requested to do so by defendant:

"The shipment in question was an interstate shipment and controlled by the acts of Congress commonly known as the Interstate Commerce Acts and schedules of rates and charges filed with the Interstate Commerce Commission pursuant to said acts." 10

6. Because the trial court refused to find as follows, although duly requested to do so by defendant:

"The shipment of lumber in question was carried to Leary's dock in Brooklyn and was reported to the plaintiff by the captain of the lighter Breed & Preston at 1:30 P. M. Thursday, July 29th, 1915; that pursuant to Rule 20 19 of the demurrage tariff of the defendant, demurrage at the rate of ten dollars per day accrued forty-eight hours after the time the captain of the lighter reported to the plaintiff; that the period of forty-eight hours mentioned in said demurrage tariff expired at 1:30 P. M. Saturday, July 31st, 1915, and that demurrage thereupon became a charge upon the lumber which had not then been delivered, and the defendant had a lien for the demur- 30 rage charges and the right of possession to such undelivered lumber until said demurrage charge was paid."

7. Because the trial court refused to find as follows, although duly requested to do so by defendant:

"That under said Rule 19, it was necessary for the plaintiff to pay the demurrage charges which had accrued, and if the plaintiff disputed the assessment of said demurrage 40

charges, complaint should have been made under the provisions of the interstate commerce act to the Interstate Commerce Commission or to any District Court or Circuit Court of the United States, asking for reparation."

10 8. Because the trial court refused to find as follows, although duly requested to do so by defendant:

"That this Court will not take jurisdiction of the question of whether said demurrage charge was properly assessed or not, that question being for the determination of the Interstate Commerce Commission."

9. Because the trial court erred in holding that
20 it had the power to determine whether the defendant used reasonable and proper diligence in unloading the boat in question on July 31st, 1915.

10. Because the trial court erred in holding that no demurrage accrued against the undelivered lumber replevined in the above suit.

11. Because the trial court erred in awarding damages to the plaintiff for the detention of the
30 lumber replevined in this suit.

12. Because the trial court erred in refusing to permit defendant to introduce in evidence Section 879, Session Laws of the year 1901 of the State of New York, containing the provisions of the Charter of the City of New York relating to the fastening of boats to docks in the City of New York.

VREDENBURGH, WALL & CAREY,
Defendant's Attorneys.

40

Transcript.

(Filed September 30-1915)

FIRST DISTRICT COURT—WRIT OF REPLEVIN.

The State of New Jersey,
HUDSON COUNTY, ss. To the Sergeant-at Arms of the First District Court of Jersey City or to any Constable of Said County: 10
GREETING:

(seal) L.S. YOU ARE HEREBY COMMANDED, that if
KELLS MILL AND LUMBER CO., INC.,
a corporation
shall make you secure, you cause to be replevied and delivered to KELLS MILL AND LUMBER CO., INC., A CORPORATION, THE FOLLOWING LUMBER, TO WIT:

158 Pcs.	no. 2 Cedar Plank		1126′
247 "	no. 1 "	"	2582′
13 "	no. 2 6/4 Boat Boards		376′
239 "	no. 1 4/4 "	"	2782′

20

which PENNSYLVANIA RAILROAD COMPANY, a corporation,
took and unjustly detained—as is said: AND that you summon the said
PENNSYLVANIA RAILROAD COMPANY, a corporation,
to appear before the First District Court of Jersey City, to be held at the Court Room, City Hall, corner of Grove & Montgomery Streets, in said City, on the twenty-fourth day of August one thousand nine hundred and fifteen at ten o'clock in the forenoon, to answer the said KELLS MILL AND LUMBER CO., INC., a corporation of a plea of taking and unjustly detaining the said goods and chattels aforesaid: AND have you then there this writ, with your proceedings thereon.

30

40

Witness, CHARLES L. CARRICK, Esquire, Judge of said First District Court, at Jersey City aforesaid, the eighteenth day of August in the year One Thousand Nine Hundred and fifteen.

JAMES N. BRADEN,
Clerk.

10 M. T. Rosenberg,
Attorney.

True Copy.

CONSTABLE'S RETURN TO REPLEVIN WRIT.

By virtue of the annexed writ, the plaintiff having given sufficient security to prosecute &c., and no claim of property therein and no bond being delivered to me by the defendant, I did on the
20 19th day of August, 1915, replevy and deliver to the said plaintiff the goods and chattels in the said writ mentioned, and I served the within writ August 19th, 1915, on J. F. Watson, chief clerk and agent of the defendant in charge of its principal office, by reading the same to him and delivering to him a copy thereof.

FRANK MEYER,
Constable.

30

40

State of Demand.
(Filed August 15-1915)

FIRST DISTRICT COURT OF THE CITY OF JERSEY CITY.

KELLS MILL AND LUMBER Co. Inc., a corporation, *Plaintiff*, *vs.* PENNSYLVANIA RAILROAD COMPANY, a corporation, *Defendant.*	In Replevin.

10

PENNSYLVANIA RAILROAD COMPANY, the defendant in this suit, was summoned to answer unto Kells Mill and Lumber Co., Inc., a corporation of the State of New York, the plaintiff herein, in an action whereof it took lumber of the said plaintiff, and unjustly detained the same against sureties and pledges &c., and thereupon the said plaintiff, by M. T. Rosenberg, its attorney, complains:

20

For that whereas, the said defendant, on or about the thirty-first day of July, nineteen hundred and fifteen, in the City of Jersey City, in the County of Hudson and State of New Jersey, took the following lumber to wit:

30

158	pcs.	no. 2 Cedar Plank	1126′
247	"	no. 1 " "	2582′
13	"	no. 2 6/4 Boat Boards	376′
239	"	no. 1 4/4 " "	2782′

of it, the said plaintiff, of great value, to wit, the value of Two hundred and ninety-eight dollars and forty-two cents. ($298.42), and unjustly detained the same against sureties and pledges, until &c.

Wherefore the said plaintiff says it is injured and has sustained damages in the sum of Five hundred dollars, and thereupon it brings its suit, &c.

40

M. T. ROSENBERG,
Attorney of Plaintiff.

Claim of Defendant Pennsylvania Railroad Company.

(Filed September 14-1915)

FIRST DISTRICT COURT OF THE CITY OF JERSEY CITY.

KELLS MILL AND LUMBER CO. INC., a corporation, *Plaintiff*, vs. PENNSYLVANIA RAILROAD COMPANY, a corporation, *Defendant*.	In Replevin.

10

The defendant, PENNSYLVANIA RAILROAD COMPANY, comes into court in the above
20 entitled suit and says:

That by virtue of the Acts of Congress of the United States, commonly known as the "Interstate Commerce Acts," and the tariffs and classifications filed with the Interstate Commerce Commission pursuant to said Statutes, the defendant claims a lien upon the goods mentioned in the writ of replevin issued in the above entitled suit for the following sums:

Boat demurrage	$100.00
30 Extra towing	9.00
Storage	2.10
	$111.10

That the defendant does not dispute the right of ownership of the plaintiff in said goods mentioned in said writ of replevin issued, but defendant claims that it had and still has the right of possession against the plaintiff until its lien for
40 the above mentioned charges has been paid and satisfied; and said defendant PENNSYLVANIA RAIL-

road Company has always been and still is ready to deliver possession of said goods mentioned in said writ of replevin to the plaintiff upon the payment of the above mentioned charges.

Defendant therefore will claim judgment for possession and judgment against the plaintiff for the sum of $111.10, the aggregate amount of said above mentioned charges, together with costs of suit. 10

VREDENBURGH, WALL & CAREY,
Defendant's Attorneys.

State of New Jersey,
Hudson County, } ss.:
City of Jersey City.

FIRST DISTRICT COURT OF JERSEY CITY
Before, 20
Charles L. Carrick, Esq.,
Judge.
No.—97617

Kells Mill and Lumber Co., Inc. a corporation,
Plaintiff,
vs.
Pennsylvania Railroad Company, a corporation,
Defendant. 30

In Replevin.

M. T. Rosenberg—Plff's Atty.
Vredenburg, Wall & Carey—Deft's Atty.

Costs	City	AL
Bond	1.00	
Summons	1.50	
Service & Return		1.50
Trial Fee	1.50	
	4.00	1.50

August 18, A. D. 1915. Bond presented approved by the Court and filed. 40

A summons was issued tested August 18, A. D. 1915, returnable August 24, A. D. 1915, at 10 o'clock in the forenoon at the Court Room of said Court in the City of Jersey City. The constable returned the summons as follows, viz: By virtue of the annexed writ the plaintiff having given sufficient security to prosecute &c., and no claim of
10 property therein and no bond being delivered to me by the defendant, I did on the 19th day of August, A. D. 1915, replevy and deliver to the said plaintiff the goods and chattels, in the said writ mentioned, and I served the within Writ August 19, A. D. 1915, on J. F. Watson, chief clerk and agent of the defendant, in charge of its principal officers, by reading the same to him and delivering to him a copy thereof.

Plaintiff's demand was filed August 18, A. D.
20 1915.

September 14, A. D. 1915, Claim of defendant filed.

September 16, A. D. 1915, the plaintiff appeared and the defendant appeared and the trial of the cause was proceeded with as follows:

Upon application of defendant, Charles Young was appointed and sworn as stenographer.

On the part of the plaintiff—Charles D. Kells, William J. McCarthy, Nicholas A. Hoffman and
30 William C. Reed were sworn and testified.

On the part of the defendant—Warren H. Rinn, Joseph Dobeck, Levi H. Harrison, Henry Herberman, Thomas J. Walsh and George R. Allen were sworn and testified. One Bill of Lading, One Order and one law of 1901 State of New York were offered and received in evidence.

Whereupon it is on this sixteenth day of September, A. D. 1915, by this Court considered and
40 adjudged that the title to the goods and chattels

in question as in said Writ of Replevin set forth, namely 158 pcs. no. 2 cedar plank 1126′. 247 pcs. no. 1 cedar plank 2582′. 13 pcs. no. 2 6/4 Boat Boards 376′. and 239 pcs. no. 1 4/4 Boat Boards 2782′, are in KELLS MILL AND LUMBER Co., Inc., plaintiff, that the said plaintiff is entitled to the possession of the said goods and chattels and the possession thereof is hereby awarded to said plaintiff. 10

And it is further adjudged that said KELLS MILL AND LUMBER Co., Inc., plaintiff, recover of said PENNSYLVANIA RAILROAD COMPANY, defendant, the sum of Eighty dollars, damages for the unlawful detention of the said goods and chattels, and the sum of Fifteen dollars and fifty cents, costs.

September 25, 1915, Notice of appeal filed by defendant. 20

September 28, 1915, Appeal Bond filed by defendant.

I, JAMES N. BRADEN, Clerk of the First District court of Jersey City, CHARLES L. CARRICK, Esq., Judge, do hereby certify that the foregoing is a true copy of the Writ of Replevin and return thereto, State of Demand, Claim of Defendant and transcript of a judgment of said Court.

30

IN WITNESS WHEREOF, I do hereby set my hand as Clerk of the said Court and affix the seal of the said Court this twenty-eighth day of September, nineteen hundred and fifteen.

JAMES N. BRADEN,
Clerk.

(Seal)

40

(Filed September 27-1915)

FIRST DISTRICT COURT OF JERSEY CITY.

KELLS MILL AND LUMBER CO.,
Plaintiff,

10

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

In Replevin.

MINUTES OF TRIAL of the above-entitled action before the Honorable Charles L. Carrick, Judge of the First District of the City of Jersey City, in the Court Room in the City Hall, corner of Grove and Montgomery Streets, in said City, on Thursday, September 16th, 1915.

20

APPEARANCES:

MAXIMILIAN T. ROSENBERG, ESQ., Attorney for the Plaintiff.

VREDENBURGH, WALL & CAREY, by JOHN H. PATTERSON, ESQ., Attorneys for the Defendant.

30

CHARLES YOUNG, the stenographer selected by the Court, was duly sworn to faithfully and truly take the testimony offered and to correctly transcribe the same according to the best of his skill and ability.

CHARLES D. KELLS, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

40

Direct Examination by Mr. Rosenberg:

Q. You are the president of the Kells Mills & Lumber Company? A. I am the secretary and treasurer.

Q. Who is the president? A. Mr. Louis E. Reid.

Q. Your company is engaged in the lumber business in Brooklyn, New York, in the City of New York, and Borough of Brooklyn? A. Yes, sir. 10

Q. Is your corporation incorporated under the laws of the State of New York? A. Yes, sir.

Q. You purchased a boat load of lumber, did you not, from the Roper Lumber Company of Norfolk, Va., some time in the month of July? A. Yes, sir.

Q. And that lumber was transported to you at Greenpoint in Brooklyn, over the line of the New York, Philadelphia and Norfolk Railroad as well as the Pennsylvania Railroad? A. Yes, sir. 20

Q. Do you remember when that particular boat load of lumber arrived? A. It arrived at our office on July 29th, at 1:30 P. M.

Q. How near is your office to the dock? A. About six hundred feet away.

Q. Did you go down the dock to see if that lumber was there? A. I did.

Q. What kind of a boat was it on? A. A canal boat. 30

Q. Was the lumber on it? A. It was.

Q. What time did it arrive? A. One-thirty P. M., July 29th.

Q. That was on July 29th? A. Yes, sir, Thursday, July 29th.

Q. What was the condition of the dock at the time the lumber arrived? A. We were too busy to receive it.

Q. When did you begin to unload it? A. I or- 40

dered our foreman on Friday, July 30th, in the evening, to have his trucks and men on the dock on Saturday morning, July 31st.

Q. Do you know whether they were there? A. They were there.

Q. How many trucks and men did you have there to unload? A. We used two-wheeled trucks to unload this lumber from the boat; we had two horses and three of our men, and there were probably a half a dozen of these two-wheeled trucks.

Q. Whose duty is it to take the lumber from off the boat to the dock? A. The captain's duty.

Mr. Patterson: I object to the question and to the answer unless this man has properly qualified.

Q. How long have you been in the lumber business? A. All my life.

Q. How long have you been in business in Brooklyn? A. Forty-two years.

Q. Are you familiar with the methods of handling lumber? A. I am.

Q. When lumber is lightered, how is it to be delivered? A. It is to be delivered on the dock alongside the vessel.

Q. After you had your trucks and your horses there on the morning of Saturday, July 31st, what happened with reference to the unloading of that lumber? A. Our foreman came to the office and said the captain had not made any move to take off the lumber, saying that he could not move his lighter to the dock on account of another boat being in the way. I went down to the dock, and lifted his ropes, and he pulled the boat ahead, and started to work it, and another man started to handle the lumber to the stringpiece, and our men took it from the stringpiece and put it on the trucks.

Q. How many men were working on the boat? A. Two men were working on the boat, the captain of the lighter and his assistant.

Q. How long did the assistant continue to work on that occasion? A. Fifteen minutes.

Q. What happened after that? A. I understood from the captain that he had discharged the man. 10

Q. At the end of fifteen minutes, how many men were working on the boat? A. Only one man was working, that was the captain of the lighter.

Q. How fast did he take off that lumber? A. It was very slow. It took three times the length of time it would have taken two men to handle it. I told him the lumber was coming too slowly, and that he should have another man, but he would not give me any reply.

Q. You did have an interview with him later, about eleven thirty, with reference to that other man? A. Yes, he said he had discharged him. 20

Q. And he went on alone taking off that lumber? A. He did.

Q. What is the practice over there with reference to unloading lumber; what is the regular number of men they use for that? A. Two or more men at all times.

Q. Do you know of any particular case where that practice has been broken? A. No, this is the only case that I have ever been called upon to answer a question of that kind. 30

Q. What happened during that morning up to the time— A. The captain sent word to the office about eleven thirty o'clock that he could work until one thirty, and he would then have to stop unless we paid ten dollars demurrage. I immediately went down to the dock, and told him to load the lumber on the dock, and we would take it away on our trucks. He said he would not have 40

sufficient space on the dock, and I told him to go to Logan's dock, which is the next dock to ours, where he would have plenty of room to unload. He said he would go there, but that if by one thirty, the lumber was not all off, we would have to pay ten dollars' demurrage before he would go any further, and that he would not go to work until one o'clock.

10

Q. What happened after that? A. He came up to the office about half past one, and said he did not have all the lumber off, and that he would not take any more off until we gave him ten dollars' demurrage. He refused to take off any more lumber.

Q. And he went off with this lumber which you have replevied? A. Yes, after it remained there for a number of days, he went away taking the lumber to Jersey City.

20

Q. Was that the lumber of the lighter? A. Yes, about seven thousand feet on the lighter.

Q. You know there were seven thousand feet of lumber still left on the lighter? A. Yes, sir.

Q. What kind of lumber was it? A. White Cedar, very light lumber.

Q. How long would it have taken to have gotten that lumber off? A. We had an experience of that kind just only two days before, with the same kind of lumber, and that was taken off in three hours by two men.

30

Q. If he had two men working on that morning, and working there ordinarily, how long would it have taken him to get that lumber off? A. Three hours would have been enough, but in four, it could have been done nicely.

Q. That is to say, if he had started at half past seven to unload, he could have had that lumber off by half past eleven? A. He could.

40

Cross Examination by Mr. Patterson:

Q. What was the actual time, Mr. Kells, when they started to unload that Saturday morning? A. Half past nine.

Q. This Logan's dock that you speak of, what kind of a dock is that? A. A dock about two hundred feet on the water, and there is nothing on it, it is a vacant dock. 10

Q. Do they charge for unloading there? A. They charge wharfage to the vessel while she is there.

Q. How much? A. I believe fifty cents every twenty-four hours.

Q. So that there is a charge made? A. I understand there is.

Q. What do you call that, dock wharfage? A. Wharfage is the only name I have ever known it by. 20

Q. You saw this boat this morning, the whole time it was there? A. I did.

Q. Did you see it that Saturday morning, when they were taking the lumber out and putting it on the dock? A. I did.

Q. Will you tell us what the position of that boat was with respect to the other boats there? A. It lay at the stern of a steamship lighter.

Q. Do you know the name of that boat? A. No.

Q. A large sea-going vessel? A. No, a harbor 30 barge which takes cargo from sea-going vessels, and delivers it to the dock.

Q. And was there another boat there? A. There was around at the slip there at that point.

Q. Do you know what that boat was? A. No.

Q. Was there any room on this dock? A. There was.

Q. How was that lumber piled? A. The way lumber is usually piled.

Q. How large a space on Leary's dock did it 40

occupy? A. The dock is a very large dock; I could not tell you that.

Q. Was there a pile right at the corner of the dock and the slip? A. Yes.

Q. Was there a space between that pile and another pile? A. There was, where the men were working.

10 Q. How large was that space? A. About ten feet.

Q. It might have been a little less? A. I didn't measure it, but we had room enough to pass our trucks down there, and for them to pass the lumber to our trucks at that point.

Q. On the other side of that, that is from the first point that you mentioned, over that space of ten feet about, as you say, there was another lumber pile? A. Yes.

20 Q. Outstretched how far? A. Quite a distance.

Q. Where was the stern of this boat; do you know the name of this boat? A. The Breed and Creston.

Q. That was the Pennsylvania Railroad boat? A. Yes, sir.

Q. You say the stern of the Breed and Creston was up against this other lighter? A. I don't know whether it was the stern or the bow, but one end was up against it.

30 Q. Was that close up against the dock? A. They were both lying alongside the dock.

Q. I asked you the part of the boat where there was any space between the dock and the boat, was where it was closed up? A. Closed up.

Q. Where was the other end of the Breed and Creston? A. Lying out over the slip.

Q. How far did it stretch out over the slip? A. The stern of the boat was almost up to the Logan dock.

40 Q. One end was up against the Leary dock and

the other end was up to the Logan dock? A. Not all the way, but pretty nearly.

Q. How was this lumber unloaded? A. The man lifted it to the captain, and the captain was passing it to the man on the dock.

Q. They went to work about nine o'clock? A. Half past nine; they could have worked at seven if your man had any ambition in him. 10

Mr. Patterson: I will ask that the latter part of that answer be stricken out.

It is so ordered.

Q. For how long a period after nine thirty did they work? A. He sent word to the office at ten minutes to twelve and told me that he did not have room to put this lumber on the dock, and I told him to go to this other dock.

Q. How many feet, if you know, was there from this boat? A. About 14,000 feet of cedar. 20

Q. They had taken off about half of it up to twelve o'clock? A. Yes, sir.

Q. Then the captain notified you about twelve o'clock? A. About ten minutes of twelve I went down myself, and they loading the trucks at the time, and he said he would have to have demurrage at half past one, or he would not go any further. I told him to put the lumber on the dock, and he said he did not have sufficient room, and I told him to go to the Logan dock, and land it there. 30

Q. Did you make any arrangement to have the lumber unloaded at the Logan dock? A. I did.

Q. With whom? A. With Mr. Slutter, the manager of the dock.

Q. Did you agree to pay the charge they exacted for unloading the boat at the Logan dock? A. I did.

Q. At what time did you do that? A. At twelve o'clock. 40

Q. Was any lumber unloaded at the Logan dock? A. There was.

Q. From what time to what time did they unload at the Logan dock? A. The captain was over at the dock about ten minutes after twelve, but refused to go to work until one o'clock, and back at our office at one forty-five, and said he would
10 not go any further.

Q. Between what hours on Saturday morning, did he unload the lumber on the Logan dock? A. Between one and one-thirty-five P. M.

Q. That is when he quit finally? A. Yes.

Q. Do you recall how much he's unloaded there? A. I haven't got the figures.

Q. I show you a paper, and ask you what that paper is? A. Bill for freight charges on car load of lumber.

20 Q. What is on the back?

Mr. Rosenberg: Does not the paper speak for itself.

Mr. Patterson: I am asking him to identify it if he knows.

Mr. Rosenberg: You can read, can't you. Never mind, answer the question. I object to the question as the paper speaks for itself.

Q. I asked you if you recognize the paper? A.
30 I do.

Q. I ask you if there is any writing on the back of the paper that you recognize? A. There is; that is our bookkeeper's writing to the effect—

Mr. Rosenbeerg: Never mind the effect.

Q. The signature at the bottom of that writing is made by whom? A. The bookkeeper.

Q. Was he the person whose duty it was for your company to order the lumber? A. It is her
40 duty.

Q. That is a proper order for the delivery of the lumber?

Mr. Rosenberg: I object as to whether it is a proper order.

Mr. Patterson: It is signed by the company.

By the Court: Suppose you use the word "authorize." 10

Mr. Patterson: I ask to have the paper marked for identification.

Paper marked "D1" for identification.

Q. I show you a paper, and ask you what that is? A. Bill of lading from the shipper of the lumber.

Q. Covering the lumber involved in this suit? A. I will have to read it to find that out. (Witness reads paper) Yes. 20

Mr. Patterson: I will ask to have that marked for identification.

Paper marked "D2" for identification.

Redirect Exmination by Mr. Rosenberg:

Q. At the time the lumber was unloaded at your dock, how much space did he have? A. About ten feet.

Q. Was that sufficient? A. It was.

Q. How long did he continue there? A. He worked there about three and one-half hours. 30

Q. Taking off the lumber during all that time? A. Yes, and he made no complaint about it whatever.

Q. Did you have your wagons there? A. We did.

Q. Were you taking away the lumber as fast as it was coming off of the boat? A. It was not coming off fast enough.

Q. Was there any space to put the lumber on 40

the dock? A. There was space there at all times for him to put the lumber on the dock.

Q. Have you had any trouble with this man before?

Mr. Patterson: I object to the question. I don't think that is at all material.

Mr. Rosenberg: I expect to show that this has been a regular scheme; I don't blame the Pennsylvania Railroad, except that the Pennsylvania has been having some pretty rotten men, and there has been a regular scheme on the part of these people to delay the delivery of the goods for the purpose of making demurrage charges against consignees.

The Court: I don't think it is material to this particular case. I will rule it out.

William J. McCarthy, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Rosenberg:

Q. Where do you live? A. 1-33 Meeker Avenue, Brooklyn, N. Y.

Q. What is your business? A. Lumber handler.

Q. Are you employed by the Kells Mill & Lumber Company? A. Yes, sir.

Q. In Brooklyn? A. Yes, sir.

Q. Were you working for them on the 31st day of July of this year? A. I was.

Q. Do you remember a car load of lumber which came up in a Pennsylvania lighter about the 29th of July? A. I do.

Q. On the lighter Breed and Creston? A. Yes, sir.

Q. Do you remember when that came up to the dock? A. I could not tell you when it came, but I was told about it on the night of the 29th.

Q. Do you know when they began to unload? A. Yes, sir.

Q. When? A. About half past nine on Saturday morning.

Q. Was there any reason why they should not have started earlier than half past nine? 10

Mr. Patterson: I object to the question. It is incompetent, immaterial and irrelevant.

Q. Do you know the condition of the dock? A. I was down there at seven o'clock when the trucks backed onto the dock.

Q. Did the Kells Mill & Lumber Company have their wagons and horses there at half past seven o'clock that morning? A. Yes, sir.

Q. To unload that lumber? A. Yes, sir. 20

Q. Was there any room for the lighter to come up to the dock to unload? A. Yes, sir.

Q. Was there any reason why they could not have started to unload at half past seven, so far as you could see?

Mr. Patterson: That calls for a conclusion.

The Court: I will admit it.

A. They could have started at half past seven just as good as they did at half past nine. 30

Q. When he started at half past nine, how many men did he start with? A. Himself and another man.

Q. How long did he have the other man? A. About fifteen or twenty minutes.

Q. After that, what happened? A. The captain passed the lumber to the man.

Q. Was anybody else working with him? A. No, sir. 40

Q. Did you have the trucks there to take the lumber away? A. Yes, sir.

Q. How fast did you take it off? A. It was kind of slow work.

Q. Did they take it off as fast as they put it on the dock? A. We could take it as fast as he could get it to us.

10 Q. The wagons were taking it off as fast as they were putting it on the dock? A. Yes, sir.

Q. Was there any reason why two men could not have worked there? A. No, they could have worked.

Q. Were there any other men around at that time who were regular lumber handlers? A. There are always a lot of them around.

Mr. Patterson: I object to the question.

Objection overruled.

20 Q. There are men there looking for that kind of work? A. The men there are always ready for a job.

Q. How long after that did he work alone? A. Until half past eleven.

Q. Were you there at half past eleven? A. Yes, sir.

Q. What happened at half past eleven? A. He pulled over to the other dock.

Q. Did he say anything to you about it? A. 30 No.

Q. He just went and pulled over to the other dock? A. Yes, he unloaded about eight hundred or a thousand feet of lumber himself by shifting it from the boat onto the dock. We went down there about one o'clock with a truck, and he gave us one load and refused to give us any more.

Q. How much lumber had he taken off there that time? A. I should judge about eight hundred or a thousand feet; it might have been a little 40 more.

Q. I mean during the whole morning. A. About half the car; about seven or eight thousand feet, I should judge.

Q. Are you familiar with handling lumber? A. Yes, sir.

Q. You have been handling lumber for how many years? A. About thirty-five years.

Q. What kind of lumber was this? A. White cedar. 10

Q. Heavy or light? A. Very light lumber.

Q. Are you familiar with the length of time to take lumber off a boat? A. Yes, sir.

Q. That boat had on it how many feet of lumber? A. Fourteen thousand feet, I guess.

Q. What is the practice there as to the number of men who are supposed to unload a boat? A. Generally two men on the boat, and two men on the dock. 20

Q. With two men on the boat, how long would it take two men to unload 14,000 feet? A. Three or four hours.

Q. No longer than that? A. No.

Q. So that in your experience, 14,000 feet could have been unloaded in three or four hours? A. Yes, sir.

Q. How much space did he have there? A. About ten or twelve feet.

Q. Was that room enough? A. That was room enough to back the trucks in. 30

Q. And you were taking it off the vessel as fast as he was putting it on the dock? A. Yes, sir.

Cross Examination by Mr. Patterson:

Q. You spoke of unloading this lumber in three or four hours with two men, that was the usual time? A. Yes.

Q. Under what conditions, the same as prevailed at this time? A. Under any conditions. If 40

you could pass the lumber out fast enough, we could take it away just as fast as it was passed out.

Q. No matter whether the boat is fastened or not? A. Yes.

Q. Or whether you had to pass it over three or four lighters? A. No.

10 Q. I am asking you under what conditions you could unload it in three or four hours? A. Any-time the boat is up against the dock, two men to pass the lumber to two other men, they ought to unload it in three or four hours.

Q. You mean up against the dock in front of the pile they were making with the lumber? A. Yes, sir.

Q. Was this boat up against the dock? A. Yes.

20 Q. How much of it was up against the dock? A. I should judge about twenty feet.

Q. Twenty feet was up against the dock, is that true? A. Yes, sir.

Q. One end of the boat? A. Yes.

Q. And about twenty feet of that end was up against the dock? A. Yes.

Q. Where was the rest of the boat? A. Sticking out from the dock across the slip.

Q. It went pretty nearly over to the other side to
30 the other dock? A. Yes.

Q. You watched them, did you, unload this boat? A. I was helping to unload it.

Q. Where were you standing? A. Down on the stern.

Q. Just how did the men pass the lumber from the boat to the dock? A. The captain passed it to me, and I passed it to the third man.

Q. Where did they get the lumber from? A. The other side of the cabin.

40 Q. Was there a cabin on this boat? A. Yes, sir.

Q. Where was the cabin located with respect to the dock, the end of the boat near the dock? A. Right where the hole was.

Q. In unloading the lumber that was unloaded at Leary's dock, was it necessary to pass any of the lumber or all of it over the top of the cabin? A. Yes. 10

Q. Did he pass it all over? A. Not all of it, because the boat was shifted every once in a while.

Q. With the exception of the pile that was unloaded at Logan's dock, all that was unloaded at Leary's dock was unloaded over the top of the cabin? A. Yes, sir.

Redirect Examination by Mr. Rosenberg:

Q. Even taking into consideration that part of that lumber had to be unloaded over the cabin, 20 was there any reason why it could not have been unloaded in four hours? A. We could have had it off in four hours, in five anyway; it was rather slow work.

Nicholas A. Hoffman, a witness called on beahlf of the plaintiff, having been first duly sworn, testified as follows: 30

Direct Examination by Mr. Rosenberg:

Q. What is your business? A. Lumber inspector.

Q. By whom are you employed? A. Leary & Company.

Q. They have the next dock to the Kells Mill & Lumber Company? A. Yes, sir.

By the Court:

Q. The witness has referred to the Logan's 40

dock, Leary's dock, and Kell's dock; is there a Kell's dock? A. There is no Kell's dock. It is next to the Kell's plant.

By Mr. Rosenberg:

Q. Then I mean the Leary dock; what is the name of the dock they were to take it over? A. 10 Logan's dock.

Q. You are a lumber inspector at Leary's dock? A. Yes, sir.

Q. And by whom are you employed? A. Leary & Company.

Q. Do you remember this cargo of lumber that came on the Breed & Creston? A. Yes, sir.

Q. Do you remember when it came to the dock? A. I don't remember the day, but I remember the time.

20 Q. Do you remember the day of the week? A. Yes, sir.

Q. When was it? A. On Saturday; I could not just say; they were working on a Saturday.

Q. You don't remember when it came? A. No, sir.

Q. You remember the circumstances of that lumber being there, and being unloaded on Saturday morning? A. Yes, sir.

Q. What were you doing with reference to it? 30 A. I was working on another barge at the same dock.

Q. When was your attention first directed to it? A. I seen them unload it.

Q. When did they begin to unload? A. Somewhere around nine o'clock, I imagine.

Q. How many men were unloading? A. There were a few of them there; I should say four men.

Q. Four men altogether. A. Yes, sir.

Q. How many men were unloading on the 40 lighter? A. I think it was two men on the lighter.

Q. How long were the two men on the lighter? A. I think there were two men there all day long.

Q. How long was the other man there? A. There were two men there in the morning, two strange men, the first thing in the morning.

Q. Did you watch it pretty closely? A. No, sir, I didn't watch it very closely.

Q. Do you know of your own knowledge how many men were working there? A. No, I saw a crowd of men there, that is all. 10

Q. Did you see what space the Breed and Creston had at that point? A. Yes, sir.

Q. How much space did it have? A. Ten or twelve feet.

Q. Did it have room eenough to unload the lumber there? A. In the manner they were handling it, yes, sir.

Q. Did you see the men taking the lumber away as it was taken off the boat? A. Yes, sir. 20

Q. How fast were they taking it away? A. As fast as they could receive it.

Q. Did you notice that? A. Yes, sir.

Q. How long have you been in the lumber business? A. Sixteen years.

Q. Did you notice what kind of lumber this was? A. It was cedar.

Q. Do you know how long it ought to take a car load to be unloaded; you have been in charge of unloading boats there? A. Yes, every day. 30

Q. How long ought it to take two men to unload 14,000 feet of this kind of lumber? A. Three or four hours.

Q. Not any more than that? A. No, sir.

Q. Considering the space that they had there, and the conditions under which they were working—You saw it all, did you? A. Yes, sir.

Q. How long should it have taken them to get out the 14,000 feet? A. Three or four hours. 40

Q. That is the length of time it should have taken them with two men on the lighter, taking the lumber off the boat, and the other men on the dock taking it away? A. Yes, sir.

Cross Examination by Mr. Patterson:

Q. Did your observation enable you to de-
10 termine how the lumber was situated on the pier? A. Yes, sir, I could see from where I was.

Q. Did you take that fact into consideration when you said it would take two men on the boat, three or four hours to unload? A. Yes, sir.

Q. Whereabouts on the barge, was the lumber? A. The first bench right behind the cabin. There may have been some in the second bench. It was all right together in one bulk, the length of the boat behind the cabin.

20 Q. How much space was there there? A. On the dock?

Q. No, the end of the cabin where you say this lumber was? A. About twenty feet.

Q. Do you know what was on the rest of the boat? A. No.

Q. This barge that you say you were working on, do you recall what the name of it was? A. Transportation Company, I think it was the Beauford.

30 Q. Was it not the Tangier? A. It may have been the Tangier.

Q. Where was that located with respect to Leary's dock? A. In the slip.

Q Did any part of the overhang extend beyond the slip? A. No, sir.

Q. How was the end of this boat with reference to the end of the pier and the dock itself? A. Just about flush.

Q. Was there any other barge there at the time?
40 A. There were other barges up at the bulkhead further over.

Q. The other side of the dock was pretty well occupied with other barges? A. Part of it was.

Q. Was there a barge there named Scherelo Brothers? A. Yes, sir.

William C. Reid, a witness called on behalf of the Plaintiff, having been first duly sworn, testified as follows: 10

Direct Examination by Mr. Rosenberg:

Q. You are the president of the Kells Mill & Lumber Company? A. I am.

Q. Where do you live? A. Jamaica, Long Island.

Q. Do you remember this particular boat-load of lumber coming on the Breed and Creston? A. Yes, sir. 20

Q. Tell us what you remember about it? A. I know they began to work about nine or nine-thirty on Saturday morning, July 31st, and Mr. Kells told me that he thought he would have trouble about it.

Mr. Patterson: I object to the conversation with Mr. Kells.

Q. Tell us what you know of your own knowledge. A. Mr. Kells mentioned the matter which called my attention to it, and I took a walk down to the boat to see what was happening about nine-thirty or ten o'clock. 30

Q. What did you see when you got there? A. The boat was working, discharging the lumber.

Q. How many men were working. A. Kells had two horses and a number of small trucks, and they were backing them in one at a time, and were removing the lumber as fast as it was coming off 40

the boat. There were two men on the lighter, the captain and one of Kells' men, he was standing on the end of the lighter helping to pass the lumber ashore.

Q. How many men were working on the lighter? A. One I think.

Q. Do you know whether or not he was the
10 lighter captain? A. He was, because I saw him afterwards, and he said he was. I did nothing then, but at one-thirty, Mr. Kells asked me to go up and ——

Q. Before one-thirty, did you see the lumber again? A. I don't think so, but at one-thirty, Mr. Kells asked me to come up to his office, and a runner representing the Railroad Company, was there. He is the man who collects the freight. He demanded ten dollars from Kells, and made the
20 same demand of me, and said they would not discharge the rest of the lumber before the demurrage was paid. I told them that we disputed the payment of the demurrage, that we did not consider any demurrage was due, as they could have delivered the lumber before one-thirty. I told him to put the lumber on the Logan dock, which was a public dock, and that after that was done, we would take up the question of demurrage. He refused to deliver any more lumber until the mon-
30 ey was paid. I told him we would have to take issue on this point as we have had a whole lot of trouble along this same line.

Q. Never mind that. When you were down there, they were unloading at the Leary dock? A. Yes.

Q. How much space did they have in which to unload? A. There was a clear space of ten or twelve feet.

Q. Were the trucks taking the lumber away as
40 fast as it was being unloaded? A. Yes, sir.

Q. How long have you been in the lumber business? A. About twenty-five years.

Q. And have been in charge of receiving lumber, unloading it, and things of that kind? A. A. Yes, sir, almost everything connected with lumber.

Q. What sort of lumber was this? A. White cedar. 10

Q. Was it heavy lumber? A. It was very light and very dry.

Q. How many men is it the practice to use on lighters? A. On lighters of that kind, two men are always used where the work is done by hand.

Q. In that particular case, assuming that there were two men working on the lighter unloading the lumber, passing it to the men on the shore,— How many feet of lumber did you say were on the lighter. A. 14,000 feet. 20

Q. How long would it take them to unload 14,000 feet? A. Three or four hours.

Q. Your office is right near that dock? A. Yes, right up the end of the yard.

Q. Do you know whether there are enough men that can be hired? A. There are always a number of men there looking for work.

Q. Were there on that day? A. Yes, I saw two or three sitting around there.

Q. What is the usual cost for hiring these men? A. Twenty cents an hour, from twenty to forty cents an hour, depending on the men. 30

Cross Examination by Mr. Patterson:

Q. When the runner and captain on Saturday, about noon time, demanded of you demurrage, you actually refused to pay it before the lumber was taken off the boat? A. I denied that any was due them, and I said that if any was due, we would leave the lumber in their possession until the demurrage was paid. 40

Q. You did actually refuse to pay the demurrage until the lumber was taken off the boat? A. I did refuse to pay it until the lumber was on the dock.

Q. At the time you were down on Leary's dock where this ten or twelve feet of space was, how many loaders of Kells' were there loading from
10 the dock into the wagons? A. There was two horses and probably half a dozen of these small two-wheeled trucks.

Q. How many loaders were there? A. You mean men-

Q. Yes. A. There were three men on the dock, three of Kells' men.

Q. Are you sure? A. I am positive. I know that two drivers were there, and another man.

Q. Is it customary for drivers to load the lum-
20 ber on their trucks? A. If they are there, they help with the work.

Q. When you said it would take three or four hours to unload this barge, did you take into consideration all the circumstances of this particular occasion? A. I did.

Q. Did you see them unload the barge over the top of the cabin? A. Yes, that is at the extreme end of the boat.

Q. This was the end that was nearest the dock?
30 A. Yes, the lumber did not actually come over the cabin, but across the corner of the cabin.

Q. It went over the top of the cabin? A. Yes, but the cabin was not any obstruction. The men could stand on the corner of the cabin and pass it over.

Redirect Examination by Mr. Rosenberg:

Q. By reason of this refusal to deliver this lumber, did the Kells Mill & Lumber Company have
40 any additional expenses? A. We eventually

trucked the lumber from Jersey City to our yards, and in addition to that, we had intended a portion of this order for the lighthouse department, and we were delayed in getting this lumber. The lighter lay at the dock for ten days, and then it was taken to Jersey City, which meant a delay of a few more days, which resulted in a loss on that particular order. 10

Q. I show you this ——

Mr. Patterson: I object to counsel showing the witness the paper in his hand.

Q. Can you tell me exactly what that loss was? A. I could tell you from that.

Q. Is this the way you made it out? A. I made up a memorandum with Mr. Kells as follows: ——

Recross Examination by Mr. Patterson: 20

Q. Did you actually make that yourself? A. I didn't typewrite it, but I made up the figures. Q. You mean you made up some other memorandum that you gave to the stenographer? A. No, I gave it verbally to the stenographer.

Redirect Examination by Mr. Rosenberg:

Q. Is that a correct statement of what you gave to the stenographer?

By the Court: 30

Q. Can you tell us without referring to that statement what your damages were? A. We figured the damage at about $120.00.

Q. That consisted of what? A. The cost of trucking the lumber from Jersey City, we had two trucks with extra men, which cost us twenty-two dollars.

Q. What was your loss by the substitution of stock on the other order? A. We estimated that at about $80.00. 40

Q. How many feet of lumber was that? A. 7,000 feet.

Charles D. Kells recalled for further examination.

10

Direct Examination by Mr. Rosenberg:

Q. Mr. Kells, do you remember the loss you had by reason of this lumber? A. Yes, we had an order with the lighthouse department at Tompkinsville, and this lumber was to have been supplied to that order, and we had to substitute other lumber for it.

Q. How many feet of lumber did you have to substitute? A. Close on to 3,000.

20 Q. 2780 feet was it not? A. Yes.

Q. How much difference a foot? A. About two cents a foot.

Q. That would make about fifty-five dollars. A. Yes, sir.

Q. Then you had to get this lumber from Jersey City? A. Yes.

Q. And it cost you for trucking and handling the lumber from Jersey City to Brooklyn, how much? A. I have not the figures before me, but

30 it took two trucks thirteen hours one day, and then part of it had to be brought over the next day.

Q. What did the trucks cost you each day? A. About ten dollars a day.

Q. So that using two trucks, it would cost you twenty dollars each day? A. Yes, sir.

Q. So that altogether, you have a loss of about eighty or ninety dollars? A. About eighty-five dollars.

40

Cross Examination by Mr. Patterson:

Q. How many feet did you put on a truck? A. About a thousand to twelve hundred feet.

Q. Is that a single or double truck? A. Single.

Q. And you think that ten dollars is a proper charge for a single truck for a day? A. We were rendered a bill for that amount. Eight or nine hours is the usual day's work, but this truck was used for thirteen hours that day. 10

Q. Is that a single truck? A. A double truck. Which trucks are you talking about; do you mean the trucks that carry the lumber from the dock or which carry the lumber from Jersey City to Greenpoint?

Q. From Jersey City to Greenpoint? A. They were double trucks which carried about three thousand feet each.

Q. What lumber was used on this Staten Island 20 yard? A. One-inch lumber that was taken over to Jersey City, we expected to use, but we used other stock that we had on hand. That was not there on time, and we had to pay a penalty as it was, for being behind in delivery.

Q. Where did you get the material that you did use? A. We substituted other lumber that was longer stock.

Q. Can you say positively that this lumber that was on the boat had been actually accepted by the 30 lighthouse department? A. Yes, I said that before. That lumber was supposed to be for that order.

Q. Is it not true that even if material is supplied for the government, that they frequently refuse it?

Mr. Rosenberg: I object to that as to whether they frequently refuse it.

Objection Overruled.

40

A. We have no experience in that line.

Q. You never had any lumber rejected by the government? A. Not that I can remember, not on cedar; we have had other classes of lumber refused, but not cedar.

Q. Was this 7,000 feet actually used on a government job. A. 2,800 feet.

10 Q. 7,000 feet was actually delivered on the government job? A. Yes, sir.

Q. Do you know anything about the length of this lumber? A. I am talking now about the lumber that was delivered from Jersey City. It was a short pank plank. 2,000 feet of short pank plank.

Q. Give us the dimensions of that lumber? A. 1½, 2 and 3 inch pank plank in short lengths from four to eight feet long.

20 Q. Was that the part that was unloaded on Saturday morning? A. Some of that was unloaded on Saturday morning.

Q. The part that was brought to Jersey City, what kind of lumber was that? A. About two thousand feet of inch and one-half to three inch, and were twelve, fourteen and sixteen feet in length.

Q. That was longer? A. Yes.

30 Q. But some of the short lumber went to Jersey City, too? A. Yes, sir, about two thousand feet of it.

Q. Why was it that you needed two extra men on these trucks that carried the lumber from Jersey City to Greenpoint? A. The man called up in the morning and said that he could not handle it alone, as it had to be carried a hundred feet from where the lumber was, and we called up Vanderbeek to get some men from them to help with the work.

40 Q. How many men did you have? A. Four.

Examination by Mr. Rosenberg:

Q. That was because the lumber had to be carried such a distance from where it was? A. Yes.

Q. After they brought it to Jersey City? A. Yes, sir.

Q. They had landed it from the lighter in some point in Jersey City which was a hundred feet from where you could get it to the trucks? A. That was the way the man gave it to us on the wire. 10

Plaintiff Rests.

Warren H. Rinn, a witness on behalf of the defendant, having been first duly sworn, testified as follows: 20

Direct Examination by Mr. Patterson:

Q. Mr. Rinn, what is your business? A. Draftsman.

Q. For whom? A. Pennsylvania Railroad.

Q. Did you have occasion to go over to Greenpoint to Leary's dock to make some measurements there? A. Yes, sir.

Q. Was anybody with you at that time? A. One assistant. 30

Q. Was anybody else with you? A. The captain of the boat was there, the captain of the Breed and Creston.

Q. What is his name, is he here? A. Yes, sir, that is the man.

Q. Did you go over these docks and measure them? A. I did.

Q. Did you draw a plan? A. Yes, sir.

Q. Have you the plan with you? A. Yes, sir. 40

Q. Will you open it up?

Witness does as directed.

Q. The measurements that are on this map, did you measure them yourself? A. Yes, sir, I measured them on the ground.

Q. They are correct? A. Yes, sir.

10 Mr. Patterson: I offer the map in evidence

Cross Examination by Mr. Rosenberg:

Q. Whe ndid you go there? A. September 1st.

Q. Was the barge "tangier" there when you were there? A. No.

Q. How did you happen to put down the barge Tangier on the map when it was not there? A. I put it there, I took it from the captain's description.

20 Q. Then you put it down merely because the captain described it? A. Yes.

Q. What captain was that? A. The barge captain.

Q. The captain of the Breed and Preston? A. Yes, sir.

Q. Did he tell you how long the Tangier was? A. Yes.

Q. What size did he say? A. He said it was the length of the slip.

30 Q. And because he told you that you put it down on this map? A. Yes, sir.

Q. Was that pile of lumber on the dock when you were there? A. Yes, sir.

Q. Was that pile of lumber that you have marked here six by twelve there at the time? A. Yes, sir.

Q. Was the pile of lumber two by ten on the dock on September 1st? A. Yes, sir.

Q. Was the miscellaneous lumber there on the

40 first of September? A. Yes, sir.

Q. Was this pile of lumber there off on the left? A. No.

Q. How did you happen to put this pile of lumber down on the left of Logan's pier? A. He showed me the location of it, and the marks of the lumber were still there.

Q. Do you take the measurements, or have somebody else tell you, and you put down what is told to you? A. I put down the things that I see, and what I don't see and they tell me about, I put that down from what they say. 10

Q. How long have you been a draftsman for the Pennsylvania Railroad? A. Three years.

Q. How often have you made plans to be used in court? A. That is the first one I ever made.

Q. And you are willing to come here and tell us that that is a diagram of what was there on the first of September, when it merely shows what the captain told you? A. I made that from the captain's description. 20

Q. Who sent you over there? A. The chief, Mr. Collins.

Q. What is his position? A. Chief draftsman of the Pennsylvania Railroad.

Q. Did he tell you what to do? A. Yes, he told me to go over there and meet the captain, and make a drawing of the thing as it was, and get a description of it. 30

Q. You were to get a drawing as it was as of what time? A. Of that day.

Q. What day? A. September first.

Q. Was the barge Tangier there on that day? A. No, sir.

Q. You were not told to put that down? A. Yes, sir.

Q. Who told you to put it down? A. My boss told me to put it on, Mr. Collins.

Q. When did he tell you that? A. When I came back to the office. 40

Q. Did you tell him the Tangier was there? A. No.

Q. What did he tell you about the Tangier? A. He told me to put it in as I was told by the barge captain.

Q. What did he tell you about the lumber? Did he tell you to put down the lumber that was there
10 on that day? A. Yes.

Q. Did he tell you about the other lumber that was not there? A. He told me to put it on.

Q. This map merely shows the things as you think they were the thirty-first of July, and the rest is as you found it on September first? A. The plan of the ground is as of September first, and the other is what the captain told me.

Q. Did you measure that distance, 81-6? A. I walked around here.

20 Q. Did you measure the distance, 81-6 at this point where you have marked it; you didn't measure it at this point? A. I measured this point and this point too.

Q. How could you measure it at this point; that is across the water, is it not? A. Yes, sir.

Q. Did you get into a boat and measure it? A. I didn't go as far as that.

Q. Then you didn't measure this point? A. That is a constructive parallel.

30 Q. So that because it was your judgment that this was a constructive parallel, you marked it down as 81-6? A. Yes.

Q. How did you measure this, that was two hundred feet? A. I measured it from this point to this point.

Q. Did you measure on a line that shows two hundred feet? A. No.

Q. So that you assumed again that that was a parallel, because this line that you measured was
40 two hundred feet, you assumed that this other

line must be two hundred feet by the parallel? A. Yes.

Q. This lumber that is marked here six by twelve, you saw it there on the first of September? A. Yes, sir.

Q. You don't know whether it was there on any other time? A. No.

Q. And this lumber, two by ten, that you saw there on the first of September, you don't know whether that was there at any other time? A. No. 10

Q. How did you get this distance? A. That was the distance from the edge of the bulkhead.

Q. And this distance of 195 feet, did you actually measure that on a tape line? A. Yes, sir.

Q. Did you make any actual measurements of the barge Tangier? A. No, sir.

Q. And you don't know whether it is more or less than two hundred feet long? A. The barge captain told me the boat extended from this bulkhead four feet, and he said it extended over this end of the dock about four feet. 20

Mr. Patterson: I offer the plan in evidence.

Mr. Rosenberg: I object to the offer on the ground that it is very apparent that this man did not make these measurements from what he saw.

The Court: The plan will not be received in evidence. 30

Joseph Dobeck, a witness called upon behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. You were the captain of the lighter Breed and Preston? A. Canal boat Breed & Preston. 40

Q. Did you go to Leary's dock on Thursday, July 29th, with a carload of lumber on your barge? A. I didn't go direct to Leary's dock, I went to Logan's dock.

Q. What time did you report there on Thursday? A. One twenty or one thirty.

Q. Where were you when you reported? A. I
10 laid over there at Logan's dock when I reported.

Q. You were at Logan's dock; to whom did you report? A. Mr. Kells himself.

Q. What happened then? A. I asked Mr. Kells at what time he was going to start in to unload, and he said seven o'clock next morning. That was supposed to be Friday morning.

Q. What was the next thing you heard? A. About nine or nine thirty, Mr. Kells came down the dock.

20 Q. What day was this? A. That was on Friday, and he came down the dock, and he ordered me to pull over to the other dock, and I did so. He told me that he would have a berth for me in about an hour's time, and I laid there and I heard nothing until nine-thirty one of the drivers came down and said, "What are you going to do".

Mr. Rosenberg: I object to what the driver said.

30 Q. Never mind referring to what the driver said, but continue your story. A. I laid there all Friday, and nothing doing until Saturday morning, when I was still waiting there with nothing to do; half past seven, nothing doing, eight o'clock nothing doing, about a quarter to nine he came down and asked me to give him the stuff, and I told him that I had no way of delivering the stuff; that was the driver.

Q. What driver was that? A. The gentleman
40 over there, I don't know his name. He came down,

and I told him I could not get the boat alongside of the dock for the delivery of the lumber, as the line of the boat ahead was lying across it, and I couldn't get by; Mr. Kells came down about nine o'clock, and started to give me a little abuse, and I told him that that was no way to work at all, that I could not do anything as he would not move up, so Mr. Kells went over and told the captain 10 to move up his boat which he did, and that gave me a chance to get to work; that was about nine thirty on Saturday morning. I said to Mr. Kells, "What way do you intend to work this thing; you don't call this a berth for the first thing, and in another way, I can't carry the stuff across. Mr. Kells went over to the barge, and asked that gentleman would he pull up, and he pulled up about seven feet, and that gave me a chance to pull up with the stern of the boat, and I saw a chance to work 20 over the cabin, and his line was interfering with us all the time. His line was right across the cabin. I told Mr. Kells that it would be all right, and that we would start in with the work, but he said, "Never mind, I will tell you the truth; you are nothing but a lot of sons of bitches and robbers." I told him I would not take that off of him or anyone else. He said, "I don't mean it for you, I mean it for Mr. Herberman."

Q. What time was this? A. Between nine thirty and a quarter to twelve. 30

Q. Did you start to unload the lumber? A. Yes, I did the best I could until ten minutes to twelve.

Q. Do you recall what the circumstances were at that time? A. I do.

Q. Can you draw us a rough diagram of the dock, the slip, and how the boats were placed? A. yes.

(Witness draws diagram.) 40

Q. This diagram that you have drawn, what spot is that? A. That is Logan's dock.

Q. Where is Leary's dock? A. Over here.

Q. Where is the slip?

(Witness indicates.)

Q. Where is Scherelo Brothers? A. That is
10 marked "S. B."

Q. What is this marking? A. That is the Tangier.

Q. What was on the dock at that time? A. Six by twelve.

Q. What came next? A. Eight-foot space.

Q. What came after the eight foot space? A. Two by ten.

Q. What followed that? A. There were all kinds of mixed things.

20 Q. Was there any space between them? A..No.

Q. When you reported at one thirty on Thursday, to what office did you go? A. I came right here to Logan's dock, and came up here.

Q. You stayed there after you reported until when? A. Until Friday morning, and Mr. Kells came down the dock and ordered the boat pulled across the slip.

Q. Then what happened? A. I pulled over and I laid there all Friday.

30 Q. And the position you have marked, that is the position on the diagram that you assumed that you went over to Leary's dock? A. Yes.

Q. Will you mark that on the diagram some way? A. You can mark that "shift".

Q. How were you fastened up there to Leary's dock? A. From Logan's dock, I had a line right from Logan's dock onto the bow of the Preston.

Q. And that stretched about nine feet from that corner? A. Logan's dock into the middle of the
40 pier.

Q. How long is your boat? A. Ninety-seven feet long and seventeen feet wide.

Q. How much of your boat was up against Leary's dock? A. I should judge before we shifted that was on Friday, the line would give me about six feet; after I shifted, that gave me about twenty feet, after I made the second shift on Saturday morning. 10

Q. Was there any cabin on the Breed & Preston? A. Yes, sir.

Q. On what end was the cabin? A. The stern of the boat.

Q. The part that was up against Leary's dock? A. Yes.

Q. How big is that cabin? A. Eight feet or eight and a half feet.

Q. Square? A. Runs eight by fourteen.

Q. On the sides of the cabin, how much space have you between the cabin and the stringpiece of the boat? A. About a foot and a half. 20

Q. On each side? A. Yes, sir.

Q. What is the space from the rear of the cabin to the end of the boat? A. About 5½ or 6 feet.

Q. How high is this cabin? A. The cabin runs from the deck, about 2½ feet over the deck.

Q. How is the boat Breed & Preston constructed with regard to hatches? A. She has four holes in her, and three beams that bears her up.

Q. Where was the lumber on this shipment in that boat? A. The two stern hatches. 30

Q. How far is the first hatch in front of the cabin? From the part of the cabin near the bow to the first hatch? A. That runs right in.

Q. The first is right even? A. Yes, sir.

Q. How far is it to the second hatch? A. 17 feet.

Q. In unloading the boat on this Saturday morning, just how did you unload the lumber? A. We 40

took the short stuff right out of the stern hatch, and passed it over the house and passed it to the driver.

Q. This man McCarthy? A. Yes, I don't know his name; he passed it up to the truck.

Q. How many men were working on the boat at that time? A. There were two of us, I and the
10 mate.

Q. How long did your mate work? A. A half hour or so, then Mr. Kells came down and gave him a lot of abuse, and he would not stand for it, and he left the job. He said he would not take that abuse off any man, and quit the job.

Q. Did he come back at all? A. No, he told me he was through.

Q. What did you do? A. I had to pass the stuff to the man myself. I told him I would go
20 over and hire a man, and I went out and looked around for a man, and couldn't find any, and I went back on the job myself.

Q. What happened after that? A. I kept right on going until about ten minutes to twelve, some young boy came down, and I heard it was Mr. Kells' son, and he asked me what I was going to do. I told him that he had better notify him that he had only another hour to get the lumber off, otherwise there would be demurrage. At five
30 minutes to twelve, Mr. Kells came down himself, and I told him he had only a half hour to get the lumber off. He told me to pile it in that space, and I told him I would not pile it in that space because it was not wide enough. He started to tell me to put it in that space. He said, "You have the space." I said, "I won't put it in there." He said, "You have got all kinds of room, put it in that space." I said, I would not put it in that space because it was not wide enough. Mr. Kells
40 started to abuse me again, and I said. "Don't

give me any of your sass." I could not put it in the eight-foot space because it was too unhandy to work there.

Q. When you usually come to the dock to unload lumber from the barge, what sort of a space do you get to work in?

Mr. Rosenberg: I object to the question.

Objection sustained. Defendant's objection noted. 10

Q. Is this the usual sort of place that is furnished you for unloading a barge?

Mr. Rosenberg: I object to the question.

Objection sustained. Defendant's objection noted.

Q. What happened after twelve thirty? A. I shifted the boat over between twelve and twelve 20 thirty, pulled it over to Logan's dock, and at five minutes to one, I notified Mr. Kells.

Q. Did you begin to unload there? A. I tried to unload there, but was stopped by the watchman. He said he had no permission to let me put stuff there at all.

Q. What time was that? A. Five minutes to one.

Mr. Rosenberg: I object to what the watchman may have said. It does not appear 30 that he had any authority to bind the plaintiff.

Q. What happened after you were stopped? A. After I was stopped, I went up and notified Mr. Kells. I said, "What do you intend to do with the stuff?" He said, "I don't want to talk to you. Get out of here," and he put me out of his office. I told him I was stopped by the watchman, and I said you can notify the watchman to let me put 40

it there, and I will put it on the dock. Mr. Kells went out and informed the watchman, and I came back, and he told me it was all right to unload it there, and I worked until one thirty, and the time was up for demurrage, and I told Mr. Kells the time was up, and if he would not let me have the cash or check for ten dollars, I would stop 10 work. He said he would not pay any demurrage.

Q. How long did you stay there? A. Ten days after that.

Q. What happened to you then? A. There was nothing going on until one afternoon a driver came down with a slip of paper and he handed it to me, and my orders are not to have any words with him. My runner came along, and I gave him the paper, and that was the last I seen of the paper.

20 Q. What happened after the ten .days? A After the ten days, I laid there, and the first thing I knew a tow-boat came along, and I had orders to go with the tow-boat over to Jersey City.

Q. Did you come back to Jersey City? A. I went back to Jersey City .

Q. Now, Mr. Dobeck, when the stern of your boat was fastened up to Leary's dock, where was the bow? A. The bow was about nine feet away from Leary's dock, that is up against the end of 30 the slip.

Q. Was the slip closed? A. The slip was locked by my laying there.

Cross Examination by Mr. Rosenberg:

Q. You have told us about some man named Herbert? A. Herberman, that is the gentleman over there (indicating).

Q. This man standing next to Mr. Patterson, who is he? A. He is the manager of the Worten-40 dyke Lighterage Company.

Q. Where did the Wortendyke Lighterage Company hang out? A. Pier "K", Jersey City.

Q. They are not part of the Pennsylvania Railroad? A. I don't know.

Q. What does Mr. Herberman do as manager of the Wortendyke Lighterage Company? A. So far as I know, he manages the business.

Q. How long have you been working for him? A. On and off for six years. 10

Q. How often did you collect demurrage during that time? A. I have collected quite a lot of demurrage.

Q. How much of the demurrage do you get? A. A dollar.

Q. So that out of that day's demurrage, you get a dollar? A. Yes.

Q. You have collected quite a lot of demurrage? A. Yes, sir. 20

Q. You mean to say that you got there on Thursday? A. Yes, Thursday afternoon.

Q. Thursday afternoon, at half past one? A. Yes, sir.

Q. You said you went to see Mr. Kells the same day? A. Yes, that was my orders.

Q. You saw Mr. Kells himself? A. Yes, sir.

Q. On Saturday morning you were at Leary's dock? A. My line was leading from Logan's dock, and the boat was over at Leary's dock. 30

Q. Where was your boat laying? Indicate on the diagram? A. I first lay off Logan's dock, and then I moved over to the point marked "D.B." on Leary's dock.

Q. What is this thing you marked six by twelve? A. That is lumber that was piled onto the dock.

Q. Did you measure it? A. Yes, sir.

Q. When did you measure it? A. I didn't take any exact measurement, but I measured it as far as I could.

40

Q. You thought it was six by twelve? A. It was.

Q. Then you got a space marked "eight feet," did you measure that? A. As far as I measured it by rough guessing.

Q. You guessed it was eight feet? A. I went and measured it, and found it was eight feet.

10 Q. What did you measure it with? A. With a ruler.

Q. When? A. Saturday afternoon.

Q. A little while ago you said you didn't measure it? A. Not the lumber, but the space.

Q. How did you happen to measure it that Saturday afternoon? A. There was nothing to do, and I thought I might just as well keep busy.

Q. What led you to measure that space? A. Mr. Kells said he would not do anything with the

20 demurrage, and I went over to measure it to prove to myself what space the man wanted me to pile the lumber in.

Q. What did you measure it with? A. A two-foot rule.

Q. Why did you tell me a little while ago that you didn't measure it? A. I told you I didn't measure the lumber.

Q. Did you not say you guessed at it? A. I didn't guess the space, I guessed the lumber.

30 Q. When I showed you the eight-foot space, you said you guessed at it, did you not? A. Not the eight-foot space, but the lumber.

Q. Are you telling me the truth now? A. I am trying to tell you that I measured it with a two-foot rule.

Q. What boat was it that was ordered to be moved up seven feet? A. Scherelo Brothers.

Q. Who ordered it moved? A. Mr. Kelles had a talk with the captain, and he asked him to give

40 us a chance to get in.

Q. And he moved up the boat seven feet? A. Yes, sir.

Q. That brought you opposite that eight-foot space? A. The cabin came right in there.

Q. Then you did unload that lumber, about half the cargo, in that eight-foot space? A. Yes, sir.

Q. And it was taken away by the wagons as fast as it was taken off the boat? A. Yes, sir.

Q. You say you had your man helping you about a half hour? A. About a half hour, or three quarters of an hour. 10

Q. And then Mr. Kells came up and said something to you? A. He came up and gave us abuse.

Q. Why did you have to talk to the man? A. He came up to the two of us.

Q. You say the man left after that? A. Yes, sir.

Q. What is the mate's name? A. Fred Cernack.

Q. Is he here in court? A. No. 20

Q. You say there was another man on the dock? A. Yes, sir.

Q. Why didn't you hire other men? A. Why should I hire other men, if I could keep them going?

Q. If you had another man, you could work twice as fast? A. No, we could not, because we were in no position where we could use two men so as to work any faster; if we had a regular berth, then, of course, two men could work faster. 30

Redirect Examination by Mr. Patterson:

Q. What do you mean by a regular berth? A. The berth where I could unload, where I could put on the helper.

Q. Was this such a place?

Mr. Rosenberg: I object.

Mr. Patterson: On cross examination, he brought out the question about a regular space. 40

The Court: He said if he had more space.

Q. Do you know how much space was necessary to make a regular berth for this boat?

Mr. Rosenberg: I object again.

Objection overruled.

A. As far as the trucks were concerned, they had enough space, but the boat was not in a position to get around to the hole.

Q. Was it, or was it not, what you would call a berth? A. It was not what I would call a berth.

Mr. Patterson: At this time, if your Honor please, I offer the bill of lading for this shipment, and also the freight bill, and order on the back, both of which have been identified by Mr. Kells.

Mr. Rosenberg: May I ask what the object of the offer is?

Mr. Patterson: The object is to show to the Court the whole transaction. I want to show that it is an interstate shipment. I want to show the fact that it was ordered, and I want to get before the Court the whole facts in the case.

Mr. Rosenberg: I will admit that it is an interstate shipment; what else is there.

Mr. Patterson: I will go through the case in the regular way.

Mr. Rosenberg: I will object to the offer for anything except to show that it is an interstate shipment.

Arrival notice and bill of lading admitted in evidence and marked Exhibits D-1 and D-2 respectively.

Mr. Patterson: It is relevant in this way; the shipment is an interstate shipment; the order shows that after it got to New York, the order was given by Mr. Kells or by the bookkeeper—by the company anyway—to

have the lumber carried to Leary's dock. It was taken there, and the captain reported it at one-thirty. That was the time from which demurrage accrued, and I want to show by now offering the interstate tariffs affecting the demurrage and other charges which we claim in this case, and I will offer this now. I first offer Rules 19 and 22, certified by the Secretary of the Interstate Commerce Commission as being true extracts from the tariffs G. O. I. C. C. 4400, which were effective from June 1, 1915, to September 1, 1915, covering more than this period. I will read Rule 19— 10

Mr. Rosenberg: Just a moment before you read anything, Mr. Patterson. How are these papers certified?

Mr. Patterson: They are certified by the Secretary of the Interstate Commerce Commission. 20

Mr. Rosenberg: What makes them evidence in this court?

Mr. Patterson: A section of the interstate commerce act as follows: "The copies of schedules and classifications and tariffs of rates, fares and charges, and of all contracts, agreements and arrangements between common carriers, filed with the Commission as herein provided, and the specifications, tables and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this Act, shall be preserved as public records in the custody of the Secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and 30 40

extracts from any of such schedules, classifications, tariffs, contracts, agreements, arrangements or reports made public records as aforesaid, certified by the Secretary of the Commission under the Commission seal, shall be received in evidence with like effect as the originals." This relates particularly to the
10 demurrage charges. Rule 19: "Demurrage charges on lighters, barges or car floats carrying freight under export and domestic bills of lading. When a car float, lighter or barge reports at its destination, shipper, consignee, ship owner or ship agency permitting or receiving the same, as the case may be, must provide a berth, and 48 hours from the time the car float, lighter or barge reports (Sundays and full holidays excepted) shall
20 be deemed lay days without charge, after which demurrage shall accrue against each shipper, consignee, ship owner or ship agency, as the case may be, at the following rates per day of 24 hours or a fraction thereof. Then is set forth various charges and under the title "Other lighters or barges" the charge is made of ten dollars. Or at the option of the Pennsylvania Railroad Company, if no berth is provided or the vessel is
30 not unloaded within the lay days, the property shall be removed to and stored in any public or licensed warehouse in New York Harbor, at the cost of the owner and without liability on the part of the Pennsylvania Railroad Company and subject to a lien for all lawful charges. Delivery of the property, when covered by domestic bills of lading, will only be made upon the payment or satisfactory guaranty of demurrage charges.

40 Rule 22: On rejected or re-ordered

freight, a charge of nine dollars per lighter shall be made for each towage movement between points within the free lighterage limits; the published rates for towing to points beyond the free lighterage limits to apply in addition to the above charge. If the freight is not unloaded within the established free time from arrival at point to which the lighter was originally ordered, the charge for demurrage as provided in the tariff of the delivering line will be assessed for any excess over such free time, in addition to the charge above provided for extra towage."

10

Those are the two rules. There are some exceptions which do not apply to this case.

The Court: Is there any limit to the amount of demurrage that can be charged?

Mr. Patterson: There is no limit.

20

The Court: I mean after the demurrage is refused? Is there anything which enables the barge-man to keep it there for any specified time, or is it subject to removal?

Mr. Patterson: There is nothing covering that.

The Court: I merely ask that question because the boat stayed there for ten days after they refused to pay the demurrage.

Mr. Patterson: I might clear that up by saying that there was a controversy respecting that, and the captain expected that his boat would be taken at any time. I now offer Rules 19 and 22 in evidence.

30

Marked Exhibit D-3.

I also offer Rule 4, G. O.—I. C. C. 6838, certified the same way, and which was in effect longer than this period and is in effect at the present time.

Marked Exhibit D-4.

40

Levi Hitch Harrison, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. Where do you live? A. 261 West 21st Street, New York City.

10 Q. Where are you employed? A. I am harbor master of the port of New York.

Q. Are you in the employ of the City of New York? A. City, State and United States.

Q. How long have you been so employed? A. Over twenty years.

Q. Are you familiar with New York Harbor and the methods by which shipping is carried on? A. Yes, sir.

Q. Do you know the location of Leary's dock and 20 Logan's dock over on Whale Creek in Greenpoint? A. Yes, sir.

Q. I show you a slip—

Mr. Rosenberg: Is there any question about the location of these docks, Mr. Patterson?

Q. The captain has testified, Mr. Harrison, that when his boat was unloading on Saturday morning, he had fastened it to Leary's dock, and that there was about twenty feet of his boat opposite the dock, 30 and that the forepart of his boat, the rest of it, extended out over the entrance to the slip, and that he had a line on Logan's dock. Will you tell us whether that is a safe berth in which to unload a boat?

Mr. Rosenberg: I object to the form of the question.

The Court: How does it make any difference, Mr. Patterson?

Mr. Patterson: The tariff, as you will no-

40 tice, says that the consignee must provide a

berth. This man knows in his official capacity what a berth is, and I want him to explain whether or not that was not a safe berth, and if not, why not?

Mr. Rosenberg: Does the tariff say a safe berth?

Mr. Patterson: I will use the term proper berth. I want to show that this was not a proper berth or such a berth as was contemplated by the tariff. 10

The Court: I will admit the question over your objection, Mr. Rosenberg.

A. No, sir; it was a violation; the boat was there in violation of the rules of the harbor.

Mr. Rosenberg: I object to that; the rules of the harbor are not in evidence.

Mr. Patterson: If your Honor please, here was a situation where they did not have a berth regardless of the fact whether this man worked part of the boat as a courtesy. A berth was not provided until the afternoon of Saturday, at one o'clock. I am perfectly willing to show what the law is. I have the acts of the legislature of the State of New York to prove that. I will show that and bring Mr. Harrison later on. 20

Mr. Rosenberg: I object to that. 30

The Court: The testimony will be excluded.

Henry Heberman, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. What is your business? A. Manager of the J. R. Wortendyke Lighterage Company. 40

Q. Is this man Dobeck, the captain of the canal boat Breed & Preston, under your supervision? A. Yes, sir.

Q. Did you give any orders to the captain with regard to the Breed & Preston going over to Leary's dock to deliver a cargo of lumber to the Kells Mill & Lumber Company?

10 Mr. Rosenberg: I object to that.

The Court: How is that material?

Mr. Patterson: I want to show the whole transaction.

The Court: It seems to be admitted and nobody denies it that he was there for the purpose of delivering this lumber.

Q. Were you over there? A. I passed there on a tow boat.

20 Q. When? A. About the second or third of August.

Q. Was that the time when this boat lay there? A. Yes, the boat was laying there.

Mr. Rosenberg: I object to anything that may have happened on the second or third of August if your Honor please. This transaction was finished on the thirty-first of July.

The Court: I will allow the question.

30 Q. What happened over there? A. The Breed & Preston was laying there and I looked in to see what she was doing.

Q. Do the interstate rules provide what shall be done—

Mr. Rosenberg: I object to the witness testifying what the interstate rules provide.

Mr. Patterson: I will withdraw Mr. Herberman, and call Mr. Walsh.

40

Thomas J. Walsh, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. What is your business? A. Shore foreman for the Wortendyke Lighterage Company.

Q. Were you located over at Greenpoint, Brooklyn, around the twenty-ninth of July and the thirty-first of July? A. Yes, sir. 10

Q. Do you remember this boat, the Breed & Preston, coming there with a load of lumber? A. Yes, sir.

Q. What do you know yourself about that matter? A. I know I was there on the thirtieth and the boat lay at Logan's dock, and on the thirty-first when I went around there around eleven o'clock the boat was working at Leary's dock. 20

Q. What did you see regarding the boat at Leary's dock? A. I asked the captain why he wanted to put the boat in that position; that was not a suitable position to put the boat in.

Q. How long have you been in the boating business over there? A. Thirty-five years.

Q. Do you know from that experience what a berth is? A. Yes, sir; I think a boat ought to have about seventy-five per cent of her length to discharge. 30

Mr. Rosenberg: I ask that that be stricken out.

The Court: I will allow it.

Q. Will you tell us whether or not the way the Breed & Preston was tied up there was a proper berth?

Mr. Rosenberg: I object.

The Court: I will allow the question. 40

A. No, sir.

Q. Did you have anything to do with going to see Mr. Kells? A. Yes, sir.

Q. When did you go to see him? A. I went to see him on the thirty-first to collect the freight for this boat.

Q. Did you collect it? A. Yes, sir.

Q. When did you see him again? A. Monday.

10 Q. Did you have charge of the collection of demurrage? A. Yes, sir.

Q. They call you a runner? A. Yes, sir; shore foreman.

Mr. Patterson: The rule itself is absolutely imperative. It says the consignee must provide a berth. I want to prove what a safe berth is according to the regulations governing New York Harbor.

20 The Court: The difficulty is that your client or rather the captain had taken a position there to unload, and having once started to unload, he cannot come in later on and say that was not a berth. Of course, it is perfectly proper for you to argue that because of the conveniences furnished you and the circumstances, you could not unload in that time.

30 Mr. Patterson: That does not really bear on the question. The fact is, a berth was demanded, and had a proper berth been given, they could have run alongside the dock and unloaded the lumber. That sort of berth was never given them until one o'clock on Saturday at Logan's dock, which was a proper berth. That is what I want to show the Court and have it appear on the record that a proper berth was not given them until one o'clock on Saturday. In the meantime, the carrying of the lumber over the cabin was merely a courtesy on the part of the captain,—unloading in that eight-foot space. 40

Mr. Rosenberg: I don't see how that changes the situation.

The Court: I don't see how it does either, Mr. Rosenberg, but Mr. Patterson feels that it does; it is quite likely that this case will be reviewed, and if he wants to show that, I will give him that opportunity.

10

George R. Allen, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. Mr. Allen, you are an attorney at law of the State of New York? A. I am.

Q. You have been so for how long? A. About eleven years.

20

Q. Are you familiar with the books containing the laws of the State of New York? A. I am.

Q. I show you a volume containing certain laws of the State of New York, and ask you whether that volume and the contents thereof are the laws of the State of New York, and are so regarded to be the law of that State by the Courts of the State of New York and by the Bar?

> Mr. Rosenberg: I object, if your Honor please. I don't believe under the Evidence Act that this is the proper method of proving the law.
>
> The Court: I don't think it is objectionable. I don't think it is proof.

30

Q. Is that a publication of the State of New York containing the laws therein incorporated? A. Yes, sir.

The Court:

40

Q. What is it you are showing? A. It is part

of the Session Laws of 1901, passed by the Legislature of the State of New York, embodied in three volumes, of which this is one.

By Mr. Patterson:

Q. Is there anything contained therein relating to the fastening of lighters and barges to piers and slips? A. Yes, that is part of the City Charter, the City Charter being a part of the Laws of 1901 of the State of New York.

10

Mr. Rosenberg: I object for two reasons. In the first place, I don't think it is material and relevant, and in the second place, this is not the way to prove it; the contents of the book speak for themselves.

The Court: I suppose the witness' attention is only called to it for the purpose of convenience in directing our attention to the page. What is it you propose to prove, Mr. Patterson?

20

Mr. Patterson: By this section, it is made unlawful for boats to tie up in such a way as to obstruct the ends of piers and ends of slips,—in other words, to obstruct navigation; so that when a boat is tied up or fastened as this was in the end of the slip, it is not a proper position.

The Court: I do not see how that could have any evidential value at all in a case of this kind. The only question in issue in this case is whether or not this defendant or its agent in discharging this cargo was using proper diligence under the circumstances.

30

Mr. Rosenberg: The very language of this section shows that the only purport of the act is that anybody who ties up his boat in this way so as to cause injury to anyone makes it negligence on his part.

40

Mr. Patterson: I offer the laws of 1901 of the State of New York, Section 879, in evidence.

Mr. Rosenberg: I object to the offer, on the ground that it is immaterial.

The Court: I will sustain the objection.

Mr. Patterson: Will your Honor note my objection to your ruling? 10

Defendant Rests.

Charles D. Kells, a witness heretofore called and examined on the part of the plaintiff, being recalled for further examination in rebuttal, testified as follows: 20

Direct Examination by Mr. Rosenberg:

Q. When this lighter captain came to you and reported that he was there, what did you say to him? A. I told him I would notify him when we were ready to unload the boat.

Q. Did you have him notified? A. Yes, sir.

Q. Did you ever say he would have a berth by Friday morning? A. No, sir.

Q. He testified that when you came over there on Saturday morning, he said he could not work 30 in the space he had and that you had the other boat moved up seven feet? A. The other boat didn't move; I never saw the captain of that boat.

Q. Was there room there without moving that boat up seven feet? A. Yes, the men were working there without moving the boat.

Q. And the boat was not moved? A. No, sir.

Q. Did you see the captain of the other boat at all? A. No, sir.

Q. What did you do? A. I raised the line and 40

the captain pulled the boat ahead. I think the stern of his boat touched the stern or bow of the other boat.

Q. That was all that was done? A. Yes, sir.

Q. How wide was that space that he had to move? A. He moved up about eight or nine feet by raising this rope on top of his cabin. He came up about eight or nine feet.

Q. Did you abuse him at all? A. No, sir.

Q. Did you refer to him or to the lighterage company as sons-of-bitches or robbers? A. No, sir.

Q. Did you ever use any words of that kind? A. No, sir.

Q. He testified that your son came there at one time; how old is your son? A. Sixteen years old.

Q. What does he do? A. During vacation, he was helping out by running a machine.

Q. Did he work on the dock? A. No, sir.

Q. He was simply an employee working in the shop? A. That is all.

Q. You didn't send him down to the captain? A. No, sir.

Q. Were you there when the helper left? A. No, sir.

Q. Did you abuse the helper at all? A. I didn't see him. I saw the two men working there, but I would not know him if I saw him.

Q. Did you use any abusive language to this man at all? A. No, sir.

Q. Or to the captain of the lighter? A. No, sir.

Q. Did you order him out of your office when he came there? A. I did not.

Q. When he demanded the demurrage, you were there? A. Yes, sir.

Q. And was Mr. Reid there? A. Yes, sir.

Q. What was said? A. Mr. Reid told him to put the lumber on the dock, and after it was on

the dock, if we owed them any money, they should send a bill and we would see that it was paid, and they were to hold the lumber until it was paid.

Q. What kind of a dock is Logan's dock? A. A vacant dock on which wharfage is collected.

Q. And Logan has charge of that dock? A. Yes, sir.

Q. And the lumber could have been put on that dock and remained there subject to the lien of the Pennsylvania Railroad? A. It could. 10

Mr. Patterson: I object to the question, Mr. Rosenberg, that it could have remained there subject to the lien of the Pennsylvania Railroad; that is a conclusion.

The Court: The trouble with the question is that it is leading. The question of its remaining subject to the lien is soemthing that has nothing to do with what this witness may say. 20

Q. You know Logan's dock, do you? A. I do.

Q. Is it or is it not the practice to store stuff here? A. It is a private dock and the practice is not to store anything there, but they help us out once in a while if we want them to.

Q. And Mr. Reid told them to unload on that dock? A. He did.

30

Case Closed.

40

Mr. Patterson: (Summing up):

If your Honor please, I move at this time for judgment for the return of the goods to the Pennsylvania Railroad Company, and I would like to argue that motion out, and at this time, in lieu of a charge to the jury, I ask for certain findings which I have typewritten, and rather than read it, 10 I will submit it to your Honor or else read it if you prefer.

The Court: You had better read it.

Mr. Patterson: The shipment in question was an inter-state shipment and controlled by the acts of Congress commonly known as the Interstate Commerce Acts and schedules of rates and charges filed with the Interstate Commerce Commission pursuant to said Acts." "The shipment of lumber in question was carried to Leary's dock in 20 Brooklyn and was reported to the plaintiff by the captain of the lighter Breed & Preston at 1:30 P. M., Thursday, July 29th, 1915; that pursuant to Rule 19 of the demurrage tariff of the defendant, demurrage at the rate of ten dollars per day accrued forty-eight hours after the time the captain of the lighter reported to the plaintiff; that the period of forty-eight hours mentioned in said demurrage tariff expired at 1:30 P. M., Saturday, July 31st, 1915, and that demurrage thereupon 30 became a charge upon the lumber which had not then been delivered, and the defendant had a lien for the demurrage charges and the right of possession to such undelivered lumber until said demurrage charge was paid;" "That under said Rule 19, it was necessary for the plaintiff to pay the demurrage charges which had accrued, and if the plaintiff disputed the assessment of said demurrage charges, complaint should have been made under the provisions of the interstate com-40 merce act to the Interstate Commerce Commis-

sion or to any District Court or Circuit Court of the United States, asking for reparation;" "That this Court will not take jurisdiction of the question whether said demurrage charge was properly assessed or not, that question being for the determination of the Interstate Commerce Commission." I ask your Honor to so find. It seems to me under the facts, speaking first of the facts and later on on this question, that there is no dispute as to the time the captain reported. The plaintiff permitted the greater portion of the forty-eight hours to pass by without doing anything at all to permit the defendant to unload. It could have been unloaded at any time if proper provision had been made by the plaintiff. Then in the short period that remained, the captain tied up at a spot which I think the testimony shows was not a proper berth, such as is required by Rule 19, and endeavored as best he could to unload that lumber over the cabin of the boat, which the plaintiff's witnesses admitted was a slower process. That continued until about twelve o'clock, when the captain of the boat told Mr. Kells that he was unable, by reason of the length of the lumber or something of that kind, to unload any more at that place—the space was too small; he said he ought to have a sixteen-foot space. Mr. Kells then told him to go to Logan's dock. He went over there and got there about twenty minutes past twelve, and the watchman on the dock refused to permit him to unload any lumber there; that he went up and told Mr. Kells, who then obtained the permission to unload on that dock. On the facts of the case, it seems to me that the defendant has done all that was required of it, and the plaintiff has shown nothing that required them to do otherwise. They have spoken about two men on the barge; they have spoken about

the hiring of more men. There is nothing that requires them to do that. One man could have unloaded this barge had he had all of the forty-eight hours, and I think from all the facts in the case the defendant is entitled to a return of the goods. On the interstate question, I would like to point out to your Honor that the cases, even in
10 our Court of Errors, hold that these tariffs when filed with the Interstate Commerce Commission are binding on the railroad, as well as on the consignees and consignors. Also in the recent case of *Spada* vs. *P. R. R.*

Rule 19 says that the demurrage charges shall be a lien and we were entitled to keep possession until that lien was satisfied. Rule 19 is arbitrary. It says that unless the lumber is unloaded within the free time, demurrage shall accrue. Demurrage
20 did accrue in this case. Even though it were the fault of the Pennsylvania Railroad men themselves, it is immaterial; the demurrage as a matter of fact accrued. The free time had expired and, under the strict ruling of the Interstate Commerce Commission, it became a lien. If remedy is wanted by the plaintiff, the interstate commerce act itself points out the way it shall be obtained, —that he shall proceed to the Interstate Commerce Commission o say whether it was properly
30 assessed, or he should go to the United States District or Circuit Courts. There is no provision in the Act for this court to determine issues on that particular point, and we think this court will not assume jurisdiction on that point. The charge having been assessed, the captain had a perfect right to demand the demurrage and to notify the plaintiff as he did at twelve o'clock that the free time would be up. They should have paid the charge at that time and sought their remedy. If
40 the Interstate Commerce Commission should de-

termine that it was improperly assessed, it would afford reparation, both the return and damages as pointed out by the court. On the other hand, your Honor can see that if, in the strict interpretation of these tariffs, which is to prevent discrimination and which are interpreted strictly, this court and other courts were permitted under certain facts to determine whether or not the rules had been carefully complied with; in some cases it would result in one sort of ruling and in another case another under certain facts, and the result would be that instead of having a uniform ruling, we would have a great many diverse rulings; whereas the interstate commerce act points out one remedy. I might cite one case which was decided by Justice White; that is the old case of Texas vs. Mugg, in 202 United States, page 242, 50 Law Edition, page 1011, which says: the carrier's lien on the goods is by force of the Act of Congress for the amount fixed by a public schedule of rates and charges, and this lien can be discharged and the consignee can become entitled to the goods only by the payment or tender of payment of such amount. Such is now the supreme law, and by it, this and the courts of all other states are bound. The charge is made arbitrarily, and we cannot help ourselves. The demurrage accrued under that rule, interpreted strictly, and the carrier was bound to collect it. The carrier is not permitted to exercise his discretion at any time, and the plaintiff was bound to go to either of the courts mentioned by the Act itself. That is the extent of my motion, and I ask for judgment for possession.

The Court: If the plaintiff is entitled to recover, I do not think there is any such limitation upon any court to deal with issues such as this, as suggested by counsel for the defendant. It

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New Jersey State Library

seems to me that, conceding that this boat arrived about half past one o'clock on Thursday, the time would expire about half past one on Saturday. That, of course, pre-supposes that the carrier would o its duty and, it is conceded in the case that under the provisions of the interstate commerce laws, it was the duty of the carrier and his
10 agents to unload when proper facilities had been offered for that work. I am not saying the carrier had refused to unload, nor that a proper time had been allowed. It is the duty of the carrier, when notified, to use reasonable and proper diligence in the ordinary course of its business to unload whatever is in its possession, and if, in the reasonable discharge of that duty, with the facilities he has and under the conditions which are supplied by the wharf of the consignee, the time
20 elapses, then the property becomes subject to the lien of the demurrage. That is the only question I take it that is presented here. I do not understand that there is any duty on my part in this court to make any findings of fact. My conclusion from the tetsimony is that this cargo of lumber could have been unloaded within the time that was permitted after the consignee gave notice to the carrier that he was ready to receive it. I think that time was shortly after seven o'clock on the
30 morning of Saturday, the thirty-first, and the evidence convinces me that three or four hours work, if it were prosecuted with reasonable diligence by the captain and such assistance as he could have readily gotten, would have been sufficient for the discharge of the lumber, and that the reason why it was not discharged before the expiration of the time allowed was that the carrier did not discharge his duty in complying with the reasonable requirements which the law places upon him. I
40 therefore find that there was no demurrage prop-

erly chargeable against this lumber. The plaintiff therefore is entitled to a judgment for possession and is also entitled to a judgment for damages for the detention of the goods. The damages for the detention have been testified to as being the cost of getting the lumber back from Jersey City, where it had been taken by the carrier, to the place of business of the plaintiff in Brooklyn, twenty-five dollars, and the expense to which the plaintiff was put by not having this lumber for the purpose of meeting some of his contractual obligations, which was testified to as being fifty-five dollars more. There will be a judgment of title in plaintiff and judgment for damages for detention, eighty dollars, and the usual attorney's allowance of ten dollars. 10

Mr. Patterson: If your Honor please, I would like to have my objection noted to your refusal to find as requested. 20

The Court: Let the objection be noted.

To The Honorable Charles L. Carrick,
Judge of the First District Court of the City of Jersey City:

I, Charles Young, the stenographer sworn in the foregoing cause, do certify that the foregoing is a true transcript of the shorthand notes of testimony taken by me on the trial of the cause wherein the Kells Mill & Lumber Company is plaintiff and the Pennsylvania Railroad Company is defendant, which suit was tried on the sixteenth day of September, nineteen hundred and fifteen. 30

CHARLES YOUNG,
Stenographer.

40

Judge's certificate

~~Argument~~

To The Honorable William S. Gummere,
Chief Justice, and to the Associate Justices of the Supreme Court of the State of New Jersey:

I, Charles L. Carrick, Judge of the First District Court of the City of Jersey City, do certify that the foregoing stenographer's transcript of
10 testimony made by Charles Young, a stenographer designated by me, is my state of the case between the Kells Mill & Lumber Company, plaintiff, and the Pennsylvania Railroad Company, defendant, as the same was tried before me on the sixteenth day of September, nineteen hundred and fifteen.

CHARLES L. CARRICK,
Judge.

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D-1 for idn.
Exhibit D-1
Chas Young

NOTE

Property for which the Bill of Lading reads "Lighterage Free," except prohibited articles, is entitled to delivery at any point accessible by Lighter within the prescribed "Lighterage Limits" of New York Harbor, but is subject to the established additional charge if ordered to a point beyond the Lighterage Limits. All landing charges, except for the berth for the lighter, to be paid by consignee.

July 7 1915

J. FULLER, Agent,
No. 8 Broadway,
New York City.

Deliver the within-mentioned property

To Leary's Dock
At Foot India St & Whale Creek
Greenpoint Brooklyn - N.Y.

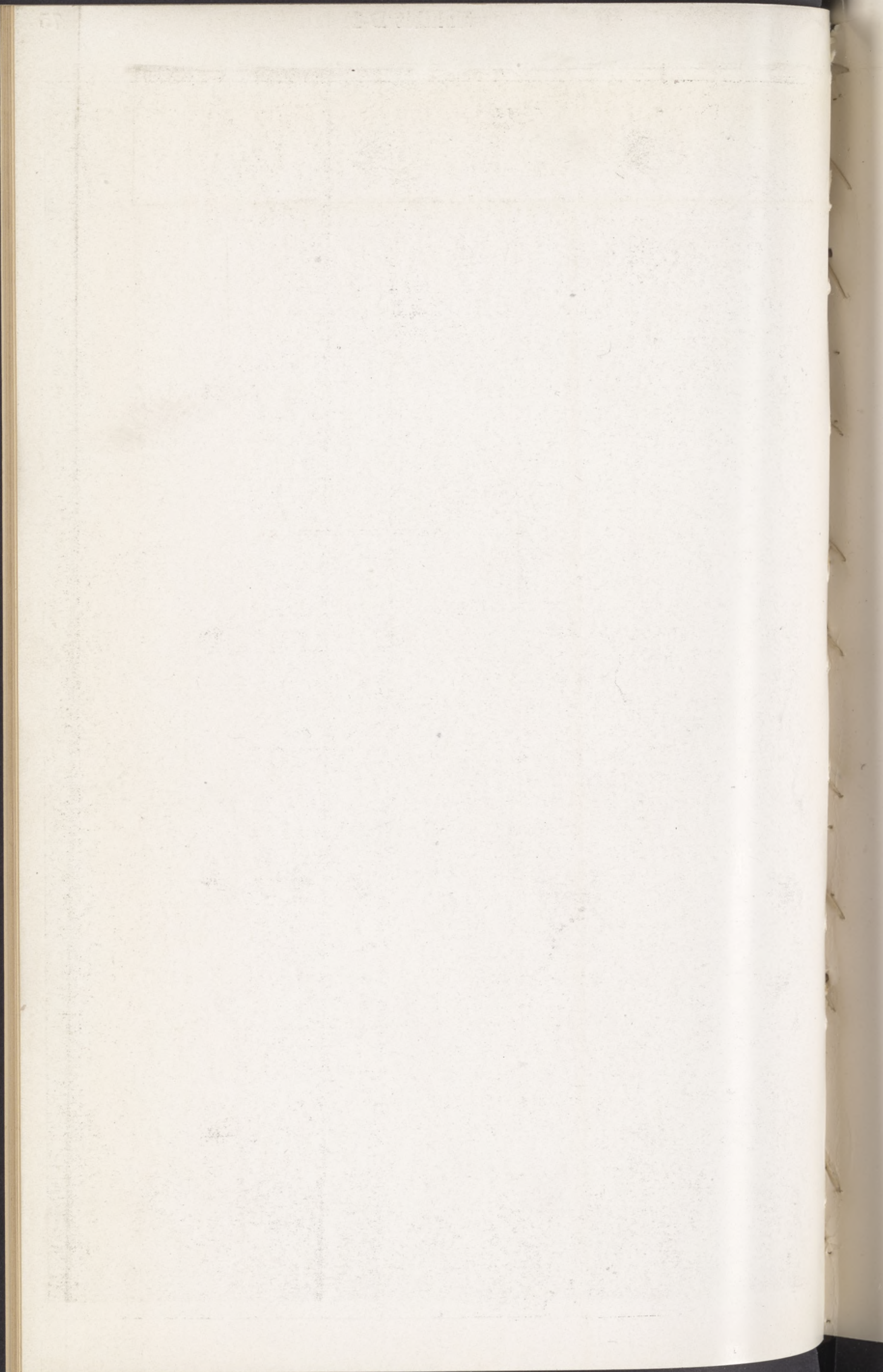
Kells Mill & Lumber Co., Inc. Consignee
AZ

PERMIT ATTACHED.

DEMURRAGE

When a car float, lighter or barge reports at its destination, the shipper, consignee or steamship company must provide a berth, and two days (48 hours) from the time the car float, lighter or barge reports (Sundays and holidays excepted) shall be deemed lay days, without charge, after which demurrage shall accrue at the following rates per day (of 24 hours) or fraction thereof:

Car floats	$25.00
Steam hoisting barges	20.00
Other lighters or barges	10.00



A. D. 8917   JUL 6 1915   11 19 1912

ARRIVAL NOTICE

8 Broadway
New York 191

Consignee KELLS MILL & LBR CO
GREENPOINT BROOKLYN NY

Provost Greenpoint

Bill 93427

Sheet M 12 7/1/15

MSTP&SSM Car No. 13034

Original .... Car No. ....

Pennsylvania Railroad Company

Shipped by J L ROPER LUMBER CO .... From .... Via NYP&N

Waybill No. JT 19838 From 11262 NORFOLK VA Date 6/30/15 191

MARKS	ARTICLES 860	WEIGHT	RATE	FREIGHT CHARGES		ADVANCES		TOTAL	
	LUMBER	38900	13/7	53	29			53	29

PENN. R. R. Co
8 Broadway, N. Y.
JUL 8 1915

CAR SERVICE at rate of One Dollar per day begins ... JUL 8 1915 unless previously ordered

The above-described Merchandise has arrived at JERSEY CITY and will be delivered at the Pier arranged for and named by you (see other side). Your order endorsed on the back of this Notice must be presented at No. 8 Broadway, New York.

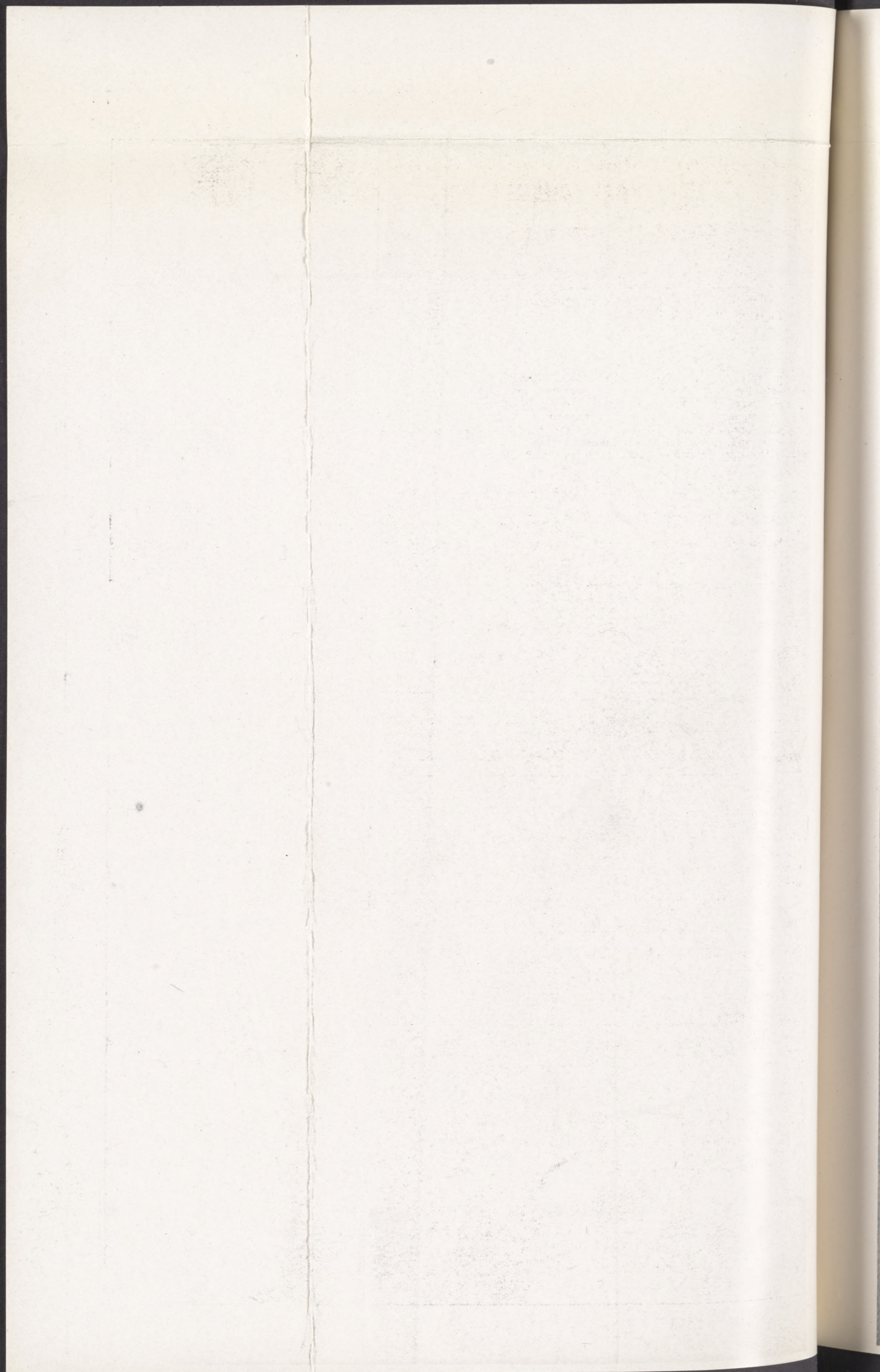
RYND

J. FULLER, Agent.

(OVER)

Check in payment, to order of the Pennsylvania Railroad Company, should be sent to Agent, Pennsylvania R. R. Co., No. 8 Broadway.

Reverse of Exhibit D-1



Form 22 Straight 11-22-12

For use in connection with the Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908.

NEW YORK, PHILADELPHIA & NORFOLK RAILROAD 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. 4611

Agent's No.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

at NORFOLK, VA., 6/29/ 191

from Jno. Roper 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 road, otherwise to deliver to another carrier on the route to said destination. It is mutally 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 Norfolk Va

to Greenpoint, Brooklyn Ny is in Cents per 100 Lbs.

IF....Times 1st	IF 1st Class	IF 2d Class	IF Rule 25	IF 3d Class	IF Rule 26	IF Rule 28	IF 4th Class	IF 5th Class	IF 6th Class	IF Special per	IF Special per
										13½	

(Mail Address—Not for purposes of Delivery.)

Consigned to Wells Mill & Lumber Co

Destination, Greenpoint Brooklyn State of Ny County of

Route, PRR

Car Initial [illegible] Car No. [illegible]

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
	1 car lumber	38900		
	seals-1293			
	Penn. RR. Co. $53.29			
	7/7/15			

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:

Jno. Roper Co. Shipper. B. G. [illegible] Agent.

Per WRE Per

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CONDITIONS

SEC. 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, quarantine, 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 (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 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. 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, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

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, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

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 or 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 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.

SEC. 4. All property shall be subject to necessary cooperage and 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 car 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.

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 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 carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; 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 intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

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 provisions of the tariff, which shall be treated as incorporated into the conditions of this Bill of Lading.

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.

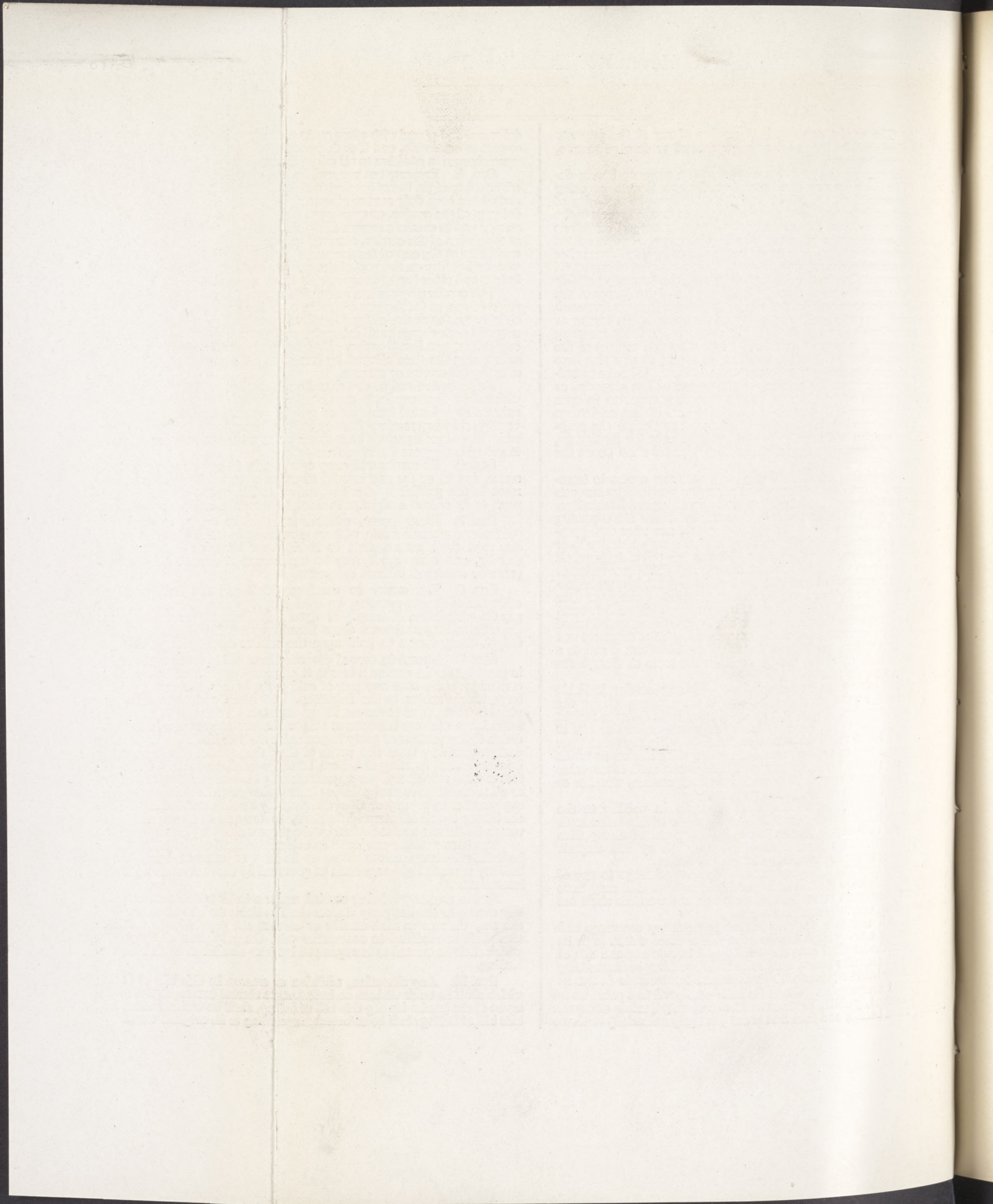

Exhibit D-3.

INTERSTATE COMMERCE COMMISSION

WASHINGTON

Cancelled
Stamp

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached (consisting of three typewritten sheets and one photostat copy of page) contain true and correct extracts from the schedules therein more particularly described, said schedules having been filed with the said Interstate Commerce Commission on dates specified in said papers, and the said extracts therefrom having been in force throughout the period June 1, 1915, to September 1, 1915, both dates inclusive. 10

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of (SEAL) said Commission this 11th. day of September, A. D. 1915. 20

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

Extracts from Pennsylvania Railroad Company Local Freight Tariff G. O.—I. C. C. No. 4400, said schedule having been filed on July 1, 1913, and the said extracts therefrom having been in force throughout the period June 1, 1915, to September 1, 1915, both dates inclusive. 30

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Exhibit D-3

Page 14 & 15

*　　　*

19.—Demurrage Charges on Lighters, Barges or Car Floats Carrying Freight Under Export and Domestic Bills of Lading.

When a car float, lighter or barge reports at its destination, shipper, consignee, ship owner or ship agency permitting or receiving the same, as the case may be, must provide a berth, and 48 hours from the time the car float, lighter or barge reports (Sundays and full holidays excepted) shall be deemed lay days without charge, after which demurrage shall accrue against each shipper, consignee, ship owner or ship agency, as the case may be, at the following rates per day of 24 hours or a fraction thereof:

Car Floats	$25.00
Steam Hoisting Barges, when handling shipments any piece of which weighs up to 25 tons	20.00
Heavy Hoisting Derricks, when handling shipments any piece of which weighs over 25 tons to 40 tons, inclusive	40.00
Heavy Hoisting Derricks, when handling shipments any piece of which weighs over 40 tons	50.00
Other Lighters or Barges	10.00

Or, at the option of the Pennsylvania Railroad Company, if no berth is provided or the vessel is not unloaded within the lay days, the property will be removed to and stored in any public or licensed warehouse in New York Harbor, at the cost of the owner and without liability on the part of the Pennsylvania Railroad, and subject to a lien for all lawful charges.

Delivery of the property when covered by domestic bills of lading will only be made upon the payment or satisfactory guarantee of demurrage charges.

*　　　*　　　*

Exhibit D-3

22.—Handling of Rejected Freight.

On rejected or re-ordered freight a charge of nine ($9.00) dollars per lighter shall be made for each towage movement between points within the free lighterage limits; the published rates for towing to points beyond the free lighterage limits to apply in addition to the above charge.

If the freight is not unloaded within the established free time from arrival at point to which lighter was originally ordered, the charge for demurrage as provided in the tariff of the delivering line will be assessed for any excess over such free time, in addition to the charge above provided for extra towage. 10

* * *

Only two supplements
of this tariff will be
in effect at any time 20

P. R. R.

G. O.—I. C. C. No. 4400

Superseding tariff shown on page 3

PENNSYLVANIA RAILROAD COMPANY

Northern Central Railway Company

Philadelphia, Baltimore & Washington Railroad Company

West Jersey — Seashore Railroad Company

Local Freight Tariff

of 30

Rates and Regulations

Governing

Freight Service by Floats and Lighters and Elevator Charges

at

Brooklyn, N. Y., Jersey City, N. J. and New York, N. Y., and Points in New York Harbor.

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Exhibit D-3

F. D. No. 3
Corrected to August 1, 1913
(Superseding F. D. No. 3, Corrected to May 1, 1912)

Governed, except as otherwise provided herein, by the Official Classification, I. C. C.—O. C. No.
10 40.
(N. Collyer, agent), supplements thereto and reissues thereof; and by Exceptions to said Classification G. O.—I. C. C. No. 3774, supplements thereto and reissues thereof.

Effective August 1, 1913

Issued June 25, 1913, by
George D. Ogden, General Freight Agent, Philadelphia, Pa.
20 Walter Thayer, General Freight Agent.
Chas. E. Kingston, Assistant General Freight Agent.
J. L. Eysmans, Assistant General Freight Agent.
Robt. C. Wright, Freight Traffic Manager.
E. P. Bates, Assistant Freight Traffic Manager.
(R.-G. O. 2466) (File T. L. 778)
Agent's Index No. 48
Extracts from Supplement No. 19 to Pennsylvania Railroad Company Freight Tariff G.
30 O.—I. C. C. No. 4400, said schedule having been filed on February 6, 1915, and the said extracts therefrom having been in force throughout the period June 1, 1915, to September 1, 1915, both dates inclusive.

Page 5
Page of Tariff
* Affected *
* * * *
14 Exceptions.

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Exhibit D-3

Under Rule 19.—

(a) When a car float, lighter or barge contains more than 200 tons of freight for one shipper, consignee, ship owner or ship agency, an additional 24 hours free time will be allowed that shipper, consignee, ship owner or ship agency for each additional 100 tons or fraction thereof in excess of 200 tons. 10

(b) On deliveries to a steamer or other vessel, when car float, lighter or barge contains shipments for two or more shippers or consignees (whether covered by export or domestic bills of lading) but one bill for demurrage will be collected, provided the ship owner or ship agency pays or guarantees the charge, otherwise each shipper or consignee will be assessed demurrage at the foregoing rates. 20

(c) The Pennsylvania Railroad Company will accept permits only when a reasonable time is provided thereon to make delivery. (See Rule 16: "Delivery orders and Vessel Permits.") 30

(d) When there are two or more lots of freight on one car float, lighter or barge tendered to a steamship company under permits for one steamer and 40

Exhibit D-3

10 20 30 40

for delivery thereto at more than one time, the lay time will begin from the time specified as "Permit Time", on the permit calling for latest delivery, subject to Exception (F) after which demurrage rules and charges named above will apply.

(e) If shipment is tendered to the steamship company prior to time of delivery specified on permit, the demurrage rules and charges named above will be applied from the time of delivery specified on permit.

(f) If shipment is tendered to the steamship company within one working hour after the time specified on permit, the demurrage rules and charges named above will be applied, but if shipment is tendered to the steamship company more than one working hour after the time specified on permit, one additional lay day will be allowed, after which demurrage rules and charges named above will be applied.

*   *   *

Exhibit D-4.

Cancelled
Stamp

INTERSTATE COMMERCE COMMISSION

WASHINGTON

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the document hereto attached is a true copy of Pennsylvania Railroad Company Local Freight Tariff G. O.—I. C. C. No. 6838, said schedule having been filed with the said Interstate Commerce Commission on June 28, 1915, and being still in force on September 13, 1915. 10

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 13th. day of September, A. D. 1915.

GEORGE B. MCGINTY, 20
Secretary of the Interstate Commerce Commission.

No supplement to this Tariff will be issued except for the purpose of cancelling the tariff

G. O.—I. C. C. No. 6838
Superseding G. O.—I. C. C. No. 5380
PENNSYLVANIA RAILROAD COMPANY 30
Philadelphia, Baltimore & Washington Railroad Company
West Jersey & Seashore Railroad Company

LOCAL FREIGHT TARIFF
of
STORAGE CHARGES
at
BROOKLYN, N. Y., JERSEY CITY, N. J.
and 40
NEW YORK, N. Y.

Exhibit D-4

Agents will be governed by rules shown herein relative to storage of freight at Brooklyn, N. Y., Jersey City, N. J., and New York, N. Y.

Effective August 1, 1915

Issued June 26, 1915, by

10 Geo. D. Ogden, General Freight Agent, Philadelphia, Pa.

Walter Thayer, General Freight Agent.

Chas. E. Kingston, Assistant General Freight Agent.

J. L. Eysmans, Assistant General Freight Agent.

Robt. C. Wright, Freight Traffic Manager.

E. P. Bates, Assistant Freight Traffic Manager.

(R.—G. O. 5672) (File R. F. 423-29)

(2450)

20 Agent's Index No. 54

Storage at Expiration of Free Holding Period.

"4. If the freight referred to in Rules 2 and 3 is not removed at the expiration of ten days, as above provided, it will (at the option of this Company) be stored at the risk and expense of owner at public warehouses within the lighterage limits of the port, or stored in our freight houses at Jersey City. When held in our freight houses at Jersey City this Company will not be liable for loss,

30 damage or delay, except in cases of negligence and the following rates of storage will be charged:

	Per 100 Pounds.
For the first ten days or fraction thereof beyond the period of free storage (including handling in and out)	1 cent.
For each succeeding ten days or fraction thereof	½ cent.

40