LEGAL DECISIONS

IN

CAR SERVICE CASES,

PUBLISHED BY THE

National Association of Car Service Managers.

1904.

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IN ACCORDANCE with a resolution presented to the National Association of Car Service Managers in annual convention at Chicago, Ill., June, 1903, the following compilation of Decisions and Opinions in Car Service Cases is respectfully submitted.

The Decisions are arranged as nearly as possible, in chronological order.

For all reported cases the legal citation is given.

The following index is an endeavor to afford ready reference to the various points of law established by these decisions.

A. G. THOMASON,
Secretary.

SCRANTON, PA., May 12th, 1904.

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1904.

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Press of
People's Printing Company
Dime Bank Building,
Scranton, Pa.

LEGAL DECISIONS AND OPINIONS.

SUPREME COURT OF MASSACHUSETTS,
112 MASS. 260.

MILLER

VS.

MANSFIELD, AGENT HOUSATONIC R. R. CO.

This is a case where a car load (containing one hundred barrels) of flour was placed for delivery on the tracks of the Housatonic R. R. Co. at Great Barrington, Mass., on Feb. 14th, 1872, and the consignee was notified on the same date that he would be allowed 24 hours in which to unload the car, and that the charge after 24 hours would be $2.00 per day for demurrage. The consignee was aware of the arrival of the car, but deferred unloading until the 20th of February, when he tendered the agent the amount of freight charges, but declined to pay the demurrage. The agent refused to permit of the car being unloaded and held the flour as a lien for the charges.

Subsequently the consignee paid all charges under protest and removed the flour and then brought suit in the District Court, before a jury, for damages. The case was decided in his favor. It was appealed by the Railroad Co. and the following is the opinion of Justice Morton, of the Supreme Court of Massachusetts:

"For the purpose of this hearing all the facts which the defendant offered to show are to be taken as estab-

lished. We must assume, therefore, that there was an existing regulation and usage of the Housatonic R. R. Co. that car-load freight, like that of plaintiff's, should be unloaded by the consignees within 24 hours after notice to him of their arrival; that for delay in unloading after 24 hours the consignee should pay $2.00 per day for each car belonging to other Railroad Companies, and that this regulation and usage was known to the plaintiff."

Being known to the plaintiff it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted in reference to it. It enters into and forms part of their contract, and the Railroad Company is entitled to recover the amount fixed by the usage, by virtue of the plaintiff's promise to pay it. This charge is, in its essential character a charge for storage. After the arrival of the goods at their destination the liability of the Company, as common carriers, ceased, but they became liable for the custody of the goods as warehousemen, and, if they were not removed within a reasonable time, were entitled to compensation, for which they had a lien as warehousemen. "Norway Plains Co. vs. Boston & Maine R. R., 1 Gray, 263." The parties by their agreement, fixed the rate of compensation which the company should receive and the time when it should commence. It is not material that the goods remained in the car instead of being put into a storehouse. The responsibility of the company for their custody was the same as if they had been stored, and they had the right to retain them until their charges were paid.

We are of the opinion, therefore, that instructions should have been given (in the District Court) substantially as requested by the defendant, and that the presiding judge erred in the instructions which he gave."

RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF ILLINOIS.
COMPLAINT No. 64.

HEARD AT CHICAGO, OCTOBER 4, 1890.

UNION BREWING COMPANY OF PEORIA
VS.
THE CHICAGO, BURLINGTON & QUINCY R. R. CO.

OPINION OF PHILLIPS, COMMISSIONER.

No reason is perceived in law or justice why any unreasonable and unnecessary detention of cars by consignees should not be paid for. Car demurrage is an important subject which has arisen in a practical way only within late years, and long after our statutes for the regulation of railroads was passed.

It does not, however, follow that because there is no statutory regulation of the question, there is no law.

MAGISTRATES' COURT, COLUMBUS, O., JAN., 1891.

FRANK E. POWELL
VS.
P. C. C. & ST. L. RY. CO.

This is an action of replevin brought by the plaintiff to recover of the defendant the possession of a car load of lumber which he claims is unlawfully detained from him

by the defendant. The parties have waived all technical questions and ask that the case be decided solely on the merits of the real controversy between them. The real question at issue is the right of the railroad company to demand payment of the so-called car service charges as a lien on the property and to hold the lumber until these charges are paid. This is an important question and has excited considerable attention. It affects the rights of all the railroad companies and of every merchant or dealer receiving freight by the car load, and should be settled beyond legal controversy for the interest of all parties concerned in shipping goods.

The facts are not controverted. Mr. Powell bought a car load of lumber in Michigan of a lumber company there, to be delivered to him on board the cars at Kalkaska. The lumber company duly delivered the lumber to the railroad company there, receiving a bill of lading in the usual form, signed by the agent of the railroad company. The bill of lading was not sent to Mr. Powell by the lumber company until after the suit was commenced, when Mr. Powell wrote for it, and it was then sent to him. The lumber arrived here somewhere from the first to the third of November, and on the latter day Mr. Powell received notice by postal card of its arrival. He did not send his teams for the lumber until more than forty-eight hours after receiving the notice, and when the teams arrived no objection was made to delivering the lumber, on account of Mr. Powell's not having the bill of lading, but the drivers were informed that there was $1.00 car service charges which would have to be paid before delivering. Mr. Powell refused to pay, and from time to time thereafter demanded the lumber, but the railroad company always refused to deliver it to him unless he paid the car service charges of $1.00 per day for every day the car was detained after the forty-eight hours. The matter remained in this condition until December 11th, when plaintiff brought this action and got possession of the lumber by writ of replevin. The car was thus detained on the tracks of the company thirty-three days after the forty-eight hours, not counting Sundays or legal holidays. The bill of lading, among other terms and conditions, contains the following:

"—Fifth—Property not moved by the person or party

entitled to receive it within twenty-four hours after its arrival at destination, may be kept in the car, depot or place of delivery of the carrier, at the sole risk of the owner of said property, or may be, at the option of the carrier, removed or otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges. The delivering carrier may make a reasonable charge per day for the detention of any car, and for the use of track, after the car has been held forty-eight hours for unloading; and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor."

The plaintiff claims:

First—That the contract was one which a common carrier (railroad company) has no authority to make. Section 3838 of the Rev. Stat. is as follows: "Section 3838 (common carrier companies). A corporation organized as and for a common carrier company shall have the following powers:

1. To make all contracts that it shall be lawful for natural persons to make for the carriage of persons and the storage, forwarding, carriage and delivery of property, but subject to the same liabilities."

As there was nothing immoral in the contract and nothing prohibited by any statute, and the contract was plainly within the scope of the railroad company, we see no reason why the contract was not one which the railroad company was authorized to make.

Second—The plaintiff further claims that there is nothing in the contract which gives the railroad company the right to claim a lien on the lumber for the car service charges. A part of the bill of lading, above set forth, reads as follows: "The delivery carrier may make a reasonable charge per day for the detention of any car, and for the use of the track after the car has been held forty-eight hours for unloading; and may add such charge to all other charges hereunder and hold said property subject to a lien therefor." This seems about as plain as language can make it, and if the contract is binding on the parties, it clearly means that the railroad company

may hold the goods until the reasonable charges for the detention of the car are paid.

The plaintiff claims:

Third—That even if the contract is legal and binding on the parties who made it in Michigan, Mr. Powell, not having signed it or seen it before he demanded the lumber, it is claimed, he was not bound by it.

The defendant claims that when Mr. Powell agreed with the lumber company in Michigan to deliver the lumber to him on board the cars in Michigan he thereby authorized the lumber company to make a contract of shipment with the railroad company, and that the lumber company thereby became his agent for that purpose, and that he is bound by the contract which it made; and further that ratified the contract which the lumber company had made. And this is the main question argued in the case.

In Angell, on Carriers, page 359, it is said: "After consignee or indorsee of a bill of lading, containing the clause making the goods deliverable to him on payment of freight, accepts the consignment, there is either a legal presumption that he contracted to pay the freight, or evidence from which the jury would be warranted in finding a contract by the consignee to pay the freight."

I also find in Lawson, on Contracts of Carriers, page 327, the following: "It may be said generally that authority given to an agent to ship property carries with it an authority to accept a bill of lading or to make a contract containing exemptions from liability." And the same author says on page 328: "The consignor is regarded as the agent of the consignee for the purpose of entering into contracts for their carriage."

In the case of Seaif vs. Tobin, an English case, 3 B. & A. D. 523, the court says: "That the consignee, by taking the goods, adopted the contract, that is, the contract in the bill of lading, whereby the master agreed with the shipper to deliver the goods to the consignee, he paying demurrage and freight."

From those authorities it would seem clear that when Mr. Powell bought the lumber of the lumber company to be delivered on board the cars at Kalkaska, he thereby

authorized the lumber company as his agent, to make a contract of shipment with the railroad company. It makes no difference that he never saw the contract. A principal is bound by the acts of his agent within the scope of the agent's authority. His ignorance of what his agent has done, of course, does not release him.

I think, therefore, that Mr. Powell was bound by this contract and became liable to pay the car service charges after the forty-eight hours, and that the railroad company has a right to hold the goods until the charges were paid.

RAILROAD COMMISSION OF THE STATE OF ALABAMA.

MAY, 1891.

HENRY R. SHORTER,
President Railroad Commission of Alabama.

W. C. TUNSTALL,
Associate Commissioner.

Youngblood & Ehrman, lumber dealers of Birmingham, Ala., May 8, 1891, applied to the above-named commission for relief from the demurrage rules.

In dismissing the complaint the commissioner used these words: "When the charge is made by a railroad company only for the detention of cars and holding the side tracks beyond a reasonable time after arrival and notice given to consignees, such detention being by the negligence or delay by the patron, we are of the opinion that a charge for such detention and use of the track, reasonable in amount, is lawful and may be properly collected by the carrying company."

SUPREME COURT OF GEORGIA, NO. 17
AUGUSTA, OCTOBER, 1891.

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88 GEORGIA, 563.

MILLER & CO.

VS.

THE GEORGIA RAILWAY CO.

OPINION BY HON. JUSTICE SIMMONS.

By the Court:

1. It is competent for a common carrier whose customers at their option have the privilege of unloading for themselves the vehicles in which their freights are shipped, to adopt and enforce a reasonable regulation as to the time within which the vehicles may be unloaded free of any expense for storage, and to fix a reasonable rate per day at which storage will thereafter be charged for the use of such vehicles so long as they remain unloaded.

2. A rate of one dollar per day for each railroad car thus devoted to the use of storing freight is not necessarily unreasonable because cars are of different sizes and vary in capacity, nor because a fraction of a day is charged for as a whole day, nor because the customary rate of storage in warehouses or elevators is much lower; nor is it, as matter of law, unreasonable for any cause.

3. A particular common carrier, though a corporation, makes a regulation its own by adopting it and acting upon it, irrespective of the source from whence it is derived; and therefore, that it was promulgated by a person or board of persons representing a combination of such carriers would make no difference.

4. As between the carrier and customers who have notice of the regulation before shipments are made, the

regulation is operative whether indicated upon bills of lading or not, and whether the shipments are made to the order of the consignor with the customary direction to notify the customer, or directly to the customer himself.

5. In construing the phraseology of a regulation expressed in this language, "it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that when the period for such demurrage charge commences, they are to remain accessible to the consignee for unloading purposes," the course and exigencies of business are necessarily to be regarded; and hence the cars, after their arrival at destination, though not kept accessible at every moment of time, are to be treated as being and remaining accessible if the carrier is always ready to render them so within the shortest practicable time, not longer than a few hours, after being notified that the customer is ready to unload. Judgment affirmed.

The Georgia Railroad Company sued Miller & Company for the sum of $892, besides interest, the declaration containing two counts, as follows: (1) "On the first of January, 1890, and on various days thereafter up to the time of filing this complaint, petitioner stored on its tracks in said county certain car-loads of corn, wheat, grain and other produce, at the special instance and request of said Miller & Company, by means whereof said Miller & Company became indebted to your petitioner for said storage at the rate of one dollar per day for each and every of said carloads, amounting to the aforesaid sum of $892. (2) Your petitioner further shows that said Miller & Company is further indebted to your petitioner in the sum of $892, besides interest; for that heretofore, to wit, before the first day of January, 1890, your petitioner, who is a common carrier of goods and merchandise, made and put in operation a reasonable rule or regulation for the conduct of its business, of which rule or regulation said Miller & Company had notice, by virtue of which said Miller & Company became liable to pay to your petitioner the sum of one dollar for every day commencing forty-eight hours after notice of arrival, on each and every carload of property stored by your petitioner on its tracks or elsewhere.

Your petitioner shows that after said first day of January, 1890, and up to the time of filing this complaint, your petitioner has so stored a large number of carloads of property, a schedule of which is hereunto annexed; by means whereof said Miller & Company have become indebted to your petitioner in the sum of $892, besides interest. Your petitioner shows that said Miller & Company fail and refuse to pay said sum," etc.

The rule or regulation here referred to is as follows:

DEMURRAGE RULES.

CONCERNING LOADED CARS TO BE UNLOADED BY CONSIGNEES.

"Bulk meats, bulk grain, hay, cotton seed, lumber, lime, coal, coke, sand, brick, stone, wood and such other freights in bulk or otherwise, as it may be a stipulation of the rates thereupon, or contract for the transportation thereof, or where it is the custom for the cars to be loaded and unloaded by the owners of the property, which is not unloaded from the cars containing it in forty-eight hours, not including Sundays or legal holidays, computed from ten o'clock a. m. of the day following the day of arrival, shall be subjected thereafter to a charge for demurrage of one dollar for each day or fraction of a day that said car or cars remain loaded in the possession of the company, by whom to be delivered as the last carrier at interest; it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that when the period of such demurrage charges commences they are to remain accessible to the consignee for unloading purposes."

The jury found in favor of the plaintiff, and the defendants made a motion for a new trial, which was overruled, and they excepted. Without undertaking to discuss separately and in their order the numerous grounds of the motion, it is sufficient to say that, in addition to the general objections that the verdict is contrary to law and the evidence, they complain in substance as follows:

(1) That as matter of law, a railroad company is not entitled to charge "demurrage" or storage on cars remain-

ing unloaded on its tracks, and hence the rule in question is invalid and the defendants are not subject to the charges recovered. (2) That the charge fixed by this rule is unreasonable. (3) That the rule was not promulgated by the proper authority, but emanated from a combination of persons other than the board of directors of the Georgia Railroad. (4) That the regulation is inoperative because not indicated upon the bill of lading. (5) That the cars were not accessible during the whole period for which demurrage was charged.

1. It is the undoubted right of a common carrier to adopt and enforce, as between itself and its customers, any reasonable regulation for the conduct of its business, the purpose and effect of which is the protection of the carrier and the benefit of the public. The rule in question, we think, falls clearly within the scope of this power. It seeks to prevent the diversion and detention of cars from the legitimate work of transportation, as well as to secure compensation for service not otherwise paid for, by prescribing, in cases where by contract or custom the carrier is under no duty to unload the cars but they are to be unloaded by the customer, a rate per diem in the nature of a charge for storage, to begin at a certain time after the cars have been delivered to the customer or placed at his disposal for unloading. Such a regulation cannot be regarded as unreasonable so long as a reasonable time is allowed for unloading and so long as the charge for the use of the cars beyond that time is not excessive. The law compels the carrier to receive the goods of the public and to transport and deliver them within a reasonable time. (Code, sec. 2029; 2 Am. & Eng. Enc. of L., Tit. Carriers, p. 787.) To do this it is necessary that the means of transportation shall be under the carrier's control, and that after the duty of carriage has been performed, its vehicles shall not be converted into storehouses, at the will of consignees, to remain such indefinitely and without compensation. If no check could be placed upon such detention, it is plain that the business of transportation would be at the mercy of private interest or caprice, and that carriers, thus hampered in their facilities and unable to foresee the time or extent to which their vehicles would be diverted from the work of carriage, could not provide properly for the demands of traffic or perform with dis-

patch their legitimate function. It would place upon the carrier the burden and expense of supplying numerous vehicles not needed for the hauling of freights, thus requiring it to provide extra facilities, as well as to render extra service, without compensation beyond that received for transportation. It would result in the accumulation of cars on the carrier's tracks and the obstruction in a greater or less degree of the movement and unloading of trains. Not only would loss ensue to the carrier, but consignees and shippers in general and the people at large must suffer seriously from this hindrance to the due and regular course of transportation. In this matter the public have rights paramount to those of any individual or class of individuals, and the business of the common carrier must be so conducted so as to subserve the general interest and convenience. Especially is this true as to railroad companies, in view of the important franchises granted them by the public, and the use and control thus acquired of highways upon which the commerce of the country is so largely dependent.

The need of regulations of the kind in question is well illustrated by the evidence in this case. The general manager of the plaintiff testified that before this rule was adopted, consignees were often dilatory in removing freight from the cars in which it was shipped, and "the cars were detained day after day, and days lengthened into weeks, until our transportation work was subjected to immeasurable embarrassment; the transportation of the company was well nigh paralyzed,—not for the lack of cars, for we had plenty, but because our cars were converted into warehouses. The trouble grew and finally culminated in a threatened blockage throughout the country. It has been a part of our experience to be threatened with suit by the shipper for not moving the freight promptly. We are supposed to always have cars ready to transport any freight that is offered; we endeavor to make proper arrangements to do so; but the trouble was that when A had freight to ship B had our cars and we could not get them."

It was contended by counsel for the plaintiff in error that the railroad company could unload the cars into a warehouse or elevator, and thus avoid detention. On the other hand, counsel for the railroad company contended

that in the cases provided for by this rule, that is, where it is a stipulation of the rates or contract for transportation, or is the custom for the cars to be loaded and unloaded by the owners of the property, it would be a breach of contract if the company were to unload, which would subject it to at least nominal damages. We do not think it material, as affecting the right to make a charge of this character, that the goods remain in cars instead of being put into a warehouse. It is well settled that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them. (Hutchinson Carriers, sec. 378; Southwestern R. Co. vs. Felder, 46 Ga. 433.) And we think where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may in many cases be as effectual as any other. Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business where he may unload it himself, or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier and the goods stored elsewhere at the customer's expense. And if a customer whose duty it is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car, by requesting or permitting the carrier to continue holding it unloaded in his service and subject to his will and convenience as to the time of unloading, he cannot be heard to complain of the method of storage and to deny the right to any compensation at all for this service on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no

compensation whatever shall be charged for such extra service.

It was contended by counsel for the plaintiff in error that "demurrage," which is the designation given to this charge by the rule in question, is allowed only in maritime law, and cannot be demanded by a railroad company in the absence of a stipulation therefor in the bill of lading. And in support of this view the cases of Chicago & N. W. Ry. Co. vs. Jenkins, 103 Ill., 588, and Burlington & M. R. Co. vs. Chicago Lumber Co., 15 Neb., 391, are cited. In the former of these cases it is said: "'The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by sea-going vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement, or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights; owners of vessels have none. Railroads discharge cargoes carried by them; carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not; and it is seen that these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers." The decision in the Nebraska case does not go into any discussion of the question, but merely cites and follows the holding of the Illinois court. In our opinion the reasoning above quoted is inconclusive. We see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles, as well as carriers by sea. What we have already said, we think, is a sufficient answer to the reason assigned, that railroads have warehouses in which to store freights. And the reason that "railroads discharge cargoes carried by them" and "carriers by ship do not but it is done by the consignee," of course cannot operate as to the cases provided for by this rule, which by its terms applies only where the unloading is to be done by the owners of the property. Nor is it settled that the right to demurrage in maritime law exists only by express contract. In this

country the courts have repeatedly declined to follow the rulings of the English common law courts on this subject, and have held that the ship owner has a lien upon the cargo for demurrage, notwithstanding the absence of any stipulation therefor in the bill of lading. (5 Am. & Eng. Enc. of L., Tit. Demurrage, p. 546; Porter Bills of Lading, sec. 356. See also Huntley vs. Dows, 55 Barb., 310, and Hawgood vs. 1310 Tons of Coal, 21 Fed. Rep., 681, and cases there cited.)

But we are not controlled by the principles which govern as to demurrage under the maritime law. The adoption by the railroad company of the term "demurrage" as a designation for this charge, does not require us to resort to that law as a standard for testing the validity of the rule. We are to look to the real substance and effect of the rule, rather than to analogies suggested by the technical designation which the carrier in this instance has seen fit to adopt. To hold that because the conditions of carriage by sea are different, no charge under this name can be enforced by a carrier by land, or that if allowed, it must be governed by the rules of the marine law, would be to adopt a narrow and merely technical view, ignoring well recognized grounds of public policy and the right of the carrier to prescribe reasonable rules and regulations for its own safety and the benefit of the public.

The instances are few in which regulations similar to the one in question have been passed upon by the courts. The only cases we have found in which the right of a railroad company to make a charge of this kind is denied, are the ones above referred to. On the other hand, the right is sustained by the Supreme Court of Massachusetts. (Miller vs. Mansfield, 112 Mass., 260.) See also a full and able discussion of the question by Toney, J., of the Law and Equity Court of Louisville, Kentucky, in a decision which has appeared since the judgment in the present case was announced. (Kentucky Wagon Mfg. Co. vs. Louisville & Nashville R. Co., 11 Rwy. & Corp. Law Jour., 49.)

2. We cannot as matter of law say that the rate of $1 per day for each car is unreasonable. It is not necessarily unreasonable because the cars vary in capacity, nor because a part of a day is charged for as a whole day. Nor can we hold that the customary rates for storage in ware-

houses and elevators must be the measure of compensation where the storage is in cars on the tracks of a railroad. Indeed, if it be a legitimate object of this rule to prevent the diversion of cars from the work of carriage, it would seem but proper that the charge for their use when detained as a means of storage, should not be such as to encourage customers to adopt that means instead of the more regular and usual methods. Moreover, there was no evidence to show that the rate fixed by this rule was higher than those customary for storage of other kinds. On the contrary, there was evidence tending to show that storage in the car, at the rate fixed by the rule, might be much less expensive than storage elsewhere, the general manager of the railroad company testifying that the modern car carries from 50,000 to 60,000 pounds, and that storage in a company's depot of a car load of 50,000 pounds would amount to $1.25 per day. He testified further: "The rate of $1 per day does not compensate us for the detention of the cars, and it was simply to induce the shipper to unload that the rule was passed."

3. That the rule was promulgated by a person or board of persons representing a combination of carriers, did not impair its effect as a regulation of this particular company. A common carrier though a corporation, makes a regulation its own by adopting it and acting upon it irrespective of the source from whence it is derived.

4. Where a regulation of this character is known to the customer before the contract for transportation is made, it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted with reference to it (Miller vs. Mansfield, supra,) and it is operative whether indicated upon bills of lading or not, and whether the shipments are made to the order of the consignor with the customary direction to notify the customer, or directly to the customer himself.

5. The plaintiff's mode of delivery of the cars to the defendants was to place them on a certain track "designated as belonging to the Augusta & Summerville Railroad" and known as "track 38;" from which point they went "into the possession of the Central Railroad," upon whose side track in another part of the city, the defendants' place of business was situated. Cars were not deliv-

ered on track 38 until the freight was paid and the bill of lading surrendered. Until then they were inaccessible for unloading, being kept elsewhere in the plaintiff's yard. After payment of the freight, the defendant could at any time have his cars moved where they would be accessible, but sometimes it would take from one to five hours after the freight was paid before they could be placed at the point of delivery. It was contended that the time thus required for placing the cars in position should not be included in computing the time which should run against the defendants under the rule in question, the rule containing this language, to wit: "It being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that when the period of such demurrage charges commences, they are to remain accessible to the consignee for unloading purposes." Certain instructions of the court on this subject and the refusal to charge thereon as requested by the defendants, were the basis of several assignments of error, which will be found set out in the reporter's statement. Taking the whole charge, in connection with the evidence, we think the law applicable to this part of the case was fairly presented. The court, having instructed the jury, in substance, that if the defendant had notice of this rule or regulation, and the goods were shipped under a contract that they were to be unloaded by the consignees, and the plaintiff notified the consignees of the arrival of the car and of its readiness to deliver the goods, and the consignees did not receive and unload them within the time stipulated by the rule, the defendants would be liable for the charge fixed by the rule for the detention of cars, added the following: "The railroad will have complied with that rule and regulation if you find from the testimony that it placed these cars at a point where they were accessible to the consignees, and allowed them to remain there during the time fixed by the railroad when they would be free from demurrage, or where it gave notice that it was ready to place them in such position. The mere giving notice, if there was evidence that it was not ready to place them in that position, would not avail, but if you find that the cars were in a position where they could be placed in an accessible place, and the road offered to place them, by sending notice that it was ready, then that would be a substantial

compliance with the rule and regulation. But if the consignees elected to delay and not receive them, they would be liable for the charges under the rule." Also: "If you are satisfied from the testimony that the cars, up to the time of actual delivery or taking possession, were inaccessible, that the railroad could not comply with its offer and that the delay was not the fault of the defendants, then no demurrage under this rule could be enforced, and your verdict would be for the defendants." We think the instructions complained of, as to substantial compliance with the rule, read in connection with the instructions above quoted, give a reasonable and proper interpretation of that part of the rule which relates to delivery at a point accessible to the consignee. In construing its phraseology, the course and exigencies of business are necessarily to be regarded, and hence, the cars, after their arrival at destination, though not kept accessible at every moment of time, are to be treated as being and remaining accessible if the carrier is always ready to render them so within the shortest practicable time, not longer than a few hours, after being notified that the customer is ready to unload. There is no evidence in the record that the cars were not at all times accessible, in this sense, or that there was any undue or unnecessary delay in placing them in position for unloading, after notice from the defendants that they were ready to receive them.

6. The evidence is sufficient to uphold the verdict.

Judgment affirmed.

Clerk's Office, Supreme Court of Georgia,

Atlanta, Ga., June 16, 1892.

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the opinion of the Supreme Court of Georgia in the case therein stated.

Witness my signature and the seal of said Court hereto affixed, the day and year above written.

[Seal.] Z. D. HARRISON, Clerk.

LAW AND EQUITY COURT, LOUISVILLE, KENTUCKY, NOVEMBER, 1891.

NO.. 4103.

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11 RWY. & CORP. LAW JOUR. 49.
50 AM. AND ENG. CASES, 90.
98 KY., 152.

KENTUCKY WAGON MFG. CO.

VS.

LOUISVILLE & NASHVILLE R. R. CO.

OPINION OF HON. STERLING B. TONEY, JUDGE.

The Kentucky Wagon Mfg. Co. is a concern of Louisville owning their own side tracks, employing on an average of four hundred men per day and receives from fifteen hundred to two thousand car loads of freight per year. Refusing to pay demurrage the L. & N. R. R. Co. refused to deliver to them any loaded cars, hence this suit to enjoin the L. & N. R. R. Co. from refusing in the future to deliver cars of freight to them on account of non-compliance with the rules of the Demurrage Association.

The plaintiff urges six grounds of impeachment of the demurrage rules to prove that they are unreasonable and therefore not binding on it, to wit:—

1st. That the period of forty-eight hours within which it is required to unload said cars is arbitrary and unreasonable.

2d. That the charge of one dollar per day per car for the detention of cars after the expiration of said forty-eight hours is excessive.

3d. That neither the plaintiff or any other shipper or consignee was consulted by the defendants in the framing of said rules.

4th. That there is no reciprocity of indemnity in said rules in favor of plaintiff for not promptly furnishing and delivering cars.

5th. That the defendants, by entering into the Demurrage Association, have surrendered their corporate autonomy and functions, and have thereby agreed to abolish competition, and that for this reason the said rules are illegal.

6th. That under the demurrage rules a delivering road may make demurrage charges on cars that do not belong to it but to other companies.

BY THE COURT.

1st. From the testimony and of the action of the various Railroad Commissioners and of the decision of Judge Pryor (of the Court of Appeals, State of Kentucky), upon the testimony, the Court feels warranted in holding that the time fixed by the Demurrage Association for unloading cars is not unreasonable, and no one consignee has the right to advance the peculiar, rare and exceptional circumstances of his peculiar case to justify his violation of the rule.

2d. The life of the railroads is in their rolling stock, and it seems to the Court, upon the proof to be incontestibly established, that the demurrage charge of a dollar a day for the detention of cars is extremely reasonable.

3d. It is not perceived in what manner or upon what principle the reasonableness of the rules or regulations complained of can be affected, from the fact that the plaintiff was not consulted in framing the said rules.

4th. In making necessary and reasonable rules and regulations to control the traffic business of railroads in their dealings with shippers and consignees, it is difficult to understand how a rule or regulation, which is itself reasonable and essential to the proper conduct of the business,

can be assailed as unreasonable because there are not self-imposed penalties upon the carriers contained in said rules for possible delinquencies on their part.

If the regulation be reasonable the shipper is bound by it and that is all there is in it.

5th. What the Demurrage Association demands is simply the legitimate use of the cars and service of the track upon which the cars are operated. It is not organized in antagonism to legitimate competition.

6th. Each company uses the cars of the other roads which come upon its tracks, while in its possession, just as it does its own, and in point of law and in point of facts is the special owner and bailee of such car or cars until it returns them.

We find that none of the six objections urged by the plaintiff are sustained, either by evidence or by any known principle of law applicable thereto. But the plaintiff insists that even conceding that the rules are reasonable, the defendants have no right to withhold loaded freight cars consigned to it upon a tender by it to said defendants of the specific freight charges upon said cars. If the rules of the Demurrage Association are reasonable, the plaintiff ought to comply with them. The plaintiff wrongfully refusing compliance with the defendant's reasonable rules is the cause of the latter refusing to switch cars, and the plaintiff is therefore not entitled to equitable relief. Refusing to do equity, it cannot claim equity. The plaintiff's is the greater wrong and is not entitled to an injunction, therefore, let judgment be entered accordingly.

THE KENTUCKY COURT OF APPEALS.
OCTOBER, 1895.

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97 KY.—32 S. W. R. 595.

THE KENTUCKY WAGON MANUFACTURING CO., APPELLANT,

VS.

THE OHIO & MISSISSIPPI RAILWAY COMPANY, APPELLEE.

APPEAL FROM THE LOUISVILLE LAW AND EQUITY COURT.

ABSTRACT OF OPINION.

First—There may be a reasonable charge by a common carrier for the detention of its cars by the consignee or consignor beyond a reasonable time in which to load and unload them, and such charges may be imposed and enforced through what are known as car service associations, two or more carriers having the right to combine in that way and promulgate and enforce reasonable rules and regulations for the accomplishment of the desired object, all having the right to do jointly what each might do separately.

Second--Whether a charge of one dollar per day or fraction thereof made for detention of cars and use of track on cars not unloaded within forty-eight hours after arrival, not including Sundays and legal holidays, and on empty cars not loaded within forty-eight hours after being placed, is a reasonable charge, and the time fixed for loading and unloading is a reasonable time, are questions of fact, and on these issues in this case, the preponderance of the proof is with the carriers. And it is no objection to such a rule

that no exception is made in behalf of the shipper by reason of an unfavorable condition of the weather, as the rule must in the first instance allow time enough to meet all cases likely to arise, which is shown to be the case here.

Third—If the rules of such an association are reasonable, the fact that the shipper was not consulted in framing them does not vitiate them. Nor can the shipper complain that no counter penalties are provided, the carrier being accountable under well established legal principles for any dereliction of duty.

Fourth—The rule fixing a uniform charge for the detention of cars does not violate the law preventing agreements among rival carriers not to compete with each other.

Fifth—The fact that under the car service rules the delivering road is authorized to collect storage charges on cars received from connecting lines affords no ground of complaint to the shipper, the company having the right under the universal practice among carriers to use and control such cars as its own property.

Sixth—While common carriers, members of a car service association, have no right to refuse to receive freight from, or switch cars for a shipper because he owes to them or to other members of the association car service fees which he refuses to pay, or because he and other shippers have combined to resist the enforcement of the reasonable rules of the association, yet a shipper thus in default cannot ask the aid of a Chancellor to compel the carrier to do that which it admits it is its duty to do, and which it is willing to do upon a compliance on the shipper's part with the reasonable rules of the association. The shipper having done the first wrong and this caused the wrong-doing of the carrier, the Chancellor may refuse to hear him. And especially so, when as in this case, the delivery of the specific cars withheld by the carrier was accomplished by the issual of a mandatory injunction when the petition was filed.

Seventh—If upon any particular shipment storage charges have accumulated before it is unloaded by the consignee, and it is still in the car of the carrier, it may be retained until the regulation is complied with and the charges paid.

OPINION OF THE COURT DELIVERED BY JUDGE HAZELRIGG.

The Kentucky Wagon Company is a corporation extensively engaged at South Louisville in the business of manufacturing and selling wagons. Its works are located near the junction of the tracks of the Louisville & Nashville and the Louisville Southern Railroad Companies, and upon its yards it has its own switches and side-tracks connecting with each of these roads and with these roads alone.

It receives its materials in car load lots, and sends out much of the finished product in the same way. These railroad companies, the one or the other, have physical connection with every other railroad entering the city of Louisville, and are under contract with the Wagon Company for a stipulated consideration to deliver upon the side-tracks of the latter all loaded cars consigned to that Company over their own lines, or over their connecting lines; which cars when unloaded by the Wagon Company the carriers are to remove free of charge.

In February, 1890, the two roads named, together with the other railways entering the city of Louisville, conceiving that their patrons who handled these shipments in car load lots were unreasonably detaining the cars of the carriers, using them for storage purposes and otherwise materially impeding the service, formed what is known in the record as the Louisville Car Service Association; and through it at once promulgated certain rules and regulations calculated to remedy the evil, and ensure the prompt unloading of the consignments and consequent prompt return of the cars.

On the other hand the shippers conceding that the abuse complained of had in fact grown up not through their fault, and contending that the association of the carriers was illegal and wrongful, and the rules they were attempting to enforce, unreasonable and exorbitant, formed a counter association to resist their enforcement. The Wagon Company was a member of this organization and refusing to conform to the rules of the Car Service Association, or pay the charges accumulating against it by

reason of its detention of cars, for more than 48 hours after delivery, the carriers refused to deliver freight consigned to it over their respective lines.

Whereupon in November, 1890, the Wagon Company brought this action in equity against some eleven of the railroad companies to restrain them from refusing to deliver to it on its side-tracks because of its non-compliance with the Car Service Rules certain designated car-loads of freight ready for delivery, and from so refusing in the future.

The original order which issued on the plaintiff's petition enjoined the defendants from further refusing to deliver to the plaintiff the carloads of freight held by them respectively, but thereafter in August, 1891, and after much of the proof had been taken the court so modified the order as to require the Wagon Company to return and redeliver to the railway companies the cars delivered by them, within the time prescribed by the Car Service rules; and such seems to have been the attitude of the parties upon the rendition of the final judgment herein, in December, 1891, when the Chancellor refused to grant the relief asked by the plaintiff, dissolved the injunction and dismissed the petition without costs.

The question to be determined at the threshold of our investigation of this case, is whether or not the rules and regulations of the associated defendants are reasonable and just, and such as the plaintiff ought to have regulated its business by.

Whether if reasonable, the carriers might enforce them by a combination or association, and whether however reasonable the rules may be, and however wrongful may have been the action of the defendants in resisting them, the carriers could lawfully refuse to deliver the freight consigned to the owners, are questions to be considered further along, as is the question whether conceding the refusal of the carriers to deliver the freight to have been wrongful, the plaintiff is in an attitude to ask the Chancellor to right the wrong by compelling an unconditional delivery of the cars to it.

The rules of the Association are of great length, and need not be recited in detail. A discussion of the grounds upon which the appellant seeks to impeach them will suf-

ficiently indicate their nature and purpose. Those grounds, as carefully grouped by the learned Chancellor, are as follows:

1st. That the period of 48 hours, which computed under the car service rules extends to near 60 hours, within which it is required to unload said cars after delivery, is too short.

2d. That the demurrage charge of a dollar per day per car for the detention of cars after the expiration of said 48 hours is exorbitant and excessive.

3d. That neither the plaintiff nor any other shipper or consignee was consulted by the defendants in the framing of said rules, and that neither it nor any other shipper or consignee has any voice in the selection and appointment of the manager or committee of the Car Service Association.

4th. That there is no reciprocity of indemnity and counter-penalty in said rules in favor of plaintiff and other shippers and consignees against the defendants for not promptly performing their duties as common carriers.

5th. That the defendants by entering into the Car Service Association have surrendered their corporate autonomy and functions, and relegated the control and management of their business as common carriers to the arbitrary control of the manager and committee of the Car Service Association, and have thereby agreed to abolish competition, and that for this reason the said rules are illegal.

6th. That under the Car Service rules a delivering railroad company is authorized to demand demurrage charges on cars that do not belong to it but to other companies.

That there may be a reasonable charge for the detention of the carrier's cars by the consignee or consignor beyond a reasonable time within which to load and unload them cannot now be doubted, and that such charges may be imposed and enforced through what are known over the country as Car Service Associations, is equally well settled.

A few cases only had arisen in the courts prior to the institution of this action, but several have since been considered, and we know of no exception to the general doc-

trine that reasonable rules involving charges for such detention may be promulgated by such associations, and that such organizations have universally been held to effect beneficial results in car service, alike to the shipper and to the carrier.

Whether a charge of one dollar per day, or fraction thereof, made for detention of cars and use of track, on cars not unloaded within 48 hours after arrival, not including Sundays and legal holidays, and on empty cars not loaded within 48 hours after being placed, is a reasonable charge, and the time fixed for the loading and unloading as required in the rule, is a reasonable time, are questions of fact, and on these issues the preponderance of the proof is clearly with the carriers. Such was the finding of the Chancellor at the hearing of the motion for a modification of the injunction and his conclusion at the final hearing; and such was the opinion of the Judge of this Court as to the reasonableness of the time for re-delivery when the case was heard on a motion to reinstate the injunction after its modification. Such indeed has been the determination of every tribunal where a similar provision has been adopted by the various car service associations of the country, nor has it been found objectionable to the courts because no exception is made in behalf of the shippers by reason of an unfavorable condition of the weather.

The rule to be beneficial to all alike must be of universal application and a rare or exceptional circumstance incident to a particular shipper at some particular time cannot be allowed to annul the rule. The rule must allow time enough to meet all cases likely to arise and that such is the case here is abundantly shown by the testimony.

That the rate of one dollar per day is also reasonable is conclusively shown. It may be somewhat more than the usual per cent. on the first cost of the car, but this is not the proper criterion.

A railroad company does not construct cars for the purpose of storing property in them, and their use for transportation involves the use of costly railway tracks and other expenditures. It may be true as contended that the shipper was not consulted in framing these rules. We think, however, if the rules are reasonable, this fact does not vitiate them. No complaint is made that there was an attempt

to enforce them before ample notice had been given of their adoption. So, too, if the rules are reasonable, the fact there is no reciprocity of indemnity or counter penalties provided, cannot avail the appellant.

If there is any principle of law well understood by shippers, it is that for any dereliction of duty the common carrier may be held accountable. Nor do we think the roads surrendered their corporate autonomy and functions by relegating the control and management of their affairs to the control of the Association. If the rules may be enforced by the respective carriers in their separate capacities, they may be enforced by them jointly. In the executive committee of this voluntary association, each road has its representative, and the rules adopted by the association are accepted by the carriers and become their own rules. What the carriers may each do for themselves, they do by a common agent.

This practice is common when Union Depots are under the control of a common agent of all the roads using the Depot. It is true that the rule involves the agreement of the roads to make their charges uniform, and this is supposed by counsel to be in violation of the law preventing agreements among rival carriers not to compete with each other.

We do not regard the principle contended for as applicable to this case. Manifestly the object of the rule fixing a uniform charge for the detention of cars, is not for the purpose of raising revenue at all. That feature is insignificant, the purpose being to facilitate transportation, and the less revenue there is derived from the enforcement of the charge, the greater the carriers are benefitted and their facilities increased for serving the public. The agreement in this case to fix a uniform rate is an advantage and not an injury to the appellant and its associates.

It is said, further, that under the car service rules the delivering road is authorized to collect storage charges on cars that do not belong to it but to other companies. This if true would seem to be material to the appellant, but it is only true in a qualified sense. The universal practice among carriers is, that instead of the railroad company which first handles the shipment unloading it at its terminal point, thus necessitating a transfer to a connecting line to

be forwarded to its destination, the cars containing the freight are delivered to the connecting line, and this line takes charge of, and uses and controls the car so received as its own property. It keeps it in repair while so using it as it does its own cars and under a mutual and universal custom, is entitled to all its earnings. Certainly no custom or regulation is more beneficial to shippers than this, for otherwise a transfer must be made at each terminal point of the carrier.

The assumption is that this interchange of cars will work out equal advantages to all, but to still further equalize the earnings, an account of the mileage is taken and the road using the car renders an account to the road in fact owning it, on the basis of three-quarters of a cent a mile so run.

We are convinced therefore that no valid objection can be urged against the enforcement of these rules of the appellees as announced through this Association. They not only commend themselves to the reason and common experience of those observant of such matters but as we have indicated they have found approval at the hands of a number of the courts of the country, and we may add of a number of State Boards of Railroad Commissioners whose business has been to carefully investigate such questions in behalf of the general business public. (See Miller & Co. vs. The Georgia R. R. Co., 88 Ga. 563, 18 L. R. A. 323. Miller vs. Mansfield, 112 Mass. 260. Chicago, Milwaukee & St. Paul Ry. Co. vs. Pioneer Land Co., 1892 Iowa. Beach Ry. Law Sec. 924. Union Pacific &c. R. R. vs. Cooke, Colo. 1892, 50 Am. & Eng. R. R. Cases 89.)

Admitting all this, the question remains: "Is the refusal of the appellant and its associates, even acting as they did under a combination to resist the enforcement of these reasonable rules, a legal excuse for the carrier's refusal to deliver freight cars on the appellant's side-tracks and switches?

If upon any particular shipment storage charges accumulated before it was unloaded by the consignee and it was still in the car of the carrier, we see no reason why it might not be retained until the regulation be complied with and the charges paid. The carrier undoubtedly has a lien on the freight while in his control and cannot be

compelled to surrender his security. But if he delivers the freight without collecting the car service fee, can it be said that he may refuse to do his duty as a common carrier and decline to deliver freight subsequently consigned?

If a passenger owe a former bill to the railway, can he be turned away when he tenders his ticket for the trip he is then about to take? The car service fees in this case were due only to two of the carriers and if the excuse offered were valid, the other appellees were without even that. The appellant owed them nothing.

But the plea is wholly insufficient as an excuse for any of the carriers. They occupy the same attitude and it is wholly immaterial whether they had or had not demands arising out of the failure of the appellant to pay the arrearages for car service. It was the duty of the roads not in connection with the appellant's yards to deliver the freight consigned to it to the roads which were in such connection, and the duty of these roads to receive it and deliver it to the appellant.

The right of the carriers to thus decline to switch cars for those who refuse to pay the bills for car service as defined in the rules of the association is made the basis of earnest argument by counsel for appellant, that such an unreasonable regulation itself affords ample excuse for the appellant's combination to resist the enforcement of the rules. But it is observable that the enforcement of this rule is made to depend on the refusal of the consignee to comply with the regulations.

The conditions upon which it may be put in force cannot exist except at the will of the shipper. He must first wrongfully refuse to comply with the rules, before any excuse is given the carrier to do the second wrong. And we think the appellant cannot complain of the wrong doing of the carrier made possible by his own wrongful refusal to comply with other reasonable regulations of the carriers.

And this brings us to a consideration of the question: Is the appellant in an attitude to ask the aid of a Chancellor to compel the carrier to do that which it admits is its duty to do, and which it is willing to do, upon a compliance on appellant's part with the reasonable rules of the Association?

Of the two wrong doers, we have seen that the appellant was the first. And upon ample authority, the Chancellor may refuse to hear him. Especially so, when the delivery of the specific cars withheld by the carriers was accomplished upon the issual of the mandatory injunction when the petition was filed. The carriers obeyed the order to deliver, so that no injury in that particular can accrue to the appellant by withholding the relief sought.

In Nash, &c., vs. Page, &c., 80 Ky., 539, the complainants who were tobacco buyers withdrew from the Board of Trade because the warehousemen, also members of the Board, were charging them too much. They resolved in a body not to buy from the warehousemen until the latter should accede to their demands. In doing this they acted in violation of the rules of the Board. The warehousemen, subsequently and illegally, refused them admittance to their rooms and the Chancellor was asked to compel such admission.

This Court said: "We have already adjudged that all have the right, upon payment of reasonable fees and charges, to enter these public warehouses, nor do we determine that such a right does not belong to the appellants; but while this right exists, it does not follow that the Chancellor will undertake to grant relief by injunction when the one party is as much in fault as the other." And the judgment below dismissing the petition was affirmed.

This cannot result as feared by counsel in putting the proper control and regulation of the business relations of these carriers with their patrons beyond the power of the courts or relegate the grievances of shippers to the mercy of the carrier. Doubtless the appellant has paid to these carriers bills of freight to the extent of thousands of dollars, and not a few of them inaccurate. If these inaccuracies and errors were not corrected and the carrier made to adjust them, it was certainly not because the courts were not open to its complaints. If the rules of the Association provide as they seem to do, an easy remedy for the settlement of conflicting claims among the parties interested, it is to be regarded only as an additional mode of adjusting these inevitable differences to the slower processes of the law. As suggested in the Nash-Page case, it may be expected that the personal and mutual interests of the parties in securing a prompt and satisfactory car

service so important to all will certainly lead them to a fair adjustment of their differences without the aid of the Chancellor. Judgment affirmed.

W. O. Harris, Humphrey & Davie, for Appellant.

Edmund F. Trabue, Pirtle & Trabue, Lyttleton Cooke, for Appellee.

DISTRICT COURT OF WOODBURY COUNTY, IOWA, AT SIOUX CITY, JANUARY, 1892.

BEACH RY. LAW., SEC. 924.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO.

VS.

PIONEER FUEL CO.

OPINION OF HON. JUDGE VAN WAGENEN.

The defendants, the Pioneer Fuel Co., denied the right of plaintiff to recover for the detention of cars. That no contract, expressed or implied, was ever made or existed between plaintiff and defendant in which defendant recog nized the right of plaintiff to charge and collect for detention of cars.

OPINION OF THE COURT.

We are not compelled to resort to the maritime law for well-established principles decisive of this case.

If the railroad's vehicles can thus be indefinitely tied up and converted into warehouses, it will take twice or three times the number of cars to accomplish the work of trans-

portation and increased trackage and terminal facilities in proportion. This would necessitate a large and unnecessary increase of the capital invested, and a corresponding increase of freight charges, and thus the rights of the public to an economical service would be violated. If the rule contended for by the defendants shall obtain, no reasonable man will expect the railroad company to provide the additional rolling stock and terminal facilities for nothing, and if the parties who render the same necessary, and who get the use of the cars and trackage, cannot be made to pay for the same, the general public will have to do so in increased freight rates. Such, however, is not the law.

We have been cited no case which clearly so decides, and it is so manifestly unjust and inequitable that we cannot believe it will obtain where the question is fairly presented.

When one person uses the property of another after being notified that a charge will be made for the same, the law implies a contract to pay a reasonable sum for such use. This is an elementary principle and one of every day application in the courts. Any other rule would be alike contrary to the fundamental principles of law and equity and repulsive to the commonest sense of right and justice. It is not the policy of the law to give something for nothing. It is the policy of the law to require a reasonable compensation for every valuable thing obtained or of which the complaining party has been deprived. Cases in which it has been held that the common carrier can make all necessary and reasonable rules for the speedy, safe and economical discharge of its important duties to the shipping public are too numerous to require citation. We can conceive of no more reasonable and necessary regulation than the one we are asked to enforce in this action. The need of such a regulation is apparent from the facts of this case.

The judgment will therefore be for the plaintiff in the sum of $90.00, the stipulated amount due.

DISTRICT COURT OF ARAPAHOE COUNTY, COL., MARCH, 1892.

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50 A. & E. R. R. CASES, 89.

THE UNION PACIFIC, DENVER & GULF RY. CO. VS. JOHN COOKE.

This suit was for $347.50 demurrage charges which had accrued on car loaded with brick consigned and delivered to the defendant at Denver.

Every possible question that could be raised was raised in this suit.

BY THE COURT.

1. That the railroad companies have the right to adopt and enforce any reasonable rule.

2. That the rule allowing 48 hours in which to unload is not unreasonable.

3. That $2.00 per car per day is a reasonable charge.

4. It is not perceived upon what principle the reasonableness of the rule can be affected from the fact that the defendant was not consulted in framing these rules.

5. The evidence shows that the regulation complained of was well known to the defendant before hand, and that it was immaterial whether the consignee had notice or not.

6. That the regulation is operative whether indicated upon bills of lading or not.

7. That it is not the duty of the railroad company to unload freight shipped in carload lots.

8. Whether or not this shipment was made by the consignor against the will and wish of the defendant is a

question that would be very material between the defendant and consignor, but does not affect this case.

The Court thereon ordered the jury to bring in a verdict for the plaintiff for the amount sued for, $347.50.

Hon. Amos J. Rising, Judge.

LAW AND EQUITY COURT, LOUISVILLE, KY. JUNE, 1892.

UNREPORTED.

NEWPORT NEWS & MISS. VALLEY CO.

VS.

J. SCHWARTZWALDER & SON.

This was an ordinary action to recover car service charges for detention to cars beyond the time allowed for unloading.

It was tried before Judge Toney and a jury.

The jury returned a verdict for the plaintiff and the Court gave judgment for the full amount claimed, $128.00.

COMMON PLEAS COURT, LOUISVILLE, KY. OPINION RENDERED JUNE 20, 1892.

UNREPORTED.

OHIO & MISSISSIPPI RY. CO.

VS.

PATRICK BANNON.

OPINION OF HON. EMMET FIELD, JUDGE.

In this case Mr. Bannon, the consignee, failed to unload the car within forty-eight hours allowed free, and

after demurrage had accrued the railway company had the shipment stored. Mr. Bannon soon afterwards replevined the consignment and the O. & M. Ry. Co. made answer claiming the demurrage charges, switching charges to the warehouse and storage charges, making a total of $27.00, for which the Court gave judgment.

In deciding this case the Court said that it seemed to him not only that the rules promulgated by the Louisville Demurrage Association were reasonable, but that he did not see how common carriers by railroad would ever have cars to furnish shippers without some such regulation to compel the unloading of them by consignees.

COURT OF COMMON PLEAS OF BUTLER COUNTY, PA., NO. 68, SEPT., 1892.

UNREPORTED.

PITTSBURG AND WESTERN RAILWAY COMPANY

VS.

W. J. GILLILAND.

Appeal by defendant from judgment of R. C. McAboy, Justice of the Peace.

This suit was brought to enforce the payment of $25.00 demurrage due the plaintiff company from the defendant for the detention to a car loaded with fertilizer, shipped to the defendant at Mars Station, on the railway of the plaintiff, in said county of Butler, Pennsylvania, from Carteret, New Jersey, which said car so loaded was under the rules and regulations of the Pittsburg Car Service Association, adopted by the plaintiff company, and of which the defendant had notice, to be by him unloaded within forty-eight hours next ensuing the delivery of said car on the side track of plaintiff's railway at said station,

for said purpose, or in default thereof to pay a charge of one dollar per day for the detention and use of said car for each and every day it should be permitted by the defendant to remain on said siding unloaded after the expiration of forty-eight hours, as aforesaid.

Which said car the said defendant would not and did not unload within said period of forty-eight hours next ensuing the delivery thereof on said siding, and notice to him to unload the same, but on the contrary unreasonably refused and neglected to unload said car for the period of twenty-seven days after the same was placed for unloading as aforesaid.

The defendant denied the right of the plaintiff company to charge and collect demurrage for the detention of said car because of his neglect and refusal to unload the same for the period of time charged in plaintiff's statement of claim. Alleged that the fertilizer company from whom he ordered said fertilizer shipped it one month too soon, that he did not have a place to store it conveniently, that it was not convenient for him to have it delivered before April 1st, 1892, and claimed that if the plaintiff company had any right to charge and collect demurrage for the detention of said car, it must look to the consignor therefor, as under his contract with the consignor he was not obliged to accept said fertilizer before April 1st, 1892.

January 9th, 1893, jury sworn.

Plaintiff's Counsel admits:

That the defendant will testify that the fertilizer company from whom he ordered the same, by mistake shipped said fertilizer one month too soon, that the defendant did not have a place to store it conveniently, that it was not convenient for him to have it delivered before the first day of April, 1892, and that defendant gave plaintiff's agent the above reasons for not unloading said car sooner than it was unloaded.

Defendant's Counsel admits:

That the plaintiff company is a common carrier for hire and in its capacity as such carrier transported said car upon and over its railway to Mars Station, as charged in the narr filed.

That said plaintiff company had adopted the rules and regulations of the Pittsburg Car Service Association with reference to the time in which cars should be unloaded by consignees or in default thereof, that a charge should be made of one dollar per day for each and every day any car shall be detained by reason of the neglect or failure of the consignee to unload the same. That said rule and regulation is reasonable and that the defendant had notice thereof as charged in the narr.

That he had notice of the arrival of said car at Mars Station and refused for the reasons aforesaid to unload the same for the period and time charged in the plaintiff's affidavit, and claim and narr, and that he has not paid the plaintiff said demurrage charge of $25.00 or any part thereof, and claims as a matter of law that said plaintiff is not entitled to charge or collect demurrage on cars thus detained.

Eo die under the facts agreed upon, the court directed a verdict in favor of the plaintiff for the sum of $26.12, being the amount which the defendant admits plaintiff is entitled to recover if under the law applicable to such cases the plaintiff is entitled to recover at all, with the right in the court to enter judgment for the defendant non obstante veredicto.

May 5, 1893, reserved question of law and rule for judgment on the verdict of the jury, argued.

R. P. SCOTT, Counsel for Plaintiff.

A charge reasonable in amount made by a railroad company for the detention of cars beyond a reasonable time after arrival and notice given to consignees, such detention being by the negligence or delay of the consignee is lawful and may be collected by the carrying company.

Alabama Railroad Commission in re petition of Youngblood & Ehrman.

No reason is perceived in law or justice why any unreasonable and unnecessary detention of cars by consignees should not be paid for. It does not follow that because there is no statutory regulation of the question, there is no law.

Union Brewing Co., Peoria, vs. the C. B. & Q. R. R. Co. (Phillips Commissioner, etc.)

Railroad companies have the implied authority as incident to their corporate character and purpose, to make and enforce all reasonable rules and regulations for the transacting and conducting of their business which in their judgment may be necessary for the successful, convenient and safe conduct thereof.

Their business implies a degree of authority almost absolute in the management, conducting and controlling of their trains and the persons thereon, as necessary for the common safety, and to protect themselves from imposition and wrong. Rohrer on Railroads, Vol. 1, page 227.

And this extends not only to passengers, but also to the making of like reasonable rules as to the reception and delivery of freight, such rules and regulations, passengers, shippers and consignees are to conform to.

Illinois Central R. R. Co. vs. Whitmore, 43 Ill., 420.

Tracy vs. N. Y. & H. R. R. Co., 9 Bosw., 396.

It is the duty of the consignee to be in readiness to receive his goods after proper notice and he will be liable to the carrier for compensation for any detention which may be caused by his fault in not promptly accepting them after he gets notice that the carrier is prepared to deliver them; and this not upon the ground that there is any contract or stipulation beween the parties as to the charge, but the principle is general that the carrier who has been improperly detained by the freightor or consignee of the cargo, can receive from him such damages in the nature of demurrage as will afford him a fair compensation for the loss sustained by the delay; as where the consignee of a cargo of grain instead of at once accepting it from the vessel which was ready to deliver it or providing a place for its delivery kept the vessel waiting for several days in order to sell it before delivery, it was held that he was liable for the loss occasioned by the detention.

Huntley vs. Dows, 55 Barb. 310.

Hutchinson on Carriers, page 383.

Railroad Company may make and enforce a reasonable regulation to prevent detention of cars. It is a reasonable regulation to charge a reasonable rate for demurrage and storage, and the payment of such reasonable rate or charge may be enforced.

Miller & Co. vs. The Georgia Railroad Co., Supreme Court of Georgia.

Kentucky Wagon Co. vs. The Louisville & Nashville R. R. Co., Louisville (Ky.) Law and Equity Court.

The Union Pacific, Denver and Gulf Ry. Co. vs. Cooke, District Court, Arapahoe Co., Colorado.

Ohio & Mississippi Ry. Co. vs. Bannon, Common Pleas Court, Louisville, Ky.

Milwaukee, Lake Shore & Western Ry. Co. vs. Lynch, Circuit Court, Oneida Co., Wisconsin.

Chicago, Milwaukee & St. Paul Ry. Co. vs. Pioneer Fuel Co., District Court, Woodbury Co., Iowa.

And not only are charges of this character collectible, but the Railroad Company has a lien on the goods for the same.

Miller vs. Mansfield, 112 Mass., 260.

George Campbell Co. vs. The Baltimore & Ohio R. R. Co., Circuit Court, Jefferson Co., W. Va.

J. D. MARSHALL, Attorney for Defendant.

June 5th, 1893. Opinion of the Court delivered by Hazen, President Judge.

OPINION.

Question.—Under the facts agreed upon the Court directed a verdict in favor of the plaintiff for the sum of $26.12, being the amount which defendant admits plaintiff is entitled to recover if under the law applicable to such cases the plaintiff is entitled to recover, with the right in the Court to enter judgment for defendant if the law is with him, non obstante veredicto.

Facts admitted:

Plaintiff admits inter alia that defendant will testify that the Fertilizer Company from whom he ordered the fertilizer, shipped it one month too soon and that he did not have a place to store it conveniently and that it was not convenient for him to have it delivered before the first day of April following its arrival at the station, as agreed upon with the Fertilizer Company, and that he gave plaintiff's agent the above reason for not unloading the car sooner than it was unloaded.

Defendant admits:

That the plaintiff company is a common carrier for hire, and in its capacity as such carrier, transported said car of fertilizer upon and over its railway to Mars Station, as charged in the narr filed. That plaintiff has adopted the rules and regulations of the Pittsburg Car Service Association, with reference to the time in which cars should be unloaded by consignees, or in default thereof that a charge should be made of one dollar for each and every day, per car, but no car shall be detained by reason of the neglect or failure of the consignee to unload the same for a longer period than forty-eight hours. That said rule and regulation is reasonable and that defendant had notice thereof as charged in the narr. That defendant had notice of the arrival of said car at Mars Station, and refused for the reason above (in plaintiff's admissions) to unload the same for the period and time charged in the plaintiff's affidavit and claim and narr., and that he has not paid the plaintiff said demurrage charge of $25 or any part thereof, and claims as a matter of law that plaintiff is not entitled to charge or collect demurrage on cars thus detained. That defendant ordered a car of fertilizer from Carteret, N. J. That this suit is brought to enforce the payment of $25 demurrage charges due plaintiff from defendant for the detention of a car loaded with fertilizer, shipped to the defendant at Mars Station, on the said railway of plaintiff company, in said county, from Carteret, N. J., by his order, which said car the defendant admits he had notice, under the rules and regulations adopted by plaintiff company, was to be by him unloaded within forty-eight hours next ensuing the delivery of said car on the side track on plaintiff's railway at said Mars Station, for

said purpose, or in default thereof to pay a demurrage charge of one dollar per day per car for the detention and use of said car and siding for each and every day the car shall be permitted by defendant, the consignee, to remain after delivery and notice, on said siding unloaded, after the expiration of forty-eight hours, as aforesaid.

That defendant would not and did not unload the goods from said car within a period of forty-eight hours next ensuing the delivery thereof on said siding, and notice to him to unload the same, but on the contrary unreasonably refused and neglected to unload said goods from said car for the period of twenty-seven days then next ensuing after the same was properly placed for unloading on the side track of plaintiff's railway at Mars Station, and notice of such delivery thereof. That said car, numbered 5,301, Pittsburg, Fort Wayne & Chicago, arrived and was properly placed upon the side track of plaintiff's railway, at said station, with notice thereof to defendant on March 9th, 1892, and was not unloaded until April 9th, 1892, being twenty-five days exclusive of forty-eight hours and Sundays (two days,) allowed the consignee under said car service rules, as applicable to this case, to wit, Article 4, Section 1: "That a charge of one dollar per car per day shall be made for detention to all cars and use of tracks at all points within the territory governed by this association, as hereinafter defined, after forty-eight hours from the time of delivery of cars on track for loading or unloading, not including Sundays or legal holidays, it being understood that collections be made and shall belong to each company for detentions on all side tracks directly connected with its line; a fraction of a day after forty-eight hours shall be considered a day."

Sec. 2. Each railroad company shall place upon its delivery tracks all cars containing freight to be delivered in that manner immediately upon arrival or as soon thereafter as ordinary routine of yard work will permit.

Sec. 3. Delivery of cars shall be considered to have been effected when such cars have been placed on recognized or designated delivery tracks.

Sec. 9. The territory covered by this association is

hereby defined as follows: To include all tracks within the distance of forty miles of the Pittsburg Court House."

That said Mars Station is within said radius. That plaintiff company having formulated its said rules governing its car service, which the defendant admits he had notice of and understood, and that the said rules were reasonable and necessary, he ordered the car of goods shipped over plaintiff's railway to Mars Station, within said district; that the car so loaded with his goods was so shipped by his consignor, though at an earlier date possibly than he desired, and when it arrived was properly delivered to him upon plaintiff's side track for unloading, he duly notified thereof, but refused to unload, save for the space of twenty-seven days and upwards thereafter. He assigned as a reason for his delay, that his consignor shipped his goods one month too soon, and that it was not convenient for him to have the fertilizer delivered before the first day of April next after its arrival, but there is no evidence that plaintiff company knew of this other than as stated, after the arrival of the loaded car. The plaintiff company, a common carrier for hire, neither knew of the private arrangement between consignor and consignee, nor was in any way a party to or interested therein, other than as a carrier for hire of said car load of fertilizer. The consignee, knowing the rules of the car service in this district, and admitting that they are reasonable and necessary for the accommodation of the public in shipping is bound by them through the implied contract growing out of this necessary relation in such cases.

Law.—It will not be denied that plaintiff company could have unloaded defendant's merchandise into its warehouse, and not only have collected storage charges, but have acquired a lien therefor as well as for the carriage of same. Then upon what theory can we distinguish the claim of storing in warehouse and in equally well constructed buildings on wheels. Upon the arrival of the fertilizer at its destination the liability of the plaintiff company as a common carrier ceased, but then became liable for the custody of the fertilizer as warehousemen. This claim or demand is in its essential character a charge for storage. Clearly the common carrier, after a reasonable time has been allowed for unloading, is as much en-

titled to charge for the further use of the car, and the track upon which it stands, as it would be for the use of its warehouse. This method of storage may in many cases be as effectual as any other, indeed it may serve the consignee's interest much better to have the goods remain in the car, at least for a time, than for him to unload them, and especially so where the goods are of an offensive character. Such was admittedly the fact in this case. Cases in which it has been held that the common carrier can make all necessary and reasonable rules for the secure, safe and economical discharge of its important duties to the shipping public, are too numerous to require citation.

We can conceive of no more necessary and reasonable regulation than the one we are asked to enforce; the need of such a regulation is apparent from the facts in this case, The rules adopted in this district are reasonable and clearly necessary, and in no way detrimental to shippers, but wholly in their interest. The common carrier is compelled to accept goods for transportation, and it would be manifestly unjust to not enforce a corresponding duty on the shipper, to not negligently and unnecessarily detain or otherwise deprive the common carrier of the use of the vehicles which the law thus places at his command.

Having reached this conclusion, judgment must be entered in this case in favor of plaintiff, and against the defendant upon this verdict, upon payment of the jury fee.

And now, June 5th, 1893, upon due consideration the Court being of opinion that the law is with the plaintiff in the question reserved in this case, and that judgment must be entered upon this verdict against defendant and in favor of plaintiff, upon payment of the jury fee. Judgment. By the Court,

AARON L. HAZEN,

President Judge.

CIRCUIT COURT, ONEIDA COUNTY, STATE OF WISCONSIN.

UNREPORTED.

OPINION RENDERED OCTOBER 15, 1892.

MILWAUKEE, LAKE SHORE & WESTERN RY. CO

VS.

A. F. LYNCH.

FOR PLAINTIFF BY JURY.

The plaintiff shipped one car load of lumber consigned to the defendant at Tomahawk Lake, Wis. The car was allowed to stand on the side track loaded until one dollar demurrage had accrued, when the defendant offered to pay the freight charges thereon and unload the car. The agent of the railroad company refused to allow the car to be unloaded until the demurrage charges were paid. The defendant refused to pay the charges, and the car remained on track nine days longer, when it was unloaded by the railroad company, and contents were taken by the defendant against the protest of the plaintiff.

The defendant made answer that the car was not properly placed for unloading, hence no demurrage was due, and set up a counter claim for $500.00 damages.

The jury decided that the car was properly placed for unloading.

The Court decided that the rule was a reasonable one, both as to the time allowed free to unload cars and as to the amount of the charge, and ordered judgment against the defandant for the amount sued for, twenty-two dollars and costs, making a total of one hundred and fifty-one ($151.00) dollars.

SIXTH DISTRICT COURT OF RHODE ISLAND, AT PROVIDENCE.

(R. I.) 22, L. R. A., 532.

J. C. GOFF

VS.

OLD COLONY R. R. CO.

OPINION OF HON. JUDGE COOKE.

(Opinion Rendered January 19, 1893.)

The defendant refused to deliver to the plaintiff a car load of brick on which demurrage charges had accrued, until the said charges were paid or guaranteed. Suit was brought by the plaintiff against the Old Colony Railroad for damages of $100.00 for illegally (as plaintiff claimed) preventing him from unloading the car.

The Court affirmed the railroad company's right to hold freight for demurrage charges and gave judgment for the Old Colony Railroad Company.

CIRCUIT COURT OF JEFFERSON CO., W. VA. MARCH, 1893.

UNREPORTED.

GEORGE CAMPBELL CO.

VS.

BALTIMORE & OHIO RAILROAD CO.

Two cars of bark were received at B. & O. Station in Charlestown, W. Va., in the month of August, 1891, and

consignees were notified on arrival in the usual way. They neglected to call and pay freight charges and remove the lading until after the free time had expired, and were then told by the agent that $1.00 car service charge on each car had already accrued, which must be paid before delivery. This they refused to do, and in accordance with car service rules delivery was withheld for payment of charge. The cars remained on track until $69.00 charge had accrued upon each car; the railroad company then sold the bark for freight and car service charges, and suit was brought by plaintiff for damages in sum of $500.00. By agreement of both parties, a jury having been waived, the case was submitted to the judgment of the Court, and after hearing the evidence and argument of counsel, judgment was rendered in favor of the defendant for the sum of $14.88, being the difference between the value of the bark sold and the amount of freight and demurrage charges.

The Supreme Court affirmed Judge Faulkner's decision, the Court unanimously refusing to grant an appeal.

CIRCUIT COURT OF COOK CO., ILLINOIS.
NOVEMBER 10, 1893.

UNREPORTED.

THOMAS PURCELL, ET. AL.
VS.
PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Thomas Purcell & Bro. are coal dealers in the city of Chicago, and are accustomed to receive coal in car-load lots over the P., C. C. & St. L. Ry. In December, 1891, the railroad company refused to deliver certain cars of coal which were then in its possession and upon which car service charges had accrued owing to the delay on the part of

Thomas Purcell & Bro. to promptly unload same. Purcell & Bro. filed a bill in the Circuit Court asking for a mandatory injunction compelling the railroad company to deliver the cars of coal then held and others as received, and an injunction was granted upon the bill.

Messrs. Walker & Eddy, counsel for the railroad company, afterwards appeared in the case, filed answer and cross-bill, and upon reference of the case to Master in Chancery I. K. Boyesen, evidence was taken, and a hearing had upon bill and answer, cross-bill and answer, and upon the evidence taken.

Both in the pleadings and at the hearing the railroad company made no attempt to claim any lien on the freight for charges which had accrued upon prior shipments of freight, or for any sums due for the construction of a side track. The only claim made by counsel for the Car Service Association, was that the specific freight in the possession of the railroad company at the time of the filing of the bill should be held for the specific charges which had accrued upon that freight by reason of unreasonable delay on the part of complainants in receiving and unloading the cars, so that on the hearing before Master in Chancery Boyesen, and afterwards before Judge Horton, the only question in controversy was whether or not the railroad company had a lien upon freight for car service charges which had accrued upon that particular freight on account of unreasonable delay in receiving and unloading.

Master in Chancery Boyesen held that the railroad company had a lien upon the freight in question under the published notices, rules and regulations, and provisions in the bills of lading, all of which provided that freight shipped should be subject to car service or demurrage charges at the point of destination, and, after a careful and equitable computation, he found that the sum of $40.00 was due the railroad company for car service charges.

On the hearing before Judge Horton, on exceptions to the Master's report, the case was exhaustively argued by counsel on both sides, and taken under advisement by the Court.

November 10th the Court rendered its decision, which is given at length. It holds broadly that railroad com-

panies have a lien upon freight for reasonable car service charges after a reasonable time has elapsed for the unloading and release of the cars.

Only one case has ever been passed upon by a court of record in this State prior to this decision by Judge Horton and that was the case of Jenkins vs. The Northwestern Railway Company, which went to the Supreme Court and was decided by that Court, and the decision reported in 103 Ill., page 588.

In that case the freight involved was paper, part of which had been unloaded before the railroad company claimed to hold the balance. The Supreme Court used rather sweeping language as to the right of railroad companies to hold freight for "demurrage."

It will be observed from Judge Horton's opinion that he does not question in any way the language or the decision of the Supreme Court as applied to the facts in the Jenkins' case, but he clearly distinguishes the Purcell case from the Jenkins' case, and clearly points out that the very language of the Supreme Court in the Jenkin's case impliedly gives railroad companies a lien upon such freight as coal, which cannot be practicably unloaded and stored, but must be delivered in bulk and unloaded by the consignee.

The decision is as follows:

DECISION BY JUDGE HORTON.

I have not prepared a written opinion in this case. While I have examined many of your authorities, I have not felt it necessary to review all these authorities in a written opinion. What I have to say, therefore, is more in the nature of my conclusions in the matter, with some references to the facts and the law.

The question as originally presented in this case by the bill Thomas Purcell filed originally was the right of the railroad company to hold his coal, claiming a lien thereon for charges on former shipments and for a claim of a balance due for construction of side track into his yard. An injunction was granted upon that bill, and that position has since been substantially abandoned by the present counsel in the case, and I think wisely abandoned,

for no court could sustain such a position, as claimed by the freight agent, I think it was, of the railway company —could not sustain it at all. The question, however, that has now been presented to the Court is this: The complainant is the receiver of large quantities of coal shipped in bulk, from Ohio, I believe it is—from out of the State. It is claimed on the part of the railway company that the defendant unnecessarily delayed the unloading of the cars, and that the railway company had a right to a car service charge or demurrage, or whatever you please to name it, for the use of these cars beyond a reasonable time for unloading, under the rules. The case was originally wisely brought, in my opinion, and would have been sustained upon the issue as originally presented.

There have been elaborate oral arguments and I have been furnished with very elaborate printed briefs in the case. The freight was coal in bulk. The complainant had a yard and side track connected by switches with the defendant railway company's tracks. The railway company was therefore bound by law in this State, and I think by a fair interpretation of the Constitution, by the Constitution of the State, not only to allow that switch connection to be made, but to deliver the coal in the yard of the defendant on the track, or, rather, deliver the cars loaded on the track. Were it not for the case of the Northwestern Railway Co. vs. Jenkins, 103 Ill., 588, this Court would have no serious trouble in this case. That case at first seems to be conclusive of the question now before the court. That case was decided upon an agreed statement of facts, and at my request I have been furnished with and have examined a copy of this agreement as filed in the Supreme Court which passed upon the case. When the facts in that case are examined and compared with the details of the case at bar, it will be seen that they differ materially. For instance, a sentence from their opinion, on page 600, the Supreme Court says: "But the mode of doing business by the two kinds of carriers is essentially different." That is, carriers by sea and carriers by rail, the opinion not recognizing, though not excluding, that carriage by water on our lakes is carriage by sea. "Railroad companies have warehouses in which to store freights. Owners of vessels have none. Railroads discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee. The masters of vessels provide in

the contract for demurrage, while railroads do not, and it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers."

It appears in the evidence, and perhaps the Court should take judicial cognizance of the fact, that the railway company has no warehouses for the storage of coal shipped in bulk. Another difference in facts is that the railroad company is required by law to deliver its coal into the complainant's yard. Again, it is the duty of the consignee to unload this coal the same as it is the duty of a consignee to unload a vessel. There is no demurrage as such, in a technical sense of demurrage, claimed in this case. There was no bill of lading accompanying the coal, but it was the custom, as between this railway company and this consignee and the consignor, to ship the coal without bills of lading. I do not know what the railway's custom is. They have some sort of checks or bills for the use of their conductors, and they are delivered with the goods.

In these essential facts and elements the case at bar differs from the case in the 103d—the Jenkins' case.

It is argued that the railway companies might impose great hardships upon shippers if allowed a lien upon freight for such reasonable charges as have accrued for the use of cars after reasonable time has elapsed for unloading, and indeed that might be so, and the argument impressed me with considerable force. But, on the other hand, if the railway company has the right to store freight, such as coal, upon the expiration of forty-eight hours, or whatever time is considered reasonable, they might run the cars out and store them on vacant property from which the cartage would be more than the coal is worth. That is, if railways were inclined to subject shippers to inconvenience, the opportunities would be quite as great under one method of doing business as under the other.

As remarked by the Supreme Court in the Jenkins' case, there can be no such lien except by contract or where it is allowed by law. There are many classes of cases where a lien is allowed, and where, without any specific contract to that effect, the law sustains it, such as innkeepers, agisters, carriers, bailees and warehousemen. Demurrage, as such technically, cannot be sustained, but the

right of lien is not limited here technically to the word demurrage, or to what may be defined demurrage. When the railway company placed the cars in the yard, the relation of common carrier ceased, it seems to me. When these cars were shunted onto the side track in the yards of the complainant, then the relation of common carrier ceased; but was not the railway company furnishing storage for this party? Substantially the same relation exists when cars were set upon a side track ready to be delivered and complainants did not receive them. It seems to me that the company, under such circumstances, would be sustained in so leaving the coal in cars, and considering the class of freight it is a proper place to store it. It would not be the proper place to store paper, such as was the subject-matter of the Jenkins' case, but it would be for bulk coal. Whether it be called demurrage, or car service, or whatever it may be, it seems that the company is entitled to a lien for proper charge. If they make an unreasonable charge, the plaintiff can make tender, replevin or pay under protest.

It is claimed that the railway company has the right to sue for the charge, whatever it might be. That is undoubtedly true, but in this case the proof shows that this coal is sometimes sold in car-load lots from one person to another, and passes through several hands while it remains on the cars of the company; that the complainants sell it in bulk and have the cars put into their yards and the purchaser takes the coal off the cars, the purchaser doing the unloading and the complainants having nothing to do with it.

If the company is to look to the parties in a civil suit for the money, they have to sue as many parties as were owners of the coal while it remained on the cars. I do not think that a reasonable rule for the court to establish. The railways have no right to throttle a man as this company undertook to, according to the bill originally filed. They cannot hold freight in their possession for charges which have accrued upon freight delivered, or for other general indebtedness. That was the allegation of the bill as originally filed, but in the case as finally submitted to the Court, the question raised was as to the right of the company to hold freight for car service or storage charges which had accrued upon that particular freight. The

amount involved in the case is small, and the Court has not taken the time to exhaustively review the figures and accounts submitted in evidence, for I apprehend that it makes little difference to counsel whether the amount awarded be a few dollars more or less, for whether the claim be for one dollar or for forty dollars or more, the principle is the same, and it is the question of law which the Court must decide and which is of importance in the case. Therefore the finding of the master as to the amount due the railroad company is not disturbed.

So far as I have seen or examined the facts of the cases like the Jenkins' case, which hold that the railway company must unload and store, the freight involved was such as could be unloaded in warehouses. None of the cases applied to property such as coal, which cannot be readily and practically unloaded and stored.

Perhaps the proper order would be the dismissal of the bill for want of equity, but counsel may confer together and prepare an order in accordance with the opinion of the Court.

SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND.

90 VA., 393; 18 S. E. R., 516.
56 A. & E. R. R. CAS., 330.

JANUARY 11, 1894.

NORFOLK & WESTERN RAILROAD CO.

VS.

ADAMS, CLEMENT & CO.

OPINION OF THE COURT.

FAUNTLEROY, J.—The petition of the Norfolk & Western Railroad Co. complains of a judgment of the Cir-

cuit Court of Roanoke County, rendered therein at the April term, 1893, in favor of Adams, Clement & Co. against the said Norfolk & Western Railroad Co., for the sum of $488.00, with interest thereon from September 1, 1891, until paid, in which suit the said Adams, Clement & Co. are plaintiffs and the petitioner is defendant.

The suit is an action of assumpsit against the Norfolk & Western Railroad Co. to recover back certain sums of money alleged to have been illegally exacted from and paid by the said Adams, Clement & Co., lumber dealers, to the said Norfolk & Western Railroad Co. for car service or demurrage charges under car service rules, and a verdict was rendered and a judgment entered for the full amount of the plaintiff's claim. The case is here upon a writ of error obtained by the defendant company.

It is well settled, in this State and in other States, that a common carrier may make reasonable rules and regulations for the convenient transaction of business between itself and those dealing with it—either as passengers or as shippers. See Norfolk & Western Railroad Co. vs Wysor, 82 Va. (Hansbrough), 250; Norfolk & Western Railroad Co. vs. Irvine, 84 Va. (Hansbrough), 553. That this rule is reasonable and proper, and that the railroad company can make such a charge, has been decided in a number of States, the question never having arisen before in this State.

See Miller et. al. vs. Georgia Railroad & Banking Company, reported in American and English Railroad Cases, vol. 50, page 70.

Miller vs. Mansfield, 112 Mass., 260; Union Pacific, Denver & Gulf Railroad Company vs. Cooke, American and English Railroad Cases, vol. 50, page 89.

Kentucky Wagon Manufacturing Company vs. Louisville & Nashville Railroad Company, American and English Railroad Cases, vol. 50, page 90.

C., M. & St. Paul Railway Company vs. Pioneer Fuel Company, Beach Railway law, section 924, and cases there cited; Jones on Liens, section 284, and cases cited; Lawson's Rights and Remedies, vol. 4, page 3146, sections 1831 and 1832; Wood's Railway Laws, pages 1592, 1593 and 1600; Waterman on the Law of Corporations, vol. 2, pages 245 and 246; American and English Enc. of Law,

vol. 2, pages 878 to 881; and Notes: Redfield on the Law of Railways, 6th edition, pages 67 to 83.

In addition to this long line of authorities holding the right of a railroad company to make such charge, and the reasonableness of such charge, there have been numerous investigations and rulings upon the point by the railroad commissioners of the various States. In Texas the railroad commissioner, Judge Reagan, after full investigation, made an order fixing $3.00 per day, per car, as a reasonable charge for delay in unloading, after 48 hours' notice. The railroad commissioner of Illinois, and those of other States, after full investigation, have decided in favor of the right and reasonableness of such a charge; and when it is considered that these railroad commissioners are appointed for the express purpose of regulating railroads in the interest of the public, the weight of their decisions as to the reasonableness of such charge is apparent.

It is contended that the sections of the Code of Virginia, 1887, 1202 and 1203, make such a charge illegal, and the judge of the trial court took the view of the plaintiff, and instructed the jury that, under the law of Virginia, such charge is unlawful, whether it be reasonable or not.

We think that the trial court erred in so holding, and in so instructing the jury. The charge made by the railroad company for the detention of its cars, and the occupation of its track after due notice, is not a charge for transportation, storage or delivery of freight, and it is not a device or a pretext for exacting of the shipper or the consignee more than the rate prescribed by law and fixed by schedule; but it is for the use and occupation of the cars and the obstruction of their tracks by the consignee after the contract for transporting and delivering the freight had been fulfilled and ended. After arrival at the place of consignment, and notice to the consignee of the arrival, and the allowance of a reasonable time for the unloading of the cars by the consignee, according to his contract obligation to unload, the duties and the liabilities of the carrier cease, and the carrier becomes simply a bailee for hire, and can make reasonable rules and regulations and charges for such service as bailee as it may see fit. Such charges are not carrier charges in the meaning, intendment or prescription of the statute. Under the head

of carriers, the American and English Encyclopedia of Law, page 880, Vol. II: "A carrier fulfilling the duties of a warehouseman is not obliged to accept the goods subject to his ordinary liability. He may impose such terms as he pleases, and the consignor (consignee), with notice thereof, will be bound. Whether such terms are or are not reasonable, is an irrelevant inquiry."

In a note to this section is the following:

"We can see no reason why a railroad company as a common carrier cannot stipulate, by a contract express or implied, that their liability as carriers shall terminate with delivery at a particular point, and they will assume no liability at all in such case as warehousemen. If the consignee is fully advised, at the time of shipment, that the company has no agent at a particular station, or the place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do according to the reasonable and proper usages of his business."

Hutchinson on Carriers, section 378, says: "The custody and protection of the goods in his new character as warehouseman is a distinct service from that of their transportation, which entitles him to additional compensation, in consideration for which he continues liable for their safe keeping as the hired bailee of the owner."

The statute provides solely for the transportation, storage and delivery of freight to the carrier, to be shipped by it, and delivered at the other end of the journey to the consignee; but it makes no provision or regulation for the hiring of cars to be loaded and unloaded by the customer, according to such contract as the carrier and the customer may make, express or implied.

"A railroad company is not required by law to keep a warehouse or depot at every station along its route or line, and it may stipulate either expressly or by implica-

tion that it will assume no liability as warehouseman at a flag station where it has no depot or agent, and when the consignee is fully advised at the time of shipment, that the company has no depot or agent at such station, and it is not shown that the exigencies of its business required that it should have an agent at the place, the liability as common carrier terminates with the safe delivery of the goods on the side track at that point, and it assumes no liability as a warehouseman." It is shown in evidence that this rule and charge of one dollar a day for the unreasonable and even long-continued detention of the car, and obstruction of the tracks and business of the railroad, is not made for compensation to the company, but for the benefit of the public and a stimulus to the consignee to unload the car and disencumber the track and the business of the road. The evidence in the record is that the car is much more valuable to the company than the charge of $1.00 per day; and it is manifest that, if cars can be delayed and held by shippers or consignees for months (as the record shows was done in this case) without any regulation that would be operative, the business of the railroad and the public service must necessarily suffer. In view of the authorities and the facts of this case, we are of opinion the money paid by the plaintiffs to the defendant company was properly charged by the said company, and was due to it by the plaintiffs, Adams, Clement & Co., and that they had no right to recover it back; and that the Circuit Court of Roanoke County erred in the law as applicable to the facts of the case, and erred in refusing to set aside the verdict of the jury; that the judgment complained of is erroneous, and the same is reversed and annulled. And this court, proceeding to enter such judgment as the Circuit Court ought to have entered upon the pleadings, will dismiss the plaintiffs' suit.

Reversed.

SUPREME COURT, COUNTY OF CHENANGO, N. Y., MARCH, 1894.

UNREPORTED.

WARREN L. SCOTT

VS.

DELAWARE, LACKAWANNA AND WESTERN RY. CO.

This action was duly brought to trial at the above term of the Court before the Court without a jury, a jury trial having been waived in open Court, and the Court having heard the proofs and allegations of the respective parties, and David H. Knapp, Esq., of counsel for the plaintiff, and George W. Ray, of counsel for the defendant, and having duly considered the same and the arguments of said counsel, makes the following decision and finds and holds as follows:

FACTS.

I. At the times herein mentioned, the plaintiff, Warren L. Scott, was a dealer in lumber and resided at Norwich, Chenango Co., N. Y.

II. At the same times the defendant, The Delaware, Lackawanna & Western Railway Company, was a duly organized and incorporated railroad company, and common carrier of passengers and freight duly incorporated and organized under and pursuant to the laws of the State of Pennsylvania and owned and operated a railroad in the State of New York extending from Buffalo, N. Y., to Norwich aforesaid.

III. On or about the 5th day of October, 1893, the plaintiff purchased of Stewart Brothers at Buffalo, N. Y., a carload of pine lumber containing 13,871 feet, and same was shipped by said Stewart Brothers as consignors to said Warren L. Scott, the plaintiff, over its road and consigned to said Scott at Norwich, Chenango Co., N. Y.

IV. At the time the said lumber was shipped by the said Stewart Brothers as aforesaid the said consignors filled out three shipping bills or shipping receipts for said car of lumber to be signed by the defendant upon blanks furnished by the defendant, but kept by said Stewart Brothers at their office for the purpose, and which were dated at Buffalo Station, October 5, 1893, in which the consignee of said lumber was named as W. L. Scott, Norwich, N. Y., and the freight rate was fixed and the weight of the car specified when weighed. These shipping bills or receipts were delivered by Stewart Brothers, the consignor, to the defendant with the lumber which was sent from Buffalo Station to East Buffalo where the car was weighed on the 7th of October and then forwarded over the defendant's road to the consignee. The rate fixed in such shipping bills and receipts was $8\frac{3}{4}$ cents per 100 pounds and was a special rate. The said shipping bills or receipts contained, among other things, the following: Received from Stewart Bros., by the Delaware, Lackawanna & Western Railroad Company the property described below, marked, consigned and destined as indicated below, which said company agrees to carry to the said destination. It is mutually agreed in consideration of the rate of freight hereinafter named, 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 upon the face or back of this receipt, and which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable. Upon all the conditions whether printed or written herein contained upon the face or back of this receipt, it is mutually agreed that the rate of freight from to is to be in cents per 100 lbs., if special, rate $8\frac{3}{4}$ cents.

Then followed the name of the consignee with place of destination and a description of the car by number with the weight of the car, and among the conditions so referred to were the following, printed upon said shipping receipts or shipping bills, viz.:

"5. Property not removed by the person or party entitled to receive it, within twenty-four hours after its ar-

rival at destination, may be kept in the car, depot or place of delivery of the carrier at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges. The delivering carrier may make a reasonable charge per day for the detention of any car, and for use of track after the car has been held forty-eight hours for unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor. Property destined to or taken from a station at which there is no regularly appointed agent, shall be entirely at risk of owner when unloaded from cars, or until loaded into cars; and when received from or delivered on private or other sidings, shall be at owner's risk until the cars are attached to, and after they are detached from, trains."

"10. Owner or consignee shall pay freight at the rate below stated, and all other charges accruing on said property, before delivery, and according to weights as ascertained by any carrier hereunder; and 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, and at the rates and under the rules provided for by published classifications."

These three shipping bills or shipping receipts when the car had been weighed and the weight inserted, were signed by W. C. Colwell who was the freight agent of the defendant at Buffalo, and the defendant retained one and the other two were immediately returned by mail to the consignor, said Stewart Brothers, and received by them duly signed as aforesaid.

Said Stewart Brothers were acquainted with the contents of said receipts and were accustomed to ship lumber over the defendant's road and to fill out the shipping bills or receipts to be signed and returned to them for freight shipped and were in the habit of having said shipping receipts and bills, when signed returned to them through the mail.

All the conditions above given were printed in and upon the form or blank in use by the defendant at all points, and the plaintiff had received freight over the de-

fendant's road, and sometimes had received the shipping bills and receipts for said freight, and had also shipped freight over the defendant's road at Norwich, N. Y., and had used and received from the defendant shipping bills and receipts for freight shipped by him over their road filled out upon the same forms or blanks and containing the same conditions.

V. The above shipping bills and receipts with the conditions above stated formed the contract between the consignors and the defendant, and the plaintiff and the defendant, for the transportation and delivery of said lumber, and was a valid and binding contract.

VI. The defendant was also a member of the Central New York Car Service Association, and the defendant had adopted the car service rules of said association, among which were the following:

"1. A charge of one dollar ($1.00) per car per day or fraction of a day shall be made for car service and use of track on all cars not unloaded within forty-eight (48) hours after arrival, not including Sundays or legal holidays, except as hereinafter provided.

"9. A full record shall be made of the arrival and disposition of all cars subject to car service rules, and the agent of each road shall make daily reports to the manager on such forms and in such manner as may be prescribed by him from time to time."

"10. On cars arriving after seven o'clock (7) a. m., car service will be charged after the expiration of forty-eight (48) hours from seven (7) a. m. following. On cars arriving after twelve (12) o'clock noon, car service will be charged after the expiration of forty-eight (48) hours from noon following."

"11. When cars are delayed after arrival beyond the time allowed by Rule 10, on account of failure of shipper or consignee to give prompt notice of disposition, the time so consumed shall be considered a part of the forty-eight (48) hours allowed for unloading."

"23. Car service charges shall be collected in the same manner and with the same regularity and promptness as

transportation charges, and agents will report to the manager of the association the name of any corporation, firm or individual refusing to pay the same."

"24. Property upon which car service charges have accrued shall be held by the road, and the consignee will not be allowed to remove the same from the company's premises, or from cars on its team tracks, until the charges that have accrued thereon are paid."

The substance of a part of such rules had been incorporated in the aforesaid conditions.

A short time prior to the shipping of the above specified lumber over the defendant's road, the plaintiff had received other lumber over the same road, and same having remained unloaded more than forty-eight hours after being placed for delivery, the defendant had claimed pay for car service and use of track on such car, and the existence of such rules and the amount of the charge made and claimed had been made known to the plaintiff who made no objection to the amount, but denied the defendant's right to make such a charge and his liability to pay, and he had refused to pay the amounts charged or anything for car service and use of track, or demurrage, as it was usually termed.

VII. The said carload of lumber so forwarded by Stewart Brothers to the plaintiff from East Buffalo on the 7th day of October, 1893, reached Norwich aforesaid on the morning of October 9, 1893, and was placed for delivery at one o'clock p. m. of the same day on the switch, and at a convenient place for unloading, and between 7 and 9 o'clock in the forenoon of the same day the defendant's agent notified the plaintiff or his agents and servants, at his place of business, in the usual manner, that the car had arrived and would be placed for delivery at noon of that day. On the 11th the defendant paid the freight on said carload of lumber.

VIII. Between the 11th and the 13th days of October the plaintiff removed a portion of said lumber, and on the afternoon of October 13th a portion of said lumber remained in said car and the plaintiff was engaged in unloading it, and 5,713 feet of lumber then remained in the car which was worth $42.50 per thousand.

IX. Under the said rules and regulations of the defendant charges for car service and use of track at one dollar per day commenced to accrue at 7 o'clock a. m. on the 12th day of October, and in the afternoon of the 13th day of October two dollars for car service and use of track on said car had accrued.

X. During the afternoon of October 13th the defendant by its agent, W. S. Wagner, who was the freight agent at Norwich, N. Y., made out and presented a bill to the plaintiff for such car service and use of track for two days, to wit: the 12th and 13th days of October, and presented the same to the said Warren L. Scott, the plaintiff, for payment. The plaintiff refused to pay said charges, whereupon the defendant, by its said agent, notified the said Scott that if he did not pay said charges he should close the car, and said Scott refused to pay said charges or any part or portion thereof, making no objections to the amount or to the reasonableness of the charge, whereupon the defendant, by its said agent, closed said car.

XI. At 7 o'clock on the morning of October 12 the said car of lumber had been held more than forty-eight hours for unloading, and the charge of two dollars for the detention of said car and use of track thereafter was a reasonable charge.

XII. The defendant asserted his lien therefor and gave due notice to the plaintiff thereof.

XIII. Thereafter and on the 27th day of October, 1893, the plaintiff commenced this action, claiming that the defendant had converted the lumber remaining in said car at the time it was closed as aforesaid.

And from the above facts I do find and hold as

CONCLUSIONS OF LAW.

I. That the above and aforesaid shipping bill and receipt or bill of lading formed and constituted a valid and binding contract between the said defendant, The Delaware, Lackawanna & Western Railway Company, and the said consignors, Stewart Bros., and the consignee and plaintiff, Warren L. Scott, as modified and limited as to

the placing of the car and the time demurrage on charge for car service and use of track should commence, and as to the amount of such charge, by the said rules and regulations of the defendant.

II. That such charge of one dollar per day for car service and use of track was a reasonable charge.

III. That the sum of two dollars had accrued due the defendant from the plaintiff for car service and use of track under said contract at the time defendant closed said car and refused to permit the plaintiff to remove the balance of said lumber unless such charge was paid, and the defendant had a lawful lien on said lumber therefor and the right to hold said lumber until such sum duly demanded was paid.

IV. That such lien was not waived by the defendant.

Note:—The question was raised, whether the railroad company waived its right to charge for car service and use of track, by accepting the freight charges and taking the consignee's receipt for the property.

The Court holds that this right was not waived, for the reason, that, to hold otherwise would permit a consignee to hold a car indefinitely, provided the charge for transportation was paid, and receipt given for the property.

V. The defendant rightfully detained said lumber and did not convert the same to its own use or at all.

VI. The plaintiff has not proved a cause of action.

VII. The defendant is entitled to a judgment dismissing the complaint of the plaintiff on the merits with costs.

Judgment is ordered and directed accordingly, to be entered by the clerk of the County of Chenango, N. Y.

CHARLES E. PARKER,
Justice of the Supreme Court.

COUNTY COURT WINNEBAGO COUNTY, WIS., MAY, 1894.

UNREPORTED.

CHICAGO & NORTHWESTERN RY. CO.

VS.

JOHN STRANGE PAPER CO.

Demand, $257.00.

Suit commenced April 3rd, 1893, both sides agreeing to have case tried before the Court without a jury.

May 31st, 1894, judgment entered in favor of plaintiff and against the defendant for full amount sued for.

COUNTY COURT, WINNEBAGO COUNTY, WIS., MAY, 1894.

UNREPORTED.

MILWAUKEE & NORTHERN R. R. CO.

VS.

JOHN STRANGE PAPER CO.

Demand, $596.00.

Suit commenced April 3rd, 1893, both sides agreeing to trial of case before the Court without a jury.

May 31st, 1894, judgment entered in favor of the plaintiff and against the defendant for full amount claimed.

The defendant did not dispute records of cars, nor question right of railroad companies to collect car service charges, but advanced a counter claim, based on alleged delays on the part of the railroad companies in placing cars.

The Court found:

1st. That the allegations of the plaintiff, as made, were true.

2nd. That the defendant withdrew the counter claim.

3rd. That defendant owed plaintiff the full amount sued for, and judgment for the plaintiff was entered accordingly.

COURT OF COMMON PLEAS, NO. 3, HAMILTON COUNTY, O., OCTOBER, 1894.

UNREPORTED.

DAWSON, BLACKMORE & CO., ET. AL.

VS.

C. C. C. & ST. L. R'Y. CO.

CHARGE BY HON. HOWARD B. HOLLISTER, JUDGE.

Gentlemen of the Jury:

This is an action brought by Dawson, Blackmore & Company, against the three C's & St. L. Railroad Company, commonly known as the "Big Four," for the recovery of eight dollars, which the plaintiff claims was extorted from it, or obtained from it against its protest, and in such a way that in order to obtain its property, it was compelled to pay, or go without the property.

It is claimed by the plaintiff that the eight dollars paid by it was paid under protest. A voluntary payment, made by one of a charge against him, can not be recovered back by him, except under a mistake of facts. There is no charge in this case that there was a mistake of facts. But a recovery may also be had where property to which the individual owning it is entitled is detained from him to pay any charge which has been illegally made against him by the person who has the property in charge, to which the plaintiff is entitled. But such payment must be made under circumstances showing that the intention was absolute, and that he could not obtain his property without the payment of the sum demanded. Under those circumstances, he may recover, if you find them to exist, the money so paid, back. And the testimony in this case on that subject is confined to the testimony of two witnesses, one on either side of the case. You will have to weigh the testimony as given by them between them, and you will observe in the weighing of that testimony, the rule which will pertain also to the other questions in the case, that the plaintiff must establish his case by a fair preponderance of the testimony. That is to say, that the weight of the testimony must be on his side of the case. It is not necessary that that weight shall be of any considerable amount. It is sufficient that it weigh down the scale.

If you find, under the rules I have given you, that there was no demand made upon the plaintiff for the payment of eight dollars, in the sense that without the payment, the property could not be obtained, then you will find for the defendant. The money in such case would have been paid voluntarily. If you find, however, that there was a demand for the payment, and as a condition preceding the delivery of the goods, the payment had to be made, from the statement of witnesses and the testimony in the case, then you will find that the payment was involuntary, and may be recovered, and you will find a verdict on that issue for the plaintiff. Even under the circumstances of the case, as the law will further be given to you, if it is a reasonable regulation, there could be no recovery.

It is the duty of a railroad Company, when freight is delivered for shipment, to deliver the bill of lading as it is called, to the shipper, and then to transmit the goods, within a reasonable time, to the place of destination. Any

information of the contents of a bill of lading that may have come to the shipper after the goods are shipped, has no binding force upon him; and if you find that before these goods were transmitted, that a bill of lading was delivered to the shipper of the goods, then I charge you that the contents, under the circumstances of the case, of the bill of lading, are chargeable to the shipper.

It is true that the law is general that any restrictions in bills of lading, concerning which there is not an express agreement, and which limit is what is known as the common law liability of a common carrier, of which a railroad is one, are not binding upon the shipper, unless they are brought to his notice, and he especially assents thereto.

And that involves the question whether or not a charge of the nature of the charge made by the testimony in this case is such a charge as was within the process of the law, as announced by the decisions which now go to make up the common law. There was a rule of common law whereby a common carrier by water might, after reaching the destination and notice to the consignee of the goods to remove the goods, charge a reasonable sum, after a reasonable time had elapsed within which the consignee had not removed goods. That reasonable sum was such sum as the vessel could fairly have earned during the time that the consignee neglected to take the goods away after notice that they were there, and after reasonable time to take them away. The principle applicable to those cases is applicable to the case of railroads; exactly the same. And if there is no decision in England on the subject, as announcing the common law, the practice of the common law is the same, and is, I charge you, applicable in the State of Ohio, to railway cases.

They have, after receiving the goods and taking them to the place of destination, a right, after giving the notice upon their arrival to the consignee, to charge a reasonable sum for demurrage, for storage, in the nature of demurrage, as explained to you. What that sum is, is an amount which the cars in which the grain is left, if it is grain in any given case, might have earned during such time as the consignee, after notice, and a reasonable time within which to remove, has permitted the cars to remain in the yards of the railroad company.

It is in evidence that the time of detention, the time of redemption, the time within which the consignee might take away goods, was forty-eight hours after arrival of the goods. It is in evidence that notice was sent to the consignee on the day of the arrival of the goods.

If you find from the testimony in this case that notice was sent to the consignee, which was Williamson, who was also the shipper, after the arrival of the goods, and within the first twelve hours or other reasonable time, leaving enough time within which the goods might have been removed by the consignee from the ground, then I charge you that the railroad company had given a reasonable notice of the arrival of the goods.

If you find that the custom, where the name of the consignee was not familiar to the railroad company, was to give notice to the Chamber of Commerce, and such notice was given within such reasonable time, as I have said, then I charge you that that notice is a good notice, and was all that was required of the railroad company.

But to go back; as I have said, the right then, that the Railroad Company had to charge this demurrage, was a common law right, and inasmuch as it was a common law right, the rule before stated, that an express assent on the part of the shipper to a clause in a bill of lading was necessary where a common law right was to be restricted; that in this case by the insertion of that clause in the bill of lading, that stipulation, to the effect that demurrage would be charged, was not an abridgment or a restriction of the common law right by the Railroad Company, and that under those circumstances it was not necessary that that special clause should be brought home to the notice of the shipper, and any especial agreement made or express agreement made with respect to it; that under those circumstances, the stipulation being in the bill of lading, if you find that the bill of lading as delivered before the car was shipped, did bring home notice to the shipper, and that he is bound by it. But he is bound by it without any special contract. And further, that when a shipper delivers to another to whom it may have been sold, the shipper and the consignee being the same, the bill of lading is delivered to the one to whom he has sold it, and the one to whom he has sold it is bound by the same conditions

he is, and is bound by the information contained in the bill of lading that there would be a reasonable charge for demurrage if after notice here at Cincinnati, the goods were not removed within a reasonable time. If you find that a notice, such as I have described, was sent out by the Railroad Company, to the consignee, here at Cincinnati, Williamson & Company, and that also within forty-eight hours that the cars could have been unloaded, the forty-eight hours also covered the time within which notice was given that the car could have been unloaded by the consignee before the expiration of that time, then I charge you that forty-eight hours is a reasonable time within which the car might have been unloaded by the consignee.

If you find from the testimony that the car could have earned more to the Railroad Company than a dollar a day, then the sum of one dollar, I charge you, was not an unreasonable sum to charge for that service.

There remains the important question, the right of an agent of the defendant to make a contract relative to notice of who was the owner of the goods shipped under the circumstances under which these goods were shipped. The ownership of goods of this kind shipped in this way, is indicated by the existence of the paper called the bill of lading. The delivery of the bill of lading by the one to another, carries with it the title to the property.

It is in evidence that the rule was, of the Railroad Company, and known to the trade generally dealing with Railroads, that notice was given of the ownership by the delivery of bills of lading, or upon written order of the owner to the Railroad Company to deliver to some one else. That regulation is a very reasonable one, growing out of the fact that the paper itself shows the title to the property, and its delivery carries with it the title. The mere say so of any individual that he is the owner of such property, is entirely ineffectual. It amounts to nothing. The Railroad could not act upon it in the delivery of the goods safely, because if they did, frequently opportunities would come for dishonest men to announce themselves as the owner of the property and receive it from the Railroad Company to its damage, because it would have to respond to the owner of the goods if they delivered them to some one who was not entitled to them.

It is also in evidence that on occasions, verbal notices were given to the Railroad Company that the property belonged to some one or other, and that those verbal notices were accurate. There is no rule more clearly established than that the principal is bound by the act of his agent acting within the scope of his authority. If you find that the agent of the defendant acted within the scope of his authority in receiving verbal notice, and that he did in fact receive a verbal notice, then such notice would be a notice to his principal, the Railroad Company.

Whether a notice of that sort was given in this case is the question for you to determine. If a notice merely came from Mr. Louden, that is to say, if Mr. Louden said that he was the owner of the goods, it would amount to nothing more than that he claimed to be the owner of the goods, and under those circumstances, the Railroad Company, through its agent, would not be bound by his statement. But if the owner of the goods, the shipper, with the individual to whom he has sold the goods, in other words, if Williamson and Louden went to Mr. Campbell, and expressly stated to him that Williamson had sold the goods to Dawson, Blackmore & Co., and Campbell knew that Louden was a member of the firm of Dawson, Blackmore & Co., and thereupon expressly agreed that he would waive what is the usual course in such cases, if you find that the usual course was to require the delivery of the bill of lading, or a written order, then, under those circumstances, I charge you that the Railroad Company had notice that Dawson, Blackmore & Co., were the owner of the goods. In that connection, you will bear in mind, if you find that the custom was to deliver bills of lading or written orders, that at the time that it was claimed by Williamson and Louden, that statements were made to Campbell to the effect that Louden and Dawson, Blackmore & Company, were the owner, had in their possession, or in the possession of one, or either of them, the bill of lading itself, if you so find the fact to be, which is the evidence and the best evidence of the passing of title from one to another; that fact will be considered by you in determining the probability of the claim that there was an express promise on the part of Campbell, in effect to receive notice for the Railroad Company, contrary to the usual custom of giving such notice by a bill of lading, or by written notice, if you find that that was the custom.

You will also bear in mind that the rules out of which the demurrage charge grew, adopted, as the testimony shows, in 1889, were known to the shipping public, to shippers and receivers of grain, at the City of Cincinnati; and if you find that they were known to the public and that they were known also to Dawson, Blackmore & Company, then the charge that there would be a charge for storage would be known to them from the time that the car arrived.

There is a dispute in the testimony as to when the time began from which the charge for storage or demurrage should be started. The testimony on the part of the superintendent is that such charge or the time for the expiration of which such charge shall begin, began at the arrival of the goods.

That is also testified to by Campbell and perhaps by others.

There is also testimony tending to show that the forty-eight hours began to run from the time that the grain was inspected. You will have to determine from the testimony which of those statements is correct and which is more likely to be correct, from the position and standing and occupation of the witnesses who have testified on the subject. The necessity for inspection is not devolved upon railroad companies. The testimony is uncontradicted. The railroad has nothing to do with it, and inspection is made by the Chamber of Commerce for the benefit of merchants, for the facilitation of business between merchants, by which samples of the articles bought and sold may be brought as early as possible to the Chamber for inspection by those who deal in such commodities.

As to the publication of lists of cars received by railroad companies, there is no requirement to publish such lists unless you find that the custom has grown up between them in their dealings with shippers of grain, to publish such lists, and that under those circumstances it would be their duty to continue their publication. But even under those circumstances, if you find from the testimony in this case, even if there was a custom generally, that that custom did not apply to the shipment of grain over the division of the railroad of the defendant from which this car came, then the question should be entirely left out in your consideration of the case.

The jury returned a verdict for the defendant.

LAW AND EQUITY COURT, RICHMOND, VA., MARCH, 1895.

UNREPORTED.

C. W. ANTRIM & SONS

VS.

RICHMOND, FREDERICKSBURG & POTOMAC R. R. CO.

ACTION OF DETINUE.

For 61 Bbls. Flour @ $2.25 per bbl.....$137 25
And 80 Bbls. Flour @ $2.15 per bbl..... 172 00

Total $309 25

Damages laid at $500.00.

The car of flour arrived at Richmond on the night of March 12th, consigned to order of David Stott, the shipper, without name of party to notify. On March 15th railroad company received for first time the information as to whom to deliver flour, viz.: C. W. Antrim & Sons.

On same day the railroad company notified Antrim & Sons of the arrival of the flour. This day was Friday. On Monday the 18th, (Saturday being half holiday) Antrim & Sons commenced hauling the flour from the car, and after hauling one load refused to pay one dollar car service charge, which they were told had accrued, whereupon the company refused to deliver the remaining quantity of flour. C. W. Antrim & Sons then brought an action of detinue against the R. F. & P. R. R. C., in the Law and Equity Court, as above set forth, to recover the flour and damages for its detention. The defendant company put in a special plea asserting their lien upon the flour for the one dollar, car service charge, and the Court allowed the instruction asked for by the defendant company. This instruction set forth the opinion of the Court, which is briefly this, viz.: that where goods are consigned

"to order" of consignor, or in such other way as does not enable the carrier receiving them to know who the consignee is, then the free time allwed consignees under the car service rules begins to run from the same time as in other cases, viz.: the arrival of the car, and not from the date of the receipt of notice of the name of consignee.

INSTRUCTIONS OF COURT IN CASE OF C. W. ANTRIM & SONS VS. R. F. & P. R. R. CO.

The Court instructs the jury that, if they believe from the evidence that the flour sued for in this case was received in Richmond, Va., by the R. F. & P. R. R. Co. on the night of 12th, or morning of 13th of March, and the company had no instructions or knowledge as to whom it was to be delivered to other than that contained in manifest until the 15th of March, on which day the plaintiffs were notified by the company, and that Antrim & Sons commenced hauling the flour from the company on the 18th day of March, and after hauling one load refused to pay one dollar charged by the said company for detention of car and occupation of track, then the said company had the right to decline to deliver flour until said charge was paid, and they should find for the defendant on the special plea in this case asserting a lien.

Verdict for defendant.

SUPERIOR COURT OF TIPPECANOE COUNTY, IND., APRIL, 1895.

UNREPORTED.

THE LAFAYETTE LUMBER & MFG. CO. VS. C. C. C. & ST. L. RY. CO.

An action in replevin.

In February, 1894, a car of lumber consigned to the LaFayette Lumber & Manufacturing Co. arrived at La-

Fayette, Ind., on the C. C. C. & St. L. Ry. This firm had repeatedly refused to pay car service charges. At the expiration of the free time, the car being but partly unloaded, a bill for car service due was presented, which they refused to pay. They were then told they could not have any more of the lumber until car service bill was paid, and that additional charges would be made at the rate of $1.00 per day until car was released.

At the expiration of two weeks the lumber company got a writ of replevin, under which lumber was delivered and unloaded with $17.00 due for car service.

The case went into court, and after several demurrers on the part of plaintiff to defendant's answers, which were overruled, came to trial.

Plaintiffs claimed discrimination against them in the car service rules which allowed an additional 48 hours in which to unload coal and coke, over and above the 48 hours allowed for unloading lumber; and inasmuch as car service rules were not enforced at certain stations on the C. C. C. & St. L. Ry. LaFayette dealers were discriminated against and in favor of dealers in the towns where the car service rules are not enforced.

Defendants denied this and submitted bill of lading covering this shipment of lumber, which contained the clause covering car service rules.

Judge Everitt decided:

That the free time allowed for unloading is reasonable.

That the charge is not excessive.

That there is no discrimination shown in favor of coal dealers and against lumber dealers.

That rules could be enforced at LaFayette and not at adjoining stations, without discrimination, as there is nothing in common between dealers at such points.

Judgment was given for the full amount of car service claimed.

BEFORE THE RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF MISSOURI. HEARD AT ST. LOUIS, APRIL 4th AND 5th, 1895.

EVANS & HOWARD FIRE BRICK COMPANY AND OTHERS. CONSTITUTING THE COAL DEALERS' PROTECTIVE ASSOCIATION OF ST. LOUIS.

VS.

THE ST. LOUIS CAR SERVICE ASSOCIATION. JAS. COWGILL, JOS. FLORY, COMMISSIONERS.

The complaint in this case is of unjust and unreasonable charges for demurrage, as relating to coal, lime, and kindred commodities, delivered upon the private tracks of consignees in the city of St. Louis, and praying for the restoration of a former rule (in force Sept. 1st, 1892), which provided for a charge of fifty cents per day for cars on private tracks, instead of $1.00 per car per day, as under the rules as at present enforced; and that some rule should be provided whereby the owners of private tracks should be entitled to a corresponding charge against railroads for leaving cars on side tracks beyond a reasonable time, after same are unloaded.

In dismissing the complaint, and refusing the prayer of the petitioners, the Commission says: "Hearing was had at St. Louis on the 4th and 5th of April, 1895, both parties being represented by counsel. Full investigation was had. Briefs were filed by the attorneys on May 25th, 1895. After a careful reading of the testimony, and full consideration of the arguments of attorneys, we are of the opinion that a charge of one dollar per day for the detention of cars is just and reasonable.

"Cars detained upon a private track are, in our judgment, entitled to the same demurrage as like cars detained upon any other track; the loss by detention being the same in either case, and for this reason we are of the opinion that the provisions of the car service rules are just and proper, and that the rules as formerly existing would not insure prompt service, but in our judgment would cause unreasonable delay in unloading, and consequent unnecessary detention of cars."

CIRCUIT COURT OF JACKSON COUNTY, MO., FEBRUARY, 1896.

UNREPORTED.

T. A. GRIFFITH

VS.

KANSAS CITY, FORT SCOTT & MEMPHIS R.R. CO.

NO. 10,698.

Opinion of E. L. Scarritt, Judge, on plaintiff's motion for new trial.

By the agreed statement of facts, upon which this cause was submitted to the court, it appears that defendants had promulgated a rule or order to the effect that the defendant company would on and after October 6, 1890, assess and collect a charge of one dollar per car per day, Sundays and legal holidays excepted, for delay of cars and use of tracks, on all cars that should be delayed in unloading, loading, or awaiting forwarding instructions, for more than a stated time after the same should be received, or should be at the disposal of the shipper.

The plaintiff had knowledge of this rule and order of the defendant company, and knew the same was in force at the times herein stated.

On January 10, 1891, defendant received for plaintiff in Kansas City a car load of coal in one of its own cars that had arrived on that day from Carbon Center, Mo. On January 12th, defendant notified plaintiff of the arrival and whereabouts of said car of coal, and further notified him in the same notice that "trackage charges will commence on this car January 19th, 1891, at 7 a. m." Plaintiff did not call for said coal until January 26th, 1891, at which time defendant demanded seven days charges at $1.00 per day for trackage and storage charges, and refused to permit plaintiff to unload the car until the same was paid. Plaintiff thereupon instituted a replevin suit, and took possession of the coal.

At the trial the court found the issues for the defendant, and the plaintiff insists in his argument upon a motion for a new trial, that the court committed error in so finding.

There are two questions involved in this case.

1st. Can the defendant legally charge storage for cars used and occupied by its patrons beyond a reasonable time after the contract of transportation has been fulfilled?

2nd. If so, has defendant a lien for such charges?

As to the first proposition, there is no question as to the reasonableness of the charge made in this case, nor does the plaintiff complain of the time allowed him in which to unload his coal.

A railroad company has the right to make reasonable charges for the use of its cars and tracks, when the delay is caused by the failure of the shipper or consignee to receive and unload the cargo, after due notice of its arrival. Of this proposition there can be no doubt, and the plaintiff in his brief admits that it is the law.

Has the defendant a lien for such charges?

This question the plaintiff earnestly contends should be answered in the negative. And cites several cases in support of his contention. (Chicago R. R. vs. Jenkins, 103 Ill. 588, Railroad vs. Chicago, 15 Neb. 391, Cromlien vs. Harlem Ry., I Abb (N. Y.) App. 472.

These cases are unsatisfactory in their reasoning. I think the cases that hold the contrary doctrine are more in consonance with reason and better adapted to the conditions and requirements of the present commercial age. It is admitted that the liability of the railroad company as a common carrier ceases when it lands the cargo at its destination. Its contract of carriage has been fulfilled. It is the duty, then, of the shipper to receive and unload the cargo. If he fails to do it, he fails to perform one of the conditions of his contract of carriage or transportation. He constitutes the railroad company his bailee, and the car which contains the freight, his storage house. Does not the railroad company then become his warehouseman? If the railroad company should unload the car and place the cargo in their warehouse they would have a lien for storage charges. This is not denied. Where is the difference, except that in case the goods are retained in the car, the shipper is saved the expense of unloading and removing them to a warehouse?

The shipper, by his failure or neglect to receive and unload the cargo, compels the railroad company to retain, house and care for his goods beyond the time, when by the terms of the contract of carriage they are bound to do so. For this extra service the railroad company is entitled to extra compensation. If the car is unloaded and the goods placed in a warehouse the company has an undoubted lien for such extra compensation. Now under the rule of the company, of which the shipper has notice, the car is made the storage house for the goods after a reasonable time has been given the shipper to unload. Is not this the rule and the knowledge thereof on the part of the shipper equivalent to an agreement on the part of both parties that the goods shall be considered as "stored" in the car, the same as if in a warehouse, and if so, does not the lien for charges follow as a matter of law?

There is another reason why this rule should be maintained. Railroad companies are quasi-public corporations. The innumerable ramifications of the combined railroad systems extend to every nook and corner of this country, and the loaded cars of almost every individual corporation are found at one time or another, upon the switches, sidetracks and unloading tracks of almost every city of any commercial importance on the continent. They are

transferred from one carrier to another until their final destination is reached. This is in the interest of commerce. It facilitates and lessens the expense of the transportation of property.

A railroad company cannot meet the ordinary demands for transportation if its cars can be tied up indefinitely at the pleasure of an individual shipper.. The individual shipper and the company are not the only ones interested. The public convenience and trade would be seriously interfered with if each individual shipper were permitted to retain the use of cars and tracks for storage purposes beyond a reasonable time. "Car famines" and consequent congestion of traffic would inevitably result from such a rule.

The increasing complexity and growing complications of railroad traffic have induced railroad companies in different places to organize what are known as Car Service Associations for the purpose of having an authorized agent to look after fugitive cars and others of every description, and to see that they are seasonably unloaded and returned to the ordinary channels of trade. This, together with the announcement of the rule that the companies shall have a lien for charges upon goods stored in cars, will, I think, have a salutary effect upon the car service in this State.

I submit the foregoing as some of the salient reasons for the conclusion I have reached in this case. The authorities cited below, in my opinion, fully support the conclusion of the court upon legal theories. I am pleased to follow the lead of some of our sister States which have already announced the same doctrine. (Gashweiler vs. Ry. Co. 83 Mo. 112; Gregg vs. I. C. Ry Co. 147 Ill. 550 S. C., 61 A. & E. R. R. Cs. 208; Miller vs. Mansfield, 112 Mass. 260; Miller vs. Ga. Pac. Ry. & B. Co., 88 Ga. 563; S. C. 50 A. & E. R. R. Cs. 79 and 15 S. E. Rep. 316; Hutch. on Carriers, Sec. 378; Ry. Co. vs. Filder, 46 Ga. 433; Norfolk & W. R. R. Co. vs. Adams, 56 A. & E. R. R. Cas. 330. On proposition as to lien, 28 Amer. & Eng. Enc. of Law p. 663, and authorities cited under note 4; Alden vs. Carver, 13 Ia. 253; Barker vs. Brown, 138 Mass. 340; Story on Bailments, (9th Ed.) Sec. 453 a.; Steinman vs. Wilkins, 42 Amer. Dic. 254 and note at page 287; Schmidt vs. Blood, 24 Amer. Dic. 143 and note at page 145: Ken-

tucky Wagon Co. vs. R. R. Co., 17 S. W. Rep. page 595; Rev. St. of Mo., 1889, Sec. 6806.

The motion for a new trial is overruled.

Robert Adams, Attorney for Plaintiff.

I. P. Dana, Attorney for Defendant.

CIRCUIT COURT OF COLES COUNTY, ILL., APRIL, 1896.

UNREPORTED.

FULLER & FULLER
VS.
CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO.

The following opinion by Judge F. M. Wright, rendered April 21st, 1896, sustains the right of railroad companies to hold freight for car service charges after allowing forty-eight (48) hours free for unloading.

Fuller & Fuller, lumber and coal dealers of Charleston, Illinois, received in July, 1894, and January, 1895, cars 58171 C. C. C. & St. L. and 18460 C. C. C. & St. L., respectively. These cars were placed in the usual manner for unloading and at the expiration of forty-eight (48) hours after arrival, a bill for $1.00 each car service was presented to consignee, who refused payment. In accordance with the rules of the Illinois Car Service Association of which defendant company were members, the cars were then padlocked by the railroad company's agent and held until five ($5.00) and sixteen ($16.00) dollars car service respectively accrued thereon, whereupon consignees replevined the property.

The two cases were by consent consolidated and a jury waived.

F. K. Dunn, attorney for plaintiffs.

Geo. F. McNulty and Neal & Wiley, attorneys for defendant.

Judgment for defendant.

WRIGHT, J.—The facts in these cases are that the defendant had transported two car loads of hard coal, one of them consigned to the plaintiffs, and the other to the Coles County Coal Company, and afterwards by the Coles County Coal Company transferred to the plaintiffs in Charleston, Illinois.

The defendant company had adopted a rule at this station, that after actual notice to the consignee, or his assignee, cars should be unloaded within forty-eight hours after such notice, and upon failure to do so the owner of the property should be subject to a charge of one dollar per day for car service.

Plaintiffs were so notified, and failed to comply with such notice, and the defendant thereupon refused to permit them to unload the cars unless such charges were paid, and thereupon plaintiffs replevined the cargo.

The question arising under the argument in these cases is whether a railroad company has a lien upon such freight, as is involved in this controversy, for a reasonable charge after an unreasonable delay in unloading the cargo.

It is not contended by counsel for plaintiff that the railroad company has not a right to make a reasonable charge for such service, but it is denied that the company has a lien upon the cargo for such charges.

Were it not for the decision of the Supreme Court of this State in the Jenkins case, reported in 103 Illinois Reports, the court would have little difficulty in reaching a conclusion.

However, the court has arrived at a conclusion which at least is satisfactory to itself. The common law rule in respect to liens is a familiar one, and of wide and varied application.

It is a familiar principle of common law that anyone who has bestowed any particular service or care upon any article of property which has been confided to his possession for such purpose, has a lien upon it for any reasonable charge in respect to such service or care. It is difficult to see why the facts in the present case do not call for the application of this familiar principle. It is difficult to imagine why a railroad company having bestowed a care upon property which it is conceded to be entitled to a reasonable charge in that respect should be excepted from the general rule which entitles parties performing such services to a lien upon the property.

All, in my judgment, that the Jenkins case determines is, that the consignee is not bound by the rules of the company unless he assents or agrees thereto. This principle is generally true, not only in cases like the present, but in all other cases.

It is not denied that the shipper is entitled to a reasonable time to unload the cars before he is subject to any charges.

The statute in respect to grain provides that twenty-four hours is a reasonable time. In the cases at bar the rule gives forty-eight hours. It is difficult to see why twenty-four hours in the one case should be a reasonable time and forty-eight hours in the other case should be unreasonable. Therefore, it can hardly be contended that forty-eight hours is an unreasonable time under all the facts and circumstances in the case in view of the express legislative provision in respect to freight which consists of grain.

The Legislature has seen proper to pass another statute in this State, which, while it is not upon the express subject involved in these cases, seems to me to have a very pertinent application, and to a certain extent will control the decision of this case. It is the statute relating to unclaimed propery, Chap. 141 of the Revised Statutes. The title of that Act is: "An Act to provide for the sale of personal property by common carriers, warehousemen, innkeepers, and by others having liens thereon." The first section of it, in part, reads as follows: "That whenever any trunk, carpet bag, valise, bundle, package or article of property transported or coming into the possession of any railroad or express company, or any other common

carrier, inkeeper or warehouseman or private warehouse-keeper, in the course of its, or his business as common carrier, innkeeper, warehouseman or private warehouse-keeper shall remain unclaimed and the legal charges thereon unpaid during the space of six months after its arrival at the point to which it shall have been directed, and the owner or person to whom the same is consigned cannot be found, upon diligent inquiry, or being found and notified of the arrival of such article, shall refuse or neglect to receive the same and pay the legal charges thereon for the space of three months, it shall be lawful for such common carrier, warehouseman, innkeeper or private warehousekeeper to sell such article at public auction, after giving such notice as prescribed by the statute."

Now, it seems to me that this statute plainly recognizes that railroad companies have a lien upon all personal property transported by them, not only for freights, though that is not the word used by this statute, but for the reasonable charges thereon.

It is conceded in these cases that the railroad company has the right to charge for car service after an unreasonable delay on the part of the consignee in unloading the freight. If that be true, then that becomes a legal charge, to the same extent that the freight rate is a legal charge, and this statute, by its title, and by its plain provisions, recognizes that lien and subjects the property, under certain conditions, and after the lapse of a certain time, to be sold to pay those legal charges.

This view of the case seems to the court to be more consistent with justice between man and man than the other view of the case contended for, which is, that the railroad company should sue the party for these charges.

To recognize a lien existing in favor of a common carrier is promotive of justice. It avoids litigation, and enables parties to settle these small charges without controversy.

The principal object of the rule of the company doubtless is not to secure the small charges made for the use of the cars, but to secure to themselves and to the public the use of the cars.

If the courts refused to recognize liens under the facts and circumstances shown in the evidence here, it would not

only be a detriment to the railroad company, but it would be disastrous to the public interests in view of the fact that it is necessary both to the railroad company and to the public that the railroad companies at all times have the use of their cars, in order that the public business may be properly transacted.

The finding and judgment, therefore, will be for the defendant.

CIRCUIT COURT OF ST. LOUIS, MO., JUNE, 1896.
NO. 98876.

UNREPORTED.

THE WABASH R. R. CO.

VS.

BERRY-HORN COAL CO.

This was an action by the Wabash Railroad Company to recover compensation for the detention and use of certain cars by the defendant, to whom the cars loaded with coal were upon consignment delivered by the plaintiff upon defendant's private track at its coal yard in St. Louis.

The coal was shipped to be unloaded by the defendant, who was allowed under plaintiff's rules as a reasonable time for unloading, three days or 72 hours on soft coal, two days, or 48 hours on hard coal; counting from 7 a. m. of the next day following the delivery of the cars to the defendant.

It was claimed by the plaintiff that it was the defendant's duty to unload the said cars within a reasonable time after delivery. That the time allowed by the car service rules as aforesaid was a reasonable time, and that the defendant having failed to unload said cars within the said time thereby became and was liable to compensate plain-

tiff for the use and detention thereof at the rate of $1.00 per car per day.

The defenses set up by the answer were:

First—That the charge was illegal and that it was unreasonable.

Second—That as to forty-eight cars it appeared that they were owned by other railways than the plaintiff company, and that as to these the plaintiff company was not entitled to recover because of the ownership by foreign companies.

Third—That the plaintiff was not entitled to recover because the character of the service rendered to the defendant by the plaintiff was bad, that they frequently delivered cars "bunched," and thereby damaged the defendant in a greater amount than the amount sued for by the plaintiff.

Fourth—That the plaintiff could not recover because of the peculiar properties of the soft coal, which it was shown could not be unloaded except from the cars to the wagons without disintegration and great loss to the defendant, which it was claimed compelled the defendant to use the cars as warehouses, particularly when the cars were delivered "bunched."

Fifth—That the plaintiff could not recover because the coal was delivered upon defendant's private track, of which they were the owners; that to charge them as much as was charged others upon tracks owned by the company was unlawful discrimination as against the defendant.

The action was for $138.00 demurrage charges, and was tried before the Court sitting as a jury.

The Court held: Honorable John F. Dillon, Judge:

That a common carrier has a right to impose a reasonable charge for the use and detention of its cars delivered to the consignee, and to be unloaded by him, when detained by the consignee, beyond a reasonable time for unloading.

That the charge of $1.00 per day for each car so detained was a reasonable and legal charge, and that the

time of 72 hours allowed for unloading soft coal and 48 hours allowed for unloading hard coal was a reasonable time for the unloading of the cars.

That as for the forty-eight cars belonging to other railroads and originally consigned through them, the plaintiff was entitled, as special owner or bailee thereof, to collect the demurrage charges thereon as upon its own cars.

That the question of good or bad service of the plaintiff in delivering cars to the defendant could not be considered in determining the legality or reasonableness of the demurrage charge sought to be enforced; nor could the quality of the coal or alleged necessity of handling it directly from the cars to the wagons be considered.

That the charge being legal, reasonable and just, plaintiff was entitled to recover the sum of $138.00 sued for.

CIRCUIT COURT OF WAYNE COUNTY, MICH. JUNE, 1896.

UNREPORTED.

WILLIAM A. M'EACHRAN & CO.

VS.

GRAND TRUNK RY. CO.

An action at law by William A. McEachran & Company, dealers in wood and coal, against the Grand Trunk Railway, for $500 damages for withholding three cars of cord wood for car service charges, was decided in favor of the defendant railway company by Judge W. M. Lillibridge, in the Circuit Court for the County of Wayne, at Detroit, Michigan, June 19, 1896. Messrs. Riggs & Lehman appeared for plaintiffs, and Edwin F. Conely, counsel for Car Service Association, appeared for the Railway Company.

The history of the case is as follows:

Three cars of wood were received at Detroit station in the latter part of January, 1895, and the consignees were notified of arrival in the usual way. McEachran called at freight office, and, having ascertained the amount of freight charges, left directions to deliver cars at a certain wood yard having private track delivery, and promised to send check for the freight. Plaintiffs were notified by telephone on two or three occasions, during the running of free time, that the check had not come to hand and promised to investigate the matter. Defendant did not receive check for freight charges until after one day's car rental had accrued, under the rules of the Car Service Association. Plaintiffs were then notified that car rental had thus accrued, and that cars would not be delivered until car rental was paid. Plaintiffs claim that they had left order for delivery, and had deposited check in the United States mail within proper time, and that they would do nothing further. Some correspondence ensued in which, on the one hand, defendant reiterated its demand for car rental and refusal to deliver unless paid, and, on the other hand, plaintiffs refused to pay car rental and said that they would hold defendants liable for the wood unless it was delivered as directed. Defendant finally notified plaintiffs that unless the car rental was paid the wood would be stored with a certain storage company to await release by paying car rental, and additional storage charges. Car rental was not paid and wood was stored. Plaintiff brought suit.

On the trial the foregoing appeared with evidence showing Car Service Rules and other material facts.

Judge Lillibridge ruled that under the testimony the Car Service Rules were valid and reasonable, and that unless there was something to take the case out of the operation of the rules, plaintiff could not recover. Plaintiff's counsel then contended that the defendant company had waived pre-payment of freight, but, on this point, Judge Lillibridge ruled that though possibly there was enough evidence for the consideration of the jury on the waiver, there was no testimony tending to show that the party with whom McEachran had the conversation on which plaintiff's claim of waiver was based, had any authority to release the company's rights in the matter. Accordingly, Judge Lillibridge directed the jury to render a verdict in favor of the defendant company.

SUPREME COURT OF THE DISTRICT OF COLUMBIA, WASHINGTON, D. C., JUNE, 1897.

Law No. 31524.

AUSTIN HERR

VS.

BALTIMORE & POTOMAC R. R. CO.

The facts of the above entitled cause are as follows:

The plaintiff, Austin Herr, who was engaged in building a house and improving a farm at Springfield, Md., near Bowie Station, on the Baltimore and Potomac Railroad, in January, 1891, purchased from Thomas W. Smith, a lumber dealer of Washington, four car-loads of lumber and from one Caton three or four car-loads of manure to be forwarded to him at Springfield. These consignments were received at Springfield about the 12th of January, 1891. Two cars of lumber and two cars of manure, remaining loaded beyond the forty-eight hours prescribed by the Car Service regulations, the agent of the defendant company presented Herr with a bill for demurrage on the four cars at $1 a day per car, which Herr refused to pay, assigning as his excuse for failing to unload the cars that the roads were not in a condition for him to haul. On Herr persisting in his refusal to recognize the right of the company to charge demurrage, the cars containing the lumber were locked up and delivery withheld, and after storing the required period the lumber was sold in pursuance of the provisions of the Maryland act authorizing the sale of freight, etc, for unpaid charges. (Poe's Code, Md. Gen. Laws, sec. 180.)

Before the goods were sold by the railroad company, Herr sued the defendant in the Supreme Court of the District of Columbia, in an action of trover, to recover $5,000 damages for the two car-loads of lumber and two car-loads of manure which he claimed had been unlawfully converted by said defendant.

The cause came on for trial, June 22, 1897, before Mr. Justice C. C. Cole and a jury, and lasted three days. Chas. C. Tucker, Esq., appeared for the plaintiff, and Messrs. Enoch Totten and J. S. Flannery represented the defendant company. The defendant proved by the testimony of a number of witnesses the necessity for making the regulations and that the charge of $1 a day for demurrage was reasonable. Messrs. Smith and Caton, the consignors from whom Herr purchased, admitted that they had received copies of the regulations concerning demurrage shortly after the organization of the Car Service Association, in August, 1890; but Herr denied all knowledge of said regulations. It was also shown that Smith and Caton prepaid the freight and took from the railroad company shipping receipts, which they retained. Among the conditions printed on the back of these shipping receipts (copies of which were produced) were the following:

"The carrier shall have a lien upon the goods for all freight advances, back charges, demurrage and claims in the nature of demurrage, expense of storage, necessary cooperage or baling."

"The carriage of said merchandise shall be complete and freight charges earned when it has been held a reasonable time without notice, say twelve working hours, subject to the owner's order at the station or place where it is above agreed to be delivered, and if not then removed by the person or party entitled to receive the same, it may be removed and stored, or kept in the car, station or place of delivery of the carrier, or otherwise at the sole risk and further expense of such person or party without notice, except that when merchandise is destined to or from the several "way stations" and platforms where station buildings have not been established by the carrier, or where there are no regularly appointed freight agents, it shall be at the risk of the owner until loaded into the cars and when unloaded therefrom, and when received from or delivered on private turnouts, it shall be at the owner's risk until cars are attached to and after they are detached from the trains."

At the close of all the evidence, counsel for the defendant asked the court to instruct the jury to return a verdict for the defendant, upon the following grounds:

1. That the defendant had a lien upon the goods for storage or demurrage (1) by contract and (2) by the common law, and having such lien the plaintiff was not entitled to the possession of the goods until the charges were paid, and, therefore, could not maintain an action of trover because to maintain such action he must have not only the right of property in the goods, but the right to the immediate possession of them.

Citing:

Miller & Co. vs. Georgia R. R. Co., 88 Ga., 563; 50 A. & E. R. R. Cas., 80 and notes.
Norfolk & Western R. R. Co. vs. Adams, Clement & Co., 90 Va., 393.
Kentucky Wagon Mfg. Co. vs. Ohio & Miss. Ry. Co., 97 Ky., —; 50 A. & E. R. R. Cas., supra.
Story on Bailments (9th Ed.) Sec. 453 A.
Jones on Liens, (2nd Ed.), Secs. 284 and 967-977.
Miller vs. Mansfield, 112 Mass., 260.
Barker vs. Brown, 138 Mass., 340.

Contra, cited by plaintiff's counsel:

Chicago, etc., R. R. vs. Jenkins, 103 Ill., 588.
Burlington, etc., R. R. vs. Chicago Lumber Co., 15 Neb., 391.
Cromeline vs. R. R. Co., 4 Keyes (N. Y.), 90.
Falconburg vs. Clark, 11 R. I., 278.

2. That the plaintiff was bound by the conditions of the shipping receipt or contract of shipment made with the defendant company by Smith and Caton, the consignors, (1) because they were the owners of the goods at the time of shipment, and (2) because they were the plaintiffs' agents in making the shipment.

Citing:

York vs. Central R. R., 3 Wall (U. S.), 107.
Bank of Kentucky vs. Adams Express Co., 93 U. S., 174.
Nelson vs. R. R. Co., 48 N. Y., 498.
Shelton vs. Merch. Dispatch Co., 59 N. Y., 258.
Squire vs. R. R. Co., 98 Mass., 239.
Barker vs. Brown, 138 Mass., 340.

The court granted the motion of the defendant's counsel and directed the jury to render a verdict for the defendant, holding that the regulation was valid and that the plaintiff was bound by the conditions of the shipping receipts taken by Caton and Smith, the consignors.

The opinion of the Court is as follows:

Gentlemen: I have no doubt in the world about the validity of this regulation of the railroad company, nor have I any doubt that it becomes a part of the contract with any shipper who makes a contract to have goods shipped, knowing of its existence.

That being so, there is no question but this contract is binding upon Smith and Caton, the shippers; and the only question about which I have had any difficulty at all during the trial is the one of whether it is also, as matter of law for the Court to determine, binding upon the plaintiff in this case. If it is binding upon the plaintiff as matter of law for the Court to determine, it must be upon the theory that the contracts made by Smith and Caton are binding upon the plaintiff because he did not make them, and he testifies that he had no knowledge of this regulation or matter that is relied upon here. And, therefore, that would be a question of fact for the jury, unless, as matter of law, the contract of these shippers is his contract, binding upon him.

I say "his contract." It might be that the contract might be binding upon him although the shippers were not his agents, and it might be upon this theory, which I suggested to Mr. Tucker during the argument: Smith was in possession of these goods. The railroad company has the right to treat as the owner whoever is in possession. They must deal with the party in possession. They cannot receive from anybody but the party in possession. And the title in these goods did not vest in the plaintiff in this case until the act of delivery to the railroad company was complete, until the railroad company had received the goods from Smith, or the shippers, and given their bill of lading, or receipt, or whatever they did give, so that the shippers would be able to charge them with the goods. The goods remained the property of the shippers, Smith and Caton, until that time. So that when the railroad company received this property from Smith and Caton, it belonged to Smith and Caton, and only became the property of the

consignee when it was completely in the care of the railroad company for transportation.

Therefore it is probably true that, strictly as matter of law, the railroad company received this property from the owner, and made its contract with the owner.

The York Company case, in 3rd Wallace, uses the language, "contracting with the owner;" and I have looked up the cases referred to, and find that in every case where the Supreme Court speaks of the contract of carriage, it speaks of it as between the owner and the carrier.

Now, if Smith was the owner of these goods when he made that contract with the railroad company, of course he had the power to create a lien on them until the title actually passed out of him and into the plaintiff in this case. The act by which he created the lien, and the act that vested the title in the consignee, were simultaneous; and according to general principles (I have not any decided case upon that point) I think that must be so.

I think the principle must be that where a man orders goods as the plaintiff did in this case, he does not become the owner of the goods upon giving the order. Unless there is something to the contrary in the contract between him and the party from whom he orders, the title vests in him when the property is delivered to the carrier to be carried; and in a case of that kind, it seems to me that the owner of the goods who delivers them to a carrier in pursuance of an executory contract to sell them to the consignee, must of necessity have the power to make any contract in relation to the carriage of the goods that it would be reasonable and proper to make.

Now, if I am right about that, Smith created this lien upon this lumber, regardless of the question whether he was acting as agent of the consignee or not.

I cannot distinguish the case of the York Company, in 3rd Wallace, from this. There the people in St. Louis I think, who were cotton brokers, had cotton in their possession for sale, and agreed to sell it to this Eastern company, and, in pursuance of that executory contract to sell, delivered this property to the railroad company in St. Louis, and made this contract. The Supreme Court holds that that contract is binding upon the consignee, although that contract cut down the common-law liability of a com-

mon carrier, something they had no express authority to do; but it could only be held upon the ground that the consignor was the general agent of the consignee for the purpose of making any proper contract of carriage.

There is a later case in 93 U. S., 174, the case of the Bank of Kentucky vs. The Adams Express Company, where the question was whether the bill of lading taken by the Louisiana Bank was binding upon the Kentucky Bank. In that case a certain instruction which I will read was given by the judge who tried the case; and although the case was reversed upon another point, the Court refer to that particular instruction, and say that they approve it; that it is in accordance with the law as held by the Supreme Court of the United States.

The instruction is as follows:

"If the jury believe that the teller of the Louisiana National Bank presented a bill of lading to the agent of the express company for his signature with the blanks filled up, and at such time delivered to the agent the package of money, without disclosing who was the owner of it, but addressed to the plaintiff at Louisville, that the bill of lading was signed and re-delivered to the teller, and forwarded to the plaintiff at Louisville, then the bill of lading thus signed constitutes the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not; and the plaintiff"—

That is, the Bank of Kentucky—

"Is bound by the contract, whether it expressly authorized the Louisiana National Bank to make it or not."

Now, that is precisely this case; and the cases read from New York, and the one from Massachusetts, by Col. Totten, are all in the same direction. Mr. Tucker has cited two or three cases which undoubtedly seem to contradict that doctrine, but the great weight of these cases that I have had before me today is the other way, and I think the reason is certainly the other way. And, of course, while it is possible that my mind might be changed upon further argument and examination, I am obliged to dispose of this question now; and my best judgment at

this time is that these contracts, made by Smith and Caton, are binding upon the plaintiff in this case. That being so, they created a lien, a conditional lien, upon this property, in favor of the railroad company, at the rate of a dollar a day for each car, after the lapse of forty-eight hours. It is admitted that Mr. Herr received notice when these cars were put there; that they remained more than forty-eight hours; that the demand for this storage, or demurrage, or whatever it is, was made upon him, and he refused to pay it; and those being the facts, a lien is established in favor of the company, and they had the right to hold the goods until the lien was paid. The disposition by them of this property for the purpose of paying the lien would not be a conversion; and under that state of the case, the plaintiff could not recover."

CIRCUIT COURT, JEFFERSON COUNTY, KY., CHANCERY DIVISION, AND BEFORE JAMES H. HAZELRIGG, JUDGE OF COURT OF APPEALS.

APRIL, 1898.

DUCKWALL VS. C. C. C. AND ST. L. RY. CO.

E. G. Duckwall & Company obtained a mandatory injunction against the C. C. C. & St. L. Ry Co. commanding it to deliver on their private siding cars of grain consigned to plaintiffs at Louisville. The Railway Company had refused to deliver on consignee's private siding because plaintiffs were indebted for car service to the P. C. C. & St. L. Ry. Co. and L. & N. R. R. Co. members with defendant, of the Louisville Car Service Association.

The lower court granted an injunction and afterward refused to dissolve it, on the ground that defendant could not withhold a car because of unpaid charges on previous cars, and a fortiori unpaid charges to other railway companies on previous cars; and that plaintiff had no adequate remedy at law. That the case of Kentucky Wagon Mfg. Co. vs. O. & M. Ry. Co., 98 Ky., 152, was inapplicable because in that case the consignees had combined to resist the rules of the Car Service Association ascertained by the Court of Appeals to be reasonable; that Duckwall admitted the reasonableness of the rules, but simply refused to pay bills whose correctness under the rules he disputed.

On the motion before Judge Hazelrigg to dissolve the injunction, the Railway Co. contended that there was no distinction in principle between the two cases. That on the theory of the lower court a plaintiff to obtain an injunction against the enforcement of the car service rules, need only proclaim his approval of them, while he proceeded to disregard and violate them. That if he refrained from impeaching their correctness he might, ad libitum, refuse to pay charges against him arising under the rules and obtain a mandatory injunction compelling delivery of cars. That such a doctrine would destroy the efficiency of the rules. That in refusing to pay car service charges assessed against him, Duckwall had, as had the plaintiffs in the Wagon Company case, committed the first wrong, and was, therefore, not entitled to the interposition of the Chancellor. Defendant quoted from the opinion 98 Ky., 152, that: "The conditions upon which it may be put in "force cannot exist except at the will of the shipper. He "must first wrongfully refuse to comply with the rules be- "fore any excuse is given the carrier to do the second "wrong, and we think the appellant cannot complain of the "wrongdoing of the carrier, made possible by his own "wrongful refusal to comply with other reasonable regula- "tions of the carrier." That if the principle announced in the Wagon Co. case was inapplicable to a consignee disputing a bill, every consignee could escape the application of the principle by simply disputing car service bills. That a carrier is more at a shipper's mercy in regard to car service charges than freight charges, because his lien entitles him to hold the freight for the latter; but that although the courts recognize his lien for the former, he would be compelled to part with the lien if compelled by injunction

to deliver cars in advance to a private siding. That he cannot know when placing the car on the private track that it will be unloaded in 48 hours, so that when the charge becomes possible the car is beyond the carrier's control. That, consequently, the only remedy of the carrier is to retain on its own delivery tracks the cars of consignees, who refuse, or fail, to pay charges.

Judge Hazelrigg delivered the following opinion:

It is somewhat difficult to distinguish this case from that of Wagon Company case. It is true that company denied the legality of the Association, and sought to destroy it, and while this is not attempted here, still the Duckwalls refused to pay the demurrage charges when presented. And if this is permitted, the efficiency of the Association is seriously impaired, if not destroyed. It seems to me the better rule for all parties is to enforce full compliance with the car service regulations, unless they should be shown to be oppressive and unjust in some particular case. Here there is at least a fair showing made of the correctness of the charges against the Duckwalls, and they ought to have paid the bills, relying on the Association for redress, as provided in its by-laws, or failing in which, applying to the courts for relief.

If the plaintiff ought to have paid these bills at the time they were presented, not waiving their right to question their correctness afterward, then when they refused to so pay, were they not guilty of the first wrong? And if so guilty, they are in the same attitude as was the Wagon Company in the case cited. This is the way the matter occurs to me on this preliminary hearing; and, therefore, the order overruling the motion to dissolve the injunction ought not to have been made.

The injunction ought to have been dissolved, and it is so ordered.

This Apl. 16, 1898.

J. H. HAZELRIGG,
Judge Ct. Appeals.

From this it appears that if the consignee be permitted to decline to pay bills and nevertheless enforce by in-

junction delivery of their cars on their private track, the efficiency of the Association is seriously impaired, if not destroyed; and that the better rule is to enforce the regulations unless shown to be oppressive in a particular case, relying on the Association for redress, and failing that, appealing to the courts.

It would seem from this enunciation that in such a contest some foundation for the charge made by the carrier must appear, although this is not entirely clear, for the judge announces that the plaintiff ought to have paid the bills without prejudice to questioning their correctness afterward.

Possibly it would be consistent with the opinion to hold that the claim of such fees should be acceded to in every case just as a passenger must yield to the conductor's claim of his fare, and afterward raise any question which he may desire with the carrier. As it would be impracticable to permit a passenger to try with the conductor a claim of offset against the Company so it would be impracticable while the car stands unloaded upon the sidetracks to discuss the merits of the charges made by the carrier for car service; but in each case the question may be litigated afterward.

The case was elaborately argued in lower Court, and Court of Appeals by J. A. Allen and Augustus Elbillson for Duckwall, and Pirtle and Trabue, counsel for the Louisville Car Service Association, and Humphrey & Davie, for the C. C. C. & St. L. Ry. Co

IN THE CIRCUIT COURT OF MOBILE COUNTY.

ALA., JUNE 24th, 1898.

UNREPORTED.

THE GULF CITY CONSTRUCTION COMPANY

VS.

LOUISVILLE & NASHVILLE RAILROAD CO.

This was a suit to recover three hundred and eighty dollars, car service paid by the Construction Company to the Louisville & Nashville Railroad Company at the rate of one dollar per day per car from the expiration of forty-eight hours after the arrival of the freight to the time the freight charges were paid and the freight delivered. The plaintiff offered evidence showing the following facts, viz.:

The Construction Company was building a railroad for the Mobile, Jackson & Kansas City Railroad Company, and had constructed tracks and a railroad yard at a point in Mobile, known as "Frascati." Carnegie shipped steel in car load lots to the Construction Company to be delivered in the yards of the Mobile, Jackson & Kansas City Railroad at Frascati, with a guaranteed rate of freight endorsed upon the bills of lading. Some of the cars arrived in the early part of June, 1897, and others arrived from time to time down to July 17th, 1897. As fast as a car load would arrive, the Louisville & Nashville Railroad Company sent notice of the arrival to the Construction Company, stating the amount of freight and charges on each car. In each instance the freight charge exceeded the rate stipulated upon the bill of lading. Immediately upon receipt of the first notice the Secretary of the Construction Company called the attention of the General Agent of the Louisville & Nashville Railroad Company at Mobile, to these discrepancies and asked that the errors

be at once corrected, and the agent promised to do so. In the early part of July, the Secretary of the Construction Company paid the railroad company twelve hundred and odd dollars on account and received part of the steel, but agreed upon no settlement of the differences. On July 17th the Louisville & Nashville Railroad Company presented a bill against the Construction Company for freights and charges, corrected according to the Construction Company's contention, but including a car service charge of one dollar per day per car from forty-eight hours after arrival to date, and refused to deliver the freight until the whole bill was paid, and the Construction Company paid the bills under protest. The Construction Company, previous to this transaction, paid similar car service charges and knew the rules of the Association, but on application the railroad company had refunded the charges by the instructions of the association. When the plaintiff's evidence was closed, the defendant moved the court to strike out all of the evidence upon the ground that it did not make out a case and contended that the railroad had a right to charge a reasonable amount for the use of its cars while being detained by plaintiff's failure to pay freight and charges and receive its property. That the Construction Company might have tendered the proper freight and charges and demanded its freight, but as it did not do so it could not avoid liability for car service on account of the overcharge; that to put the railroad in fault for not delivering, it should have tendered what was justly due. The court granted the motion and rules out all of the evidence. No further evidence was offered, and the court, at the request of the defendant, charged the jury to find a verdict for the defendant, which was accordingly done. The jury, under the instructions of the Court, then found a verdict for the defendant.

SUPREME COURT OF GEORGIA, MARCH 2, 1900.

35 S. E. R., 369.

DIXON, ET. AL.

VS.

CENTRAL OF GEORGIA RAILWAY CO.

Carriers—Switching Charges—Parol Evidence—Special Contract—Rights of Parties—Freight—Delivery—Refusal to Pay Charges.

1. The test of distinction between "transportation" service, relatively to loaded freight cars, for which a railway company can lawfully charge tonnage rates, and "switching" or "transfer" service, for which it is restricted to a fixed charge per car, is not whether the movement of the cars involves the use of a portion of the company's main line or that of another; for there may be a transportation service over one or more spur tracks of the same company, if the contract of affreightment requires no movement over other tracks or lines of railway, whereas a switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned or are to be earned.

2. Parol evidence is admissible to explain the meaning of the terms "transportation," "switching," and "transfer," as applied to railroad operation.

3. A contract between a city and a railway company for reduced freight rates upon goods transported by the company for the municipality does not inure to the benefit of one under contract with the city to deliver to it at a fixed price supplies f. o. b. at the point of delivery.

4. Though a person who had contracted with a city to furnish it with coal for use in running a system of water-

works became the head of the water commission of such city, he could not, because of his official position as such, avail himself of the terms of a transportation contract between the city and a railway company, whereby the former had secured reduced freight charges upon goods or supplies hauled for its benefit.

5. The relation of shipper and carrier does not begin between the owner of goods and a railway company, though the former may have delivered the goods to the latter, if after such delivery anything required, either by law or the contract, remains to be done by the shipper, and in such case the rights and liability of the company are those only of a warehouseman.

6. Where goods to be shipped are situated upon a spur track of a railway company, and the owner has no track scales, thus rendering it necessary to move the loaded cars to the company's depot for the purpose of weighing the same, so as to ascertain the proper amount of freight charges, the delivery of such cars will be treated as having been made to the company at such depot.

7. When such a delivery is in fact made, and the shipper refuses, on demand, to pay the proper freight charges, and the goods are left in the custody of the company, it has a lien upon such goods for proper storage charges, whether they be left in the cars or removed into a warehouse.

8. Where several cars are left in the custody of a railway company under such conditions as those just indicated, the company may retain possession of the goods in all of them until its just charges are paid.

9. While the motion for a new trial contained a large number of grounds, the principles of law above announced are controlling in this case, and, upon the merits, the evidence demanded the verdict.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; R. Falligant, Judge.

Action by the Central of Georgia Railway Company against C. H. Dixon & Co., Agents. Judgment for plaintiff. Defendants bring error. Affirmed.

Saussy & Saussy, for plaintiffs in error. Lawton & Cunningham, for defendant in error.

LEWIS, J.—On the 1st day of August, 1898, the Central of Georgia Railway Company instituted, under Section 2816 of the Civil Code, proceedings to foreclose a lien on four cars of coal received by it from the defendants, C. H. Dixon & Co., Agents, on June 7, 1898. It was claimed in the affidavit of foreclosure that this coal was received by the company at its place of business in the city of Savannah, to be shipped to the waterworks in said city, for which the defendants refused to pay the regular rates of 17½ cents per ton demanded by the company, and since the date of their receipt the four cars of coal have been in its possession, as depositary for hire, in its yard in the city of Savannah. The proceedings were for the purpose of foreclosing a lien claimed by the company as a depositary for hire. It was further urged in the affidavit of foreclosure that these cars of coal were received by the company with the understanding that Dixon & Co., Agents, would prepay any freight charges thereon, which they refused to do. Fi. fa. was issued upon this affidavit of foreclosure, and levied upon the coal. To this proceeding C. H. Dixon, trading under the name of C. H. Dixon & Co., Agents, filed an affidavit of illegality on the several grounds, embracing substantially the following as defenses: (1) It did not appear from plaintiff's affidavit it had completed its contract of shipment, so as to entitle it to any lien for freight charges. (2) The place of shipment was the waterworks, and it did not appear that there was any delivery of the freight tendered at the place of destination. (3) The charge in the proceedings for foreclosure was for storage, while the bill of particulars attached thereto was for demurrage, for which charge there is no lien prescribed under the statute. (4) The company had no lien on the property levied upon. (5) The amount set forth in the affidavit of foreclosure or no part thereof was due. (6) Plaintiff received the cars from the place of business of defendant on River street under a contract to deliver the same, as per consignment, to the city of Savannah, at the wharf of said railroad, at the end of River street, in said city; and, before any charges could accrue against the shipment, defendant tendered to plaintiff the cost of track-

age along River street, the usual and customary charge for such service, and a charge regulated under the ordinances of the city of Savannah, to wit, one dollar per car; that the company operates the line on River street for purposes of transfers, said track being no part of the main stem of the railway. This defendant, in behalf of the city of Savannah, and under authority of the chairman of the waterworks commission, which has control of the Savannah waterworks, accepted the freight at the wharf of plaintiff, and ordered the freight transferred to the Savannah waterworks, and tendered plaintiff the sum of one dollar per car, being the rate for such transfer. Plaintiff refused the tender, and retained possession of the goods unlawfully. It is further claimed in the affidavit of illegality that the rules of the railroad commission of Georgia provided that the failure of a railroad company to deliver freight entitles the shipper to recover damages at the rate of one dollar per car, and that was pleaded as an offset. It was the duty of the plaintiff to deliver the freight to the Florida, Central and Peninsular Railroad Company, with which company it had a contract concerning transportation of freight for said waterworks, whereby the last named company was to haul all freight to said point without charge, inasmuch as the spur track leading from the main line of the plaintiff to the waterworks was used in part by the Florida, Central & Peninsular Railroad Company as a means of approach to the depot in the city of Savannah. It also alleged that the waterworks were not situate on the main line of plaintiff's railway, nor upon any connecting road, so as to enable plaintiff to charge regular freight rates for transportation; but the waterworks were situate on a spur track built by the city of Savannah, and by it turned over to plaintiff's predecessor upon express condition that all freight consigned to said city at the waterworks should be hauled and delivered at the rate of one dollar per loaded car as trackage; and the waterworks not being upon the main line of plaintiff, nor upon the line of any other railroad or station, or public place for delivery of freight, and being within three miles of plaintiff's wharf and the wharf of defendant, said waterworks stand upon the same footing as warehouses and factories, and plaintiff, upon completion of its contract of affreightment, was not entitled to charge any more than the rate allowed by law for trackage.

It substantially appears from the evidence in the record that C. H. Dixon & Co., Agents, were coal merchants, whose place of business was on River street, adjacent to the River street track of the Central Railway. Dixon & Co. had a contract with the water commissioners of the city of Savannah to deliver coal f. o. b. cars at the waterworks, which was about two miles out of the city, and connected with the terminals of the Central by a track known as the "Waterworks Track." This last track was also owned by the Central, which laid the same on the land belonging to the city, and, upon completion of the waterworks, the track and roadway was ceded by the city to the Central, and a contract was entered into between them "that the trackage charge to the city shall not exceed the sum of one dollar per loaded car for all cars received from, or delivered to, the said city on said spur track." It seems this track was under lease to the Florida, Central & Peninsular Railroad Company, being the track on which its railroad entered the city, but it was agreed in the lease that railroad would switch the cars of the Central of Georgia "to and from the waterworks, and such other industries as may be located thereon, over said track, free of compensation, and as promptly as their own similar service is performed, and when so engaged the agents and servants of the Florida Railroad shall be considered as servants of the Central Railroad." It would seem therefore, as to this case, the waterworks track may be treated as substantially the track of the Central of Georgia Railway.

C. H. Dixon & Co. was a firm composed only of C. H. Dixon, who became insolvent a few months before the time of this shipment. Pending the incorporation of a company which was to be known as the "C. H. Dixon Company," the incorporators of which were the said C. H. Dixon and his two brothers, M. W. and James M. Dixon, the business formerly conducted by the defunct firm passed into the hands of C. H. Dixon & Co., Agents, who assumed the contract with the waterworks commissioners to deliver coal free on board cars at the waterworks. C. H. Dixon ran the business of Dixon & Co., Agents, whereof his brother, J. M. Dixon, was the principal. J. M. Dixon was surety for the faithful performance of the contract of Dixon & Co. with the waterworks commission, and he was also chairman of the waterworks commission, a body

created by the legislature. See Acts 1895, p. 300. That act provided that an oath of office be taken by each member of the commission, which was duly taken by J. M. Dixon, as follows: "I swear that I will not be concerned or interested, pecuniarily, in any way * * * in any contract for the purchase of property or supplies for said waterworks, while a member of said board." C. H. Dixon & Co., Agents, were not on the credit list of the Central of Georgia Railway, and the pre-payment of freight was always exacted. The rate which the Central had uniformly charged for shipments of coal from any point on the River street track to the waterworks was 17½ cents a ton. The railroad commission rate for a distance of five miles and under was 35 cents per ton. The distance from Dixon's wharf to the waterworks is 2.64 miles. In 1896 C. H. Dixon and H. M. Comer, who was then receiver of the Central, by contract, made the rate of freight between these points of 17½ cents a ton, which seems to be half of what the law permitted the Central to charge. For an ordinary transfer or switching service on the River street track the railroad's charge was uniformly one dollar per car.

It appears from the evidence that these rates were uniformly charged and paid by Dixon & Co., Agents, who had shipped a number of cars under their contract with the Central, and that they paid these charges without any objection whatever up to the time of the shipment in question. Dixon & Co., Agents, had no track scales at their wharf, and the only way in which the amount of freight could be determined, if the tonnage rate applied, was to weigh the cars on the track scales in the Central Railway yards. The four cars in question were, on this account, loaded with coal on the River street track, adjacent to Dixon's place of business for the purpose of being shipped to the waterworks. The Central took the cars up to its yard, weighed them, and sent the weights to Dixon & Co., Agents, with a bill for $17.20, freight charges, that being the amount at the rate of 17½ cents per ton, and the shipper, instead of sending that amount, sent the Central a check of $8, or $2 per car. This the Central refused to accept. It seems the shipper thereupon complained to the city that the Central had violated its contract with the city, and would not transfer the cars from the wharf to the waterworks for one dollar per car. The city declined to grant

the relief sought by the shipper, and replied that, his contract being to deliver coal f. o. b. cars at the waterworks, it was a matter of indifference to the city how much freight the shipper paid.

It appears from the evidence that J. M. Dixon was the principal actor in this matter for C. H. Dixon & Co., Agents, and that he was also chairman of the water commission. A letter was written by them to the agent of the Central at its wharf, consigning the cars to the city of Savannah, for which they made a tender of one dollar per car for River street trackage. J. M. Dixon, as chairman of the commission, also wrote a letter to the agent of the Central, instructing him to transfer to the waterworks, in accordance with the agreement between the city and the railway, at one dollar per car, the coal which had been consigned to the city at the Central wharves; thus making the rate from Dixon's wharf to the waterworks only two dollars per car. It further appears from the record that J. M. Dixon did not consult any member of the board of the water commission about writing the letter, and that the money he tendered came out of his own pocket. The shipper having declined to pay the rate demanded, the cars remained where they were when the difference arose between the parties, and the railway assessed charges for storage, and foreclosed its lien as a depositary for hire.

1. The vital question in this case, and one upon which its determination mainly depends, is whether or not the service for which the railway was charging the shipper of this coal was "transportation" service or "transfer" or "switching" service. It appears from the record that an appeal was made by the plaintiff in error to the railroad commission, by which proceeding it was sought to get the railroad commission to enforce in this matter its rule No. 25 in language as follows: "A charge of no more than two dollars per car will be allowed for switching or transferring a car from any point on any road to any connecting road or warehouse within a space of three miles from starting point, without regard to weight or contents." From the facts in the record it appears that this rule manifestly applies to what is known as "switching" or "transfer" service, and it was claimed by counsel for plaintiff in error that it was applicable to this case, where it was purely

a transfer service, as the shipment of the goods was confined to what is known as "spur tracks" of the railroad. On the other hand, it was contended by counsel for defendant in error that that rule had no application whatever to this service, for transfer or switching service only relates to the removal of cars over spur tracks after they have reached the terminal point of some railroad line, and, without being unloaded, are transferred on a spur track usually to the place of business of the consignee. It is therefore contended that switching service applies only in cases where there necessarily preceded or succeeded such service the payment of freight for transportation over some line of railway. From this contention it would follow, for example, that if Dixon & Co. had ordered freight over the Central to be shipped to Savannah from Macon, Ga., they would be liable for regular rates of transportation from that point to the railway terminal at Savannah, and the Central, in shipping the freight from its depot over the spur track to Dixon & Co.'s place of business, would simply be entitled to the rates fixed for such transfer service; or, if Dixon & Co. desired the Central to transport freight from their place of business in Savannah to Macon, and the Central transported the goods over its spur track from the shipper's place of business to its depot, it could only charge additional, for this part of the transportation, simply the switching service rate. We think the case is quite different when the shipment of freight is entirely confined to such a spur track. The uncontradicted evidence shows that the necessary expenses for such a shipment could not be met by payment of the small rate prescribed for a transfer or switching service, and these small rates are chargeable only in cases where revenue is derived for transporting the freight over a railway which must either precede or follow the service rendered on the spur track. In this case the contract of carriage involved a transportation from Dixon's wharf to the waterworks. That constituted the entire service, and the fact that that entire service was rendered on spur tracks of a railway company we do not think prevents it from being transportation, pure and simple.

It appears from the record that the shipper in this case appealed to the railroad commission to enforce its rule No. 25, above quoted, and that, after hearing the application, the commission decided that the shipper was not entitled to

the relief sought, and that the service rendered by the Central in the case was really for transportation, and hence it had the right to make the charge in accordance with the rule of the railroad commission, which allowed for the transportation of freight over routes under five miles a rate of 35 cents per ton. In the present case the Central only charged half this sum. It does seem that this decision of the railroad commission in this identical case should operate as conclusive evidence of the reasonableness and legality of the charge exacted by the Central against the shipper. Section 2189 of the Civil Code provides: "The commissioners shall make reasonable and just rates of freight, and * * * shall make reasonable and just rules and regulations, to be observed by all railroad companies doing business in this state, as to charges at any and all points for the necessary handling and delivering of freights." And, under Section 2190 of the Civil Code, it is provided that in suits brought against such corporations the commission's schedules of rates shall be deemed and taken in all the courts of this state as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for transportation. Even if the construction the commission has placed upon its own rule is not conclusive upon the parties, it certainly should receive great weight, under the law, with the courts. But, in addition to this, a quantity of evidence was introduced in behalf of the Central Railway by witnesses expert in railroad business, and familiar with the meaning of certain terms used in connection with such business, who defined what was meant by transportation and switching service, and distinguished the difference exactly in accord with the contention of counsel for defendant in error in this case. We therefore think, in the light of all the evidence in the record, that the service undertaken by the Central in this case was purely transportation service, and that the rates with reference to transfer or switching cars over spur tracks had no application whatever.

2. Error is assigned in the motion for a new trial upon the admission of parol evidence for the purpose of explaining the meaning of the terms "transportation," "transfer," and "switching," as applied to railroad corporations. This question involves the construction of words used in connection with a particular subject-matter. Ex-

perts in the business were offered as witnesses to testify as to their common acceptation and usage when applied to the operation of railroad companies. We think the Political Code Section 4 (1) settles the question. It declares: "The ordinary signification shall be applied to all words, except words of art, or connected with a particular trade or subject-matter, when they shall have the signification attached to them by experts in such trade, or with reference to such subject-matter." See, also, Civil Code, Section 3675 (2), where it is declared: "Words generally bear their usual and common signification; but technical words, or words of art, or used in a particular trade or business, will be construed generally, to be used in reference to this peculiar meaning. The local usage or understanding of a word may be proved in order to arrive at the meaning intended by the parties." See, also, 1 Greenl. Ev. 280, where the principle of allowing parol evidence in such cases is clearly recognized.

3, 4. It was further insisted in behalf of plaintiff in error that the contract between the city of Savannah and the Central for reduced freight rates upon goods transported by the company for the municipality was binding upon the former in this case, and that it could not charge for service of this transportation from the depot to the waterworks any more than the price stipulated in that contract of one dollar per car. It is manifest from the evidence in the record that this contract between the Central and the city had nothing whatever to do with the contract between the parties to this case. The contract made with the city had direct reference only to such goods as were consigned to the city, and for the payment of which the municipality itself was liable. In this case the shippers were under contract with the water commission of Savannah to deliver to it coal f. o. b. the cars at the waterworks. It is true that the active manager of the business of Dixon & Co., J. M. Dixon, was also chairman of the water commission. He adopted the scheme of writing a letter to the agent of the Central instructing him to transfer to the waterworks the coal which had been consigned to the city, but he had no authority whatever for giving such direction. It was certainly never authorized by the city itself, through its officials, nor was it authorized by any resolution or other

action taken by the board of water commissioners. On the contrary, it appears that he intended to make the payment himself out of his own pocket, and that it was in no wise a charge upon the city. When he made his appeal to the municipal authorities of the city, they gave the same construction of this contract as was adopted by the Central, and declined to grant any relief whatever.

5, 6. It was further contended by counsel for plaintiff in error that the railway company in this case occupied the position of a common carrier; that it had failed to comply with its obligations to transport the goods to their destination; that it never occupied the position of a warehouseman, and therefore had no lien upon the property for storage. It was further contended that the duty devolved upon the company, unless it intended to transport the property to its destination, to re-ship it to the consignor, and that the company had no right to hold the same, and thus accumulate against the shipper charges for storage. Under the facts of this case, we do not think there is any question but that the company occupied the position of a warehouseman. It is true the goods had been transferred from the place of business of the shipper to the company's yards, but that was absolutely necessary, in order to determine what would be a proper charge for transportation. There was no means of weighing the cars at the shipper's place of business, where they were loaded. This weight was absolutely necessary in order to determine the amount of freight, and hence they had to be transferred to the company's yards for this purpose. We think, therefore, the delivery of the cars should be treated as having been made to the company at its depot. Under the contract between the carrier and shipper in this case, a prepayment of the freight was required before any obligation rested upon the carrier to transport the goods to their destination. This the shipper wrongfully refused to pay, and, clearly, the duties of the company as a common carrier did not begin, although the delivery of the goods for shipment had been made, as long as anything remained to be done by the shipper himself. In 5 Am. & Eng. Enc. Law (2d Ed.) p. 261, that author says: "The rule, broadly stated, is that if, after the delivery of the goods for shipment, anything remains to be done by the shipper, the liability of the carrier as in-

surer does not attach, and it is responsible only as a warehouseman." In the case of Barron vs. Eldredge, 100 Mass. 458, Colt, J., in discussing this subject, says: "The responsibility of a common carrier for goods intrusted to him commences when there has been a complete delivery for the purpose of immediate transportation. * * * The delivery must be for immediate transportation, and, of course, it cannot be complete if anything remains to be done by the shipper before the goods can be sent on their way." The same principle is announced in Hutch. Carr. Section 63. It is therein stated that no one can be chargeable as a carrier, but merely as a warehouseman, until the shipper has complied with every duty upon him which it was necessary for him to discharge before shipment, and the author thus illustrates: "As where the goods are deposited without instructions as to their place of destination, either by marks or otherwise, or to await orders, or until the charges for the transportation are paid, if that is required by the carrier; or if anything remains to be done, or any expense to be incurred, to put them in a condition to bear transportation." While the company, therefore, retained this property on board its cars at its depot, on account of the failure of the shipper to comply with the conditions precedent to its shipment, it occupied, as to him, the position of a warehouseman. There is nothing in the contention that the company should have returned the property to the consignor. He made no demand therefor. On the contrary, he insisted upon the company transporting the goods to their destination without complying with his obligations under the contract. The position of the company, therefore, was lawful, and it had a right to charge storage for this purpose. The fact that the goods were stored in its cars instead of a warehouse did not change the company's position as a depositary for hire. Miller vs. Banking Co., 88 Ga. 563, 15 S. E., 316, 18 L. R. A. 323.

7. It appears that the Central Railway adopted Rule 4, Section 2, of the car service rules, which is in the following language: "On cars placed for loading, free time will expire forty-eight hours from the time the loading of car commences, and car-service charges will continue on same until shipping instructions are given and bill of lading taken out." In accordance with the power conferred upon

the railroad commission by virtue of Civil Code, Section 2206, to prescribe a schedule of maximum rates and charges for storage of freight, the commission has passed rules known as "demurrage rules"; regulating charges for storage of goods in cars, which rules are similar to the ser-service rule above quoted. The rates charged by the Central in this case were within the limits prescribed by those regulations. The term "demurrage," as used in its technical sense, applies to maritime law, and has been held by some authorities that it is confined to carriers by water; but it is evidently, under these rules of the commission and by railroad companies, not used in its technical sense. It was no doubt adopted as a convenient term, as contended by counsel for defendant in error, to represent the storage of goods in cars, as distinguished from the storage in warehouse. The right to charge for such storage in cars arises when the goods are necessarily detained by virtue of the failure of the shipper to comply with his obligations to the carrier. The company is in this way deprived of the use of its cars, and, even if the rules adopted in this particular case as to such charges did not apply, they would still be entitled to reasonable charges as a warehouseman or as a depositary for hire. In 28 Am. & Eng. Enc. Law, p. 667, it is stated: "In the absence of a special agreement as to charge, the law implies a contract to pay a rasonable compensation." In Elliott, R. R. Section 1567, that author in discussing this subject, says: "While it is probably true that this right [of demurrage] is derived by analogy from the maritime law as administered in America, the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases." The author then quotes the following observation from one of the decisions of the courts: "We see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea." On the same line, see Norfolk & W. R. Co. vs. Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530; Kentucky Wagon Mfg. Co. vs. Ohio & M. Ry. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850; 9 Am. & Eng. Enc. Law (2d Ed.) p. 261.

It is insisted by counsel for plaintiff in error that, even conceding the railway company had a right to make charges for storage of goods, it had, by operation of law,

no lien upon the property itself. If we are correct in the conclusion that the defendant in error occupied the position of a warehouseman, then, under the laws of this state, it has a lien upon the property, and can retain possession thereof until it is paid. Section 2928 of the Civil Code declares: "Depositaries for hire are bound to exercise ordinary care and diligence, and are liable as in other cases of bailment for hire; they have a lien for their hire, and may retain possession until it is paid." Section 2930 declares: "A warehouseman is a depositary for hire, and is bound only for ordinary diligence," etc. The right of the retention of goods by a carrier for charges for freight and storage, even when the property is stored upon cars, was virtually recognized by this court in Pennsylvania Steel Co. vs. Georgia Railroad & Banking Co., 94 Ga. 636, 21 S. E. 577. In that case it appeared that tons of rails, spikes, bolts, etc., had been shipped in car-load lots, which came into the possession of the defendant railroad company as the last connecting line. From each consignment the defendant retained one or two cars to secure itself for the freight and demurrage it claimed on such consignment, and delivered to the consignee the rest of the cars. It was held in that case that payment of the freight and storage must be made before the consignor can obtain possession. In Miller vs. Banking Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, this right of a carrier to collect its reasonable charges for storage in its cars was clearly recognized. In that case it seems the same rate was charged by the railroad company as in the case at bar, and it was there held the fact that this regulation was promulgated by a board of persons representing a combination of such carriers made no difference. On page 571, 88 Ga., page 318, 15 S. E., and page 327, 18 L. R. A., Simmons, J. (now C. J.), stated in his opinion the following: "We do not think it material, as affecting the right to make a charge of this character, that the goods remain in cars instead of being put into a warehouse." This right of the retention of the property to enforce its lien is recognized in Kentucky Wagon Mfg. Co. vs. Ohio & M. Ry. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850; and also by the following language in 4 Elliott, R. R. p. 2439, Section 1567: "It was held in the cases cited in the first note to this section that a railroad company can have no lien for demurrage charges,

but, as we have seen, those cases deny in toto the right to charge for delay or detention of cars, in the absence of a contract, and, to that extent at least, are contrary to the weight of authority. In several of the cases which assert the right to charge demurrage, it is expressly held that the company may have a lien for such charges, and in others there are intimations to the same effect."

Counsel for plaintiff in error cite some authorities in conflict with this view. Among them attention is called to 9 Am. & Eng. Enc. Law (2d Ed.) p. 270, where it is stated: "By the weight of authority, a railroad company has no lien on goods shipped for demurrage or damages in the nature of demurrage for delay in unloading the same, and consequent detention of cars or other property, unless a lien is given by contract or by statute." The author cites a few cases in support of the text, and makes no reference to the decided weight of authority to the contrary, including the decision of our own court in Miller vs. Banking Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323. Besides, as above indicated, we think the statute of Georgia does give a lien which necessarily follows upon the relation of warehouseman that the company in this case sustained to the owner of these goods.

8. Counsel for plaintiff in error contend in the motion for a new trial, bill of exceptions, and also in the argument, that the Central had no right to retain the whole shipment for the payment of its charges, and that the question of reasonableness or unreasonableness of so doing was improperly withheld by the court from the jury. It was urged that the value of the coal on one car would have been amply sufficient to have met these charges, and that the other three should have been delivered at the place of destination. All four cars were delivered under one entire contract, and we think Section 2928 of the Civil Code upon the subject gives the right to retain possession of the entire property thus stored until the charges for such storage are paid. The case of Pennsylvania Steel Co. vs. Georgia Railroad & Banking Co., 94 Ga. 636, 21 S. E. 577, is cited in behalf of plaintiff in error as authority for their contention. In that case it appeared that the railroad company did not retain all the cars, but only a portion of them; and it was contended by the Pennsylvania Steel Company, that each

car constituted a separate shipment, and the amount due on each was readily ascertainable, and that defendant, in delivering the freight, departed from its general custom requiring cash before delivery. A demurrer to the declaration was sustained, which was affirmed by court. There is no indication whatever that the railroad company did not have an equal right to retain all the cars instead of a portion thereof. In 28 Am. & Eng. Enc. Law, pp. 663, 664, the author recognizes, as accompanying the lien of a warehouseman on property stored with him, the right to retain possession of the goods until satisfaction of the charges imposed upon them. Under that text, a number of authorities are cited. Morgan vs. Congdon, 4 N. Y. 552; Schmidt vs. Blood, 24 Am. Dec. 145; Barker vs. Brown, 138 Mass. 340. In view of the above principles, it is quite manifest that the claim of offset made by the plaintiff in error to the foreclosure of this lien was properly not submitted by the court to the jury. The demurrer or storage charges that had been running against the shipper in this case could have been readily prevented by paying the freight charges demanded by the carrier, and the unfortunate position in which the shipper was placed by such detention was the result of no legal wrong whatever done him by the carrier, but was caused by the shipper's failure to comply with the legal obligations under his contract. Of course, therefore, the shipper had no legal claim against the company for the detention of his property.

9. The motion for a new trial contains a large number of grounds not specifically set forth in this opinion. These grounds, about 35 or 40 in number, are sub-divided, many of them, into distinct points of law made thereon, making the several charges of error complained of amount in number to some 80 or 90. In the above treatment of this case, however, we think the principles enunciated cover every point worthy of any consideration whatever involved in the writ of error, and those decided are certainly controlling in this case. Applying these principles to the testimony introduced upon the trial, and our conclusion is that the evidence demanded the verdict. We will take this occasion to remark that, in the investigation of the principles of law controlling this case, we have been materially aided, and our work greatly facilitated, by the condensed, but thorough, brief of learned counsel for defendant in error. Judgment affirmed. All the justices concurring.

SUPREME COURT OF TENNESSEE, DECEMBER TERM, 1900.

PETER SWAN VS. LOUISVILLE & NASHVILLE RAILROAD COMPANY.

VOL. 20, A. & E. R. R. CASES.
NEW SERIES, P. 446.

OPINION BY WILKES, J., DELIVERED JANUARY 12, 1901,

This was a suit brought by Peter Swan against the Louisville and Nashville Railroad Company before a Justice of the Peace to recover the value of three (3) cars of Bedford Stone, which, it was alleged, the Louisville and Nashville Railroad Company had converted to its own use by refusing to deliver same upon the payment of the freight.

The proof showed that the cars of stone in question were shipped from Bedford, Ind., consigned to Peter Swan, Nashville, Tenn. The day they arrived in Nashville notice was given Mr. Swan of their arrival, and he was also notified to call and pay the freight thereon within forty-eight (48) hours or there would be car service charge of one dollar ($1.00) per day per car until the freight was paid. He did not call or offer to pay the freight until twenty-one dollars ($21.00) car service charges had accrued, the charges being at the rate of one dollar ($1.00) per car per day after forty-eight (48) hours free time had expired, excluding Sundays and legal holidays.

At the end of this period he paid the freight, but refused to pay any car service charges. The proof showed that Mr. Swan had a stone yard with a railroad track laid therein, which had been built by the N. C. & St. L. Ry., and which connected with the tracks of the Louisville and Nashville Railroad Company, but the Louisville and Nashville Railroad Company did not construct any part of the

side track nor own any part thereof. Mr. Swan's yard was enclosed by a fence, and there was a gate which could be closed across the track in question. It had been customary to deliver all cars consigned to Mr. Swan upon these tracks. The railroad company declined to deliver these cars upon his side track until he paid the freight, before the car service charges accrued, and further declined to put them upon his track upon his paying the freight after the car service had accrued, he refusing to pay the car service charge. He thereupon sued the railroad company for the value of the stone, with the freight added.

The proof showed that the cars in question were placed by the railroad company upon one of its own side tracks adjacent to Mr. Swan's yard, where they could be conveniently placed upon the tracks within his yard upon a few hours' notice.

The bill of lading under which the cars were shipped contained the following clauses:

"Clause 5—Property not removed by the person or party entitled to receive it, within 24 hours after its arrival at destination, may be kept in the car, depot or place of delivery of the carrier at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost and there held subject to lien for all freight and other charges.

"The delivering carrier may make a reasonable charge per day for the detention of any vessel, or car, and for the use of the track after the car has been held 48 hours for unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor."

Clause 10—"The owner or consignee shall pay the freight at the rate hereon stated, and all other charges accruing on said property before delivery and according to the weights as ascertained by any carrier herein."

The plaintiff insisted that it was the duty of the railroad company to place the cars upon the side track in Mr. Swan's yard before it could demand payment of the freight or make any car service charge; and its refusal to place the cars upon the side track in his yard before payment of the freight was equivalent to a conversion of the stone. The plaintiff also contended that the railroad company had no right to make any car service charge, and that when he paid the freight he was entitled to the stone without payment of the car service charge.

The defendant contended that it was under no obligation to place the cars upon the side track within Mr. Swan's yard, the track belonging to another railroad company, until the freight had been paid; and further that the car service charge was reasonable and legal; that the railroad company had a legal right to charge for the detention of its cars beyond a certain reasonable time—48 hours; and that the regulation itself was reasonable and should be enforced, and that it had a lien therefor upon the freight.

The Circuit Court judge charged the jury in substance as follows:

That when the defendant company received this freight for transportation, it did so upon the terms and conditions stipulated in these bills of lading.

"When it delivered it to Nashville, the point of destination, that was the termination of its contract, that it was not necessary for it, for the completion of that contract, to deliver it into the yard of the plaintiff or upon the side track; but, before it could charge this demurrage, as claimed by defendant in this case, it must have had the cars and freight at a convenient point where it could have delivered them to the plaintiff at a reasonable and convenient place for unloading, before it could either demand the freight due thereon, or any demurrage, and being in that condition, prepared and ready upon payment of its freight, and whatever demurrage, if any, had accumulated; in the meantime the plaintiff was bound to have received the same and paid the freight and demurrage upon it. Now, the question being, in this case, for you to determine, is, as to whether or not the defendant has received that freight, whether they transported it to the City of Nashville, and whether it gave the plain-

tiff the required notice as stated to you, and whether it had the cars there ready to deliver them into the yards of the plaintiff, and where it was usual and customary for the delivering of freight for this plaintiff upon the payment of the legal charges upon it, which, as I stated to begin with, was the freight of so much, and the demurrage so much; and if the plaintiff has failed to receive it and unload it within the time stipulated within the contract of bill of lading.

"Now, as stated before, the plaintiff is insisting that the notice was not given; that the cars were not in condition to have been delivered to him; and, furthermore, he insists that the cars must have been delivered within his yard before they could demand the freight, and before any demurrage could have accumulated on them thereafter.

"The defendants say, on the other hand, that after the arrival of the cars and freight with it, defendant had given the notice required; that the plaintiff failed to come and pay the charges; to remove the same or to remove the freight; and that it had the cars there ready and at a convenient time and place after demanding the freight, to have switched the cars into the yard of the plaintiff:, which was a convenient and proper place for it, he was not required to switch into the yard of the plaintiff until these charges had been paid.

"The court instructs you that if the contention of the defendant is sustained by the proof, that the plaintiff could not recover in this case."

Under the charge of the court the jury found a verdict in favor of the defendants.

Plaintiffs appealed.

Upon the appeal to the Supreme Court, the plaintiff assigned error upon the charge of the court below, claiming that the charge was not the law. The Supreme Court affirmed the judgment of the court below, sustaining the charge of the lower court upon every point.

The points decided by the Supreme Court were as follows:

First—That the railroad company has a right to make a reasonable charge for the detention of its cars beyond a

certain reasonable time allowed for paying the freight, receiving and unloading the car.

Second—That it appears from the proof in this case, there being no proof to the contrary, that one dollar ($1.00) per day per car for the detention beyond 48 hours is a reasonable time.

Third—That under the contract set out in the bill of lading in this case, the railroad company has a lien for demurrage or car service charges.

Fourth—That the railroad company is not bound to deliver the cars upon the tracks in the private premises of the consignee, such tracks being owned by another railroad, until the freight has been paid; but that it is sufficient if the railroad company has the cars conveniently located so that they may be placed upon side tracks within a reasonable time after the freight and charges for which a lien may exist have been paid; and that, therefore, there was no conversion, and the defendant railroad company was not liable for the value of the stone.

STATE OF MISSOURI.
OFFICE OF THE RAILROAD AND WAREHOUSE COMMISSION.
CITY OF JEFFERSON, JUNE, 3, 1901.

IN THE MATTER OF THE COMPLAINT OF E. R. DARLINGTON & COMPANY VS. CENTRAL CAR SERVICE ASSOCIATION OF ST. LOUIS.

Hearing Held at St. Louis, May 16, 1901.

Complaint alleges that certain demurrage charges made by defendant on cars held on hold tracks of the Missouri Pacific Railway were illegal.

The evidence taken shows that certain cars of lumber consigned to complainant were placed on hold track on arrival at St. Louis, and due notice of such arrival, with request for orders concerning their disposition was given complainant in usual form, as follows:

> "You are hereby notified that the following cars are now on tracks at this station for your unloading or disposition, and that said cars are subject to a charge of $1.00 per day or fraction of a day for all time that they are held beyond the free time allowed by the rules of this Company."

Section 5 of Rule 2, Rules and Regulations of Central Car Service Association provides as follows:

> "Cars for loading or unloading shall be considered placed when such cars are held subject to the orders of consignors or consignees, or held for the payment of freight charges."

This rule was approved by this Board February 16th, 1900, in its finding in the case of the Brownell Car Company vs. Central Car Service Association. Forty-eight hours "free time" is allowed after placing cars for loading or unloading, after which a demurrage charge of $1.00 per day is made. This charge also has been approved by this Board as being reasonable.

Cars consigned to complainant having been held awaiting orders beyond the free time allowed by the Car Service Association rules, due notice of arrival having been given, demurrage was charged accordingly.

E. R. Darlington testified that he did not know personally that any cars were held, but perhaps his employes did, but they did not understand that car service was being charged on cars held beyond free time limit. The fact that Darlington & Co. were ignorant of this rule is not a sufficient plea for the non-payment of the charges. The enforcement of the rule referred to is absolutely necessary for the prompt transaction of the business of the railroads terminating at St. Louis. If otherwise, any manufacturer

or dealer could have cars consigned to them held indefinitely, awaiting such time as might best suit their convenience for delivery and unloading. Upon the prompt delivery and discharge of cars at destination depends in a great measure the very existence of any railroad handling a large traffic, and it is imperative that proper, reasonable rules regarding this most important matter should be made and enforced. The rule referred to is one of the most important governing the movement of cars after arrival at St. Louis, and certainly has had a very beneficial effect in improving car service and preventing blockades.

Mr. Darlington's evidence shows that the private track of Darlington & Co. has a capacity of five to six cars, according to length. Evidence taken shows that by the piling of lumber on each side of this track its capacity was reduced to three cars instead of five or six.

Parties having private tracks upon which they expect cars to be placed for loading or unloading should use every effort to keep such tracks clear, and in condition to be used to their full capacity, if occasion demands, in order that the prompt movement of cars can be assured. Promptness in delivery of cars by railroads, in accordance with the orders of consignees and prompt discharge of cars after receipt, is essential for the interest of all parties concerned.

In reference to the decisions of the Inter-State Commerce Commission (Nos. 617, 1075, 1076, 1088 and 1078) offered in evidence by Mr. E. R. Darlington, we do not see their application in the case under consideration.

In decision No. 617, it is held that the action of defendant (C. M. & S. P. Ry. Co.) in refusing to switch two cars of coal to a connecting line after payment of freight, and the offer of customary switching charges, unless complainant promised in advance to pay any demurrage charges which might be made, whether just or legally enforcible, was unjust.

Decision No. 1075 holds that if demurrage charges are made to commence before the expiration of a reasonable time for loading or unloading, such action might be a violation of provisions of Section 1 of Inter-State Commerce Act.

Decision No. 1076 holds that the Inter-State Commission may find the time allowed for unloading or loading unlawful and forbid the charging of demurrage before the expiration of a reasonable time.

Decision 1077 orders that a defendant company cease and desist from charging demurrage until the expiration of a reasonable time for unloading after cars have been placed for unloading, and notice of such placing given to consignee.

Decision 1078 is simply explanatory of Section 1 of Inter-State Commerce Commission Act.

An order of this Commission made January 8, 1896, provides that cars arriving at destination on which there are no previous or general orders as regards delivery must be placed on hold track awaiting orders.

In the case under consideration the cars on which demurrage was charged were placed on hold tracks for orders, and Darlington & Co. were duly and promptly notified of such placing. After a reasonable time had expired, subsequent to notice given, no orders having been received, demurrage charges were made in accordance with the approved rules of the Car Service Association. There being nothing in the evidence heard in the matter showing any injustice in the demurrage charges claimed by the Car Service Association, we find that the demurrage charges of seventeen dollars against E. R. Darlington & Co., as made by the said Association, as shown by statements in evidence, are equitable and proper, and the case is, therefore, dismissed.

By order of the Board of R. R. & W. Commissioners.

(Signed) JAMES HARDING, Secretary.

SUPERIOR COURT, CATAWBA COUNTY, NORTH CAROLINA, JULY, 1901.

LATTA-MARTIN PUMP COMPANY

VS.

SOUTHERN RAILWAY COMPANY.

UNREPORTED.

Heard Before Judge Council.

This case involved question of the right of carriers to enforce warehouse charges for storage of freight. Shipment of pump cylinders arrived Hickory, N. C., June 27th, 1900, consigned to plaintiffs; notice was given on arrival of shipment, which was acknowledged, but for business reasons plaintiffs failed to remove said shipment until after forty-eight hours had expired, computed from noon day following date of arrival.

They demanded delivery without payment of storage charges, and tendered payment of freight charges only; delivery was withheld and shipment replevined. Case was heard before trial justice, who decided in favor of plaintiffs, and defendants appealed. Case was called in Superior Court, July Term, 1901.

Plaintiffs contended that defendants unlawfully detained property referred to in complaint for storage charges.

Defendant admitted possession and detention of the property, but alleged that detention was lawful, and that it was subject to storage or warehouse charges under its rules.

Under the evidence the Court charged the jury that the possession was lawful, that the property was subject to the charges referred to, and that said rules were reasonable.

Verdict for the defendant. Judgment upon verdict.

SUPREME COURT OF PENNSYLVANIA.
NO. 142, JANUARY, 1900.

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201 PA. St. P. 624.
SUP. 51, ATL., 313.

PENNSYLVANIA RAILROAD COMPANY

VS.

THE MIDVALE STEEL COMPANY.

Appeal by Plaintiff from Judgment of Court of Common Pleas No. 4, Philadelphia County.

Opinion by Dean, Judge, February 24th, 1902.

The plaintiff, as a common carrier corporation, before 1893, adopted by its proper officers this rule:

"A charge of one dollar shall be imposed for car service for and upon each car carried over any portion of its line of railroad not unloaded by the consignee within forty-eight hours from the time said car arrived at the destination thereof, ready for delivery to such consignee, for each day or part of day after said forty-eight hours, not including Sundays and legal holidays, during which said car should remain unloaded, the said charge being payable by the consignee or person receiving the car."

From July, 1893, up to December, 1898, the defendant, which is a large iron and steel manufacturer at Nicetown, in Philadelphia County, received from plaintiff, consigned to the Steel Company, about fourteen thousand cars laden with iron, coal and other products used in its manufacturing business. A large number of these cars were detained beyond the forty-eight hours, some for many days, before being unloaded. Plaintiff charged for the delay as provided by the rule quoted, and presented monthly bills for the same to defendant, which it refused to pay. In an affidavit of defense it denied the right to make the charge, and consequently its liability to pay. Plaintiff then took a rule

to show cause why judgment should not be entered for want of a sufficient affidavit of defense. The aggregate of the charges within the years named was $4,048. The learned President Judge Arnold, of the Court below, in his opinion discharging the rule, says:

"Conceding that a carrier may charge a consignee a fixed rate in the nature of demurrage for the detention of its cars beyond a reasonable time for discharging their cargoes, and that the rate claimed in the present suit is a reasonable rate, yet there is sufficient denial of the facts upon which the plaintiff bases its claim to prevent the entry of a summary judgment, and therefore we discharge the rule for judgment for want of a sufficient affidavit of defense."

From this decree plaintiff brings this appeal, arguing that the Court erred in refusing to make the rule absolute.

The plaintiff has an unquestioned right as a common carrier to make reasonable rules to speed the unloading of its cars; cars are for the transportation of freight, not for its storage. A rule on its face may apparently be reasonable, either as to time allowed for unloading, or as to the extent of the penalty by which it is sought to enforce a reasonable time-limit; or the reasonableness of the rule may be doubtful; in either of which cases the evidence would be for the jury. But no such question arises here, for the affidavit does not deny the reasonableness of this rule as applicable to others; it only denies, on other grounds, the right of plaintiff to apply it to these shipments. Where the rule is manifestly a reasonable one, as this one is, both as to time and charge, the court will not take up time by instructing a jury to find the facts, any more than it would instruct a jury, on undisputed facts, to find that a collecting bank had protested a negotiable note within a reasonable time after non-payment. Although the question has not been heretofore directly passed upon by this Court, it has been decided in several of the states. (Miller vs. Mansfield, 112 Mass. 260; Norfolk Railroad Co. vs. Adams, 90 Va. 393; Wagon Co. vs. Ohio Railway Co., 98 Ky. 152, and other cases.)

As before noticed, with the plaintiff's statement is filed a complete copy of its account—giving car initials, number,, contents, exact hour of arrival, date of release, number of days detained and amount of charge. None of the

cars charged for were kept less than three days, and many of them from seven to twenty-one days. So far as it was in the power of a railroad company to give notice to a consignee of every material fact, the defendant got this notice from plaintiff when the bills were rendered. Wherein does the affidavit make an issue of fact which ought to go to a jury? It sets out that the demurrage rule is not applicable to it because large numbers of the cars consigned to it were unloaded promptly, but being re-loaded as outgoing shipments the detention caused by re-loading is embraced in a charge of delay in unloading. The plaintiff having sworn to its detailed statement, having positively averred the number, date of arrival and date of release as to every car, it was the duty of the defendant to meet this charge by specifying the cars detained for other reasons than by neglect to unload. The least error in plaintiff's account, whether overcharge as to delay, mistake in car, or consignment to defendant, when consigned to some other, could easily have been detected and exposed in the affidavit of defense; every delay occasioned, not by unloading but by re-loading, could have been particularly averred. We do not say that if defendant had been unable to do this, either by neglect to keep accounts or by their loss or destruction, that the Court below might not, under the circumstances, have refrained from entering judgment. But the defendant makes no averment of inability to produce accounts which will specify the alleged errors in plaintiff's account; on the contrary, it avers that "the defendant will produce at the trial its own records, carefully prepared under a system adapted to prevent error, for the purpose of proving that the plaintiff's records are inadequate as a basis of claim." It thus asserts that it has in its possession accurate accounts, which at the trial in Court before a jury will defeat plaintiff's claim in part at least; yet, with seeming caution, it refrains from specifying the particulars then before it. This defeats the very purpose of the affidavit of defense law. Its object was to hasten final judgment by setting out in the affidavit the groundlessness of the whole or part of plaintiff's claim; or by averring that it had been paid and how, in whole or in part. The parties might then, in that early stage of the proceedings be brought together; the plaintiff might abandon his claim in whole or in part. This affidavit specifies nothing in answer to plaintiff's full and complete specifications.

Every averment is an inference from a "carefully prepared" system of bookkeeping of its own, without a copy of the particulars which would demonstrate the errors of plaintiff's charges. "The affidavit should state specifically and at length the nature and character of the defense relied on." (Bryer vs. Harrison, 37 Pa. 233. "The spirit of the affidavit of defense law abhors evasion and equivocation, and punishes them by entering judgment." (Endlich on Affidavits of Defense, Sec. 377; Woods vs. Watkins, 40 Pa. 458.)

The further objection to plaintiff's claim is, that it does not aver expressly or impliedly that these parties ever became parties to any contract for payment of demurrage on detained cars. But they were parties to the contract of shipment over plaintiff's railroad, and this is averred; and then, further, it is averred that since the demurrage rule was adopted it has formed part of the contract of shipment. This is sufficient averment of the implied contract. As a consignee of goods over plaintiff's railroad, it impliedly contracted to submit to all reasonable rules for the regulation of shipments. That the shipper was not consulted in framing the rules does not affect their validity. (Wagon Co. vs. Ohio Railway Co., supra.) There is no duty on a common carrier to consult either its shippers or consignees as to the wisdom of its rates of freight for carrying or rules for demurrage; as to the one, it cannot exceed a lawful rate; as to the other, it cannot exceed a reasonable charge. Within these bounds, it is presumed, in the interest of its stockholders and the public, to properly conduct its own business. The defendant further avers in its affidavit that "prior to 1893, or any time subsequent thereto," it had no knowledge that plaintiff had established a rule relating to the demurrage charges set forth in its statement, and that no notice of such rule was ever communicated prior to the bringing of this suit; but then it says: "At various times during the year 1893, and subsequently, bills have been rendered to the defendant by plaintiff for demurrage charges; but said bills did not contain notice of any regulation or rule on which said charges were or could be based, nor were the charges in said bills consistent with the terms of the regulations upon which the plaintiff has declared." This is inconsistent and evasive both in language and substance. That plaintiff did adopt such rule is clearly shown by its uniform charges.

It was not bound to serve a verbatim copy of the rule on defendant; that could have shown nothing so specifically as the charge, which plainly says what detention is allowed, what excess is charged, on what car and on what goods. And that defendant had full knowledge is shown by its own admission that bills for violation of the rule were regularly rendered. We think this affidavit falls short of what the law calls sufficient. It raises no issue of fact calling for the intervention of a jury, and the law is clearly with the plaintiff.

Therefore the decree discharging the rule is reversed, and the record is remitted to the Court below with directions to enter judgment for plaintiff, unless other legal or equitable cause be shown to the Court below why such judgment should not be entered.

ST. LOUIS COURT OF APPEALS.
OCTOBER TERM, 1902.

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72 S. W. R., 122.

EVANS R. DARLINGTON, ET. AL., Respondents.

VS.

THE MISSOURI PACIFIC RAILWAY CO., Appellant.

No. 8617. Appeal from Circuit Court, City of St. Louis. Hon. Warwick Hough, Presiding.

STATEMENT.

"The plaintiffs claimed that on or about December 16th, 1901, the defendant, with force and arms, without leave, wrongfully seized, took and carried away certain of the goods and chattels of plaintiffs and converted the same to its own use against the peace of the State of Missouri and to the actual damage of plaintiffs in the sum of seven hundred dollars; that said taking was wrongful, by force, malicious and oppressive."

It was shown that the plaintiff was a lumber dealer, receiving freight on the siding of the Merchants' and Manufacturers' Railroad Warehouse Company, they having leased from said company the part of track that passed through their ground.

It was shown by the defendant that they had paid for the labor in building the track and also that they owned the approaches to the siding. That is, they owned the rail where it was on the right-of-way of the railroad and where it connected at each end with the railroad.

On December 16th, the plaintiff having previously paid the freight charges at the agent's office, the cars were placed on the siding by the Missouri Pacific employes and remained on the siding on December 17th and 18th, which was the free time allowed and were still on the track on December 19th, and car service having accrued the employe of the railroad demanded payment of $1.00 for each car, total $2.00, which claimant refused to pay.

First—Because the delivery was complete and the railroad had no right to take the lading, and because inclement weather prevented the unloading of the lumber from the car.

Payment having been refused, Missouri Pacific, through its employes, removed the car from the siding and unloaded the lumber in their warehouse, holding the lumber for the car service charges.

In the Circuit Court the question of the legality of the car service charge was not raised.

The judge allowing consideration only as to the removal of the car; that is: "That it was unlawful, wrongful, to forcibly take and carry away the property of the plaintiff, provided the evidence showed that the plaintiff had paid the freight charges to the defendant and had paid all other charges due up to the time of the placing of the cars, even if it was also found that car service, or demurrage as it is sometimes called, had accrued after delivery."

His instructions were for the value of the lumber and for punitive damages.

The court overruled the instructions of the defendant, who claimed authority under the promulgated car service rules to charge demurrage or storage after the expiration

of the free time, and that payment having been refused for said demurrage or storage, that the right to remove the cars from the switch remained with the defendant.

The jury returned a verdict seven hundred dollars actual damages, five hundred dollars punitive damages.

The defendant appealed to the St. Louis Court of Appeals with an exhaustive brief covering all the later decisions of the courts in Georgia, Kentucky, Massachusetts, Missouri, Virginia, etc., and to rulings of the Kansas Railroad Commissioners, Iowa Railroad Commissioners, and Missouri Railroad Commissioners.

It is the opinion of the court, C. C. Bland, Judge, "That the defendant had at least a license to move its engines upon the siding and that it never parted with its possession and control of the cars, as the switch was put in for the profit and convenience of the tenants of the M. and M. R. R. Warehouse Company, and also for the profit of the defendant railroad company and partly at its expense, and it could set in and take cars off the track consigned to the lessee or to the M. and M. Warehouse Company."

Baker vs. Railroad, 57 Mo. l. c., 272.

Dickson vs. Railroad, 67 S. W., 642.

Chiles vs. Wallace, 83 Mo., 85.

Gibson vs. St. L. Agricultural & Mechanics' Ass'n., 33 Mo. App. (St. L.), 165.

McAllister vs. Walker, 69 Mo. App. (St. L.), 476.

House vs. Montgomery, 19 Mo. App. (K. C.), 170.

Cook vs. Prigden, Stapler & Dunn, 45 Ga., 331.

Kirk vs. Hamilton, 102 U. S., 68.

Risien vs. Brown, 73 Texas, 135.

Campbell vs. Railroad, 110 Ind., 490.

The Evansville & Terre Haute R. R., et. al., vs. Nye, 113 Ind., 223.

Garrett vs. Bishop, 27 Oregon, 349.

"Second—The cars were switched on plaintiff's track to be unloaded. The plaintiffs, to accomplish this purpose, were, in a sense, in possession of both cars and contents, but the defendant did not lose its dominion over the cars or the lumber so long as the lumber remained in the cars.

"It retains the right to re-possess itself of the cars after they were unloaded and to re-possess itself of both cars and the lumber remaining in them for the purpose of enforcing any carrier's lien it may have had on the lumber existing when the cars were placed or any common law lien acquired after the cars were placed in the plaintiff's yards.

"It appears from the evidence that the defendant had knowledge of the existence of the car service rules. There was abundant evidence that plaintiffs impliedly agreed to be bound by these service rules. But, independent of any express or implied contract of plaintiffs to be bound by the rules, the modern doctrine in this country is that the right to demurrage, in such circumstances, exists independent of contract or statute. Section 1115, R. S. 1899.

"The opinion then quotes from opinion of Judge Toney, Chancellor, before whom the Kentucky Wagon Manufacturing Company case was first heard, as presenting a sound and logical demonstration of the necessity and reasonableness of the rule.

"Without the right of making and enforcing reasonable rules and regulations as to the delivery of freight and the detention of their cars by consignees, railroads would be at the mercy of individual shippers. Individual convenience should be subordinate to the public good, which demands expedition, regularity, uniformity, safety and facility in the movement of the freight, of the country which must of necessity be materially obstructed if individual consignees are allowed, without let or hindrance, to convert freight cars on their arrival with cargoes of freight, upon their side tracks, into warehouses for the storage of freight at the suggestion of their convenience or interest."

Hutchinson is quoted as follows:

"If the carrier had agreed to carry the goods to their destination and there deliver them within the prescribed time, he will be held to a strict performance of his contract, and no temporary obstruction or even absolute impossibility will be a defense for failure to comply with the agreement."

Hutchinson on Contracts, Sec. 317.

In Harrison vs. Mo. Pac. R. R. Co., 74 Mo., l. c., 371, the Supreme Court, speaking through Norton, Justice, said:

"Where a party by contract agrees to do a prescribed thing in a prescribed time, he is liable for non-performance of the contract, notwithstanding the fact that his non-fulfillment of the contract was occasioned by inevitable and unavoidable accident."

"To the same effect is

Galvin vs. Railroad, 21 M. A. (K. C.), 273.

Miller vs. Railroad, 62 M. A. (K. C.), 252.

Waters vs. Richmond & Danville R. Co., 16 L. R. A., 835.

Atkinson vs. Ritchie, 10 East, 530.

Wareham Back vs. Burt, 87 Mass., 113.

Nelson vs. Odiorne, 45 N. Y., 489.

Cutliff vs. McAnally, 88 Ala., 507.

Cassaday & Dunn vs. Clarke, 7 Ark., 123.

Ward vs. The Hudson River Bldg Co., 125 N. Y., 230.

"There are numerous other cases in support of this doctrine.

"The cases which seemingly announce a contrary doctrine will be found to be cases involving obligations where the thing to be done is one of duty and not of private contract; as in Ballentine vs. Mo. R. R., 40 Mo., 491; where it was held a carrier was excused for failing to deliver goods in a reasonable time on account of delays occasioned by an extraordinary snow storm.

"Our conclusion is that, under the pleadings and the evidence, the defendant was not guilty of trespass; that it had a right to take possession of the car shipped from Oregon, and to store the lumber remaining in the car until its demurrage charges were paid, but that it had no right to take the car and lumber therein shipped from Chippewa Falls, the time agreed upon in which it might be removed not having expired, and that its taking and retention of the

lumber was a conversion thereof to its own use and that plaintiffs, having paid the freight, are entitled to recover the market value of that lumber at St. Louis on the day it was taken by the defendant.

"The judgment is reversed, and the cause remanded.

"Barclay and Goode, JJ., concur; the former concurs in the result. "C. C. BLAND."

Note.—In the bill of lading of the Chippewa Falls car, as exhibited, the free time allowed was 72 hours. Missouri Pacific removed car from the siding before the expiration of the 72 hours.

UNITED STATES TREASURY DECISION.

(24431.)

LIEN.

A lien for demurrage or car detention, where it exists is embraced by Section 2981, Revised Statutes, as amended by Act of May 21, 1896, under the provision therein for "charges."

Washington, D. C.

Treasury Department, May 16, 1903.

Gentlemen:

The department duly received your letters of the 7th ultimo and 13th instant, wherein you request to be informed whether a lien against merchandise for car service or demurrage accruing after arrival of goods at destination, and while such goods are in customs custody, may be lawfully filed.

I have to inform you that the matter was referred to the Solicitor of the Treasury for an expression of his views on the subject, and that in a letter dated the 11th instant (copy inclosed) he states that, in his opinion, a lien for de-

murrage or car detention, where it exists, is embraced by Revised Statutes (Sec. 2981) as amended by the Act of May 21, 1896, under the provision therein for "charges."

Respectfully,

(3181) LESLIE M. SHAW, Secretary.

Edward Frohlich Glass Company, Detroit, Mich.

OPINION OF THE SOLICITOR OF THE TREASURY.

Department of Justice,

Office of the Solicitor of the Treasury,

Washington, D. C., May 11, 1903.

Sir: Assistant Secretary Armstrong, by reference of the 5th instant, indorsed on a communication from the Edward Frohlich Glass Company, of Detroit, Mich., requests my opinion upon the question "whether a lien against merchandise for car service or demurrage accruing after arrival of goods at destination, and while such goods are in customs custody, may be lawfully filed."

It does not appear whether the bill of lading in this case provided that the carrier should have a lien on the goods for demurrage.

There is a conflict of authority upon the question whether the law of demurrage applies to cases of car detention, and whether a lien for demurrage can be claimed where it is not provided for in the contract between the carrier and the shipper. (9 Am. and Eng. Encyc. of L., 2d ed., p. 262; Miller vs. Georgia Railroad Company, 88 Ga., 563; Chicago, etc., Railroad Company vs. Jenkins, 103 Ill., 588.) I do not consider it necessary to determine what may be the weight of authority upon these questions, for, assuming that a railroad company may lawfully claim such a lien, either under the law merchant or by virtue of its special contract with the shipper, and that such a lien exists in the particular case now under consideration, the Customs Regulations of 1899 (Art. 431) appear to deny to

the company the right to assert such lien against goods in customs custody, under Revised Statutes (Sec. 2981) as amended by the Act of May 21, 1896.

The provision of that statute, so far as pertinent to the present inquiry, is as follows:

"That whenever the collector of the port of entry, or other proper officer of the customs shall be duly notified in writing of the existence of a lien for freight charges, or contributions in general average he shall" * * *

The application of the words "freight" and "charges" as here used, is thus defined by Article 431 of the Customs Regulations of 1899:

"The freight which is specified in the above quoted Act is held to be the freight charged for the ocean transportation of the goods and the inland freight charged for delivering to an interior port goods covered by through bills of lading for such ports; the 'charges' specified therein are the charges incident to the shipment of the goods abroad, together with any charge assumed by the claimant of the lien in forwarding the same to the port of destination, and are not other charges accruing after the arrival of the goods in this country."

It may be that demurrage for car detention is properly a part of the "freight" referred to in the statute and the regulation, as there are respectable authorities for the proposition that demurrage is "extended freight" or compensation for the earnings improperly caused to be lost. (Sprague vs. West, 1 Abb. Adm., 548; Donaldson vs. McDowell, 1 Holmes, 290, 292; the J. E. Owen vs. 65,000 Bushels of Corn, 54 Fed. Rep., 185.) But this I need not determine, as I am clearly of the opinion that a lien for demurrage or for car detention, assuming such a lien to exist in the present case, is a lien for "charges" within the meaning of the amendment of May 21, 1896.

If by the language of Article 431 of the regulations of 1899 "other charges accruing after the arrival of the goods in this country" it is intended to exclude from the benefits of the Act an admitted lien in favor of the carrier for car detention accruing while the goods are in customs custody, I am of the opinion that the regulation is, to that extent, unwarranted by law. The statute plainly recognizes the

fact that there may be liabilities other than freight on the part of the shipper or consignee to the carrier, for which the latter is entitled to a lien on the goods, and it is this lien—a lien for "charges"—which the statute is designed to protect. I do not perceive upon what principle, or by what authority, the Treasury Department limits the application of the "lien for * * * charges" mentioned in the statute to charges accruing before the arrival of the goods in this country. If the carrier has a lien on the goods for his protection, it is of no consequence when the lien accrued. The statute was enacted to enforce the plainest sort of an equity, namely, that the right of the carrier to look to the goods for his protection should not be defeated by the loss of his control over the goods while in the customs custody.

The extension of the benefits of the Act to a lien for charges first occurs in the amendment of May 21, 1896. Shortly thereafter the Treasury Department promulgated its construction of the Act now embodied in Article 431 of the Regulations of 1899. (T. D. 17444, October 2, 1896.) That construction does not appear to have been founded upon any decision of the courts, nor upon the opinion of the Attorney General, nor other law officer of the government.

For the foregoing reasons I have to advise you that in my opinion a lien for demurrage or car detention, where it exists, is embraced by Revised Statutes (Sec. 2981) as amended by the Act of May 21, 1896.

Respectfully,

THE SECRETARY OF THE TREASURY,

MAURICE D. O'CONNELL, Solicitor.

CIRCUIT COURT, TAZEWELL COUNTY, ILL.
SEPTEMBER, 1903.

UNREPORTED.

T. & H. SMITH & CO.
VS.
P. & P. U. RY. CO.

November 14th, 1901, the P. & P. U. Ry. Co. set two cars of lumber on team track at Pekin, Ill., consigned to T. & H. Smith & Co. As one of said cars was not entirely unloaded at the expiration of the forty-eight hours allowed free, and consignee refused to pay the car service charge due, agent removed the car which then contained about one wagonload and a half of flooring, and sent the lumber to a public storehouse. T. & H. Smith & Co. brought suit against the P. & P. U. Ry. Co. for $120.00, the value of the lumber withheld from delivery.

The case was tried before Judge George W. Brown, Circuit Judge, and a jury, at Pekin, Ill., Tuesday, September 22nd, 1903, the court instructing the jury to find for defendant.

A stipulation covering most of the facts was agreed to between opposing counsels, before the trial. Plaintiff contended:

First—That while forty-eight hours was possibly reasonable time in which to unload one car, it was unreasonable when more than one car arrived at the same time.

Second—That stipulations in bills of lading had no binding effect upon consignee unless he had assented thereto.

In instructing the jury to find in favor of the Railroad Company, the Court said:

"The courts in this state have held that railroad companies have the right to charge a reasonable amount for detention of their cars, after allowing a reasonable time for their unloading, assuming, of course, that consignee had

notice of the rule. This, I think, will not be disputed. I am also of the opinion that the laws of this state give railroad companies the right of lien upon such freight as lumber, and other bulk shipments, whether same be held in the car or in a warehouse, their duties as warehousemen being the same, whichever method of storing they may choose. The question here, independent of the contract, is, whether Smith & Co. had reasonable time in which to unload after arrival and notice. The contract signed by shipper is to the effect, and in specific terms, gives a lien for demurrage charges according to the custom of the place and the road where the shipment is delivered. There has been no evidence to show that Smith & Co. might not have put on more men and unloaded the cars in time. The evidence shows that they had help enough to unload one car at a time.

Gentlemen of the jury, you are instructed that under the law and the evidence, plaintiffs cannot recover, and the form of your verdict shall, therefore, be, 'We, the jury, find for the defendant.'"

Prettyman & Velde, attorneys for plaintiff; Stevens, Horton & Abbott, attorneys for defendant.

CIRCUIT COURT, SAINT JOSEPH COUNTY, IND. SEPTEMBER TERM, 1903.

UNREPORTED.

ISAIAH MILLER, ET. AL.

VS.

THE TERRE HAUTE & LOGANSPORT RAILWAY COMPANY, ET. AL.

NO. 9199.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW.

At the time the above entitled cause was submitted to the Court for trial, the plaintiffs and the defendant, The

Terre Haute & Logansport Railway Company, filed their written request that the Court find the facts specially, and state its conclusions of law thereon; and the Court, having heard the evidence, does now make its special finding of facts and state its conclusions of law thereon as follows:

STATEMENT OF FACTS.

1. During the month of March, 1903, and for more than a year prior thereto, and ever since, the defendant, The Terre Haute & Logansport Railway Company, was, has been, and is, a common carrier of freight engaged in operating a line of railroad terminating at the City of South Bend, Indiana, at which place it had and has a yard with side tracks, switches, and a freight house where freight transported over its railroad was and is delivered to persons entitled to receive the same.

During said month of March, the said defendant had a siding commonly known as a team track, long enough to accommodate from fifteen to seventeen freight cars when placed thereon for unloading purposes; and, during said time, it was said defendant's common practice and custom to place freight cars loaded with heavy freight, such as lumber, to be delivered in car load lots, upon said team track to be unloaded by parties entitled to the freight. The plaintiffs had full knowledge and notice of its practice and custom during said month of March, 1903, and before.

2. On February 27, 1903, the Mobile & Ohio Railroad Company received from one O. G. Huff at Case Siding, Alabama, one car load of yellow pine lumber, being the lumber described in the plaintiffs' complaint herein, to be transported over its line of railroad and connecting lines to South Bend, Indiana. Said lumber was loaded in a box car, No. 9202, and bearing the initials M. and O., and the same was consigned to said O. G. Huff, South Bend, Indiana. The car containing the lumber arrived over the railroad and in the yard of the defendant, The Terre Haute & Logansport Railway Company, at South Bend, at seven o'clock A. M. on March 19, 1903. On the same day and immediately after its arrival, the said O. G. Huff was notified of the arrival of the car by said defendant by postal card, and on the same day, he directed said defendant first

by telephone and then by postal card, to deliver the lumber contained in said car to the plaintiffs. Said car containing the lumber was placed on said team track, at a point where it was reasonably convenient and suitable for the plaintiffs to unload the same, by said defendant, for unloading at eight o'clock a. m. of March 20, 1903, and the plaintiffs had knowledge thereof at the time and of the order to deliver the lumber to them when given.

The plaintiffs did not unload said car within forty-eight hours, excluding Sunday, after seven o'clock a. m. of March 21, 1903. After seven o'clock a. m. of March 24, 1903, the defendant made out a bill for one dollar for the car service charge for the day beginning with seven o'clock a. m. of that day, and, by an employe presented the same at the business office of the plaintiffs at South Bend. This bill was not paid, and the plaintiffs' clerk, then in their office, and having authority so to do, informed the defendant's said employe that the plaintiffs would not pay said bill, and that they would not pay any car service charges. Thereafter, and on the same day, the defendant locked the car, and, upon demand of the plaintiffs made before the commencement of this suit, refused to deliver the lumber to them, unless they would pay the car service charges then accrued, being three dollars. The plaintiffs refused to pay said sum or any sum whatever as car service charges, and instituted this action. The plaintiffs fully paid the freight charges for transporting said lumber on March 26, 1903, and the same was taken from the defendant and delivered to the plaintiffs, under the writ issued and bond filed herein, on March 28, 1903.

3. The Court finds that the plaintiffs were the owners of said lumber described in their complaint from the time it arrived at South Bend, Indiana, on March 19, 1903, and until after it was delivered to them under the writ issued and their bond filed herein, and that, when it was replevined, its value was three hundred and seventy-five dollars; and, further, that the defendants refused to deliver up the lumber on demand, solely on the ground that car service charges had accrued to the railway company when the demand was made, and that it had a lien on the lumber for the amount of such charges, and the right to hold the same until the charges were paid.

4. On October 1, 1902, the defendant, the Railway Company, and all the other railroad companies having yards at South Bend, became members of the Central Car Service Association, and continued to be members thereof until April 1, 1903, when they all became members of the Indiana Car Service Association. The principal object of the various railroad companies that were and became members of said Central Car Service Association, in organizing and sustaining the same, was to adopt, promulgate, and enforce, through its agency, rules and regulations, that should apply to all companies, members thereof, alike, and to all their customers without discrimination, designed to prevent the unreasonable holding and detention of freight cars placed for loading and unloading on their tracks, by their customers; and to secure the prompt loading and unloading of freight cars used by them and the speedy clearing of their yards and tracks, and thereby secure the greatest possible use of their freight equipment for transporting purposes to the end that the shipping public might be well served and their own interest be promoted.

5. During the entire time from October 1, 1902, to April 1, 1903, the railroad companies, then members of the Central Car Service Association, and, particularly, this defendant, the Railway Company, had in force certain rules intended to accomplish the purposes above stated and which had been promulgated and which were well known to the plaintiffs during all of the months of February and March, 1903, of which the following are the ones and the only ones that are material to the issues in this cause, to wit:

"RULE 1.

Free Time Allowed for Loading or Unloading.

Sec. 3. On all commodities for unloading, except bituminous coal and grain, two days' free time will be allowed. Agents will charge car service after the expiration of forty-eight hours from 7 a. m. following placing.

Sec. 5. Cars for loading or unloading shall be considered placed when such cars are held subject to the orders of consignors or consignees or held for the payment of freight charges.

Sec. 6. After the expiration of the free time allowed, a charge of $1.00 per car per day or fraction thereof shall be made and collected upon all cars set for loading or unloading.

RULE 10.

Collection of Car Service.

Sec. 1. On all public deliveries, car service must be collected by the agent daily as it accrues. Where consignees or consignors refuse to pay, the agent must hold the car until payment is made; the regular charges being assessed until car is unloaded, or, at his option, he may direct the sending of such cars to public storage houses or yards, where the freight will be held subject to regular storage charges in addition to accruing car service and all other charges.

RULE 12.

Agents will be held responsible for the collection of car service charges on public tracks in exact accordance with placing and releasing."

And the Court finds that said rules were and are reasonable and that their enforcement was effective to accomplish the object designed thereby as hereinbefore found, and, particularly, that the interests of both the general shipping public and the railroad companies causing the same to be enforced were promoted thereby; and, further, that the free time allowed by said rules for unloading freight cars was reasonable, and that the charge of one dollar per day for the use of a freight car on track, after the lapse of the free time, was reasonable and less than the useable value of a freight car generally, and less than the useable value of the freight car in which was the plaintiffs' lumber at the time the same stood on the defendant's team track as hereinbefore found.

6. The Court further finds that, at the time said lumber was received by the Mobile & Ohio Railroad Company at Case Siding, Alabama, for shipment, it issued to the consignor, who was also the consignee named therein, one O. G. Huff, its bill of lading, which he sent to the plaintiffs, and which provides that said lumber should be transported

by said company and the forwarding lines with which it connects to South Bend, Indiana, and that the liability of the companies thereunder as carriers should terminate on the arrival of the lumber at the station of delivery, and that the companies should be liable as warehousemen only thereafter, and that the consignee should promptly receive and take away the lumber as soon as the same was ready for delivery, and, in the event that the consignee failed to receive and remove the freight within forty-eight hours after it was ready for delivery, he and the consignor agreed that the delivering carrier should be paid the sum of $2.00 per day for each and every day that the lumber remained in the car after the expiration of the forty-eight hours allowed for unloading, and that the same was the amount agreed on as liquidated and reasonable damages for the detention of the car per day, and that for the amount thus accruing, the delivering carrier should have a lien in addition to the common law lien for freight, charges and advances, and might detain said lumber or any part thereof for the payment of such damages as well as for other charges and advances.

Said bill of lading further provides as follows:

"Notice.—In accepting this contract, the shipper or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations and conditions."

The defendant, Railway Company, was the last and delivering carrier of said lumber.

7. At the time the demand was made by the plaintiffs for the lumber, three dollars for car service or damages as claimed by the Railway Company had accrued to it, and two dollars more accrued before the car was unloaded.

8. As to the defendant, John C. Edgeworth, the Court finds that he was the defendant Railway Company's station agent at South Bend, Indiana, during March, 1903, and, that, as such agent, it was his duty to collect the car service charges that might accrue to his principal and to assert its lien therefor on the property in its cars; and that he did endeavor to collect the car service charges and

damages on said car of lumber from the plaintiffs, and upon their refusal to pay the same, as hereinbefore found, he refused, on behalf of his principal, to deliver up the lumber, upon the ground solely that the said Railway Company had the right to hold the same for the payment of said charges.

CONCLUSIONS OF LAW.

Upon the foregoing facts found, the Court now states its conclusions of law as follows:

1. At the time the car load of yellow pine lumber described in the complaint was taken from the defendant, The Terre Haute & Logansport Railway Company, under the writ of replevin issued in this suit, the said defendant had and held a lien on the lumber for its car service charges or damages in the sum of five dollars then accrued to it, and was then and at the time the demand was made for the lumber and when this suit was commenced entitled to hold the possession of the lumber for the payment of its charges or damages, accrued to it at each of said times, and the plaintiffs, though the owners of said lumber, were not entitled to the possession thereof at the time this suit was commenced or when the same was delivered to them under the writ of replevin and bond issued and filed herein.

2. That the defendant, The Terre Haute & Logansport Railway Company, is entitled to the return of the lumber described in the complaint, the value of which is three hundred seventy-five dollars.

3. The law of the case is with the defendants and they are entitled to recover of the plaintiffs their costs; and the plaintiffs should take nothing by this action.

SUPREME COURT OF ILLINOIS.
OCTOBER TERM, A. D. 1903.

207 ILL. SUP., 199.

BOWEN W. SCHUMACHER, Appellant,

VS.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellee.

Appeal from Appellate Court, Second District.

SYLLABUS.

1. Railroads are quasi public corporations, and reasonable rules and regulations adopted by such corporations, conducive to the proper discharge of this public duty, should, where they are not in violation of some public law, be sustained.

2. The court reaffirms the doctrine that after the delivery of a car containing the freight, to the consignee, upon its own track, or at the place selected by him for unloading, if he have one, or to the consignee upon the company's usual and customary track for the discharge of freight, and a reasonable opportunity is given to the consignee to take the same, then as to such freight the railroad companies occupy the relation of warehouse men.

3. If cars in which freight is shipped, are the property of another railroad than that of the company transporting the same to the point of destination, such latter company bears the same relation to such cars as to the freight therein.

4. It is the duty of the consignee to take notice of the time of the arrival of freight shipped to him, and to be present, and to receive the same upon arrival, and he is not entitled to notice from the company that the same has arrived, but the company is authorized to store such freight and to be relieved of its duty as a common carrier.

5. When a railroad company, delivering freight at its point of destination, has no warehouse at that point, suitable for the storage of bulk freight in carload lots, and the property is of such character that the cars in which it is transported, furnish a proper and safe place for the same, said freight may properly be held in storage in the cars in which the same was carried.

6. The public interests require that cars should not be unreasonably detained.

7. The case of Jenkins vs. The Chicago & Northwestern Railway Company, 103 Ill., 588, does not apply in cases of this kind.

8. The free time allowed by car service rules for the removal of goods from a car, should not be dependent upon the distance the same may be hauled, or the number of teams employed in making delivery.

9. The object of the rule requiring a charge of $1.00 per car per day, for car service, is not so much for the recovery of revenue, as for the enforcement of a rule that is for the benefit of all shippers, and is thereby a public benefit. From the facts submitted to the court in this case, the charge of $1.00 per day is held to be a very reasonable charge.

10. The right of a railroad company to a lien for storage of car service charges that are reasonable is sutained.

The court in its conclusion said:

"The views above expressed as to the rules pertaining to such charges, whether regarded as railroad charges or demurrage or car service charges, seems to be in keeping with the weight of modern decisions upon the question, and, we believe, will tend to the public welfare."

ABSTRACT OF RECORD OF APPELLATE COURT.

Placita, April Term, 1903.

Order entered April 10, 1903, that cause be taken under advisement.

Judgment rendered June 8, 1903. Affirmed the judgment of the Circuit Court of Lake County in all things and that "the appellee recover of and from the appellant its costs by it in this behalf expended to be taxed, and that it have execution therefor."

On the 19th day of June, 1903, on petition of Bowen W. Schumacher praying for an appeal from the order and judgment of the Appellate Court to the Supreme Court, said Appellate Court certified that the cause involved questions of law of such importance on account of collateral interests that it should be passed upon by the Supreme Court, and order entered allowing the said Bowen W. Schumacher, appellant, an appeal to the Supreme Court from the said judgment of the Appellate Court, on condition that said appellant within twenty days from June 19, 1903, execute and file a bond in the penal sum of $250.

Appeal bond in the sum of $250, approved and filed June 24, 1903.

Certificate of the clerk of the Appellate Court to the transcript of the record in that court.

OCTOBER TERM, A. D., 1903.

BOWEN W. SCHUMACHER, Appellant.

vs.

CHICAGO & NORTHWESTERN RAILWAY CO., Appellee.

Appeal from Appellate Court, Second District.

ASSIGNMENT OF ERRORS.

And now comes the said Bowen W. Schumacher, appellant, by Louis Zimmerman, his attorney, and says that in the record and proceedings and in rendering the judgment aforesaid in the Appellate Court, there is manifest error in this, to wit:

First—Said Appellate Court erred in affirming the judgment of Lake County as follows: "Therefore, it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the court that the said appellee recover of and from the said appellant its costs by it in this behalf expended to be taxed, and that it have execution therefor."

Second—Said Appellate Court erred in not reversing the judgment of the Circuit Court of Lake County and remanding the said cause to the court below for trial de novo.

Third—Said Appellate Court erred in not reversing the judgment of the Circuit Court of Lake County and rendering final judgment for the appellant that the right to the possession of the coke involved in this suit at the time of the commencement of this suit was in the appellant, together with the costs of suit.

Fourth—Said Appellate Court erred in rendering a judgment contrary to the evidence in the case.

Fifth—Said Appellate Court erred in rendering a judgment contrary to the law of the case.

By reason whereof the appellant, Bowen W. Schumacher, prays that the judgment of the said Appellate Court may be reversed and that judgment may be entered in his favor and against the appellee; or that such other proceedings may be taken as may be justified by the law and the evidence.

LOUIS ZIMMERMAN,
Attorney for Appellant.

OPINION OF APPELLATE COURT, SECOND DISTRICT.

Opinion by Judge George W. Brown, filed June 8, 1903.

This is an action of replevin instituted by appellant to recover from appellee possession of three tons of coke. The court at the conclusion of all the evidence directed a verdict for appellee and entered judgment thereon from which this appeal was prosecuted.

It appears from the record that Schumacher, a practicing lawyer in Chicago, resides in Highland Park, a village of two or three thousand inhabitants, on the line of the Chicago & Northwestern Railway, in Lake County. Schumacher shipped two carloads of coke from Chicago over appellee's line of railroad to his residence in Highland Park. Schumacher was promptly notified of the arrival of the cars, and that unless they were unloaded within forty-eight hours a demurrage or car service charge of $1.00 per day for each car would be charged after the expiration of such time. One car was promptly unloaded within thirty-six hours after the work of unloading was begun. The remaining car was not unloaded at the expiration of ten days after its arrival at Highland Park and notice to Schumacher, who worked for a week in an interrupted, indifferent and dilatory manner in attempting to unload the car, when the railroad company sealed the car and refused to permit him to remove more of the coke till the demurrage charges claimed by the company were paid. Schumacher thereupon instituted this replevin suit to recover possession of the coke.

The question presented for our determination is whether a railroad company under the laws of Illinois is entitled to a lien upon coke, coal or a like commodity, retained by the common carrier in its freight cars in which it is shipped, for reasonable charges for storage after the expiration of a reasonable length of time by the shipper to remove the same and failure on his part so to do.

The evidence warranted the court in assuming as a basis of its peremptory instruction that Schumacher did not unload the car within a reasonable length of time. The right of a railroad company to recover reasonable charges for the unreasonable detention of a car by a shipper is no longer an open question. Miller vs. Mansfield, 112 Mass., 260; Barker vs. Brown, 138 Mass., 340; Kentucky Wagon Co. vs. L. & N. R. R. Co., 50 Am. and Engl. Cases, 90; Miller vs. Georgia Railroad Company, 88 Ga., 563; Norfolk & Western R. R. Co. vs. Adams, 90 Va., 393; Kentucky Wagon Co. vs. O. & M. Ry. Co., 97 Ky., 32; Pennsylvania Co. vs. Midvale Steel Co., Pa. Sup., 51 Atl., 313; Elliott on Railroads, Vol. 4, Sec. 1567; Goff vs. Old Colony R. R. Co. (R. I.) 22 L. R. A., 532. A railroad company may after the expiration of a reasonable time to the shipper to re-

move the same, terminate its liability as a common carrier by unloading and storing freight in its warehouse, thereby assuming the liability of a warehouseman only, and have a lien for reasonable storage charges. I. C. R. R. Co. vs. Alexander, 20 Ill., 404; Porter vs. Railroad, 20 Ill., 407; M. D. T. Co. vs. Hallock, 64 Ill., 284; R. R. Co. vs. Friend, 64 Ill., 303; Anchor Line vs. Knowles, 66 Ill., 150; Rothschild vs. Railroad Co., 69 Ill., 164; Cahn vs. R. R. Co., 71 Ill., 96; M. D. T. Co. vs. Moore, 88 Ill., 136; Scheu vs. Benedict, 116 N. Y., 510. When the right to a lien exists, the same will not be defeated by the fact that the amount claimed may be too large, unless the owner or party desiring the possession of the goods makes a tender of the amount due. Russel vs. Koehler, 66 Ill., 459; Hoyt vs. Sprague, 61 Barb., 491; B. & L. H. Ry. Co. vs. Gordon, 16 U. C. L. B., 283; Lowenberg vs. A. & L. Ry. Co., 19 Southwestern, 1051; Schouler on Bailments, Sec. 125.

Where a party has a lawful lien on goods for storage, although he may have delivered part of them without insisting upon the lien, nevertheless, he has a right to retain the residue for the amount due upon the whole. Lans. vs. O. C. & F. R. R. Co., 14 Gray, 143; M. H. & N. Co. vs. Campbell, 128 Mass., 104; Steinman vs. Wilkins, 7 W. & S., 466; McFarland vs. Wheeler, 26 Wendell, 467; Darlington vs. Missouri Pacific, St. Louis Ct. of Appeals, Southwestern Reporter, December, 1902.

It is well settled that a common carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them. And, we think, where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car, as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may in many cases be as effectual as any other.

Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business, where he may unload it himself, or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier, and the goods stored elsewhere at the consignee's expense. And if a customer, whose duty it is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car, by requesting or permitting the carrier to continue holding it unloaded in service, and subject to his will and convenience as to the time of unloading, he cannot be heard to complain of the method of storage and to deny the right to any compensation at all for this service on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no compensation whatever shall be charged for such extra service. Miller vs. Georgia Railroad Company, 88 Georgia, 563.

In Miller vs. Mansfield, 112 Mass., 263, which was a case involving the relative rights of common carrier and shipper with reference to 100 barrels of flour, the court said:

"This charge is, in its essential character, a charge for storage. After the arrival of the goods at their destination the liability of the company as common carrier ceased, but they became liable for the custody of the goods as warehousemen, and, if they were not removed within a reasonable time, were entitled to compensation, for which they had a lien as warehousemen. * * * It is not material that the goods remained in the cars instead of being put in a storehouse. The responsibility of the company for their custody was the same as if they had been stored, and they had the right to retain them until their charges were paid."

And in Gregg vs. Ill. Cent. Ry. Co., 147 Ill., 550, it was held that the liability of a railroad company as a common carrier of freight ceased upon unloading the goods from the car at the place of destination and placing them in a safe or secure warehouse; and that where the carrier was not required, in the usual course of business, or expected, to remove the freight from the car, as in the case of grain in bulk, coal, lumber and the like, its liability as a common

carrier would terminate by delivering the car in a safe and convenient position for unloading, at the elevator, warehouse or other like place designated by the contract or required in the usage of business, or, if no place of delivery were designated or required on the said contract, in the usual and customary place for unloading by consignees; and that where the consignee of car lots of such commodities failed to receive the same or designate any place of delivery, the carrier would not be permitted to abandon the freight, but would be required to exercise ordinary and reasonable care for its preservation, as warehousemen; that in the exercise of such care the common carrier might leave the freight in the car or store it in a warehouse, assuming the liability imposed by law in such case for its care. The same case held in express terms that a common carrier, while it thus retained possession of freight committed to it for transportation, was entitled to a lien both for its charges as a common carrier and as warehousemen.

It is contended by appellant that the trial court erred in refusing to permit him to prove the distance required to haul the coke from the car of appellee to his place of residence. The testimony of appellant shows that his place of residence was within the corporate limits of the village of Highland Park. We hold that the rejection of this testimony was not reversible error. It cannot be held that different residents of the same village, like that in which appellant resided, can be entitled under circumstances precisely similar except the distance of their respective residences from the side tracks of the railroad, are entitled to materially different lengths of time for unloading car lots of coke, coal, lumber and other like commodities. If such were not the rule a person residing many miles distant from the village would be entitled to practically an unlimited length of time within which to unload a carload of similar freight. Such a rule cannot be declaratory of the law applicable to the case. The judgment of the Circuit Court is affirmed.

Affirmed.

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF THE CASE.

The form of the action and the nature of the pleadings are correctly stated in the brief of appellant.

As appellee does not feel, however, that the statement of facts as prepared by appellant is sufficiently full to enable this court to properly pass upon the questions involved in this case, the following statement of facts is submitted:

The cars in question arrived at Highland Park on June 20th, at about 7.30 o'clock a. m., and were placed upon the east team track where same were accessible for unloading from one side. On Saturday morning, June 21st, they were placed upon the west team track, where they remained until unloaded, and where they were accessible for unloading upon both sides (Abst., 10 and 11; Rec., 32½-35.) They were placed at the end of the switch track, and there was no interference with same thereafter by reason of any subsequent switching (Abst., 30; Rec., 65.) There was plenty of room to handle teams in unloading the cars, and there was no mud where the cars stood (Abst., 11; Rec., 35.)

John H. Arps, agent of appellee, mailed appellant a postal card about 9 o'clock on June 20th, notifying him of the arrival of the cars. A second postal card was mailed to appellant about noon on June 20th (Abst., 10, 11; Rec., 32½-33.) Appellant admits having received a postal card notice on the 21st, some time between half-past eight and nine o'clock. There was printed upon said postal card, among other things, the following:

> "All carload freight shall be subject to a minimum charge for trackage and rental of $1.00 per car for each twenty-four hours detention, or fractional part thereof, after the expiration of forty-eight hours from its arrival at destination. Jno. H. Arps, Agent."

Across the face of said postal card was stamped the following:

> "If this car is not unloaded within forty-eight hours from 7 K. A. M., June 21, 1902, a charge of $1.00 per day or fraction thereof, will be made for car service, for which this company reserves a lien upon the contents of car."

(Abst., 4; Rec., 23.)

Appellant admitted there was another notice which he thinks was at the house. He did not get it and had not seen it, but saw it afterward. Did not know whether the notice offered in evidence was the first or second notice sent (Abst., 8; Rec., 29½.)

Agent Arps saw appellant Friday morning, June 20th, and told him he had mailed a notice, and had the two cars of coke on the track, and that the cars should be unloaded Monday evening (Abst., 11; Rec., 33.)

Appellant did not pay freight charges until June 21st, when he gave his check upon the Bankers' National Bank for $19.63 (Abst., 4; Rec., 25.) At that time he received two receipts from the agent of appellee, upon both of which was the following notation:

> "If this car is not unloaded within forty-eight hours from 7 K. A. M., June 21, 1902, a charge of $1.00 per day or fraction thereof will be made for car service, for which this company reserves a lien upon the contents of car."

(Abst., 6; Rec., 26.)

At the time said receipts were given to appellant, he was advised by the agent of the appellee that in estimating time, Sunday would not be counted (Abst., 5; Rec., 25); and that the cars were ready for unloading (Abst., 5; Rec., 25½.)

Appellant arranged with Mr. Duffy to unload the cars, who commenced to unload on Monday morning, the 23rd. The first car was unloaded some time Tuesday forenoon, but the agent's books show same released as of Monday, June 23rd (Abst., 12; Rec., 35.) On Thursday, June 26th, appellee's agent stopped Duffy from unloading for two or three hours, at the expiration of which time the wife of appellant told the agent of appellee that she would personally pay the car service charges, whereupon the agent allowed Duffy to proceed with the unloading (Abst., 12; Rec., 36.) Having sent a messenger for the check promised by the wife of appellant, but not receiving same, agent of appellee on Friday, the 27th, again stopped Duffy for two or three hours, at the end of which time check was received and Duffy allowed to proceed with the unloading (Abst., 12, 13; Rec., 37.) The Saturday following, payment

was refused on the check when presented by agent of appellee, and he again stopped the unloading. A writ of replevin was then obtained by appellant. The second car was finally unloaded on Monday, June 30th, about 10 o'clock (Abst., 13; Rec., 37.)

A pamphlet was introduced in evidence and identified by Mr. Arps, agent of appellee, as being the car service rules adopted by the Chicago and Northwestern Railroad (Abst., 13; Rec., 37), by which he was governed in the application of car service at Highland Park. The rules were entitled as being the rules of the Chicago Car Service Association. Rules 2, 4 and 23 are as follows:

"2. Forty-eight hours free time will be allowed for loading or unloading all cars, whether on public or private tracks, at the expiration of which time a charge of $1.00 per car per day, or fraction thereof, shall be made and collected, for the use of cars and tracks held for loading or unloading, or subject to the orders of consignors or consignees, or their agents.

4. In calculating time, Sundays and the following holidays are excepted: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas.

23. The manager of this association is authorized to entertain claims for relief from or refund of charges collected under these rules, based upon the following reasons:

(a) That cars were bunched en route by the railroad company, and were not delivered in the order in which they were billed.

(b) That cars were not placed for unloading in the order in which they arrived.

(c) Condition of the weather.

Such claims must show the character of the car and all particulars why cars cannot be loaded or unloaded within forty-eight hours." (Abst., 15; Rec., 40 and 41.)

The above rules apply uniformly over the district bounded on the east by Lake Michigan, and on the north, west and south by the Elgin, Joliet and Eastern Railroad (Abst., 20; Rec., 49.) All of the railroads within the territory above described, have the same car service rules (Abst., 19; Rec., 47.) These rules were in force at the time in question herein.

Appellant had knowledge of the car service rules, having had trouble with the agent of the appellee concerning their enforcement a year prior (Abst., 8, 9; Rec., 30), Mr. Arps having at that time referred him to the car service rules (Abst., 16; Rec. 42.)

It appeared from the undisputed evidence in the case that the Chicago Car Service Association was a joint agency of all of the railroads within the above described territory, created for the purpose of the uniform application and enforcement of car service rules within said territory. That the appellee company was one of the members of the Car Service Association. It also appeared that there are forty-two car service associations in the United States and Canada, all practically the same. That prior to the creation of the car service associations, detention of cars by consignees in Chicago would average somewhat like seven or eight days (Abst., 19; Rec., 48); that when the railroads attempted individually to correct these abuses in various ways, there was a want of uniformity in the methods and charges of the various railroads, and therefore much comparative discrimination (Abst., 20; Rec., 49.) That it was decided that the different railroads should appoint a joint agent to have exclusive charge of the application of car service rules, and there was given to the office of such agent, the title of the Chicago Car Service Association; that the application of the rules of the Car Service Association had increased the capacity of the railroads in the handling of carload business about 50 per cent. (Abst., 20; Rec. 49.)

It appeared from the evidence that the period of forty-eight hours allowed by the rules for unloading each of the cars of coke in question was reasonable. Mr. Arps, agent of appellee, stated that from his experience as agent at Highland Park, that cars of coke are easily unloaded inside of forty-eight hours after unloading has commenced (Abst., 17; Rec., 43.)

Mr. Sanford, manager of the Chicago Car Service Association, stated that about 7,500 cars of coal and coke arrived in Chicago each month; that only about seven per cent. of these cars were detained beyond the free time of forty-eight hours; that the records of all cars subject to car service rules for all the railroads centering in Chicago were kept in his office (Abst., 22; Rec., 51.)

Mr. Ira W. Johnson, superintendent for the unloading and ordering of coal and coke for Bunge Brothers, of Chicago, stated that from his experience it usually took from one and one-half to two days to unload a carload of coke; that about 90 per cent. of the cars loaded with coke, are unloaded within the prescribed limit of forty-eight hours (Abst., 28; Rec., 61.)

Mr. James H. Duffy, the teamster who unloaded the coke in question, and who appeared as a witness in behalf of the appellant, testified that two days would be a reasonable length of time to unload a car of coke of 50,200 pounds (this was the weight of the larger of the two cars in question.) (Abst., 34; Rec., 73.)

Theodore M. Clark, manager for the John Middleton Coal and Coke Company at Highland Park, and who also appeared as a witness for the appellant, testified that a carload of coke containing 25 tons, could be unloaded onto a wagon in two days. (Abst., 37.)

There is no dispute whatever as to the reasonableness of the charge of $1.00 per car per day. Mr. Sanford stated that car service was a charge made for the use of the car and the track upon which it stood, the responsibility and risk of the railroad in holding it, and the extra expense to which it was put incidentally in holding the car, because of liability to damage by switching, etc. (Abst., 21; Rec., 50.) Mr. Sanford further stated that from data taken from the annual reports of 29 railroads for the year 1901, that the average freight earnings per car per day of these 29 railroads was $2.42, and that the average earning per day of one of appellee's freight cars was $2.15 (Abst., 21; Rec., 51); that the maximum earning capacity of a freight car of the 29 railroads in question was $4.44 (Abst., 22; Rec., 51.)

Mr. W. P. Marsh, car service agent of the appellee company, whose duty it was to take the records of cars

and to make distribution of the car equipment of the appellee company, stated that the average daily earning of a freight car belonging to his company, was $2.15 per day. (Abst., 27.)

It further appeared from the evidence, that in shipments of this nature, consignees always unloaded the cars, and that the appellee company had no facilities at Highland Park for the storing of coal or coke (Abst., 17; Rec., 44.)

BRIEF.

The Right of a Railroad Company to Recover Charges for the Detention of Cars by Consignees Who Fail to Unload Within a Reasonable Period Is Thoroughly Established.

Miller vs. Mansfield, 112 Mass., 260.

Barker vs. Brown, 138 Mass., 340.

Kentucky Wagon Co. vs. L. & N. R. R. Co., 50 Am. and Eng. Cases, 90.

Miller vs. Georgia Railroad Co., 88 Georgia, 563.

Norfolk & Western R. R. Co. vs. Adams, 90 Va., 393; 18 S. E. R., 516.

Kentucky Wagon Co. vs. O. & M. Ry. Co., 97 Kentucky, 32, S. W. R., 595.

Pennsylvania Co. vs. Midvale Steel Co., Pa. Sup., 51, Atl., 313.

Scott vs. D., L. & W. R. R. Co., New York Sup. Ct., Mch. 12, 1894.

Elliot on Railroads, Vol. 4, Sec. 1567.

Goff vs. Old Colony R. R. Co. (R. I.), 22 L. R. A., 532.

Also the following unreported cases to the same effect:

Antrim vs. R. F. & P. R. R. Co., Law and Equity Ct., Richmond, Va., March 19, 1895.

Griffith vs. K. C., Ft. S. & M. R. R., Circuit Ct. of Jackson County, Mo., Feb., 1896.

Fuller vs. C., C., C. & St. L. Ry., Circuit Ct. Coles County, Ill., April, 1896.

Wabash R. R. Co. vs. Berry-Howe Coal Co., Circuit Ct. of St. Louis, June, 1896.

Blackmore vs. C., C., C. & St. L. Ry., Common Pleas, Hamilton County, O., Oct. 31, 1894.

P. & W. Ry Co. vs. Gilliland, Common Pleas, Butler County, Pa., September, 1892.

C., M. & St. P. Ry. Co. vs. Pioneer Fuel Co., District Ct., Woodbury County, Ia., January, 1902.

Purcell vs. P., C., C. & St. L., Cir. Ct. of Cook Co., Nov., 1893.

U. P. & D. G. R. R. Co. vs. Cook, District Ct., Arapahoe County, Colo., Mch. 25, 1892, 50 A. & E. R. R. Cases, 89.

Campbell vs. B. & O. R. R., Jefferson Cir. Ct., W. Va., Mch., 1893.

A railroad company may, in its discretion, either store goods in its own warehouse or store same in the car in which same were transported, where such car affords the proper storage facilities.

Miller vs. Mansfield, 112 Mass., 260.

Miller vs. Georgia Ry. Co., 88 Ga., 563.

Gregg vs. I. C. R. R. Co., 147 Ill., 550.

Wherever the question has been raised, the weight of authority is to the effect that railroad companies have a lien upon freight for damages which have accrued by reason of unnecessary and unreasonable delay of consignee in receiving and unloading, and that the railroad company may refuse to deliver such freight until the reasonable and established charges which have accrued for the detention and use of the cars containing such freight have been paid.

Ky. Wagon Co. vs. L. & N. R. R., 50 Am. and Eng. R. R. Cases, 90.

Miller vs. Mansfield, 112 Mass., 260.

Norway Plaines Co. vs. B. & M., 1 Gray, 263.

Miller vs. Georgia R. R. Co., 88 Ga., 563.

O. & M. R. R. vs. Bannon, Common Pleas, Louisville, Ky., June 20, 1892.

Purcell vs. P., C., C. & St. L. Ry., Cook County Cir. Ct., Nov., 1893.

Fuller vs. C., C., C. & St. L. Ry., Cir. Ct., Coles Co., Ill., April, 1896.

Darlington vs. Mo. Pac., 72 S. W., 122.

Elliot on Railroads, Vol. 4, Sec. 1567.

Goff vs. Old Colony R. R. (R. I.), 22 L. R. A., 532.

Campbell vs. B. & O. R. R., Jefferson Cir. Ct., W. Va., 1893.

U. P. R. R. vs. Cook, 50 Am. and Eng. R. R. Cases, 89.

A railroad company may terminate its liability as a common carrier by unloading and storing freight in its warehouse, thereby assuming the liability of a warehouseman only, and have a lien for all storage charges.

I. C. R. R. C. vs. Alexander, 20 Ill., 404.

Porter vs. Railroad, 20 Ill., 407.

M. D. T. Co. vs. Hallock, 64 Ill., 284.

R. R. Co. vs. Friend, 64 Ill., 303.

Anchor Line vs. Knowles, 66 Ill., 150.

Rothschild vs. Railroad Co., 69 Ill., 164.

Cahn vs. R. R. Co., 71 Ill., 96.

M. D. T. Co. vs. Moore, 88 Ill., 136.

Scheu vs. Benedict, 116 N. Y., 510.

When the right to a lien exists, the same will not be defeated by the fact that the amount claimed may be too large, unless the owner or party desiring the possession of the goods makes a tender of the amount due.

Russel vs. Koehler, 66 Ill., 459.

Hoyt vs. Sprague, 61 Barb., 491.

B. & L. H. Ry. Co. vs. Gordon, 16 U. C. L. B., 283.

Lowenberg vs. A. & L. Ry. Co., 19 Southwestern, 1051.

Schouler on Bailments, Sec. 125.

In this country demurrage, even in maritime law, exists aside from express contract, and the ship owner has a lien upon the cargo for unnecessary detention.

9 Am. & Eng. Ency. Law, p. 253, 2d Ed.

Porter on Bills of Lading, Sec. 356.

Hargood vs. 1,310 Tons of Coal, 21 Fed., 681.

Young vs. 140,000 Brick, 78 Fed., 149.

Whitehouse vs. Halstead, 90 Ill., 149.

The M. S. Bacon vs. E. & W. Trans. Co., 3 Fed., 344.

Trans. Co. vs. P. & R. Coal & Iron Co., 70 Fed., 268 (aff. C. C. of A., 77 Fed., 919.)

Railroad companies have a right to adopt rules for enforcing charges in the nature of demurrage for the unreasonable detention and use of cars for the storage of unloaded freight.

4 Elliott on Railroads, Sec. 1568.

Kentucky Wagon Co. vs. O. M. Ry. Co., 97 Ky. (32 S. W. Rep., 595.)

Miller vs. Mansfield, 112 Mass., 260.

Miller vs. Georgia R. R. Co., 88 Ga., 563.

Beach on Railway Law, Sec. 924.

U. P. & D. G. Ry. vs. Cook, 50 Am. and Eng. Cases, 89.

P. & W. Ry. Co. vs. Gilliland, Common Pleas, Butler Co., Pa., Sept., 1892.

Norfolk & Western R. R. vs. Adams (Va. Sup.), 18 S. E., 516.

Penn. R. R. Co. vs. Midvale Steel Co. (Pa.), 51 At. Rep., 313.

Where a defendant has lawfully a lien on goods for storage, although it may have delivered part of them without insisting upon the lien, nevertheless, it has a right to retain the residue of the shipment for the amount due upon the whole shipment, and the plaintiff cannot maintain replevin.

Lans vs. O. C. & F. R. R. Co., 14 Gray, 143.

M. H. & N. Co. vs. Campbell, 128 Mass., 104.

Steinman vs. Wilkins, 7 W & S., 466.

McFarland vs. Wheeler, 26 Wendell, 467.

Darlington vs. Missouri Pacific, 72 S. W., 122.

Schmidt vs. Blood, 9 Wend., 268, 24 Am., Dec., 143.

Railroad companies are compelled by the law of this state to furnish cars for the transportation of freight which may be offered by the public.

R. S. Ill., Ch. 114, Sec. 84.

A lien may exist by reason of an implied contract for the same.

Miller vs. Mansfield, 112 Mass., 260.

M. D. T. Co. vs. Moore, 88 Ill., 136.

I. C. R. R. vs. Alexander, 20 Ill., 23.

Darlington vs. Mo. Pac., 72 S. W., 122.

Barker vs. Brown, 138 Mass., 340.

Public policy demands that individual convenience should be subordinate to the public good, which requires expedition, regularity, uniformity, safety and facility in the movement of freight.

Miller vs. Georgia R. R., 88 Ga., 563.

N. & W. R. R. vs. Adams (Va.), 18 S. E., 763.

Kentucky Wagon Co. vs. L. & N. R. R., 50 A. & E. R. R. Case, 90.

Darlington vs. Mo. Pac. R. R., 72 S. W., 122.

Fuller vs. C., C., C. & St. L. Ry., Cir. Ct., Coles Co., Ill., Apr., 1896.

C., M. & St. P. Ry. Co. vs. Pioneer Fuel Co., Dist. Ct., Woodbury Co., Ia.

Griffith vs. K., C., Ft. S. & M. R. R., Cir. Ct. Jackson Co., Mo., Feb., 1896.

4 Elliott on R. R., Sec. 1567.

Car service, or demurrage rules, are recognized as being proper and lawful by the Federal Courts.

Interstate Commerce Commission vs. D., G. H. & M. Ry. Co., 17 Sup. Ct. R., 986.

Same vs. Same, 21 C. C. A., 103, 74 Fed., 803.

Am. Warehousemens Assn. vs. Ill. Cent. Ry. 7 Interstate Com. Rep. 556.

Pennsylvania Millers Assn. vs. P. & R. R. Co., 8 id., 531.

ARGUMENT.

The decision of the Appellate Court finds as a matter of fact, that the time allowed by the rules of the appellee company for the unloading of the coke from the cars was reasonable, and that the charge of one dollar per day made by the appellee for the use or detention of the car after the expiration of the free time allowed for unloading was reasonable. The only questions upon which this court is asked to pass are, therefore, ones of law.

It is claimed by the appellee in this case:

First—That after a reasonable time had been afforded appellant to unload the cars of coke in question, that the appellee had a right to make a charge known as a car service charge for the further detention of the cars by appellant.

Second—That the appellee was entitled to a lien upon the contents of said cars to secure such charge.

THE RIGHT TO MAKE THE CHARGE.

The charge which the appellee claimed that it had a right to make and enforce against the appellant, is neither a transportation or terminal charge, or a subterfuge for adding to the cost of transportation an amount in excess of the rate fixed by law; but is a charge, which, in its essential character, is a charge for storage. (Miller vs. Mansfield, 112 Mass., 260.) When the appellee company placed the cars in question upon its sidetrack at Highland Park, in a location accessible for unloading by the appel-

lant, and had waited a reasonable time for the appellant to unload same, it had then fulfilled its entire transportation contract as a common carrier. The consideration of the freight charges received by it covered no other or additional services. After the expiration of such reasonable time for the unloading of the cars in question, the liability of the railroad company as a common carrier ceased, and its liability as a warehouseman commenced.

In Interstate Commerce Com'n. vs. Detroit, G. H. & M. Ry. Co., 17 Sup. Ct. Rep., 986, the Supreme Court of the United States approved the conclusion of the Circuit Court of Appeals, which was that the railway transportation ends when the goods reach the terminus or station and are there unshipped, and that anything the company does afterward is a new and distinct service, not embraced in the contract for railway carriage. That a railroad company has a right to terminate its liability as a common carrier by unloading and storing freight in its warehouse, thereby assuming the liability of the warehouseman, and have a lien for all such warehouse charges, will not, we believe, be disputed.

There was no dispute in the evidence offered in this case as to the reasonableness of the time allowed by the rules of the appellee company for unloading the coke. The time allowed by the rules was forty-eight hours, Sundays and legal holidays not included. Furthermore, the forty-eight hours did not commence until seven o'clock a. m. of June 21, 1902, nearly twenty-four hours after appellant was advised of the arrival of the cars, at which time there was no reason why he might not have commenced unloading; so that instead of forty-eight hours, appellant had practically seventy-two hours within which to unload. As a matter of fact, the larger of said cars was not unloaded by appellant until about ten o'clock on Monday, June 30th, or more than 216 hours after same had been placed for unloading. If we deduct from the above, the time during which the unloading was stopped by the agent of appellee, it will still be more than 200 hours.

The conditions in railroading are very much different at the present time from what they were in 1872, at the time the facts involved in the Jenkins' case, cited by appellant, occurred, or even in 1882, when the decision in that case was rendered. Today, a very large percentage

of the freight handled by railroads is in the nature of bulky, heavy freight, and is shipped and carried by the railroads in carload lots. It is the custom between those shipping in carload lots, that same shall be loaded by the consignors, and unloaded by the consignees.

CARS AS WAREHOUSES.

It is the admitted law of this state, that a railroad company may terminate its liability as a carrier by unloading and storing the freight in either its own warehouse, or some other warehouse, and have a lien for all warehouse charges. As a matter of fact, a railroad car may be a suitable warehouse for many kinds of commodities. In Miller vs. Georgia Railroad Company, 88 Georgia, 563, the court says:

> "It is well settled that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them. And, we think, where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car, as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may, in many cases, be as effectual as any other. Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business, where he may unload it himself, or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier, and the goods stored elsewhere at the consignee's expense. And, if a customer, whose duty it

is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car, by requesting or permitting the carrier to continue holding it unloaded in service, and subject to his will and convenience as to the time of unloading, he cannot be heard to complain of the method of storage and to deny the right to any compensation at all for this service on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no compensation whatever shall be charged for such extra service."

Undoubtedly, in this case, it was to the convenience of the appellant that the coke be left in the car, rather than unloaded by the appellee and stored in some warehouse, were that possible; and, undoubtedly, it was to the advantage of the appellant that this coke remain in the car upon the tracks until such time as he was able to have same delivered direct from the car to his house, and also to the house of his friend, Mr. Towner, to whom a portion had been sold by appellant. But it appeared from the evidence that the storage of coke is not a common practice; that there were no warehouses for that purpose, and that the appellee, railroad company, had no facilities for the storing of the coke at Highland Park. Under the circumstances, there was nothing which the appellee could do, except to leave the coke in the cars upon the sidetrack, and considering the class of freight, it was a proper place in which to store the same. It might not have been a proper place to store paper, such as was the commodity mentioned in the Jenkins' case, but certainly it was a proper place for the storage of coke in bulk.

In Miller vs. Mansfield, 112 Mass., 260, the commodity was flour. The court said:

"It is not material that the goods remained in the cars, instead of being put into a storehouse."

In Gregg vs. I. C. R. R. Co., 147 Ill., 550, the commodity was corn. The court said:

"The railroad company was not required to keep the corn in its cars on track indefinitely, and although the consignee was in default in not receiving the

freight, after reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation as warehouseman. In the exercise of such care it might leave it in the cars, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, or it might, with the exercise of like degree of care in selecting a responsible and safe depository, store the grain in an elevator or warehouse at the expense and risk of the owner, and thereby discharge itself from further liability."

In C. M. & St. P. Ry. Co. vs. Pioneer Fuel Company, District Court of Woodbury County, Iowa, the court, speaking of the use by the consignee of the cars of the railroad company, says:

"It will not be denied that the plaintiff could have unloaded its merchandise into its warehouses and not only have collected storage charges, but have acquired a lien therefor. Upon what theory can we distinguish between storing in warehouses and in equally well constructed buildings on wheels? * * * We think the carrier's duty ends with the transportation of the car and its delivery to the customer and no further service is embraced in the contract. The carrier, after a reasonable time has been allowed for unloading, is as much entitled to a charge for the further use of the car as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storing. There is no law which inhibits the use of cars for this purpose or which requires the unloading and removal of the goods to some other structure before any charge for storage can be made. Indeed, it may serve the customer's interest and convenience much better to have the car placed at its own place of business where he may unload it himself or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier and the goods stored elsewhere at the customer's expense."

On April 13, 1891, the Hon. George Hunt, Attorney General of the State of Illinois, delivered to the Board of Railroad and Warehouse Commissioners of this state, a written opinion, sustaining the right of a railroad company to make charge for an unnecessary and unusual detention of its cars. This opinion was given in complaint No. 64, Union Brewing Company of Peoria vs. C., B. & Q. R. R. Co., and complaint No. 71, Lyon & Scott vs. P. & P. U. R. R. Co. We quote the following language from the opinion of the attorney general:

> "Section 5 of the act in relation to receiving, carrying and delivering grain in this state provides that a consignee of grain, transported in bulk, shall have twenty-four hours, free of expense, after actual notice of arrival in which to remove the same from the cars of such railroad corporation. There would seem to be an implied right, under the statute, to charge for a longer detention than the twenty-four hours which the statute names. Indeed, no reason is perceived in law or justice, why an unreasonable and unnecessary detention of cars by consignees should not be paid for; and the Car service Association seems, from the proof before us, to be only an agency established to keep account of claims so arising and enforce them. The charges so made were thought to be reasonable, under all circumstances * * * Demurrage is an important subject which has arisen in a practical way only with late years, and long after our statute for the regulation of railroads was passed. It does not, however, follow that because there is no statutory regulation of the question there is no law."

Elliott, in his work on Railroads, Vol. 4, Section 1567, says:

> "It has been said that the right to demurrage exists only in maritime law and is confined to carriers by water. But while it is probably true that this right is derived by analogy from the maritime law as administered in America, the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases. As said by one of the courts, 'we see no satisfactory reason why carriers by railroads should not be entitled

to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea.' After a carrier has completed its services as such, it has a right to charge extra compensation for storing the goods in a warehouse and keeping them after the consignee has had a reasonable time in which to remove them. Why, then, when its duties as a carrier have been performed, and a reasonable time has elapsed, is it not as much entitled to additional compensation for the use of its cars and tracks as for the use of its warehouse? Certainly a customer whose duty it is to unload, or who unreasonably delays the unloading of a car for his own benefit, ought not to complain if he is made to pay a reasonable sum for the unreasonable delay caused by his own act. But this is not all. The public interests also require that cars should not be unreasonably detained in this way. Railroad companies as common carriers are 'bound to furnish cars for transportation of freight, and they must have control over their cars in order to perform their duties to the public. A car in motion is a useful thing, but a car standing idle and unloaded on the track is useless, and an incumbrance. If A be allowed to hold a car unloaded (or loaded) at his pleasure or convenience, without cost or charge, and thus deprive the railroad company of the use of its vehicles for transportation of the freight of B it is obvious that both the railroad company and the public will suffer injury. It is also well settled that common carriers may make reasonable rules and regulations for the convenient transaction of their business. It follows, from this line of reasoning, that railroad companies may adopt and enforce general rules, which are, or ought to be, known to their customers, making a reasonable charge for the unreasonable detention of their cars. In a number of cases a charge of one dollar a day for the detention of a car after the lapse of forty-eight hours, Sundays and legal holidays excepted, has been held not to be unreasonable as a matter of law. So, a charge of two dollars a day, after the lapse of twenty-four hours, has been enforced where the customer knew of the rule at the time the shipment was made."

The Rules of Appellant Were Necessary.

In order that railroads may properly perform their duties both to themselves and the public, it is necessary that they should formulate and enforce rules relative to the conditions upon which freight will be received and transported. Not only have they the right to adopt rules, but the law makes it an obligation that they do so, the only restriction being that the rules adopted must be reasonable.

The reasonableness of such rules and regulations, and the manner of their enforcement in a given case has, by some courts, been held to be a question of fact for the jury; but the better authority seems to be that if any fixed and permanent regulations are to be established it must be a question of law for the court to decide, since one jury in a given case might pronounce a given rule reasonable, while another jury in another case might decide the same rule to be unreasonable. Nor is there any objection, from a legal standpoint, that common carriers may employ, for the purpose of adopting and enforcing the rules, a joint agent. (4 Elliott on Railroads, Sec. 1568.)

The rules relative to the forty-eight hour limit of free time for unloading, and the charge of one dollar per day thereafter, are found by the Appellate Court from the evidence in this case to have been reasonable. It appeared that the charge of one dollar per day was less than one-half of the average daily earnings of the freight cars of the appellee for the last year, and considerably less than one-half of the average daily earnings per car per day of twenty-nine of the largest railroads in the country. The object of these rules was not that the railroad company might derive profit from the use of its cars as storehouses, but that consignees might be induced by reason of these rules to promptly unload the cars, and thereby permit the railroad company to again take same into its service where they were more than twice the value than when standing upon a side track and used merely as a storehouse.

In Miller vs. Georgia Railroad Co., 88 Ga., 563, the court, speaking of a similar rule, said:

> "The rule in question, we think, falls clearly within the scope and power of the common carrier to adopt

and enforce any reasonable regulation for the conduct of its business, the purpose and effect of which is the protection of the carrier and the benefit of the public. It seeks to prevent diversion and detention of cars from the legitimate work of transportation, as well as secure compensation for services not otherwise paid for, by prescribing, in cases where, by contract, or custom, the carrier is under no duty to unload the cars, but they are to be unloaded by the customer, a rate per diem, in the nature of a charge for storage, to begin after the cars have been delivered to the customer or placed at his disposal for unloading; and such a regulation cannot be regarded as unreasonable, so long as a reasonable time is allowed for unloading, and so long as the charge for the use of the cars beyond that time is not excessive. The law compels the carrier to receive the goods of the public and to transport and deliver them within a reasonable time. To do this, it is necessary that the means of transportation shall be under the carrier's control, and that, after the duty of carriage has been performed, its vehicles shall not be converted into freight houses at the will of consignees, to remain such indefinitely, and without compensation. If no check could be placed upon such detention, it is plain that the business of transportation would be at the mercy of private interest or caprice, and that carriers thus hampered in their facilities, and unable to foresee the time or extent to which their vehicles would be diverted from the work of carriage, could not provide properly for the demands of traffic, or perform with dispatch their legitimate function. It would place upon the carrier the burden and expense of supplying numerous vehicles not needed for the hauling of freights, thus requiring it to provide extra facilities, as well as to render extra service, without compensation beyond that received for transportation. It would result in the accumulation of cars on the carrier's tracks, and the obstruction in a greater or less degree of the movement and unloading of trains."

In P. & W. Ry. Co. vs. Gilliland, Common Pleas, Butler County, Pennsylvania, the court said:

"We can conceive of no more necessary or reasonable regulation than the one we are asked to enforce.

> The need of such a regulation is apparent from the facts in this case. The rules adopted in this district are reasonable and clearly necessary, and in no way detrimental to shippers, but wholly in their interest. The common carrier is compelled to accept goods for transportation, and it would be manifestly unjust to not enforce a corresponding duty on the shipper, to not negligently and unnecessarily detain or otherwise deprive the common carrier of the use of the vehicles which the law thus places at his command."

In N. & W. R. R. R. Co. vs. Adams (Va. S. C.), 18 S. E. Rep., 673, it was said:

> "The railroad company, as a common carrier, is bound to furnish cars for transportation of freight; and they must have control over their cars in order to perform their duties to the public. A car in motion is a useful thing, but a car standing idle and unloaded on the track is useless and an incumbrance. * * * It is well settled in this state and in other states, that a common carrier may make reasonable rules and regulations for the convenient transaction of business between itself and those dealing with it, either as passengers or as shippers; that this rule (referring to the car service rules) is reasonable and proper has been decided in a number of states."

IT IS NECESSARY THAT THE RULES BE GENERAL IN THEIR APPLICATION.

It appeared from the evidence in this case that within the territory embraced in what is known as the Chicago Car Service territory, but one set of car service rules are used by all of the railroads operating within that territory. The application of these rules is thus made uniform, and discrimination, which would be unlawful, is obviated. Furthermore, the enforcement of the rules in question is left in the hands of the car service manager, who is not the representative of any one railroad, but is equally responsible to and the representative of all the roads in the association. It thus follows that the construction put upon the various rules in their enforcement by the several rail-

roads must, necessarily, be the same. We cannot conceive of an arrangement which it would be better to adopt, and which, at the same time, would protect both the interests of the railroads, the interests of the shippers and consignees and the interests of the public at large.

In Kentucky Wagon Co. vs. L. & N. R. R. Co., 50 Am. & Eng. R. R. Cas., 90, Judge Toney said:

> "No one consignee, if the rule be a reasonable one, in its application to all shippers, in the ordinary conduct of traffic business, has the right to advance the peculiar, rare and exceptional circumstances of his particular case to justify his violation of the rule or establish a common carrier's liability for not relaxing it as to him. Shippers and consignees must adjust the possible exigencies of their business in dealing with a common carrier, whose functions, as we shall hereafter see, are of a quasi public character, affecting the general shipping interests of the country, to the general, ordinary, reasonable rules of traffic, adopted by common carriers, for the convenience and benefit of all alike."

In Darlington vs. Missouri Pacific Railway Company, 72 Southwestern, 126, the court says:

> "In order to fulfill the chief end of their creation, viz.: the service of the public as common carriers, they should be left free to establish general and reasonable rules and regulations governing the delivery of freight and charges for the unnecessary or unreasonable detention of their cars by consignees. It is a matter of the highest public interest that they should be accorded this right and power. Individual convenience should be subordinate to the public good, which demands expedition, regularity, uniformity, safety and facility in the movement of the freight of the country, which must of necessity be materially obstructed if individual consignees are allowed, without let or hindrance, to convert freight cars on their arrival with cargoes of freight upon their side-tracks into warehouses for the storage of freight at the suggestion of their convenience or interest."

PUBLIC POLICY REQUIRES THAT THE RIGHT OF LIEN BE GIVEN.

Railroads, being quasi public corporations, receiving their rights and franchises from the public, are under certain obligations to the public which they must perform. The innumerable ramifications of the combined railroad systems extend to every nook and corner of this country, and the loaded cars of almost any railroad may be found, at one time or another, upon the switches or sidetracks of nearly every city of any commercial importance on the continent. They are transferred from one carrier to another until their final destination is reached. This is in the interest of commerce. It facilitates and lessens the expense of commerce and transportation.

In Griffith vs. K. C., Ft. S. & M. R. R. Co. (C. C. of Jackson Co., 1896), the court, stating the obligation of the railroads to the public, said:

> "A railroad cannot meet the ordinary demands of transportation if its cars can be tied up indefinitely at the pleasure of the individual shippers. The individual shippers and the company are not the only ones interested. The public convenience and trade would be seriously interfered with if each individual shipper were permitted to retain the use of cars and tracks for storage purposes beyond a reasonable time. 'Car famines' and consequently congestion of traffic would inevitably result from such a rule."

In Fuller vs. C., C., C. & St. L. R. R. Co. (Cir. Ct. of Coles County, Illinois), Judge Wright said:

> "The principal object of the rule of the company doubtless is not to secure the small charges made for the use of cars, but to secure to themselves, and to the public, the use of the cars."

In Miller vs. Georgia Railroad, supra, the court, in commenting upon the effect upon the public, where consignees were allowed to retain cars to be unloaded at their pleasure, said:

> "Not only would loss ensue to the carrier, but consignees in general and the public at large must suffer

seriously from this hindrance to the due and regular course of transportation. In this matter the public have rights paramount to those of any individual shipper or class of individuals, and the business of the common carrier must be so conducted so as to subserve the general interest and convenience. Especially is this true as to railroads in view of the important franchises granted to them by the public, and the use of control thus acquired of highways on which the commerce of the country is so largely dependent."

In C., M. & St. P. Ry. Co. vs. Pioneer Fuel Company, supra, the court said:

"But there are other considerations in regard to railroads. If its vehicles can thus be indefinitely tied up and converted into warehouses, it will take twice or three times the number of cars to accomplish the work of transportation, and increased trackage and terminal facilities in proportion. This would necessitate a large and unnecessary increase of the capital invested and a corresponding increase of freight charges, and thus the rights of the public to an economical service would be violated. If the rule contended for by defendants shall obtain, no reasonable man will expect the railroad company to provide the additional rolling stock and terminal facilities for nothing, and if the parties who render the same necessary and who get the use of the extra cars and trackage cannot be made to pay for the same the general public will have to do so in increased freight rates."

In N. & W. R. R. vs. Adams (Va.), 18 S. E. Rep., 763, speaking upon this subject, the court said:

"If A be allowed to hold a car unloaded at his pleasure or convenience, without cost or charge, and thus deprive the railroad company of the use of its vehicle for transportation of the freight of B, it is evident that both the railroad company and the shipping public will suffer injury. * * * The evidence in the record is that the use of the car is much more valuable to the company than the charge of one dollar per day; and it is manifest that, if cars can be delayed and held by shippers or consignees for months (as the record

shows was done in this case, in some instances), without any regulation that would be operative, the business of the railroad and the public service must necessarily suffer."

In Kentucky Wagon Co. vs. L. & N. R. R. Co., supra, it is said:

"It is important to the proper discharge of its duty to the public that it (the railroad company) should not be disturbed by any special consignee or set of consignees by the wrongful withdrawal of its rolling stock from its main lines, to subserve their private convenience or interest. It is important, in order that the railroad common carriers may always know, with certainty, their own capacity for meeting the customary demands of traffic along their lines, and of that coming to them from other lines. How can these important conditions be supplied or exist if the amount of rolling stock at the command of the railroad common carriers of the country must always depend upon the peculiar business exigencies of individual consignees who may find it either convenient or profitable to convert freight cars, when once they have them upon their own side-tracks, into warehouses."

In Darlington vs. Mo. Pac. R. R. Co. (St. L. Ct. of App.), S. W. Rep., Feb., 1903, the court says:

"Without the right of making and enforcing reasonable rules and regulations as to the delivery of freight and the detention of cars by consignees, railroads would be at the mercy of individual shippers. Individual convenience should be subordinate to the public good, which demands expedition, regularity, uniformity, safety and facility in the movement of the freight of the country which must necessarily be materially obstructed if individual consignees are allowed, without let or hindrance, to convert freight cars on their arrival with cargoes of freight, upon their side-tracks, into warehouses for the storage of freight at the suggestion of their convenience or interest. As we have seen, railroads are a public necessity, the general welfare of the country being dependent upon their untrammeled interconnection and un-

trammeled liberty to accomplish the legitimate public purposes of their organization. Promptness, regularity and safety in the transportation of passengers and freight are essential requisites to the successful administration of the railroad common carrier's system of the country. These characteristics or qualities are demanded by the public interest. Regularity and system in the movement of their cars, in the handling of freight, both in receiving, transporting and delivering it, so that the public can know what to expect and what it can depend upon, are demanded of railroads by law and by public policy. But how can this be expected of railroads if their rolling stock may be tied up and water-logged upon the private side-tracks and switches of private consignees to serve as store-rooms and warehouses for their freight, without any power on the part of the railroad companies to enforce reasonable rules against such consignees, requiring diligence in the unloading and re-delivery of their cars. These public carriers rely upon the rolling stock to meet the demands of the volume of business which they have to carry. How can they insure to consignees and shippers in general and to the public that facility of commercial interchange which they are required to afford both by charters and by public law? How can they furnish cars and transportation to shippers in general, and discharge the volume of traffic business of their respective systems, if their rolling stock can be locked up in the private yards of special consignees? How can such carriers know with any reasonable degree of certainty whether their rolling stock at any given time is or will be fully up to the demands of the business along their lines? Promptness, uniformity and safety in the railroad traffic business of the country can only be secured by the adoption and strict enforcement by railroad companies of uniform and reasonable rules and regulations, which shall be binding upon all shippers and consignees alike, with reference to the reception, transportation and delivery of freight."

IMPLIED CONTRACT FOR A LIEN.

Appellant, in his brief, takes the position that in this

state a railroad company can acquire a lien upon freight to secure the payment of car service charges only when a provision of the statute gives it that right, or where there is an express agreement therefor between the railroad and the owner against whose property it is sought to enforce such lien, and cites in support of his position the case of C. & N. W. Ry. Co. vs. Jenkins, 103 Ill., 588.

The position taken by appellant herein is not supported by the Jenkins case, as the language in that case is as follows:

> "Where the law gives no lien, neither party can create it without the consent or agreement of the other."

This is, no doubt, correct. While it is true that in the Jenkins case, the court decided that under the facts in that case, the law gave no lien, still, as we will hereinafter endeavor to show, the court, in rendering its opinion in that case, was guided by its belief that the maritime law gave no right to a lien for demurrage, except as the same was expressly stated in the contract of affreightment. In this particular it appears from the cases of Hawgood vs. 1310 Tons of Coal, 21 Fed. Rep., and the other cases cited by us, that the right to demurrage does exist at common law, irrespective of whether or not a stipulation for the same expressly appears in the contract of affreightment.

As heretofore stated, the conditions surrounding commerce, and especially the railroad branch of commerce, have changed much in the last few years, and many elements, heretofore unknown, have been introduced. It appears from the evidence herein, and it is also a matter of common knowledge, that railroads frequently have suffered much from the wrongful and unnecessary detention of their cars and the use of the same and the tracks upon upon which they stand, for storage purposes. This is, no doubt, due partly to the rush and growth of business, but also largely to the policy of consignees in failing to provide yard room and warehouses, and to the fact that they find it easier and cheaper to keep goods stored in cars than to unload same into warehouses, and then re-handle a second time. This is an abuse with which the railroads have been struggling for years, and while willing, as is shown by the reasonableness of the rules and regulations intro-

duced herein, to give the amplest time for the unloading of cars, they have been, so far, unable to prevent this obstruction to their business, except by making a charge of a nominal sum per day for such detention and endeavoring to collect the same.

This condition of affairs is so well known that this court may almost take judicial knowledge of the same, and it is asked to meet and deal with these comparatively new conditions in railroad transportation, not in any narrow or technical spirit, nor in accordance with any rigid or technical rules which may have been established before railroads existed, or while they were yet in their infancy, or which may have been established, as in the Jenkins case, to meet the requirements of water navigation, but to meet the same in the spirit of Chief Justice Shaw, in the opinion given by him in the Norway Plains vs. B. & M. R. R. Co., 1 Gray, 263, in which he says:

> "The liability of carriers of goods by railroads, the grounds and precise extent and limits of their responsibility, are coming to be subjects of great interest and importance to the community. It is a new mode of transportation, in some respects like the transportation by ships, lighters and canal boats by water, and in others like that by wagons on land; but in some respects it differs from both. Though the practice is new, the law, by which the rights and obligations of owners, consignees and of the carriers themselves, are to be governed, is old and well established. It is one of the great merits and advantages of the common law that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail when the practice and course of business to which they apply should cease or change; the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific and adapted to practical use by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course

of judicial proceedings by tribunals to the highest authority, the general rule has been modified, limited and applied according to particular cases; such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances.

"The effect of this expansive and comprehensive character of the common law is, that whilst it has its foundation in the principles of equity, natural justice, and that general convenience which is public policy, although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases of daily occurrence, in the business of an active community, yet the rules of common law, so far as cases have arisen and practices actually grown up, are rendered in a good degree precise and certain, for practical purposes, by usage and judicial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grew out of those circumstances. The consequence of this state of law is, that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; general considerations of reason, justice and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations to the new circumstances."

There are many instances where the common law gives or allows a lien in cases where no specific agreement for the same exists, such as the liens of inn-keepers, agisters, carriers, bailees and warehousemen.

Whoever uses the property of another must expect to pay whatever that use is reasonably worth, and it would be a great hardship for railroads to be compelled to leave their cars upon side-tracks and in the possession of con-

signees until the latter saw fit to unload and release them, and were not permitted to collect a reasonable charge therefor. But in order to collect these charges, which are due in many cases from irresponsible consignees, the railroads claim the right to demand that payment be made of all charges which have accrued before they permit the cars to be unloaded. In other words, they claim a lien upon the contents of the car, not only for the freight, but for any car service charges which may have accrued up to the time the consignee signifies a willingness to unload.

It is a well known fact that the sale and transfer of property, by assignment of the bill of lading, while enroute, in carload lots, is a matter of everyday occurrence. The railroad company which accepts a car of coal or coke at Pittsburg, cannot with any certainty know the final destination of the car in question. And if a railroad company is to be protected from abuse by consignees in the unlawful detention of cars for unnecessary lengths of time, it is not sufficient that the company may have the right to sue the final owner in assumpsit. It must, in addition, have the benefit of the warehouseman's lien for the service which it has rendered as a warehouseman. A suit in assumpsit would, many times, be absolutely unavailing, for the reason that judgments rendered could not be collected on account of the insolvency or irresponsibility of the judgment debtor.

The life of a railroad company is naturally in its rolling stock. If the company is deprived of the use of its cars, the vast amounts of money invested in the purchase of right of way, the maintenance of track, the building and operation of locomotives, and the necessary machine shops for repairing the same, is made unremunerative; and the shipping public will have to pay higher rates of traffic if one-half of the freight cars of our railroads are needlessly detained—idle upon side-tracks.

It appeared from the evidence in this case that appellant was familiar with the rules of appellee to the effect that a charge would be made for the detention of the cars longer than the free time allowed by the rules, and that a lien would be claimed upon the contents of the cars to secure such charge. Such rule being known to appellee, and not being unreasonable, it will be presumed that he agreed to be bound by same when he detained the car an unreasonable length of time.

If the appellee herein is correct in its contention that after the expiration of a reasonable time, within which to unload cars, its liability as a carrier ceases, and that of warehouseman begins, and as it is admitted that if the railroad company were to transfer the contents of the car in question to a warehouse owned by itself, it would be entitled to charge compensation therefor, and have a lien to secure such compensation, we can see no reason why it is not entitled to a lien when its cars are used as warehouses. And this, particularly in view of the decision of our Supreme Court in Gregg vs. I. C. R. R. Co., supra, to the effect that for many classes of freight a car may be as suitable a warehouse as any other.

In Griffith vs. K. C. & Ft. S. R. R. Co., supra, the court said:

> "The shipper, by his failure or neglect to receive and unload the cargo, compels the railroad company to retain, house and care for his goods beyond the time, when by the terms of the contract of carriage they are bound to do so. For this extra service the railroad company is entitled to compensation. If the car is unloaded and the goods placed in a warehouse the company has an undoubted lien for such extra compensation. Now, under the rule of the company, of which the shipper has notice, the car is made the storage house for the goods after a reasonable time has been given the shipper to unload. Is not this rule and the knowledge thereof on the part of the shipper equivalent to an agreement on the part of both parties that the goods shall be considered 'stored' in the car, the same as if in a warehouse, and if so, does not the lien for charges follow as a matter of law?"

In Fuller vs. C., C., C. & St. L. R. R. Co., supra, Judge Wright says:

> "It is a familiar principle of common law that any one who has bestowed any particular service or care upon any article of property which has been confided to his possession for such purpose, has a lien upon it for any reasonable charge in respect to such service or care. It is difficult to see why the facts in the present case do not call for the application of this familiar principle. It is difficult to imagine why a railroad

company having bestowed a care upon property for which it is conceded to be entitled to a reasonable charge in that respect should be excepted from the general rule which entitles parties performing such service to a lien upon the property."

In N. & W. R. R. Co. vs. Adams, 18 S. W., 673, the court says:

"If the consignee is fully advised at the time of the shipment that the company has no agent at a particular station, or the place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable, in view of the condition of the company's business, there is an implied consent that the carrier's responsibility shall be dissolved when he has done all that the nature of the case permits him to do, according to the reasonable and proper usages of his business."

In Penn. R. R. Co. vs. Midvale Steel Co., 51 Atl. Rep., 313, the comment of the court is as follows:

"The further objection to plaintiff's claim is that it does not aver expressly or impliedly that these parties ever became parties to any contract for the payment of demurrage on detained cars. But they were parties to the contract of shipment over the plaintiff's road, and this is averred; and then, further, it is averred that since the demurrage rule was adopted it has formed part of the contract of shipment. This is sufficient averment of the implied contract. As a consignee of goods over plaintiff's railroad, it impliedly contracted to submit to all reasonable rules for the regulation of shipments. That the shipper was not consulted in framing the rules does not affect their validity. Kentucky Wagon Co. vs. Ohio & M. Ry. Co., supra. There is no duty on a common carrier to consult either its shippers or consignees as to the wisdom of its rates of freight for carrying or rules for demurrage. * * * It was not bound to serve a verbatim copy of the rule on defendant. That could have shown nothing so specifically as the charge, which plainly says what detention is allowed, what excess is charged, on what car, and on what goods.

> And that defendant had full knowledge is shown by its own admission that bills for violation of the rule were regularly rendered."

In the case now before this court, it will be recollected that appellant had been familiar with the car service rules of the appellee for more than a year prior.

In Miller vs. Mansfield, 112 Mass, 260, the court said:

> "For the purposes of this hearing all the facts which the defendant offered to show are to be taken as established. We must assume, therefore, that there was an existing regulation and usage of the Housatonic Railroad Company that carloads of freight like that of the plaintiff's should be unloaded by the consignee within twenty-four hours after notice to him of their arrival; that for delay in unloading, after twenty-four hours, the consignee should pay two dollars a day for each car belonging to other railroad companies, and that this regulation and usage was known to the plaintiff.
>
> "Being known to the plaintiff, it is presumed, in the absence of any evidence to the contrary, that the parties contracted in reference to it. It enters into and forms a part of their contract, and the railroad company is entitled to recover the amount fixed by the usage, by virtue of the plaintiff's promise to pay it."

In M., D. & T. Co. vs. Moore, 88 Ill., 136, it appeared that the consignors were frequent shippers over the railroad in question; that they had accepted certain bills of lading, but subsequently objected to being bound by the conditions therein. The court said:

> "We must presume, from the fact that the consignors were frequent shippers by this line, and in the habit of receiving like bills of lading, that they were familiar with its contents, and hence, when they accepted it, knew that it obligated the defendant only to ship to the Chicago depot."

In C., M. & St. P. vs. Pioneer Fuel Company, supra, the court said:

"When one person uses the property of another after being notified that a charge will be made for the same, the law implies a contract to pay a reasonable sum for such use. This is an elementary principle, and one of every day application in the courts. The fact that the property was not originally taken for that use, but was obtained by holding the property beyond a reasonable time after obtaining it for another purpose, cannot, either upon principle or precedent, make any difference. * * * It is the policy of the law to require a reasonable compensation for every valuable thing obtained or of which the complaining party has been deprived. It is the policy of the law to engraft by implication all those provisions upon every contract which are grounded in the good faith of each party, and are not, therefore, expressed in the contract."

In I. C. R. R. Co. vs. Alexander, 20 Ill., 23, it is said:

"The agent of the plaintiffs below had abundant notice that the company claimed the right to charge for storage after the goods had remained in the depot one day, and by suffering the goods to remain in the warehouse for any length of time, when by such rule they would be subject to charge, he impliedly agreed for his principal to pay reasonable charges for the storage, and until these charges were paid, the company were not bound to let the goods go.

"The law is now too well settled to bear discussion that a railroad company may assume the double character of carriers and warehousemen. That their duty as carriers is ended when they have placed the goods in a safe depot of their own or any other safe warehouse. That their depot is their warehouse, and that for warehouse services they have a right to charge a reasonable compensation, the same as other warehousemen. The railroad company in this case, after their relation to the goods as common carriers had ceased, is then to be considered and treated the same as other warehousemen would be considered and treated in case the goods had been placed in another warehouse. * * * While a lien for these charges existed, which the agent of the plaintiffs neglected or

refused to pay, the company was not guilty of a conversion, by retaining the goods for such non-payment. If the charges claimed for the storage were unreasonable, the plaintiff should have tendered a reasonable amount for the charges, and then if the company had refused to receive it and deliver the goods, it would have been guilty of a conversion."

The above has been cited time and time again with approval by our Supreme Court.

In Darlington vs. Missouri Pacific Railway Company, 72 Southwestern, 122, the court, speaking of what are commonly called demurrage or car service rules, says:

"It is conceded that plaintiffs had knowledge of the existence and terms of this rule, and that they only objected to the payment of the demurrage charges on account of the weather, and it appears from the evidence of Darlington that the rule had theretofore been recognized and acted upon by the plaintiffs; so that, leaving out of consideration the stipulations in the bills of lading, there is abundant evidence that plaintiffs impliedly agreed to be bound by these car service rules. But, independent of any express or implied contract of plaintiffs to be bound by the rules, the modern doctrine in this country is that the right to demurrage, in such circumstances, exists independent of contract or statute."

In the case of M., L. S. & W. vs. Lynch (Wis., 22, L. R. A., 532), a car of lumber had been allowed to stand on the side-track until one dollar car service had accrued. Lynch then offered to pay the freight and unload the car, but the agent refused to consent, unless the one dollar car service was paid. Nine days later, the car was unloaded by the railroad company, and Lynch, over the protest of the agent, took the lumber. The company brought suit against him for the charge. The court and jury found that the car had been properly placed for unloading; that the rule in question was a reasonable one as to the time allowed within which to unload and as to amount of charge per day. Judgment was rendered against Lynch for $22 and costs.

In Goff vs. Old Colony Railroad, 6th District Court of Rhode Island, 22 L. R. A., 532, the commodity was a carload of brick, upon which car service charges had accrued, and the company refused to deliver the car until same had been paid. The court affirmed the railroad company's right to hold the freight until the car service charges were paid, and gave judgment for the railroad company accordingly.

In Campbell vs. B. & O. (Circuit Court, Jefferson County, West Virginia, March, 1893), the consignees were notified of the arrival of two cars of bark. They neglected to call and pay freight charges and unload same until after the free time had expired. They were then notified by the agent of the additional charge of one dollar car service upon each car. This they refused to pay, and the company, in accordance with its rules, declined to deliver the bark. Same remained in the cars, until charges amounting to $69 had accrued upon each car. The railroad company then sold the bark for the freight and car service charges, and Campbell brought suit against it for the value of the bark. The case was tried before the court. The court entered judgment in favor of the defendant company for $14.85, the difference between the value of the bark sold and the total amount of the freight and car service charges.

It seems to appellee that careful examination will show not only that the right to a lien is necessary, but that it is reasonable and logical.

First, and above all, it is right and just that the railroads should have it. They are compelled to furnish to the public cars for the transportation of commodities (R. S., Ch. 114, Sec. 84), and should have the reciprocal right to compel the prompt unloading and return of cars to the railroads after the transportation is completed. It is not sufficient to say that they have a right to resort to an infinite number of suits at law to recover any reasonable charges for the detention of the cars against parties who are not known to them and who may not be responsible. But it is necessary that they should have some means within their own control to enforce the prompt unloading of their cars after a reasonable time had elapsed for the unloading of the same.

Second, as a matter of law, carriers have a lien for all charges connected with the transportation of freight from shippers to terminus; and,

Third, as a matter of law, carriers have a right to store freight, which is not called for within a reasonable time, and either the carrier or warehouseman with whom the same is stored have a lien for warehouse charges.

Fourth, it would seem that as a matter of law, from the last two propositions, that if a carrier can store freight and hold the same in its own warehouse until the charges of a warehouseman are paid, then, if the consignee receives his freight in carload lots, and in such shape that it is not practicable for the carrier to unload and store same, and it must be unloaded by the consignee from the car, and the consignee, instead of unloading same within a reasonable time, uses the car for his own convenience and profit as a storage place, it should follow that the carrier should have the same lien for all such reasonable charges for the use of the car as it would have had if the freight had been of such character that it could and should have been unloaded and placed in a warehouse. In short, in dealing with freight which is being shipped in carload lots and delivered in cars upon tracks, the character of the warehouse is simply changed. The railroads, not being able to unload it or store it as the law says that they may do, are obliged to leave it in their cars until the consignee chooses to unload it, and during all this period of detention the cars are the actual warehouse, and the same reasoning which gives a lien for warehouse charges when freight is unloaded and stored in a warehouse, must necessarily fix a lien for charges for the use of the cars, when it is found impossible to unload or store the freight.

THE CASES CITED BY APPELLANT.

The appellant relies almost entirely upon the case of Chicago & Northwestern Railway Company vs. Robert E. Jenkins, 103 Ill., 588, in support of his position. The facts and conditions appearing in that case, taken in connection with the time at which the same arose, are such that, in our opinion, the same is not applicable, and would not now be held by this court to be decisive of the question now before it.

We desire, briefly, in commenting upon the Jenkins case, to call the attention of the court to the following features, which are so different that we believe it is not decisive of this case.

In the Jenkins case, it appears that a quantity of paper had been consigned to Noyes & Messenger, at Chicago, from some person at Clinton, Iowa. This paper arrived at the depot of the Northwestern road on July 4, 1872. The freight was paid on the 11th, and after one drayload of paper was removed, the company refused to deliver the balance until the consignee should pay $5 per day for each day the paper had remained in the car after twenty-four hours from the time of its arrival. The court will notice the following distinctions:

1. The load in that case was paper, a commodity which might very properly have been unloaded by the railroad company, and stored in its warehouse. In fact, this seems to have been one of the controlling points before the court in that decision, the court saying: "Railroad companies have warehouses in which to store freights."

Neither does it appear from the opinion in the Jenkins case whether the paper in question constituted the entire load of the car, or whether it was merely a part of the merchandise contained in the car.

In the case at bar the load was coke, a commodity which could not be stored in warehouses with advantage to either the railroad company or the consignee. In this connection it ought also to be remembered that it appears from the evidence herein that the coke constituted the entire load of the car, and that it is the universal custom that shipments of carload lots are unloaded by the consignee.

2. In the Jenkins case, the railroad company sought to enforce car service after the expiration of the first twenty-four hours from the time the car arrived. Neither was there, in that case, any evidence that the consignee knew of the regulation of the railroad company requiring the unloading of cars within twenty-four hours after arrival; nor does it appear that the consignee had knowledge as to when the car arrived.

In the case at bar, the rules of the appellee company introduced in evidence provided that the cars in question should be unloaded within forty-eight hours from the first seven o'clock a. m., after the car was placed upon the track for unloading. Another of the rules provides that Sundays shall not be included. As a matter of fact, the construction put upon these rules is to allow forty-eight hours from the seven o'clock a. m., succeeding the day on which the cars are placed upon the track for unloading. It further appears from the evidence that in the case at bar appellant knew of the arrival of the cars, and that same were ready for unloading on Friday, June 20th, the day preceding the day from which the forty-eight hours' limit would commence to run. So that, instead of merely the forty-eight hours allowed by the rules, appellant had nearly seventy-two hours within which to unload before any charge for detention would have been made.

3. In the Jenkins case, it was sought to enforce a charge of $5 for each day the car was detained in unloading after the expiration of twenty-four hours. In the case at bar the charge made was but one dollar per day after the expiration of forty-eight hours provided by the rules, but, in fact, after the expiration of about seventy-two hours, Sunday not included. It appears from the evidence in this case that $5 per day is much more than the average daily earning capacity of a car, so that the court might well have considered the charge of $5 attempted to be collected in the Jenkins case, as in the nature of an unlawful penalty. On the other hand, it appears from the evidence in this case that the average daily earning capacity of a freight car of appellee was $2.15, and that the average daily earning capacity of the freight cars of twenty-nine railroads of the United States was $2.42. It will thus be seen that the charge of $1 per day in the case at bar was less than fifty per cent. of the amount which the appellee company would have received had the cars been promptly unloaded so they might have again entered its service.

4. In the Jenkins case, the court said:

> "Railroad companies discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee."

It is evident from this language used by the court in that case that the court did not have in mind a case where the load was a carload lot, and which is always unloaded by the consignee, but did have in mind package or parcel freight of the character that was ordinarily and customarily unloaded by the railroads themselves into warehouses or places provided by them for that purpose.

In the case at bar it is admitted that it was the obligation of the appellant to unload the cars in question. It would seem that a railroad car loaded with a commodity which it is not customary for the railroad company to unload into a depot or warehouse, but which is always unloaded by the consignee, is rather to be compared to the ship mentioned by the court in the Jenkins case, than to the railroad car considered in that case as loaded with ordinary package or parcel freight.

In the Jenkins case, the railroad company termed the service for which it sought to make the charge of $5 per day "demurrage." The use of this word seems to have been unfortunate, as the court evidently considered the word in the technical sense in which it is used in the maritime law, and said that the right to demurrage, if it existed as a legal right, was confined to maritime law, and only existed as to carriers by sea-going vessels, and further said, that such right was believed to exist alone by force of contract.

The charge of one dollar per day, made in the case at bar, is, as appears from the evidence, made primarily for the use of the car, and the track upon which the same stood, and incidentally for the responsibility, risk and expense to which the company may be put in holding the car with its contents upon the track, occurring during the unnecessary detention of same by reason of additional necessary switching of the same. Whether this service be termed demurrage, as it was in the Jenkins case, or whether it be called a car service charge, as is more common, it was, nevertheless, an additional service performed by the railroad company over and above the matter of transportation, and necessitated wholly by the default or failure of the appellant to receive cargo within a reasonable time.

In this connection we wish to call the court's attention to the fact that it is believed that the court was in error when in the Jenkins case, it said, that the right to demurrage was believed to exist alone by force of contract. While the rule in English courts has generally been that demurrage in maritime law exists only by express contract, yet the courts of this country have repeatedly declined to follow the rule of the English common law courts on this subject, and have held, that a ship-owner has a lien upon the cargo for demurrage, notwithstanding the absence of any stipulation of contract therefor in the bill of lading.

In Hawgood et. al. vs. 1,310 Tons of Coal, 21 Fed., 681, the court, after citing at length many cases, concludes as follows:

> "It is thus apparent that there is no ground for contention, at least, in a court of admiralty, that the right to maintain a claim for demurrage or damages for unreasonable detention of a vessel, is dependent upon the existence of a demurrage clause in the bill of lading. That an admiralty action in personam, will lie in such a case against the consignee of the cargo, if he is responsible for such detention, is also beyond question, whether the bill of lading contains any stipulation on the subject or not. Why has not the ship owner also a lien on the cargo for demurrage, and why could not such a lien be enforced in admiralty? * * * Why should the right of the ship owner be limited in the admiralty to the common law lien, when, in fact, that right is dependent on the law merchant, which extends the lien or privilege to all damages and expenses growing out of the affreightment. It is the doctrine of the law merchant that the master or ship owner contracts rather with the merchandise than with the shipper; and, as is remarked by Judge Shepley, in Donaldson vs. McDonald, 1 Holmes, 290: 'It necessarily follows from this, that the merchandise is liable whenever the shipper is liable.' In the present extended jurisdiction of admiralty, a liberal recognition of the rights of the parties interested in lake navigation or commerce, no sound reason is apparent why the ship owner's privilege and lien should not be extended to demurrage. If the ship is bound to safely deliver the cargo to the consignee without exemption

from liability, except such as may be named in the bill of lading, the cargo ought to be answerable for the neglect of the consignee to duly receive it. The cargo may be libeled for freight. Why not for the extended freight which the vessel is improperly caused to lose, where, as in this case, the consignee is the owner of the cargo? * * * The course of argument has led me to consider the question and the authorities at some length; and I am constrained to say, that if the question were an original one, I should have little hesitation in coming to the conclusion announced. The libelants received from the consignee the freight money due them, but it was received under protest and subject to the demurrage claim, and upon the facts shown, I am of the opinion that the demurrage was not waived or lost by reason of anything that transpired in relation to the delivery of the cargo, or of the receipt of the freight moneys."

In the case of the M. S. Bacon vs. Erie & Western Transportation Company, 3 Fed. Rep., 344, it was held, that an express stipulation for demurrage in a contract of affreightment was not necessary to entitle the owner of the vessel to compensation for unnecessary or improper detention in loading or unloading.

In Transportation Co. vs. P. & R. Coal & Iron Co., 70 Fed., 268, and in the same case in the Circuit Court of Appeals, 77 Fed., 919, it was held, that one who charters a vessel under a contract that is silent as to the time of unloading and discharge, contracts, by implication, that he will unload and discharge her within a reasonable time, and with reasonable diligence.

It may not be irrelevant to call attention to the allusions of some of the courts of other states to the Jenkins case.

In Miller vs. Georgia Railroad Company, 88 Ga., 563, the court, after quoting from the Jenkins case, says:

"In our opinion the reasoning in that case is inconclusive. We see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles, as well as carriers by sea. What we have already said, we think is a sufficient answer to the reason assigned, that railroad companies have ware-

houses in which to store their freights; and the reason that 'railroads discharge the cargoes carried by them,' and 'carriers by ship do not; but it is done by the consignee,' of course, cannot operate as to cases provided for by this rule, which, by its terms, applies only where the unloading is to be done by the owner of the property. Nor is it settled that the right to demurrage in maritime law exists only by express contract. In this country the courts have repeatedly declined to follow the rulings of the English common law courts on this subject, and have held, that the ship owner has a lien on the cargo for demurrage, notwithstanding the absence of any stipulation therefor in the bill of lading. But we are not controlled by the authorities which govern as to demurrage under maritime law. The adopting by the railway company of the term 'demurrage,' as a designation for this charge does not require us to resort to that law as a standard for testing the validity of the rule. We are to look to the real substance and effect of the rule, rather than to analogies suggested by the technical designation which the carrier in this instance (Jenkins case), has seen fit to adopt. To hold that because the conditions of carriage by sea are different, no charge under this name can be enforced by the carrier by land, or, if allowed, that it must be governed by the rules of marine law, would be to adopt a narrow and merely technical view, ignoring well-recognized grounds of public policy, and the right of the carrier to prescribe reasonable rules and regulations for its own safety and the benefit of the public."

In C., M. & St. P. Ry. Co. vs. Pioneer Fuel Company, the District Court of Woodbury County, Iowa, in rendering its opinion, commented upon the Jenkins case as follows:

"It is claimed that the language upon page 599 (103 Ill.) of the opinion holds adverse to the plaintiff herein. But bearing in mind the facts of that case, it seems clear to this court that the learned judge had in mind the lien which was involved, and not the charges which the lien was invoked to secure. * * * The action being in trover, the legality of the charge for the wrongful detention of the case, was not and

could not, under the view of the court, be involved. And we ought not, by a forced construction of the court's language, make it decide a case which was not before it, and which, in all probability it had not considered and had not in mind. If we bear in mind this, and the further fact that the charges in that case were five dollars a day, which the court may have found to be exorbitant, we can get to a better understanding of the language of the court, and will find therein nothing wholly irreconcilable with the right of the plaintiff in that case to have maintained an action in ordinary proceedings for the reasonable value of the use of the cars negligently detained beyond a reasonable time, for unloading the same."

In U. P. D. & G. R. R. Co. vs. Cook, 50 A. & E. R. R. Case, 89, the District Court of Arapahoe County, Colorado, the court, in speaking of the Jenkins' case, said:

"The decision mentioned in Illinois said that the question of demurrage only applied to the maritime law. I do not think that it is any reason why we should hold there is no law, because there is no statutory law that has been promulgated."

In the case of Purcell vs. N. Y. C. & St. L. R. R. Co., in the Circuit Court of Cook County, Judge Horton said:

"Were it not for the case of the Northwestern Company vs. Jenkins, 103 Ill., 588, this court would have no serious trouble in this case. That case at first seems to be conclusive of the question now before the court. That case was decided upon an agreed statement of facts, and at my request I have been furnished with and have examined a copy of this agreement as filed in the Supreme Court, which passed upon the case. When the facts in that case are examined and compared with the details of the case at bar, it will be seen they differ materially. For instance, in a sentence from their opinion on page 600, the Supreme Court says: 'But the mode of doing business by the two kinds of carriers is essentially different.' That is, carriers by sea and carriers by rail. 'Railroad companies have warehouses in which to store freights. Owners of vessels have none. Railroads discharge

cargoes carried by them. Carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not. And it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers.' It appears in the evidence, and perhaps the court should take judicial cognizance of the fact, that the railway company has no warehouse for the storage of coal shipped in bulk. Another difference in the facts is that the railroad company is required by law to deliver this coal into the complainant's yard. Again, it is the duty of the consignee to unload this coal, the same as it is the duty of the consignee to unload a vessel. There is no demurrage, as such, in the technical sense of demurrage, claimed in this case. There was no bill of lading accompanying the coal, but it was the custom, as between this railway company and this consignee and the consignor, to ship the coal without bills of lading. I do not know what the railway's custom is, but they have some sort of checks or bills for the use of their conductors and they are delivered with the goods. As remarked by the Supreme Court in the Jenkins case there can be no such lien except by contract, or where it is allowed by law. There are many classes of cases where a lien is allowed, and where, without any specific contract to that effect, the law sustains it, such as innkeepers, agisters, carriers, bailees and warehousemen. Demurrage, as such, technically, cannot be sustained; but the right of lien is not limited here, technically, to the word demurrage, or to what may be defined demurrage. When the railway company placed the cars in the yard, the relation of carrier ceased. When the cars were shunted onto the side-track in the yards of the plaintiff, then the relation of carrier ceased; but was not the railway company furnishing storage for this party? Substantially the same relation exists when cars were set upon a side-track, ready to be delivered, and plaintiff did not receive them. It seems to me that the company, under such circumstances, would be sustained in so leaving the coal in cars, and considering the class of freight, it is a proper place to store it. It would not be a proper place to store paper, such as was the subject-matter of

the Jenkins case, but it would be for bulk coal Whether it be called demurrage or car service, or whatever it may be, it seems that the company is entitled to a lien for a proper charge. If they make an unreasonable charge, the plaintiff can make tender, replevin or pay under protest. If the company is to look to the parties in a civil suit for the money, they have to sue as many parties as were owners of the coal while it remained on the cars. I do not think that is a reasonable rule to establish."

In Fuller et. al. vs. C., C., C. & St. Louis R. R. Co., Circuit Court of Coles County, Illinois, April term, 1896, Judge Wright, who rendered the opinion of the court, said:

"Were it not for the decision of the Supreme Court of this state in the Jenkins case, reported in 103 Ill. reports, the court would have little difficulty in reaching a conclusion.

However, the court has arrived at a conclusion which at least is satisfactory to itself. The common law rule in respect to liens is a familiar one, and of wide and varied application.

It is a familiar principle of the common law that one who has bestowed any particular service or care upon any article of property which has been confided to his possession for such purpose, has a lien upon it for any reasonable charge in respect to such service or care. It is difficult to see why the facts in the present case do not call for the application of this familiar principle. It is difficult to imagine why a railroad company, having bestowed a care upon property for which it is conceded to be entitled to a reasonable charge in that respect, should be exempted from the general rule which entitles parties performing such service to a lien upon the property.

All, in my judgment, that the Jenkins case determines is that the consignee is not bound by the rules of the company unless he consents or agrees thereto. This principle is generally true, not only in cases like the present, but in all other cases. It is not denied that the shipper is entitled to a reasonable time to unload the cars before he is subjected to any charges.

The statute in respect to grain provides that twenty-four hours is a reasonable time. In the case at bar, the rule gives forty-eight hours. It is difficult to see why twenty-four hours in the one case should be a reasonable time, and forty-eight hours in the other case should be unreasonable. Therefore, it can hardly be contended that forty-eight hours is an unreasonable time under the facts and circumstances of the case, in view of the express legislative provision in respect to freight which consists of grain.

The legislature has seen fit to pass another statute in this state, which, while it is not upon the express subject involved in this case, seems to me to have a very pertinent application, and to a certain extent will control the decision of this case. It is the statute relating to unclaimed property, Chapter 141, Revised Statutes. The title of that act is 'An act to provide for the sale of personal property by carriers, warehousemen, innkeepers, and by others having liens thereon.' Now, it seems to me this statute plainly recognizes that railroad companies have a lien upon all personal property transported by them, not only for freight, though that is not the word used by this statute, but for the reasonable charges thereon. It is conceded in this case that the railroad company has the right to charge for car service after a reasonable delay on the part of the consignee in unloading the freight. If that be true, then it becomes a legal charge to the same extent that the freight rate is a legal charge, and this statute, by its title, and by its plain provisions, recognizes that lien and subjects the property, under certain conditions, and after the lapse of a certain time to be sold to pay these legal charges. This view of the case seems to be more consistent with justice between man and man than the other view of the case contended for, which is that the railroad company should sue the party for those charges.

To recognize a lien existing in favor of the common carrier is promotive of justice. It avoids litigation and enables the parties to settle these small charges without controversy. The principal object of the rule of the company doubtless is not to secure the small charges made for the use of cars, but to secure to themselves and to the public, the use of the cars.

If the courts refuse to recognize liens under these circumstances shown in the evidence here, it would not only be a detriment to the railroad company, but it would be destructive to the public's interest in view of the fact that it is necessary, both for the railroad company and the public, that the railroad company should at all times have the use of their cars in order that the public business may be properly transacted."

Many more cases might be cited from the decisions of other states wherein the position set forth in the Jenkins case is not sustained. But for the purpose of this hearing it is in our opinion wholly unnecessary to question the wisdom of this court in that case. The court places its decision in that case upon the broad ground that a railroad company, having a right to unload cars and store the freight, could not charge for the use of cars which it might, by the exercise of diligence, have unloaded. But it is not believed that this court will ever hold that a railroad company should unload freight in bulk, such as coke, coal, grain, wood or the like, and store the same either upon the ground or in warehouses. It is so obviously impracticable, not to say impossible, that the necessity for permitting the freight to remain in the cars until the consignee sees fit to unload it, or until it can be disposed of in car load lots, is at once apparent. A radical distinction exists between the delivery to consignee of freight in bulk in car load lots, and the miscellaneous parcel and package freight which can easily and with little expense be transferred to a warehouse. This distinction is recognized in the case of Coe vs. L. & N. R. R., 3 Fed., 775, wherein the court says:

"The common law must be applied, as the necessity of its relaxation did not exist. This rule (rule regarding the delivery of grain to a warehouse on the line of the road) is just and convenient, and necessary to an expeditious and economical delivery of freight. It has regard to their proper classification, and to the circumstances of the particular case. Under it articles susceptible of easy transfer may be delivered at a general delivery depot provided for the purpose. But live stock, coal, ore, grain in bulk, marble, etc., do not belong to this class. For these some other and more appropriate mode of delivery must be provided."

As above stated, the Jenkins case was tried upon an agreed state of facts. The sixth clause of the agreed statement was as follows:

> "At the time this paper was received by the defendant into its cars at Clinton, and when cars were received or arrived at the railway station in Chicago, the defendant had standing on its grounds, and along its tracks, freight houses into which it did, and was accustomed to put freight brought in by it or on its cars to Chicago, as well as to allow it to remain in the cars unloaded."

An inspection of this clause is sufficient to show that the Railway Company in that case practically admitted away the foundation of its claim for demurrage in saying that it had freight houses, into which it did, and was accustomed to put freight brought to Chicago. Such being the case, it was not in a position to charge a high price for the use of cars on its track, which might be very valuable, when it at the same time had the facilities for unloading the freight into a warehouse, and when it was equally customary to so unload into such warehouses. In the case now at bar, the company had no warehouses within which to store coke, nor was there any claim that it was the custom to store coke in warehouses, or that the appellant expected it to be stored in a warehouse, and if stored the coke would have been depreciated in value by the additional handling.

We are confident that had the question of car service been properly presented to this court in the light of the facts in the present case, it would have arrived at a very different conclusion as to the right of a railway company or a ship owner to collect damages in the nature of demurrage for an unreasonable detention, regardless of contract.

The appellant, in addition to the Jenkins case, has cited the two cases reported in the 73d Illinois Appellate, namely, C., C., C. & St. L. vs. Holden, 73 Ill. App., 582, and C., C., C. & St. L. vs. Lamm, 73 Ill. App., 592. The opinions in each of these cases were by Justice Harker.

In the Lamm case it appears from the opinion of the court that the condition of the railroad yard for some thirty or forty feet between the car and the macadamized

road over which the teamster had to drive, was very bad because of the mud. The court found as a matter of fact that there was no unnecessary delay on the part of the defendant in removing the lumber in question, and says:

> "The delay seems to have been caused by the muddy condition of the railroad yard in which the car was standing, in which not more than half a wagon load could be hauled at one time."

Furthermore, the court said:

> "Neither the amount of the judgment ($35), nor the questions of law involved in the controversy, will justify a discussion in detail of the numerous points of contention raised by the appellant. We feel that the law of the case was settled in the case of C. & N. W. Ry. Co. vs. Jenkins, 103 Ill., 588."

The fact that the court found that there was no unnecessary delay in unloading the car, due to the fault of the railroad company in failing to have its railroad yard in a suitable condition for the hauling of full loads, probably influenced the court in its decision of this case more than the law or argument of counsel. Had there been no dispute in the facts, we are inclined to the opinion that the decision of the court would have been different, and instead of announcing the proposition that a railroad company has no lien or right of retaining for car service charges the goods consigned, it would have held that while in their warehouse, or, in the case of car load lots, in their cars, it would have a lien upon the property for the payment of a fair and reasonable and just charge for the storage made necessary by failure of consignee to unload within reasonable time.

The same questions of fact were evidently leading features in the decision of the Holden case, wherein Judge Harker says that he is guided in his decision by the holding of the Supreme Court in the Jenkins case, to the effect that the right of demurrage does not attach to carriers by rail, and that liens are only created by law or by contract of the parties.

We believe that we have shown to the satisfaction of this court that the statement of this court in the Jenkins case to the effect that the right of demurrage only existed

by virtue of express contract, was wrong, and that in this country the right to demurrage is recognized, although the contract of carriage may be entirely silent in that respect.

The only other cases relied upon by appellant, are those of E. T. V. & G. R. R. Co. v. Hunt, 83 Tenn., and Crommelin v. N. Y. & H. R. R. Co., 10 Bosworth, 77.

In the Hunt case it appeared that a car load of stoves had been consigned to the defendant, and that after the car arrived at destination "it was three or four days before the car was placed at the point for unloading," and when this was done and the consignee sent hands to unload, the agent refused to unlock the car, because the freight had not been paid. The consignee offered to pay the freight once or twice, but the company would not place the car in position to be discharged of the goods, because the company claimed damage of $2 or $2.50 per day on the cars, of which payment was refused.

The court further says:

> "Under any state of facts in the absence of an agreement to the contrary, the company was not entitled to demand or recover either freight charges or demurrage until it was in a position to tender delivery of the goods at a safe, convenient and uninterrupted point at its depot or on its road. The legal effect of this undertaking was to deliver the goods at a point and in a manner to enable the consignee to receive them without inconvenience, delay or interruption. If it requires the consignee to remove the goods in a limited time, it must do all in its power to enable him to do so, while it may, after giving notice of the receipt of the goods, require prompt action on the part of the consignee, he may demand of it free, convenient, safe and undisturbed access to his goods."

From the above it is evident that there was no merit in the charge of $2 or $2.50 per day sought to be made in that case. The court does, however, recognize the right of the company after giving notice of the arrival of the goods to the consignee to require prompt action on the part of the consignee in unloading the same, but insists that

such prompt action cannot be demanded by the company unless it has placed the car where it can be safely and conveniently unloaded without interruption.

The court having found as a matter of fact that the railroad company was not entitled to the charge, did not apparently make any considerable investigation as to the right of the company to secure the charge in question by a lien, but relied upon the decision of Somes v. The British Empire Shipping Company, which case, in accordance with the older English authorities, held that demurrage was strictly a matter of contract.

In the Crommelin case it appeared that three cars loaded with marble were transported by the railroad company to the point of destination, and that the same remained in the street in front of the depot for several days. A charge of one dollar per car per day was sought to be imposed by the railroad company, and the company refused to deliver the marble without the payment of this. The court, in rendering its opinion, laid considerable stress upon the fact that the cars were allowed to remain on a public street, and as a matter of fact created a public nuisance. Furthermore, considering the character of the load of the cars, the court said:

> "So far as any safety of the merchandise was concerned, its bulk would probably have rendered it equally safe if taken off from the cars and laid on the pavement. Leaving articles in an open vehicle exposed on a highway is not the kind of storage for which a lien can be acquired."

In a dissenting opinion by Judge Monell, rendered in this same case, it was held that inasmuch as the consignee had notice of the regulation when he shipped the marble, that there was an implied agreement upon which the railroad company could recover in an action for that purpose. The dissenting opinion does, however, say that the right of lien, if any existed in favor of the railroad company, must be established either by express contract or by the common law, and cites the cases of Burley v. Gladstone, 3 M. S. R., 205, and Lambert v. Robinson, 1 Esp. R., 119. (See comment on first of these cases in the Hawgood case, 21st Fed., 681.)

As above stated, the holding of the admiralty courts in this country, as set forth in the cases of Hawgood v. 1,310 tons coal, 21 Fed., 681, and Young v. 140,000 brick, 78 Fed., 149, is not in harmony with the holdings of the English courts, in that they say that in maritime law the right of demurrage exists aside from agreement by express contract.

In the Crommelin case it was held that the defendants could not be regarded as warehousekeepers and as such entitled to lien for storage, the court saying:

> "They did not in any sense store the plaintiff's marble. It was left upon the cars standing upon the railway track in the public highway. Upon its arrival at the place of destination and notice to the plaintiff, and a reasonable time given to accept and take by the consignee, the defendant had discharged their whole duty and could not be responsible for any loss or damage; and hence no right of lien could arise for housing, unless defendants were warehousemen as well as carriers, which they were not in this case."

The Crommelin case was decided in November, 1862. At that date railroading was comparatively in its infancy, and the shipping of commodities in bulk and car load lots to be loaded and unloaded by the consignor and consignee was comparatively unknown. Nor do we think that the law was correctly stated in that case, when it was said that after a reasonable time had elapsed within which the consignee might accept the goods, that the defendants had discharged their whole duty and could not be held responsible for any loss or damage. We do not understand that a common carrier can abandon, as a matter of indifference, property transported by it, after it has afforded a reasonable opportunity to the consignee to call for or unload the same, but that after such time has elapsed the carrier must assume the obligation of a warehouseman.

In Gregg v. Illinois Central R. R. Co., 147 Ill., our Supreme Court, speaking upon this point, said:

> "The railroad company was not required to keep corn in its cars on track indefinitely, and although the consignee was in default in not receiving the freight

after a reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation as a warehouseman. In the exercise of such care it might leave it in the cars, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, or it might with the exercise of a like degree of care in selecting a responsible and safe depository, store the grain in an elevator or warehouse at the expense and risk of the consignee and thereby discharge itself from further liability."

CONCLUSION.

In conclusion, we respectfully submit that the propositions contended for by appellee in the opening of this brief, are sustained by the authorities, namely:

First. That after a reasonable time had been afforded appellant to unload the cars of coke in question, that this appellee had a right to make a reasonable charge, known as a car service charge, for the further detention and use of the cars and track.

Second. That the appellee was entitled to a lien upon the contents of said cars to secure such charge.

It will be seen by an examination of the authorities cited, that the courts of many states, notably those of Massachusetts, Virginia, Kentucky, Wisconsin, Iowa, Rhode Island, Colorado, Georgia, Missouri and Pennsylvania, have passed upon this question, and that every one of them have upheld the right of a railroad company, in proper cases, to make a car service charge, and to collect same by retaining a lien upon the contents, or such portion of the same as may remain in the cars. In some cases, the charge in question is called "a car service charge"; in others, a "demurrage charge," and in still others, a "charge in the nature of demurrage"; but it is obvious that a storage or warehouse charge is what is meant in each case.

The law requires railroad companies to transport the commodities offered them for transportation. Such commodities must, therefore, be transported by them. When

delivered at their destination what shall be done with them? It would be a physical impossibility for railroads to provide warehouses in which these commodities could be stored if not unloaded within a reasonable time after they have arrived at their destination. And if the shipper could, by any possibility, indicate to the railroad company the character or kind of a house in which he desired his goods should be stored, the impossibility of providing storage room would be still greater. One might want a steel structure, another one an iron building, another a brick building, and it would be necessary for the railroad company to have all kinds and character of buildings in order to suit the varying tastes and dispositions of the different consignors and consignees. If railroads can store goods which are shipped over their road in a warehouse or depot and relieve themselves of their liability as common carriers, what reason is there why they cannot relieve themselves of their liability by continuing to use the car in which they were shipped, for a warehouse. Counsel for appellant, in his brief, concedes, for the sake of argument, that the company has the right to charge for the use of the car. If this is so there must be some reason for it. How is it that it can charge for the use of the car? Certainly not for carrying the goods, for the transportation is over, and its duty as a common carrier has been performed when it has delivered the car at point of destination, and waited a reasonable time for the consignee to unload it. It then, as a common carrier, has only a lien for carriage charges. What, therefore, is it that enables it to charge for the use of the car. In our judgment, there is only one ground upon which it can do this, and that is that it is acting as a warehouseman, and as such, is entitled to compensation; and, if it is a warehouseman, it never loses possession of the goods, for although the consignee is permitted to unload a part of same from the car in which they have been transported, yet, as to the goods which are not removed, they are still in the possession of the railroad company as a warehouseman, and as such, it has a lien upon them for payment of any amount which may be due for storage charges. If railroad companies in proper cases are not allowed to enforce their lien as warehousemen, the railroad sidings all over this country will be crowded with cars that are partially unloaded, and the railroads will be unable

to provide vehicles enough to transport even a small percentage of the vast amount of freight which they are today carrying.

We have felt justified in the argument of this case in asking the court to examine carefully and at length the several points presented by the appellee; not that the amount of the judgment involved in this particular controversy will justify same, but because a decision of the questions involved herein will be far-reaching in its effect upon the commerce of the country.

It is respectfully submitted that the judgment of the Appellate Court herein should be affirmed.

PAM, CALHOUN & GLENNON, and
A. W. PULVER and S. A. LYNDE,
Attorneys for Appellee.

CHARLES D. CLARK,
Of Counsel.

REPLY BRIEF OF APPELLANT.

May It Please the Court:

The lien claimed by appellee railroad company did not exist at common law. The lien does not exist in this state by statute. The lien does not exist in this suit by agreement, expressed or implied, of the parties.

The fact that a railroad company publishes certain rules and regulations and these rules and regulations are known to the consignee, can raise no expressed or implied contract between them with reference to said rules and regulations.

Jones on Liens, 2d Ed., Vol. 1, Sec. 282, contains the following:

"A lien for demurrage in favor of carriers by land is not implied by law, and cannot be asserted, except by virtue of an express agreement, or of a custom so recognized as to have the force of a contract. The rules and regulations of a railroad company providing for a lien for demurrage,

though published, are not binding upon the consignor or consignee of goods without their consent, or the consent of one of them, when the contract for shipping the goods was made. Even the knowledge of such rules by the shipper or consignee, without assent thereto, does not bind him. The law does not presume assent to the rules of a railroad company, for damages caused by delay of the consignee in receiving goods shipped, from the publishing of such rules."

The case of Cleveland, C. C. & St. L. Ry. Co. v. Lamm, 73 Ill. App., 592, contains the following:

"It is insisted, however, that as appellant had adopted rules for demurrage charges, which were known to appellee, and because they had paid a like charge in 1890 and had not protested against them since that time, there was such acquiescence as would amount to a contract for a lien.

"Railroad companies cannot create in their favor a demurrage lien on freight not removed from a car within a short time, by simply publishing to the public their intention of doing so. They may attempt it, and shippers and consignees may be compelled to use their roads for the transportation of freight with full knowledge of the publication. Detention charges may be paid a few times by a consignee who may feel that he has been somewhat tardy in removing freight in those particular instances. But for all that, it could not be rightfully held that there was such acquiescence in a rule for demurrage charge as would amount to a contract for it in a future case where the consignee felt that there was an unreasonable insistence of its application."

In the case at bar it appears from the testimony that when the appellant's attention was called to the rule in question he told the agent of the company that it would be impossible to get the two cars unloaded within forty-eight hours or anywhere near that time, and that he could not and would not comply with any such rule. (Abst., 5; Rec., 25.)

It will appear from an examination of the authorities cited by appellee that none of them are applicable to the state of facts as shown by this record. Most of the authori-

ties have no bearing on the question of lien. Where the lien is discussed it is either obiter dictum, or decided in favor of the railroad company on the ground that the lien was established by expressed or implied contract between the parties.

A large number of the cases cited by appellee are circuit, county and district court cases, and are not reported. The facts upon which these decisions were based are unknown and therefore worthy of no consideration by this court.

The following are the only cases cited by appellee that have any bearing whatsoever on the question involved in this suit:

The case of Miller v. Mansfield, 112 Mass., 260, was an action of tort, for the conversion of 100 barrels of flour. The plaintiff was the owner of a bakery and had shipped to him by the defendant's line of railroad 100 barrels of flour, and the defendant railway company refused to deliver the flour until certain charges were paid for delay in unloading the car. The court expressly held that the parties contracted with reference to the rule of the railroad company to charge $2 a day for each car for delay in unloading. The court says, with reference to this rule (page 263):

"Being known to the plaintiff, it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted in reference to it. It enters into and forms part of their contract, and the railroad company is entitled to recover the amount fixed by the usage, by virtue of the plaintiff's promise to pay it."

The case of Miller v. Georgia Ry. Co., 88 Ga., 563, merely decided the question as to whether or not a railroad had a right to make rules and regulations in regard to the time in which the cars may be unloaded, and to fix a reasonable rate per day for storage thereafter. The question as to whether or not the railroad company had a lien on the contents of the car for this storage was not involved, and any language of the court with reference to the question of lien was obiter dictum. The suit was brought by the Georgia Railroad Company against Miller & Co. for storage charges after the goods had been delivered. Moreover the suit is decided upon the theory that the parties con-

tracted with reference to the right of the railroad company to charge this storage. The court says, on page 576:

"Where regulation of this character is known to the customer before the contract of transportation is made, it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted with reference to it (Miller v. Mansfield, supra), and it is operative whether indicated upon bills of lading or not, and whether the shipments are made to the order of the consignor with the customary directions to notify the customer, or direct to the customer himself."

The case of the Kentucky Wagon Mfg. Co. v. the Louisville & Nashville Railroad Co. is an unreported case decided by the law and equity court of Louisville, Kentucky, December 20, 1891, a synopsis of the same being set forth in a note in the 50th Am. & Eng. Rd. Cases, page 90. In this case also there was no question involved with reference to liens, as it was a bill in equity filed by a manufacturing company against certain railroads to restrain them from refusing to deliver to the plaintiff upon its private side tracks certain loaded cars on account of any non-compliance on the part of the manufacturing company with the rules of the Louisville Car Service Association with reference to demurrage charges. The case simply holds, so far as can be gathered from these notes, that common carriers have a right to make reasonable rules and regulations.

The case of Philadelphia Railroad Co. v. Midvale Steel Co. (Penn.), 51 Atl. Reporter, 313, was an action brought by the railroad company against the manufacturing company for demurrage charges after the goods had been delivered, and the case went up to the Supreme Court on the question of the sufficiency of the affidavit of defense. There was no question of lien involved and none passed on by the court.

The case of Norfolk & Western Railroad Co. v. Adams (Va.), 18 S. E. R., 673, was an action of assumpsit brought against the railroad to recover back certain sums of money said to be illegally exacted from, and paid by the plaintiff to the railroad company on account of demurrage charges. In this case the court says:

"The plaintiffs in this suit had notice of the existence and operation of these rules, and they had paid the charges for the detention of the cars long before the commencement of the account sued upon; and they knew and agreed when the shipments were made, that such a charge would be made, unless they unloaded their cars in compliance with the rule of the company which gave to them seventy-two hours in which to unload their freight after notice of the arrival of the cars which they had stipulated to unload."

The court then goes on and decides that the rule in question was a reasonable one. There was nothing in the case involving the right of the railroad company to claim a lien for the amount of these charges.

The case of Darlington v. Mo. Pac. Ry. Co. (Mo. Court of Appeals), 72 S. W. Repr., 126, was an action of conversion brought by the plaintiff against the railroad company for taking certain lumber belonging to the plaintiff upon which the railroad claimed certain demurrage charges. The court says, with reference to this rule of the railroad company:

"It is conceded that plaintiffs had knowledge of the existence and terms of this rule, and that they only objected to the payment of the demurrage charges on account of the weather; and it appears from the evidence of Darlington that the rule had theretofore been recognized and acted upon by the plaintiffs; so that, leaving out of consideration the stipulations in the bills of lading, there is abundant evidence that plaintiffs impliedly agreed to be bound by these car service rules. * * * In this state demurrage charges as to shipments of grain in carload lots are allowed by statute, Section 1115, Revised Statutes, 1899."

The case of Norway Plains Co. v. Boston & Maine Ry. Co., 67 Mass., 263, was an action of contract upon the agreement of the defendants to transport certain goods from Rochester to Boston, it appearing that after the goods had been removed from the car to a warehouse that they were destroyed by fire. It will be seen from this state of facts that there was no question of lien involved and anything in the opinion with reference thereto is obiter dictum.

In the case of Swan v. Railroad, 106 Tenn., 229, the bill of lading expressly provided for demurrage charges and that

said charges should be a lien upon the freight which might be held by the railroad company until said lien was paid.

From an examination of the Illinois cases cited in our brief and a careful consideration of the cases cited by appellee there can be no doubt that the law is correctly set forth in Jones on Liens, 2d Ed., Vol. 1, Sec. 281, as follows:

"A carrier has no lien for charges not connected with the transportation of the goods, and not within the contemplation of the parties. Thus, ordinarily, a carrier has no lien for the storage of goods which he has carried unless there be a special contract allowing him to charge for storage. Nor has he a lien upon goods for demurrage arising from the consignee's neglect to take them away within a reasonable time after notice to him of their arrival. Thus, a railroad company cannot retain goods to satisfy a charge for the detention of cars by the failure of the consignee to remove the goods after notice; for the claim is in the nature of demurrage, and no lien exists for this. Such detention is a breach of contract simply, for which, as in the case of a contract in reference to pilotage or port charges, the party must seek his redress in the ordinary manner. He cannot enforce it by detention of goods."

Appellee's brief is largely devoted to a discussion of the benefits that would accrue to the railroad and consequently to the public if it were enabled to make this demurrage charge and enforce a lien therefor, and the great inconvenience and burden to the railroad and therefore to the public if this lien does not exist.

This brief should be addressed to the legislature and not to the courts. The province of the judiciary is to construe the laws and not to make them. The relief asked by appellee can only be given by the legislature, not by the courts.

Respectfully submitted.

LOUIS ZIMMERMAN,

Attorney for Appellant.

The opinion of the Supreme Court, filed February 17th, 1904, is as follows:

Present:

JOHN P. HAND, Chief Justice.
BENJAMIN D. MAGRUDER, Justice.
JAMES H. CARTWRIGHT, Justice.
JAMES B. RICKS, Justice.
JACOB W. WILKIN, Justice.
CARROLL C. BOGGS, Justice.
GUY C. SCOTT, Justice.

Docket Nos. 3206.—Agenda 34.—Oct. 1903.

Schumacher v. Chicago & Northwestern Railway Co.

Mr. JUSTICE RICKS delivered the opinion of the court:

Appellant brought an action of replevin in a justice's court in Lake county against appellee for three tons of coke. Judgment was for appellee in the justice court. On appeal to the circuit court of said county a trial was had before a jury, and the court directed a verdict for appellee and entered judgment thereon. Appeal was taken to the Appellate Court, where the judgment of the lower court was affirmed, and this appeal was prosecuted.

Appellant is a resident of Highland Park, and in June, 1902, purchased and caused to be shipped to himself at said place, over appellee's road two cars of coke. The cars arrived in Highland Park on June 20, at seven o'clock in the morning, and at nine o'clock in the morning of the same day appellee's station agent at said point mailed appellant notice of the arrival of the cars. Appellant is a practicing lawyer residing at Highland Park and having his office in the City of Chicago, and on the same morning of the arrival of the cars, and shortly after the mailing of the first notice, appellee's agent saw appellant personally and informed him that said cars had arrived. At that time appellee's agent did not know the freight charges, and neither by the first postal card nor by verbal statement was appellant informed on that day of the freight charges. On the morning of the 21st appellee's agent again notified ap-

pellant of the arrival of said cars, sending notice by postal card through the mail, which was received by appellant between 8.30 and 9 o'clock in the morning of that day. On the postal card so sent to appellant, after describing the freight, was the following: "Which is now at your risk; please pay charges and remove property within twenty-four hours, or same will be charged storage or delivered to warehouseman; all carload freight shall be subject to a minimum charge for trackage and rental of one dollar per car for each twenty-four hours' detention, or fractional part thereof, after the expiration of forty-eight hours from its arrival at destination." And across the face of said postal card was stampel the following: "If this car is not unloaded within forty-eight hours from 7 A. M., June 21, 1902, a charge of one dollar per day, or fraction thereof, will be made for car service, for which this company reserves a lien upon the contents of car." Upon the 21st of June, and after the receipt of the postal card by appellant on that day, he went to appellee's station and there paid its agent the freight, taking a receipt therefor, and on each of the freight bills was stamped a notice identical with the one last above quoted. When appellant received the freight receipts he called the attention of appellee's agent to the notice with reference to the charge for car service contained thereon, and stated to him that he could not get the cars unloaded within forty-eight hours, or anywhere near that time; also recalled the fact that he had had trouble a year or so previous to this shipment with this same company at the same station, growing out of appellee's insistence upon the enforcement of the above rule. Appellant then engaged one James H. Duffy, whose business was the hauling of coal and coke, to haul the same for him, but was informed by said Duffy that he could not begin the work until the following Monday, June 21 being on Saturday. One car was unloaded by Tuesday, June 24. On Thursday, June 26, the other car was only partially unloaded, and appellee, through its agent, notified Duffy, who was hauling the coke, that he could haul no more until the car service due from the delay in unloading had been paid. A controversy then arose between appellant and appellee, which resulted in the suing out of the writ of replevin on Monday, June 30, there remaining about three tons of coke in one car, which appellee had sealed and refused to allow to be removed until the car service was paid.

The evidence further shows that the cars, on their arrival on Friday, June 20, were placed on a stub-track, where they could be approached from one side and unloaded, and on the 21st of June were placed at the end of another stub-track, so that their removal was unnecessary until they were unloaded, and could be approached from both sides, for the purpose of unloading, without interference from switching so long as they remained at that point. The two cars in question came from and belonged to other railroad lines, one being from the Baltimore & Ohio Railroad Company and the other from the Illinois Central Railroad Company; that appellee had no warehouse for the unloading of bulk freight, such as car-loads of coal and coke, at Highland Park Station, and that freight such as that in question is uniformly loaded and unloaded by the shipper and consignee.

The evidence further shows that in what was called "Chicago territory," and embracing a considerable scope of country surrounding the City of Chicago, and including Highland Park, was an association called the "Chicago Car Service Association," which was a joint association including all the railroads within that territory, all of which united in the selection of a single agent, known as the "Car Service Association agent," the purpose and business of which association were to facilitate the loading and unloading of cars and for the securing of prompt service to shippers; that this agency or association had existed since 1888, and that appellee was a member of such association; that the United States, with reference to railroad traffic, was divided into forty-two districts, each having a similar association; that certain rules, designed to effectuate the purpose of such association, were formulated and published by it and observed by all its members and brought to the attention of shippers, as business between them arose and was conducted; that among the rules were rules 2, 4 and 5, as follows:

"2. Forty-eight hours' free time will be allowed for loading or unloading all cars, whether on public tracks or on private tracks, at the expiration of which time a charge of one dollar per car per day, or fraction thereof, shall be made and collected for the use of cars and tracks held for loading or unloading or subject to the orders of consignors or consignees or their agents.

"4. In calculating time, Sundays and the following holidays are excepted: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas.

"5. On cars arriving after 6 p. m. of any day, car service will be charged after the expiration of forty-eight hours from 6 p. m. on the day following."

The evidence showed that in the City of Chicago alone there were shipped in, approximately, 7,500 cars of coal and coke every month; that the average earning capacity of freight cars upon twenty-nine railroads in the association, for the year 1901, was $2.42, and on appellee's road $2.15 per day.

Under the above state of facts appellee contends that it was entitled to charge a car service or car track service of one dollar per day, after the expiration of forty-eight hours, upon these cars, and that it was entitled to a lien upon the coke, the same being the freight contained in them, for the payment of such charges. Both of these propositions are denied by appellant, and arise upon the peremptory instruction for a verdict, given by the trial court.

Under the constitution and laws of this state railroads are public highways and railroad corporations are quasi public corporations. They are chartered by the state and may invoke the right of eminent domain for the acquirement of lands necessary for the conduct of their business. Regarding them as public agencies, discharging duties in which the public is interested, the state regulates and controls their rates and tolls, both for the carrying of freight and passengers, and in many other respects regulates and controls their operation. Upon the payment or tender of the legal tolls, freight or fare, such companies are required to furnish cars and transport freight and passengers within a reasonable time, and upon their failure to do so they are subject to treble damages to the party aggrieved and in addition thereto a penalty or forfeiture to the school fund of the state. (Hurd's Stat. 1899, chap. 114, pars. 84, 85.) They must receive and transport cars loaded and unloaded over their lines, and in doing so assume the liability of a common carrier as to both such cars and freight. (Peoria and Pekin Union Railway Co. vs. Chicago, Rock

Island and Pacific Railway Co., 109 Ill., 135.) They may not discriminate against shippers in rates or facilities for shipping, and are required to make special provision for the handling and shipping of grain. All of these regulations by the state are justified and sustained upon the ground that the state is interested in the prompt and proper carriage of its products and the commerce of its people, and it would seem that reasonable rules and regulations adopted by such corporations, conducive to the proper discharge of the public duty, should, where they are not in violation of some positive law, be sustained.

Railroads, as to freights committed to their charge, during the period of transport and until they are delivered, bear two well recognized relations. While in transit, and for a reasonable time after reaching the point of destination, they owe the duties and bear the relation of common carriers; and when the car containing the freight is delivered to the consignee upon his own track or at the place selected by him for unloading, if he have one, or to the consignee upon the company's usual and customary track for the discharge of freight, with reasonable and proper opportunity to the consignee to take the same, or when placed in the warehouse of such company or the warehouse of another selected by them, in any and all such cases such companies then bear to such freight the relation of warehousemen. (Peoria and Pekin Union Railway Co. vs. United States Rolling Stock Co., 136 Ill., 643; Gregg vs. Illinois Central Railroad Co., 147 id., 550.) If the cars in which such freight is shipped are the property of another railroad than that of the company transporting the same to the point of destination, such latter company bears the same relation to such cars as to the freight therein. (Peoria and Pekin Union Railway Co. vs. United States Rolling Stock Co., supra.) Such are the duties of such companies appertaining to bulk freight in carload lots, which, it may be said, by the uniform rule and custom of this country are to be loaded and unloaded by the shipper and consignee. Small or package freight, of such character and bulk that that belonging to many distinct owners may be shipped in a single car, is commonly loaded and unloaded by the transporting company or companies. When such freight reaches the point of destination and is placed in the freight depot or warehouse of such company it is held by such company as a warehouseman, and when

a railroad company carries freight to its point of destination and stores the same in its warehouse, and the relation of warehouseman is established by the failure to remove the property within a reasonable time, the liability of a warehouseman attaches, and not the liability of a common carrier. Illinois Central Railroad Co. vs. Alexander, 20 Ill., 24; Porter vs. Chicago and Rock Island Railroad Co., id., 408; Merchants' Dispatch Transportation Co. vs. Hallock, 64 id., 284; Illinois Central Railroad Co. vs. Friend, id., 303; Rothschild vs. Michigan Central Railroad Co., 69 id., 164; Merchants' Dispatch and Transportation Co. vs. Moore, 88 id., 136; Anchor Line vs. Knowles, 66 id., 150.

It is the duty of the consignee to take notice of the time of the arrival of freight shipped to him and to be present and receive the same upon arrival, and he is not entitled to notice from the company that the same has arrived, but the company is authorized to store such freight and to be relieved of its duty as a common carrier (Merchants' Dispatch Transportation Co. vs. Hallock, supra), and when such freight is in the warehouse the railroad company may charge storage upon the same, and it has a lien upon the freight so stored for its storage charges, and this rule obtains although the company may have given the consignee notice to remove the property within twenty-four hours. Richards vs. Michigan Southern and Northern Indiana Railroad Co., 20 Ill., 405; Porter vs. Chicago and Rock Island Railroad Co., supra; Illinois Central Railroad Co. vs. Alexander, supra.

When a railroad company delivering freight at its point of destination has no warehouse at that point suitable for the storage of bulk freight in carload lots, and the property is of such character that the cars in which it is transported furnish a proper and safe place for the same, so that it is not liable to damage or deterioration arising from heat or cold or the elements, there would seem to be no reason for requiring the transporting company to seek a warehouse of another and add the cost of removal to the cost of storage when said freight may properly be held in storage in the cars in which the same was carried; and after notice to the consignee, and a reasonable time to remove the same, reasonable storage charges may be collected therefor and the freight held for the payment thereof. Miller vs. Mansfield, 112 Mass., 260; Mille

vs. Georgia Railroad Co., 88 Ga., 563; Gregg vs. Illinois Central Railroad Co., 147 Ill., 550.

In Gregg vs. Illinois Central Railroad Co. the action was for damage to grain by water, which had been stored by the railroad company in a warehouse in Augusta, Georgia. The grain was not received promptly upon arrival at its destination and was stored, and while in storage was injured by a flood. In speaking of the duty of the company with reference to such freight, this court said (p. 560): "The railroad company was not required to keep the corn in its cars on track indefinitely, and although the consignee was in default in not receiving the freight after reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation as warehouseman. In the exercise of such care it might leave it in the cars, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, or it might with the exercise of like degree of care in selecting a responsible and safe depository, store the grain in an elevator or warehouse at the expense and risk of the owner."

In Miller vs. Georgia Railroad Co., supra, it is said (p. 563): "It is well settled that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them; and we think where the carriers' duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may, in many cases, be as effectual as any other. Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business, where he may unload it himself or where it may be unloaded by purchasers as the goods are sold, thus saving dray-

age and other expenses, than to have it unloaded by the carrier and the goods stored elsewhere at the consignee's expense. And if a customer whose duty it is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car by requesting or permitting the carrier to continue holding it unloaded in service and subject to his will and convenience as to the time of unloading, he cannot be heard to complain of the method of storage, and to deny the right to any compensation at all for this service on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no compensation whatever shall be charged for such extra service."

In Miller vs. Mansfield, supra, it was said: "It is not material that the goods remained in the cars instead of being put into a storehouse."

In the case at bar appellant did not discharge his duty to the appellee by being present and ready to receive his freight upon its arrival. Within two or three hours of its arrival he was notified thereof, and after it had lain there twenty-four hours and said car was placed where appellant had full and fair opportunity to remove the freight without interference in any form and to approach the car from both sides for that purpose, and when appellee's duty as a common carrier had ceased, appellant was notified that he must remove the same within forty-eight hours, or a car service or storage charge, which, under the circumstances, must be held to be the same thing, of one dollar per car would be insisted upon. Appellant also knew, by the previous dealings between himself and appellee, that such rule obtained, and unless he could show that the limit of time was unreasonable or the charge excessive, it would seem appellee's contention to charge as for storage should be upheld.

It is also urged by appellee that the right to demand such charge and enforce the same by lien arises from the unreasonable detention of the cars in question by appellant, and that such charge is in parity with and in the nature of demurrage as it exists under the maritime law, and not based upon the theory of storage charges; that it was the duty of appellant to take notice of the arrival of his freight and to be present and ready to receive the same when it did arrive, and that having failed to do this, he hav-

ing notice of the rule of the company to charge for the detention beyond the period of forty-eight hours, a car and track service in the nature of demurrage may properly be demanded. The evidence in this case shows that by the enforcement of the rule here insisted upon, the transportation facilities in the car service territory here involved was increased practically one hundred per cent., and that only about seven per cent. of the shippers or consignees, through its operation, hold their cars overtime. If such common carriers must comply with our statute and must furnish transportation for people and freight when demanded, and such companies have made proper provision in equipping their roads with an ample supply of rolling stock, and yet, because of the dilatoriousness or perversity of shippers and consignees, cars may be held indefinitely at loading and discharging points, contrary to the desires and interests of such companies, then it must be plain that the statute must either fall as a dead letter or its enforcement must work great injustice to such companies.

This precise question seems not to have been before this court previous to the present case. In 1891 the attorney general of this state, in an opinion to the Railroad and Warehouse Commissioners in complaint No. 64, Union Brewing Co. of Peoria vs. Chicago, Burlington and Quincy Railroad Co., and complaint No. 71, Lyon & Scott vs. Peoria and Pekin Union Railroad Co., said: "Section 5 of the act in relation to receiving, carrying and delivering grain in this state provides that a consignee of grain transported in bulk shall have twenty-four hours, free of expense, after actual notice of arrival, in which to remove the same from the cars of such railroad corporation. There would seem to be an implied right, under the statute, to charge for a longer detention than the twenty-four hours which the statute names. Indeed, no reason is perceived, in law or justice, why an unreasonable and unnecessary detention of cars by consignees should not be paid for; and the Car Service Association seems, from the proof before us, to be only an agency established to keep account of claims so arising and enforce them. The charges so made were thought to be reasonable, under all circumstances. * * *. Demurrage is an important subject, which has arisen in a practical way only within late years and long after our statute for the regulation of railroads was passed.

It does not, however, follow that because there is no statutory regulation of the question there is no law."

Mr. Elliott, in his work on Railroads (Vol. 4, Sec. 1567), says: "But while it is probably true that this right is derived, by analogy, from the maritime law as administered in America, the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases. As said by one of the courts, 'we see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea.' After a carrier has completed its services as such, it has a right to charge extra compensation for storing the goods in a warehouse and keeping them, after the consignee has had a reasonable time in which to remove them. Why, then, when its duties as a carrier have been performed and a reasonable time has elapsed, is it not as much entitled to additional compensation for the use of its cars and tracks as for the use of its warehouse? Certainly a customer whose duty it is to unload, or who unreasonably delays the unloading, of a car for his own benefit, ought not to complain if he is made to pay a reasonable sum for the unreasonable delay caused by his own act. But this is not all. The public interests also require that cars should not be unreasonably detained in this way." And to the like effect are Miller vs. Georgia Railroad Co., supra; Norfolk and Western Railroad Co. vs. Adams, 90 Va., 393; 44 Am. St. Rep., 916; Darlington vs. Missouri Pacific Railroad Co., 72 S. W. Rep., 122; Interstate Commerce Commission vs. D., G. H. & M. Ry. Co., 74 Fed. Rep., 803; American Warehouse Ass. vs. Illinois Central Railroad Co., 7 Interstate Com. Rep., 556.

Nor do we think it necessary to the existence of such lien that it arise from a specific contract providing for the same, but that such right and contract may arise by implication, as in the case of warehouse charges to a railroad company that has stored goods transported by it when not received by the consignee promptly at the place of delivery. Miller vs. Mansfield, supra; Merchants' Dispatch and Transportation Co. vs. Moore, 88 Ill., 136; Illinois Central Railroad Co. vs. Alexander, 20 id., 24; Darlington vs. Missouri Pacific Railroad Co., supra; Barker vs. Brown, 138 Mass., 340.

It is claimed, however, by appellant that the case of Chicago and Northwestern Railway Co. vs. Jenkins, 103 Ill., 588, lays down the rule contrary to the views we have above expressed, and that that case should be controlling in the present case. We think not. That case seems to have related to or grown out of the shipment of goods in less quantity than a carload lot. The character of the goods was of a perishable nature, and such, if removed from the cars, must be stored, and in distinguishing that case from cases under the maritime law, and denying that the rule applicable in contracts of shipment under the latter law applied to railroad companies, it was said (p. 600): "But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights; owners of vessels have none. Railroads discharge cargoes carried by them; carriers by ship do not, but it is done by the consignee." Thus, it will be seen that the court could not have had in mind the case of the shipment of goods of the character here involved by carload lots, and where the undisputed evidence shows that the rule is that such freight shall be loaded by the shipper and unloaded by the consignee, and that railroads do not have warehouses in which to store that class of goods.

Appellant contends that the trial court erred in not permitting him to show, as tending to show whether the coke was unloaded within a reasonable time, the distance from his house to the station where said car was placed for unloading. In this, we think, there was no error. If such is the rule, and as there was 57,000 pounds of coke in this shipment, and it should appear by the evidence that the distance from the consignee's home to the station should be such that but one load of coke could be hauled a day, and that a ton at a load was all that could be hauled, taking the condition of the roads into consideration, then according to appellant's contention, he would be entitled to hold the cars in question at this place, without charge, for more than a month. Such a rule would practically take out of business, under the supposed case, the rolling stock of a company for one-twelfth of the year, to the prejudice of other shippers and to the detriment of the public interests. The correct rule must be that the consignee shall have a reasonable time, after having knowledge of the arrival of his freight, to get the necessary help and means to remove

the same; and it cannot be presumed that he is to do this by the employment of the fewest number of persons or teams that can be employed at such work, and at the same time have it said that any effort whatever is being made to remove the freight. No circumstance is shown here why a number of teams and abundance of help could not have been obtained, by proper effort, to have unloaded this coke within the forty-eight hours fixed by the rule, allowing for the Sunday; and if it could not, it cannot be maintained, as we think, that appellee should stand the loss of appellant's failure or inability to discharge his duty and perform his contract. Circumstances might arise, and doubtless will, in such cases, when, in determining what shall be a reasonable time, many things are necessary to be taken into consideration, but the distance that the commodity is to be hauled when removed from the company's cars, it would seem, should not be one of them.

It is urged, further, that a lien ought not to be accorded common carriers in such cases, but they should be left to their action upon the case or in assumpsit. There is no law preventing the sale, by the consignee, of the cargo, at the point of destination, to one or many persons who may be wholly irresponsible and as against whom suits would be unavailing. The object of such a rule cannot be so much for the recovery of a revenue as the enforcement of a rule that is to the benefit of all the shippers, and thereby a public benefit. The charge must be said to be little more than nominal, and yet the evidence discloses that its imposition in such cases has had a highly beneficial effect. No question is made as to the reasonableness of the charge, and if there were, it could have no effect in the case at bar, for the reason that appellant absolutely denies the right of appellee to any charge of compensation and made no tender of any portion of it. Russell vs. Koehler, 66 Ill., 459; Hoyt vs. Sprague, 61 Barb., 491; Schouler on Bailments, Sec. 125.

The views above expressed as to the rule obtaining to such charges, whether regarded as storage charges or demurrage or car service, seems to be in keeping with the weight of the modern decisions upon the questions, and, we believe, will tend to the public welfare.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

SUPREME COURT, STATE OF MISSISSIPPI.
OCTOBER TERM, A. D. 1903.

NEW ORLEANS & NORTHEASTERN R. R. CO.

VS.

A. H. GEORGE & CO.

UNREPORTED.

Hon. Albert H. Whitfield, Chief Justice.
Hons. S. S. Calhoun and Jeff Truly, Associate Justices.

On the 16th day of November, 1903, the following opinion was rendered and delivered by the court.

Truly, J., reversed and remanded.

STATEMENT OF FACTS.

On the 3rd day of February, 1902, A. H. George, doing business as A. H. George & Company, instituted this suit in replevin against the New Orleans and Northeastern Railroad Company for eighty-six tons of cotton seed hulls contained in five box cars in the possession of defendant company, charging that the same was wrongfully detained by the railroad company. Upon the trial the railroad company contended that the plaintiff was not entitled to the possession of the hulls because of failure on his part to pay certain "demurrage" charges which the railroad company was entitled to under certain rules of the "Alabama Car Service Association" and the Mississippi Railroad Commission. The rules referred to are as follows:

ALABAMA CAR SERVICE ASSOCIATION.

RULE I.

Per Diem Charges.

All property shipped in carload lots shall be subject to car service and trackage charges in accordance with the following regulations:

A charge of one dollar per car per day or fraction thereof shall be made for the delay of cars and the use of tracks within the following described territory, after forty-eight hours from arrival thereat, not including Sundays or legal holidays.

RULE II.

Rules for Reckoning Time.

On cars arriving during the forenoon after 7 a. m. and held for orders from consignees, car service will be charged after the expiration of forty-eight hours from 12 m. of that day, and on cars arriving after 12 m. to and including 7 a. m. of the following day, car service charges will commence forty-eight hours from 7 a. m. of the following day, provided notification has been given during that day previous to this time. Should notification not be given within the time, car service will commence forty-eight hours from the hour of notification.

On cars consigned to team tracks or private tracks and which may be so delivered on advance or standing orders from consignees, car service will be charged after the expiration of forty-eight hours from the time such cars are placed on the tracks designated.

RULE III.

Cars for Delivery on Team Tracks and Private Sidings.

Cars containing freight to be delivered on team tracks or private sidings shall be delivered on the track designated immediately upon arrival, or as soon thereafter as the ordinary routine of yard work will permit.

(a) The time consumed in placing such cars, or in switching cars for which directions are given by consignees, after arrival, shall not be included when computing detention.

(b) The delivery of cars consigned to or ordered to sidings used exclusively by certain firms or individuals located on such sidings shall be considered to have been effected either when such cars have been placed on the siding so designated; or, if such sidings be full, when the road offering the cars would have made delivery had such sidings permitted.

(c) No cars shall be held from delivery in any manner, provided it is possible to secure their delivery, and the manager is charged with the duty of seeing that the purposes for which this association is formed are not evaded by the action of any railroad company.

(d) On deliveries to sidings used exclusively by certain firms or individuals located on said sidings, and where consignees or consignors refuse to pay, or unnecessarily defer settlement of bills for car service charges, the agent will decline to switch cars to the sidings where such parties are located, notifying them that deliveries will only be made to them on the public delivery tracks of the company after the payment of freight charges at his office, and will promptly notify the manager of the action taken.

RULE IX.

Collections.

Agents will collect car service charges accruing under the rules of the association with the same regularity and promptness as other transportation charges, and the manager is charged with the duty of seeing that these rules are enforced without discrimination.

(a) It is the duty of the agent to demand car service on all cars before delivering them where car service has accrued between notification and ordering. It is also the duty of an agent, where he has any doubt about car service being paid, to demand one dollar car service at the end of the free time allowed for unloading cars, and if said car service is refused, to decline to deliver the car and to allow the lading to be taken from it, either by sealing the car, locking the car, or placing it where it is not accessible to consignee.

(b) All collections for car service charges shall belong to the road upon whose tracks the cars are detained.

(c) Railroads shall not discriminate between persons in car service charges. If a railroad company collects car service from one person, under the car service rules, it must collect of all who are liable.

RULE XII.

Storage.

No railroad company, member of this association, shall provide free storage in its freight warehouses of contents of loaded cars subject to car service charges, but any railroad company may unload cars subject to car service charges into its own warehouse or into public or private warehouses subject to the following rule and regulations:

MISSISSIPPI RAILROAD COMMISSION.

RULE I.

Railroad Companies to Give Prompt Notice of Arrival of Goods.

Railroad companies shall give prompt notice by mail or otherwise to consignee of arrival of goods, together with weight and amount of freight charges due thereon, and when goods or freight of any kind in carload quantities arrive, said notice must contain letters or initials of the car, number of the car, net weight and the amount of the freight charges due on the same. Storage and demurrage charges may be assessed if the goods are not removed in conformity with the following rules and regulations. No storage or demurrage charges, however, shall in any case be allowed, unless legal notice of the arrival of the goods has been given to the owner or consignee thereof by the railroad company.

RULE II.

Definition of Legal Notice.

Legal notice referred to in these rules may be either actual or constructive. Where the consignee is personally served with notice of the arrival of freight, free time begins at 7 o'clock a. m. on the day after such notice has been given.

RULE IV.

Demurrage on Loaded Cars, How Assessable.

Loaded cars, which by consent and agreement between the railroad and consignees, that are to be unloaded by

consignees, such as bulk meat, bulk grain, hay, cotton seed, lumber, lime, coal, coke, sand, brick, stone and wood, and all cars taking track delivery, which are not unloaded from cars containing same within forty-eight hours (not including Sundays or legal holidays) computed from 7 a. m. from the day following the day legal notice is given of its arrival and the car or cars are placed accessible for unloading, may be subject thereafter to a charge of demurrage of one dollar per car for each day or fraction of a day that said car or cars remain loaded in the possession of the railroad company; it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and when the period of such demurrage charges commences they are to be placed accessible to the consignee for unloading purposes on demand of the consignee; provided, however, that if the railroad company shall remove such car or cars after being so placed, or in any way obstruct the unloading of the same, the consignee shall not be chargeable with the delay caused thereby; provided further, that when consignees shall receive four or more cars during any one day loaded with lumber, laths, shingles, wood, coal, lime, ore, sand, or bricks, and all cars taking track delivery, the said cars in excess of three shall not be liable to demurrage by any railroad company until after the expiration of seventy-two (72) hours.

Plaintiff was engaged in the wholesale feed and grain business in the city of Meridian; he handled large numbers of cars of hulls, feed stuff, grain and other commodities requiring track delivery; some of these cars were unloaded at Meridian, some re-billed to other points. For convenience in unloading and handling freight, George had leased a portion of a warehouse, which was located on a spur track known as the "compress track," the larger part of which was used by the Cotton Compress Company and other concerns, and as their warehouses were situated further up the spur track all of the cars used by them had to pass over that portion of that track to the use of which George was entitled, thus necessitating the re-switching and replacing of his cars; but the lease to George was made with full knowledge on his part of this condition of affairs. George's warehouse only had trackage for four cars. It was the usual course of dealing between George and the railroad company that the cars were to be set into

his side track on arrival, without special demand, and the representatives of the Alabama Car Service Association would check the cars on the track each day to see that there was no unnecessary delay in the switching and placing of the cars. The New Orleans & Northeastern Railroad Company had also an employe who was charged with the duty of checking all cars on the track, and this double checking was recorded in books kept for that purpose and the results compared to guard against errors.

On Saturday, Dec. 7th, 1901, a train of 12 cars loaded with cotton seed hulls, loose in bulk, reached Meridian, consigned to A. H. George & Co. On arrival, this train was placed on the "storage track," appellant contending that it was necessary on account of the crowded condition of the "compress track." On Monday, 9th, the compress track being still crowded with cars, the train was switched to the "waterworks track." It was shown that at this date the railroad business at Meridian was extremely large; every track was in constant use; every car needed for the transportation of cotton and other freight. On the same day notice of the arrival of this freight was sent to George, but he declined to receive the freight bill, claiming an overcharge. George denied that the freight bills were tendered to him, but he paid the freight charges on the 12 cars of hulls on the 13th inst., and either that day or a few days thereafter had the overcharge corrected. George knew of the rules of the Alabama Car Service Association; was familiar with the provisions regarding demurrage; had paid some demurrage and had refused to pay some, and at this date had a dispute or litigation pending about another matter of demurrage.

None of the cars composing this train were placed in front of the warehouse of George; the Car Service Association's representative and the railroad company's car checker both testified that at no part of the "free time" after the arrival of this train did George have less than four cars on his side track, and an inspection of their original books corroborates this. George was notified during the free time that demurrage would accrue, and shortly after the "free time" expired he was again advised of this claim and then and there denied his liability, denied the right of the railroad company to claim demurrage and refused to pay.

The manager of the Car Service Association instructed the railroad company not to deliver the cars until the demurrage was paid.

So matters stood until about the 1st of February, 1902, when the railroad company released six of the cars to George and notified him of its intention to sell the contents of the remaining six for the demurrage on the 12. Thereupon this suit was filed for the contents of five, the hulls in the other proving worthless. At the conclusion of the testimony the court refused a peremptory instruction for the defendant and submitted the case to the jury under instructions for both sides. The jury found for plaintiff and the Northeastern Railroad Company appeals.

OPINION OF THE COURT.

TRULY, J.—This suit involves the determination of the following questions:

First—Are the rules for the collection of demurrage valid; and

Second—If so, how are they to be enforced?

Car service associations are formed by mutual agreement among the railroad companies operating in a stated territory; they owe their existence to the growth of the business interests of the country, the enormous increase in the bulk of through freight handled daily and the consequent extension of the many railroad systems handling the same. With every increase in the volume of the freight brought into a section from distant markets, hauled without unloading over the tracks of many connecting systems of the same gauge, it became more difficult for each carrier to keep track of its own cars. As the cars of each system were handled indiscriminately by every other system, they soon drifted to every quarter as the current of traffic ebbed or flowed and their whereabouts were often unknown to the carrier owning them. To correct this evil, car service associations were formed, the primary object of which was to prevent loss by keeping a daily record of every car handled by each carrier, so that each system might receive compensation for the use of its rolling stock and no unfair advantage taken by one system over another; and further

to prevent cars standing idle at one place when needed to meet the traffic and demands of another section of the country. These organizations had a beneficial effect in preventing congestion of empty and idle cars at one point while a car famine prevailed at another. But it soon became apparent that the remedy was not complete; carriers earned money by the moving of freight; the idle car produces no revenue and the car service associations found that while it was possible under its then existing rules to keep the unloaded cars moving from place to place as necessity might require, they were without power to have the freight promptly unloaded by the consignee thus securing the car for further service.

The merchant who bought goods for sale from his shelves or through his warehouse was ordinarily anxious to receive and unload his freight, but the broker who wished to do a large business with limited or no warehouse facilities found it cheaper and more convenient to use the cars of the carrier for storage purposes and thus with no expense to him wait a favorable fluctuation of price when the commodity could be disposed of to advantage and the car unloaded or re-billed to another place without unloading. To meet this contingency the demurrage rules in question were formulated and promulgated.

It should be noted that the purpose of car service associations was not to make money; they increase the revenue of the contracting carriers only incidentally in that, by keeping every car in active service, the earning capacity was constantly exerted and the returns therefrom increased; but the prime object of their formation was to observe and promote the mutual interests of the carriers and the public dealing with them, by improving the service of the traffic department and insuring the prompt handling and speedy delivery of freight to the consignee.

It is admitted that the amount charged under the demurrage rules is reasonable, and it appears to us that the rules in themselves are fair and based upon the fundamental maxim of justice, "the greatest good to the greatest number." The carrier of freight is responsible in damages if it unreasonably delays the transportation of freight delivered to it and exact justice demand equal diligence of the consignee.

When freight has been transported to its destination and the consignee legally notified of its arrival it then be-

comes the duty of the consignee to promptly receive the same, so that the car may again be placed in service. These rules work no hardship to the consignee who displays proper diligence in the handling of his freight ample time is granted him, but they prevent the dilatory dealers who seek to save storage or warehouse charges from keeping the track blocked with idle cars, thereby impeding the carriers in the prompt handling of freight and depriving other dealers of the use of necessary cars to haul their freight or transport the product of the country to market.

Certainly no reason founded in justice, can be given why consignees should not pay for any unreasonable or unnecessary detention of cars. Prompt handling of freight by both carrier and consignee is for the best interest of both and of the commercial world at large.

The question was never before in this court, but this view is in full accord with an almost unbroken line of decisions in other states, and precedent aside, it is supported by justice and right. Norfolk & W. R. Co. vs. Adams, 90 Va., 393, 22 L. R. A., 530; Kentucky Wagon Mfg. Co. vs. O. M. Ry. Co., 98 Ky. 152, 36 L. R. A., 850, and cases cited. They have also been approved by the railroad commissions of various states who are charged with the duty of guarding the interest of the public.

It is well settled that railroad companies may make reasonable rules and regulations, not to limit their own duty or liability, but for the convenient transaction of business between themselves and the shippers of freight over their lines.

Having reached the conclusion that the rules imposing reasonable demurrage charges upon dilatory consignees are fair, just and enforcible, we now pass to a consideration of the manner of their enforcement.

It may be borne in mind that the duty of the railroad company as a carrier of freight terminates under the decisions of our court when, the freight having reached its destination in good order the consignee is legally notified of its arrival, after that time the railroad holds as warehouseman and bailee for hire. But in the present case whether appellant held as carrier or as warehouseman and special bailee it was in either of these capacities, rightfully in possession and had the right to retain that possession until its legitimate charges were paid. This is a suit in re-

plevin in which right of possesson is the only question of law involved. If there was any sum due appellant, whether little or much, the verdict should have been that it retain possession.

It is earnestly insisted that the railroad company has no lien on the freight for demurrage charges either by statute or at common law. It may be true that there is a technical distinction between the lien here claimed and the common law lien, though the difference is more imaginary than real; but it is undoubtedly true that the warehouseman as bailee for hire has a lien for his reasonable charges and this is recognized as to warehousemen by the express terms of Section 2108, Code 1892, in which a lien is given for freight and storage coupled with a power to sell in a manner therein pointed out. If a carrier has a lien for storage charges if the freight is unloaded into a warehouse upon what principle can it be denied if by the action of the consignee the cars themselves become his storage houses? Particularly when, as in this case, the consignee knows in advance by his course of dealing with the carrier that the charges will be incurred if he delays in receiving his freight. In our judgment, by necessary implication the Code Chapter on freight and storage carries with it the necessary lien to enforce the collection of all reasonable charges incident to the handling of freight. In a case of this character, involving the dealings of a carrier and public, the courts will not narrowly restrict the meaning of a statute, but will rather "expand the principles" of law and "fit them to the exigencies of the occasion," as was aptly phrased by the eminent jurist, Chief Justice Cooper, in discussing a similar proposition (66 Miss., 555). Knowing the rules governing the transaction, the voluntary action of the consignee gives an implied assent to the charge and lien which those rules assert.

By the sole action of the consignee the carrier is forced to retain the possession of the freight; by operation of law, it is required to keep, store and care for the property of another; it is under the law entitled to compensation for its services in this connection and the law gives it a remedy to enforce its right. In the case of Wolf vs. Crawford, 54 Miss., 514, our court, in discussing the right of a carrier as a bailee, said: "But the right of the general owner (of the freight) to be restored to the possession is dependent on the payment or tender of the freight and other charges

on the goods of the carrier. For these he had a lien which would be lost if he had parted with the possession; and he cannot be compelled to make delivery until they are discharged. The general owner cannot dispossess the carrier of the goods without payment or tender of his legal demands upon them."

Again:

"But a bailee until the condition of the bailment have been accomplished has a property in the chattels and the possession which is exclusive, both as to the general owner and strangers his right and possession extend to the entire property; nor can the bailor, or any one claiming through him, interrupt and defeat his rights until a satisfaction of his claim or an offer to do so. The common carrier, warehouseman and all the class of bailees who have a beneficial interest have a right of possession and a lien in the thing. These rights are inviolable until the acts and purposes for which they were created are performed."

In Miller vs. Ga. R. R. Co., supra, after stating the general rule that a carrier had a right to collect reasonable storage, the opinion proceeded:

"We do not think it material as affecting the right to make a charge of this character that the goods remained in the car instead of being put into a warehouse." (28 Am. Eng. Ency. L., 663; Dixon vs. Central of G. R. R., 35 S. E. R., 369; Barker vs. Brown, 138 Mass., 240).

There is no force in the argument which conceded the right of the carrier to make demurrage charges but contends that the goods be delivered and then the carrier sue for the amount. This course would give the dishonest and insolvent an unfair advantage and would breed a multiplicity of suits.

It is contended for appellee that whatever may be the general rule in the instant case, the appellant should be defeated of its recovery because it failed to bring itself within the rules allowing demurrage in this. It failed to notify the consignee in the manner pointed out, and it failed to tender delivery of the freight as required by the rules of the car service association. As to the first contention, it is enough to say that the object of the rule was reached and the law fully complied with when George was advised

of the arrival of the twelve cars, though, if the testimony of all, as supported by the entries in his notice book, be true, the rule was literally complied with.

As to the second contention, there is conflict as to the fact. It is true that the cars were not in fact placed in front of George's warehouse, but the testimony does not clearly show that it was the fault of the appellant. On the contrary, the testimony of Fewell, the representative of the Car Service Association; of Lowery, car checker of appellant company, supported by the contemporaneous entries in their record books, if believed by the jury, show conclusively that during all of the "free time" to which appellee was entitled under the rules, placing in front of George's warehouse was prevented by an accumulation of cars consigned to George himself. This is contradicted by Shepherd, car checker for appellee, while appellee himself testified that "there was no place to deliver them; they had our track full of cotton."

With the sharp conflict of testimony on this point, Clause "B," of Rule III, must be considered. "The delivery of cars consigned to or ordered to sidings used exclusively by certain firms or individuals located on such sidings, shall be considered to have been effected either when such cars have been placed on the sidings designated; or, if such sidings be full, when the road offering the cars would have made delivery had such sidings permitted.' It was claimed by appellant that the cars would have been placed on siding on arrival had the siding permitted; there is much proof that the siding was full. Whether the siding was filled with cars consigned to George or to the Cotton Compress, in either event appellant was excused from delivering upon the siding. If George had his full quota of cars, then he had no ground of complaint. If the siding was filled with cars for Compress, it had equal right to use of siding and appellant is not liable.

The court correctly instructed the jury on the point by fifth instruction for defendant, but also gave the second instruction for plaintiff, and in the light of our conclusions, this was error. By this instruction the jury was told that it devolved upon defendant to prove by a preponderance of the evidence that it notified plaintiff of the arrival of the cars, and placed them on the side track adjacent to plain-

tiff's warehouse, or "to show circumstances of excuse or justification therefor."

This was misleading. By it the determination of certain questions was submitted to the jury, whereas, in fact, the questions were not in dispute. The jury did not have to pass on the question of notice; George's own testimony leaves no doubt of his knowledge of the arrival of the cars. In the light of the instructions for the defendant the jury were left in doubt as to what was meant by "circumstances of excuse or justification therefor." To sum up the sole question of disputed fact involved in this record, is: was the siding so filled with cars consigned to George, or to others entitled to use the side track as to prevent the railroad company placing the cars until after the expiration of the "free time." If so, the railroad was entitled to the verdict; if not, George should recover. Upon this sole question is there sufficient conflict to justify the submission of the cause to the jury for determination.

The ingenious but fallacious argument is made that the railroad company should not be permitted to claim the fact, if fact it be, that the siding was full of cars consigned to the Compress as "an excuse or justification," in the language of the second instruction for plaintiff, for the failure to place the cars in question, because of the unjust favoritism shown the Compress Company by the railroad company in not charging demurrage on cars loaded with cotton. This is not within the condemnation of the rules. Clause "C," Rule 9, prohibits discrimination between persons, and says that if the car service be collected from one person it must be collected of all who are liable. This is to prevent discrimination between persons handling cars loaded with the same class of freight. So that if car service is collected from one dealer handling hulls, or flour, or grain, or other class of freight, it must be collected from all dealers handling the same class of freights. But in the instant case, car service was collected from no car loaded with cotton or coal, no matter by whom handled, anywhere within the territory covered by the Alabama Car Service Association. It is to be seriously doubted whether, under the undisputed testimony of the assistant manager of the Alabama Car Service Association, the carriers have the authority to impose car service on the cars loaded with cotton or coal. We know of no reason why we should condemn as unlaw-

ful or unjust the exemption of cars loaded with cotton or coal from car service charges, while many reasons present themselves to commend the equity of the rule. In construing the language of said second instruction the jury might well have inferred, in considering all the instructions together, that even though the siding was filled with cars for George or the Compress this was no "excuse or justification" for the appellant because no car service was collected of the Compress. And this position is not maintainable.

For the error in giving the second instruction for plaintiff above referred to which is in itself erroneous and misleading and is in conflict with the other instruction for both plaintiff and defendant, the case is reversed and remanded and a new trial awarded.

As a new trial must be awarded for the error indicated, one further question presents itself for decision: Did the railroad company forfeit its claim for demurrage upon the six cars released by releasing the six cars and holding the remaining six for the charges upon the entire twelve. The twelve cars in question constituted one shipment belonging to one owner received at the same time; further, a different amount of demurrage was due (if any was due) upon four cars from what was due upon the remaining eight there was no way to distinguish the four cars from the eight except by arbitrary selection. The cars were all loaded with the same commodity loose in bulk.

In 28 Am. and Eng. Ency. L. the rule is stated: "The lien (for storage charges) is a right to retain possession of the goods until the satisfaction of the charges imposed upon them; it is specific upon the goods stored for the particular charges for such storage, although the entire lien extends to every parcel of the goods stored at any one time."

In Schmidt vs. Blood, 24 Am. Dc., 143, it is said: "A warehouseman has a lien upon the balance left in his hands of an entire lot of merchandise entrusted to him at the same time, after delivery of part for the storage of the whole. And the same conclusion is reached in Steinman vs. Wilkins, 42 Am. Dec., 254, a thoroughly well reasoned case and fully supported by citation of numerous authorities.

In Penn. Steel Co. vs. Ga. R. R. & B. Co., a recent case reported in 94 Ga., 636, it was decided that a railroad company had the right to retain from each consignment one or more cars to secure itself for the freight and demurrage it claimed on such consignment. And we think this the true and just rule, supported by reason and the more modern decisions.

We are unable to see why it should be required of the carrier that it retain twelve cars loaded with a commodity, belonging to the same owner, when the contents of a fewer number of the cars is sufficient to liquidate its charges on all, especially in a case where, as in the instant case, a dispute has arisen as to the validity of the charges claimed, and the consignee is willing to receive the contents of the other cars. As stated, the conclusion of the Supreme Court of Georgia occurs to us as being the just, sensible and convenient rule. It avoids the sale of a large amount of freight for the collection of a trifling sum; it saves the consignee the possibility of a loss by the sacrifice of his property at a forced sale, and it gives the carrier the speedy use of its cars for the moving of other freight. We note nothing in the rules under consideration forbidding such action, and it commends itself to us as being the proper course.

If the question of fact be decided in favor of appellant that it is entitled to demurrage in this case, the six cars retained by it are liable to the charges for the entire twelve constituting the shipment.

For the reasons hereinbefore stated, the case is reversed and remanded.

I, George C. Myers, Clerk of the Supreme Court of Mississippi, do hereby certify the foregoing to be a true copy of the opinion of said court, delivered in the cause hereinbefore stated, as the same appears of record in my office.

In testimony whereof I hereunto set my hand and seal of said court at office at Jackson this 19th day of November, 1903.

GEORGE C. MYERS, Clerk.

DISTRICT COURT, BLACK HAWK CO., IOWA.
JANUARY TERM, A. D., 1904.

UNREPORTED.

Iowa Statute under which Ill. Central, C. G. W. and C. R. I. & P. were Indicted for Conspiracy in Agreeing to Car Service Rules, Declared Unconstitutional.

FACTS.

August 1, 1902, car service rules became effective throughout a large portion of Iowa. Townsend & Merrill, a lumber firm, doing business at a number of points, took counsel of state authorities, and refused payment of the first charges accruing; cars were, therefore, held for car service due, which was later paid under protest. Indictments, based on above action, were then secured against the Illinois Central Railroad Company, Chicago, Great Western Railway Company, and Chicago, Rock Island and Pacific Railway Co., through the grand jury at Waterloo, Iowa.

STATUTE CLAIMED TO HAVE BEEN VIOLATED.

Iowa Code, Sec. 5060, Pools and Trusts. Any corporation organized under the laws of this or any other state or country, for transacting or conducting any kind of business in this state, or any partnership, association or individual, creating, entering into or becoming a member of or a party to any pool, trust, agreement, contract, combination, confederation, or understanding with any other corporation, partnership, association, or individual, to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, shall be guilty of a conspiracy.

Sec. 5062, Penalty. Any corporation, company, firm or association violating any of the provisions of the two preceding sections shall be fined not less than one per cent. of its capital or amount invested in such corporation, company, firm or association, nor more than twenty per cent. of the same; and any president, manager, director, officer, agent or receiver of any corporation, company, firm or association, or any member of any corporation, company, firm or association, or individual, found guilty of a violation thereof, shall be fined not less than five hundred nor more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or both.

Sec. 5065, Forfeiture of Charter. Any corporation created or organized by or under the law of this state, which shall violate any provision of the five preceding sections, shall thereby forfeit its corporate right and franchise, as provided in the next section.

EXTRACTS FROM DECISION.

(Hon. Franklin C. Platt, District Judge.)

"The indictment charges that the defendants did conspire together 'to fix the time allowed shippers for unloading any commodity from a car upon the railway of any member of said unlawful combination without charge, and to fix the charge for the shipper detaining said car for a longer period than forty-eight hours.' The defendants demur generally and specifically to the indictment. * * * The contention is that the statute is unconstitutional in that it is in contravention of the Fourteenth Amendment to the Constitution of the United States, which is as follows:

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

No question is raised that the legislature did not have the power to enact Section 5060 of the Code, but it is urged that the penalty provided by Section 5062 deprives the defendants of the equal protection of the law. * * * The minimum fine as to the defendants would be, say $600,000, $680,000, and $1,000,000 respectively, while the maximum penalty would be $12,000,000, $13,600,000, and $20,000,000 respectively. But the offense of such defendant is the same, yet one might be required to pay as a penalty $6,400,000 more than another.

This inequality in the protection of the law is slight, however, compared to that when the penalty attaching to a violation of the statute by an individual or by an agent, officer of a corporation, or member of any firm or association, is considered. As to such persons the minimum fine is $500 and the maximum penalty is $5,000. Thus, while a corporation is guaranteed the equal protection of the law, one of these defendants might be fined $19,995,000 more than could be imposed upon an individual, or upon an officer or agent of any corporation, company, firm or association, for the same offense. Such statutes have been uniformly held to be unconstitutional.

In the case of Gulf, Colorado & Santa Fe Railway Co. vs. Ellis, 165 U. S. 150 (quotes): in Leeper vs. Texas, 139 U. S. 462 (quotes); in Cotting vs. Kansas City Stock Yards Co., 183 U. S. 79 (quotes); in Connelly vs. Union Sewer Pipe Co., 184 U. S. 560 (quotes); in Babier vs. Connelly, 113 U. S. 27 (quotes); in Cooley's Const. Limitations, 5th Ed., (quotes).

Another serious objection of the act is the further penalty provided by Section 5065. Here is a clear violation of the constitutional right, in that a very heavy additional penalty is imposed upon domestic corporations, while foreign corporations may escape by paying the fine imposed under Section 5062. If the act is constitutional the corporate right and franchise of the defendant Chicago, Rock Island and Pacific Railway Co. must upon conviction be forfeited, while the defendant, Illinois Central Railroad Co., being an Illinois corporation, would retain its corporate franchise and the right to transact business in this state.

The 8th amendment to the Constitution of the United States and the Constitution of Iowa provide that excessive fines shall not be imposed. If the defendants are guilty as

charged in the indictment they have committed no heinous crime, yet the minimum aggregate fine would be $2,280,000 of which the county attorney would be entitled to the sum of $456,000. In addition to this fine the corporate franchise of one of the defendants would necessarily be forfeited.

I do not think the indictment charges the commission of the offense defined by the act under which it was found. The statute prohibits any combination to regulate or fix the price of any article of merchandise or commodity. If any commodity was affected by the alleged combination, it was no doubt, the use of the car by the shipper. But the indictment does not charge that there was any combination or understanding between the defendants to fix the charge for such use. It charges that the defendants combined together 'to fix the charge for the shipper detaining said car for a longer period than forty-eight hours.' The detention of a freight car is not a commodity.

The demurrer is sustained.

The state excepts."

UNITED STATES CIRCUIT COURT.

CHICAGO COAL SHIPPERS' ASSOCIATION VS. CHICAGO CAR SERVICE ASSOCIATION.

Hon. S. H. Bethea, United States District Attorney, Chicago, Illinois.

Sir: In order that you may have complete information as to the organization and purposes of the Chicago Car Service Association, when you take up for consideration the bill the Commissioner of the Coal Shippers' Association of Chicago has asked the government of the United States to file against the Chicago Car Service Association, the following statement is respectfully submitted:

Prior to the organization of the Chicago Car Service Association, November 1, 1888, an intolerable condition of misuse of the freight car equipment of railways by consignees had for a long time prevailed, and notwithstanding the efforts made to stop the abuses, no influence which the roads individually could bring to bear was of any effect in improving the situation.

The person who, with a desk for an office, could solicit a consignment of freight, would, upon its arrival, take a sample and go about the city to effect a sale, and, failing to find a customer to accept his terms, would hold the car upon the tracks of the railway company without expense to himself until it suited his purpose to remove the freight. When the patience of the first railway company was, after many days and sometimes weeks, finally exhausted, he would upon payment of a small switching charge, order the car switched to the tracks of another railway company, there to repeat the operation, and so on from one railway company to another, until not infrequently months would be consumed before the car would be unloaded. This proceeding, carried on simultaneously by many individuals, each handling numbers of cars, congested the railway terminals and tied up a vast amount of equipment.

Freight was allowed in many instances to remain in cars on sidings until the same deteriorated and depreciated in value so that the railway companies could not by sale realize sufficient to satisfy freight charges. Cars of coal in some instances were held under load until vegetation a foot or more in height grew thereon, and in other cases spontaneous combustion occurred, damaging or destroying the car, and threatening the property in the vicinity of the same.

Again, many manufacturing establishments would order large supplies of material in order that they might take advantage of a favorable price or other special condition of the market. When, owing to their lack of storage facilities, they were unable to unload the freight upon arrival, they would hold the cars indefinitely to suit their convenience.

Consignees with cars on team tracks that were favorably located, by unnecessarily delaying the unloading of the same compelled other consignees to wait their turn, or to unload their cars on less favorably situated tracks.

In general a feeling of indifference prevailed on the part of consignees, and no considerations other than convenience or economy influenced them in releasing the equipment of the railway companies.

This state of affairs existing at their terminals seriously crippled the capacity of the railway companies to adequately serve the public.

The situation at Chicago was not different from the condition that existed at other terminals throughout the country. Twenty-one railway companies, with lines stretching out and connecting with the entire railway system of the United States, had their terminals in the City of Chicago. Freight coming in over these twenty-one lines and terminating at Chicago could be divided into two classifications:

(1) Freight originating beyond or on a Chicago line, and delivered on that line at Chicago.

(2) Freight originating beyond or on a Chicago line, and delivered at Chicago through one or more connecting lines.

From 10 to 50 per cent. of the freight consigned to Chicago was delivered upon the terminals of lines that did not originate the business or bring it into Chicago. To illustrate: A car owned by the Chicago & Northwestern Railway Company, loaded with freight originating either beyond or upon its own lines, could be switched for unloading to a terminal point on the tracks of any of the other twenty railway companies having terminals at Chicago. The Chicago & Northwestern Railway Company had no control over this car after it was switched to the tracks of another terminal railway company in Chicago over which the car might go to reach its destination. This illustration applied to all cars that are unloaded at Chicago.

The result was that unless there was some uniform and reciprocal understanding with reference to the handling of cars at Chicago after they left the lines of the railway which owned and operated them, it might happen that any railway company would be entirely divested of its rolling stock and equipment for the accommodation of patrons of other railway companies.

Without a uniform and reciprocal understanding between railway companies to expedite the loading and unloading of each other's cars, it might have become necessary for a railway company to refuse to permit its cars to go beyond its own line. This would have required the shipper to reload the freight into cars of other railway companies at junctions with connecting lines. The interference and annoyance that would have resulted to interstate commerce from such practice was manifest.

To meet this difficulty, prior to the organization of the Car Service Association the railway companies, by the application, separately and individually, of car service rules, tried to hasten the movement of their own cars on the lines of other railway companies. These rates were not uniform and this plan was found to be impracticable, for the reason that the elements of uniformity and reciprocity between railway companies doing an interchange business were entirely lacking. The business necessities of the country demanded that the railway companies enter into a uniform and reciprocal arrangement with reference to the use of each other's cars when they were allowed to go beyond the jurisdiction of the tracks of the owner of the cars.

At a terminal point like Chicago, where twenty-one railway companies were doing an interchange business, it became manifest that it was necessary to have an association or clearing house that would keep track of the movements of all the cars, and would see to the enforcement of reasonable car service rules.

In such an arrangement there could not be reciprocity without a uniform rate upon all of the railways in the Chicago district. Detentions within the territory wherein a lesser rate was charged would be greater than in the territory wherein a higher rate was charged. In addition to this, many large business interests receiving freight by several lines, in the absence of a uniform car service charge, would be subjected to various and fluctuating car service rates. Smaller business interests, doing business solely over one line, might frequently be placed at a disadvantage in competing for business with those doing business over another line, owing to the difference of car service rates as between the two lines. To illustrate, the cars of the Chicago, Burlington & Quincy Railroad Company went to destinations upon the tracks of every other railway

company in Chicago, and if each railway company had its own rate for car service, independent of the car service rates of other railway companies, there would have been as many different rates upon the cars of the Chicago, Burlington & Quincy Railway Company as there were railway companies in Chicago.

To meet this situation, it was decided by the railway companies, that a car service association should be organized to secure the prompt loading and unloading of cars, and to enforce a reasonable and uniform charge of one dollar per day for unreasonable detention of cars.

On November 15, 1888, the following circular was published in the daily papers of the City of Chicago, and distributed to the patrons of the railway companies:

"To Consignors and Consignees of Freight in Chicago and Vicinity.

"Gentlemen: Having in view the inconvenience and loss to patrons and railroads alike, consequent upon the inability to promptly provide cars requisite for the handling of freight, and believing that such trouble is mainly due to the delay in unloading and loading of cars, the railroad companies have resolved to make an effort to largely reduce, if not abolish this evil.

"In their efforts to accommodate their patrons, the railroads have permitted an abuse of their equipment, which has become intolerable. They fully realize that their own laxity of method is largely responsible for this abuse, and they desire, in applying the remedy, to exercise due moderation, and give no occasion for complaint.

"Notice is hereby given that on and after the 19th day of November, 1888, there will be made a minimum charge of one dollar per car per day, or any fraction thereof, for the use of cars not loaded or unloaded within forty-eight hours after being placed in position to load or unload.

"The railroads desire it understood in adopting this plan that the amount will not compensate them for the loss occasioned by the use of their cars and tracks for warehouse room, and that they will be best pleased when there is least to collect.

"It is manifestly unjust that the shipper who has invested in real estate, warehouse and other appliance-

should have these advantages neutralized by the use of cars as storage room by his competitor, who has not invested a dollar in similar facilities, and who, in tying up and rendering useless for long periods the railroad equipment of the country, contributes to a scarcity of cars which injures not only the railroads, but all their patrons.

"That there may be no discrimination in the enforcement of the rules and collection of the charges herein announced, the entire matter has been placed in charge of an organization which will act for all interests alike."

This circular was signed by twenty-one railways with terminals in Chicago.

The rules put into effect by the foregoing notice are set out in full in Appendix "A." (Ususal Car Service Association rules).

The effect of the enforcement of these rules was immediate. The congestion of cars upon the terminals of the railways in Chicago was relieved, and the entire situation at once became greatly improved.

Prior to the enforcement of the rules above referred to few railway companies kept a systematic record of the detention of cars. The records of the Chicago and Eastern Illinois Railroad Company, then and now a prominent coal carrying road, forcibly illustrate the advantages derived from the enforcement of these rules. The experience of that line is shown in the following statement:

Average detention before inauguration of car service rules.		Average detention after inauguration of car service rules.		Decrease in average time of unloading cars.
Month.	Avge. days.	Month.	Avge. days.	
Dec. 1887	12.20	Dec. 1888	3.22	8.98 days per car.
Jan. 1888	10.60	Jan. 1889	3.15	7.45 " " "
Feb. 1888	12.40	Feb. 1889	2.52	9.88 " " "

During the two months immediately preceding the establishment of car service rules the average detention in unloading cars on the tracks of this road at Chicago was in September, 1888, 15.50 days, and in October, 1888, 14.10 days.

In the case of the Chicago and Alton Railroad, the following statistics have been obtained:

Dec. 1887,	Avg. 8.00	days	Dec. 1888,	Avg. 2.30	days	Decrease	5.70	dys
Jan. 1888,	" 6.50	"	Jan. 1889,	" 1.90	"	"	4.60	"
Feb. 1888,	" 6.00	"	Feb. 1889,	" 1.52	"	"	4.48	"

The experience of the Atchison, Topeka and Santa Fe Railway was as follows:

Dec. 1887,	Avg. 10.18	days	Dec. 1888,	Avg. 2.37	days	Decrease	7.81	dys
Jan. 1888,	" 8.64	"	Jan. 1889,	" 1.96	"	"	6.68	"
Feb. 1888,	" 8.17	"	Feb. 1889,	" 1.58	"	"	6.59	"

During the two months just prior to the adoption of the rules the average detentions were 9.29 days for September and 9.49 days for October.

The records of the association show a steady decrease in the average daily detentions of cars on all roads for the first three months of operation under the car service rules, the number of cars reported and the average detention for each month being as follows:

	Cars handled	Average detention.
December, 1888,	69,010	2.37 days
January, 1889,	55,712	2.19 "
February, 1889,	55,314	1.94 "

So successful were the results obtained that within two years twenty-two car service associations were formed at different points, covering pretty generally the territory between the Great Lakes and the Gulf, Denver and the Atlantic coast. A compilation of the operations of these associations shows that during the months of May, June and July, 1890, there were handled under car service rules 1,220,382 cars, the average detention per car being 1.64 days, against an average detention before car service rules became operative of over four days in the East and six to eight days in the West.

In 1891 some trouble began to be experienced by railway companies whose lines ran through the territory of more than one car service association, over variations of practice and time allowances for the loading and unloading of different commodities, occasioning much embarrassment to the railroad companies and frequent charges of discrimination from patrons. For instance, one railroad company, a member of several different associations (in each association handling for the same individual, firm or

corporation, some particular commodity upon which in one territory 48 hours' time was allowed, in another additional time was given, and in a third still more time was allowed), could not explain upon any reasonable basis why the same car containing the same commodity should under substantially the same conditions have while upon the same railroad different time allowances at different places. The result of an investigation extending over nearly the entire country, showed that about 95 per cent. of the cars reported to the various associations were released within the time limit of 48 hours. As this allowance was found to be well adapted to requirements, it came to be generally adopted as the standard.

The administration of car service rules throughout the country has from the outset been placed in the hands of bureaus known as car service associations, each under the charge of a manager. Under the intelligent and impartial administration of the rules by the managers of the various associations, the usefulness of car service regulations has increased steadily from year to year until the calendar year 1903 there were handled by the car service associations of the country, 28,634,020 freight cars, upon which the total average detention per car was but 1.69 days.

Results equal to those obtained at Chicago in 1888 were obtained at other and smaller points at later dates by extending the jurisdiction of the association.

Notice was served July 15, 1902, that association rules would apply at Joliet, Illinois, beginning August 1st of that year. Records have been secured for 560 cars held on the tracks of the Elgin, Joliet and Eastern Railway at Joliet for 40 days or more which were handled previous to August 1, 1902; the total detention for such cars was 41,906 days, the average 74.83 days; 54 of the cars were held more than 100 days.

The average detention in days for cars held by the Elgin, Joliet and Eastern Railway at Joliet, Illinois, from June 1 to October 30, 1902, by months, was as follows:

June,	1902,	8.29 days	Prior to the adoption of car service rules.
July,	"	4.28 "	
August,	"	1.41 "	After the adoption of car service rules.
September,	"	1.19 "	
October,	"	1.06 "	
For the year	1903,	1.50 "	

During the period of nearly sixteen years that the Chicago Car Service Association has been in existence the number of cars handled has increased from about 600,000 the first year to 1,828,045 for the year 1903. Ninety-two and eighty-seven hundredths per cent. (92.87) of the cars reported during the past year were released within the time allowed for unloading, and the total average detention of cars by consignees was 1.71 days.

The rules of the association have been adjusted from time to time to establish a better understanding of those functions which are the obligation of the carrier, and those which constitute the proper duty of the shipper or consignee.

The Agreement and Rules of the association in force at the present time are attached to this statement as Appendix "C."

The principles underlying the Rules are as follows:

1. Any action or omission on the part of a shipper or consignee which operates to cause unreasonable delay in the movement of a car or its release for further service, is made the basis of a charge for such use or detention of the car.

2. No charge is made against a shipper or consignee for any detention of a car for which he is not responsible.

3. No car service charge is ever made until after reasonable time has been allowed for the use of the car, and a reasonable charge is then made for such further detention of the car as may be desired by the person in control of it.

4. All car service charges are based on the rate of one dollar ($1) per car per day, for the working days of the year; no charge being made for Sundays and legal holidays.

5. All storage charges are based upon the car service rate, and are as nearly as may be an exact equivalent.

6. Concessions to public necessity and to established customs of trade have been made by the allowance of additional time on coal and coke, grain, baled hay and straw. Further concessions are made by exemption of commodities likely to be injured by inclement weather.

7. In cases of doubt and where justice demands it, the manager is vested with authority to give relief from charges which have accrued and to order the refund of charges collected.

8. To interpret the rules equitably and to direct their application justly and alike for all railroads, shippers and consignees, the manager is given supervision of all cars within the territory of the association.

9. The organization of which the manager has charge consists of inspectors, accountants and the necessary clerical force to enter upon the records the car reports received daily from the different railways. No car service or storage charges are collected by the manager or any employe of the association; the function of the association being merely that of a bureau of record, inspection, supervision and adjustment.

In addition to the strictly railroad considerations, there are economic principles underlying the rules, the consideration of which is essential to a full understanding of the car service question.

In a limited sense the function of a railway company is to furnish cars for the movement of freight. From movement only does it derive adequate revenue. Its highest interest, therefore, is to stimulate such movement that the largest number of cars may with the greatest frequency be used for freight transportation. These considerations, therefore, impel the railways to place their car equipment promptly at the disposal of shippers, require the cars to be promptly loaded, move them expeditiously to their destinations, and there to be unloaded with reasonable diligence that they may again become available for loading.

These considerations have little influence with the shipper and still less influence with the consignee.

In this connection attention is called to the Coal Shippers' Association of Chicago, at whose instance this bill is sought to be filed. This Association consists of sixty-two members, of whom only three are exclusively miners of coal. Of the others, twenty have some interest in mines, but are primarily jobbers and many of them retailers. Thirty-nine are exclusively coal dealers. The membership is, therefore, made up of those whose primary interests

justify their classification as three producers and fifty-nine dealers in coal. Of these sixty-two members, fifteen only have yards in which a supply of coal may be stored for the purpose of conducting their business. The remaining forty-seven members are dependent at Chicago entirely on track facilities of the railway companies and the use of cars for storage purposes. As it is necessary for coal dealers to carry at all times some stock of coal on hand, such dealers as the forty-seven above referred seek to use cars for storage purposes, and the resulting expense of car service has always been to them a source of contention.

Car service rules stand as a bar to the control and manipulation of the soft coal market of Chicago. So long as the regulations of the railway companies compel the prompt unloading of cars, the supply of coal for current use in the city is ample, and there is a rapid return of cars to the mines for reloading, with the result that the mines are regularly operated, the current of traffic steadily maintained by the railways, the consumers in the city abundantly supplied, and normal prices prevail in the coal market.

The miners of coal and likewise the consumers, are dependent entirely upon the supply of cars to maintain normal conditions. The movement of coal to Chicago is an unending stream, and so inadequate now are the storage facilities of consignees that the city is dependent upon the daily movement of cars to maintain its supply for even a short time. Any interruption or a cessation for a few days of the coal movement of the railway companies will produce a shortage of coal. While the rules of the car service association cannot prevent the holding of cars for speculative purposes in times of serious disturbance and cessation of work at the mines, they ordinarily exert a deterrent effect upon manipulation of the supply and speculation in the price of coal.

It will be seen from the above that the car service charges are not a fixed charge upon all freight coming into Chicago, but only originate by reason of the action of the shipper or consignee. Ninety-three per cent. of the freight handled at the terminals in Chicago does not pay any car service charges. The Car Service Association is one of the few associations in the commercial world that, as its efficiency to the public is increased, the revenues of its members from car service decrease.

In 1888, prior to the formation of car service associations, the average detention to cars under load was, as near as can be ascertained, at least five days per car. In 1903, after the car service association rules had been in force and effect for a period of fifteen years, the average time was 1.69 days per car. The usefulness of the association is conclusively demonstrated when it is considered that in 1903 28,634,020 cars were handled by car service associations. Computing the time consumed in loading and unloading on the five day basis existing in 1888, for these 28,634,020 cars there would have been 143,170,100 car days consumed in 1903. Computing the time consumed in loading and unloading on the 1.69 day basis existing in 1903, for these 28,634,020 cars there were 48,391,494 car days actually used. A saving was thereby effected in the year 1903 under the operation of the rules of car service associations of 94,778,606 car days, equal to the service of 315,928 cars for the three hundred working days of the year, or 21½ per cent. of the entire freight car equipment of the country. To withdraw the service of such a number of cars would put the railway companies back for equipment to their status for the year 1900, with the result at the present time that they would be unable to meet the transportation requirements of the country and a disastrous car famine would ensue. These figures conclusively prove that a car service association does not restrain but facilitates commerce.

It is respectfully submitted that a car service association at every large commercial point where there are many connecting lines is a public necessity, to prevent inefficiency in the operation of the railways and to secure the release of equipment for further use in the channels of commerce. It conserves and promotes the interests of the public and of the railway companies by the equitable distribution and fullest use of the freight car equipment of the country.

Respectfully submitted,

C. W. SANFORD,

Manager Chicago Car Service Association.

Chicago, Illinois, May 5th, 1904.

SUPPLEMENT No. 1

TO

LEGAL DECISIONS

IN

CAR SERVICE CASES

PUBLISHED BY THE

National Association of Car Service Managers.

1906.

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CAR SERVICE CASES

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National Association of Car Service Managers.

1906.

IN ACCORDANCE with a resolution adopted by the National Association of Car Service Managers, in annual convention at Washington, D. C., May, 1905, the following compilation of court, railroad commission and national government departmental decisions in car service cases, is respectfully submitted, as supplement number one, to our publication of 1904, entitled LEGAL DECISIONS IN CAR SERVICE CASES.

This supplement is intended to include a synopsis of all decisions bearing upon car service rules, reported to your Secretary since 1904.

The decisions are arranged, as nearly as possible, in date order, and the legal citation shown for all reported cases.

The index shows the principal points covered by each decision.

A. G. THOMASON,
Secretary.

SCRANTON, PA., March 14, 1906.

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91 Ga. Reports, p. 317.

Harris

vs.

The Central Railroad and Banking Company of Georgia; and Vice Versa.

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known to the plaintiff who contracted with the defendant's station agent and soliciting agent that in consideration of a large shipment of freight over the defendant's railway no demurrage, drayage or storage would be charged against him, a breach of the contract as to storage gave the plaintiff no right of action against the company to recover the money paid, and it was not error to grant a non-suit.

By Bleckley, *Chief Justice:*

The railroad company had general rules declaring that, under certain circumstances, demurrage and storage would be chargeable to all patrons. These rules were known to Harris, who combined with two subordinate agents of the company, one of them a soliciting agent, the other a station agent, to shun the rules and prevent their application to a large shipment of freight which Harris contemplated making. On account of the volume and magnitude of the shipment, these agents agreed that the rules should not be enforced against Harris, as to that shipment; and on account of the exemption thus granted him, he agreed to make and did make the shipment over the line of this railroad, instead of making it over the line of some other company. It is not to be presumed that soliciting and station agents have been invested with any suspending power over general rules which the company has adopted and promulgated, and the evidence affords no indication that any such power existed or had been conferred in this instance. The stipulations between the two subordinate agents and Mr. Harris did not bind the company, and, for this reason, he was properly nonsuited in the present action.

Judgment affirmed. Cross-bill dismissed.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

8 I. C. C. Rep. 531.

PENNSYLVANIA MILLERS' STATE ASSOCIATION

vs.

THE PHILADELPHIA & READING RAILWAY COMPANY *et al.*

Decided the 8th day of October, 1900.

1. It is well settled that a railway company whose road is wholly within the bounds of a single state, "when it voluntarily engages as a common carrier in interstate commerce by making an arrangement for a continuous carriage or shipment of goods and merchandise, is subjected, so far as such traffic is concerned, to the regulations and provisions of the act to regulate commerce."

Interstate Commerce Commission vs. Detroit G. H. & M. R. Co. 167 U. S. 642, 42 L. ed. 309, 17 Sup. Ct. Rep. 986.

Cincinnati, N. O. & T. P. R. Co. vs. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

The Daniel Ball, 10 Wall. 565, 566, sub nom. The Daniel Ball vs. United States, 19 L. ed. 1002.

2. There is no violation of section 2 of the Commerce law shown in this case in the *application* of the rule allowing 96 hours for unloading cars at Philadelphia; neither is there any violation of that section in the facts, that on all other commodities beside those to which the 96-hour rule is applied, only 48 hours are allowed at Philadelphia, and on coal, coke, pig iron and iron ore 72 hours are allowed at in-

terior points, while only 48 hours are allowed on other traffic at interior points. Section 2 prohibits unjust discrimination in "the transportation of a *like kind of traffic,*" and does not apply where the traffic is of different kinds or classes not competitive with each other.

3. The rule of section 4 of the law, forbidding the greater charge for the shorter than the longer haul, has no application to this case. That rule is based on *distance* and relates to the actual transportation charges and not to demurrage charges, which are in the nature of charges for storage in the cars of the carrier. *(Interstate Commerce Commission vs. Detroit, G. H. & M. R. Co. 167 U. S. 644, 42 L. ed. 309, 17 Sup. Ct. Rep. 986.)* If, however, such demurrage charges when added to transportation rates result in greater aggregate charges in certain cases than in other cases involving longer hauls, this may constitute undue preference as between different localities under section 3.

4. If the time allowed at Philadelphia, or other terminals, for loading or unloading is reasonable and that allowed at interior points is unreasonably small, then an undue prejudice to interior points in violation of section 3 of the law might result; and, if demurrage charges are made to commence before the expiration of a reasonable time for loading or unloading, this may be a violation of the provision of section 1 of the law, which directs "that charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just."

5. While it is held by the Supreme Court in *Interstate Commerce Commission vs. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896,* that the Commission has no power to prescribe rates, "maximum, minimum or absolute," the Commission may order the carriers to "desist from the continuance of an unlawful practice." *(Interstate Commerce Commission vs. East Tennessee, V. & G. R. Co. 85 Fed. Rep. 110).* The Commission may therefore after investigation find a particular rate to be unlawful and prohibit the exaction of that rate, or find the

time allowed for loading or unloading unlawful, or, in other words, unreasonably small, and forbid the charging of demurrage at the expiration of that time and before the expiration of a reasonable time.

6. It is held that 48 hours is an unreasonably small allowance of time for unloading where any portion of it has to be consumed in attending to the preliminaries necessarily antecedent to the actual process of unloading, and it is ordered that as to grain, flour, hay, and feed consigned to and deliverable at interior points in the territory of the Philadelphia Car Service Association, the defendants cease and desist from charging demurrage until the expiration of a reasonable time for unloading after the cars have been placed for unloading and notice of such placing has been given the consignee or other proper party. It is further held that 48 hours will be a reasonable time for the actual unloading.

7. By section 1 of the law, storage is named as a "service in connection" with transportation, and the charges therefor are required to be "reasonable and just." The schudule of rates required by section 6 of the law to be printed, posted and filed with the Commission should state, among other terminal charges, the rules and regulations, if any, of the carrier in relation to storage; and the Commission has so ordered.

Wilson Welsh, for the complainant.

Charles Heebner, for Philadelphia & Reading Railway Company, the Central Railroad of New Jersey, the Perkiomen Railroad Company and the Stony Creek Railroad Company.

George V. Massey, for Pennsylvania Railroad Company and the Northern Central Railway Company.

F. I. Gowen, for Lehigh Valley Railroad Company.

David Willcox, for Delaware & Hudson Canal Company.

S. P. WOLVERTON, for Erie & Wyoming Valley Railroad Company, Central Pennsylvania & Western Railroad Company, Bangor & Portland Railway Company, Delaware, Susquehanna & Schuylkill Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

CLEMENTS, *Commissioner:*

The Pennsylvania Millers' State Association, complainant in this cause, is a corporation organized under the laws of the State of Pennsylvania. The object of the Association as stated in its complaint to this commission, is "to protect and promote the interests of the milling industry of the State and of all engaged in the purchase and sale of grain, flour, feed and hay, for consumption in the State and for export."

The complaint alleges that the members of the Association "are engaged in the manufacture of flour and feed" and that "they are purchasers of grain, feed, flour, hay and other merchandise throughout the west for home consumption and for export," and charges:

First. "That the defendants have been and are guilty of violations of the provisions of sections 1, 2, 3 and 4 of the Act to regulate commerce, in that they have long established and maintained, and do establish and maintain, car service rules and regulations, that are unjust and unreasonable, and that discriminate against such" of the members of the complainant "as are located at *interior points* of the State upon the lines of the defendant companies."

Second. That "this discrimination consists in charging at *interior points* $1.00 per car for each day or fraction of a day said car may be detained over *48 hours* in unloading or loading, while on cars loading with *coal, coke, pig iron or iron ore,* delivered at interior points, *72 hours* are allowed for loading or unloading, and at terminal points, such as Philadelphia, New York and Baltimore, the following privileges are accorded:"

(*a*) "In *Philadelphia, 96 hours* on all cars that arrive at the delivery points of the respective companies after notice of such arrival has been given to the consignee. The latter may then order the car to another delivery point, and will still have 96 hours to unload, after its arrival at the point designated; or if the car contains flour or grain, he may order it to the warehouses of the defendant companies and 10 days' freight storage is accorded him on the grain or flour—whether for local consumption or export. In *New York,* the time allowed on flour is from 5 days to 40, and on grain, feed and hay, 120 hours. In *Baltimore,* 96 hours are allowed on mill feed, hay and straw, and 120 hours on grain and flour."

(*b*) "In addition to these special and discriminating privileges at the three terminal points above named, consignees may order flour from store at the expiration of the 10 days allowed to a private warehouse, or to a dock for export,—without any additional charge. And when ordered to the warehouses of the defendant companies, the labor of unloading cars is all done at the expense of the carrying companies."

Third. "That defendants make no corresponding allowances in rates of freight to complainants, and do not afford any assistance in loading or unloading cars, but complainants are compelled to pay the same rates of freight from the west that prevail to the terminal points, although the distance in most cases is much less, and in addition on reshipment must pay relatively much higher local rates to Philadelphia, New York, Baltimore and interior points."

All the defendants have filed answers except the Central Railroad Company of New Jersey, the Delaware & Hudson Canal Company, the Erie Railroad Company, the Delaware, Lackawanna & Western Railroad Company and the New York, Ontario & Western Railroad Company.

These answers, while not expressly admitting, do not deny that the "Car Service Rules" are as stated in the complaint, but they allege that they are just and reasonable, that they are not in violation of sections 1, 2, 3 or 4 of the Act to regulate commerce, and that they do not discriminate

against such of the members of complainant "as are located at *interior points* in Pennsylvania upon the lines of the defendants," because the circumstances and conditions affecting the loading and unloading of cars at the *terminal points,* Philadelphia, New York and Baltimore, are dissimilar from those affecting such loading and unloading at interior points in the State; and that they do not discriminate at interior points against grain, flour, feed and hay in favor of coal, coke, pig iron, or iron ore, because the circumstances and conditions attending the loading and unloading of coal, coke, pig iron or iron ore at interior points are dissimilar from those attending the loading or unloading of grain and flour, feed and hay, at interior points.

The Central Pennsylvania & Western Railroad Company, the Erie & Wyoming Valley Railroad Company and the Bangor & Portland Railroad Company, each aver that their roads are "situate wholly within the bounds of the State of Pennsylvania, and that the same are not parts of any through lines connecting other roads in different states of the United States," and, therefore, are not subject to the provisions of the Act to regulate commerce. Those defendants also deny that this Commission "has any authority under the Act to regulate commerce to fix and establish any period within which the members of complainant may load or unload cars free of charge upon their tracks."

The Delaware, Susquehanna & Schuylkill Railroad Company avers "that its line of railroad is wholly within the State of Pennsylvania, and if any part of the property transported by it is interstate, it is by reason of such property being delivered on connecting roads to be transported to points *outside* of the State of Pennsylvania."

FACTS.

We find the facts, relevant to the issues presented by the pleadings, to be as follows:

First. The "Car Service Rules" particularly complained of were established by the Philadelphia Car Service Association, an organization composed of many of the defendants and of other railway companies, and which em-

braces in its operations Philadelphia and territory as far north as "Tamaqua on the Reading Railroad and Sunbury on the Philadelphia & Erie road, south to the Susquehanna River, east to the Delaware River, and about 300 points in South Jersey."

This association was formed September 1, 1890, and its principal object, as stated by its Secretary, J. E. Challenger, is to see that cars are loaded and unloaded "within a reasonable time." It appears to have been called for by the fact that the time for loading and unloading at Philadelphia had been indefinite and this gave opportunity for discrimination and was otherwise unsatisfactory. The Association, therefore, soon after it came into existence adopted rules prescribing a definite time for loading and unloading and this time as originally fixed, for Philadelphia as well as interior points, was 48 hours.

Notice was thereupon given the Philadelphia Commercial Exchange that on and after a certain date only 48 hours would be allowed "to unload cars after delivery." The members of the Commercial Exchange, not considering this time sufficient as to grain, flour, feed and hay, protested and their representative had several meetings with representatives of the Car Service Association for the purpose of procuring an extension. The result was that the Car Service Association extended the time on these commodities to 96 hours, on the condition, as appears from the testimony, that no allowance was to be made on account of weather. This extension took place 60 or 90 days after the formation of the Car Service Association, or about November 1st or December 1st, 1890. On all other commodities the 48 hour rule remained applicable at Philadelphia as well as at interior points.

The 96 hour rule or allowance of "free time" applies "only on commodities which are handled by the Commercial Exchange of Philadelphia." Practically all of the receivers of and dealers in grain and the other commodities to which that rule is applied at Philadelphia are members of the Commercial Exchange. At the time the extension to 96 hours was conceded, the Commercial Exchange entered into an agreement with the Car Service Association that demurrage,

or the charges for car service after the expiration of the 96 hours "free time," should be promptly paid. They were enabled to guarantee payment of demurrage because they were the beneficiaries of the 96 hours "free time" from whom the demurrage would be due.

The printed rules of the Philadelphia Car Service Association filed in evidence in this case only set forth the rules making the 48 hour allowance and relating thereto. The special allowance at Philadelphia of 96 hours and the rules relating thereto were not published among those printed rules. In the "Revised Printed Rules" (effective July 21, 1898), however, of the Association, the rules and regulations relating to both the 96 hour allowance and to the 48 hour allowance are given.

Those Revised Rules, so far as pertinent to this case, are as follows:

CHARGES.

RULE 1. A charge of *one dollar* per car per day or fraction of a day shall be made for car and track service on all cars not unloaded within forty-eight hours after arrival, not including Sundays and legal holidays, except as hereinafter provided.

The charge of *one dollar* per day shall not be made on cars loaded with the following commodities, when intended for track delivery, within the limits of Philadelphia and Camden, until forty-eight hours for inspecting, sampling and selling and *forty-eight hours additional for unloading have elapsed:* Wheat, shelled and ear corn, oats, barley, malt, rye, mill-feed, cerealine, maizone, malt sprouts, hay and straw; also perishable fruits, vegetables, melons and berries, in packages or bulk.

RULE 2. Forty-eight hours will be allowed for loading cars on team or private tracks (subject to Rule 13), after the expiration of which time a charge will be made of *one dollar* per car per day or fraction of a day, Sundays and legal holidays excepted.

CARS SUBJECT TO THE RULES.

RULE 5. All property shipped in car loads or in less than car loads, *which is loaded or unloaded by shippers or consignees* at their request, or is so required by custom or the Official Classification, shall be subject to the car and track service charges of the forwarding and delivering railroads, except as provided in Rule 9.

CARS EXEMPT.

RULE 9. Cars containing freight in transit billed through over rail or water lines, not held for orders or for disposition by the shipper or consignee, shipments which are to be unloaded in and delivered from railroad freight houses, and company material, will not be subject to charge and should not be included in reports to the Manager.

RULES FOR COMPUTING TIME.

RULE 11. On cars arriving *after* 7 o'clock A. M., car and track service will be charged after the expiration of forty-eight hours from 7 A. M. following. On cars arriving *after* 12 o'clock noon, car and track service will be charged after the expiration of forty-eight hours from the noon following.

RULE 12. When cars are delayed after arrival beyond the time allowed by Rule 11, on account of failure of shipper or consignee to give prompt notice of disposition, the time so consumed shall be considered a part of the forty-eight hours allowed for loading or unloading.

RULE 13. On cars consigned direct to team or private tracks, or which may be so delivered on standing or advance orders from the shipper or consignee, car and track service will be charged after the expiration of forty-eight hours from the time such cars are *placed* on the tracks designated. If placed *after* 7 A. M. the forty-eight hours will begin at 7 A. M. following the placing; if placed *after* 12 o'clock noon, the forty-eight hours will begin at noon following the placing.

RULE 14. On cars *not* consigned to team or private tracks, the forty-eight hours allowed for unloading will begin at 7 A. M. or 12 noon following arrival (see Rule 11), will continue until order is given by shipper or consignee, and begin again at the *actual* hour placed according to such order, except that cars so placed between the hours of 6 P. M. and 7 A. M. will be regarded as placed at 7 A. M.

PLACING OF CARS ON ARRIVAL.

RULE 17. Cars containing freight to be delivered on team tracks or private sidings shall be delivered on the tracks designated on the way-bills immediately upon arrival, or as soon thereafter as the yard work will permit. The time consumed in placing such cars, or in switching cars for which directions are given by consignees after arrival, shall not be included in the time allowed for unloading.

RULE 18. Delivery of cars shall be considered to have been effected at the time when such cars have been placed on recognized or designated delivery tracks, or if such track or tracks contain cars belonging to the same consignee, which have been detained over forty-eight hours, when the railroad offering the cars would have delivered them had the condition of such tracks permitted.

RULE 19. The delivery of cars consigned to or ordered to *private* tracks shall be considered to have been effected, either when such cars have been placed on the tracks designated, or, if such track or tracks be full, when the railroad offering the cars would have made delivery had the condition of such tracks permitted.

STORMY WEATHER.

RULE 26. Agents will collect car and track service charges occurring under the rules as explained herein, regardless of the condition of the highways or weather.

CLAIMS.

RULE 27. Car and track service charges collected under these rules shall not be refunded except on the written authority of the Manager. Claims for the refunding of such charges will not be considered unless accompanied by the receipted bills for the amounts paid.

RULE 28. Upon receipt of claims for refunding car and track service charges alleged to have been incurred by reason of unfavorable weather, the Manager will decide each case on its merits, taking into consideration the nature of the freight in connection with the condition of the highways and the weather, and authorize such refund as in his judgment may be right and proper.

Second. There is applied in the territory of the Philadelphia Car Service Association a rule known as "the 24 hour monthly average." This rule was not published among the printed rules of the Association at the date of the hearing, but among the "Revised Printed Rules," effective July 21, 1898, there is the following rule, entitled "Monthly 24 hour Average Agreement:"

MONTHLY TWENTY-FOUR HOUR AVERAGE AGREEMENT.

RULE 29. The Manager is authorized to make contracts with such shippers and consignees as desire to enter into a monthly twenty-four hour average agreement. Under this contract agents will render reports each day of the cars loaded and unloaded by those operating under such monthly contracts, and if the average time exceeds *twenty-four hours* per car for the calendar month, the fraction in excess will be charged for at the rate of one dollar per car per day. This privilege is open to all shippers and consignees, but notice must be given the Manager expressing a desire to enter into the contract.

The testimony at the hearing was that under the Twenty-four hour Monthly Average Rule, "the total number of cars handled during the month by any one firm is taken and if the average of each car is 24 hours or less, such charges as might have accrued under the 48 hour rule are

canceled." For example, if the number of cars handled by a single firm during one month is 20, and 10 of those cars are unloaded in 16 hours, 6 in 18 hours, 2 in 20 hours, and 2 in 78 hours, making a total of 464 hours for all, the average per car would be 23 hours and 12 minutes, and under the "24-hour monthly average rule," the charges which would have accrued under the 48 hour rule on the 2 cars unloaded in 78 hours would be canceled.

This monthly average rule applies on all classes of traffic and at all points, whether interior or terminal. Advantage of it is taken by a large number of shippers. Over 300 firms in the territory of the Philadelphia Car Service Association are "working under it." The beneficiaries under the 96 hour rule at Philadelphia do not, however, avail themselves of it to any extent.

The shipper is required to elect in advance whether or not he will have the 24 hour monthly average applied in his case, and an agreement to that effect has to be made.

Asher Miner, General Manager of the Miner-Hillis Milling Company at Wilkes-Barre, Pennsylvania, and a witness for the complainant, testified that *"a monthly average* of 48 hours *per car* would be satisfactory to himself and the other millers in the state."

Third. The principal grounds assigned by the witnesses for allowing 96 hours for unloading grain in Philadelphia, while only 48 hours are allowed at interior points, are:

(*a*) "That 90 per cent of the grain coming to Philadelphia *has to be sold after it arrives,* and it is necessary, according to the rules of the Commercial Exchange in Philadelphia, that each car should be officially inspected, and sampled, and the commodities sold upon the floor of the Philadelphia Exchange; and that all but a small proportion of grain shipped to interior points from the West does not have to be sold after arrival but it is consigned directly to millers and placed at once on their tracks, in which case no sampling and inspecting are necessary."

(*b*) "That when grain arrives at Philadelphia, it is stopped on suburban or storage tracks and notice is given of its arrival, and it is then, in pursuance of directions from the consignee, moved to unloading tracks; and that the time consumed in inspection, sale and other details necessary to be attended to before cars are placed upon the unloading tracks, amounts to about 48 hours, and the consignee at Philadelphia has only about 48 hours in which to unload after the cars are placed on the unloading track, and hence, the 96 hours are necessary to place the Philadelphia consignee in the same position as the consignee at interior points. The 96 hours begin to run from the time notice is given that the shipment has reached the suburban tracks."

(*c*) That New York, Philadelphia and Baltimore are large "seaports, as well as ultimate domestic markets and general distributing points, and as such attract a great volume of commodities either for export, or for sale and distribution thereat and therefrom," and that at these seaports "sidings and railroads are congested by the amount of traffic upon them, and it is impossible to clear the tracks and handle the traffic in the time which would be ordinarily required at interior points where there is less traffic."

As to the mode of procedure when shipments reach Philadelphia, the testimony is that "the cars are delivered at outlying points. The Philadelphia Commercial Exchange has a Chief Inspector under the control of the grain trade and the Commercial Exchange, and he has his deputy inspectors, a number of them, and those inspectors are detailed at the different termini of the railroads, and it is their duty to go around every morning or during the day. They start in the morning, but do not sometimes go through until late in the day, because they have difficulty in the first place in locating the cars. These cars are mixed in very often with cars of other merchandise. When they find the cars they procure samples. The next day, which is practically 24 hours after arrival and after notification of arrival has been given, those samples are brought on Change and disposition has to be made of them and orders given to the various railroad companies. That is done probably about noon. Then, it almost invariably requires 24 hours—sometimes double that time—before the grain can be delivered at a private warehouse to be unloaded or on a delivery track."

A small percentage of the grain shipped to Philadelphia is "consigned flat" and not subject to inspection. This has, however, the benefit of the 96-hour rule. The requirement of inspection applies principally, if not exclusively, to grain.

It appears that at interior points "as a rule cars are placed for delivery either on private sidings in connection with warehouse or mills or places to unload," and that there is in such cases "greater capacity for quick delivery at interior points at the place of discharge than there is at Philadelphia at the place of discharge."

As before stated, no allowance on account of bad weather is made at Philadelphia on "96-hour commodities." At interior points and at Philadelphia such allowance, *according to the evidence,* is made on "48-hour commodities." (No note of this distinction appears in the "Revised Rules," effective July 21, 1898.) It is stated by the manager of the Philadelphia Car Service Association, that "in adjusting claims on account of weather refunds are frequently made for bad weather, which occurs *after* the lapse of the 48 hours." Under the Baltimore & Washington Car Service Association, allowance is made for bad weather occurring *during* the "free time," but not after the expiration of that time.

The rule for Reckoning Time (Rule 11 of Rules of Philadelphia Car Service Association, hereinbefore set forth), namely, that the 48 hours "free time" shall begin to run from 7 A. M. or 12 M. of the day following arrival as provided in that rule, does not, according to the testimony at the hearing and under the "Revised Rules," effective July 21, 1898, apply under the 96 hour rule at Philadelphia.

On the other hand, while a comparatively small amount of grain is consigned to interior points *to be sold after its arrival,* when it is so consigned, it has to be sampled and inspected by the consignee himself and then sold before placed for delivery or unloading, and it is claimed that this business to interior points would be much larger "if there were not the discrimination in the car service rules as between interior points and the terminal points, Philadelphia, New York and Baltimore." In many cases, also, grain shipped

to interior points comes "without any certificate as to grade," or "with draft and *subject to inspection* before draft is paid." All such grain has to be inspected. In this and other cases, inspection has to be made at interior points. It also appears that grain, as well as coal, coke, pig iron and iron ore, comes to interior points at times in *train loads* and that these entire train loads have to be unloaded within the "free time."

There is general complaint on the part of the interior millers, members of complainant's Association, that the Car Service Rules applicable to interior points are oppressive and result in some financial loss.

Fourth. The Car Service Rules appear to be enforcedand demurrage, or charges made for the detention of cars and occupation of tracks after the expiration of the "free time," is collected by an officer of the Car Service Association promptly and, so far as the proof shows, without discrimination.

The demurrage *on traffic of all classes* collected by the Philadelphia Car Service Association amounts annually to about $50,000, of which from 60 to 70 per cent is collected in Philadelphia. This would be about $32,500 at Philadeland about $17,500 at interior points. The bulk of the traffic at Philadelphia consists of other commodities than grain and the other traffic subject to the 96 hour rule, and the greater part of the demurrage collected is on such other traffic. This may also be true as to interior points. The demurrage under the 48 hour rule is collected subject to a refund for what are deemed good and sufficient reasons, particularly *weather.* (As before said, no weather allowance is made on the 96-hour commodities at Philadelphia.) About 20 per cent of the demurrage is refunded because, for the most part, of weather conditions. This leaves a net annual demurrage collected at interior points *on all traffic* of $14,000.

For the year 1897 demurrage was collected in the territory of the *Northeastern Pennsylvania* Car Service Association to the amount of $30,000 on *traffic of all classes,* of which $10,000 was refunded. The General Manager of the Miner-Hillis Milling Company at Wilkes-Barre, Pennsylva-

nia (the largest interior milling company in the State), testified that during the year 1897 there were from 1500 to 2000 cars received by that company, that the demurrage paid on those cars was $50 and that $25 of that was refunded. He further stated that his company was "unusually well equipped in comparison with other interior mills for handling cars," and that they often had to unload at night to avoid demurrage charges.

According to the statistics of the Philadelphia Car Service Association, *about 97 or 98 per cent* of the cars are unloaded at interior points within the "free time," and about 80 per cent in large cities like Philadelphia. In other words, a larger percentage of cars are unloaded on time at interior points than are unloaded on time at Philadelphia. The same is true as between *Baltimore* and interior points in the territory of the *Baltimore & Washington* Car Service Association.

Fifth. The grain receiver in Philadelphia "has 48 hours from the time he receives notice of its arrival in which to get the result of the inspection and to order the car, and then has 48 hours additional in which to make a disposition of it, and if he orders it into the grain depot or the Twentieth Street Elevator, he has 10 days' storage in addition to which the company unloads the cars." For the service of unloading, however, the consignee pays ½ cent per bushel, which follows the grain and adds that much to its cost. The testimony is that the ½ cent paid for unloading "gives" the 10 days' storage.

Flour is said to be "warehouse freight" and not subject to Car Service Rules. It will be observed that the 96 hour rule at Philadelphia as set forth in Rule 1 of "Revised Rules," effective July 21, 1898, does not name flour as one of the commodities to which it is applicable, but only "wheat, shelled and ground corn, oats, barley, malt, rye, mill-feed, cerealines, maizone, malt sprouts, hay and straw, and also perishable fruits, vegetables, melons and berries, in packages or bulk."

When grain and other 96 hour commodities are shipped to Philadelphia for export they are not subject to the Car

Service Rules, but are considered through shipment via Philadelphia to foreign ports. The same is true as to all "freight in transit billed through over rail or water lines." (Rule, 9, Revised Rules.)

Sixth. Car Service Associations of Railroad Companies, similar in object to the Philadelphia Car Service Association, exist throughout the United States. There is evidence in this case, introduced by defendants, relating to the Car Service Rules and regulations of three other Car Service Associations besides the Philadelphia Car Service Association, to wit, the Northeastern Pennsylvania Car Service Association, the Baltimore & Washington Car Service Association, and the New York & New Jersey Car Service Association.

The Northeastern Pennsylvania Car Service Association embraces in its operations territory in the State of Pennsylvania described in the printed rules of that Association, as follows:

"All that part of the State of Pennsylvania bounded on the north and east by the state line, and on the south and west by a line drawn from the Delaware River through Easton, Bethlehem, Allentown, Slatington, Mauch Chunk, Tamaqua, New Boston, Frackville, Gordon, Kneass, Sunbury, Northumberland, Lewisburg, Milton, Williamsport, Jersey Shore to Lockhaven, and from Williamsport to Fasset. All stations on the line of the south and west boundary to be included except Tamaqua, New Boston, Frackville and Gordon, which are included in the territory of the Philadelphia Car Service Association."

All this territory appears to be *interior* as distinguished from sea-coast territory and the 48-hour rule is applied by the Northeastern Pennsylvania Car Service Association throughout this territory. The rules and regulations of that Association are similar to, if not identical with, the printed rules and regulations of the Philadelphia Car Service Association, *relating to the 48-hour rule,* heretofore set forth. The 96-hour rule is not applied at any points in the territory of the Northeastern Association.

The Baltimore & Washington Car Service Association covers, as stated by its manager (A. L. Gardner), "the southern tier of counties of Pennsylvania, the State of Maryland, the District of Columbia, and the upper part of the State of West Virginia, through Wheeling and Parkersburg."

This witness testifies that "the rules of the Baltimore & Washington Car Service Association, with respect to grain, feed and hay, are substantially the same as the rules of the Philadelphia Car Service Association, and that the regulations applied as between *Philadelphia* and interior points are substantially the same as those applied between *Baltimore* and interior points with one exception," that allowance is made on account of weather during "free time" but not thereafter.

The rule as set forth in the printed rules of the Baltimore & Washington Car Service Association, effective January 1, 1894, is as follows:

CHARGES.

"1. A charge of One Dollar ($1.00) per car per day, or fraction thereof, shall be made for delay of cars and use of track on all cars not unloaded within forty-eight (48) hours after arrival, not including Sundays or legal holidays, except as hereinafter provided. *An additional forty-eight (48) hours shall be allowed (in Baltimore only) for inspecting, sampling, and selling Hay and Straw, Bran, Mill Feed, and Ear Corn, in bulk,* also on Fruit and Vegetables in bulk, and one hundred and twenty hours on grain arriving by the Western Maryland R. R. for city or track delivery in Baltimore. No charge will be made on freight in transit, or freight for trans-shipment to Water Lines.

Forty-eight (48) hours will be allowed for loading cars on all car-load delivery tracks or private sidings, after the expiration of which time a charge will be made of One Dollar ($1.00) per car per day, or fraction thereof, Sundays and legal holidays excepted."

F. E. Morse, Manager of the New York & New Jersey Car Service Association, states that the territory covered by that Association "is the State of New Jersey and all south of a line from Deposit to Kingston, touching a part of New York State." He further states, "the 48-hour rule applies all through that territory on everything."

The 48-hour rule as set forth in the printed rules of that Association, effective November 1, 1892, is as follows:

"1. A charge of one dollar ($1.00) per car per day or fraction thereof, shall be made for delay of cars and use of track, on all cars not unloaded *within forty-eight (48) hours after* arrival, not including Sundays or legal holidays, except as hereinafter provided.

Forty-eight (48) hours will be allowed for loading cars on car-load delivery tracks or private sidings, after the expiration of which time a charge will be made of one dollar ($1.00) per car per day or fraction thereof, Sundays and legal holidays excepted."

In New York City grain is divided into two classes, graded grain and ungraded grain. Graded grain is delivered as fast as possible by the roads to the elevators and the cars are released as soon as the grain can be put into the elevators. Ungraded grain for track delivery has 72 hours "free time," at the end of which the roads have the option of putting it in the elevator or allowing demurrage to accumulate. The receivers generally prefer to pay the demurrage of $1.00 per day rather than to pay the charges for having the grain put in the elevator and taken out and for storage while it is in the elevator. There is no substantial dissimilarity of conditions shown by the evidence as between New York and Philadelphia.

The rules for reckoning time under the Northeastern Pennsylvania Car Service Association, the Washington & Baltimore Car Service Association and the New York & New Jersey Car Service Association, are substantially the same as Rule II. of the Phialdelphia Car Service Association hereinbefore set forth, namely, that the "free time" shall begin to run from 7 A. M. or 12 M. of the day following arrival as provided in that rule.

Flour does not come under the Car Service rules of either the New York & New Jersey or Baltimore & Washington Associations. It goes direct to the flour warehouses.

Seventh. It was testified in this case that the *96-hourrule* prevailed at interior points in New England. On examination of the printed rules filed with this commission by the Connecticut Car Service Association, the Rhode Island Car Service Association and the Massachusetts & New Hampshire Car Service Association, we find this to be the case in the territories covered by those associations.

The territory embraced in the Connecticut Car Service Association includes "all freight stations and sidings in the State of Connecticut owned or operated by its members," to wit, the Central Vermont Railroad Company, the New York & New England Railroad Company, the New York, New Haven & Hartford Railroad Company, the Philadelphia, Reading & New England Railroad Company, and the Shepaug, Litchfield & Northern Railroad Company.

The territory of the Rhode Island Car Service Association embraces "all freight stations and sidings in the State of Rhode Island owned or operated by its members," to wit, the New York, New Haven & Hartford Railroad and the New York and New England Railroad.

The territory of the Massachusetts & New Hampshire Car Service Association includes "all freight stations and sidings in the states of Massachusetts and New Hampshire owned or operated by its members," to wit, the Concord & Montreal Railroad, the Boston & Albany Railroad Company, the Boston & Maine Railroad, the Fitchburg Railroad Company, the New York & New England Railroad Company, the New York, New Haven & Hartford Railroad Company, the Union Freight Railroad, the Maine Central Railroad and the Grand Trunk Railway.

Eighth. The rules of the Northeastern Pennsylvania Car Service Association provide for an allowance of 72 hours for unloading coal, coke, pig iron and iron ore.

Seventy-two hours for unloading these commodities is also allowed at interior points in the territory of the Philadelphia Car Service Association, but in Philadelphia the 48-hour rule is applied to coal and coke.

The 72-hour rule prevails on grain at New York and under the New York & New Jersey Car Service Association.

The reasons assigned for allowing coal, coke, pig iron and iron ore 24 hours in addition to the 48 hours allowed traffic in general in the territory of the Northeastern Pennsylvania Car Service Association are, as stated by the secretary of that Association, that coal shipments are "made and received at points of unloading irregularly, and grouped in large shipments," and that the "material allowed the additional 24 hours is shipped in open cars of less value than the house car, available only for rough material and rarely used for return shipments, and as to pig iron and iron ore, they are received at the furnaces by the train load, delivered into yards where it is physically necessary to sometimes shove up the earlier arrivals to make room for the later ones, the result being that the unloader is unloading a great many cars in one day, and finds himself delayed in getting at older arrivals of several days." On the other hand, carloads of coal, coke and iron ore can by dumping be unloaded probably in less time than carloads of grain, feed or hay.

It is testified that the 72 hours allowed for unloading coal, coke, pig iron and iron ore, are not for unloading a single car but a number of cars or train load.

Ninth. The 48-hour rule is stated by the witnesses to be "the basis" or general rule throughout the country, to which the rules of certain associations, to which we have referred, allowing 96 hours and 72 hours in certain cases, are exceptions.

CONCLUSIONS.

First. We will first dispose of the plea of the Central Pennsylvania & Western Railroad Company, the Erie & Wyoming Valley Railroad Company, and the Bangor & Portland Railway Company, that their roads are "situate wholly within the bounds of the State of Pennsylvania, and

that the same are not parts of any through lines connecting other roads in different states of the United States," and the plea of the Delaware, Susquehanna & Schuylkill Railroad Company, "that its line of railroad is wholly within the State of Pennsylvania and if any part of the property transported by it is interstate, it is by reason of such property being delivered on connecting roads to be transported to points *outside* the State of Pennsylvania."

It is well settled that a railway company whose road is wholly within the bounds of a single state, "when it voluntarily engages as a common carrier in interstate commerce by making an arrangement for a continuous carriage or shipment of goods and merchandise, is subject, so far as such traffic is concerned, to the regulations and provisions of the Act to regulate commerce."

Interstate Commerce Commission vs. Detroit, G. H. & M. R. Co. 167 U. S. 642, 42 L. ed. 309, 17 Sup. Ct. Rep. 986.

Cincinnati, N. O. & T. P. R. Co. vs. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

The Daniel Ball, 10 Wall. 565, 566, sub nom. The Daniel Ball vs. United States, 19 L. ed. 1002.

If it be true, as alleged by the three defendants first named, that "their roads are situate wholly within the bounds of the State of Pennsylvania, and the same are not parts of any through lines connecting other roads in different states of the United States," and they do not, in fact, participate, as links in chains of carriers, in the transportation of traffic from points outside the State of Pennsylvania to points within that State or from points within to points outside, they are not subject to the provisions of the Act to regulate commerce. If, also, the line of the Delaware, Susquehanna & Schuylkill Railroad Company is, as alleged by it, "wholly within the State of Pennsylvania" and the only interstate traffic transported by it is traffic delivered "to connecting roads to be transported to points *outside* of the State of Pennsylvania," then it is only subject to the provi-

sions of the law in respect to the traffic from points within to points outside the state in which alone it participates. It appears, however, that the grain of interior Pennsylvania goes, not only to Philadelphia, but largely *outside* the State to Baltimore and New York. As to this traffic from within the State to the latter cities, the road, if it participates in its transportation, is subject to the provisions of the law.

There was no evidence introduced bearing upon the matters of fact alleged in these pleas. Of course, if these defendants do not participate in the interstate traffic involved, they will not be affected by any order which the Commission may make.

Second. It is alleged in the complaint that the members of complainant "are compelled to pay the same rates of freight from the west that prevail at the terminal points, although the distance in most cases is much less, and in addition on reshipment, must pay relatively much higher local rates to Philadelphia, New York, Baltimore and interior points." No testimony was introduced at the hearing relating to these allegations and nothing has been said in argument in reference thereto either at the hearing or in the briefs subsequently filed.

Third. The complainant avers that the "Car Service Rules" of the defendants prescribing the time to be allowed for the unloading of cars at interior points in the territory of the Philadelphia Car Service Association, are in violation of Sections 1, 2, 3 and 4 of the Act to regulate commerce. These were the charges insisted upon at the hearing and to which the investigation was confined.

In *Wight vs. United States, 167 U. S. 518, 42 L. ed. 259, 17 Sup. Ct. Rep. 822,* the Supreme Court held that "it was the purpose of the section [2] to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor."

It is admitted there is no discrimination against members of complainant's association, or anyone, *"in the application"* of the 96-hour Car Service Rule at Philadelphia—in

other words, for example, one shipper to, or consignee at, Philadelphia, is not allowed 96 hours free time while it is denied to another. It is true the proof shows that *practically* the 96-hour rule benefits only the members of the Commercial Exchange of Philadelphia, but this is because of the fact, that that Exchange embraces in its membership virtually all the receivers of or dealers in grain and the other commodities to which the 96-hour rule is applicable; and the testimony indicates that if there were such receivers or dealers outside the Commercial Exchange, they would receive the benefit of the rule. There is not, therefore, shown any violation of section 2 in the administration of the 96-hour rule.

Cattle Raisers' Asso. vs. Fort Worth & D. C. R. Co. 7 I. C. C. Rep. 513.

Wight vs. United States, 167 U. S. 518, 42 L. ed. 259, 17 Sup. Ct. Rep. 822.

Neither is there any violation of section 2 in the facts, that on all other commodities besides the "96-hour commodities" only 48 hours "free time" is allowed at Philadelphia, and on coal, coke, pig iron and iron ore 72 hours are allowed at interior points, while only 48 hours are allowed on other traffic at interior points. Section 2 prohibits unjust discrimination in "the transportation of a *like kind of traffic*," and does not apply where the traffic is of different kinds or classes not competitive with each other.

We are, also, of the opinion that the rule of Section 4, forbidding the charging or receiving "any greater compensation in the aggregate for the transportation of a like kind of property under substantially similar circumstances and conditions, for a shorter than for a longer *distance* over the same line in the same direction, the shorter being included in the longer distance," has no application to this case. That rule is *based on distance* and relates to the *actual transportation charges,* and not to demurrage charges, which are in the nature of charges for storage in the cars of the carrier. *Interstate Commerce Commission vs. Detroit, G. H. & M. R. Co. 167 U. S. 644, 42 L. ed. 309, 17 Sup. Ct. Rep. 986.* The actual transportation is at an end and the goods delivered by

the carrier when the car is placed on the unloading track or other proper place for unloading by the consignee. The functions of the carrier, "to receive, transport and deliver," are then fully discharged. *American Warehousemen's Asso. vs. Illinois C. R. Co. 7 I. C. C. Rep. 589.*

If, however, such demurrage charges when added to transportation rates, result in greater aggregate charges in certain cases than in other cases involving longer hauls, this may constitute undue preference as between different localities under section 3.

Counsel for the Delaware & Hudson Canal Company in a printed brief claims, that, in the case *supra* of the *Interstate Commerce Commission vs. Detroit, G. H. & M. R. Co. 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986,* the Supreme Court held that "it was not an unlawful discrimination for a carrier to furnish free cartage at one place and to decline to furnish the same at another place at some distance," and that "under this authority it must be held that no discrimination arises from the fact that the time during which free storage in the carriers' cars is allowed varies in one place from that allowed in another." In this counsel is in error. The Supreme Court placed its decision distinctly upon the ground, that the only question before it was, whether the furnishing of free cartage at Grand Rapids when it was not furnished at Ionia, constituted a violation of *the rule of Section 4,* and held that under the facts of the case it was not a violation of *that rule.* The court, after calling attention to the fact that the question whether there was an undue preference under Section 3 had been withdrawn from the consideration of the Court, says:

"It may be that it was open for the Commission to entertain a complaint of the Ionia merchants that such a course of conduct was in conflict with sections 2 and 3 of the act; but, as we have seen, such questions, if they really arose in the proceedings before the Commission and in the circuit court, have been withdrawn from our consideration in this appeal from the decree of the circuit court of appeals."

Witnesses for the complainant testify that in their opinion the allowance of 96 hours' "free time" at Philadelphia, and of 72 hours on coal, coke, pig iron and iron ore at inter-

ior points, was not excessive, but only reasonable. The contention on the part of complainant is solely that the 48 hours' "free time" allowed at interior points is unreasonably small. If the time allowed at Philadelphia, or other terminals, is reasonable and that allowed at interior points is unreasonably small, then an undue prejudice to interior points, in violation of section 3 of the law, might result. It is testified that the fact that only 48 hours is allowed at interior points, while 96 are allowed at Philadelphia and other terminals, has diverted grain and other traffic covered by the 96-hour rule from the former to the latter.

Fourth. Furthermore, if demurrage charges are made to commence before the expiration of a reasonable time for loading or unloading, this may be a violation of the provision of section 1, which directs, "that charges made for any service rendered or to be rendered in the transportation of passengers or property or *in connection therewith,* or for the receiving and delivering, *storage or handling of such property,* shall be reasonable and just." The charge of demurrage, before a reasonable time for loading or unloading has elapsed, would, so far as that charge covers time which should be embraced in a reasonable time, be an unjust or unreasonable charge for a "service rendered in connection with the transportation of property" or "for the storage or handling" of such property. For example, if 96 hours were a reasonable time at interior points, then the exaction of $1.00 a day, or $2.00 for the two days, following the expiration of the 48 hours' free time now allowed, would be an unjust and unreasonable charge.

Fifth. It is admitted on the part of complainant, not only that the allowance of 96 hours on grain and certain other products at Philadelphia and of 72 hours on coal, coke, iron ore and pig iron, at interior points, is reasonable, but, also, that the charge of $1.00 a day for the detention of cars beyond a reasonable time for loading or unloading is a just and proper charge. The question raised is simply whether the *time allowed at interior points* is reasonable. This is the question under section 3 as well as under section 1, because, as before stated, it being admitted that the time allowed at Philadelphia is reasonable, the undue prejudice under sec-

tion 3 would result from the fact, that while a reasonable time is allowed at Philadelphia, the time allowed at interior points is not reasonable.

Sixth. While reference is made in the complaint to the greater time allowed at Baltimore and New York as well as at Philadelphia than is allowed at interior points in Pennsylvania, Mr. Welsh, who represented the complainant at the hearing, said that "the real contention was with reference to the differential conditions between Philadelphia and interior points," that the "complaint was confined to the State of Pennsylvania," and that reference was made in the complaint to the rules at New York and Baltimore "simply as a matter of comparison and to emphasize, if possible, the discrimination which was made at interior points in Pennsylvania." While, also, the complaint relates to *loading* as well as unloading, it was admitted on the part of the complainant, that the chief ground of complaint was the rules in reference to *unloading,* and the testimony relates almost exclusively to those rules. In fact, on an examination of the rule (Rule 1 of the Philadelphia Car Service Association), it will be seen that the 48 hours additional time on grain and certain other commodities provided for therein, is expressly stated to be for "unloading," the language of the rule being *"48 hours additional for unloading."*

Seventh. The gravamen of the complaint, which we will now consider, is the reasonableness of the 48 hours allowed for unloading at interior points.

There appear from the rules to be two distinct cases to which the 48-hour allowance of time is applicable:

First, where cars are "consigned direct to team or private tracks, or may be so delivered on standing or advance orders from the shipper or consignee." In such cases no time after arrival is consumed in procuring direction from the consignee as to where the cars shall be *placed* for unloading, and, if the cars are so *"placed* after 7 A. M., the 48 hours will begin at 7 A. M. of the day *following the placing,* and, if placed after 12 M., the 48 hours will begin at 12 M. of the day *following the placing."* (Rule 13.)

Second, where "cars are not consigned to team or private tracks" and are not deliverable at previously designated places. In such cases, the consignee after the arrival of the car has to designate the place of unloading and this will consume more or less time, and the 48 hours for unloading "begins at 7 A. M. or 12 M. *following arrival,* and continues until order for placing is given by the shipper or consignee, and *begins again* at the actual hour placed according to such order, except that cars so placed between the hours of 6 P. M. and 7 A. M. will be regarded as placed at 7 A. M." (Rule 14.)

Under the 96-hour rule applicable at Philadelphia, "48 hours is allowed for inspecting, sampling and selling" alone, and 48 hours additional for unloading. Witnesses for the defendants all testify that the 96 hours is necessary to place Philadelphia on an equality with interior points—that is, that the 96 hours is necessary to give Philadelphia fully 48 hours for unloading alone. The claim that this simply places Philadelphia on an equality with interior points is based upon the assumption that under the 48-hour rule and regulations in relation thereto applicable at interior points, consignees at interior points have fully 48 hours for unloading. In the first case above mentioned, under rule 13, where cars are consigned direct to team or private tracks or to some designated point for unloading, and the 48 hours begins at 7 A. M. or 12 M. of the day following the day of the *placing* of the cars for unloading, there may be 48 hours left for the process of unloading, provided prompt notice is given of the placing. In the second case, however, under rule 14, where the cars are not consigned to team or private tracks and the place for unloading is not designated prior to arrival, and the 48 hours begins at 7 A. M. or 12 M. *following arrival and before order for placing is* given, there will, as the cars cannot be unloaded until placed, be less than 48 hours left for the process of unloading. In the latter case, therefore, if not in the former, the 96-hour rule at Philadelphia would not simply place Philadelphia on an equality with interior points but would give a longer time for the actual unloading at Philadelphia than for the actual unloading at interior points.

The testimony is that fully 48 hours are required for the actual unloading at Philadelphia, and, so far as the process

of unloading is concerned, there is no reason for holding that a less time will be required at interior points.

It may be that at Philadelphia more time is required for inspecting, sampling and selling than at interior points, because the sampling and inspecting is done in Philadelphia by an official inspector and his deputies, who are required to perform these services daily for a large number of shipments, while at interior points the sampling and inspection are done by each consignee himself and it is not probable that he will have many inspections on his hands at once. Moreover, at Philadelphia the sampling and inspection may be delaved by the difficulty in promptly finding the cars on the crowded or "congested" tracks—the traffic to Philadelphia being much larger than at interior points—and, after inspection, a report thereof is made to the Commercial Exchange.

It appears that at interior points cars as a rule are placed for delivery or unloading on "private sidings in connection with warehouses and mills" and that there is in such cases "greater capacity for quick delivery at the place of discharge at interior points than at Philadelphia," and also that the bulk of the grain shipped to interior points is shipped "sold," and does not have to be sampled, inspected and sold after arrival. The traffic *when sold before arrival,* however, often comes to interior points "without certificate as to grade" or "with draft and subject to inspection before draft is paid." In the latter cases, as well as where the traffic arrives unsold, inspection is necessary. Some traffic is shipped to interior points unsold and that has to be both inspected and sold after arrival.

On the other hand, cars loaded with commodities subject to the 96-hour rule at Philadelphia are "intended for track delivery" (Rule 1), and all but a small percentage of such commodities have to be sampled, inspected and sold after arrival. Where, however, they are shipped "sold" and do not require sampling, inspection and sale after arrival, they are given the benefit of the 96-hour rule.

We are of the opinion that a distinction should be made between shipments of grain and other commodities which are already sold before arrival, and which do not have to be sampled, inspected and sold after arrival, and which are con-

signed to designated places for unloading, and shipments which have to be sampled, inspected and sold, and the place for unloading which has to be designated, after arrival. It is true the latter are but a small percentage of the shipments to interior points, but it is claimed that, if a longer time was allowed for unloading, that class of business in the interior would be encouraged and increased.

Interior points in Pennsylvania can be placed on an equality with Philadelphia only by rules allowing 48 hours *net* for the actual unloading. In order to accomplish this, a reasonable *definite* period of time should be allowed in the interior, as at Philadelphia, for attending to all the matters necessarily preliminary to the placing of the cars for unloading. It may be that, for reasons heretofore stated, as much time as that allowed for these preliminaries at Philadelphia is not necessary in the interior.

In four of the New England States, Connecticut, Rhode Island, Massachusetts and New Hampshire, the rules of the Car Service Association allow 96 hours at interior points, and general complaint is made throughout Pennsylvania of the 48-hour allowance as being insufficient and "oppressive." The testimony also shows that at one interior point, Wilkes-Barre, Pa., where there are exceptional facilities for unloading, it has to be done at times after dark in order not to exceed the 48-hour limit.

On the face of the rules, "refunds" on account of *weather* are allowable without discrimination, but the manager of the Philadelphia Car Service Association testified, that such refunds are only made under the 48-hour rule and not under the 96-hour rule, and that at the time the latter was granted, the receivers of grain at Philadelphia waived any allowance on account of weather. If 96 hours are only a reasonable time at Philadelphia, and 48 hours a reasonable time at interior points, it is difficult to conceive of any valid reason why weather should not be taken into consideration in the former as well as in the latter case. From the distinction made it is a legitimate inference, that the 96-hour allowance was considered liberal and sufficient to cover delays on account of weather, while that of 48 hours was not so considered. If this be not the basis of the distinction, then injustice is being done Philadelphia.

Eighth. As we have seen, certain defendants in their answers deny that this Commission "has any authority under the act to regulate commerce to fix and establish a period within which the members of complainant may load or unload cars free of charge upon their tracks."

In *Interstate Commerce Commission vs. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896,* the Supreme Court held that the Commission had no power to prescribe rates, "maximum, minimum or absolute," as a mode of enforcing the provision of section 1 of the law requiring all rate charges to be just and reasonable. This was based upon the ground, principally, that the Act to regulate commerce does not *expressly* delegate to the Commission the power to prescribe rates. *(Cattle Raisers' Asso. vs. Fort Worth & D. C. R. Co. 7 I. C. C. Rep. 552.)* The law does not expressly confer upon the Commission power to prescribe the time which shall be allowed for loading or unloading cars, and, if the absence of authority expressly conferred is a valid reason for denying power in the Commission to prescribe rates, it would seem that such absence of express authorization would preclude the exercise of the former power.

Section 15 of the Act to regulate commerce, however, does in *express* terms provide that the commission shall, upon finding a carrier in violation of any of the provisions of the Act, order it to cease and desist therefrom. In the language of the circuit court in *Interstate Commerce Commission vs. East Tennessee, V. & G. R. Co. 85 Fed. Rep. 110,* the Commission may order the carriers to "desist from the continuance of an unlawful practice." The power to prohibit an unlawful practice or to forbid "the continuance" thereof, necessarily involves the power to determine and declare the unlawfulness of the practice. The Commission may, therefore, after investigation, find a particular rate to be unlawful and prohibit the exaction of that rate, or find the time allowed for loading or unloading unlawful, or, in other words, unreasonably small, and forbid the charging of demurrage at the expiration of that time and before the expiration of a reasonable time.

We find that 48 hours is an unreasonably small allowance of time for unloading where any portion of it has to be consumed in attending to the preliminaries necessarily antecedent to the actual process of unloading, and it is ordered that as to grain, flour, hay and feed consigned to and deliverable at interior points in the territory of the Philadelphia Car Service Association, the defendants cease and desist from charging demurrage until the expiration of a reasonable time for unloading after the cars have been placed for unloading and notice of such placing has been given the consignee or other proper party. Our opinion is that 48 hours will be a reasonable time for the *actual unloading.* This is the time allowed at Philadelphia and by making that allowance at interior points after the cars have been placed and due notice given, will put such points on an equality with Philadelphia.

If by reason of any fault on the part of the consignee, the carriers are unable to place the cars promptly for unloading, the time so lost may be deducted from the 48 hours, and to this end suitable rules may be adopted—the object and intent of our order being to secure 48 hours *net* for unloading where unnecessary delay in placing the cars for that purpose is not caused by the default of the consignee.

Ninth. In respect to grain and flour, it is claimed, that at the expiration of the 96 hours they may be ordered to the grain depot, warehouse or elevator, where they are unloaded by the roads and given 10 days' storage. The roads however, charge ½ cent per bushel for unloading and the *storage is incidental to that.* It does not appear from the evidence whether or not facilities for storage, or the necessity therefor, exist at interior points to the same extent as at terminal seaports like Philadelphia, New York and Baltimore. Inasmuch as all but a small percentage of these commodities shipped to Philadelphia have to be sold or disposed of after arrival, while the reverse is the case at interior points, the presumption is, that the *necessity* for storage does not exist to the same *extent* in the interior as at Philadelphia.

By section 1 of the law, storage is named as a "service in connection" with transportation, and the charges therefor are required to be "reasonable and just." In *American*

Warehousemen's Asso. vs. Illinois C. R. Co. 7 I. C. C. Rep. 591, we held that the schedules of rates required by section 6 of the law to be printed, posted, and filed with the Commission, should state among other terminal charges the rules and regulations, if any, of the carrier in relation to storage; and the Commission, February 8, 1898, issued a general order directing "that all carriers subject to the Act shall plainly indicate upon the schedules published and filed with the Commission under the provisions of the sixth section . . . what storage in stations, warehouses or cars will be permitted, stating the length of time, the character of the storage, the service rendered in connection therewith, and all the terms and conditions upon which the same will be granted." This order became effective April 1, 1898, and at that date the carriers issued a general Circular providing that "property unloaded in the railroad stations or warehouses must be removed within 24 hours after arrival and if not so removed will, at the option of the carrier, either be removed and stored at a public warehouse at owner's cost and risk, and there held subject to lien for freight and charges, or will be retained in carriers' station or warehouse under the same conditions and subject to like charges for storage as prevail at public warehouses, except *as may be provided by local regulations at destination* as made by public warehouses or delivering carrier." In the schedule of rates of the carriers filed with the Commission under section 6 we find reference to this general Circular allowing 24 hours' storage after arrival. A special allowance at Philadelphia of 10 days' storage on grain and flour is not mentioned either in the general Circular or in the schedules of rates of the defendants. If such storage is given, the order of the Commission has not in this respect been complied with and the carriers are liable to be proceeded against under section 16 of the law for "neglecting to obey or perform a lawful order of the Commission."

In *American Warehousemen's Asso. vs. Illinois C. R. Co. 7 I. C. C. Rep. 591, supra,* we held, on the authority of the decision of the Supreme Court in *Interstate Commerce Commission vs. Detroit, G. H. & M. R. Co. 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986,* that the Commission had authority to make the order in question. *(7 I. C. C. Rep. p. 592.)*

DECISION OF THE QUARTERMASTER-GENERAL OF THE U. S. ARMY ON DEMURRAGE CHARGED ON CARS CONTAINING GOVERNMENT FREIGHT CONSIGNED TO COMMISSARY FORT APACHE, CARE DEPOT QUARTERMASTER, HOLBROOK, ARIZONA.

April 19, 1902.

GENERAL M. I. LUDDINGTON, U. S. A.,

Quartermaster General, Washington, D. C.

SIR:

For some time past the Santa Fé Pacific Railroad Company has been embarrassed in its accounts by reason of the refusal of the Quartermaster's agent at Holbrook, Arizona, and other points, to recognize the right of the Company for a charge of $1.00 per day demurrage on each car detained beyond forty-eight hours, exclusive of Sundays and legal holidays, after 6 P. M. of the day upon which the car is placed ready for unloading and notice given the consignee.

We file herewith a copy of communication dated March 9th, from the Quartermaster's agent at Holbrook, wherein he refuses to recognize the Company's bills covering demurrage charges, giving as his reason therefor that the Santa Fé Pacific Railroad Company is a land grant road, for the use of the Government of the United States, free from toll or other charges except 50 per cent. of tariff rates.

Manifestly the question is not one affecting the obligations of this road to the United States Government as a land grant road. The only question is as to the liability of the government for car service and whether such car service can be properly considered as a part of the transportation charge.

In submitting this matter to your office for its consideration, we advise that the Car Service Bureau is an organization whose purpose is to expedite the handling of cars and enable the railroads to apply their equipment more promptly and push forward the general business of the public, and to that end the rule is stated that each car detained beyond forty-eight hours, exclusive of Sundays and legal holidays, after 6 P. M. of the day upon which the car is placed ready

for unloading, and notice given the consignee, shall be charged for at the rate of $1.00 per day. This car service arrangement is general throughout the entire country, and the end to be subserved of keeping the equipment available to the fullest possible extent for prompt and expeditious forwarding of freight will be recognized as wholly meritorious.

The account now under consideration has been rendered by the Car Service to this Company for the sum of $10.00, comprised of three items as shown thereon. We respectfully submit that this car service charge cannot in any sense be a part of the transportation charges proper, as the consignment is carried to its destination, the consignees notified of its arrival and allowed forty-eight hours from notice, within which to make disposition of the goods. This period of forty-eight hours has of course been decided upon as a reasonable time, and the car service charges which accrue thereafter are charges made against the general public and one which should be recognized by the Government itself, such charges are for an additional service which the Company undertakes for the convenience of the consignee.

We respectfully request that the Quartermaster's agent at Holbrook may be notified that the car service charge is not one connected with the transportation charge, nor affected by the land grant obligation of this road, and that if it is a charge which is made against the general public it is proper and he should certify to the Company's account for the same when satisfied of its correctness.

Very respectfully,

(Signed) Britton & Gray,
Attorneys Santa Fé Pacific R. R. Co.

Indorsement.

April 24, 1903.

(No. 43)

Respectfully referred by direction of the Quartermaster General to the Chief Quartermaster, Denver, Colorado, for

investigation and report. If cars are necessarily detained as stated in within letter, such detention should be paid for by the government at the rates charged the general public, and the Quartermaster's agent at Holbrook should be instructed to furnish the railroad evidence of indebtedness requested.

(Signed) CHAS. BIRD,
Depot Quartermaster General, U. S. A.

WAR DEPARTMENT.

QUARTERMASTER-GENERAL'S OFFICE.

Washington, May 31, 1902.

MESSRS. BRITTON & GRAY,

Attorneys, 1419 "F" Street, Washington, D. C.

GENTLEMEN:

I am directed by the Quartermaster-General to inform you, in reply to your letter of the 19th ultimo, relative to demurrage at Holbrook, Arizona, that the Quartermaster's agent at that point has been instructed to comply with the rules of the carriers governing in cases of demurrage. The account for $10.00 referred to in above-mentioned letter is now being adjudicated for payment by the Chief Quartermaster, Denver, Colo.

It is thought that there will be no further friction in this direction.

Respectfully,

(Signed) CHAS. BIRD,
Brigadier-General, U. S. A.

CIRCUIT COURT, GRUNDY COUNTY, IOWA.

UNREPORTED.

C. & N. W. Ry.

vs.

Townsend & Merrill Co.

During December, 1901, the C. & N. W. Railway set two cars of lumber, one car of lath, and one car of coal on team track at Dike, Iowa, consigned Townsend & Merrill Co. As the cars were not released within the time allowed free under Car Service Rules, bills for $27.00 Car Service were presented, which consignees declined to pay; hence this action.

Defendant failed to appear, and judgment was, on two different dates, rendered by default, defendant praying later for a re-hearing, claiming some misunderstanding. The case was last called for trial February 10, 1903, when defendant, instead of contesting the question as to the right of the railroad company to recover for Car Service charges, conceded such right by consenting to the entering of a judgment against them of $27.00, the full amount sued for, together with the Court costs.

CLARK QUARTERLY COURT, WINCHESTER, KY.

MARCH 31, 1903.

UNREPORTED.

E. H. DOYLE

vs.

LOUISVILLE & NASHVILLE R. R. Co.

Writ of Delivery, HON. J. H. EVANS, Presiding.

FACTS.

Plaintiff received two carloads of coal at Winchester, which were placed for unloading March 2d, and plaintiff notified before noon of that day that they were ready for unloading; that free time would begin on the same at 12 o'clock and would expire 48 hours from that date. Also, that $1.00 per day or fraction thereof would be charged for each day the cars were detained after the free time had expired.

The Bill of Lading also made the same stipulation as to free time, and stated that a reasonable amount would be charged for each day the cars were detained after the expiration of 48 hours.

The plaintiff unloaded one car within the free time, but not having finished unloading the second car by 1 o'clock P. M., on March 5th, Agent of the defendant presented a bill for $2.00 car service and demanded payment of same. Payment being refused, plaintiff was stopped from unloading by the Agent. At this time there remained in the car about one hundred bushels of coal.

The plaintiff then sued out a writ for the immediate delivery of the coal remaining in the car, and the same was taken charge of by the Sheriff and remained in his charge in the car for two days, at the end of which time it was turned over to the plaintiff.

PROCEEDINGS UNDER THE WRIT.

In response to the writ the defendant asserted a claim to a lien on the coal to secure the demurrage for the time the car was detained by the plaintiff and the Sheriff under the plaintiff's writ, amounting to $4.00 in all, and relied upon the condition in the Bill of Lading fixing 48 hours as the free time for unloading, and upon $1.00 per day as a reasonable charge for detention after the free time expired.

The plaintiff claimed:

First. That he was not bound by the terms of the Bill of Lading, because he had never received the same before the institution of the suit, and that he had no notice of its contents.

Second. That the defendant could not rely upon the condition in the Bill of Lading as to the free time allowed, because it had placed two cars for unloading on the same day.

Third. That the condition in the Bill of Lading fixing 48 hours as the free time allowed was unjust, unreasonable and contrary to public policy, in that the time was insufficient and that cars were of different capacities.

Fourth. That $1.00 per day was an unreasonable and excessive charge.

Fifth. That the notice of the arrival of the cars, the payment of the freight thereon, and the placing of the same for unloading before the plaintiff had received the Bill of Lading constituted a new contract, relieving plaintiff of the conditions of the Bill of Lading.

The Court held:

First. That the plaintiff was bound by the terms of the Bill of Lading, and that it was his contract.

Second. That it was not competent to introduce any testimony with reference to the first car, which was unloaded within the 48 hours.

Third. That the plaintiff was bound by the terms of the Bill of Lading unless he could show as to the 48 hours that said condition was an unjust requirement and could not be reasonably complied with by dealers.

Fourth. That the notice of the arrival of the cars, the payment of the freight thereon, the placing of the same for unloading before the plaintiff received the Bill of Lading did not of itself constitute a new contract, and that the plaintiff should prove an express contract in lieu of the Bill of Lading if any was so made.

The case was tried before Judge Evans and a jury. Dwight Jewett, Esq., appeared for the plaintiff, and Messrs. Pendleton and Bush for the defendant.

Upon hearing the evidence and arguments of counsel, and being instructed by the Court, the jury returned a verdict for the defendant, fixing the amount at $4.00 and costs; whereupon the Court ordered the plaintiff to return the coal taken under the writ, or in lieu thereof to pay the defendant the value of its interest therein—to wit, $4.00 and costs.

O. G. Fetter, *Superintendent.*

STATE OF MISSISSIPPI SUPREME COURT.

OCTOBER TERM, A. D. 1903.

82 Miss., 710.
35 South. Rep. 193.

HON. ALBERT H. WHITFIELD, *Chief Justice.*

HON. S. S. CALHOUN *and* JEFF TRULY, *Associate Justices.*

On the 16th day of November, 1903, the following opinion was rendered and delivered by the Court:

NEW ORLEANS & NORTH EASTERN RAILROAD COMPANY

vs.

A. H. GEORGE & COMPANY.

TRULY, *J.*

Reversed and remanded.

NEW ORLEANS & NORTH EASTERN RAILROAD COMPANY

vs.

A. H. GEORGE & COMPANY.

STATEMENT OF FACTS.

On the 3d day of February, 1902, A. H. George, doing business as A. H. George & Company, instituted this suit in Replevin against the New Orleans and North Eastern Railroad Company for eight-six tons of cotton seed hulls contained in five box cars in the possession of defendant Company, charging that the same was wrongfully detained by the Railroad Company. Upon the trial the Railroad Com-

pany contended that the plaintiff was not entitled to the possession of the hulls because of failure on his part to pay certain "demurrage" charges which the Railroad Company was entitled to under certain rules of the "Alabama Car Service Association" and the Mississippi Railroad Commission. The Rules referred to are as follows:

ALABAMA CAR SERVICE ASSOCIATION.

Rule I.

PER DIEM CHARGES.

All property shipped in carload lots shall be subject to car service and trackage charges in accordance with the following regulations:

A charge of one dollar per car per day or fraction thereof shall be made for the delay of cars and the use of tracks within the following described territory, after forty-eight hours from arrival thereat, not including Sundays or legal holidays.

Rule II.

RULES FOR RECKONING TIME.

On cars arriving during the forenoon, after 7 A. M., and held for orders from consignees, car service will be charged after the expiration of forty-eight hours from 12 M. of that day, and on cars arriving after 12 M. to and including 7 A. M. of the following day, car service charges will commence forty-eight hours from 7 A. M. of the following day, provided notification has been given during that day previous to this time. Should notification not be given within the time, car service will commence forty-eight hours from the hour of notification.

On cars consigned to team tracks or private tracks and which may be so delivered on advance or standing orders from consignees, car service will be charged after the expiration of forty-eight hours from the time such cars are placed on the tracks designated.

Rule III.

CARS FOR DELIVERY ON TEAM TRACKS AND PRIVATE SIDINGS.

Cars containing freight to be delivered on team tracks or private sidings shall be delivered on the track designated immediately upon arrival, or as soon thereafter as the ordinary routine of yard work will permit.

(*a*) The time consumed in placing such cars, or in switching cars for which directions are given by consignees, after arrival, shall not be included when computing detention.

(*b*) The delivery of cars consigned to or ordered to sidings used exclusively by certain firms or individuals located on such sidings shall be considered to have been effected either when such cars have been placed on the siding so designated; or, if such siding be full, when the road offering the cars would have made delivery had such sidings permitted.

(*c*) No cars shall be held from delivery in any manner, provided it is possible to secure their delivery, and the Manager is charged with the duty of seeing that the purposes for which this Association is formed are not evaded by the action of any Railroad Company.

(*d*) On deliveries to sidings used exclusively by certain firms or individuals located on said sidings, and where consignees or consignors refuse to pay or unnecessarily defer settlement of bills for car service charges, the agent will decline to switch cars to the sidings where such parties are located, notifying them that deliveries will only be made to them on the public delivery tracks of the Company after the payment of freight charges at his office, and will promptly notify the Manager of the action taken.

Rule IX.

COLLECTIONS.

Agents will collect car service charges accruing under the rules of the Association with the same regularity and promptness as other transportation charges, and the Manager is charged with the duty of seeing that these rules are enforced without discrimination.

(*a*) It is the duty of the agent to demand car service on all cars before delivering them, where car service has accrued between notification and ordering. It is also the duty of an agent, where he has any doubt about car service being paid, to demand one dollar car service at the end of the free time allowed for unloading cars, and if said car service is refused, to decline to deliver the car and to allow the lading to be taken from it, either by sealing the car, locking the car, or placing it where it is not accessible to consignee.

(*b*) All collections for car service charges shall belong to the road upon whose tracks the cars are detained.

(*c*) Railroads shall not discriminate between persons in car service charges. If a railroad company collects car service from one person, under the Car Service Rules, it must collect of all who are liable.

Rule XII.

STORAGE.

No railroad company, member of this Association, shall provide free storage in its freight warehouses of contents of loaded cars subject to car service charges, but any railroad company may unload cars subject to car service charges into its own warehouse or into public or private warehouses subject to the following rule and regulations:

Mississippi Railroad Commission.

Rule I.

RAILROAD COMPANIES TO GIVE PROMPT NOTICE OF ARRIVAL OF GOODS.

Railroad companies shall give prompt notice by mail or otherwise to consignee of arrival of goods, together with weight and amount of freight charges due thereon, and when goods or freight of any kind in car load quantities ar-

rive, said notice must contain letters or initials of the car, number of the car, net weight and the amount of the freight charges due on the same. Storage and demurrage charges may be assessed if the goods are not removed in conformity with the following rules and regulations. No storage or demurrage charges however, shall in any case be allowed, unless legal notice of the arrival of the goods has been given to the owner or consignee thereof by the railroad company.

Rule II.

DEFINITION OF LEGAL NOTICE.

Legal notice referred to in these rules may be either actual or constructive. Where the consignee is personally served with notice of the arrival of freight, free time begins at 7 o'clock A. M. on the day after such notice has been given.

Rule IV.

DEMURRAGE ON LOADED CARS, HOW ASSESSABLE.

Loaded cars, which by consent and agreement between the railroad and consignees, that are to be unloaded by consignees, such as bulk meat, bulk grain, hay, cotton seed, lumber, lime, coal, coke, sand, brick, stone and wood, and all cars taking track delivery, which are not unloaded from cars containing same within forty-eight hours (not including Sundays or legal holidays) computed from 7 A. M. from the day following the day legal notice is given of its arrival and the car or cars are placed accessible for unloading, may be subject thereafter to a charge of demurrage of one dollar per car for each day or fraction of a day that said car or cars remain loaded in the possession of the railroad company; it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and when the period of such demurrage charges commences they are to be placed acessible to the consignee for unloading purposes on demand of the consignee; provided, however, that if the railroad company shall remove

such car or cars after being so placed, or in any way obstruct the unloading of the same, the consignee shall not be chargeable with the delay caused thereby; provided further, that when consignees shall receive four or more cars during any one day loaded with lumber, laths, shingles, wood, coal, lime, ore, sand, or bricks, and all cars taking track delivery, the said cars in excess of three shall not be liable to demurrage by any railroad company until after the expiration of seventy-two (72) hours.

Plaintiff was engaged in the wholesale feed and grain business in the City of Meridian; he handled large numbers of cars of hulls, feed stuff, grain and other commodities requiring track delivery; some of these cars were unloaded at Meridian, some rebilled to other points. For convenience in unloading and handling freight, George had leased a portion of a warehouse, which was located on a spur track known as the "Compress track," the larger part of which was used by the Cotton Compress Company and other concerns, and as their warehouses were situated further up the spur track all of the cars used by them had to pass over that portion of that track to the use of which George was entitled, thus necessitating two reswitching and replacing of his cars; but the lease to George was made with full knowledge on his part of this condition of affairs. George's warehouse only had trackage for four cars. It was the usual course of dealing between George and the railroad company that the cars were to be set into his side track on arrival, without special demand, and the representatives of the Alabama Car Service Association would check the cars on the track each day to see that there was no unnecessary delay in the switching and placing of the cars. The New Orleans & North Eastern Railroad Company had also an employee who was charged with the duty of checking all cars on the track, and this double checking was recorded in books kept for that purpose and the results compared to guard against errors.

On Saturday, December 7th, 1901, a train of 12 cars loaded with cotton seed hulls, loose in bulk, reached Meridian, consigned to A. H. George & Co. On arrival, this train was placed on the "storage track" appellant contending that it was necessary on account of the crowded condition of the "Compress track." On Monday 9th, the "Com-

press track" being still crowded with cars the train was switched to the "Water Works track." It was shown that at this date the railroad business at Meridian was extremely large; every track was in constant use; every car needed for the transportation of cotton and other freight. On the same day notice of the arrival of this freight was sent to George, but he declined to receive the freight bill claiming an overcharge. George denied that the freight bills were tendered to him, but he paid the freight charges on the 12 cars of hulls on the 13th inst. and either that day or a few days thereafter had the overcharge corrected. George knew of the rules of the Alabama Car Service Association; was familiar with the provisions regarding demurrage; had paid some demurrage and had refused to pay some, and at this date had a dispute or litigation pending about another matter of demurrage.

None of the cars composing this train were placed in front of the warehouse of George; the Car Service Association's representative and the railroad company's car checker both testified that at no part of the "free time" after the arrival of this train did George have less than four cars on his side track, and an inspection of their original books corroborates this. George was notified during the "free time" that demurrage would accrue, and shortly after the "free time" expired he was again advised of this claim and then and there denied his liability, denied the right of the railroad company to claim demurrage and refused to pay.

The Manager of the Car Service Association instructed the railroad company not to deliver the cars until the demurrage was paid.

So matters stood until about the 1st of February, 1902, when the railroad company released six of the cars to George and notified him of its intention to sell the contents of the remaining six for the demurrage on the twelve. Thereupon this suit was filed for the contents of five, the hulls in the other proving worthless. At the conclusion of the testimony the court refused a peremptory instruction for the defendant and submitted the case to the jury under instructions for both sides. The jury found for plaintiff and the North Eastern Railroad Company appeals.

NEW ORLEANS & NORTH EASTERN RAILROAD COMPANY

10865—vs.

A. H. GEORGE & COMPANY.

OPINION OF THE COURT.

TRULY, *J.*

This suit involves the determination of the following questions:

First. Are the rules for the collection of demurrage valid, and

Second. If so, how are they to be enforced?

Car Service Associations are formed by mutual agreement among the railroad companies operating in a stated territory; they owe their existence to the growth of the business interests of the country, the enormous increase in the bulk of through freight handled daily and the consequent extension of the many railroad systems handling the same. With every increase in the volume of the freight brought into a section from distant markets, hauled without unloading over the tracks of many connecting systems of the same gauge, it became more difficult for each carrier to keep track of its own cars. As the cars of each system were handled indiscriminately by every other system, they soon drifted to every quarter as the current of traffic ebbed or flowed and their whereabouts were often unknown to the carrier owning them. To correct this evil car service associations were formed, the primary object of which was to prevent loss by keeping a daily record of every car handled by each carrier, so that each system might receive compensation for the use of its rolling stock and no unfair advantage taken by one system over another; and further to prevent cars standing idle at one place when needed to meet the traffic and demands of another section of the country. These organizations had a beneficial effect in preventing congestion of empty and idle cars at one point while a car

famine prevailed at another. But it soon became apparent that the remedy was not complete; carriers earned money by the moving of freight; the idle car produces no revenue and the car service associations found that while it was possible under its then existing rules to keep the unloaded cars moving from place to place as necessity might require, they were without power to have the freight promptly unloaded by the consignee thus securing the car for further service.

The merchant who bought goods for sale from his shelves or through his warehouse, was ordinarily anxious to receive and unload his freight, but the broker who wished to do a large business with limited or no warehouse facilities, found it cheaper and more convenient to use the cars of the carrier for storage purposes and thus with no expense to him wait a favorable fluctuation of price when the commodity could be disposed of to advantage and the car unloaded or rebilled to another place without unloading. To meet this contingency the demurrage rules in question were formulated and promulgated.

It should be noted that the purpose of car service associations was not to make money; they increase the revenue of the contracting carriers only incidentally in that, by keeping every car in active service, the earning capacity was constantly exerted and the returns therefrom increased; but the prime object of their formation was to observe and promote the mutual interests of the carriers and the public dealing with them, by improving the service of the traffic department and insuring the prompt handling and speedy delivery of freight to the consignee.

It is admitted that the amount charged under the demurrage rules is reasonable, and it appears to us that the rules in themselves are fair and based upon the fundamental maxim of justice "the greatest good to the greatest number." The carrier of freight is responsible in damages if it unreasonably delays the transportation of freight delivered to it and exact justice demands equal diligence of the consignee.

When freight has been transported to its destination and the consignee legally notified of its arrival it then becomes the duty of the consignee to promptly receive the same, so that the car may again be placed in service. These rules work no hardship to the consignee who displays proper

diligence in the handling of his freight, ample time is granted him, but they prevent the dilatory dealers who seek to save storage or warehouse charges from keeping the track blocked with idle cars, thereby impeding the carriers in the prompt handling of freight and depriving other dealers of the use of necessary cars to haul their freight or transport the product of the country to market.

Certainly no reason founded in justice, can be given why consignees should not pay for any unreasonable or unnecessary detention of cars. Prompt handling of freight by both carrier and consignee is for the best interest of both, and of the commercial world at large.

The question was never before in this Court, but this view is in full accord with an almost unbroken line of decisions in other States and precedent aside, it is supported by justice and right. *(Norfolk & W. R. Co. vs. Adams, 90 Va. 393, 22 L. R. A., 530; Kentucky Wagon Mfg. Co. vs. O. M. Ry. Co., 98 Ky., 152, 36 L. R. A., 850,* and cases cited.) They have also been approved by the railroad commissions of various States who are charged with the duty of guarding the interest of the public.

It is well settled that railroad companies may make reasonable rules and regulations, not to limit their own duty or liability but for the convenient transaction of business between themselves and the shippers of freight over their lines.

Having reached the conclusion that the rules imposing reasonable demurrage charges upon dilatory consignees are fair, just and enforcible, we now pass to a consideration of the manner of their enforcement.

It may be borne in mind that the duty of the railroad company as a carrier of freight terminates under the decisions of our court when, the freight having reached its destination in good order the consignee is legally notified of its arrival, after that time the railroad holds as warehouseman and bailee for hire. But in the present case whether appellant held as carrier or as warehouseman and special bailee it was in either of these capacities, rightfully in possession and had the right to retain that possession until its legitimate charges were paid. This is a suit in replevin in which

right of possession is the only question of law involved. If there was any sum due appellant, whether little or much, the verdict should have been that it retain possession.

It is earnestly insisted that the railroad company has no lien on the freight for demurrage charges either by statute or at common law. It may be true that there is a technical distinction between the lien here claimed and the common law lien, though the difference is more imaginary than real; but it is undoubtedly true that the warehouseman as bailee for hire has a lien for his reasonable charges and this is recognized as to warehouseman by the express terms of section 2108, code 1892, in which a lien is given for freight and storage coupled with a power to sell in a manner therein pointed out. If a carrier has a lien for storage charges if the freight is unloaded into a warehouse upon what principle can it be denied if by the action of the consignee the cars themselves become his storage houses? Particularly when, as in this case, the consignee knows in advance by his course of dealing with the carrier that the charges will be incurred if he delays in receiving his freight. In our judgment, by necessary implication the code chapter on freight and storage carries with it the necessary lien to enforce the collection of all reasonable charges incident to the handling of freight. In a case of this character, involving the dealings of a carrier and public, the courts will not narrowly restrict the meaning of a statute, but will rather "expand the principles" of law and fit them to the exigencies of the occasion" as was aptly phrased by the eminent jurist, Chief Justice Cooper, in discussing a similar proposition *(66 Miss. 555)*. Knowing the rules governing the transaction the voluntary action of the consignee gives an implied assent to the charge and lien which those rules assert.

By the sole action of the consignee the carrier is forced to retain the possession of the freight; by operation of law, it is required to keep, store and care for the property of another, it is under the law entitled to compensation for its services in this connection and the law gives it a remedy to enforce its right. In the case of *Wolf vs. Crawford, 54 Miss., 514*—our court—in discussing the right of a carrier as a bailee said: "But the right of the general owner (of the freight) to be restored to the possession is dependent on the payment or tender of the freight and other charges on

the goods of the carrier. For these he had a lien which would be lost if he had parted with the possession; and he cannot be compelled to make delivery until they are discharged. The general owner cannot dispossess the carrier of the goods without payment or tender of his legal demands upon them."

Again,

"But a bailee until the condition of the bailment have been accomplished has a property in the chattels and the possession which is exclusive, both as to the general owner and strangers, his right and possession extend to the entire property; nor can the bailor or any one claiming through him, interrupt and defeat his rights until a satisfaction of his claim or an offer to do so. The common carrier, warehouseman and all the class of bailees who have a beneficial interest have a right of possession and a lien in the thing. These rights are inviolable until the acts and purposes for which they were created are performed."

In *Miller vs. Ga. R. R. Co., supra,* after stating the general rule that a carrier had a right to collect reasonable storage, the opinion proceded:

"We do not think it material as affecting the right to make a charge of this character that the goods remained in the car instead of being put into a warehouse."

28 Am. & Eng. Ency, L. 663.

Dixon vs. Central of G. R. R., 35 S. E. R. 369.

Barker vs. Brown, 138 Mass. 240.

There is no force in the argument which conceded the right of the carrier to make demurrage charges but contends that the goods be delivered and then the carrier sue for the amount. This course would give the dishonest and insolvent an unfair advantage and would breed a multiplicity of suits.

It is contended for appellee that whatever may be the general rule in the instant case the appellant should be defeated of its recovery because it failed to bring itself within

the rules allowing demurrage in this. It failed to notify the consignee in the manner pointed out and it failed to tender delivery of the freight as required by the rules of the car service association. As to the first contention it is enough to say that the object of the rule was reached and the law fully complied with when George was advised of the arrival of the twelve cars, though, if the testimony of Hall, as supported by the entries in his notice book, be true, the rule was literally complied with.

As to the second contention, there is conflict as to the fact. It is true that the cars were not in fact placed in front of George's warehouse, but the testimony does not clearly show that it was the fault of the appellant. On the contrary, the testimony of Fewell, the representative of the Car Service Association; of Lowery, car Checker of appellant company, supported by the contemporaneous entries in their record books, if believed by the jury, show conclusively that during all of the "free time" to which appellee was entitled under the rules, placing in front of George's warehouse was prevented by an accumulation of cars consigned to George himself. This is contradicted by Shepherd, car checker for appellee, while appellee himself testified that "there was no place to deliver them; they had our track full of cotton."

With the sharp conflict of testimony on this point, clause *"b"* of Rule III.. must be considered. "The delivery of cars consigned to or ordered to sidings used exclusively by certain firms or individuals located on such sidings, shall be considered to have been effected either when such cars have been placed on the sidings designated; or, if such sidings be full, when the road offering the cars would have made delivery had such sidings permitted." It was claimed by appellant that the cars would have been placed on siding on arrival had the siding permitted; there is much proof that the siding was full. Whether the siding was filled with cars consigned to George or to the Cotton Compress, in either event appellant was excused from delivering upon the siding. If George had his full quota of cars, then he had no ground of complaint. If the siding was filled with cars for Compress, it had equal right to use of siding and appellant is not liable.

The Court correctly instructed the jury on the point by 5th instruction for defendant, but also gave the 2d instruction for plaintiff and in the light of our conclusions this was error. By this instruction the jury was told that it devolved upon defendant to prove by a preponderance of the evidence that it notified plaintiff of the arrival of the cars, and placed them on the side track adjacent to plaintiff's warehouse, or "to show circumstances of excuse or justification therefor."

This was misleading. By it the determination of certain questions was submitted to the jury, whereas, in fact, the questions were not in dispute. The jury did not have to pass on the question of notice; George's own testimony leaves no doubt of his knowledge of the arrival of the cars. In the light of the instructions for the defendant the jury were left in doubt as to what was meant by "circumstances of excuse or justification therefor." To sum up the sole question of disputed fact involved in this record; is, was the siding so filled with cars consigned to George, or to others entitled to use the side track as to prevent the railroad company placing the cars until after the expiration of the "free time." If so, the railroad was entitled to the verdict; if not, George should recover. Upon this sole question is there sufficient conflict to justify the submission of the cause to the jury for determination.

The ingenuous but fallacious argument is made that the railroad company should not be permitted to claim the fact if fact it be, that the siding was full of cars consigned to the compress as "an excuse or justification" in the language of the second instruction for plaintiff for the failure to place the cars in question, because of the unjust favoritism shown the Compress company by the railroad company in not charging demurrage on cars loaded with cotton. This is not within the condemnation of the rules. Clause *c,* Rule IX. prohibits discrimination between persons and says that if the car service be collected from one person it must be collected of all who are liable. This is to prevent discrimination between persons handling cars loaded with the same class of freight. So that if car service is collected from one dealer handling hulls, or flour, or grain, or other class of freight, it must be collected from all dealers handling the same class of freights. But in the instant case, car service

was collected from no car loaded with cotton or coal no matter by whom handled, anywhere within the territory covered by the Alabama Car Service Association. It is to be seriously doubted whether under the undisputed testimony of the assistant manager of the Alabama Car Service Association the carriers have the authority to impose car service on the cars loaded with cotton or coal. We know of no reason why we should condemn as unlawful or unjust the exemption of cars loaded with cotton or coal from car service charges, while many reasons present themselves to commend the equity of the rule. In construing the language of said second instruction the jury might well have inferred, in considering all the instructions together that even though the siding was filled with cars for George or the Compress this was no "excuse or justification" for the appellant because no car service was collected of the Compress. And this position is not maintainable.

For the error in giving the second instruction for plaintiff above referred to which is in itself erroneous and misleading and is in conflict with the other instruction for both plaintiff and defendant the case is reversed and remanded and a new trial awarded.

As a new trial must be awarded for the error indicated, one further question presents itself for decision, did the railroad company forfeit its claim for demurrage upon the six cars released by releasing the six cars and holding the remaining six for the charges upon the entire twelve. The twelve cars in question constituted one shipment belonging to one owner received at the same time; further a different amount of demurrage was due (if any was due) upon four cars from what was due upon the remaining eight, there was no way to distinguish the four cars from the eight except by arbitrary selection. The cars were all loaded with the same commodity loose in bulk.

In *28 Am. & Eng. Ency. L.*, the rule is stated: "the lien (for storage charges) is a right to retain possession of the goods until the satisfaction of the charges imposed upon them; it is specific upon the goods stored for the particular charges for such storage although the entire lien extends to every parcel of the goods stored at any one time."

In *Schmidt vs. Blood, 24 Am. Dec., 143,* it is said: "A warehouseman has a lien upon the balance left in his hands of an entire lot of merchandise entrusted to him at the same time, after delivery of part for the storage of the whole." And the same conclusion is reached in *Steinman vs. Wilkins, 42 Am. Dec., 254,* a thoroughly well reasoned case and fully supported by citation of numerous authorities.

In *Penna. Steel Co. vs. Ga. R. R. & B. Co.* a recent case reported in 94 Ga. 636, it was decided that a railroad company had the right to retain from each consignment one or more cars to secure itself for the freight and demurrage it claimed on such consignment. And we think this the true and just rule, supported by reason and the more modern decisions.

We are unable to see why it should be required of the carrier that it retain twelve cars loaded with a commodity, belonging to the same owner, when the contents of a fewer number of the cars is sufficient to liquidate its charges on all; especially in a case where as in the instant case a dispute has arisen as to the validity of the charges claimed, and the consignee is willing to receive the contents of the other cars. As stated the conclusion of the Supreme Court of Georgia occurs to us as being just, sensible and convenient rule. It avoids the sale of a large amount of freight for the collection of a trifling sum; it saves the consignee the possibility of a loss by the sacrifice of his property at a forced sale, and it gives the carrier the speedy use of its cars for the moving of other freight. We note nothing in the rules under consideration forbidding such action, and it commends itself to us as being the proper course.

If the question of fact be decided in favor of appellant that it is entitled to demurrage in this case, the six cars retained by it are liable to the charges for the entire twelve constituting the shipment.

For the reasons hereinbefore stated the case is reversed and remanded.

I, George C. Myers, clerk of the Supreme Court of Mississippi, do hereby certify the foregoing to be a true copy of the opinion of said court, delivered in the cause hereinbefore stated as the same appears of record in my office.

In testimony whereof I hereunto set my hand and seal of said Court at office at Jackson this 19th day of November, 1905.

GEO. C. MYERS, *Clerk.*

IN THE COURT OF COMMON PLEAS, SUMMIT COUNTY, STATE OF OHIO.

No. 11,419, MAY TERM, 1904.

14 Low. D. Col., 1548.

OPINION ON DEMURRER.

THE THOMAS PHILLIPS COMPANY, *Plaintiff.*

vs.

THE ERIE RAILROAD COMPANY, *Defendant.*

WEBBER, *J.:*

The questions raised arise on a general demurrer to the defendant's answer. In substance the petition alleges that the plaintiff has a manufacturing establishment in the city of Akron; that the defendant's main railway track runs

through said city; that leading from said railway track to the plant of the plaintiff is a side-track, constructed for the accommodation of the plaintiff in receiving and shipping its commodities to and from said plant; that the defendant has refused longer to place cars on said side-track at plaintiff's plant containing goods consigned to plaintiff, thereby compelling plaintiff to truck the goods from cars consigned to it, shipped over defendant's road, from the station of the defendant, at great expense and inconvenience to plaintiff. And the petition also alleges that in one instance defendant wholly refused to allow plaintiff to take the goods thus consigned to it from one of said cars.

The prayer of the petition is, that the Court order the defendant to place all of the cars consigned to the plaintiff on said side-track, that shall thus be in the hands of the defendant consigned to plaintiff.

The answer filed by the defendant to this petition admits the existence of the plaintiff and its plant at the location named, also said side-track, and the existence of the defendant and its main track in connection with said side-track; and it admits it has refused and does refuse to longer place cars consigned to the plaintiff from various shippers on said side-track at plaintiff's plant. It admits that it refused to let the plaintiff have the goods in the particular car in question. And the answer sets up as an excuse or reason for its refusal that at and a long time before so refusing to comply with the demands of the plaintiff, it belonged to a Railroad Car Service Association, formed for the better protection of the shipping public and railroads, forming a part of such association to better expedite the railroad shipping business for the general public.

And the answer sets up that said Car Service Association had promulgated certain rules governing the unloading by consignees of cars in their hands from consignors; that among said rules is one which provides in substance that the consignee shall within a certain number of hours unload each car thus consigned to it by the consignor from the de-

fendant's road and said other roads from the said association, and on failure so to do said consignee should pay a certain amount of money known as demurrage for such delay. A further rule of such association provides, that should any consignee fail to pay such demurrage, any one of said railroads should have the right to refuse to longer place any goods consigned to such shipper in arrears, on its side-track, until such delinquent demurrage due on other cars was paid. Another rule of said Association provides, that any one of said railroads should have the right to refuse to let the consignee take from any car consigned to such consignee, goods, where the same were not unloaded in the time limit provided by the Association's rules until the demurrage was paid; and the defendant claims that under these rules and by virtue thereof, it has refused, still refuses, and proposes to refuse hereafter to place any of said cars consigned to the plaintiff on said side-track until such delinquent arrearages are all paid on former cars, and it says that it refused and still refuses to allow said plaintiff to take the goods from said particular car at its depot, because of arrearages of demurrage due thereon, until the same shall be paid.

It has been held by practically all of the courts of the land, where the question has arisen, and so often, that car associations of the character named are legal, and their rules legal, if reasonable, that it is useless to cite authorities upon that proposition. On this all the text-writers who have touched this subject agree.

The only question for determination on this demurrer is: Are these particular rules, under which the defendant has refused to comply with the requests of the plaintiff, reasonable?

When I first began to investigate this question, my impressions were against their reasonableness; but on consideration of the authorities, while none are exactly in point as to facts, I have reached the conclusion that they are reasonable. An exceedingly instructive authority, and the leading one in this country, was cited by counsel for defendant. It is a Kentucky case, the case of *The Kentucky Wagon Manufacturing Co. vs. Louisville & Nashville R. R. Co., 98 Ky. 152, S. C., 50 Am. & Eng. Cases 90.*

It seems to me that the reasoning in that able opinion, in which large numbers of authorities are reviewed, with reference to the reasonableness of rules of traffic associations, is irresistible. I commend its careful reading to those interested in this important subject. While not exactly in point, so far as the facts are concerned, yet in principle it supports the contention of counsel for the defendant in this case. There is also a case in Illinois, known as *Bowen W. Schumacher vs. Chicago & North Western Ry. Co.,* which throws light on this question.

In the unloading by the consignee of railway freight cars, there are three classes whose rights must be taken in consideration; first, the consignee; secondly, the railroads; thirdly, the shipping public.

The failure on the part of the consignee to unload a car within a certain time, works an injury to the railroad, for its car is thereby for the time being put out of use; and it works an injury to other consignors for the time being, for the reason that they lose the benefit of such car oftentimes, when there is a glut on the roads.

Expedition alone on the part of the consignee in unloading a car within a certain time can obviate these injuries to the other two classes named.

One of the objects of a traffic association on the part of railroads is to correct the abuse of many consignees who, through negligence or oversight, would otherwise retain cars an unreasonable length of time. To hold that the railroad should be compelled to resort each time to a suit at law to recover demurrage where the consignee has failed to unload within a reasonable length of time, and that this alone is ample leverage on the consignee for the benefit of the other two classes, in my judgment comes short of the mark in affording an adequate remedy at law. It has been found by actual experience over the country that there is a disposition on the part of many consignees to forget that the cars held by them an unreasonable length of time are greatly needed by other consignors and the railroads. And it seems to require very strict rules in order to keep cars moving for the great public against such consignees.

If a consignee desires to have cars placed upon a private switch for its better accommodation, it should be willing to unload such cars within a reasonable time, and I see no injustice in the rule promulgated by a car association that leaves it optional with the railroad company to which it is in arrears for former demurrage to say it will not place cars longer upon such side-track until the former demurrage on other cars is paid. A consignee who knows that this rule will be enforced, will be certain to unload the cars within the prescribed reasonable length of time, or at once pay up the demurrage on failure so to do.

In my judgment the great shipping public is greatly benefited by a rule of this character. It should ever be borne in mind that a rule of law should be one that works out the greatest good to the greatest number. I also hold that the rule requiring the payment of demurage on a car at the station of the railroad belonging to such association before the consignee can remove the goods, is reasonable. It would hardly be fair to compel the railroad company to go to law each time in order to recover such demurrage. And so I hold that these rules are reasonable, that the answer sets up a good defense, and the demurrer should be and is overruled.

IN THE CIRCUIT COURT, SUMMIT COUNTY. STATE OF OHIO.

No. 665, (11419) April Term, 1905.

6 Cir. Ct. Rep. N. S., 505.

OPINION OF THE COURT.

The Thomas Phillips Company, *Plaintiff,*

vs.

The Erie Railroad Company, *Defendant.*

Marvin, Winch and Henry, *JJ.*

Appeal from the court of common pleas of Summit County.

Winch, *J.:*

Plaintiff brought its action against the Railroad Company, praying that the latter be ordered and directed to immediately deliver upon the plaintiff's switch certain cars consigned to plaintiff and laden with merchandise belonging to it, and that the railroad company be further ordered and directed to receive from certain other railroads and at once deliver upon said switch such further cars consigned to plaintiff as might in the future arrive, either upon such other railroads, or its own.

By an amended and supplemental petition plaintiff asks damages alleged to have been occasioned by the railroad company's delay in delivering said described cars upon said switch.

The railroad company, by its amended answer, admits its refusal to set certain cars upon plaintiff's switch, which cars, it alleges, it placed upon a public side track and notified plaintiff that they were there for its benefit. It then pleads certain car service rules, as follows: Defendant further says that prior to October 1st, 1902, in order to secure the speedy unloading and return of cars and to avoid detention thereof by shippers and consignees, it made and adopted, and through The Cleveland Car Service Association of which it was and is a member, promulgated rules providing among other things, that a charge of one dollar per day or fraction of a day would be made for delay to or storage in cars on all cars containing property shipped at car-load rates for any time beyond the so-called free time elapsing after such cars should be placed for unloading, and before the same should be unloaded, Sundays and legal holidays not being counted in the computation of the time elapsing, and the free time being 96 hours for cars containing coal and coke, and 48 hours for cars containing other commodities. By said rules it is also provided, in substance, that when cars are ordered to a private siding for unloading, and the party so ordering them is delinquent in the payment of car service charges, defendant's agent should decline to place cars on such private siding until such delinquency should be made good, and should thereupon notify the party using such private siding that his freight would be delivered or received only upon the defendant's public team track until such delinquency should be made good.

Said rules were in force continually from a date prior to October 1st, 1902, to and since the commencement of this action, and of the plaintiff, during such entire period, had full notice and knowledge, and defendant says that said rules and said charges are reasonable, and other railroad companies, and railroad companies generally, have adopted and enforced the same rules or rules of like character.

Defendant further says that all the shipments mentioned in the petition herein, and ordinary shipments of goods to plaintiff, other than of coal and coke, have been made under contracts, evidenced by the bills of lading under which said shipments have been made and transported. By the contracts of shipment and bills of lading it has been provided that "The delivering carrier may make a reasonable charge

per day for the detention of any car, and for use of track after the car has been held 48 hours for unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor," and further that "Owner or consignee shall pay freight, and all other charges accruing on said property before delivery."

Defendant further says that in its shipments from its line of road to said private track occupied and used by plaintiff, for sometime prior to the date referred to in the petition, when said cars were detained, the plaintiff had detained and held for storage purposes many cars of the defendant delivered on said spur track at plaintiff's plant, and during the month of November, 1902, plaintiff detained as aforesaid, ten cars an aggregate of ninety days over and above the free time allowed by the rule. During the month of December it detained six cars an aggregate of thirty-nine days over and above the free time allowed by the rule. During the month of January it detained eleven cars an aggregate of ninety-four days over and above the free time allowed by the rule. That the reasonable service charges for November were $90.00; for the month of December were $39.00; for the month of January $94.00, and although defendant had often requested plaintiff to pay said car charges, it had positively refused to pay the same or any part thereof.

The defendant further says that in addition to the detention of said cars above recited, for a long time, to-wit, more than two years prior to the commencement of this suit, that it positively refused to recognize the rules of the defendant with reference to the storage of the cars as above recited, but has deliberately and purposely detained cars, depriving the defendant of their use, and plaintiff in addition has refused to pay to the defendant the reasonable value of the said detention of cars, has denied and denies its liability and obligation to pay anything to the defendant for detention of cars.

Defendant says that because of plaintiff's refusal to recognize said rules, and to pay any car service charges, it, on or about January 16th, 1903, served due notice upon plaintiff, that it would deliver no more freight upon said plaintiff's private track, after January 21, 1903, until said

car service charges for November, 1902, were paid, and on January 26th, 1903, further notified plaintiff that it would not resume deliveries upon said private track till said car service charges for December, 1902, were also paid; and said car service charges not being paid, defendant refused to deliver upon said private siding said three cars mentioned in the petition, but it placed them upon its regular public team track for plaintiff to unload, and at and up to the time of beginning this suit plaintiff was free to unload them there, except that as to said car No. 80115 the free time after such placing elapsed before this suit was begun, and car service charges accrued thereon, whereupon this defendant through the medium of said Car Service Association caused said car to be locked so that it should not be unloaded till such charges accruing thereon should be paid and its lien therefor extinguished by such payment.

A demurrer filed to this amended answer raises the question of the reasonableness of the car service rules pleaded, and the right of the railroad company to enforce them.

That forty-eight hours is a reasonable time within which a consignee should be required to remove freight from cars and that the railroad company might make a reasonable charge for demurrage upon failure to remove the freight within said time, was held by this court in the case of *The N. Y. L. E. & W. R. R. Co. vs. The J. F. Seiberling & Co.*, at the October term, 1894, in this county.

In this case we have the additional question whether, upon the refusal of the consignee to pay demurrage already accrued, the railroad company can refuse to deliver other cars thereafter arriving.

We think both the rules were adopted by the railroad company for the one purpose alleged in the amended answer: "In order to secure the speedy unloading and return of cars and to avoid detention thereof by shippers and consignees," and not that the second rule was adopted for the purpose of enforcing the payment of demurrage already accrued. That such rule is reasonable and necessary for the

proper operation of defendant's railroad is alleged in the answer as follows: "Defendant says that in the operation of its railroad plaintiff is required to use a large number of cars of various kinds to haul and carry the great volume of freight which is offered to it for transportation as a common carrier; and by reason of the transportation of through freight; that is, freight originating at points beyond defendant's railway for delivery at points on its railway, large numbers of cars owned by other railroads are offered to the defendant for transportation, and hauled by it over its railroad to point of destination or for delivery to connecting carriers. That the proper operation of its railway requires that it return to the owners or to the other carriers, as soon as reasonably possible, all foreign cars coming on its lines. That for many months prior to the commencement of this suit, the volume of freight transported over defendant's railroad, and over the roads of other carriers, has been unprecedentedly large, and that the proper handling of its freight and the discharge of its duties as a common carrier make it necessary that consignees of freight unload cars with all reasonable dispatch, and without unnecessary delay, that shippers and consignees do not unnecessarily detain the defendant's cars.

The further allegation that plaintiff positively refused to recognize these rules and deliberately and purposely detained cars, depriving defendant of their use, in addition to refusing to pay reasonable demurrage charges, denying its obligation to pay anything for the detention of cars, we think makes a defense in law entitling the defendant to a hearing upon the issues thus joined.

The demurrer is, therefore, overruled.

GRANT & SIEBER,
Counsel for Plaintiff.

TIBBALS & FRANK,
Counsel for Defendant.

SUPERIOR COURT OF PENNSYLVANIA, EASTERN DISTRICT.

OCTOBER, 1904.

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27 Pa. Sup. Ct. 511.

BALTIMORE & OHIO RAILROAD COMPANY

vs.

GRAY'S FERRY ABATTOIR COMPANY, *Appellant.*

APPEAL BY DEFENDANT FROM THE JUDGMENT OF THE COURT OF COMMON PLEAS, NO. 5, OF PHILADELPHIA COUNTY, OF MARCH TERM, 1904, NO. 1660.

WM. FINDLEY BROWN, Attorney for Baltimore & Ohio R. R. Co.

FRANK R. SHATTUCK, Attorney for Defendant.

PLAINTIFF'S CLAIM.

The claim of the Baltimore & Ohio Railroad Company in this case was that it had established a charge of $1.00 per car per day for the detention of its cars by consignees beyond forty- eight hours after arrival, and that it is a reasonable and valid regulation; that the defendant company failed to unload and detained certain cars, delivered to it over the plaintiff's line, beyond forty-eight hours after arrival, and therefore it sued to recover the amount of such charges. It had attached to its statement of claim certain schedules, which specifically show how its claim was made up.

DEFENDANT'S AFFIDAVIT OF DEFENSE.

In the affidavits of defense filed by the defendant the facts set forth therein may be briefly summarized as follows:

(*a*) That defendant was never notified of the said rules of the plaintiff; never agreed to be bound or become liable thereunder, and the same never became a contract between the plaintiff and defendant.

(*b*) That said rules are not reasonable and valid regulations; but, on the contrary, are unreasonable and invalid.

(*c*) That said rules are not necessary to carry out the provisions of Article 17, Section 3, of the Constitution of Pennsylvania; that contracts in regard to the carrying of coal in cars over plaintiff's line, consigned to the defendant, were made between plaintiff and consignor.

(*d*) That defendant promptly unloaded all cars delivered to it by the plaintiff, and all defaults in regard to the detention of such cars were caused entirely by the plaintiff.

(*e*) That it was agreed between the plaintiff and defendant that the former should deliver not over two cars of coal per week to its plant, but in violation thereof, during some weeks, the plaintiff failed to deliver any cars whatsoever, and at other times delivered more than two cars per week.

(*f*) That in such cases as plaintiff claims the defendant detained its cars, it failed and neglected itself to take away and remove empty cars upon the tracks in its plant before delivering full ones upon the same tracks, so that the first ones so delivered could not be removed until the next ones delivered were unloaded.

(*g*) That the matter of delivering and removing cars was entirely within the power of the plaintiff company, and that no contract or engagement existed between the plaintiff and defendant, whereby the latter was in any way required either to deliver or remove said cars.

(*h*) That in no instance was the defendant notified by the plaintiff of the arrival of cars at the East Side Station of the plaintiff, and it was at all times without knowledge of such arrival until the delivery thereof by the plaintiff to the defendant at the plant of the latter, and that such deliveries were made under the agreement to deliver to the plaintiff two cars of coal per week.

(*i*) That the defendant is not informed as to what is meant by the entries under the terms "ordered," "released" and "detained," as printed upon the forms used in the exhibits attached to plaintiff's statement, but denies that such entries respectively represent the times when the defendant ordered cars delivered, or such cars were unloaded by it, or were in the possession of the defendant by reason of any failure on its part to unload the same.

(*j*) That the defendant does not possess detailed information in regard to each particular car mentioned in the exhibits attached to plaintiff's statement, but that the same is in the possession of the plaintiff and not of the defendant, and, therefore, the plaintiff should be required to make proof thereof before a jury.

It will be seen from the above summary of the averments of the respective parties that the plaintiff makes a claim for detention of cars by the defendant, according to rules which the plaintiff established, but of which the defendant had no knowledge or information until this suit was brought. The defendant, after denying that such rules are reasonable or necessary, sets forth as specifically as it can that it did not in any of the cases detain the cars of the plaintiff. If the delays did occur as claimed by the plaintiff, they were caused altogether by its own failure to deliver cars as agreed or to take away the cars after they were unloaded.

All questions involved were fully argued, not only in printed briefs submitted by both sides, but in oral argument. Upon the appeal, the Court by a unanimous decision affirmed the judgment of the lower Court for the plaintiff and handed down an opinion of more than usual interest to car service associations.

Opinion by SMITH, *J.*

Filed March 14, 1905.

This case is ruled by Pennsylvania Railroad Company vs. Midvale Steel Company, 201 Pa. 624, which it closely resembles, both in general character and in its chief details. That case is an authority that settles the right of a carrier by rail to establish a rule fixing a reasonable charge for the detention of cars after a sufficient period for unloading, without specific notice to shippers or consignees; and in this case, as in that, "the rule is manifestly a reasonable one, both as to time and charge." The only question presented here is whether the affidavit of defense sets forth, specifically, facts that constitute a defense to the specific items of the plaintiff's claim.

The declaration states the several items of charge, embracing in each the car number, the date of arrival, of delivery and of release, the number of days each car was detained, and the amount claimed for detention. The affidavit of defense, so far as it sets forth matters that have been settled by the case cited, need not be considered. Its further allegations are general and indefinite, and it fails to meet, specifically, any item of the plaintiff's claim. It was the plaintiff's duty, as a carrier, to transport and deliver all coal consigned to the defendant. It was the defendant's duty, unless relieved therefrom by agreement with the carrier, to provide itself with the necessary facilities for the prompt unloading and return of the plaintiff's cars. If the number of cars consigned to it was so large as to make this impracticable, it should limit its shipments to its capacity for dealing with them, or pay charges for delay. From the usual methods of business, the defendant must be presumed to have controlled the quantity of coal shipped on its order; and no lack of such control is suggested in the affidavit.

So far as appears from the declaration and affidavit, the cars for which the charge is made, shown in the exhibit attached to the declaration, are all the cars that were deliver-

ed. The affidavit alleges an agreement with the plaintiff by which only two cars a week were to be delivered, and that, as shown by the exhibit, the plaintiff "violated this agreement, and at times failed to deliver any cars during some weeks, and at other times delivered many more than two cars per week." The exhibit, however, is far from bearing out the allegation of excessive delivery. It sets forth the delivery of cars as follows: April 4th, 2; June 20th, 4; July 30th, 1; August 6th, 15th, 22d and 31st, each 2; September 8th and 16th, each 2; 22d, 28th and October 2d, each 1; October 13th, 20th, 27th and November 4th, each 2; November 12th, 1; 20th, 2; 27th, December 15th and 18th, each 1. This shows a delivery of more than two cars in a week in but a single instance, and frequently a delivery of only one car in a week. Unless the two cars per week were to consist of a semi-weekly delivery of one car—which is not alleged in the affidavit—the agreed limit was substantially observed. Further, it does not appear from the affidavit that the defendant ever complained of any violation of the alleged agreement, or refused to receive more than the number of cars it provided for. It was entirely competent for the defendant to waive its observance; and in accepting all cars consigned to it, without objection, it must be regarded as having waived it.

Judgment affirmed.

STATE OF MISSISSIPPI, SUPREME COURT.

NOVEMBER, A. D. 1904.

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37 So. Rep. 939. (Miss. 1905.)

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY

vs.

C. J. SEARLES.

OPINION OF THE SUPREME COURT OF MISS.,

FEBRUARY 20, 1905, BY TRULY, *J.*

No. 11,245

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY

vs.

C. J. SEARLES.

TRULY, *J.*

Stated in chronological sequence, the facts giving rise to this litigation are as follows:

On October 1st, 1900, under the firm style of Searles Bros., C. J. Searles and T. M. Searles, commenced business in Vicksburg, Miss. At that time, and for several years before then, the delivery of cars and the assessing of demurrage for detention thereof by consignees of freight, had been under the direction of the Louisiana Car Service Association, of which N. S. Hoskins was manager. Of this car service association both the railroads entering the city of Vicksburg, were members. On December 8th, 1900, C. J. Searles, the managing partner of the firm of Searles Bros., wrote to N. S. Hoskins, requesting leniency on the part of the Car Service Association in consideration of his promptness in handling the largest part of his business, and in view of the fact that he was then laboring under the disad-

vantage of not being able to secure an available warehouse in which to unload freight which might be consigned to his firm in car load lots. From this date, until April, 1902, the record fails to disclose any variance in regard to the question of demurrage or car service between the firm of Searles Bros. and the Car Service Association or either of the railroads over which that firm received freight. From April until August 28th, 1902, C. J. Searles, doing business as Searles Bros., and as successor to the Southern Brokerage Company, positively refused to pay any more car service or demurrage charges and announced his deliberate determination not to recognize in any manner the authority of the car service association or its employees to assess said charges, and refused to have any conference in regard thereto with the manager or the local agent thereof. Frequent overtures were made to Searles by representatives, both of the railroads and of the Car Service Association, seeking to arrive at some amicable adjustment of the pending dispute in reference to car service charges previously accrued, conditioned only that Searles would in the future recognize and comply with the rules of the Car Service Association in reference to demurrage charges. All propositions of settlement or of arbitration were rejected by C. J. Searles, who firmly adhered to his announced decision of not recognizing the authority to any extent of the Car Service Association. While this condition of affairs existed, on August 28th, 1902, after first submitting the proposed order to the Division Superintendent of the Yazoo & Mississippi Valley Railroad Company, and receiving his approval thereof, N. S. Hoskins, Manager of the Louisiana Car Service Association, directed that no cars should thereafter be switched to the warehouse where Searles Bros. and the Southern Brokerage Company transacted business or businesses. This warehouse, which Searles had secured subsequently to the writing of his letter to Hoskins hereinbefore referred to, was located on a spur belonging to the Yazoo & Mississippi Valley Railroad Company, on which were also situated the warehouses of nearly all of Searles Bros.' chief competitors in the business in which all were engaged—wholesale produce, commission and brokerage. For many years it had been the custom of the Yazoo & Mississippi Valley Railroad Co., to switch freight received in car loads to the warehouses of the consignees. After Oc-

tober, 1902, C. J. Searles continued business as successor of the Southern Brokerage Company, managing partner of Searles Bros., composed of himself and his brother T. M. Searles, and as C. J. Searles & Co., composed of himself alone. All these businesses were conducted at the same warehouse and the refusal to switch cars or freight applied to all alike. From August 28th, 1902, the date of the issuance of the order declining to further switch cars, until March 9th, 1903; the Yazoo and Mississippi Valley Railroad Company, acting under said order issued by the manager of the Car Service Association with the approval of its Superintendent, uniformly refused to place cars of freight at Searles' warehouse, but continued as theretofore to switch all freight in car load lots to other merchants engaged in similar business occupying warehouses similarly located. The Yazoo & Mississippi Valley Railroad did however, furnish to Searles upon request empty cars for the shipment of freight from his warehouse to other points, and did, with one exception, transfer all cars received over its road to the Ala. & V. R. R. when so directed by Searles. On March 9th, 1903, the Chancery court granted to Searles a mandatory injunction commanding the Yazoo & Mississippi Valley Railroad Company, to switch and place at Searles' warehouse, freight received in car load lots in the same manner that it did freight received for his competitors in business also occupying warehouses. Pending this suit, and prior to final hearing, an agreement was entered into by which Searles and the railroad company each agreed to pay any demurrage which might fall due thereafter under the rules governing that matter, such payment to be without prejudice to the rights of either party in the pending litigation. Thereupon C. J. Searles, in the name of C. J. Searles & Co., filed his declaration in the Circuit Court against the Yazoo & Mississippi Valley Railroad Company claiming that between the date of August 28th, 1902, when first refusal to place cars was made, up to the date of the filing of the suit, the Yazoo & Mississippi Valley Railroad had received over its own line and refused to switch and place at his warehouse, or had refused to receive from the Alabama & Vicksburg Railroad and switch and place at his warehouse one hundred and thirty-five cars of freight in car load lots, by reason of which action he had been compelled to receive his freight on the wagon and delivery

tracks of the Yazoo & Mississippi Valley Railroad, all some distance from his warehouse, entailing on him an additional expense for labor, draying and extra clerk hire, of $1,905.05, and he also claimed in his declaration a statutory penalty of five hundred dollars for each car load of freight which the railroad had refused to switch and place at his warehouse, averring that the railroad and the Car Service Association had discriminated against him; that the Car Service Association was a "trust" or "combine" within the meaning of the Mississippi statute in that regard, whereby he was entitled, as the injured party, to receive the penalty allowed under the statute. The case was tried before the Circuit Judge, a jury being waived. In addition to the foregoing facts, it developed upon the hearing, that Searles alone of all merchants in Vicksburg engaged in similar business, refused to recognize the authority of the Car Service Association; that while disputes over bills had from time to time arisen between other merchants and the railroads in reference to the correctness of several assessments of demurrage charges, that such disputes had been adjusted or were in process of adjustment, and that no order had been issued refusing to switch cars for any other merchant, though such order had been threatened in several instances when the settlements had been unduly delayed. It is undisputed in the record that cars would have been switched for Searles had he agreed to pay demurrage charges when the same might rightfully accrue under the rules of the Car Service Association. It was further in evidence that the Louisiana Car Service Association operated solely in regard to the assessment of demurrage under rules in reference thereto, adopted and promulgated by the Mississippi Railroad Commission, and that car service charges were not claimed except under the circumstances authorizing under said rules the collection thereof. That the order refusing to have cars switched and placed for Searles was issued not by order of the Executive Board of the Car Service Association or with its knowledge, but by its manager, after the same had been submitted to and approved by the Division Superintendent of the Yazoo & Mississippi Valley Railroad and was issued solely for the purpose of enforcing compliance on the part of Searles to the rules of the Mississippi Railroad Commission authorizing the collection of demurrage under certain stated circumstances. The Circuit Judge held that the Car Service

Association was a trust and combine within the meaning of Chapter 88 of the Acts of 1900, and awarded Searles damage for $60,861.30 being the statutory penalty for each cer of freight which the railroad had refused to place at his warehouse, and in addition thereto, the amount paid out for the drayage and handling of the freight contained therein. From this judgment the Yazoo & Mississippi Valley Railroad Company appeals.

The first question presented for consideration in arriving at a decision in this case is: What is a "trust" or "combine" within the meaning and condemnation of the statute cited? A determination of this question necessitates a brief examination at least, of the history of anti-trust legislation in our State.

Section 198, Constitution 1890, commands the legislature to "enact laws to prevent all trusts, combinations, contracts, and agreements inimical to the public welfare."

It must be observed at the outset, that not all trusts, combinations, contracts and agreements were to be prohibited because the great law-makers who framed the fundamental law of this commonwealth, as the same is embodied in our present constitution, well knew that such legislation would be palpably trenching upon if not absolutely violative of the inherent rights of the citizen, and would be restrictive to an unwarranted degree of the privilege of contract which every man is entitled to enjoy under our form of government. Tiedeman, Lim. Police Powers, 244. No such legislation was authorized because no such legislation was demanded. Only such trusts, combinations, contracts and agreements were to be prevented as would be "inimical to the public welfare."

Acting under this authority Sec. 4437 Code 1892 was adopted providing that a trust or combine is a combination, contract, understanding or agreement expressed or implied between two or more persons, corporations or firms and association of persons or between one or more of either with one or more of the others to do certain things therein enumerated, amongst others (g) "to place the control to any extent, of business or of the products of earnings thereof, in the power of trustees, by whatever name called; "[h]" by which any other person than themselves, their

proper officers, agents, and employees shall, or shall have the power to, dictate or control the management of business.

And having enumerated the various kinds of contracts which were denominated trusts and combines the section proceeds to declare them to be "inimical to the public welfare, unlawful, and a criminal conspiracy." An analytical study of this section demonstrates that it was the legislative design to prohibit and provide punishment for the formation of any criminal conspiracy by which the interest of the public might be in any manner injured or jeopardized; whether such combination was intended to be in restraint of trade, to limit, reduce or increase the price or the production of any commodity, or to hinder competition in the importation, manufacture, transportation, sale or purchase of any commodity, or to do certain other enumerated acts, which would in the judgment of the legislature, prove prejudicial to the interest of the public or any part thereof, or of any individual. The reason for this legislation being, as is so aptly phrased by Whitfield, J: *(Insurance Company vs. State, 75 Miss. 24.)* that "conspiracies of this class are raised to the grade of felony and pronounced obnoxious to the public policy of this state, and inimical to the public walfare by reason of the great mischief they are known, of all men, to accomplish, as manifested by the course of legislation and decision the country over. Such trusts constitute one of the greatest menaces to public welfare known to modern times, and the legislature has wisely made them felonies and denounced this severe penalty against them." The design of the legislature was to protect the public, not to unlawfully restrict the transacting of business by either corporations or individuals. The various kinds of legitimate business rendered necessary by the multiform demands of public convenience, the manifold callings which are an incident of this progressive age, all demand that the individual right of contract shall be given full sway, conditioned only that the rights of the public and the welfare of the people and the public policy of the state shall be held sacred. Says Terral, J. *(Hock vs. Wright, 77 Miss. 482):* "The legislature by the chapter on trusts and combines did not intend to debar a person from conducting his own private business according to his own judgment." In this connection Whitfied, J: —in *Insurance Company vs. State, supra,* says: "It (the

legislature) therefore prohibited any trust whose object was to place the control of any business in the power of trustees, where the effect of such trust should be to injure the public or any particular person or corporation in this State. Such legislation has become very general in the United States, owing to the pernicious results of such trusts." It appears, therefore, from these previously announced, well considered and strikingly accurate statements of the scope and purpose of the law by this court, that one of two things must exist in order to render a contract or agreement between two or more persons or corporations subject to the condemnation of paragraphs (g) and (h) of the Act now under consideration: First, it must place the control to some extent of the business or of the products or earnings thereof, or it must give the power to conduct or control the management of such business to trustees or persons other than the proper officers, agents or employees of the contracting persons or corporations, or, second, it must have the effect of injuring the public or some particular person or corporation in this State.

The correctness of the definition which recognizes that a "combine" to fall within the purview of the legislative design must have as a constituent element either a violation of public policy in that it tends to create a monopoly or is in restraint of trade, or that it involves a delegation and abandonment of corporate powers and is inimical to the public welfare, is emphasized and made more manifest by reference to legislation dealing with this subject enacted subsequent to the adoption of Code, Sec. 4437 hereinbefore cited. The purpose of the legislature of this State, the object it had in view, the evil it sought to prevent, appear in the title given in conformity to the constitutional requirements as setting forth the subject matter dealth with, to Chapter 88, Acts 1900, which is the latest expression of legislative will. That Act is entitled "An Act to define trusts and combines, to provide for the suppression thereof, and to preserve to the people of this state the benefits arising from competition in business." And the same intention is again declared in Sec. 11 of the Act which directs that it shall be liberally construed to the end that trusts and conbines may be suppressed and the benefits arising from competition in business preserved to the people of this state. The benefits which the

legislature sought to secure to the people of the state were those which naturally flow from competition in business. In order to insure these benefits it was provided that any contract entered into between two or more persons or corporations should be unlawful, if it in any wise restrained or decreased the advantages known to arise from competition in business, whether such contract was expressly and openly in restraint of trade, or whether by its effect it was indirectly liable to reduce or increase prices, to increase or reduce production, to engross or forestall or to hinder competition in production, manufacture, transportation, sale or purchase of any commodity. All contracts, whether expressed or implied, which would necessarily or probably have any of the effects therein forbidden were declared to be violative of the announced public policy of the state in that they inevitably tended to reduce the benefits sought to be insured by the Act. It was also forbidden for any two or more persons or corporations to issue, own or hold the certificates of stock of any trust or combine. This provision was clearly aimed at the well known plan by which the stock of various corporations surrendering their own corporate entity, engaged in a partnership of their own; such arrangements being palpably in restraint of trade and tending inevitably to the creation of a monopoly. It was further provided by paragraphs (g) and (h) that it should be unlawful for two or more persons, firms or corporations or one or more of either with one or more of the other, to form any contract or combination by which the power to dictate or control the management of the business, or by which the control of the business or of the products and earnings thereof, was placed in the power of any other person than their own proper officers, agents and employees. These paragraphs are a rescript of the provisions originally contained in Sec. 4437 *supra*. It should be observed that these paragraphs, and in fact the whole chapter, deal with both corporations and individuals alike. And in construing such statutes the general rule is that the nature of the business contemplated by the contract or arrangement, and the tendency of the contract as affecting the public, rather than whether the parties to the contract are corporations or individuals, are to be considered in determining whether it violates public policy.

Hirschl. Combination, Consolidation and Succession of Corporations, p. 2.

This consideration eliminates from this discussion the question of to what extent limitations, upon the power to contract, may be placed by the state upon corporations, solely and only, in a proper exercise of its reserved police power. When analyzed the propositions contained in the paragraphs cited are not novel; they are in truth, but mere announcements of familiar principles contained in varying form in many statutes germane to this subject. They, and all the provisions of the Act, are but means to an end, details of the legislative plan. The result desired, the purpose of the entire legislation, was to suppress trusts, secure the benefits arising from competition in trade, prevent monopolies and protect the people from the possible tyranny and oppression of combined wealth. In fact a brief investigation will show that all modern anti-trust legislation is based upon the same fundamental principle. All combinations are forbidden, the necessary, natural or probable consequence of which will be to increase or decrease the price of production of any commodity, or which restrict facilities in the handling or transportation of the same. Contracts or agreements, of whatever character, by which the autonomy of corporations is surrendered and the exercise of their charter powers delegated to others are denounced as violative of public policy. Corporations which enjoy no powers except those of which they are recipients by charter grant, are without power to absolve themselves from the performance of their duties to the public, and contracts abnegating such performance and alienating the powers granted them by the state, are void. *Central Transportation Co. vs. Pullman's Palace Car Co., 139 U. S. 35 L. Ed. 55; Ray Contractual Limitations, p. 240.*

Arrangements under whatever guise, by which the stock of several distinct corporations is placed in the hands of certain trustees who are vested with power of voting it, are condemned as tending inevitably to the creation of monopolies, and the absolute destroying of competition in the production or transportation of many commodities, and as a direful result, a few individuals would be able to fix the price of the very necessities of life, with power to increase or decrease without regard to supply or demand, but solely as their greed and rapacity might dictate. The wisdom of such legislation and the imperative necessity of its strict en-

forcement is evidenced by the fact that the aggressions of mighty aggregations of corporate wealth so formed now constitute one of the gravest problems with which the nation has to deal. *Northern Securities Co. vs. U. S. 43 L. Ed. 698; Pearsall vs. Great Northern R. R. Co., U. S. 40 L. Ed. 838*

In short, without unduly extending these observations the formation of all contracts and combinations is condemned by which corporations or individuals are banded together for any illegal purpose, or if such association be already in existence the parties will be inhibited from continuing operations thereunder.

But, at last the test, and only test, is, not what the intent of the parties may be, not what form the combination has taken, but what will its probable effect be?

If unlawful or oppressive, if obnoxious to public policy, if inimical to public welfare, they will be denounced and punishment meted out to every participant; otherwise, courts will not limit or restrict the inalienable right of contract, and will not interfere unless the violation of law be apparent or the apprehended evil effect assume some tangible form. Noyes, Intercorporate Relations, Sections 392, 401, 405.

We uphold and maintain in its full integrity the doctrine which recognizes the right of the state in the exercise of its reserved police power to restrict the power of corporations to contract within certain prescribed limits, and which forbids that such power should ever be so abridged or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or the general well being of the state. That power inheres in the sovereign and the protection from the encroachments of corporations is assured by the guarantee of Sec. 190, Constitution 1890.

But that doctrine is not assailed here. This is a case involving, not legislative power, but legislative will. In this direct connection, it must again be observed that by the Act now under review, what is forbidden to corporations is likewise forbidden to individuals; the contracts and agreements which are by paragraphs (g) and (h) condemned,

fall under the ban of the law whether entered into by corporations solely among themselves, or jointly with individuals, or by several individuals alone.

It is contended that all combinations or contracts without regard to purpose, intent or effect, by which the control to any extent of business or of the products and earnings thereof, is placed within the power of trustees or by which other persons than the contracting parties or their proper officers, agents or employees are given the power to dictate or control the management of business are prohibited by the terms of the Act. If this narrow construction is in fact the legislative intent, the entire law would be open to the just criticism of being a wholly unnecessary if not an unwarranted invasion of the inherent right of the citizen to deal with his own as he pleases, if without injury to others. *Gage vs. State, 24 Ohio, C. C. R. 724.*

Carried to its logical conclusion this argument would prevent any two or more individuals engaged in business from employing the same agents or representatives, or from placing in the hands of the same individual the right to control their separate businesses. So, two planters, owning adjoining plantations by employing the same manager to control both places with power to manage the business, dictate to the laborers and dispose of the products, would be guilty of a criminal conspiracy. Two jobbers who employ the same travelling salesman with power to accept or reject orders to be transmitted to one or the other of the stores; or two merchants who employ the same drayman to haul and deliver their freight; or two express companies which employ the same messenger and delivery man; or two railroad companies which employ the same ticket or freight agent at union depots; or two insurance companies which employ the same adjuster, with power to settle losses; or two lumber companies which employ the same attorney with power to adjust disputed claims or impending litigation, and many other cases of every day occurrence, would each be violative of the law now under consideration, and every participant therein, would be subject to the severe penalties therein prescribed. We cannot adopt or sanction this restricted view. The true interpretation in our judgment, is that only such contracts and agreements (within the purview of the paragraphs now under review) are forbidden which on account

of their natural result are obnoxious to public policy, or which, in themselves, are by necessary effect inimical to the public welfare. Practically the same construction has been placed upon the anti-trust laws of other states which, though clothed in different verbiage contain substantially the same ideas, and are designed to attain the same end. Thus the Supreme Court of Montana in a very recent case in discussing the constitutional and statutory provisions of that state relating to this matter, says: The constitution "deals generally with the rights and powers of corporations and associations of persons exercising any of the powers and privileges not possessed by individuals or partnerships, and their duties and purposes. It is prohibitory and restrictive in its general scope and purpose, the design of the convention in adopting its provisions being to prevent combinations to restrict or repress competition in all industrial pursuits, and to protect the people in general, and the employees of a certain class, against both the legislature and combinations of capital from unjust impositions." And after showing that certain consolidations, such as that of competing railroads, telegraph and telephone companies and the like, are absolutely prohibited "as having a necessary tendency to restrict competition," the court proceeds to a discussion of the anti-trust statute: "Apart from these wholesome restrictions and prohibitions, the right of the people to accumulate property and to hold and enjoy it, either by individual effort or by means of associations of natural or artificial persons, is not restricted. Section 20 prohibits any combination or contract which has a particular purpose, to wit: "fixing the price or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people." The terms "combine" and "form a trust" were evidently intended to be read in connection with the expression "for the purpose, etc., clearly implying that in order to subject offenders to the severe penalties which the legislature might impose, there must be shown a specific intent to do the prohibited act, or that the association or combination necessarily tends to accomplish the same result. That this is the meaning is clear from the enumeration of persons who may not do the prohibited acts. Corporations, stock companies, natural persons or partnerships are all included. If the criminal intent is not a necessary ingredient of the evil denounced, then all sorts of combin-

ations are to be deemed prohibited, even ordinary copartnerships, as coming within the letter or the prohibition. For the terms "combine" and "form a trust" are of equal dignity. If the former is to be regarded as modified and explained by the clause "for the purpose," etc., by the same rule must the latter also. The term "trust" is assigned the meaning given to it by the text-writers *(Cook on Corporations, Sec. 503 a; Spelling on Trusts, Sec. 121),* includes any form of combination between corporations, or corporations and natural persons, for the purpose of regulating production and repressing competition by means of the power thus centralized." And after showing that the term was first used in a narrower sense and applied only to transfer of stock by several corporations to trustees with power to vote, the Court continues: "If it be construed as equivalent to the term "combination" or "consolidation" the meaning of the section is perfectly clear. If used in the sense of the definition given it by the text-writers, it is none the less clear, though it involves a repetition of the same idea, since the definition includes the idea of criminal purpose, and makes it a necessary ingredient of the offense denounced. The section of the statute quoted involves the same idea and demands the same construction, though it is more specific in its provisions, and extends to and includes combinations in restraint of competition in transportation. It denounces every form of combination or contract which has for its purpose, directly or indirectly, the restraint of production or trade in any way or manner, or the control of the price of any article of consumption by the people. It was not the purpose of the convention, or the legislature, to limit either the term used in the Constitution, or in the Statute, by any narrow definition, but to leave it to the courts to look beneath the surface, and, from the methods employed in the conduct of the business, to determine whether the association or combination in question, no matter what its particular form should chance to be, or what might be its constituent elements, is taking advantage of the public in an unlawful way. *Harding vs. Am. Glucose Co., 182 Ills. 551.* In each case, therefore, under these provisions, the nature of the arrangement or combination is a question of fact to be determined by the Court from the evidence before it, or from the vice which inheres in the contract itself." *McGinnis vs. Boston & M. Consol. Copper & Sil-*

ver Min. Co., 75 P. 94; Ceballos vs. Munson S. S. Line, 93 Hun. 595 and cases cited.

Nor is the rule of construction different when applied to the federal anti-trust statute. "It is now settled (says the Circuit Court of Appeals) by repeated decisions of the Supreme Court that the test of the validity of a contract, combination or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade or enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law and is not obnoxious to its provisions. This Act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states." *Phillips vs. Iola Portland Cement Co., 125 F. 594.*

And for an exhaustive and very lucid discussion of the same subject, in which the same result is reached, see the elaborate opinion in *Whitewell vs. Continental Tobacco Co., 125 F. 454,* supported by numerous extracts from opinions of the United States Supreme Court.

As the latest authoritative utterance upon this subject we quote from the opinion of the Supreme Court of the United States in *Northern Securities Company vs. United States, 193 U. S. 43 L. Ed. 698,* where among other propositions which it is announced are plainly deducible from previous decisions of that Court, which are reviewed, are the following, which embrace the case at bar:

"That the natural effect of competition is to increase commerce and an agreement whose direct effect is to pre-

vent this play of competition restrains instead of promoting trade and commerce;

"That to vitiate a combination such as the act of congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition."

Justice Brewer in his concurring opinion in that case, also speaking of the federal anti-trust statute says: "That act as appears from its title was leveled at only unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear, and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen."

By parity of reasoning we think these observations strikingly applicable to our own statute. The object of the federal anti-trust statute is to preserve to the people of the entire nation the benefits arising from competition in business by preventing monopolies and contracts in restraint of trade in regard to commerce among the states; the object of the state legislation is to preserve to the people of the state the identical benefits by preventing monopolies and contracts in restraint of trade in regard to domestic commerce. To vitiate a combination such as the statute con-

demns, it is essential to show that by its necessary operation it tends to restrain trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition. The trade or commerce so affected being domestic or interstate or foreign, according to whether the state or federal statute is invoked. But to vitiate the combination the effect must be detrimental to the interests of the public under either statute. An approved statement of the rule is this: "Combination for business purposes is legal. Combinations are beneficial as well as injurious, according to the motives or aims, with which they are formed. It is therefore impossible to prohibit all combinations. The prohibition must rest upon the objectionable character of the objects of the combinations." Tiedeman Limitations Police Power, Sec. 244.

We adopt this announcement as accurate with the additional proviso, that if the effect of the combination be evil, it will be condemned no matter how praiseworthy its object may have been.

We cannot convict the legislature of having intended to prohibit the very many and constantly increasing number of perfectly legitimate contracts or combinations to which the growth of business, or the exigencies of commerce give rise, and which are constantly multiplied by new avenues continually being opened by the thrift, progress and invention of this era of complex business enterprises. Keeping in mind the clear statement before quoted from Insurance Co. vs. State *supra,* that only such combinations are forbidden as may have the effect of injuring the public or some part thereof, or some corporation or private individual, the meaning of the statute and of the paragraphs particularly in question becomes perfectly plain and the plan inaugurated by the legislature stands out in bold relief in all its details.

With this interpretation of the statute we pass to the consideration of the question whether or not the Louisiana Car Service Association, as disclosed by this record, comes within the condemnation of any of the provisions of the anti-trust law as the same now exists in our state. It is not contended that a car service association does anything to diminish the benefits arising from competition in business

which are sought to be secured to the public; it is manifest that not only is a car service association not any restraint to trade, but on the contrary by insuring or endeavoring to insure the prompt handling of freight after it has reached its destination, by increasing the facilities for transportation, by requiring the speedy unloading of cars so that the same may be again placed in use, it tends to increase competition in business and facilitates the transportation of every commodity handled through the agency of railroads. The record discloses that as a public agency, car service associations are a power for good in the line indicated and in no manner hinder competition in the importation or the transportation of any commodity. It is urged that a car service association, with the powers vested in it as shown by this record, falls within the scope and meaning of paragraphs (g) and (h) of Chapter 88, Acts 1900, in that it places the control to some extent, of the business of the various railroads forming the association in the power of trustees and permits other persons than their proper officials, agents and employees to dictate or control the management of their business, and hence is such a combination as is forbidden by the statute referred to. In this connection it should again be observed that paragraphs (g) and (h) were first adopted in identical form in Sec. 4437, Code 1892. At the date of their enactment car service associations were already in operation in many sections including our own state. Since then their usefulness and the beneficial results which have followed from their operations have so demonstrated the advantage which they afford to both railroads and the public that at this time—so this record discloses—the railroads of the entire nation with rare exceptions, are grouped into one or another of the many car service associations which now exist, so that in no part of the territory of these United States where car service associations, operating under reasonable rules and regulations, which are fairly, equitably, yet rigidly enforced, is it possible for the carrier to discriminate against the receiver of freight, or for the consignee of freight to take an undue advantage of the carrier or of any competitor in business similarly situated. As originally devised the demurrage charges which every car service association undertook to assess for undue detention of cars caused by dilatoriness in unloading the same by the consignee, the amount of per diem demurrage which could be

levied, was solely within the discretion of the car service association. With this knowledge, and in order to prevent possible hardship by imposition of oppressive rates for demurrage, the legislature of our state by Chapter 82, Acts 1898, wisely placed the car service associations under the supervision of the State Railroad Commission. Recognizing the advantages which were incident to the operation of car service associations the legislature by this thoughtful and timely action secured these advantages to the public, and at the same time shielded and protected the people from any possible hardship which might be caused by the imposition of exorbitant rates for delay in unloading. Acting under the power thus vested in it, the Railroad Commission, adopted and promulgated certain rules in reference to demurrage charges, regulating the amount which could be imposed and setting out in detail the circumstances under which they might rightfully be levied, and then clothed the associations with authority to collect in all proper cases. And the implied warrant for their continued existence and operation evidenced by this action of the Railroad Commission in thus assuming control of them, and formulating rules and regulations for their government, is suggestive that the Commission deemed neither their form, purpose or operation pernicious in effect, or in anywise detrimental to the public interests. It should be observed that these rules affixing penalties for undue detention of cars were not devised for the benefit of railroad companies alone, but were framed by the State Railroad Commission, a tribunal charged by law with the duty of supervising all common carriers for the benefit of the public at large.

Nor is the force of the inference logically drawn from this action of the Railroad Commission weakened by the suggestion that the Commission has never undertaken to supervise car service associations, but has studiously refrained from assuming the authority vested in it by the legislature, and has restricted the operation of its rules in reference to demurrage and car service charges to the railroads solely. This contention will not bear the test of investigation. That the Railroad Commission has assumed and is now exercising supervision of car service associations is made evident by an inspection of the rules adopted and formally announced by the Commission and accepted and estab-

lished by the Louisiana Car Service Association for its guidance in the transacting of its operation. It is true that these rules require the railroad company handling the freight to give notice of the arrival of the car, but this is a mere announcement by the law as it exists irrespective of the rule. This is a duty imposed upon the carrier by the law, and its prompt performance is, by the rule, made a condition precedent to the collection of any demurrage charges.

Car Service Associations have nothing to do with the handling of freight or the notifying of consignees of its arrival. Their services are only called into requisition after "legal notice" as defined by the rules, has been duly given the consignee. It is also true, that the rules speak of the demurrage charges being collected by the railroads, but this is again in accordance with the established usage of such associations. Car Service Associations are simply agencies employed by railroad companies to insure prompt, accurate and impartial assessing of demurrage, but in each instance it is assessed in favor of the railroad entitled to it, and it is collected by that railroad, sometimes by the Car Service Association of which it is a member, sometimes by some other of its various employees, according to the custom of the railroad in reference to its collections. But by Rule 11 the Railroad Commission prohibits any charges for demurrage or storage being made except as permitted by its said rules: Rule 12 limits the operations of the rule permitting demurrage charges to "places where car service rules are in operation," thus tacitly acquiescing in and endorsing the enforcement of car service rules. While Rule 13 in express terms recognizes the existence of car service associations by providing that demurrage shall be collected for the detention of "private cars," when the same are detained, presumably, even by the owners of the cars, "on the tracks belonging to or operated *by members of this Association.*"

It is a fact fraught with significance that these rules were not adopted by the Railroad Commission until by legislative enactment power to supervise car service associations had been vested in it.

Finally, a reference to the records of the Commission definitely settles its intent beyond the peradventure of a doubt, for the resolution adopting the very rules now under

consideration in express terms declares that the rules are "adopted for the Car Service Associations doing business in this State." And by resolutions subsequently adopted, Car Service Associations were warned that "under authority conferred upon the Railroad Commission by Chapter 82, Laws 1898," they were expected to make reports as the Commission might direct. Record Book 3, p. 149-164.

It is manifest, therefore, that not only did the legislature intend to place car service associations under the supervision of the Railroad Commission, but that control was in fact assumed and exercised by the Commission.

We are forced, by these considerations, to the conclusion that this position of appellee is untenable.

The argument is strongly pressed that the Louisiana Car Service Association by the manner in which it enforced its rules and regulations, in the instant case, acted in such an unlawful or oppressive way as to put itself beyond the pale of the law, and deprived it of the rights and privileges granted by the rules and regulations of the Mississippi Railroad Commission.

In addition to the rules regulating the collections of demurrage charges and stating the amount and circumstances under which the same might be collected, the Railroad Commission further provided:

"Rule 9. No discrimination in charges allowed between persons or places.

"Railroads shall not discriminate between persons or places in storage or demurrage charges. If a railroad company collects storage or demurrage of one person, under the demurrage rules, it must collect of all who are liable. No rebate, drawback or other similar devise will be allowed.

"If demurrage is collected by the railroad company at one point on its line, it must collect at all places on its line of those liable under the rules of this commission. Provided, that the commission shall hear and grant applications to suspend the operation of this rule whenever justice shall demand this course."

Without disobeying the express mandate of this rule and thereby subjecting itself to the penalties prescribed by Chapter 82, Acts 1898, the Louisiana Car Service Association was without authority to refuse or neglect to collect demurrage from one merchant when, under similar circumstances and conditions it demanded and received such charges from other merchants. This is forbidden, and most rightfully so, by the mandate of the Railroad Commission which gives to the operations of the Car Service Association the sanction of its approval. Such favoritism would work discrimination of the grossest kind, by giving to one merchant an unconscionable advantage over all competitors engaged in the same business. If a railroad, or, a car service association, had the authority, at its mere whim and pleasure, to permit one merchant, owning a warehouse on a side track, to receive freight and keep it stored in its cars without demanding demurrage for their detention, while at the same time the collection of such charges was demanded and enforced of another merchant, in the same line of business and owning a warehouse similarly located, it would place it in the power of the carrier, by such arbitrary action, to build up the one business and place a heavy burden upon the other. This rule was devised to prevent the possibility of such combination between carrier and merchant; an arrangement which would in truth be a "combine" with the inevitable and pernicious effect of decreasing the benefits arising from competition in business, because by building up one business and breaking down competition it would tend to create a monopoly for the benefit of the unjustly favored few. *Warehousemen's Asso. vs. Railroad, 7 Inter. St. Com. Com. Rep. 556.* An inspection of the rules of the Railroad Commission show that the right at any time to suspend the operation of this rule whenever justice shall demand this course, is expressly reserved. The object of this wise and thoughtful provision, being of course, that whenever by reason of untoward or unforseen circumstances, the imposition of demurrage charges would work a hardship or injury to any particular place or community, the rule could be suspended, so that what was designed as a benefit to the public cannot be converted into a weapon of oppression. In the instant case we find that during the entire period covered by this controversy, demurrage was demanded and collected of every other merchant doing business in the city of Vicks-

burg, by whom it was rightfully due. We find further, that Searles, alone of all men engaged in similar business, and so far as the record discloses, of all merchants in the city of Vicksburg, denied the power and authority of the Car Service Association to impose and collect demurrage. Under such circumstances it was not only the right but it was the duty of the Car Service Association—representing in this instance the Yazoo & Mississippi Valley Railroad Company —to accord to Searles the same treatment which his competitors received. If on account of any special circumstances, of which, however, the record gives no hint, the imposition of demurrage charges in the city of Vicksburg, worked a special hardship, the parties aggrieved had an adequate remedy by applying to the Railroad Commission to temporarily suspend the operation of the rule. This, appellee did not do, contenting himself by refusing to pay demurrage and hauling his freight from the public delivery track by drays. The fair and impartial collection of demurrage is expressly enjoined upon car service associations and they are forbidden to administer and enforce their rules "with an evil eye and an unequal hand" so as to make the unjust discrimination between persons or places in similar circumstances.

In the extremely elaborate opinion of the trial judge, it is said:

"If therefore the question was: do the published rules of the Railroad Commission, adopted by the Car Service Association, and being, as Mr. Hoskins, the Manager, says, the only rules they have, constitute them a Trust and Combine under our statutes probably plaintiff would have no standing in court. But it appears from the conduct of the parties composing this association and the testimony of their manager, Mr. Hoskins, that they operate under two sets of rules; one the exoteric or published rules in evidence, known to and for the benefit of the outside public, including the courts, and the other, the esoteric or the arbitrary and discretionary powers of the Manager himself, known only to and for the benefit of those living within the inner circle, the members of the Association and its agents. It is the acts of the Association under the latter rules that furnish the basis of this controversy, and which we are called upon to consider."

And, after an extended discussion the judge arrives at the conclusion that the Louisiana Car Service Association by reason of its operation under certain unpublished rules, so called, has brought itself within the scope of our anti-trust statute.

Applying settled principles of law to establish facts, will this conclusion, in the light of this record, bear scrutiny?

It is of course true that courts will look through the form to ascertain the character of any association and will judge of its nature, not merely by its promulgated rules, but by its actual operation as well, and will decide the question of its legality or illegality according to the true nature and probable effect of the arrangement without special regard to the form which has assumed in each particular instance. If an apparently innocent form is in truth but a disguise assumed to mask a sinister design, the court, disregarding the outward shape, will condemn the arrangement. This rule has the endorsement of the highest judicial authority.

But it is equally as true, that if the form of the arrangement be legal, and its aim and purpose such as the law will uphold, it will not be denounced from the fact alone, that the objects for which the agreement was entered into, are occasionally effectuated by rules which are only invoked as it becomes necessary to cope with unforseen contingencies as they arise. If the contract, understanding or agreement be not of itself inimical to the public welfare, nor in contravention of express statute, it will be upheld unless it be so operated as to become oppressive, by infringing upon the rights of private individuals, or, unless it works to the detriment of the general public.

Making an application of these general principles to the concrete case here presented, we find: That the Louisiana Car Service Association is one of a class of combinations the existence of which, in this State, is recognized by an Act of the legislature; that the prime aim and purpose of similar associations has been by repeated adjudications of courts of last resort, upheld and pronounced beneficial to public and carrier alike; that the rules for its government and for the transaction of its general, ordinary and routine

business are framed by the Railroad Commission, the tribunal invested by law with absolute power of supervision; that if unexpected cases arise, not covered by the general rules, the Manager of the Association copes with such difficulties in his discretion, until his action in the premises can be reviewed by the officials composing the Executive Board of the Association. The legality and validity of the general rules of the Association being vouched for by the action of the Railroad Commission, the question next presented, is: Was the special order of August 28th, 1902, refusing to switch cars for appellee, so unreasonable in its terms and such an oppressive act as to make the Association a combination inimical to the public welfare, or was it the exercise of such power as showed that the Yazoo and Mississippi Valley Railroad Company had surrendered the control "to any extent" of its business, so that persons other than its proper officers, agents or employees had the power to dictate or manage the same? This is the pivotal question upon this branch of the case. After the most careful and protracted consideration, we have reached the conclusion that the special order referred to was not, under the circumstances of this case, discriminative or oppressive. It was in fact but the reenactment and putting in force of a rule of similar import which was in force with the Louisiana Car Service Association prior to the promulgation of the present rules by the Mississippi Railroad Commission, and their adoption by the Association. The enforcement of this special order was nothing more nor less than an effort to carry into effect that rule of the Railroad Commission which requires the collection of demurrage from all alike who are subject thereto. The condition of affairs as it existed at that date amply justified the Louisiana Car Service Association in invoking the aid of the rule in question. That rule is as follows:

"Rule X, Sec. 2. On deliveries to private sidings, in cases where consignees or consignors refuse to pay, or unnecessarily defer settlement of bills for car service charges, the agent will decline to switch cars to the private sidings of such parties, notifying them that deliveries will only be made on public delivery tracks of company, and will promptly notify the Manager of the action taken."

In almost identical terms this rule was before this Court for consideration in a case involving the right to collect demurrage, the reasonableness of the rules, and the power to detain freight to enforce payment of demurrage and car service charges. At that time, after thorough investigation, upon full presentation of the question, this Court announced as its conclusion, that car service associations were legal, their charges just and enforcible, their rules, valid and reasonable. *Railroad Company vs. George, 82 Miss. 710,* and see Rule 3d.

We see no reason to withdraw from the position assumed in that case which has been strengthened and fortified by several strong and well reasoned decisions in other jurisdictions.

Railroad Co. vs. Dorsey Fuel Co., 112 Ills. Spp. 382.

Railroad Co. vs. Midvale Steele Co., 201 Pa. St. 624.

Schumacher vs. Railroad Co., 207 Ills. 199.

Millers' St. Asso. vs. P. & R. Ry., 8 Inter-St. Com. Rep. 530.

Did appellee by his conduct bring himself within the operation of this rule? For reasons which are apparent and the justice of which is readily demonstrable, the rule under consideration says to the favored consignee having a warehouse on a private siding, "If you will pay demurrage and car service, you can enjoy the advantage of having your car load freight delivered at your warehouse, but if you refuse to pay or unnecessarily defer paying for such service, you must get your freight at the public delivery track as do less favored consignees."

Appellee refused to recognize the car service association, refused to comply with its rules, refused to pay demurrage charges without knowledge and without inquiry as to their justness or correctness, and without reference to what representative of the appellant sought to collect them. Planting himself squarely on the ground that he would not allow the car service association to in any manner concern itself with the handling of his freight. It is suggested in argument that the reason of these repeated refusals was because appellee had an unadjusted claim for damages to a car of

corn, but the record shows that the dispute about the corn arose long subsequent to the issuance of the order refusing to switch cars for appellee. But even if true, this would be no valid excuse justifying appellee in refusing to pay demurrage when the same was justly due. Demurrage is secured by a lien on the freight in the specific car for the detention of which the charge has been incurred, and this lien must be discharged before the consignee has any right to demand the possession of the freight. It is manifest and practically undenied in the record that appellee denied the legality of demurrage charges as assessed by the car service association, and announced his intention of ignoring its action. In the face of this expressed determination by appellee, the Louisiana Car Service Association and the Yazoo and Mississippi Valley Railroad Company were forced to choose one of two courses; either continue to switch and place cars for appellee without collecting demurrage and thus allow him an unconscionable advantage over his competitors, and, also, subject themselves to the penalties provided for disobedience to the mandates of the Railroad Commission, or invoke the rule which permitted them to refuse to further switch cars for an uncompromisingly recalcitrant consignee.

Confronted by this condition, brought about by the persistent refusal of appellee, appellant and the Car Service Association chose the latter horn of the dilemma, and in so doing, in our opinion, they were clearly in the right. The facts do not bear out the suggestion that this order was simply a retaliatory measure on the part of the appellant to punish appellee for his contumacy. Before the order was issued, repeated overtures were made to appellee looking to a settlement of the pending differences, propositions of arbitration and an offer of submission to the sole decision of a gentleman of highest probity, pre-eminent ability, a profound jurist and closely allied to the appellees, were all rejected. From start to finish of this controversy the issue was forced by appellee.

The further switching and placing of cars at appellee's warehouse, would have been a delivery of each particular car, and to have thus continued to deliver car loads of freight to a consignee who declared his intention of persisting in his refusal to recognize the validity of demurrage

charges, would have entailed upon the appellant endless litigation, inasmuch as suit must have necessarily been brought for the demurrage accruing on each shipment, thus breeding a multiplicity of suits and conserving no good end. A just observance of the rights of the shipper and of the consignee is mandatory on every common carrier; they are responsible for actual damages caused by unwarranted and avoidable delay in the transportation of freight, and are accountable for every dereliction of duty. The rights of the shipper and consignee being amply protected, the carrier is entitled to equal fair dealing at the hands of the consignee. If the placing of cars after arrival at destination is unduly delayed, without lawful excuse, the consignee who may be entitled to have his cars switched and placed, can recover, not only demurrage but such actual damages as may be caused by the negligent delay of the carrier; with equal justice, the carrier has the right to demand and collect of the consignee demurrage for his unreasonable dilatoriness in unloading the cars after they have been so placed. There is a reciprocity of indemnity under the rules governing demurrage promulgated by the Mississippi Railroad Commission. We have narrated somewhat at length the facts and circumstances attendant upon the issuance of the order of August 28th, so that the relative attitudes upon the parties might be apparent, for the reason that this will become of vital importance when we come to the consideration of another branch of the case. The reasonableness of the order, so far as its general tenor and effect are concerned, being established, the question whether it was rightfully invoked in the instant case does not affect the question of whether a car service association is or is not a trust or combine. So far as that question is concerned it may be conceded that the enforcement of the order against appellee was unwarranted, but this while rendering appellant liable to damages, would not alter the character of the association, or in any manner assist us in determining its real nature. That every railroad company is entitled to charge and receive extra compensation for extra services rendered after the arrival of freight at its destination, such as reconsignment charges, car service, or switching charges, demurrage and the like, and that acting alone each railroad would have the right to collect such charges for itself in every proper case, is now finally settled beyond dispute.

State ex rel. vs. Atchison, etc. Ry. Co., 176 Mo. 687.
Baldwin American Railway Law, p. 357
Elliott on Railroads, Sec. 1567.
Schumacher vs. Railroad, supra.

It could therefore only be for exceptional cause of oppression or wrong doing, that an agreement among several railroads, each of which is entitled to enforce such charges, by which a plan is devised for the accurate assessing and convenient and inexpensive collection of such charges for each of the contracting companies, should be pronounced unlawful by the courts. An agreement lawful in its character and lawful in its purpose, is not rendered unlawful even if some of its members should attempt to put it to an unlawful use.

Eddy on Combinations, 369.
Commonwealth vs. Brown, 23 Pa. Sup. Ct. 470.

In *Commonwealth vs. Carlisle, Brightley's Rep. 36,* the rule is thus stated:

"When the act is lawful for the individual, it can be the subject of a conspiracy when done in concert, only when there is a direct intention that injury shall result from it, or when the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

In our judgment the trial Judge erred in holding that the order of August 28th, issued under the circumstances set forth in this record, and not of itself unreasonable in its express terms, being simply the exercise of a power previously sanctioned by this court, was an "esoteric rule" of such baneful nature that it transformed an association, lawful in its purpose and beneficial in its results, to a criminal conspiracy "inimical to the public welfare."

We have found no authority sustaining such a proposition. Eddy on Combinations, p. 1328.

We are next urged to declare the Louisiana Car Service Association a trust and combine, because it is con-

tended, the testimony in this case shows that its formation involved the delegation by the corporations constituting its membership, of the management and control of their business to the persons managing and operating the Association; that these persons not being the "proper officers, agents or employees" of the railroad companies, therefore the arrangement falls beneath the ban of condemnation pronounced by the law which forbids any person other than the proper officers, agents or employees of a corporation to "control the management of its business to any extent." And in support of this position it said: Concede that car service associations as institutions are legal in their nature, that as a general rule they violate no provision of law and as operated they are not to be the detriment of the public interest, and that they are entitled to be upheld so long as they govern themselves solely by the rules formulated for their government by the Railroad Commission, still, it is contended, the testimony shows that this particular car service association to which appellant belongs is a combination in violation of law, because it is not, nor are its operatives, the proper officers, agents or employees of appellant, and yet the association is vested with power to control the management of the business of its members to some extent. And the special order of August 28th is referred to in support of this argument. But the premises in no wise warrant the conclusion. The argument assumes that the Louisiana Car Service Association and its operatives are not the agents of the appellant and then assumes that the order referred to was issued in the exercise of an arbitrary discretion of the part of the Manager of the Association, and having thus assumed as true all that it was necessary to prove proceeds to draw the conclusion indicated. This is "vaulting the chasm," both in logic and in law. Let us see if the proof warrants either assumption.

In another connection we have already referred to Chapter 82, Acts 1898, whereby the legislature made all car service associations doing business in this state, subject to the control and supervision of the Railroad Commission. In view of this action on the part of the law-making power of the state, having authority to authorize or forbid the operation of such associations, the contention that a car service association is of itself a "combine" forbidden by the law, is

untenable. It is not conceivable that the legislature would thus recognize and give, at least, an implied approval to the existence of an association, if the same, at that very time, stood condemned by the law. It cannot seriously be contended that the legislature acted in ignorance of the end which was sought to be furthered by the formation of such associations, or the functions which were exercised by them, for the Act itself states that they are "associations governing or controlling cars or rolling stock of railroad." Yet it would be necessary for us to impute this inexcusable ignorance to the legislature if we were to accept as sound the contention that it was thus dealing with an association which was under Sec. 4437, Code 1892, at that very moment, operating in open and palpable violation of law. It cannot be conceived that the legislature would solemnly submit to the supervision and control of the Railroad Commission, an association which could only exist, if appellee's argument be sound, in defiance of express statute. The very fact that the legislature thus gave, at least, implied sanction to associations which are distinctly recognized as possessing and exercising the power of "governing or controlling cars or rolling stock of railroads" (which is practically the extent of the authority of car service associations, as it is their prime object) is strongly persuasive that such was not the control or management of business "to any extent" dealt with and condemned by paragraphs (g) and (h) of our anti-trust laws. The legislature permitted them to exist as associations "governing or controlling cars or rolling stock of railroads," and this record shows neither the existence nor the exercise of any other authority of control by the Louisiana Car Service Association. Car service associations, like other representatives of corporations, have no authority, save such as is specially entrusted to them, and have no power of control beyond the plain and well defined boundary lines of their duty; and have nought to do with the earnings of the railroads composing their membership; have no connection with any traffic arrangements; are without power to institute suits or proceedings of any kind in the name or on behalf of any of their members, and are in no wise connected with the internal management or financial affairs or corporate policy of any railroad, having not even the power of fixing the demurrage charges which it is their duty to assess. The main end and purpose of their existence is to prove of

benefit to consignor, carrier and consignee by expediting the transportation of freight, facilitating its delivery, and insuring prompter and more satisfactory service by and for all alike. Car service associations are the agents and employees of various railroads forming such associations; the salaries of the manager and his subordinates are contributed to proportionately by the different members, while, within the scope of its employment and duty the association serves and represents all its members. Car Service Associations are simply the agencies employed by railroad companies for the convenient and accurate assessing of demurrage.

It is also undeniably true, that, in the instant case, the Manager of the Louisiana Car Service Association did not assume to have the authority and in fact, did not undertake to "dictate or control the management of business" of appellant "to any extent" beyond the power granted to all car service associations by the rules of the Railroad Commission. Before the order of August 28th, forbidding the switching of cars to appellee's warehouse in the future, was issued, the same was submitted to the proper officials of the two railroads concerned, and received the approval of one, and was put into effect as to that road, while upon the objection by the officials of the other, it was annulled and revoked as to it. This potential fact stands like a sign-board at a parting of the ways and points unmistakably to the correct conclusion. Is it not proof positive that the Manager of the Car Service Association outside and beyond the rules formulated by the Railroad Commission, under which this particular association operates, is subordinate to the officials of the railroad to be affected by any special order which he may desire to issue? No other hypothesis furnishes a reasonable explanation of these facts. If the Manager was clothed with unlimited and unquestionable authority, what the necessity for conferring with the railroad officials prior to the issuance of the order? If the Louisiana Car Service Association was supreme, why should the order have been rescinded upon the mere objection of the superintendent of one member of the Association? Whatever discretionary power may be vested in the Manager of the Louisiana Car Service Association generally, sure it is, that this record disclosed no wrongful exercise or abuse thereof. In the absence of proof of injury or wrong doing courts will not in-

dulge in inferences to effect the invalidation of contracts or agreements, legal in form. But aside from the evidence, the weakness which undermines appellee's position is an evident misinterpretation of the meaning of the statute when it forbids corporations placing the "control of the management of business to any extent" in the hands of others than their proper officers, agents or employees. The argument seems to proceed upon the theory that "control to any extent" is a synonomous expression with "control of any part of its business." But this is erroneous. Every employee of a corporation is vested with power to control to some extent some part of the business of his master, but this does not come within the condemnation of the law; otherwise it would be impossible for any corporation to operate at all. The evil which the law was intended to prevent was the surrender by one or more corporations of their corporate functions, the delegation of the powers granted by their charters, to other persons, in no wise subject to or connected with such corporations, so that the business of the several distinct combining corporations would be managed, controlled and dictated by these chosen trustees. This scheme, according to the most approved authorities, was the first form adopted by "trusts," and it was at this plan, that the condemnatory anti-trust law was, in the first instance, directed. "Control" of the business of a corporation, within the meaning of all anti-trust legislation, so far, as by our researches we have been able to discover, means power to dictate the corporate action of the corporation, not the mere management of some special, limited department of its operations. Noyes on Intercorporate Relations, Sec. 294 *et seq.* *United States vs. Northern Securities Company, 120 F. 726* and cases cited.

If this is not the correct view it would be unlawful for connecting railroads to employ the same yard master, switchman, depot master, ticket agent, or other joint employees at Union Depots, for in the very nature of things, each of such employees has "control of the management of business" of all the corporations which he represents in his particular, though limited sphere of action. The Car Service Association has no greater power; it too is confined within the strict limits of the scope of its duty.

If then a railroad by joining a Car Service Association, does not surrender its corporate autonomy, neither of the

assumptions of appellee in this regard can be sustained by the proof; the Car Service Association and its employees are the agents and representatives of the railroad, and the control (in the legal sense) of the business of the railroad is not "to any extent" vested in the Car Service Association. It follows from this view, that the question of how the membership of the Executive Board of the Association is constituted, is not material.

Again it is said that under the provisions of Sec. 7, Chapter 88, Acts 1900, in suits like the present one, founded on that statute "proof by any party plaintiff, that he has been compelled to pay more for any service rendered by any corporation exercising a public franchise by reason of the unlawful act or agreement of the defendant trust, its officers, agents or attorneys, than he would have been compelled to give but for such unlawful act or agreement, shall be conclusive proof of damage" and, thus, proof of damage alone will entitle the plaintiff to recover the statutory penalty of $500 for each instance of damage. The argument is presented in this form: the plaintiff has been compelled to "pay more for a service rendered," by the appellant, which is a "corporation exercising a public franchise;" this is "conclusive evidence of damage," ergo, the plaintiff is entitled to recover. The argument is adroit but specious. It's fallacy consists in this: it ignores the fact that to enable the plaintiff to recover, by the terms of the statute, he must have been compelled to pay more for some service "by reason of the unlawful act or agreement," and he must have been compelled to give more than he would have been but for such "unlawful act or agreement." Concede that appellee was compelled to pay more for the service of delivering his freight than were his competitors doing business and having warehouses on the same switch, was this because of any "unlawful act of agreement" on the part of appellant? By no means. Appellee himself refused to comply with the rules and regulations governing the delivery of cars to warehouses. Did appellee have to pay more for any service than he would have been required to pay but for some "unlawful act or agreement?" The answer must again be in the negative. Had there been no car service associations, no agreement between the railroads of any character, appellee must still have paid demurrage, and this charge was no more

and no less, neither increased or diminished, by reason of the car service association. If there were no car service associations, railroads would still be entitled to demand car service and demurrage. This is settled beyond cavil or disputation; settled by custom and usage; by rule of the Railroad Commission, by prior decision of this Court. *Elliott, Railroads, Sec. 1566 and note, Sec. 1567; State ex rel. vs. Atchison, etc., Ry. Co., supra; N. O. & N. E. R. Co. vs. George, supra.*

We hold that a car service association is not such a "combination, contract, understanding or agreement" as is condemned by our anti-trust law; that it is not "inimical to the public welfare," does not "infringe upon the rights of the individual or the general well-being of the state," and that it is not an abandonment of corporate autonomy or a delegation of corporate functions. *Elliott, Railroads, Sec. 1568; Ky. Wagon Co. vs. Ohio Ry. Co., 98 Ky. 152; Railroad vs. Midvale Steel Co., supra.* See as illustrative *State vs. Terminal Asso., 81 S. W. 396.*

But on the contrary we find that its form is lawful, its aim and purpose legitimate, and its effect beneficial to the public, in that its operation tends to stimulate competition in business and increase the benefits arising therefrom. As the Louisiana Car Service Association is not a "trust or combine" within the meaning of Chapter 88, Acts 1900, so the appellant by becoming a member thereof did not subject itself to the penalties prescribed, and, hence, appellee is not entitled to recover the statutory penalty awarded by the statute to every one injured or damaged by the operation of a trust.

We have not thought it necessary to burden this opinion with extended extracts from authorities sustaining our position. These have been gathered from a vast field of legal research and are systematically, accurately and discriminatingly arranged in the briefs in this case, which are in themselves, veritable storehouses of learning upon this and allied subjects. We content ourselves with a reference to them and a bare citation of a few leading authorities from which we have deduced the general propositions herein announced. The conclusions arrived at upon the construction of our own statutes we give as the result of serious, pro-

longed and mature consideration, in which we have not been unmindful of the gravity of the issues, or the immensity of the interests involved.

Much that we have said in this connection applies with equal force to the claim of the appellee for actual damages said to have been suffered by reason of his having to haul his freight by team from the public delivery tracks of the railroad. And right here it becomes important to consider the relative attitude of the parties when the order not to switch cars for appellee was first put in force. The rule imposing demurrage for dilatoriness in unloading cars is binding upon consignees even if they in fact be in ignorance of its existence. In a very recent case, the Supreme Court of Pennsylvania says:

"The further objection to plaintiff's claim is, that it does not aver expressly or impliedly that these parties ever became parties to any contract for payment of demurrage on detained cars. But they were parties to the contract of shipment over plaintiff's railroad and this is averred; and, then, further, it is averred that since the demurage rule was adopted it has formed part of the contract of shipment. This is sufficient averment of the implied contract. As a consignee of goods over plaintiff's railroad, it impliedly contracted to submit to all reasonable rules for the regulation of shipments. That the shipper was not consulted in framing the rules, does not effect their validity: *Wagon Co. vs. Ohio Railroad Co., supra.* There is no duty on a common carrier to consult either its shippers or consignees, as to the wisdom of its rates of freight for carrying, or rules for demurrage; as to the one, it cannot exceed a lawful rate, as to the other, it cannot exceed a reasonable charge. Within these bounds, it is presumed, in the interests of its stockholders and the public, to properly conduct its own business. *Railroad vs. Midvale Steel Co., 201 Pa. 630; Schumacher vs. Railroad, supra.*

The instant case falls clearly within this reasoning. The bills of lading under which appellant handled the cars giving rise to this litigation, "the contract of shipment," contain an express provision that all car load freight should be liable to charge for "trackage and rental" for detention said charge to commence "after the expiration of forty-eight

hours from its arrival at destination." This was appellee's contract with appellant and the law imputes to him knowledge of its terms, and he was legally bound thereby. The soundness of this proposition was recognized by the trial Judge. We quote from his opinion: "There was probably no legal excuse for plaintiff's conduct in the premises, for he was legally bound to observe any reasonable rules in force as to demurrage and car service." But, it is further said that appellee's wrongful action did not justify the railroad company "in violating its common law and statutory obligation" to appellee to deliver freight. This conclusion, of course, being founded on the principle that in the discharge of its duty to the public no corporation enjoying a public franchise can conduct its business according to the whim or caprice of its agents, or, can arbitrarily, without special reason, refuse to serve any one seeking its service. Limiting that general principle to the matter here in dispute, it is likewise, true, that no carrier has the right on account, alone of a dispute arising from a doubt as to the correctness of a particular bill or several bills, for demurrage already past due, or an honest difference of opinion as to the justice of the charge on any number of cars already received and delivered, to refuse to "switch and place" other cars subsequently received. No carrier can refuse its services to any one desiring them on the ground alone of an unadjusted claim then pending, or on account of any previous violation of contract by such person, no matter how flagrant and inexcusable, if such person at the time of the service is demanded is legally entitled thereto. A refusal on the part of the carrier for such case would entitle the person aggrieved or injured to recover full compensation, and, if such action was dictated by vindictive motives, or by desire to wantonly oppress and injure the particular person, the offending carrier would be liable to punitive damages as well. But this result follows not because the carrier was a member of a car service association, but by reason of the firmly established and rigidly adhered to rule of law which makes the master respond in damages, both actual and exemplary, for every wanton and wilfully oppressive violation of duty by the servant, whether the servant committing the wrong be a car service association or other agent or employee. This principle of law is of universal application.

It was the duty of the appellant, primarily, to "switch and place" all cars coming over its own line, or tendered to it with proper "transfer switching charge," by any connecting line. It was the duty of the appellee to pay all freight charges and demurrage charges due on his freight and the cars containing the same. This by contract entered into, evidenced by the bills of lading, he had bound himself to do. So long as appellee complied with his contract he had the right to insist on faithful and prompt compliance on the part of appellant. More than this, even if on account of doubts and disputes as to the correctness of justice of special instances of charge, freight charges or demurrage had been withheld pending adjustment, this would not of itself absolve the carrier from the discharge of its duty as to other car loads of freight subsequently received. No past violation of contract on the part of a consignee can justify a carrier in failing to discharge a present duty. But in the case at bar, according to the testimony for the appellant not directly denied by appellee, appellee not only arbitrarily refused to pay demurrage charges which had accrued in the past but expressed his intention of persisting in his refusal even should such charges be justly incurred in the future. If this be true, appellant was warranted in its refusal to further switch and place cars at appellee's warehouse. By delivering the cars at the warehouse appellant would have lost its lien and could only have collected its charges from appellee directly and he had already evidenced his intention of not paying. We know of no principle of law under which any one can announce an intention of not paying for a particular service, and still rightfully demand that such service shall be rendered. Particularly where the charge for such service is admitted to be just and reasonable, and is in fact paid by all others who enjoy the benefit of it. And yet, this is the attitude occupied by appellee if the testimony for appellant, uncontradicted in this record, be true. Nor is it true as contended that consignees are liable to imposition in the collection of demurrage charges because of the rule which requires that the payment of demurrage bills shall not be unduly delayed, and that no claim of mistake or over charge will be considered, unless the bill for demurrage, over which the dispute arises, has been first paid. Car service associations can collect demurrage only in the amount and under the circumstances

permitted by the Railroad Commission. If they disregard those rules and undertake to extort more or to collect when not entitled thereto, they are liable to all the penalties prescribed against common carriers for disobedience of the mandates of the Railroad Commission. In addition, the consignee would have his action for damages for any extortion which might be imposed on him by collecting more than was due, or for refusing to "switch and place" cars when no demurrage was due, and when the payment of no bill really due had been unduly delayed. In a suit for such damages, the burden would be on the carrier to prove that such unpaid demurrage was properly assessed, was justly due, and payment thereof had been either refused, or unduly delayed after demand for payment first made. As the duty is on the carrier to serve all patrons alike, in case of failure to do so, it devolves on it to prove facts which under the rule justifies its action. The law affords ample protection to the consignee against both extortion and discrimination.

Appellee's contention that he had a right to refuse to pay because the bills of charges were made out by direction of the car service association and on its letter heads, we mention simply to reject. They were made out in favor of appellant, were due to appellant, for services claimed to have been rendered by it, and appellant had the right to employ such lawful agency as it chose for the discharge of its private business. It would scarcely be seriously contended that a consignee who had repeatedly failed to pay transportation charges when the freight was delivered to him without prepayment being required could still rightfully demand that he be allowed to continue to remove the freight without first paying the charges. And yet the right of the railroad company to collect freight charges is no better established than is its right to collect demurrage in proper cases. One is for the transportation of the freight and the use of the cars in transit; the other for the use of its track and rental for the cars after they have arrived at their destination.

The evidence adduced on the trial proved conclusively that prior to the refusal of appellee to pay demurrage the same treatment was accorded him as all other similarly situated, and this makes manifest the accuracy of the statement quoted from the opinion of the trial Judge that "there

was no legal excuse for plaintiff's conduct in the premises." Inasmuch, therefore, as appellee himself violated the terms of his contract of shipment without "legal excuse for his conduct," and as the actual damages complained of were entailed on him as the result of his own act, this judgment can not be sustained. One, who himself, first wrongfully breaches a contract, has no standing in court when he seeks to recover damages caused by a failure of the other party to fulfill his part of the same contract.

Reversed and remanded.

MAYS & LONGSTREET,
SMITH, HIRSH & LANDAU,
BLEWETT LEE,
Attorneys for Appellant,

J. M. DICKINSON,
Of Counsel.

McLAURIN, ARMISTEAD & BBIEN,
GREEN & GREEN,
Attorneys for Appellee.

IN THE SUPREME COURT, STATE OF ALABAMA.

NOVEMBER TERM, 1904.

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37 South Rep. 667. (Ala., 1904.)

APPEAL FROM JEFFERSON CIRCUIT.

SOUTHERN RAILWAY CO.

vs.

LOCKWOOD MFG. CO.

DOWDELL, *Judge:*

The evidence in this case upon the principal issue involved, is practically without dispute. The reasonableness of the railway company's rules, which were adopted by the Alabama Car Service Association relative to demurrage charges on its cars, and the time limit in the placing of its cars for unloading, and the unloading of the same, by the consignees, etc., as shown by the evidence, seems not to have been denied or questioned.

We concur in the statement made by counsel for appellant in their brief, that the only question in this case necessary to be considered, is whether the appellant had released its lien upon the lumber by placing the car on the "team track" for the purpose of being unloaded. The proposition seems quite clear, that if the appellant, the Railway Company, had no lien upon the lumber, then in removing the car with the lumber on it, and holding the lumber for the purpose of enforcing a pretended lien, it, the railway company, would be guilty of a conversion. This, we understand, is not controverted by counsel for the appellant.

The contention of the appellee is that the placing of the car of lumber on the "team track" to be unloaded by the consignee, was such a delivery of possession of the property

as amounted to a release of whatever lien the railway company had on the lumber. It is not denied that the railway company, as a common carrier, had a lien on the lumber for transportation charges, and for the demurrage charges, which had accrued after notice to the consignee of the arrival of the car of lumber, under the company's rules. Indeed, this question is not involved, as the undisputed evidence shows that the charges had been paid by the consignee, when the car was placed on the "team track" to be there unloaded by the consignee. And it was at this time, that the appellee, who was the consignee, claims that the lumber was delivered by, and passed from the possession of, the railway company into its possession, discharged of all antecedent liens and not subject to any subsequent liens. It is not denied that the car remained upon the "team track," where it had been placed by the railway company for the appellee's convenience in unloading the same, for the "time limit" allowed by the rules of the railway company, and that the demurrage for which a lien is claimed accrued after the expiration of the "time limit" for unloading. As stated above, the reasonableness of the rule as to "time limit" and "demurrage" charges, is not questioned, nor is it denied that the appellee had notice of such rule. The question then is, whether a lien on the lumber remaining on the cars arose in favor of the railway company for demurrage accruing subsequent to the delivery in the manner stated, and after the expiration of the "time limit" for unloading the car.

Leading up to the proposition, it may be stated, that this court has held that a rule of a railroad company that a party to whom freight is consigned must receive the same within 48 hours after notice, is a reasonable one, and a charge for storage after that time is legal.

Gulf City Constr. Co. vs. L. & N. R. R. Co., 121 Ala., 621.

And it may be said, as a corollary to this, a railroad company may legally charge storage or demurrage for its cars used and occupied by consignees beyond a reasonable time after the contract of transportation has been fulfilled.

Miller et al. vs. Ga. R. R. & Banking Co., 88 Ga., 563. 50 Am. & Eng. R. R. Cases, 79.

See also *20 Am. & Eng. R. R. Cases (N. S.) 450,* where will be found a collation of authorities on the question. It is a well settled proposition of law that a warehouseman has a lien for his charges.

Steinman vs. Wilkins, 42 Am. Dec., 254, & note on page 257.

28 Am. & Eng. Ency. of Law (1Ed.), 663.

It is equally well settled that where a common carrier, after the arrival of freight, gives notice to the consignee and places the goods in its warehouse, its liability thereafter is that of a warehouseman.

Collins vs. A. G. S. R. R., 104 Ala., 390.

And the carrier is entitled to additional compensation for its services as warehouseman.

Gulf City Constr. Co. vs. L. & N. R. R., supra.

It would seem, if the carrier can make an additional charge when it stores the goods in its warehouse and have a lien for such charge, upon like principle and for the same reason, it may make an additional charge and have a lien therefor when the goods remain in its cars after its liability as a common carrier has ceased.

Miller vs. Ga. R. R. Co. etc., supra.

Miller vs. Mansfield, 112 Mass., 260.

N. O. & N. E. R. R. vs. George, 35 So. Rep., 193.

In *Miller vs. Georgia R. R. & Banking Co.* it is said: "We do not think it material, as affecting the right to make a charge of this character, that the goods remained in the cars, instead of being put into a warehouse." And in the case of *N. O. & N. E. R. R. Co. vs. George, supra,* it was said: "There is no force in the argument which concedes the right of the carrier to make demurrage charges, but contends that the goods must be delivered, and then the carrier sue for the amount. This course would give the dishonest and insolvent an unfair advantage, and would breed a multiplicity of suits."

The foregoing authorities fully sustain the doctrine of the right of the carrier to a lien upon the goods transported for demurrage charges. Coming then to the main question in the case before us, was the placing of the car of lumber on the "team track" of the railway company for the purpose of being unloaded by the consignee, such an absolute and unqualified delivery of the lumber into the possession of the consignee as would cut off any future right of lien for legitimate charges for car service, or demurrage, subsequently accruing? We think not. The delivery of the possession of the lumber, in the manner in which it was made, and under all the conditions and circumstances, was a qualified delivery. The delivery was conditioned upon the lumber being unloaded from the car within a fixed time, and upon a failure of the consignee to comply with this condition additional rights and liabilities between the parties arose. The right of the consignee's possession of the lumber was accompanied with the duty on his part to remove the same from the car. It would hardly be contended that the placing of the car for the purpose of unloading terminated all liability of the railway company both as carrier and warehouseman while the lumber yet remained on its car. Upon the same principle that a railway company, when its relation becomes that of a warehouseman, has a lien upon goods for storage charges, it has a lien upon goods for demurrage, or car service. A contrary doctrine would defeat the purpose of the rule of the Car Service Association adopted by the railroads, and which was made in the interest of commerce generally, and for the benefit of shippers as well as carriers.

The indefinite detention of cars by shippers would naturally tend to impair the ability of the carrier to meet the demands of commerce, and lessen the facility of transportation.

The case of *Lane vs. Old Colony & Fall River R. R. Co., 14 Gray (Mass.), 143,* is somewhat similar in principle to the case in hand. In that case the railroad company had placed a shipment of coal in a bin on the company's ground to be removed by the consignee, and after a part had been hauled away, the consignee refused to pay the freight and storage charges. It was held, that the railroad company still had a lien on the coal which had not been hauled away for such charges. We think in principle there can be no

difference between a delivery of the coal in a bin to be taken and hauled away by the consignee, and a delivery of the lumber on the car on the railway company's "team track" for a like purpose.

Our conclusion is, that a lien for the subsequent charges for car service attached to the lumber in favor of the railway company. The evidence being without conflict, the trial court erred in refusing the general charge requested by the defendant, and for this error the judgment will be reversed and the cause remanded.

Reversed and remanded.

McClellan, Haralson & Tyson concur.

DECISION COMPTROLLER OF THE TREASURY.

Demurrage on Cars Containing Armor Plate Consigned to United States Depot Quartermaster, San Francisco, Cal.

Treasury Department,
Office of Comptroller of the Treasury,

November 25th, 1904.

The Atchison, Topeka & Santa Fé Railway Company, by their attorneys, appealed September 20th, 1904, from the action of the Auditor for the Navy Department in disallowing in settlement No. 8773, April 2d, 1904, a claim of $12 for demurrage on cars containing armor plate and bolts shipped to San Francisco for use in the construction, by the Union Iron Works, of a vessel for the Navy.

The Auditor allowed by his settlement $10,417.89 for freight and switching cars, and disallowed the charge for demurrage for the reason stated by him that:

"It was the duty of the Union Iron Works Company to unload the armor plate, and therefore the Government cannot be charged with the demurrage."

The shipment in question was made by the Quartermaster's Department, U. S. Army, from South Bethlehem, Pa., to the Depot Quartermaster, San Francisco, Cal., under Government bill of lading No. 560, dated September 1st, 1902.

The cars were received at San Francisco from September 11th to October 2d, 1902, and delivered in the yard of the Union Iron Works, whose duty it was to unload the material.

As to the cause of the delay in unloading which resulted in the demurrage claim, the superintending contractor, U. S. N., reported to the Auditor February 1st, 1904:

"The delay in releasing the cars was caused by the fact that at the time of their arrival a large number of freight cars were in the yard, which prevented them from being unloaded immediately. The delay, therefore, was not caused by any failure of the Railway Company. It is the Union Iron Works' duty to unload all armor plate at their expense."

The charges made as demurrage are at the rate of $1 per day for each car after the expiration of forty-eight hours allowed for unloading. This charge is made in accordance with rules of railroad associations and adopted by each railroad company as its own rules.

Demurrage has only within recent years been recognized in connection with carriage of freight by railroads.

In early cases it was held not to apply to railroads *(C. & N. W. Ry. vs. Jenkins, 103 Ills., 588)*, but the growth and consequent largely increased importance of the railroad car-

rying industry have brought about a recognition by the courts of the right claimed by railroad companies to enforce payment of such claims, by lien or otherwise, when detention of their cars occurs without fault of theirs.

It is said in Baldwin's American Railway Law, 1904, page 357:

"A rule imposing a 'demurrage' charge of a reasonable sum, such as a dollar a day, for loaded cars which the consignee fails to unload within forty-eight hours after their arrival, is a reasonable one. Cars are designed for vehicles, not storehouses. Such a rule enters into the contract of shipment, and if it has properly been made public, binds all consignees, though without actual notice of it."

See also Miller vs. Ga. R. R. Co. 88 Ga., 563.
Ky. Wagon Co. vs L. & N. Ry. Co. 98 Ky., 152.
Pa. R. R. Co. vs. Midvale Steel Co. 201 Pa. St., 624.
N. & W. R. R. Co. vs. Adams, 90 Va., 393.
Miller vs. Mansfield, 112 Mass., 260.
And Schumaker vs. C. & N. W. Ry. Co., 69 N. E. Rep., 825.

In the last cited case the court said:

"Nor do we think it necessary to the existence of such lien that it arise from a specific contract providing for the same, but that such right may arise by implication, as in the case of warehouse charges to a railroad company that has stored goods transported by it, when not received promptly at the place of delivery."

And in the case of Pa. R. R. vs. Midvale Steel Co.:

"The plaintiff has an unquestionable right as a common carrier to make reasonable rules to speed the unloading of its cars. Cars are for the transportation of freight, not for its storage."

The right of a railroad company to charge demurrage cannot now be doubted and the Auditor does not question the liability of the Government for demurrage in proper cases, but holds, that it is not liable in this case for the reason that the detention was due to no fault of the Government, but owing to the delay of the Union Iron Works.

The armor plate and other material with which the cars were loaded was the property of the Government and continued all the time in its ownership; the contract for its carriage was between the United States and the railroad; the Union Iron Works Company was not known in the transaction and there was no privity of contract whatever between them and the railroad company. For these reasons, I am of the opinion that the United States is, primarily, liable for the demurrage charged. The action of the Auditor is, therefore, disaffirmed and a difference found in favor of the appellant of twelve ($12) dollars, as per certificate herewith.

I am of the opinion further, that as it was the duty of the Union Iron Works to unload the cars at their own expense and as the detention was without fault of the Government, but was caused by the congested condition of the Union Iron Works' yard, it is liable to the United States for any damage caused by the delay. The Auditor should, after payment of the claim for demurrage to the railroad, state an account and charge the amount to the Union Iron Works.

(Signed) R. J. Tracewell,

Comptroller.

COMPLAINT OF

THE COAL SHIPPERS' ASSOCIATION OF CHICAGO

FILED WITH THE ATTORNEY GENERAL OF THE UNITED STATES, CHARGING THE

CHICAGO CAR SERVICE ASSOCIATION

WITH BEING A COMBINATION IN RESTRAINT OF TRADE AND COMMERCE CONTRARY TO THE SHERMAN ANTI-TRUST LAW.

Report No. 3.

Chicago, Ill., February 11, 1905.

Counsel for the Chicago Car Service Association was notified March 24th, 1904, by the Hon. S. H. Bethea, United States District Attorney at Chicago, that the Attorney General had referred to him for investigation and report a bill of complaint filed on behalf of the Coal Shippers' Association of Chicago which charged the Chicago Car Service Association with being in restraint of trade and commerce.

As Mr. Bethea requested representatives of the association members thereof to appear before him at early date, it was thought best to call a meeting of the General Counsel of the various railroad companies comprising the Chicago Car Service Association. At this meeting a committee of five was appointed to act with Counsel for the Association, and prepare for the hearing before the United States Dis-

trict Attorney. This committee was composed of the following attorneys:

Mr. E. A. Bancroft, C. & W. I., Belt Rys.
Mr. W. J. Calhoun, B. & O. R. R.
Mr. J. M. Dickinson, I. C. R. R.
Mr. R. A. Jackson, C. R. I. & P. Ry.
Mr. S. A. Lynde, C. & N. W. Ry.
Mr. F. R. Babcock, Counsel for the Association.

After several conferences of Counsel, it was decided to recommend a revision of the original agreement and rules of the Chicago Car Service Association. May 4th, 1904, the revised agreement and rules were submitted to the United States District Attorney, and the legality of the association, and the questions presented by the bill of complaint of the Coal Shippers' Association, were argued at this conference. The Chicago Car Service Association was represented by Mr. F. R. Babcock, Association Counsel; Mr. A. W. Sullivan, chairman, Executive Committee; Mr. E. A. Bancroft, Chairman of Special Committee of Counsel, and Mr. C. W. Sanford, Manager of the Association. The Coal Shippers' Association was represented by Mr. B. F. Sipp, Commissioner, and Mr. M. F. Gallagher, Counsel.

After extended argument by both sides, the meeting was adjourned with the understanding that the Coal Shippers' Association would file a reply to statement submitted by Association Counsel. After statement was filed by the Coal Shippers' Association, Counsel for the Association filed a reply, giving further information and statistical and comparative statements to conclusively refute the charges of the Coal Shippers' Association. Another meeting was held June 13th, 1904, for further argument, and at that time a brief of authorities was filed by the Car Service Association, together with the statement above referred to.

At this meeting Mr. Bethea suggested further amendments of the Car Service Association's agreement and rules, and the matter was taken under advisement by counsel rep-

resenting the Association. Subsequent to this time, after a careful consideration of the matter and all parties having been duly notified, counsel decided to present an entirely new agreement and rules. This new agreement and rules were carefully prepared and submitted to the Chicago Car Service Association and to the General Managers' Association of Chicago and was adopted by them, to go into force and effect on September 1st, 1904.

On advice of counsel, the Chicago Car Service Association was dissolved August 31st, 1904, and *The* Chicago Car Service Association organized with agreement and rules, effective at the present time. A copy of such agreement and rules was submitted to the United States District Attorney August 18th. 1904, and by him referred to the Attorney General of the United States, who advised Mr. M. F. Gallagher, Counsel for the Coal Shippers' Association, under date of January 25th, 1905, as follows:

"Washington, D. C., January 25, 1905.

"MR. M. F. GALLAGHER,

"Attorney at Law, Monadnock Building,

"Chicago, Illinois.

"SIR:

"After careful consideration of the complaint of the Coal Shippers' Association against the Chicago Car Service Association and your argument in support thereof, I have reached the conclusion that the Car Service Association does not directly, if at all, restrain interstate or foreign commerce."

"Respectfully,

"WILLIAM H. MOODY,

"Attorney General."

FRANKLIN (2D) CIRCUIT COURT,

MAY 4, 1905.

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6 Ohio Circuit Court Reports (New Series) 638.
27 Ohio Circuit Courts 588.

RAILROAD COMPANY'S LIEN FOR DEMURRAGE CHARGES.

PITTSBURGH, C., C. & ST. L. RY.

vs.

H. L. MOOAR LUMBER CO.

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1. *Demurrage—Lien for same.*

A railroad company has a common-law lien upon the property in a car, for its proper demurrage charges against such car, and may enforce the same by refusing to deliver such property until payment of the demurrage charges has been made.

2. *Lien Exists Independently of Stipulation in Contract of Shipment.*

Such lien exists independently of any stipulation therefor in the contract of shipment, and, in an action to enforce the same it is not necessary to aver or prove a special contract with reference thereto.

Error to Franklin Common Pleas Court.

HENDERSON & LIVESAY and K. E. BURR, for plaintiff in error.

A. E. ADDISON, for defendant in error—Huston.

M. E. THRAILKILL, for defendant in error—H. L. Mooar Lumber Co.

DUSTIN, WILSON AND SULLIVAN, JJ.

On June 23, 1902, Southern Railway car No. 8,022, loaded with lumber consigned to the defendant in error, the H. L. Mooar Lumber Co., arrived in the yards of the plaintiff in error, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company at Columbus, notice of the arrival of the car being sent to the defendant in error by the plaintiff in error on the same day.

On the following day the defendant in error sent its men to the railroad yards to inspect the lumber, and the drivers, after looking about the yards and being unable to find the car, returned to the lumber company's office and reported the car not there. The drivers made other trips to the yards from time to time in search of the car, consuming from twelve to fourteen days in this way, but they failed to go to the railroad offices and ask whether the car had arrived or to make inquiry for the car of the railroad yard men, who knew and could have told them its location.

On July 5 the drivers went to the railroad offices and there paid the freight on the car, but during the interim between June 23 and July 5, demurrage charges to the amount of eight dollars had accrued and the railroad company refused to place the car where it could be unloaded until these charges had been paid.

The lumber company refused to pay the demurrage, and the railroad company, declining to allow the car to be unloaded, continued to hold it until December 23, at which time the demurrage amounted to $138, and the lading of the car was turned over to the defendant in error, Archibald H. Huston, for storage, Mr. Huston advancing the company's charges in accordance with the usual custom existing between himself and the railroad company.

On December 24, while the lumber was being unloaded and hauled from the car to the storage warehouse, the lumber company seized the lumber under a writ of replevin,

and in February, 1904, the case was tried to a jury, the jury, under instructions from the court, rendering a verdict against the railroad company for its demurrage, the court's charge being, in substance, that, in the absence of a contract, no lien in favor of a railroad company for its demurrage charges exists.

The following was the trial judge's charges upon this point:

" . . . Upon receipt of the notice (of the arrival of the car) it was the duty of the plaintiff to go to the office of the railway company and pay the freight or tender the same. It was not sufficient for him to send his man to the railway yards to hunt for the car of lumber.

" . . . The plaintiff, therefore, could not object to a charge for demurrage on this car 8,022 after the two days, as he did not pay the freight and demand that the car be turned over to him to be unloaded.

"But the company could not demand, on its part, that this demurrage should he paid as a condition of turning the car over, unless it had a lien for the demurrage. Now in the absence of any contract for such a lien, it does not exist at law and the company must collect its claim for demurrage as ordinary debts are collected and cannot hold the property for the demurrage. I find there is no evidence in the case of such a contract as to this car, and the defendant, the railway company, does not state in its answer that there was a stipulation in the bill of lading that such charges should be a lien. It follows, therefore, that as to this car, 8,022, the plaintiff having paid the freight, was entitled to the possession of the lumber and your verdict should be in his favor."

A motion for new trial having been overruled and judgment rendered against the railroad company, a reversal of the judgment is here sought on the sole ground of error in the court's charge to the jury.

DUSTIN, J.:

"We think under the authorities cited in the brief of plaintiff in error that the railway company had a common-law lien on the lumber for 'demurrage,' and that it was not necessary to aver or prove a special contract with reference thereto. It was therefore error for the Court to charge that in absence of averment and proof as to the lien it did not attach, and that the verdict as to car 8,022 should be for the lumber company.

"The special findings of fact were not inconsistent with the general verdict.

"The judgment of the Common Pleas Court on the first cause of action will, therefore, be reversed and remanded for new trial."

STATE OF LOUISIANA, PARISH OF ORLEANS, CITY OF NEW ORLEANS.

COURT OF APPEAL IN AND FOR THE PARISH OF ORLEANS.

UNREPORTED.

ILLINOIS CENTRAL RAILROAD COMPANY, AND THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY

vs.

B. GAIRARD FILS AND THE COMPTOIR NATIONAL D'ESCOMPTE DE PARIS.

No. 3542.

COURT OF APPEAL, PARISH OF ORLEANS.

SYLLABUS.

1. It is within the scope of the authority and powers of the Railroad Commission of the State of Louisiana to adopt and promulgate rules and regulations providing penalties for detention of freight cars having for their purpose the orderly and expeditious conduct of freight traffic and other business of Railroads operating in this State.

2. In the absence of a specific anterior contract relieving the shipper of the lawful charges imposed by the Railroad Commission, said charges are held to be recoverable.

Affirmed.

No. 3542.

COURT OF APPEAL, PARISH OF ORLEANS.

ILLINOIS CENTRAL AND YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANIES

vs.

B. GAIRARD FILS AND COMPTOIR NATIONAL D'ESCOMPTE DE PARIS.

ESTOPINAL, *J.* Delivered the Opinion and Decree as follows, to-wit:

Plaintiffs, who are common carriers, transported at various times during the year 1900 a number of cars of staves to New Orleans, consigned to John F. Lafont for his principal, Gairard Fils, of Marseilles, France, and allege that the defendant is indebted to them in the sum of One Thousand and Sixty-nine Dollars ($1069.00), for car service or demurrage.

This action is brought upon a bond signed by defendant, B. Gairard Fils and the Comptoir National d'Escompte de Paris, to cover the amount of demurrage alleged to have been incurred by the defendant, the bond being furnished by reason of the fact that at the moment that the demurrage was insisted upon, a vessel was lying at the dock ready to take on the staves, and it was agreed that a bond should be substituted for the staves in order that the parties might be able to test their rights legally to the same effect as if the staves were in possession of the plaintiffs, the Comptoir National d'Escompte de Paris is made party as surety on this bond.

Plaintiffs abandoned a part of their claim and judgment was rendered below for the sum of Nine Hundred and Seventeen Dollars ($917.00), with interest and costs.

From the judgment defendants appeal, urging various grounds for reversal.

Defendant avers that he was never advised that his property was or would be subject to demurrage charges, and that in the absence of a specific contract permitting said charges, none could be made.

That the respondent's property was not subject to such demands and that plaintiff companies had no legal right to retain or withhold it after demand made for its delivery.

That the Railroad Commission of Louisiana had not then adopted any rules or regulations governing or controlling the issues herein raised between plaintiffs and respondent.

That if it should be found that the rule of the Railroad Commission relied upon by plaintiffs was in force, that the same is unjust, inequitable, discriminative, etc.

It appears that the Railroad Commission of Louisiana, a creature of the Constitution of 1898, adopted a number of regulations for the purpose of preventing the unnecessary detention of freight car equipment, and thereby keep the same in the legitimate service of transportation, clearly a right which the Commission may exercise as being within the powers delegated to it.

These rules of the Commission became effective on August 2d, 1900, and Section 7 of Rule 3 contains this provision:

"On all cars containing export freight, ten days free of charge will be allowed."

Section 1 of Rule 4 provides that:

"At the expiration of the free time allowed, a charge of One Dollar per day or fraction thereof shall be made and collected upon all cars subject to car-service charges."

The above cited rules, as well as others on the same subject matter adopted by the Railroad Commission, were addressed to the Louisiana Car Service Association, and they were ordered put in effect by said Association.

This the Association, which stands for and names all the railroads centering in New Orleans, proceeded to do.

Prior to the adoption of the rule in question in August, 1900, the rules in force relative to car service in connection with export freight provided that when the cars reached New Orleans, if the name of the vessel by which the freight was to be exported was given within ten days after the arrival of the cars, the exporter was not called upon to pay any demurrage or car service, no matter how long thereafter it would be before the vessel arrived.

Respondent, together with other exporters, is shown to have conducted his export trade under this old rule adopted by the transportation officials of each railroad company, who then composed what was known as the Executive Committee of the Car Service Association.

When, however, the car service rule adopted in August, 1900, by the Louisiana Railroad Commission, permitting free use of cars for ten days and demurrage charges of One Dollar ($1.00) per car per day after expiration of ten days was attempted to be enforced, the record shows that a loud protest went up from the exporters at this port, and that in consequence the rule was suspended altogether until the 19th day of September, 1900.

The complaint on the part of the exporters against the enforcement of the car service rules in August was placed on the ground that they had not been given sufficient time and notice of the operation and application of the rules; but the testimony shows that Mr. Lafont, defendant's agent in New Orleans, took an active part in the conferences with the railroad officials which finally culminated in the suspension of the rules until September 19th, 1900, which fact necessarily destroys the defense made, of want of proper notice of the enforcement of the rule after September 19th.

The demurrage, or car service, is charged for the period between the 19th of September and first days of November.

As to certain material facts and agreements, there can be no question in the face of the subjoined admissions, to-wit:

First. It is admitted that plaintiffs are common carriers, engaged in the operation of steam railroads, and in the transportation of freight and passengers, between points in the State of Louisiana, and from points in the State of Louisiana to points in other States, and from points in other States to points in the State of Louisiana.

Second. It is admitted that the cars described in the four lists marked, respectively, P1, P2, P3, and P4, are the cars on which the demurrage, or car service, is claimed in the present case.

Third. It is admitted that, should the court find that any demurrage, or car service, whatever is due to the plaintiffs for the detention of cars described in the above mentioned list, then that the defendants are responsible therefor, and judgment shall be rendered against them for such amount as the court may find to be due.

Fourth. It is admitted that the lists aforesaid correctly describe the numbers of the cars, the initials of the same, the time of their arrival, the time the consignees were notified, the time the consignees ordered the cars placed, and the time the cars were released.

Fifth. It is admitted that if the court should find that any demurrage, or car service, is due to the plaintiffs under the circumstances which may be developed in the case, then it is admitted that the amount of the demurrage, as figured out by the plaintiffs in the said lists, is correctly figured, except as to the eighteen cars indicated by red crosses on the lists aforesaid, and as to which cars the plaintiff abandons all claims for demurrage.

The only question for the court to determine is whether the rule adopted by the Car Service Association in August, 1900, which date was extended by agreement to September 19th, 1900, shall govern in determining car service, or demurrage, due by defendants, or whether the old rule shall prevail.

There is nothing in the record to show that other exporters were exempted from the rules of 1900, and Lafont's contention that he should not be governed by the same rules that the other exporters were, because of the existence of a contract between the railroad company and himself and principals relative to demurrage charges, is not tenable.

A letter written by Lafont to one of the plaintiff's agents is the document relied upon to establish specific contract relations.

This letter simply instructs the agent at New Orleans as to what ships he should make delivery of defendant's staves, and contains no conditions or elements going to make up a contract between the railroad company and Mr. Lafont relative to freight rates or car service to be charged.

We are of opinion that not only has the railroad company and the Louisiana Car Service Association a right to adopt rules regulating the use of freight cars, but that rules of that character are absolutely essential for insuring proper and expeditious disposition of freights by preventing the unreasonable detention and congesting of such cars, and that the rules adopted here are not unjust or discriminating.

We quite agree with the learned counsel for defendants that if there was shown to exist a contract anterior to the adoption of the car service rule, to be operative throughout the stave season of 1900, said rules would be inoperative as to defendants, but we cannot agree with him that the subjoined letter discloses such a contract as would exempt defendants from the operation of any rules fixing charges for car service or any other reasonable and lawful rules that they might deem necessary. In the next place the letter is not even addressed to an official of the railroad company shown to have the authority to enter into a contract of this nature, and plaintiff denies that the person addressed has any authority in the premises.

The letter in question reads:

New Orleans, July 24, 1900.

MR. C. T. SCAIFE,
GI.

I. C. R. R. Co.,
City.

DEAR SIR:

Please take notice that all car loads of claret staves shipped or in course of shipment to my address from Shreveport, La., or all Mississippi points, through either the I. C. or Y. & M. V. R. R. by

1. Sutherland Innes Co.
2. M. Vuk & Sons,
3. Leopold Kern,
4. Max Levy,
5. Austro-American Stave and Lumber Co.,

are intended, with all other stock of mine, laying at Stuyvesant Docks (7 cars), and Southport (68 cars) to the S. S. "Valentia" for Bordeaux.

This steamship is due in New Orleans by the 26th to 28th inst.; she will take about 275 car loads of staves, all at your terminals.

The S. S. "Soluble" will follow, for same port, on or about August 15th, and the S. S. "Woodleigh" on or about September 1st, all loading at your terminals.

Yours truly,

[Signed] J. F. LAFONT.

This letter appears to us to be perfectly plain and explicit, and is nothing more than a note of instructions to the terminal agent, advising him as to the disposition to be made of defendants' property.

Our attention is directed to a decision in 158 U. S., p. 98, *(Railroad Company vs. Heffly),* when the Court held that, even though the rate was fixed in the bill of lading, and said rate was less than the tariff rate posted by the railroad company, under the Interstate Commerce Act. The railroad company was entitled to claim and recover under printed tariff in accordance with the Interstate Commerce Act. The case at bar is measurably stronger since plaintiff asks no more than the rates fixed by the Railroad Commission.

The right of common carriers to charge storage or demurrage for detention of their cars by consignees over the time allowed, is too well settled to need discussion here.

We find no error in the judgment rendered below, and it is hereby affirmed, defendants to pay costs in both courts.

CHAS. HANTEL,

Clerk of the Court of Appeal.

New Orleans, May 26th, 1905.

[A true copy.]

No. 763.

T. M. KEHOE & CO.

vs.

ATLANTIC COAST LINE RAILROAD COMPANY.

No. 764.

T. M. KEHOE & CO.

vs.

SEABOARD AIR LINE RAILWAY.

No. 765.

T. M. KEHOE & CO.

vs.

PHILADELPHIA & READING RAILWAY COMPANY.

No. 766.

T. M. KEHOE & CO.

vs.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY.

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11 I. C. C. Rep. 166.

DECIDED AUGUST 15, 1905.

Defendants' established charge of $1.00 per day for car demurrage held upon the record in these cases to be just and reasonable.

MR. BENSON STIMSON, for Complainant.

Mr. Perkins Baxter, for Charleston & Western Carolina Ry. Co.; Atlantic Coast Line Railroad Co., and Seaboard Air Line Railway.

Mr. C. Heebner, for Philadelphia & Reading Ry. Co.

REPORT AND OPINION OF THE COMMISSION.

Prouty, *Commissioner:*

The above four cases were heard together and the question presented is identical in all. The complainants are shippers of hay from Terre Haute, Indiana, to various points in Southeastern Territory and they complain that certain demurrage charges assessed and collected upon certain of their shipments of hay are unreasonable. There is no dispute as to the essential facts. All the defendants have in force car service rules which allow 48 hours free time and assess a demurrage charge of $1.00 per day after the expiration of that time, and the demurrage charges in question were in all cases assessed properly in accordance with these rules. The only contention is as to the amount.

In all these cases the cars in which the hay was transported were owned by some railroad other than the one assessing the demurrage charge, and it was admitted that the defendant railroads paid for the use of these cars 20 cents per day. The complainants insisted that it was unreasonable for the defendants to charge them $1.00 per day when they only paid 20 cents themselves; and this was the only testimony introduced by the complainants bearing upon the reasonableness of this charge. The defendants urged that 20 cents a day was not supposed to represent the fair rental value of a car but was simply an arbitrary sum agreed upon among the various railroads for the purpose of settling car accounts with each other. Their testimony tended to show that the rental value of a car was much greater than $1.00 per day and that a demurrage charge much in excess of the sum collected might, therefore, have been properly assessed.

If the reasonableness of this demurrage charge depended upon the fair rental value of a freight car we should be disposed to hold with the complainants. The witnesses on the part of the defendants testified that a freight car

would earn on the average approximately $2.20 per day and that, therefore, this was a fair charge for the use of that car. It appeared that this sum was arrived at by taking the whole number of freight cars in the United States, multiplying that number by the 365 the number of days in a year and dividing the total gross receipts from the transportation of freight by the product. It would be difficult to conceive of anything more absurd than this method of arriving at the fair rental value of a freight car. The car does not earn $2.20 per day. The railroads of the United States may earn that amount from the transportation of freight, we have not verified the computation, and in the handling of that business a car is essential, but it is the railroad as a whole, not the freight car alone which produces these earnings. Undoubtedly there are times when a railroad could afford to pay $2.00 a day, and more, for the use of a car but that is due to some special exigency and the fact that this is the average sum which the railroad earns per freight car in service has no tendency to show the fair rental value of that car.

While 20 cents a day may not be a fair compensation for the use of a freight car, even while standing upon the track and not in service, we agree with the complainants that the fact that the railroads have fixed upon that as the amount to be paid by one line to another for the use of its cars strongly indicates that in the opinion of the railroads themselves this is a fair price. Some railroads are borrowers and others lenders of cars under the system of exchange between connecting lines which is in vogue and it is hardly credible that the lender would furnish the borrower with equipment for much less than a fair compensation. There is every reason for fixing upon some amount which is a reasonable return for the use of the car so that neither the borrower nor the lender may suffer.

Formerly the price paid for the use of foreign cars was 7.5 mills for each mile the car actually ran. This was thought too high and it was reduced to 6 mills per mile, at which figure it remained for several years. Why, if railroads had been operating upon a compensatory basis up to three years ago did they then fix upon a sum which was not supposed to be compensatory?

The rates paid private car companies for the use of their cars lead to the same conclusion. Many freight cars have been in the past furnished by private companies which owned the cars and leased them to the railroads upon a mileage basis. For a long time the mileage allowed for the use of the ordinary freight car was 7.5 mills, the same as that paid by one railroad to another, and when the allowance between railways was reduced to 6 mills the allowance to private cars was correspondingly reduced. Upon this basis of charging most railway companies found it for their advantage to provide their own equipment in all cases where that equipment was required for continuous service. There are, however, some special instances in which the use of equipment is largely periodical, in which railway companies have continued to employ the cars of private car lines, the two most conspicuous examples being cattle cars and refrigerator cars. The Commission has recently investigated the use of these private cars. The cattle car costs about the same to build as the ordinary box car; it deteriorates somewhat more rapidly owing to the fact that the bedding rots out the floors and the bottom of the posts. There are several companies which furnish cattle cars as desired for 6 mills per mile, and the testimony shows that the average earnings of these cars is from $7 to $9 per month. Refrigerator cars are more expensive to build and maintain and the allowance made for their use is generally 7.5 mills per mile. It is our impression that the business of providing cattle cars at 6 mills per mile is not extremely profitable but it did appear that at the old rate of 7.5 mills per mile it was remunerative and that car companies did, out of their wheelage charges, pay shippers a premium for using their cars.

It would seem that 6 mills per mile produces an average return not much in excess of 20 cents per day; probably in case of the average freight car not at all in excess of that sum; and it must be remembered that while demurrage is accruing the car is not in service and is not, therefore, depreciating as rapidly as when running. If therefore the question were whether one dollar per day was a reasonable sum to charge the shipper for the use of a freight car we should hold against the defendants. But that is not the question. A railroad company is a common carrier. Its duty is to transport freight to destination and to deliver it to the con-

signee. It is the duty of the consignee to receive his freight within a reasonable time and if he neglects to do so the liability of the railroad company as a common carrier ceases and it becomes simply a warehouseman. It is under no legal liability to continue to discharge the duty of a warehouseman but may insist that the consignee shall receive and remove his freight. The consequences to the railway of neglect to do this are not merely in case of carload freight the loss of the use of a car. The uncertainty arising from the fact that cars are sometimes unloaded promptly and sometimes not is embarrassing. The congestion of its terminals is often and perhaps usually a more serious matter than the loss of its cars. It would be not only much more expensive but often impossible for the railways of this country to handle their traffic at many points unless they required the prompt removal of the freight from the car. To permit one person to use the cars of a railroad company for a storehouse and to deny that privilege to another creates a discrimination between shippers which is often serious.

For these reasons and others it is not only proper but highly essential that railroad companies should make and enforce uniformly such reasonable demurrage requirements as will insure the prompt receipt by the consignee of his freight. The demurrage charge which is imposed for that purpose is not, however, based upon the fair rental value of a car; it is rather in the nature of a penalty. While it should not be sufficient in amount to work an undue hardship upon the shipper who must occasionally pay it, it should be sufficient in amount to accomplish the purpose for which it is intended. One dollar per day is the demurrage charge universally named by car service associations in all parts of this country in case of carload freight, and the same amount is generally, if not uniformly fixed by railroad commissions invested with power to make rates and regulations. Of the four cases before us the demurrage was collected in three states where $1.00 per day had been established by the State Commission, as the charge applicable to state shipments. This Commission has never passed upon the reasonableness of the $1.00 charge. It held in *Pennsylvania Miller's State Association vs. Philadelphia & Reading Railroad Company, 8 I. C. C. Rep. 531,* that 48

hours was a reasonable time for unloading hay after the car had been placed and notice given to the consignee. In the *Blackman Cases, 10 I. C. C. Rep. 352,* it was held that the Southern Railway Company might apply to its interstate business the same storage rates prescribed for state business by the Georgia Commission and the South Carolina Commission and that such rates were reasonable although much higher than those charged by warehouses for the same service of storage. We could not hold upon the testimony in this case that $1.00 per day is an unreasonable charge and while a more general investigation might alter that opinion, it is our present impression that it is just and reasonable for the purpose intended.

There seems to be a certain injustice in applying this rule to the shipments of the complainants. They reside at Terre Haute, Indiana, and these demurrage charges were collected at points many miles distant from there. They accrued in all cases owing to the fact that the consignee refused to accept the hay. Evidently in such case the complainants might reasonably require some time to make a new disposition of the hay and might not be in fault in not unloading it within the 48 hours. It is difficult to see, however, how an exception can be made in their favor and the embarrassment and pecuniary loss which result must probably be regarded as an incident of the business.

We do think that some method should be provided by which shippers of hay like the complainants will be promptly notified by the carrier of the refusal of a consignee to accept and unload the shipment. It appeared that at the present time this was not done although the complainants had actual notice in all the above cases from other sources and did not, therefore, suffer loss on that account.

The complaints will be dismissed.

DUTIES OF CONNECTING CARRIERS.

The Supreme Judicial Court of Maine *(Fisher vs. Boston & Maine Railroad Company, 59 Atlantic Rep. 532)* holds that when a common carrier has transported goods over its own lines to its terminus or point of intersection with a designated carrier and is unable to deliver them to the connecting carrier without any fault upon its part, its liability as a common carrier ceases, but the duty still rests upon it as a forwarder to exercise reasonable care and diligence to prevent unnecessary loss to the goods and save the owner needless expenses for storage and transportation, and to notify such owner of the facts.—Railway World, Feb. 17, 1905.

PRIVATE SWITCHES.

One having no property right in a private switch over the land of another cannot compel the latter to permit a railroad company to receive and ship his freight over the switch to the railroad's own track. The railroad cannot be required to receive freight on or along a private switch; its duty to receive freight being confined and limited to its own depots or shipping and receiving points.—Bedford-Bowling Green Stone Co. vs. Oman, 134 Fed. Rep. 441.

SUPPLEMENT No. 2

TO

LEGAL DECISIONS

IN

CAR SERVICE CASES

PUBLISHED BY THE

National Association of Car Service Managers.

American Association Of Demurrage Officers.

1906.

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Pursuant to resolutions of the National Association of Car Service Managers, this compilation of court decisions in car service or demurrage cases, is published as supplement number two.

This pamphlet includes all cases reported since the publication of supplement number one in March 1906, and is called for at this time by several members of the Association, because of its bearing upon what are called reciprocal demurrage laws.

A. G. THOMASON,
Secretary.

Scranton, Pa., September 29th, 1906.

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SUPREME COURT OF THE UNITED STATES.

No. 198.—October Term, 1905.

U. S. Reports, Vol. 201, Page 321.
11 Texas Ct. Rep. 69, 372.

April 2, 1906.

In Error to the Court of Civil Appeals in and for the Third Supreme Judicial District of the State of Texas.

The Houston and Texas Central Railroad Company et al., Plaintiffs in Error,

vs.

John A. Mayes.

This was an action begun by Mayes in the District Court of Llano County, Texas, against the Houston and Texas Central Railroad Company to recover a penalty of $475, by reason of defendant's failure to furnish seventeen stock cars, applied for in writing by the plaintiff under the provisions of certain statutes of Texas hereinafter referred to, for the purpose of shipping plaintiff's cattle from Llano, Texas, to Red Rock, Oklahoma, and for damages occasioned by defendant's negligence.

The petitioner alleged that the defendant company formed with two other railroad companies a continuous line

from Llano to Red Rock, and were engaged as common carriers in the business of shipping live stock and other freight; that on April 9, 1903, plaintiff being the owner of six hundred and twenty-five head of cattle, made application in writing to the local agent of the road for seventeen stock cars to be delivered on April 20, and deposited with the agent one-fourth of the freight on the same, namely, $268.82, promising to pay the remainder on demand, and that he afterwards paid the same; that upon the day named, April 20, he had cattle sufficient to load the cars, delivered them to the defendant at its stock pens at Llano for shipment, but the defendant failed to furnish the cars, and did not furnish the same until the afternoon of the 21st April, 1903.

The trial resulted in a judgment in favor of the plaintiff for $425 penalty for delay, and $500 damages to the stock while in the pens at Llano. This judgment was affirmed by the Court of Civil Appeals, and an application for a writ of error to the Supreme Court of the State was overruled.

Mr. Justice Brown delivered the opinion of the Court.

This case involves the constitutionality of certain articles of the Revised Statutes of Texas, set forth in the margin,* the material requirement of which is that when the

*"Art. 4497. When the owner, manager or shipper of any freight of any kind shall make application in writing to any superintendent, agent or person in charge of transportation, to any railway company, receiver or trustee operating a line of railway at the point the cars are desired upon which to ship any freight, it shall be the duty of such railway company, receiver, trustee or other person in charge thereof to supply the number of cars so required, at the point indicated in the application, within a reasonable time thereafter, not to exceed six days from the receipt of such application, and shall supply such cars to the persons so applying therefor, in the order in which such applications are made, without giving preference to any person; provided, if the application be for ten cars or less, the same shall be furnished in three days; and provided further, that if the application be for fifty cars or more, the railway company may have ten full days in which to supply the cars. (As amended by the act of 1899, page 67.)

"Art. 4498. Said application shall state the number of cars desired, the place at which they are desired and the time they are desired; provided, that the place designated shall be at some station or switch on the railroad.

"Art. 4499. When cars are applied for under the provisions of this chapter, if they are not furnished, the railway company so

shipper of freight shall make a requisition in writing for a number of cars to be furnished at any point indicated within a certain number of days from the receipt of the application, and shall deposit one-fourth of the freight with the agent of the company, the company failing to furnish them shall forfeit $25 per day for each car failed to be furnished, the only proviso being that the law "shall not apply in cases of strikes or other public calamity."

The defense was that this statute was not applicable to demands made for cars to be sent out of the State and to be used in interstate commerce; and as the shipment was intended for Oklahoma, the act did not apply, and the defendant was not liable. The question is whether the statute, applied as it is by the Texas court to interstate shipments, is an infringement upon the power of Congress to regulate interstate commerce.

That, notwithstanding the exclusive nature of this power, the States may, in the exercise of their police power,

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failing to furnish them shall forfeit to the party or parties so applying for them the sum of twenty-five dollars per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, and all actual damages such applicant may sustain.

"Art. 4500. Such applicant shall, at the time of applying for such car or cars, deposit with the agent of such company one-fourth of the amount of the freight charge for the use of such cars, unless the said road shall agree to deliver said cars without such deposit. And such applicant shall, within forty-eight hours after such car or cars have been delivered and placed as hereinbefore provided, fully load the same, and upon failure to do so he shall forfeit and pay to the company the sum of twenty-five dollars for each car not used; provided, that where applications are made on several days, all of which are filed upon the same day, the applicant shall have forty-eight hours to load the car or cars furnished on the first application, and the next forty-eight hours to load the car or cars furnished on the next application, and so on; and the penalty prescribed shall not accrue as to any car or lot of cars applied for on any one day until the period within which they may be loaded has expired. And if the said applicant shall not use such cars so ordered by him, and shall notify the said company or its agent, he shall forfeit and pay to said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the applicant to use said cars." (As amended by the act of 1899, page 67.)

Art. 4502 contains the following proviso: "that the provisions of this law shall not apply in cases of strikes or other public calamity."

make reasonable rules with regard to the methods of carrying on interstate busines; the precautions that shall be used to avoid danger, the facilities for the comfort of passengers and the safety of freight carried, and, to a certain extent, the stations at which stoppages shall be made, is settled by repeated decisions of this Court. Of course, such rules are inoperative if conflicting with regulations upon the same subject enacted by Congress, and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed, and not amounting to a regulation of such commerce. As the power to build and operate railways, and to acquire land by condemnation, usually rests upon State authority, the Legislatures may annex such conditions as they please with regard to *intra*-state transportation, and such other rules regarding *inter*state commerce as are not inconsistent with the general right of such commerce to be free and unobstructed.

The exact limit of lawful legislation upon this subject cannot in the nature of things be defined. It can only be illustrated from decided cases, by applying the principles therein enunciated, determining from these whether in the particular case the rule be reasonable or otherwise.

That States may not burden instruments of interstate commerce, whether railways or telegraphs, by taxation, by forbidding the introduction into the State of articles of commerce generally recognized as lawful, or by prohibiting their sale after introduction, has been so frequently settled that a citation of authorities is unnecessary. Upon the other hand, the validity of local laws designed to protect passengers or employes, or persons crossing the railroad tracks, as well as other regulations intended for the public good, are generally recognized. An analysis of all the prior important cases upon this point will be found in the opinion of the Court in *Cleveland etc. R. R. Co. vs. Illinois,* (177 U. S. 514,) wherein a requirement that express trains intended only for through passengers should stop at every county seat, when ample accommodations were provided by local trains, was held to be an unreasonable burden. Other similar cases regulating the stoppage of trains are *Illinois Central R. R. Co. vs. Illinois,* (163 U. S. 142); *Gladson vs. Minnesota,* (166 U. S. 427); *Lake Shore etc. R. R. Co. vs. Ohio,* (173

U. S. 285). In the same line is the more recent case of *Wisconsin etc. R. R. Co. vs. Jacobson,* (179 U. S. 287).

While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the State and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather.

A dereliction of the road in this particular, which may have occurred from circumstances wholly beyond the control of its officers, is made punishable not only by damages actually incurred by the shipper in the detention of his stock, but in addition thereto by an arbitrary penalty of $25 per car for each day of detention. The penalty which was assessed in this case, though the detention was only for one day, amounted to nearly as much as the damages, and might in another case amount to far more.

While perhaps the road may have no right to complain of that portion of the statute which assumes to provide for its own protection, it is illustrative of its general spirit that, if the shipper does not fully load his cars within forty-eight hours after their arrival, he shall forfeit $25 for each car, or if the consignee shall fail to unload them within forty-eight hours after their delivery, at the place of consignment, which in the case of interstate shipments would be in another State, he shall also forfeit $25 per day for each car unloaded.

In this connection the recent case of *Central etc. R. R. Co. vs. Murphey* (196 U. S. 194,) is instructive. In that case we held that the imposition by a State statute, upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where or how, and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution; and an act of the Legislature of Georgia imposing such a duty on common carriers was held void as to shipments made from points in Georgia to other States.

Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the State, and may have been intended merely to secure promptness on the part of the railroad companies, in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional and accidental violations of its provisions, when no damages could actually have resulted to the shippers.

It should be borne in mind that the act does not apply to cattle alone, but to all cases "when the owner, manager or shipper *of any freight of any kind* shall make application in writing," etc. The duty of the railroad company to furnish the cars within the time limited is peremptory and admits of no excuses, except such as arise from strikes and other public calamities. If, for instance, the owner of a large quantity of cotton should make a requisition under the act for a number of cars, the railway company would be bound to furnish them upon the day named, or incur a penalty of $25 for each car, though the detention of the cotton involved no expense to the owner, or may even have resulted in a benefit to him through a rise in the market.

While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the

market, a great public gathering, or an unforseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfil all its legal requirements cannot provide for, and against which the statute in question makes no allowance.

Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the Legislature.

The judgment of the Court of Civil Appeals is, therefore, reversed, and the cause remanded to that Court for further proceedings.

Mr. Justice White, not having heard the argument, took no part in the decision of this case.

The Chief Justice, Mr. Justice Harlan and Mr. Justice McKenna dissented.

TEXAS COURT OF CIVIL APPEALS, THIRD DISTRICT.

APRIL 18, 1906.

Texas Ct. Rep. Vol. 15-521.

THROUGH SHIPMENT—FAILURE TO FURNISH CARS ON DEMAND—PENALTY—LIABILITY OF INITIAL CARRIER—STATUTE—DEMAND FOR CARS—ROUTING—DELAY.

HOUSTON & TEXAS CENTRAL RAILWAY COMPANY

vs.

BUCHANAN.

1. The statute (Rev. Stats., Art. 4497 to 4500) denouncing a penalty against railway companies for failure to furnish cars on written demand of the shipper within a reasonable time is penal in character and must be strictly construed.

2. The statute does not in express terms require the initial carrier to furnish cars to be used by the connecting carrier in the transportation of commodities to point of destination beyond the line of the former, and it will not be extended, by implication, so as to impose such a burden or duty.

3. Where the demand was for cars to be furnished at Llano, Texas, "for the purpose of making a shipment of cattle from Llano, Texas, to Fairfax, O. T.," this was an express request for cars to be furnished and to be used in the transportation of the cattle from Llano to Fairfax, Oklahoma Territory, and Llano being a station on the line of the initial carrier which did not extend to Fairfax, the failure of such carrier to furnish the cars within a reasonable time

did not subject it to the penalty denounced by the statute, in the absence of proof of any partnership or traffic arrangement between it and the connecting carrier.

4. Where at the time the contract for a through shipment was made the shipper demanded a routing which would give connection with the second carrier's line at L. and the only way under the arrangement between the two carriers the shipment could only be billed through by way of B., and the shipper was so informed, and the shipment was so billed and routed, the carrier could not be held liable for damages for delay caused by the longer route through B. In such case the shipper could not exact a through billing which the carrier was not prepared to give.

Appeal from the District Court of Llano County; Clarence Martin Judge.

S. R. Fisher, J. H. Tallichet, Baker, Botts, Parker & Garwood, for appellant; McLean & Spears, for appellee.

Action by S. H. Buchanan against the H. & T. C. Ry. Co. and another. From a judgment for plaintiff, defendants appeal. Reversed.

FISHER, *Chief Justice.*

This was a suit by S. H. Buchanan against the Houston & Texas Central Railroad Company and the Gulf, Colorado & Santa Fé Railway Company to recover of the first defendant $175 as a penalty for the alleged failure of said defendant, for one day, to furnish seven stock cars demanded by plaintiff, and to recover of both defendants $1500 damages alleged to have been sustained by a shipment of 300 head of stock cattle made by plaintiff, April 15, 1903, over the lines of railroad of defendants, and the Atchison, Topeka & Santa Fé Railway Company, from Llano, Texas, to Fairfax, Oklahoma. Trial, May 3, 1905, resulted in a verdict and judgment for plaintiff against the Houston & Texas Central Railroad Company for $175 by way of penalty, and for $561.25 damages and interest; and against the Gulf, Colorado & Santa Fé Railway Company for $337.25 damages and interest.

There are assignments of error which object to so much of the judgment as is against the Houston & Texas Central Railroad Company for the amount of penalties recovered for the failure to furnish cars in which to ship the cattle within the time requested. The cattle in question were to be transported from Llano, Texas, to Fairfax, in the Territory of Oklahoma. One of the objections is that the statute under which the demand for cars was made does not relate to an interstate shipment. Another objection is to the effect that the demand was for cars to be used in transporting the cattle over the entire route, much of which was beyond the line of the Houston & Texas Central Railroad Company, and was over the lines of connecting carriers. Other objections were urged to the law upon which the demand for cars was predicated, but the two mentioned will only be noticed by us in disposing of so much of the judgment as relates to penalties. We have been informed through publication in some of the daily newspapers of the State that the Supreme Court of the United States in the case of *H. & T. C. R. R. Co. vs. Mayes, 11 Texas Court Reporter, 69, 372,* on writ of error from this court, has held the law in question to be unconstitutional, as being opposed to the interstate commerce clause of the Constitution. We have not read the opinion of that court, nor have we received any official information as to the full nature and effect of the decision in the case mentioned. However, while we have no reason to doubt the correctness of the published report, we have reached the conclusion that the statute, if it could be held valid, does not apply to the demand for cars in this instance. The written demand is as follows: "Llano, Texas, April 8, 1903. Mr. E. W. Tarrence, Agent H. & T. C. Railroad Company, Llano, Texas. Dear Sir: For the purpose of making a shipment of cattle from Llano, Texas, to Fairfax, O. T., I desire seven stock cars at Llano, Texas, on the 14th day of April, A. D. 1903. I herewith tender you one-fourth of the amount of freight charges for the use of such cars. Very truly yours, (Signed) S. H. Buchanan." The evidence shows that Llano is a station upon the Houston & Texas Central Railroad, and it is a fact known that it does not operate a road leading to Fairfax, Oklahoma Territory. The cars were used and intended to be used over the Houston & Texas Central Railroad, and from it transferred to its con-

necting line, the Gulf, Colorado & Santa Fé Railway, which would carry the cars and the cattle to the point of destination. The cars were not delivered on the day requested, which fact was the basis of the judgment for penalties against the Houston & Texas Central Railroad Co.

We have given this written demand much consideration, in order to determine what construction should be given to it, and we have concluded to hold that it is an express request for cars to be furnished and to be used in the transportation of the cattle from Llano to Fairfax. The railroad has interposed the defense that under the statute upon which this demand is predicated, they were not required to furnish cars to be used by a connecting carrier to transport the shipment to its destination. In other words, that the Houston & Texas Central Railroad Co. was not required to heed the request for cars to be used beyond its own line. There is no evidence of any partnership agreement or traffic arrangements between the two roads with reference to the use of cars owned by either road. We find nothing expressly stated in the statute in question which requires the initial carrier to furnish cars to be used by connecting lines in the transportation of commodities to the point of destination the statute, being penal in character, will receive a strict construction, and we will not, by implication, read into it, words that will impose such a burden or duty upon the carrier furnishing the cars; and if the law could be held to require this to be done without the consent of the carrier, we would have serious doubt as to its validity. The railway company is the owner of its cars and is entitled to their exclusive use, as much so as any other property it may possess; and if it could be forced against its consent to furnish and surrender its cars to a connecting carrier to be used by it, for the same reason it could be compelled to furnish the connecting line with locomotives and train crews, and anything else that might be necessary or needful to be used by the latter carrier in the operation of its public business. Therefore we hold that, under the demand in question, the penalties could not be recovered.

Appellant's eighth assignment of error is well taken. It complains of the action of the trial court in refusing appellants' special instruction No. 3. This charge has been

compared with that approved in *H. & T. C. R. R. Co. vs. Everett, 13 Texas Court Reporter, 930,* and, other than a slight change in verbiage, we find no difference between the two instructions. It appears from the evidence of the witness Buchanan, that a demand was made on the agent at Llano to bill the cattle through by way of Lampasas; or, if that could not be done, then by way of McNeill. The cattle were billed and shipped from Llano by way of Brenham, a route 150 or 200 miles longer than by way of Lampasas or McNeill. At Brenham, they were delivered to the Gulf, Colorado & Santa Fé Railway, the connecting line of the Houston & Texas Central. The appellee in his direct testimony, testified: "We were first informed that they would not take us by way of Lampasas when we were ready to start, after we had loaded our stock, they told us then for certain that we wouldn't get to go that way. After we were loaded and ready to start, I signed up one written contract." The contract mentioned, provided for transportation over the first line of road to Brenham, and he says that there was no further discussion of the terms of shipment "after we loaded, and prior to the time I signed this written contract. I agreed to go by McNeill or Lampasas. They wouldn't take us either way." The evidence shows that there was a through connecting system of roads from Llano to Fairfax, by way of Lampasas or by McNeill, and that if the cattle had been transported by way of Lampasas they would have reached the Gulf, Colorado and Santa Fé road at that point, and which would have given a continuous route to the point of destination.

On cross-examination, the plaintiff testified: "At the time I handed in my order, I think I specified a particular route. I did not specify any particular route in that written demand. At the time I was there he asked me which way I wanted to go, and I told him by Lampasas. He told me I could ship to Lampasas by the local rate and local billing. My demand was that he ship them by way of Lampasas under through billing, all the way through in the same cars to destination. I wanted them billed through from Llano to Fairfax by way of Lampasas, go through under through billing in the same cars. Then he told me he could not do that, he would bill me local to Lampasas at the local rate, and then me make my own arrangements with the

Santa Fé at Lampasas. I didn't want that. I then demanded that he do the same thing, through billing and through cars by way of McNeill and Milano Junction. He refused that, but said he could do it by the local rate to McNeill, and then me make my arrangements with the I. & G. N. and Santa Fé. Both of those I refused, the local part of it, and demanded that I go through under through billing from Llano to Fairfax at $63.25 a car—which was what he told us the rate was. I wasn't willing to pay more than $63.25 a car for the freight to that point, because he told me that was the rate, and I wasn't willing to have the local billing or local rates. He told me the Brenham route was the shortest route he could give you through billing and through rates by. He said the routes by Brenham or Hempstead still further, and he gave the shortest route he said he could give under that billing." There is evidence that shows that at the time this shipment was made there was no arrangement between the two roads as to a through billing other than by the way of Brenham, and if this fact is true, the demand of the plaintiff in the evidence last quoted, will settle the case against him as to the claim for damages growing out of the longer haul on account of routing by Brenham. And if the evidence was conclusive upon the question that this was the only route under a through billing that could be given, we would render the judgment in appellant's favor on this branch of the case; but, however, there may be some question as to whether or not the agent at Llano was correct in the statement that he made to the plaintiff that he could not bill through by way of Lampasas or McNeill and Milano. If the plaintiff requested a through billing and transportation by either of these shorter routes, and it was wrongfully denied him by the Houston & Texas Central Railroad Company, when it, under its traffic arrangements with the other roads, had the power or authority to grant it, the H. & T. C. could be held liable for any damages that might have resulted by reason of the longer haul and routing by Brenham, unless that road would be protected by the written contract signed and executed by the plaintiff under which the cattle were transported. If the plaintiff voluntarily and under circumstances that would make the written contract binding upon him, agreed to ship by Brenham, or waived the right previously demanded for transportation by

Lampasas or McNeill, then he is in no condition to complain. But if he was deceived and led into the execution of this contract by reason of false information given him by the agent of inability to through route by Lampasas or McNeill; or if the contract was executed under such circumstances as to bring its validity into question under the rule announced in *Railway Co. vs. Carter, 29 S. W. Rep., 565,* then plaintiff would be entitled to recover, provided the cattle sustained any injury by reason of being transported by the longer route.

The eleventh paragraph of the charge of the trial court, which is complained of in the ninth and tenth assignments of error, abstractly presents a correct proposition of law; but, however, the principle there announced should, upon another trial, be so presented as to be in accord with the views expressed in this opinion. As before said, the plaintiff admits that he was informed before the cattle were loaded that there could be no through billing from Llano to Fairfax other than by Brenham; and if this was true, the plaintiff could not select a different route and exact a through billing when the carrier was not prepared to give it, and he had been informed of this fact. The charge given and complained of omits this phase of the case.

We overrule the twelfth and thirteenth assignments of error. We have had some difficulty in reaching a conclusion upon the question raised in the fourteenth assignment of error, but have finally concluded that the action of the court in sustaining the special exception was not erroneous. No error is pointed out in the fifteenth and sixteenth assignments. For the errors discussed, the judgment is reversed and the cause remanded.

SUPREME COURT OF THE UNITED STATES.

NOS. 370 AND 594.—OCTOBER TERM, 1905.

U. S. Reports. Vol. 201, Page —.

MAY 28, 1906.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

370

FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, AND THE GREENSBORO ICE AND COAL COMPANY, APPELLANTS,

vs.

SOUTHERN RAILWAY COMPANY.

CROSS APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

594

SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, AND THE GREENSBORO ICE AND COAL COMPANY.

The Southern Railway Company, a corporation organized under the laws of the State of Virginia, operates among others a line of railway passing through Greensboro, North Carolina. At that place the Greensboro Ice and Coal Company, during the times hereafter mentioned, had a coal and

wood yard, located some distance from the main track and right of way of the railroad. From this main track, however, there was a private siding or spur track extending across the land of private persons to the establishment of the ice and coal company. In consequence of the views expressed in the opinion it is unnecessary to review the facts as to the construction of this spur track or to detail the course of dealing between the parties concerning it prior to the origin of this controversy. Certain it is that at one time the railroad delivered cars consigned to the ice and coal company from its main track on to the spur track in question. A dispute arose between the railway company and the ice and coal company concerning demurrage on thirteen cars containing coal and wood consigned to the latter company. In consequence of the refusal of the ice and coal company to pay these charges the railway, on October 12, 1903, notified the ice and coal company that after October 17, 1903, it would only deliver cars consigned to the ice and coal company on the public tracks of the railway company at a place known as the team track, set aside for the delivery to the public generally of merchandise of that character. After receiving this notice the ice and coal company ordered four cars of coal from points in the States of Pennsylvania, West Virginia and Tennessee. These cars reached Greensboro between October 18, 1903, and October 22, 1903, were placed upon the team track, and delivery was tendered to the ice and coal company. That company, however, declined to receive or unload the cars elsewhere than on the siding above referred to. An informal complaint on the subject was made by letter on October 20, 1903, to the North Carolina Corporation Commission, composed of the appellants Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield. After conversations had with officers of the railway company, the commission, on October 31, 1903, made an order requiring the railway company, upon payment of freight charges, to make delivery of the cars beyond its right of way and on the siding referred to. Hearing was had on exceptions filed on behalf of the railway company, and on December 10, 1903, the commission made an order overruling the exceptions. The railway company appealed to the Circuit Court of Guilford County.

In the meantime, on November 2, 1905, after demurrage or car service charges had attached in respect to the four

cars of coal, and to prevent unnecessary interference with its other business, the railway company removed the cars in question from the team track and placed them on a distant siding.

By chapter 164 of the Public Laws of North Carolina for 1899, creating the corporation commission, and by the acts amendatory thereof, as contained in chapter 20, revisal of 1905, as amended in 1905, it was provided as follows:

"1086. For violating rules.—If any railroad company doing business in this State by its agents or employes shall be guilty of a violation of the rules and regulations provided and prescribed by the commission, and if after due notice of such violation given to the principal officers thereof, if residing in the State, or, if not, to the manager or superintendent or secretary or treasurer if residing in the State, or if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation as may be directed by the commission, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars. (1899, c. 164, s. 15.)

"1087. Refusing to obey orders of commission.—Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the corporation commission shall, in addition to the other penalties prescribed in this chapter, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the Superior Court of Wake County, in the name of the State of North Carolina on the relation of the corporation commission; and each day such company continues to violate any provision of this chapter, or continues to refuse to obey or perform any rule, order or regulation prescribed by the corporation commission shall be a separate offense. (1899, c. 164, s. 23.)

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"1091. Violation of rules, causing injury; damages; limitation.—If any railroad company doing business in this State shall, in violation of any rule or regulation provided by

the commission, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that in case of willful violation of law such railroad company shall be liable to exemplary damages: Provided, that all suits under this chapter shall be brought within one year after the commission of the alleged wrong or injury. (1899, c. 164, s. 16.)"

On January 5, 1904, the bill in this case was filed in the Circuit Court of the United States for the Eastern District of North Carolina to perpetually enjoin the bringing of actions by the ice and coal company and by the commission to recover penalties or damages under the authority of the aforesaid statutory provisions, because of the noncompliance of the railway company with the order of the commission. As grounds for the relief prayed it was averred that the railway company had a common defense based upon the commerce clause of the Constitution of the United States, the provisions of the act of Congress to regulate commerce and the due process clause of the Constitution, and also because the corporation commission was an illegal body, as it was empowered to exercise judicial, executive and legislative functions contrary to the Constitutions of the State and of the United States. After the filing of answers the cause was referred to a master to report the testimony and findings of fact to the court. The court, concluding that the order of the corporation commission was repugnant to the commerce clause of the Constitution, entered a decree in favor of the railway company and perpetually enjoined the enforcement of the order of the corporation commission and the bringing of actions to recover penalties or damages for a violation of that order. (134 Fed. Rep. 82.) The corporation commission and the ice and coal company appealed and the railway company prosecuted a cross appeal upon the ground that the court below erred in not deciding that the corporation commission was an unconstitutional body because of the alleged mixed and peculiar character of the functions conferred upon it by the State statutes.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the Court.

The legal principle which controls the determination of this cause renders it unnecessary to state many of the facts contained in this voluminous record or to consider and pass upon a number of the legal propositions urged in the cause. But three questions are essential to be passed upon. They are, First. Whether the record discloses that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars. Second. Whether, as to the individual defendants below, this cause in fact was a suit against the State of North Carolina. Third. Whether the order and decision of the corporation commission of North Carolina and the statutes of that State upon which the same was based were void because in conflict with the commerce clause of the Constitution and the act of Congress to regulate commerce.

1. It was urged in argument on behalf of the commission and the ice and coal company that the extra cost or expense, if any, of placing the four cars of coal on the siding was the matter in controversy. In the court below it would seem to have been claimed that the one hundred and forty-six dollars demurrage was the question at issue. However this may be, as said by the trial court, although the demurrage dispute may have been the origin of the litigation, there is involved in the controversy presented by the bill not only the right to enforce against the railway company the payment of statutory penalties much in excess of two thousand dollars, but also the right of that company to carry on interstate commerce in North Carolina without becoming subject to such orders and directions of the corporation commission which so directly burdened such commerce as to amount to a regulation thereof. This latter right is alleged in the bill to be of the necessary jurisdictional value, the averment was supported by testimony, and the master and the court below have found such to be the fact. There is no merit in the contention that there is a want of jurisdiction to entertain the writ of error.

2. We think the real object of the bill may properly be said to have been the restraining of illegal interferences with the property and interstate business of the railway company, the asserted right to interfere, which it was the object of the bill to enjoin, being based upon the assumed

authority of a State statute, which the bill alleged to be in violation of rights of the railway company protected by the Constitution of the United States. In this aspect the suit was not in any proper sense one against the State. *(Scott vs. Donald,* 165 U. S. 107, 112; *Fitts vs. McGhee,* 172 U. S. 529, 530.)

3. The cars of coal not having been delivered to the consignee, but remaining on the tracks of the railway company in the condition in which they had been originally brought into North Carolina from points outside of that State, it follows that the interstate transportation of the property had not been completed when the corporation commission made the order complained of. *(Rhodes vs. Iowa,* 170 U. S. 412.)

By section 1066 of the revisal of 1905 the general powers of the North Carolina corporation commission were thus defined:

"1066. General powers.—The corporation commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations and of all other companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter and the laws regulating such companies. (1899, c. 164; 1901, c. 679.)"

By section 1100 it was provided as follows:

"1100. Demurrage; storage; placing and loading of cars.—The commission shall make rules, regulations and rates governing demurrage and storage charges by railroad companies and other transportation companies; and shall make rules governing railroad companies in the placing of cars for loading and unloading and in fixing time limit for delivery of freights after the same have been received by the transportation companies for shipment. (1903, c. 342.)"

Under these circumstances it is undoubted that by a circular, numbered 36 and dated July 9, 1903, the corporation commission promulgated rules fully regulating the right of railway companies to exact and the amount of charges which might be made for storage, demurrage, etc. And the pleadings make it clear that the order of the corporation commission complained of was not made upon the assumption of any supposed contract right which the corporation commission as a judicial tribunal was enforcing as between the ice and coal company and the railway company, but was exclusively rested upon the general administrative authority which the corporation commission deemed it had power to exercise in virtue of the rights delegated to it by the statutes of North Carolina as above stated, Thus, in paragraph 12 of the answer the corporation commission averred as follows:

"These defendants are advised that the orders made by them, hereinbefore referred to, do not constitute an interference with interstate commerce as alleged in said paragraph 12 (referring to bill of complaint); nor with the right of the complainant to conduct its business according to its reasonable rules and regulations, except so far as the corporation commission has the right and power to control its rules and regulations by virtue of said act creating the corporation commission, and the amendment thereto, contained in chapter 342, Public Laws, 1903, whereby the power is expressly conferred upon the North Carolina Corporation Commission, by subsection 26, 'to make rules governing railroad companies in the placing of cars for loading and unloading, and in fixing time limit for the delivery of freights after the same have been received by the transportation companies for shipment.' And these defendants further say that, having full power to provide for placing cars for unloading, and in conformity with the rules of the said North Carolina Corporation Commission, the orders complained of in the bill were in strict conformity to the law, and finally adjudged and made after the complainant company had full opportunity to make defense as to its alleged rights in the premises."

Without at all questioning the right of the State of North Carolina in the exercise of its police authority to con-

fer upon an administrative agency the power to make many reasonable regulations concerning the place, manner and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subject made by the State or under its authority which directly burdens interstate commerce is a regulation of such commerce and repugnant to the Constitution of the United States. *(Houston & Texas Central Ry. Co. vs. Mayes,* 201 U. S. 321; *American Steel & Wire Co. vs. Speed,* 192 U. S. 500.)

Not being called upon to do so, we do not pass upon all the general regulations formulated by the commission on the subject stated, but are clearly of opinion that the court below rightly held that the particular application of those regulations with which we are here concerned was a direct burden upon interstate commerce and void. Viewing the order which is under consideration in this case as an assertion by the corporation commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right of way and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce. On the other hand, treating the order as but the assertion of the power of the corporation commission to so direct in a particular case, in favor of a given person or corporation, the order not only was in its very nature a direct burden and regulation of interstate commerce, but also asserted a power concerning a subject directly covered by the act of Congress to regulate commerce and the amendments to that act, which forbid and provide remedies to prevent unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce.

The direct burden and resulting regulation of interstate commerce operated by an alleged assertion of State authority similar in character to the one here involved was passed upon by the Circuit Court of Appeals for the Sixth Circuit in *Central Stock Yards Co. vs. Louisville & Nashville R. R. Co.,* (118 Fed. Rep. 113.) The court in that case was called upon to determine whether certain laws of Kentucky im-

posed a direct burden upon interstate commerce and were a regulation of such commerce, upon the assumption that those laws compelled a common carrier engaged in interstate commerce transportation to deliver cars of live stock moving in the channels of interstate commerce at a particular place beyond its own line different from the general place of delivery established by the railway company. In pointing out that if the legislation in question was entitled to the construction claimed for it, it would amount to a State regulation of interstate commerce, it was aptly and tersely said (p. 120):

"It is thoroughly well settled that a State may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the States. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one State to be delivered to another at a particular place and in a particular way. If the Kentucky constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do."

As we conclude that the court below rightly decreed that the order complained of was invalid because amounting to an unlawful interference with interstate commerce, we deem it unnecessary to consider the contentions made on the cross appeal of the railway company. And because we confine our decision to the issue which necessarily arises we do not intimate any opinion upon the question pressed at bar as to whether an order which was solely applicable to purely State business, directing a carrier to deliver property upon a private track beyond the line of the railway company, would be repugnant to the due process clause of the Constitution.

The final decree which the Circuit Court entered and the writ of perpetual injunction issued thereon were, however, much broader than the necessities of the case required, and should be limited so as to adjudge the invalidity of the order complained of, restrain the institution by the defendant of

suits or actions for the recovery of penalties or damages founded upon the disobedience of such order, and forbid future interferences under like circumstances and conditions with the interstate commerce business of the railway company. As so modified, the decree below is affirmed.

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