INDEX.

NOTICE AND GROUNDS OF APPEAL.

(Filed March 22, 1917).

New Jersey Supreme Court.

FRANK A. CHAMPLIN, TRADING AS F. A. CHAMPLIN & COMPANY,
Plaintiff-Respondent,

vs.

ERIE RAILROAD COMPANY, A CORPORATION,
Defendant-Appellant.

Notice and Grounds of Appeal.

To Messrs. Brown & Beecher,
Attorneys of Plaintiff.

SIRS:

Take notice, that the defendant, Erie Railroad Company, hereby appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in this cause in the Supreme Court of New Jersey on the following grounds:

1. The Supreme Court erred in holding that the Trial Court erred in directing a verdict for the defendant.

2. The judgment of the Trial Court in directing a verdict for the defendant was not erroneous.

3. There was no evidence that the defendant was negligent.

4. The Trial Court did not err in excluding proof of the occurrences of other cases of burning of hay stored in defendant's yard.

Dated March 13, 1917.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service acknowledged March 14, 1917.

BROWN & BEECHER,
Respondent Attorneys for Plaintiff.

(Filed July 7, 1916).

NEW JERSEY SUPREME COURT

FRANK A. CHAMPLIN, Trading as F. A. Champlin & Co., *Plaintiff-Appellant,* *vs.* ERIE RAILROAD COMPANY, a Corporation, *Defendant-Appellee.*	*In Tort.* *On Appeal.*

SPECIFICATION OF DETERMINATIONS AND DIRECTIONS APPEALED FROM.

The above named plaintiff-appellant, by Brown & Beecher, his attorneys, hereby file with the clerk of the New Jersey Supreme Court the following specification of the determinations and directions of the District Court of the City of Passaic with respect to which the said plaintiff is dissatisfied in point of law and upon the admission and rejection of evidence therein against the objection of the said plaintiff.

1. At the trial of the said cause the said court, at the close of the evidence, erroneously directed a verdict in favor of the defendant, the Erie Railroad Company, whereas the case ought to have been submitted to the jury on the evidence.

2. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Cham-

plin: Q You had a conversation with Mr. Paulison here, the agent, in relation to any other depredations that had been committed there; or any other fires which had occurred in that yard?

3. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Champlin: Q On November 8th did he state to you that any other cars of hay had been burned in that yard?

4. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Levine: Q Will you state to the court and jury what the conditions in that yard are generally?

5. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Levine: Q Were there any watchmen in that yard?

6. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Levine: Q Was there in that yard or around that yard anyone to look after that car?

7. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Levine: Q What was the condition of that yard in relation to a watchman or any other person to look after the property there?

8. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Levine: Q Do you know whether they ever had fires there in that yard prior to November 6th of that year?

9. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Levine: Q Were there, or have there been, several fires during the year 1915, up to and prior to November 6th, in that year?

10. The trial court erroneously refused to per-

mit plaintiff's counsel to ask the witness, Levine: Q During the time that you were in that yard unloading, which you say was about every day prior to November 6th of 1915, did you ever see or know of a watchman being in the yard?

11. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Levine: Q Did you ever discuss the condition of that yard with the agent, Mr. Paulison?

12. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Levine: Q Do you know what the reputation of that yard is in that community?

13. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Levine: Q Did you ever see a number of people around, in and among the bales of hay and around cars of hay and through the hay in that yard at various times on or about the latter part of October and the middle of November?

14. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Levine: Q Do you know whether that yard is used as a sort of playground?

15. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Bowker: Q Were you ever called in 1915 at any time to put out or extinguish fires which occurred to cars of hay in the Dundee yard—freight yard?

16. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Mault: Q Do you know where it stood?

17. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Paulison: Q Isn't it a fact that a number of fires

have occurred and cars of hay have been burned in that yard during the past two years?

18. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Paulison: Q Don't you know that merchandise has been stolen from that yard?

19. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Paulison: Q There is no regular watchman kept in this yard during the day and night, is there?

20. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Paulison: Q Did you have in that yard at any time an agent or watchman to take care of goods and chattels and cars that came into this yard, whose duty it was to stay there and look after these goods and chattels and cars?

21. The trial court erroneously refused to permit plaintiff's counsel to ask the witness, Pasman: Q Did you ever sell any other cars of hay out of the yard in question by reason of their having been burned or damaged?

22. The said judgment was in divers other respects irregular, erroneous and unlawful.

BROWN & BEECHER,

Attorneys of Plaintiff-Appellant.

Dated, July 5, 1916.

(Returnable May 5, 1916).

DISTRICT COURT SUMMONS.

City of Passaic,
County of Passaic.

To Wit: The State of New Jersey.

To Sergeant-of-Arms of District Court or any Constable of said County:

[L. S.] Summon Erie Railroad Company, a corporation, to appear before the District Court of the City of Passaic, to be held at the District Court Room, in the Municipal Building, corner of Howe Avenue and Prospect Street, in the said city, on the fifth day of May, A. D. 1916, at ten o'clock in the forenoon, to answer unto Frank A. Champlin, trading as F. A. Champlin & Co. in an action in tort, demand two hundred and fifty-seven and 04/100 dollars. Hereof fail not.

Witness: W. Carrington Cabell, Esquire, Judge of said court, at Passaic, aforesaid, the 28th day of April in the year of our Lord, one thousand nine hundred and sixteen.

T. M. BUSTARD,

Clerk.

(Filed April 28, 1916).

District Court of the City of Passaic

FRANK A. CHAMPLIN, Trading as F. A. Champlin & Co., *Plaintiff,* *vs.* ERIE RAILROAD COMPANY, a Corporation, *Defendant.*	*In Tort. State of Demand.*

Plaintiff resides at 493 Mt. Prospect avenue, Newark, N. J., and says that:

1. The defendant is a foreign corporation transacting business in this State.

2. F. C. Mulkin, at Friendship, New York, on or about October 26, 1915, delivered to the defendant (being then a common carrier of goods), for and to the order of the plaintiff, one car of baled hay.

3. The defendant, as such common carrier, received said hay at the time and place aforesaid; and then and there, in consideration of freight and storage charges to be paid on delivery of the hay, agreed to transport and deliver said hay for and to the order of the defendant at Passaic, N. J., and, after forty-eight hours (exclusive of holidays) after notice to plaintiff of arrival of said hay at Passaic, to hold the same in storage there as warehousemen.

4. The defendant transported said hay to

State of Demand.

Passaic; and, on or about November 6, 1915, while said hay was still in the possession of the defendant, at Passaic, under its agreement, said hay was damaged and destroyed by fire through the negligence and default of the defendant.

5. The value of said hay was $257.04.

6. On or about November 8, 1915, and at other times thereafter, the plaintiff demanded of the defendant, as damages, the said value of said hay; but the defendant then refused, and ever since has refused, to pay said damages to said plaintiff.

Plaintiff demands $257.04 with interest from November 8, 1915, and costs.

BROWN & BEECHER,

Plaintiff's Attorneys.

(Filed June 7, 1916).

DISTRICT COURT OF THE CITY OF PASSAIC.

FRANK A. CHAMPLIN, Trading as F. A. Champlin & Co., *Plaintiff,* *vs.* ERIE RAILROAD COMPANY, a Corporation, *Defendant.*	*In Tort. Amended State of Demand.*

Plaintiff resides at 493 Mt. Prospect avenue, Newark, N. J., and says that:

1. The defendant is a foreign corporation transacting business in this State.

2. F. C. Mulkin, at Friendship, New York, on or about October 26, 1915, delivered to the defendant (being then a common carrier of goods), for and to the order of the plaintiff, one car of baled hay.

3. The defendant, as such common carrier, received said hay at the time and place aforesaid; and then and there, in consideration of freight and storage charges to be paid on delivery of the hay, agreed to transport and deliver said hay for and to the order of the defendant at Passaic, N. J., and, after forty-eight hours (exclusive of holidays), after notice to plaintiff of arrival of said hay at Passaic, to hold the same in storage there as warehousemen.

4. The said hay was transported by said defendant to Passaic and there stored by it in said car on its tracks in its freight yard at Passaic.

Amended State of Demand.

5. Depredations, consisting of the setting fire to goods, the stealing of goods and the damaging of goods stored in cars of the defendant on their said tracks in their said freight yard at Passaic, were a common occurrence at the time of said fire and for a long time previous thereto.

6. Defendant had no watchman in charge of said freight yard or of said hay while so stored; said freight yard, without a watchman, was unsafe and dangerous for the storage of the said hay and not such as a reasonably careful owner of similar goods would use for the storage of such goods.

7. Defendant failed to exercise, in regard to the said hay, ordinary care or reasonable care or such care as a reasonably careful owner of similar goods would exercise under the same circumstances, and failed to perform in that particular the duty imposed by law upon it as warehousemen.

8. By means whereof, on or about November 6, 1915, while said hay was still in the possession of the defendant as such warehousemen, and stored as aforesaid in its said freight yard at Passaic, said hay was damaged and destroyed by fire.

9. The value of said hay was $257.04.

10. On or about November 8, 1915, and at other times thereafter, the plaintiff demanded of the defendant, as damages, the said value of said hay; but the defendant then refused, and ever since has refused, to pay said damages to said plaintiff.

Plaintiff demands $257.04 with interest from November 8, 1915, and costs.

BROWN & BEECHER,
Plaintiff's Attorneys.

Dated, June 5th, 1916.

(Returnable June 2, 1916).

DISTRICT COURT VENIRE.

PASSAIC COUNTY, *ss.*

THE STATE OF NEW JERSEY: To DOMINICK DE MURO, the Sergeant-at-Arms or one of the constables of the District Court of the City of Passaic:

[L. S.]

You a hereby commanded that you cause to come before the District Court of the City of Passaic, holden at the Municipal building, in the said city and county, on Friday, the second day of June, 1916, at ten o'clock in the forenoon fifteen good and lawful men being citizens of this State, above the age of twenty-one years, and under the age of sixty-five years, by whom the truth of the matter may be better known, and who are in no wise akin to F. A. Champlin & Co., plaintiff, and Erie Railroad Co., a corporation, defendant, nor interested in the suit, to make a jury for the trial of the action between the parties aforesaid, because as well the said plaintiff as the said defendant have put themselves on that jury. And have you there the names of those jurors, and this writ.

WITNESS: W. CARRINGTON CABELL, Judge of the said Court, at Passaic, aforesaid, the 31st day of May in the year one thousand nine hundred and sixteen.

T. M. BUSTARD,

Clerk.

(Filed June 21, 1916).

DISTRICT COURT OF THE CITY OF PASSAIC.

FRANK A. CHAMPLIN, Trading as F. A. Champlin & Co., *Plaintiff,* *vs.* ERIE RAILROAD COMPANY, a Corporation, *Defendant.*	*In Tort.* *Notice of Appeal.*

To Messrs. Collins & Corbin,
Defendant's Attorneys:

Please take notice that the plaintiff, Frank A. Champlin, trading as F. A. Champlin & Co., hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the City of Passaic, rendered in the above stated action on the seventh day of June, nineteen hundred and sixteen.

BROWN & BEECHER,
Plaintiff's Attorneys.

TRANSCRIPT OF JUDGMENT ROLL.

IN THE DISTRICT COURT OF THE CITY OF PASSAIC.

(From District Court Docket 4).

No. 11,781.

STATE OF NEW JERSEY, }
COUNTY OF PASSAIC. } *ss.*

Before the Hon. W. Carrington Cabell, Judge; Thomas M. Bustard, Clerk; $257.04. In Tort. Brown & Beecher, plaintiff's attorneys; Collins & Corbin, defendant's attorneys.

FRANK A. CHAMPLIN, Trading as F. A. Champlin & Co., *Plaintiff,*	*Summons, $2.10.*
	Listing Fee, $1.50.
vs.	*Jury Fee, $5.75.*
ERIE RAILROAD COMPANY, a Corporation, *Defendant.*	*Jury Fee. $5.75.*

Summons was issued and tested April 28, 1916, returnable May 5th, 1916, at 10 o'clock in the forenoon at the District Court room, in the Municipal building, corner of Howe avenue and Prospect street, Passaic. The sergeant-at-arms returned the summons as follows:

"Served this summons April 28th, 1916, by reading the same to James B. Bogert, agent of

the defendant corporation, and delivering to him a copy thereof.

D. DE MURO,
Sergeant-at-Arms.''

April 28, 1916. Plaintiff filed state of demand.

May 5, 1916. Case adjourned to May 12, 1916.

May 12, 1916. Case adjourned to May 19, 1916.

May 19, 1916. Case adjourned to June 2, 1916.

May 31, 1916. Plaintiff filed demand for jury and paid jury fee $5.75.

May 31, 1916. Venire issued to Dominick De Muro for jury, returnable June 2, 1916, at 10 o'clock in the forenoon.

June 2d, 1916. Case was called and jury sworn. W. H. D. Marr, on motion of defendant's attorneys, was designated by the court as stenographer and the oath administered to him by the clerk.

June 2d, 1916. Case adjourned to June 7, 1916; same jury to appear.

June 7th, 1916. Jury fee $5.75 paid to clerk. Plaintiff filed amended state of demand. The twelve jurors appeared. The case was called and the trial proceeded.

On the part of the plaintiff, the following witnesses were sworn and gave their evidence: Frank A. Champlin, Morris Levine, Reginald H. Bowker. Plaintiff offered five exhibits in evidence, marked P. 1, 2, 3, 4, 5.

On the part of the defendant, the following witnesses were sworn and gave their evidence: John F. Mault, William Mault, John Niverth, J. C. Paulison, Augustus E. Pasman, James O'Rourke and Matthew May.

June 7, 1916. Court directed verdict for defendant.

June 7, 1916. Jury rendered verdict for defendant.

June 7, 1916. Judgment entered for defendant.

June 21, 1916. Plaintiff filed notice of appeal, endorsed with acknowledgment of service by defendant's attorneys.

June 23, 1916. Defendant filed appeal bond, approved by the court June 23, 1916.

I, Thomas M. Bustard, clerk of the District Court of the City of Passaic, do hereby certify that the foregoing is a true copy of the record of a judgment of said court and that attached hereto are true copies of the summons, venire, state of demand, amended state of demand, demand for jury and notice of appeal filed in this court in the above-entitled cause.

In witness whereof, I have hereunto set my hand as clerk of said court and affixed the seal of said court this fourteenth day of July, nineteen hundred and sixteen.

T. M. BUSTARD,

[L. S.] *Clerk.*

DISTRICT COURT OF THE CITY OF PASSAIC.

FRANK A. CHAMPLIN, Trading as F. A. Champlin & Co., *Plaintiff,* *vs.* ERIE RAILROAD COMPANY, a Corporation, *Defendant.*	*In Tort.*

Appearances:

Brown & Beecher, by Mr. Brown, of counsel for plaintiff.

Collins & Corbin, by Mr. Stevens and Mr. Herbert, of counsel for defendant.

Jury Trial:

Jurors: Gustav Otto, Ernest Remig, Peter Brooks, Michael Cavanagh, August Kinnig, Maximus Bolier, Edward F. Mulloy, John N. Jacoby, Edgar J. Baker, Ira G. Mercer, Fred Conklin, James A. Alden.

On motion of attorney for defendant, W. H. D. Marr was designated by the court, as stenographer in this case, and the following oath was duly administered to him:

"You, W. H. D. Marr, do solemnly swear that you will carefully, faithfully and impartially take the evidence in the case now pending in the District Court of the City of Passaic in which Frank A. Champlin is plaintiff, and the Erie Railroad Company is defendant, and make a true and correct transcript thereof."

Requests to Charge.

Before Hon. J. Carrington Cabell, Judge, in the District Court of the City of Passaic, N. J., June 7, 1916.

The Court. Have you filed an amended demand?

Mr. Brown. On looking over the law, we found it did not become necessary to amend. (Submitting paper to court).

The Court. (Referring to waiver submitted by Mr. Brown). Has the defendant seen them?

Mr. Stevens. Yes, your Honor, I received a copy yesterday morning, and with this copy we were able to prepare our case for today, and we are ready to proceed.

The Court. Is that the complaint in this case?

Mr. Stevens. The proof. Your Honor, I do not know what the practice is in your court. I have prepared a request to charge, and I would like to ask—is it your practice to take that during the examination of the jury?

The Court. It is more convenient for the court to have it.

Mr. Stevens. I might have one or two more requests to make that would possibly develop during the trial.

The Court. It would be more convenient for the court to have it, as early as possible.

Mr. Brown. Your Honor, in consideration of a week's time having elapsed, I believe it would be well to present the matter to the jury again.

Opening.

The Court. We will go on with the case as though it were a new action.

Mr. Brown. May it please the court and gentlemen of the jury, this is an action brought by Frank A. Champlin, trading as F. A. Champlin & Company, plaintiff, for the purpose of recovering damages occurring to a car of hay which he purchased on October 26th last, at a place called Friendship, New York, and had shipped here to himself. It arrived here on November 26th and remained on the track for three or four or five days. It was left in the Susquehanna yards. I think that is the name of the yards down there. It was destroyed by fire. Our purpose is to show that this destruction occurred through gross negligence, or negligence at least on behalf of the railroad company in their failure to store or leave the hay with proper protection while in the Susquehanna yards, as many depredations had been previously committed in that yard, and as many fires had occurred in that yard. The minute the railroad company put in storage in that yard a car of hay, or any other merchandise, it seems to me that they at once placed same in jeopardy, and we will show you that they had no watchman; that they had no care over that yard whatever, and by reason of their negligence in taking proper care of goods which were stored in that yard, Mr. Champlin sustained a loss, and we are here today to show you what that loss is.

Mr. Stevens. If the court please, and gentlemen of the jury, the fact is this car arrived on November 1st and the fire occurred on November 6th. The car was in the yard five days. That is a mere matter of detail. I have just spoken to the plaintiff's counsel about it, and we want to keep our record and our files straight. Next,

plaintiff's counsel states that the railroad did not use the degree of care required by law on the part of warehousemen to protect the property. His Honor will instruct you as to the degree of care required on the part of the railroad company under circumstances similar to this, so there is no reason for me to tell you anything in the matter, but I can assure you that we can prove to you beyond a reasonable doubt, or beyond any doubt whatsoever, that we used all the care required on our part by law. We are not required to use any more care than the law demands, and we used that degree of care which the law demands, and having used that degree of care, we are not liable for this loss. I thank you.

FRANK A. CHAMPLIN, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct examination by Mr. Brown.

Q What is your name, please? A Frank A. Champlin.

Q Mr. Champlin, where do you reside? A Newark, New Jersey.

Q What is your business? A Hay shipper.

Q How long have you been such? A Twenty-five years.

Q Did you purchase a car of hay on or about October 25, 1915, from a person by the name of F. C. Mulkin, at Friendship, New York? A Yes, sir.

Q What did you pay for that car?

Mr. Stevens. That is objected to—I don't think the amount plaintiff paid for the car is material or competent.

The Court. For what purpose.

F. A. Champlin, direct.

Mr. Stevens. Do you mean the hay or the car?

Mr. Brown. Generally speaking, we would mean the car. Don't speak so technically.

By the Court.

Q What did you pay for the car of hay? A Seventeen dollars a ton F. O. B. Friendship, New York.

By Mr. Brown.

Q How many tons were there?

Mr. Stevens. That is objected to. The witness is testifying from a paper which he has, and unless he shows that it is in some way directly connected with the case, it is objected to.

The Court. What is the paper you are referring to?

The Witness. That is a copy, an exact duplicate of the claim rendered to the Erie Railroad Company on November 8th.

Mr. Stevens. That is objected to as secondary evidence and therefore, not admissable.

The Court. Objection sustained.

By Mr. Brown.

Q Mr. Champlin, is that the bill you received for the car? A Yes, sir.

Q What did you pay for that hay? A $198.63.

Plaintiff's Exhibit 1.

Q On what road was that hay shipped by you? Of your own knowledge? A The Erie Railroad.

Mr. Brown. I now offer in evidence the original Bill of Lading, in this case.

The Bill of Lading offered, was received in evidence and marked "Plaintiff's Exhibit 1." The following is a true copy of Bill of Lading, as received in evidence:

Form 982-9-08-100M

Uniform Bill of Lading—Standard Form of Order Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908.

ERIE RAILROAD COMPANY

Order Bill of Lading—Original. Shippers No.....

Agents No.....

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this original Bill of Lading, at Friendship, N. Y., Oct. 26, 1915, from F. C. Mulkin, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof)

Plaintiff's Exhibit 1.

and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this original ORDER Bill of Lading properly indorsed shall he required before the delivery of the property. Inspection of property covered by this Bill of Lading will not be permitted unless provided by law or unless permission is indorsed on this original Bill of Lading or given in writing by the shipper.

The Rate of Freight from.....
is in Cents per 100 Lbs.

If Times 1st	If 1st Class	If 2d Class	If Rule 25	If 3d Class	If Rule 26	If Rule 28	If 4th Class
If 5th Class	If 6th Class	If Special Per		If Special Per			

(Mail Address—not for purposes of Delivery).
Consigned to ORDER OF F. A. Champlin & Co
Destination Passaic State of N J, County of....
Notify Same at Newark, State of N. J., County of.....

Route N Y S & W Car Initial L & N E Car 5081

No Packages	Description of Articles and Special marks	Weight Subject to Correction	Class or Rate	Check Column	If charges are to be prepaid write or stamp here, "to be prepaid."
	Baled Hay O R F & N Allan Inspector				

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

.....
Agent or Cashier.
Per.....
(The signature here acknowledges only the amount prepaid).

.....
Charges Advanced
$.....

F C Mulkin Shipper,
Per.....

A J Philbrick Agent
Per.....S.....

Plaintiff's Exhibit 1.

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same).

ENDORSEMENTS (On Back)

F A Champlin & Co
H J Palmer Att'y.

CONDITIONS.

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided. No carrier or party in possession of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage or delay by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehousemen only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the

carrier or party in possession (except in case of loss or damage by fire in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carried is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of

lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege at his own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject

to a lien for charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically

rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Either party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in the Bill of Lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damege resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate

ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Mr. Stevens. We have agreed to waive proof of the company's signature on that Bill of Lading, and to admit its genuineness as issued by the Erie Railroad Company.

Mr. Brown. And that the same was carried by the Erie Railroad or by its authority, and reached Passaic here.

The Court. That is the Bill of Lading that you are speaking of.

Mr. Stevens. That car of hay was shipped from Friendship, New York, and arrived in Passaic. We admit the signature of the company on the Bill of Lading as being genuine.

The Court. Is the date of arrival admitted or fixed by stipulation?

Mr. Stevens. I don't think the date is as fixed by Mr. Brown. I think it was November 1. Our records show the date as November 1.

Mr. Brown. We will fix the date by stipu-

lation as November 1, on which the car arrived here.

By Mr. Brown.

Q What became of that car of hay, Mr. Champlin; did you receive it? A Why—

Mr. Brown. (Interrupting.) Did you receive the car of hay?

A No, sir.

Q Do you know what became of that car of hay? A I do not.

Q Did you ever see the car number as called for on the Bill of Lading there? A Yes, sir; I did.

Q Where? A In the yard.

Mr. Brown. (To Mr. Stevens.) Are you going to admit it was destroyed by fire?

Mr. Stevens. We are not going to admit anything.

By Mr. Brown.

Q What was the condition of that car at the time you saw it?

Mr. Stevens. That is objected to. They have not shown that this was the car of hay in dispute; that the hay which was in the car in the yard,—that this was the car which contained the hay in question. There is nothing that appears on the record from which we are to infer this.

By Mr. Brown.

Q What was the number of that car? A 5081.

Q Did you see car 5081 in the city of Passaic here, in the Dundee yard? A Yes, sir; I did.

F. A. Champlin, direct.

Q The one named in the Bill of Lading here? A Yes, sir.

Q And what was the condition of the hay on board the car at that time? A I did not see the hay.

Q When did you see this? A I was up there on November 8.

The Court. On November 8 he saw the hay? The car was destroyed on Saturday, November 6.

By Mr. Brown.

Q When did you see that car? A November 8th.

Q Was there any hay on it at that time? A The car was in the yard. It had been destroyed by fire.

Q Did you see the car? A I did see the car.

Q Was it intact? A It was damaged.

Q Was it burned,—had it been burned up? A It had been burned up; yes, sir.

Q Do you know what was done with that car of hay?

Mr. Stevens. That is objected to. The witness is not qualified to answer that.

The Court. If he knows, he can state it.

By Mr. Brown.

Q Did you make any inquiry as to what became of that car of hay? A I think I can offer an explanation.

The Court. Do not volunteer that?

By Mr. Brown.

Q When did you first find the hay had been burned up, Mr. Champlin? A On November 8.

F. A. Champlin, direct.

Q How did you receive that notice? A By word of mouth from talking with Mr. Paulison.

Q What was it he told you had become of it?

Mr. Stevens. That is objected to, your Honor. What he told this witness is not material.

Mr. Brown. He was the agent of the company.

Mr. Stevens. The agent of the company, freight agent, is not binding as such agent upon the company.

Mr. Brown. The question has been asked here as to what became of these goods, and he is the agent of the company.

The Court. He can state as to what occurred in the freight yard.

Mr. Stevens. I won't press my objection.

The Court. Overruled.

Mr. Stevens. May I have an exception?

By Mr. Brown.

Q Do you know who this agent was? A Yes, sir.

Q Who was this agent? Was he the agent of the Erie Railroad Company?

Mr. Stevens. That is objected to as leading.

The Court. Yes.

By Mr. Brown.

F. A. Champlin, direct.

Q Was he on the property or the ground of the Erie Railroad Company, or in the office of the Erie Railroad? A In the office of the Erie Railroad.

Q Where did you see him? A I talked to him in the office.

Q In the office,—where? A Of the Erie Railroad.

Q That is what I wanted to know. I want to show he was in the office.

The Court. It is well to show who Mr. Paulison is. How long have you known Mr. Paulison?

The Witness. I have known him more than six years.

Mr. Stevens. I don't think this is a case where you can take judicial cognizance of Mr. Paulison; he hands you a postal card and asks you who signed that postal card. That is objected to until he shows the nature of the postal card; whether it is a notice of the arrival of the car of hay.

By Mr. Brown.

Q Who is that card from? Mr. Paulison or from the Erie Railroad? A The Erie Railroad.

Q Is that Mr. Paulison's signature? A Yes, sir.

Q Are you acquainted with it? A Yes, sir.

Q And he signs himself as J. C. Paulison? A Yes, sir.

Q Is this the only notice you had from the Erie railroad that your car of hay had arrived? A Yes, sir.

Mr. Brown. I now offer that postal in

Plaintiff's Exhibit 2.

evidence and asked that it be marked as Plaintiff's exhibit.

Received in Evidence and marked "Plaintiff's Exhibit 2."

The postal card reads as follows:

Addressed to F. A. Champlin & Co.,
810 Broad Street,
Newark, N. J.

postmarked "Passaic, N. J., Nov. 1, 1915, 5 P. M." and "Passaic, N. J., Nov. 1, 5 P. M."

"N Y S & W Railroad

Passaic, N. J. Station, Nov. 1, 1915.

Gentlemen:

The following cars have arrived today at this Station consigned to you—

Car number and initial	Transferred from	Amount freight	To be delivered to
5081	Line	Hay	A. L. & Son

Yours respectfully,

22704 J. C. PAULISON."

By Mr. Brown.

Q And was the next communication you had with the Erie Railroad in relation to a loss on this car of hay, Mr. Champlain? A Yes, sir.

Q The next notice you received, what was it? A I received a visit from Mr. A. E. Pasman, representing the Erie Railroad.

Q When? A On November 22, 1915.

Mr. Stevens. May I ask a question? (To Witness.) When did you receive notice of the loss of this car of hay, the date, I mean?

The Witness. November 22nd,—the date the man called.

F. A. Champlin, direct.

Mr. Stevens. How do you remember that date,—how do you fix that date?

The Witness. By a notation I made, I have a habit of doing that.

By Mr. Brown.

Q What was the conversation between you and Mr. Pasman at that time, in relation to this car?

Mr. Stevens. That is objected to on the ground that Mr. Pasman, what he may say is not binding upon the Company.

The Court. Objection sustained.

By Mr. Brown.

Q Do you know who Mr. Pasman is? A I have met the gentleman before; yes, sir.

Q You have had former dealings with him? A I had met him and know him to be a freight adjuster of the Erie Railroad Company.

Mr. Stevens. I offer an objection to the witness making that statement because he has no knowledge of that fact.

Mr. Brown. I submit, your Honor, he has knowledge.

Mr. Stevens. He says he has known him, and knows him to be a freight adjuster. That is a conclusion and not a matter of fact, and I object to it and move it be stricken out.

The Court. Strike it out.

By Mr. Brown.

F. A. Champlin, direct.

Q Did Mr. Pasman tell you he was an agent or adjuster of the Erie Railroad? A He did; yes, sir. It is right on his card here.

Mr. Stevens. All right, then.

By Mr. Brown.

Q What was the conversation between you and Mr. Pasman in relation to this car of hay? What was the conversation at that time? Tell us exactly what occurred? A It was in relation to the disposition of the car; what they should do about it; what he thought best to do about it.

Q Did he state that there has been other fires there before this one?

Mr. Stevens. That is objected to.

The Court. Objection sustained.

Mr. Stevens. And I ask to have the sentence "that there had been other fires there" stricken off the record.

The Court. Strike it out.

By Mr. Brown.

Q What was the conversation? A In relation to this car of hay?

Q Yes. Was there anything said about other fires?

Mr. Stevens. That is objected to—the statement that there has been other fires there has nothing to do—nothing whatever to do with the adjustment of this claim. It is beyond the scope of his apparent authority. Mr. Pasman's authority is limited merely to the adjustment of this claim, and he is not

entitled to make any other statement as to what had happened there before.

Mr. Brown. I submit that is about this claim.

Mr. Stevens. That statement has nothing to do with the disposition of this car.

By Mr. Brown.

Q Tell us the exact conversation between you? A He came to see me about the best way of disposing of this car. I told him that I did not care how they disposed of it, or what they did with the car so long as I got, so long as we got our money; and I expected him to pay us in full for the car; and he said, "Well," he says, "I will look around and see what I can do, and if I can dispose of the car in Passaic, I will do so; but I think that possibly we can sell the car to some advantage around New York or Jersey City, on account of the hay being damaged. On account of the hay being damaged, I don't think we can get very much for it." I replied that I did not care what he did with it; it was up to the Erie Railroad. I wanted my money, and he gave me every assurance that he would take care of it.

Q Do you know what he did with that car of hay? A I don't know, at all.

Q Did he ever tell you what he did with it? A He did not.

Q Did you ever receive any communication from the Erie Railroad in relation to that car of hay? A I called on the Erie Railroad on January 6.

Mr. Stevens. May I ask you one question —How do you fix the date on which you called on the railroad?

F. A. Champlin, direct.

The Witness. I have a memorandum of the date.

Mr. Stevens. Did you put that memorandum on that envelope at the time you made the call?

The Witness. I did, on January 6, and I saw a man there—I don't know who he was.

Mr. Stevens. I object to that statement. He says he saw a man there, unless he shows that he was connected with the Company.

By Mr. Brown.

Q Where did you see this man? A In the office of H. C. Barlow.

Q Who is he, H. C. Barlow? A Freight claim agent of the Erie Railroad. And he asked me for a statement of my claim.

Q What did he say when he called on you? Did he say that he came to see you in relation to the claim? A Yes, sir.

Q Now then; what was your conversation at that time? A In reference to my money for the claim for this car of hay?

Q What did he tell you? A He said that the car of hay had been disposed of and that they were ready to hand me over $50 or something like that.

Q What did you say? A I said that I could not accept it; that I expected to have the full amount.

Q What was the value of hay on the date on which that car of hay was destroyed by fire, on November 1?

Mr. Stevens. That is objected to. The witness has testified as to the amount he paid

for it. I think that is the value of the hay.

By Mr. Brown.

Q What was the value of hay here at Passaic on the first day of November, 1915?

Mr. Stevens. That is objected to. I don't think the witness has shown himself as qualified to testify as to the value of hay in Passaic.

Mr. Brown. He has testified that he has been a hay dealer for twenty-five years in Newark. I submit, your Honor, that this witness has testified he has been in touch with and handling hay for twenty-five years.

By Mr. Brown.

Q Are you familiar with the prices of hay, Mr. Champlin? A Yes, sir.

Q Were you familiar with the prices of hay on November 1, 1915? A Yes, sir.

Q In Passaic, here at that time? A Yes, sir; and all through the state of New Jersey.

Mr. Stevens. We admit the qualification, your Honor.

By Mr. Brown.

Q What was the value of hay per ton in Passaic at that time? A The price of No. 2 hay on November 6 was $23.

Q $23 per ton? A That was the quotation in New York City.

The Court. What is No. 2 hay?

The Witness. Just one grade under No. 1.

F. A. Champlin, direct.

The Court. What kind of hay was this?

The Witness. This was No. 2 timothy hay.

By Mr. Brown.

Q I will offer in evidence this paper. This is a paper, it is a notice of prices, at which hay was selling, on the date in question, sent out from New York City.

Mr. Stevens. I object to the admission of that paper in this case. I think it has nothing to do with this case. At any rate, it is shown to be a detached sheet.

By Mr. Brown.

Q How many tons of hay did this car contain? You have a bill there? A 23,368 lbs.

Q Have you ever received any compensation for this car in any way? A No, sir.

Q And the Company has never delivered to you any other hay in place of this? A No, sir.

Q What damages do you claim today, Mr. Champlin, for the loss of your hay? A $198. You have my bill right there. You have the bill there with the Bill of Lading attached to it.

Q I want to get the same before the jury—the facts. What is the amount that you would have received here for that hay here in Passaic if it had not been burned up? A (Witness makes calculation.) I would have received $220.12; that is what I would have received.

Q What would you have had to pay for that hay in Passaic, Mr. Champlin, if you had bought it on the first day of November, 1915? A What would I have had to pay?

Q Yes? A I would have had to pay $23 a ton.

F. A. Champlin, cross.

Mr. Brown. That is all.

Cross examination by Mr. Stevens.

Q Mr. Champlin, how many pounds did the shipment call for, how many pounds were there on the Bill of Lading? A There was no weight on the Bill of Lading.

Q What was the number of pounds; do you know how many pounds there were of hay in that car—of your own knowledge? A 23,368 lbs.

Q How many tons do you figure—how many pounds do you figure to a ton of hay? A 2,000 lbs. to a ton.

Q You say you saw a car 5081 in the yard in Passaic here? A Yes, sir.

Q Are you sure it was the same car? A Yes, sir.

Q Do you know how many railroad systems there are in the United States? A I know—I have travelled on a great many of them; I have travelled quite a little.

Q Do you know the number of freight cars that those railroads might have? A I know that all of them have a great many cars.

Q Is it not possible that several railroads might have a car numbered 5081? A Yes.

Q Please do not refer to your notes. A All right.

Q You state you saw car 5081 in the Passaic yards here? A Yes, sir.

Q What car 5081? A Covered in this Bill of Lading?

Q How do you know? A Because I saw it.

Q How do you know it was the car covered in that Bill of Lading? A I saw it up there.

Q You have not answered my question? How do you know it was the car in the Bill of Lading?

The Court. How do you know that this car 5081 was the car in question?

F. A. Champlin, re-direct.

The Witness. Because I saw it.

The Court. What were the initials?

The Witness. L. & N. E. The same as in the Bill of Lading.

The Court. Did you know it at that time?

The Witness. Yes, sir.

The Court. Or do you know it just now by looking in the Bill of Lading; did you just now see the letters of that car, as they appear in the Bill of Lading?

The Witness. No.

The Court. This is not the first time you knew what the initials of the car were?

The Witness. No.

Mr. Stevens. Mr. Brown wants to ask the witness a few more questions, and I will withdraw the cross examination temporarily.

By Mr. Brown.

Q Do you know anything about, or did any of the agents of the railroad company there tell you anything about the condition of that yard?

Mr. Stevens. That is objected to, "condition of that yard" is a broad, general statement, and the answer would clearly call for a conclusion of the witness.

By Mr. Brown.

Q As to fires, or other depredations, committed by trespassers?

F. A. Champlin, re-direct.

Mr. Stevens. That question is objected to, as to "fires or other depredations." It is objected to on the ground that it is incompetent, irrelevant and immaterial.

The Court. Objection sustained.

By Mr. Brown.

Q Did you talk with Mr. Paulison, agent of the Erie R. R.? A Yes, sir.

Q In relation to fires which had occurred in that yard?

Mr. Stevens. That is objected to, in relation to any kind of fires which had occurred before this particular one. The question is objected to on account of incompetency, irrelevancy and immateriality.

Mr. Brown. Your Honor, I just want to show, in behalf of the plaintiff, that fires had frequently occurred here. If we are not able to show that the place in which this hay was stored or placed, was unsafe and dangerous, —our contention is that this company held these goods as warehousemen, and that it was their duty to provide a safe place for the goods.

The Court. I think you can introduce his testimony as to the place, as to knowledge that he had of the place, in which they had stored the hay.

Mr. Brown. The matter has been admitted, where it was stored. I wish to show that it was in an unsafe place.

The Court. It has simply been proved in a general way, that it was in the Dundee yards.

F. A. Champlin, re-direct.

By Mr. Brown.

Q Whereabouts in the Dundee yards was this hay stored? A On First street.

Q Where; in the middle of the street, or where? A About six blocks from the Passaic station; in a very bad place.

Mr. Stevens. That is objected to.

The Court. Please make no characterization.

By Mr. Brown.

Q Where was this car of hay stored that you saw? A It was in the yard.

Q In whose yard? The yard of what company, in what street? A In First street, in Dundee.

Q Alongside of that street; you don't mean in First street? A Well, along the street. As you walk along the street there were freight cars there—you could not see it until you were right on it.

Q Is that yard enclosed with any fence? A There is a fence in the back of it. It is very well enclosed; yes, it is almost hidden.

Q Is there any fence between that and the street? A No, sir.

Q And did you have a conversation—in what part of that yard was this car stored? A This car was back in the yard, along way back, way in back when I saw it on November 8.

Q You had a conversation with Mr. Paulison here, the agent? A Yes, sir.

Q In relation to any other depredations that had been committed there?

Mr. Stevens. That is objected to, "any other depredations."

The Court. Objection sustained.

By Mr. Brown.

Q Or any other fires which had occurred in that yard?

Mr. Stevens. Same objection. And it is objected to further, on the ground of incompetency and irrelevancy.

The Court. What is the question?

Mr. Brown. I asked him whether he had a conversation in relation to any other depredations.

The Court. Objection sustained.

By Mr. Brown.

Q Did you have any conversation with the agent of the Erie Railroad Company at the time that you saw him, relative to any other cars of hay which had been burned in this yard previously? A I did.

Mr. Stevens. Wait a minute—I want to object to that.

The Court. Objection sustained.

By Mr. Brown.

Q The agent of the Erie Railroad Company at the time of your conversation with him—what day was it that you were up there? A November 8.

Q On November 8, did he state to you that any other cars of hay had been burned in that yard?

F. A. Champlin, re-cross.

Mr. Stevens. That is objected to on the ground that it is immaterial.

The Court. Objection sustained.

Mr. Stevens. Further, it is objectionable and should not be brought before the jury. The fact that they had had fires previously in that yard and that cars had been destroyed by fires in that yard is not material in this case, and I certainly object to it.

The Court. There are statements that migh be made which would eliminate this. You should confine your questions to this car of hay, to this specific shipment, and to the knowledge of the witness.

By Mr. Brown.

Q Do you know, of your own knowledge, of any fires which occurred previously in that yard, when hay was burned?

Mr. Stevens. That is objected to. It has not been shown that this witness knew, of his own knowledge, of any previous fires.

The Court. Objection sustained.

By Mr. Brown.

Q Do you know of your own knowledge? A Yes, I do.

Cross examination continued by Mr. Stevens.

Q You have testified that you received a postal card signed by Mr. Paulison? A Yes, sir.

Q Notifying you of the arrival of the hay? A Yes, sir.

M. Levine, direct.

Q What is the post date of that post card? Please? A November 1, 5:00 P. M.

Q When did you receive it? A The following day.

Q From the time you bought this hay in Friendship, New York, until the time it arrived in Passaic, did you sell it to anybody else? A No.

Q Did you contract to sell it to anybody else? A No.

Q Why did you have it shipped to Passaic? A Because I expected to sell it there. I sell a good deal of hay there.

Q You had not sold it yet when it arrived? A No.

Q Did you at any time sell this hay? A No, I did not sell it. I expected to sell it.

Mr. Stevens. That is all.

MORRIS LEVINE, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Brown.

Q What is your name? A Morris Levine.

Q Mr. Levine, where do you reside? A Passaic.

Q Where is your place of business? A Passaic, New Jersey.

Q What is your business? A Feed business.

Q And in the feed business you handle hay and grain? A Hay and grain; yes, sir.

Q And how far from the Erie yard, from the Erie freight station in this city, is your place of business? A About two blocks away.

Q Did you ever have any hay or grain come into that yard? A Yes, sir.

Q How frequently? A Frequently; pretty nearly every day.

M. Levine, direct.

Q And you are familiar with the conditions surrounding, or obtaining in that yard? A Yes, sir.

Q Will you state to the court and jury what the conditions in that yard are, generally?

Mr. Stevens. That is objected to on the ground that conditions obtaining in that yard generally are incompetent, irrelevant, and immaterial, ond on the further ground that it is entirely too broad a question.

Mr. Brown. I can show the character of the place where it was stored.

The Court. Strike out the word "generally" and reframe your question again.

By Mr. Brown.

Q Do you know the condition in that yard, this yard in question, the Dundee freight yard? A Yes, sir.

The Court. On or about November 1 of last year?

The Witness. Yes, sir.

By Mr. Brown.

Q Were there any watchmen in that yard?

Mr. Stevens. That is objected to, your Honor.

The Court. Objection sustained; that is leading.

By Mr. Brown.

Q Was there in that yard or around that yard, any one to look after that car.

M. Levine, direct.

Mr. Stevens. That is objected to as leading.

The Court. Objection sustained. The question is leading.

By Mr. Brown.

Q What was the condition of that yard in relation to a watchman or any person to look after property there?

Mr. Stevens. Objection.

The Court. Objection sustained. Ask him if he knew about the general condition of the yard.

By Mr. Brown.

Q What are the conditions of the yard there; is the yard fenced in, or open on the street? A There is no fence and anybody can come in and around there.

Mr. Stevens. I object to the answer, "Any one could come in or around there" as calling for a conclusion.

The Court. That statement is a conclusion; just state the facts as to the protection.

The Witness. There is no fence in front that I know of.

By Mr. Brown.

Q What is the condition of the yard? You live in that neighborhood, don't you? You have your business there, haven't you? A Yes.

Q Were there any other cars on the track? A Yes.

M. Levine, direct.

The Court. How many tracks are there?

The Witness. Three tracks.

The Court. How long are they?

The Witness. They would contain about six or seven cars to the track.

The Court. What is done there?

The Witness. The people all use the cars there—unload the cars.

The Court. What do you mean—load and unload?

The Witness. They unload.

The Court. You have observed the yard there, have you not?

The Witness. Yes, I have observed the yard.

By Mr. Brown.

Q You have seen the yard? A Yes, sir.

Q Do you know what the yard was used for at that time? A The yard was used for unloading from the cars.

Q Unloading from the cars? A Yes, sir.

Q Did you ever have any one state to you anything about fires?

Mr. Stevens. That is objected to on the ground that it is incompetent, immaterial and irrelevant.

By Mr. Brown.

Q Do you know whether they ever had fires there?

M. Levine, direct.

Mr. Stevens. Objection.

The Court. Objection sustained.

By Mr. Brown.

Q In that yard, prior to November 6 of that year?

Mr. Stevens. That is objected to on the same ground.

The Court. Objection sustained.

Mr. Brown. I am asking him to show the conditions as to unloading. I can prove the condition of the place where the goods were put before they were removed. The gist of this action is to show that they were negligent and careless in placing the goods of Mr. Champlin in a position where fire and other depredations had occurred.

The Court. Why not show a situation that would raise such a conclusion in the jury's mind. If you can show a condition that will raise that impression on the jury's mind—it is a physical condition—you must give some testimony that shows that physical condition. The mere fact of a fire occurring there would not show the physical condition there.

By Mr. Brown.

Q Were there, or had there been several fires during the year 1915? Up to and prior to November 6, in that yard?

Mr. Stevens. That is objected to.

The Court. Objection sustained. The Court at this time wishes to call to the jury's attention the fact that a question to which

there has been no answer made, is not to be considered by the jury as in evidence, not to be taken by the jury as evidence.

By Mr. Brown.

Q During the time that you were in that yard, unloading, which you say was about every day prior to November 6 of 1915, did you ever see or know of a watchman being in the yard?

Mr. Stevens. That is objected to.

The Court. Objection sustained.

Mr. Brown. Exception.

By Mr. Brown.

Q Did you ever discuss the condition of that yard, with the agent, Mr. Paulison?

Mr. Stevens. Objected to on the ground that it is incompetent, irrelevant and immaterial; furthermore, it is suggestive and leading.

The Court. Objection sustained.

Mr. Brown. Exception.

By Mr. Brown.

Q Do you know what the reputation of that yard is in the community?

Mr. Stevens. Objection.

The Court. Objection sustained.

Mr. Brown. Exception. They did have

fires, thefts and other depredations in the community, in the yard, and we are entitled to show that.

By Mr. Brown.

Q Did you look at this car of hay when it came into the yard?

Mr. Stevens. That is objected to on the ground that the question is entirely too general.

By Mr. Brown.

Q Did you look at the car of hay when it came into the yard, Mr. Levine? A Yes, sir.

Q Did you look at car No. 5081, marked L. & N. E.?

Mr. Stevens. That question is objected to as leading.

The Court. It is only leading up to the main question.

Mr. Stevens. It is directing attention to this particular car—I withdraw the objection.

A Yes, I looked at that car.

Q Car 5081, L. & N. E.? A Yes, sir.

Q When did you look at that car? A A day or two days after it arrived.

Q How did you know when it arrived? A Mr. Champlin called me up and told me.

The Court. Can you fix the date definitely?

The Witness. I don't know exactly the date; I don't remember the date.

M. Levine, direct.

By Mr. Brown.

Q Do you know what kind of hay it was? A It was No. 2 hay.

Q No. 2—what kind of hay? A No. 2 timothy hay.

Q What did you offer to pay Mr. Champlin for that hay?

Mr. Stevens. Objection.

The Court. Objection sustained.

Mr. Brown. That is right.

By Mr. Brown.

Q How long have you been in the feed, hay and grain business? A Ten years.

Q Do you know the price of hay in Passaic, here? A Yes, sir.

Q Do you know what that hay was worth?

Mr. Stevens. One moment. I think we should have a right to cross examine. You say, "this hay." Did you examine it?

The Witness. Yes, sir.

By Mr. Stevens.

Q Where was it when you saw it? A In the yard.

Q How did you examine the hay? A I saw it in front, the car was open—an open car.

Q An open car? A Yes, sir.

Q How much of the hay did you see? A I saw in the front of the doors.

Q Just what you could see through the doors, then? A Yes, sir.

Q Then, your testimony as to the grade and

quality of the hay is confined to what you saw from the front doors? A Yes, sir.

Q You don't know what the quality of the hay was in the ends of the car? A No, I cannot tell that.

Mr. Stevens. I object to this witness' testimony as an expert on this hay in question, because he did not examine the whole car—all the hay. He only saw a very small part of it.

The Court. He was asked to tell what it was worth.

Mr. Brown. The witness is an expert on hay in this state, as I understand it. He says that he looked at the hay in this car; that he is acquainted with the value of hay. He testified it is number 2 hay. He is not supposed to take every bale apart, and pull out every straw. It is not done in that way and cannot be done. He can tell as a practical man whether it is No. 2 hay by pulling out a handful here and a handful there.

Mr. Stevens. He has not testified that it is No. 2 timothy hay.

The Court. What is the question?

Q (Read as follows.) You don't know what the quality of the hay was in the ends of the car?

The Court. I suppose there are several prices. I suppose there are a wholesale price and a retail price; is there not a wholesale price and a retail price for this hay? What was the market value or price at that time?

Mr. Brown. We are talking about the market price.

M. Levine, direct.

By Mr. Brown.

Q What was the market price at that time? A At that time it was $23, the market price.

The Court. The market price is one thing; the wholesale price is the price they are dealing with. You see that is another price, which he might have testified to. The thing we must be careful about it not to get in any of Mr. Champlin's probable profits from selling. The price he refers to is the retail.

By Mr. Brown.

Q Were you in the vicinity on the day that car burned, Mr. Levine?

Mr. Stevens. Wait a minute, I object to that. Never mind, I withdraw the objection.

By Mr. Brown.

Q Were you in the yard, or did you go in the yard on the day that car burned? A Yes, sir.

Q And did you see that car of hay burning? A I saw it after it had been burned.

Q After it had been burned? A Yes, sir.

Q Do you know how it caught fire or any of the details? A No, I don't.

Q Was there anything to obstruct any person that was walking along First street from walking right into that yard and setting fire to that car?

Mr. Stevens. That is objected to.

The Court. Objection sustained.

Mr. Brown. Exception.

M. Levine, direct.

By Mr. Brown.

Q Did you ever see any person around the yard there who represented himself as a watchman?

Mr. Stevens. Wait a minute. I object to that.

The Court. Objection sustained.

By Mr. Brown.

Q Did you ever see a number of people in and around the cars of hay in that yard there at various times, on or about the latter part of October of last year and up to the middle of November?

Mr. Stevens. That is objected to.

The Court. Objection sustained.

By Mr. Brown.

Q Did you ever see a number of people around in and among the bales of hay and around cars of hay, and through the hay in that yard, at various times on or about the latter part of October and the middle of November?

Mr. Stevens. Objection.

The Court. Objection sustained.

By Mr. Brown.

Q Do you know whether that yard is used as a sort of a playground?

Mr. Stevens. That is objected to.

M. Levine, cross.

The Court. Objection sustained.

Mr. Brown. That is all.

Cross examination by Mr. Stevens.

Q Mr. Levine, as I understand it, you simply looked at this hay from the outside of the car, is that it? A Yes, sir.

Q You pulled open the door and examined it as it was framed by the two sides of the door? A Yes, sir.

Q Did you go around to the other side to look at it also? A At both sides?

Q You opened both sides and looked simply at the bales of hay as they appeared to you? A Yes, sir.

Q Did you pull any of them apart? A I took them apart,—no,—

Q Did you pull any of them apart? A Take them apart? No.

Q Did you go inside the car? See what the condition was on the inside? A No.

Q So, all your testimony, so far as this hay is concerned, is based upon its appearance to you from the outside, as it stood there with the bales framed by the door of the car? A Yes.

Q When was it you made this examination? A When?

Q Yes,—when was it? Do you know the date? A It was a day or two days after the car arrived. I don't know exactly the date.

Q You don't remember the date? A No.

Q You didn't see the car when it came in, did you? A No, I did not.

Q You don't recall that it was sometime after the car had been standing there on the track? A No.

Q And you don't know, as a matter of fact,

when the car came in, do you? A. I don't know exactly when it came in; but I saw the hay before it burned up.

Q This price you have spoken about as to the value of hay in this vicinity—is that the price for which you sell it on the open market? A Yes, sir; the market price. It is what we are paying when we buy.

Q That you pay here delivered at Passaic? A Yes, sir.

Q Per ton? A Per ton.

Q Of course, you don't know about the price Mr. Champlin had to pay for that hay? A No, I don't know anything about that.

By Mr. Brown.

Q It is your custom, when examining hay to determine its quality, to use the method that you have just testified you used when you examined this car, is it? A Yes.

Mr. Herbert. If your Honor please, I move to strike out all the testimony of this witness, so far as value is concerned, for the reason that he has testified only as to what he pays for hay around here in Passaic. This does not determine the loss, or what the value of Mr. Champlin's hay was in this case. Second; so far as being an expert is concerned, he admits that he only made a cursory examination and not such an examination as would qualify him in any way to testify as to the quality of this hay on the interior of the car. He might be able to say as to the quality, so far as two or three bales at the door is concerned, but that certainly is not such an examination as to qualify him

to testify to the value of the hay on the interior of the car.

The Court. It is very difficult for the Court to separate competent testimony from that which is conjectural and incompetent. You can note your objection.

Witness excused.

REGINALD H. BOWKER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Brown.

Q What is your name? A Reginald H. Bowker.

Q Where do you live? A Passaic.

Q What is your business? A Chief of the Fire Department.

Q Were you called in 1915, at any time, to put out or extinguish fires which occurred to cars of hay in the Dundee yard—freight yard?

Mr. Herbert. That is objected to.

The Court. Objection sustained. If it is your purpose to show as applying to this particular car here, all right. If it is your purpose to show the fire that took place to this particular car, that is another thing—another matter.

Mr. Brown. I understand it is admitted that the car was burned.

The Court. You are going into various fires.

Mr. Brown. I am confining myself to facts connected with this yard.

Plaintiff's Exhibit 3.

Mr. Stevens. We will admit that this car of hay was actually damaged by fire. We only admit the damage.

The Court. You admit the car was stored in that yard and that it was burned there while on the track?

Mr. Stevens. Yes.

Mr. Brown. (Submitting letters to Mr. Stevens and Mr. Herbert.) I now offer in evidence three letters dated January 13, March 6 and June 2, 1916.

Mr. Stevens. We admit those letters.

Mr. Brown. These letters are from the Freight Claim Agent of the Erie Railroad, Mr. H. C. Barlow. I ask to have them marked as plaintiff's exhibits.

The letters referred to were received in evidence and marked as follows: Letter dated January 13, 1916, marked "Plaintiff's Exhibit No. 3;" letter dated March 6, 1916, marked "Plaintiff's Exhibit No. 4;" letter dated June 2, 1916, marked Plaintiff's Exhibit No. 5." The letters referred to are as follows:

Plaintiff's "Exhibit No. 3."

ERIE RAILROAD COMPANY

New York, Susquehanna and Western Railroad Co. The New Jersey and New York Railroad Co.

Chicago and Erie Railroad Co.

Hudson Terminal Building

50 Church street, New York

Telephone 8480 Cortlandt.

Plaintiff's Exhibit 3.

OFFICE OF FREIGHT CLAIM ADJUSTER

Mailed by No. 2.

In reply refer to Claim J 123056—NY.

Jan. 13, 1916.

Messrs. F. A. Champlin and Co.,
810 Broad street, Newark, N. J.

Dear Sirs:

I return herewith papers in connection with your claim No. 3746 for value of hay damaged by fire and water at Passaic, N. J., Nov. 6, 1915, amounting to $220.12.

The investigation develops that the property arrived at Passaic, N. J., in car L. N. E. 5081, Nov. 1/15, and that both you and A. Levine & Son were notified Nov. 1/15 by postal that the property had arrived. The hay was permitted to remain in the car until the date of its damage, which was Nov. 6/15.

In accordance with the conditions of the B/L carriers liability had ceased after the expiration of the 48 hours after notice of the arrival of the property had been duly sent. As the property was not removed within the allotted time the carriers became warehousemen only and same was held in the car at the sole risk of the owner and as the investigation shows that the fire was not caused through the negligence or default of the carrier we cannot acknowledge any liability.

However, as the property was abandoned by the owners, it was sold to the best possible advantage for the account of whom it may concern and $58.07 was realized. We are ready to draw voucher in your favor for the salvage, upon receipt of amended bill supported by the original Bill of Lading. Yours truly,

(Signed) H. C. BARLOW,
Freight Claim Adjuster."

Plaintiff's Exhibit 4.

Plaintiff's "Exhibit No. 4"

ERIE RAILROAD COMPANY,

New York, Susquehanna and Western Railroad Co. The New Jersey and New York Railroad Co.,
Chicago and Erie Railroad Co.
Hudson Terminal Building,
50 Church street, New York.
Telephone 8480 Cortlandt.

Office of Freight Claim Adjuster.

New York, March 6, 1916.

In reply refer to claim J 123056 N. Y.

Messrs. Brown and Beecher,
Counsellors at Law,
Prudential Building,
Newark, N. J.

Dear Sirs:

Referring to your communication of Jan. 24/16, in connection with a claim presented by Mr. F. A. Champlin and Co. covering the value of one car of hay damaged by fire and water at Passaic, N. J., Nov. 6, '15, amounting to $220.12.

Upon receipt of your favor, the matter was referred to the Underwriters and they have now taken the attitude that as the liability of carriers had ceased afer forty-eight hours after due notice of arrival had been duly sent or given to consignees, carriers were acting as warehousemen only, under the conditions of the B/L; furthermore, having exercised the ordinary care required in the protection of the property as warehousemen and the fire originating not through any negligence or default of carriers, so liability is attached to carrier under Section 5, paragraph one of the conditions of the B/L. We, therefore, had no alternative but to decline the claim.

Plaintiff's Exhibit 5.

However, as the owners of the property abandoned same, we disposed of the hay for $58.07, and are willing to draw voucher for this amount upon receipt of claimant's bill with the original B/L.

Yours truly,
(Signed) H. C. BARLOW,
F. C. A.

Plaintiff's "Exhibit No. 5."

ERIE RAILROAD COMPANY
New York, Susquehanna and Western Railroad Co. The New Jersey and New York Railroad Co. Chicago and Erie Railroad Co.
Hudson Terminal Building
50 Church Street Telephone 8480 Cortlandt
New York

Office of Frieght Claim Adjuster
New York, June 2, 1916

Messrs F A Champlin & Co
810 Broad Street
Newark N J

Gentlemen:

Referring to mine of Jany. 13th, 1916, your claim 3746, my J123056 covering value of hay damaged by fire at Passaic, N J, Nov. 6th, 1915 amounting to $220.12.

As this property was refused by you same was sold to the best possible advantage for the account of whom it may concern and $58.07 was realized over and above the freight and demurrage charges. We are ready to draw voucher in your favor for $58.07 upon receipt of amended bill supported by the original bill of lading and the original invoice or a certified copy thereof.

yours truly,
(SIGNED) H C Barlow,
F C A

Motion for Non-suit.

Mr. Stevens. I now move a non-suit on the ground; first, that there has been absolutely no negligence shown on the part of the company; secondly, that there has been no evidence to show that the company did not use the degree of care required by law as warehousemen; third, on the ground that the plaintiff has failed to prove any of the facts alleged in his state of demand, as giving rise to the fire; fourth, on the ground that there is absolutely no evidence from which the charge may be reasonably inferred that any negligence of the defendant caused the loss complained of. It is alleged in the state of demand that the duty on the part of the company was that of warehousemen; and the law only requires warehousemen to exercise ordinary care; and there has been no proof of any lack of ordinary care in this case.

Mr. Brown. I do not know whether the Court wants me to reply or not.

The Court. Not just at present. The Court feels that some of these allegations have not been sustained; they are unnecessary allegations. The Court feels that there has been some effort to put the proof of the care you exercised. Motion denied.

Mr. Stevens. May I have an exception, your Honor?

The Court. Yes.

JOHN F. MAULT called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Stevens.

J. F. Mault, direct.

Q What is your name? A John F. Mault.

Q Where do you live? A 33 Michigan Avenue, Paterson.

Q Mr. Mault, are you employed by the Erie Railroad? A No, sir.

Q You were in the employ of the Erie Railroad? A Yes, sir.

Q In what capacity? A Police Department.

Q Where? A Bergen County Railroad, main line of the Susquehanna.

Q Did this yard at Dundee come under your supervision? A Yes, sir.

Q Were you in that yard every day? A Yes, sir.

Q For what purpose? A Protecting the property.

Q Between, say, October 26th and November, 1915, were you in that yard every day? A Yes, sir.

Q What did you do when you were in that yard? A I would go there, I would go through that yard, look it over, to see whether everything was in good condition.

Q Was there any warehouse maintained by the company in that yard? A Yes.

Q There is a hay warehouse? A There is a warehouse for merchandise only.

Q How big is it? A Just large enough for merchandise.

By the Court.

Q What do you mean by merchandise? A It is not large enough to store hay or anything like that.

Q What do you mean? A The storing of cheese and goods of that kind,—just the storing of merchandise.

Q Was there any freight house there? A Yes, sir.

J. F. Mault, cross.

Q What do you mean by "freight house"? A Where they came and took the stuff away, and placed the stuff when unloaded.

Q Freight house;—is that the place you have just been talking about? A Yes, sir.

Mr. Stevens. That is all.

Cross examination by Mr. Brown.

Q When were you employed by the Erie Railroad? A For the last year and a half.

Q When did you enter their employ? A September.

Q What year? A 1914.

Q When did you leave their employ? A The latter part of 1915.

Q Where were you the latter part of October and the first of November, 1915? A I was with the railroad.

Q Whereabounts on the railroad? How far did your operations extend,—all over? A From here to Paterson and from here to Newark, to Rutherford and points in Bergen County.

Q Where were you on the 6th day of November, 1915? A In that same yard.

Q What time of the day were you in the yard there? A Between 11:00 and 11:30

Q Were you in the yard when the fire occurred? A No, sir.

Q What time did the fire occur? A I don't know.

Q Were you in the habit of taking care of the different yards along the Erie Railroad? A Yes, sir.

Q What were your specific duties along the Erie Railroad there,—what was your duty? A Why, to go to work and protect property there.

Q How many yards did you have to look after in that manner? A Two yards.

Q What yards were they? A Rutherford and Susquehanna.

Q Rutherford and Susquehanna yards—those were the only ones you looked after? A Yes, sir.

Q Were you supposed to look after any others? A Yes.

Q What did you do with the other yards, in the other places? A Go there sometime during the day.

Q Were you employed by the Erie Railroad Company? A Yes, sir.

Q Employed by the day or the month? A By the month.

Q Let me see if I understand you right. You would watch this yard here, and then you would go and watch the yard at Rutherford; how far apart are they? A Why, about a mile and a half, I guess.

Q So that, during the day when you were not in this yard down here at Dunede, you would be at Rutherford or some other yard, is that right? A Yes, sir.

Q Were you in the Rutherford yard every day? A Every day.

Q Where were you,—when did you take care of the other places you state you were taking care of? A That was on my way home for dinner. On my way home for dinner, I used to look over the yard at Passaic.

Q You used to go over the yard at Dundee as you were going home? A That is the yard at Passaic.

The Court. There is a yard in Dundee and there is a yard in Passaic; that is the one he is now discussing.

By Mr. Brown.

Q Those were the three yards you had to

look after? A No, sir; two yards. Rutherford, New York, Susquehanna & Western.

Q What is the New York, Susquehanna & Western,—the Dundee yard? A The Dundee, yes, sir.

Q Were you night watchman or day watchman? A Both, sometimes on my own time.

Q I am asking you whether you watched this yard night or day? A Whenever I thought it was necessary.

Q Whenever you thought it was necessary. You didn't watch it regularly, did you? A Yes. I always thought it necessary to watch it regularly.

Q You watched the Rutherford yard, did you not? A Yes.

Q How often did you visit the Rutherford yard? A Every day.

Q And the Passaic yard? A Dundee yard daily.

Q Dundee daily, and Rutherford daily, and they were a mile and a half apart? A Yes.

Q And you never visited them at night at all, did you? A Yes.

Q You said daily. How many hours a day did you work? A I worked thirty-six hours a day.

Q You worked thirty-six hours a day? A Yes, a day; and day and night.

Q As a matter of fact, if you happened to come along by the Dundee yard, you would go in there and look around, would you not? A Yes.

Q And if you went to Rutherford, you would go in there and look around in the same way? A Yes.

Q And it didn't make any difference whether it was twelve o'clock at night or twelve o'clock in the day time? A No, sir.

J. F. Mault, cross.

Q You were not regularly employed to care for that yard, were you? A Yes, sir.

Q But you took care of it regularly and all the time? A Yes, sir.

Q And it made no difference whether it took you all night or not? A No, sir.

Q And all day? A All day; no, sir.

Mr. Brown. That is all.

By Mr. Herbert.

Q It was your regular duty, was it not, to look after these yards? A Yes, sir.

By Mr. Brown.

Q This yard is not in a position so that it can be seen from the freight office of the Erie Railroad at all, is it? A No, sir.

Q It is out of sight of the freight office, is it not? A Yes, sir.

Q As a matter of fact, were you not employed around the freight office and never came around the freight yard? A No, sir.

Q And never went there at all? A Oh, yes, I did.

Q How much time did you spend there? A Some times more, some times ten minutes.

Q And you went on over to Rutherford? A Yes, sir.

Q Walk or get on the cars and go over? A Walk.

Q Always walked? A Yes, sir.

Q They had a warehouse there? A Freight house.

Q And whenever things would be left there, they stored them and put them in the freight house? A Not everything, merchandise and such things.

Q They would not? A Not everything.

The Court. Suppose I interrupt you a second. What do you mean by merchandise?

The Witness. Why, groceries.

The Court. Let me see if I understand. Suppose a carload would come. It would have to be unloaded in the freight house?

The Witness. No, sir; the freight house, you see, is for different things like a few barrels of vinegar or a couple of sacks of potatoes.

The Court. Do you mean the freight house is used for unloading any less than car load lots?

The Witness. Yes, sir.

By Mr. Brown.

Q Did you ever see a carload unloaded there? A No, sir.

Q Don't you know as a matter of fact, car lots were unloaded there? A No, sir.

Q How do you know it was used for less than car load lots? A How do I know; because I never saw a carload unloaded.

Q As a matter of fact, could they not have unloaded cars while you were at Rutherford and Passaic, or while you were absent? A It has never been done.

Q They unloaded these cars daily, didn't they? A Not in the freight house.

Q You were there every day. You testified in your direct examination that you were there both days and nights. A Every day, daily, never missed a day.

Q And you never saw them unload a whole load? A No, sir.

J. F. Mault, cross.

Q Did you ever stand around there long enough to see them unload anything? A Yes, sir.

Q In the Dundee yard? A Yes, sir.

Q Did you ever catch any one setting fire to hay while you were there as watchman?

Mr. Stevens. That is objected to.

The Court. It is cross examination. He is examining this man as to the accuracy of his statements.

Mr. Stevens. He is making this witness his own witness.

The Court. Objection overruled.

Mr. Stevens. Exception.

By Mr. Brown.

Q Did you ever know of a fire in that yard while you were a watchman there? A No, sir.

Mr. Stevens. That is objected to.

The Court. Overruled.

By Mr. Brown.

Q You were not watchman when Mr. Champlin's car of hay was burned? A Yes, sir.

Q You know of it? A When his hay was burned I heard of it.

Q And you never were in the yard when a car of hay was burned up? A Never when a car of hay was burned up.

Q When it was damaged by fire? A Yes, sir.

Q You were in the yard? A After that.

J. F. Mault, cross.

Q After that time; what hay? A Just a car of hay, that is all I know.

Q Do you know what car it was? A No, sir.

Q Do you know where it stood?

The Court. This is proceeding a little further than a limited cross examination.

Mr. Brown. This man was a watchman in that yard. They brought out the fact that he was a watchman in that yard and I have a right to go through to test the witness as to how far he watched the yard.

The Court. I think you have proceeded far enough.

By Mr. Brown.

Q Did you ever know of any thefts in that yard?

Mr. Stevens. That is objected to.

Mr. Brown. If your Honor pleases, this man is a watchman here, and I submit he has a knowledge of these things.

The Court. Objection overruled.

A Yes, sir.

Q Did you ever see any other cars in the yard after they had been burned— A (interrupting) No, sir.

Q Wait until I ask you the question. Did you ever see in that yard any cars of hay after they had been burned or damaged by fire, other than the one you testified about, which belonged to Mr. Champlin?

J. F. Mault, re-direct.

Mr. Stevens. That is objected to.

The Court. Objection sustained.

Q Were you ever directed to look for any one who had set fire?

Mr. Stevens. I submit, you Honor, this is beyond the scope of this examination.

Q Do you know of any fires which occurred after Mr. Champlin's in that yard?

Mr. Stevens. That is objected to on the ground that it is immaterial.

The Court. Objection sustained.

By Mr. Brown.

Q There was a freight house down by the office, isn't there? A Yes, sir.

Q There was a warehouse up where the hay was, was there not? A No, sir.

Q What was that? A Not belonging to the Railroad.

Q To whom did it belong? A Some feed man, I believe.

Q There was no warehouse in the yard? A Not belonging to the railroad.

Q Their warehouse was down where they could watch it every day? A Freight house.

Q Freight house, was it? A Yes, sir.

Q But there was no means whatever of watching this Dundee yard from the office, was there? A No, sir.

Q Unless a man went up there? A No, sir.

Mr. Brown. That is all.

Re-direct examination by Mr. Herbert.

Q What do you mean when you state you

watched or went through this yard daily? A We always made a trip through there.

Q Every day? A Yes, sir.

Q As I understand it for the purpose of policing and protecting this yard? A Yes, sir.

Q Now, you stated about working 36 hours a day. Will you kindly explain that? A My regular hours were 12 hours a day, and whenever I went outside of 12 hours I went it on my own hook, that was to try and get people I could not get on my regular hours.

Q Then there were times when you worked performing your duties continuously for 36 hours? A No, sir; only worked 12 hours doing my regular work. Outside of that I did whatever I did on my own free will.

Q Did you go out along the line of your duty for 36 hours consecutively? A Not 36 hours steady. I rested between.

Q But you did work 12 hours each day? A Yes, sir.

Q Were you over that yard in some instances at night? A At night?

Q At night, yes. A Not every night, no.

Q Were you over it on occasions at night? A Yes, sir.

WILLIAM MAULT, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Herbert.

Q What is your name? A William Mault.

Q Where do you live? A 311 Getty Avenue, Paterson.

Q Mr. Mault, are you an employe of the Erie Railroad? A No, sir; not at the present time.

Q Were you ever an employe of the Erie Railroad? A I was for a year and a half.

Wm. Mault, cross.

Q In what capacity? A I was Acting Sergeant of the Susquehanna.

Q Acting Sergeant of Police? A With the Police Department of the Susquehanna.

Q When did you leave the Erie? A I guess I left the Erie about five months, or four months ago.

Q Did you ever police this Dundee yard? A Used to make a trip through once a day.

Q Did you police this yard between October 26th and November 6th, 1915? A I did.

Q Every day? A Yes, I used to make a regular practice of going into this yard once a day, sometimes in the morning and sometimes in the afternoon.

Q What are you working at now? A I am a machinist over in the Jersey Pipe Works.

Mr. Herbert. That is all.

Cross examination by Mr. Brown.

Q Are you employed by the Erie Railroad? A No, not at the present time.

Q Were you employed between October 15th and November 15th, by the Erie Railroad, 1915? A I was; yes, sir.

Q You say at that time you were Sergeant of Police? A I was Acting Sergeant of Police.

Q Where was your office? A In Jersey City.

Q Jersey City; you spent your days there, did you? A No, sir.

Q Your nights? A No, sir.

Q You say you went through this yard every day; how often? A I always took my time, paying attention, looking around to see what was going on.

Q As a matter of fact, you looked straight ahead, is that right? A I looked all around.

Q It was necessary for you to go through

that yard in order to get to your place of business, was it not? A No, sir.

Q How far out of your way did you have to go to through that yard? A I had to come to Passaic and I went through this Yellowdale yard.

Q Yellowdale! What do you mean? I thought it was Dundee? A Sometimes they called it Yellowdale and sometimes Dundee.

Q You would go through the Dundee yard at what time? A Sometimes about half past ten; sometimes two o'clock.

Q Your home office is in Jersey City? A Yes, sir.

Q And, as a matter of fact, once in a while, you simply walked through that office? Isn't that true? A No, sir; all the time.

Q Every day? A Every day, as a general rule, I went through that yard.

Q How long a time did you take to go through that yard? A Sometimes two hours—sometimes an hour; sometimes three hours.

Q You mean you took that time every day? A I would take my time. I would take my time to go through that yard. If I saw a car open, I would check it up. If I saw a car busted, I would take my time to see what was the matter.

Q Did you ever catch anyone in that yard stealing anything or burning anything? A No, I did not.

Q Do you know of any thefts which occurred in that yard? A No, I do not.

Q Do you know of any fires which ever occurred in that yard while you were Sergeant of Police? A No, not for the time I was there.

Q Never in that yard? A Not for the time I was Acting Sergeant.

Q Don't you know, as a matter of fact, that this car of Mr. Champlin's stood on the track

there for at least three weeks? A I went through that yard every day. I never saw it.

Q You went through the yard every day; you saw this car there about that time, didn't you? A When I went through the yard, if I saw anything the matter, I followed it up and I notified the office about the car. I made a record and notified the office.

Q What time did you take in going through that yard, what time did you go through that yard? A I should judge about half past ten.

Q At night or in the morning? A In the morning.

Q How long did you stay in that yard when you went through? A I did not stop very long. If there was nothing the matter, I turned and came back and took the train to Jersey City.

Q As a matter of fact, don't you know; wouldn't you go alongside of the yard instead of through it? A I would always turn around and would go up through the yard. I would always go into the yard.

Q As a matter of fact, you would go to the yard and would walk right along, straight along, along the street? A No, sir.

Q There was a fence—there was nothing between the yard and the street, was there? A There was a fence and I would not be attending to my duty if I did not go through the yard.

Q There was no fence or anything intervening to protect these goods from anyone who saw fit to go in there? A It was wide open.

Q Wide open? In fact it was a sort of privy for the public?

Mr. Stevens. That is objected to.

Q As a matter of fact, wasn't it a sort of a public water-closet for the people in that vicinity?

Mr. Stevens. That is objected to as leading.

Q When did you make your report about the burning of this car? A The same afternoon when I came to the office.

Q What afternoon was that? A I don't recollect the date that I put the report in at the office.

Q Don't you know the day it was that that car burned? What day was it,—Saturday, Sunday, Monday, Tuesday or Wednesday? A I think Monday.

Q Don't you know whether you made a report the same day or the next day? A What is that?

Q Don't you know whether you made a report the same day or the next day? A The next day.

Q Did you make that report on Sunday? A No sir; I don't think so.

Q Don't you know that this car burned on Saturday? A I'm trying to tell you that I don't recollect the date I made this report. As a general rule when I discovered anything I made a little note and turned around and wrote it up the same day and turned it into the office about five or six or half past six or seven o'clock.

Q You say that while you were Acting Sergenat of Police you never knew of any thefts in that yard?

Mr. Herbert. That is objected to.

The Court. For what purpose?

Mr. Brown. To show that it was a place; the railroad company knew it was a place in which it was dangerous to put that car.

The Court. That is cross examination.

Mr. Brown. He is the man in charge there for the purpose of preventing these things.

The Court. What is the question?

Mr. Brown. The question was as to whether, during 1915, while he was protecting that yard he knew of any thefts occurring there?

The Court. In that yard?

The Witness. No, I did not.

By Mr. Brown.

Q You did not? A No.

Q Do you know whether any fires occurred or any other cars of hay were burned in that yard? A Not at the time I was Acting Sergeant.

Q You don't know—is that right? A Only just that one car.

Mr. Brown. That is all.

Witness excused.

JOHN NIVERTH called.

The Court. We will take this witness up after adjournment at 1:15.

Whereupon, at 12:00 o'clock, Court adjourned until 1:15 P. M., June 7th, 1916.

Session resumed at 1:15 P. M., June 7th, 1916.

JOHN NIVERTH called as witness on behalf of the Defendant, having first been duly sworn, testified as follows:

Direct examination by Mr. Herbert.

Q What is your name? A John Niverth.

Q Where do you live? A East Madison Avenue, Clifton, New Jersey.

Q What number? A 23 East Madison Avenue, Clifton.

Q By whom are you employed? A N. Y. S. & W.

Q Were you employed by them in the month of November, 1915? A Yes, sir.

Q At what place? A Freight house.

Q Where? A N. Y. S. & W.

Q What freight house? A New York & Susquehanna.

Q What station? A First Street.

Q Dundee yard? A Yes.

Q The place at which it is alleged this fire took place? A Yes, sir.

Q In what capacity were you employed? A What's that?

Q In what capacity were you employed? A Checker.

Q As checker, what are your duties? A What's that?

Q As checker, what are your duties? A Checking, checking up the seals of the cars, sealing up cars in the Yellowdale yard.

Q By "Yellowdale," what do you mean? This yard, the Dundee yard? A This yard; yes, sir.

Q Also called Dundee yard? A Yes, sir.

Q There were two names for the same yard? A Yes, sir.

Q And did you have occasion to go down through that yard? A Yes, sir.

Q How often did you have occasion to go down through that yard? A Three times a day and over.

J. Niverth, direct.

Q Did you, upon those occasions always pass in the vicinity of or near the car which was afterwards alleged to have been burned? A I was always on the job there when on duty; yes, sir.

Q That was in your yard? A Yes, sir.

Q When you made these trips through the yard, what times during the day did you go down? A Half past eight or nine o'clock, ten o'clock in the morning, up to eleven to twelve o'clock; and after twelve the car came in on the second run.

Q When you went down on these occasions, what did you do; sealed up cars? A Sealed up cars; yes, sir.

Q Kindly tell the court and jury just what you mean by "sealing cars"? A Going through the yard; looking after the cars, and seeing that the cars were sealed, and if they were open I looked after them. If they were loaded I sealed them, and if they were empty, I left them open.

Q What do you mean by "sealing a car?" A Sealing cars, loaded cars in case they are open.

Q And when you sealed the car, you closed the door, did you? A Yes, sir.

Q Did you fasten the door with a hasp? A If they were loaded; let me tell you what I did,—

Q What do you mean when you say, "sealed the car,"—what is the operation?

The Court. What is a seal?

The Witness. A seal is a piece of lead with a wire.

By Mr. Herbert.

Q Explain to the court just what a seal is? A Just simply a piece of wire with a piece of lead attached to it. Our seal numbers are 285, and when we seal them, we put on "285."

J. Niverth, direct.

Q That is what you call a seal? A Yes, sir.

The Court. A seal is a piece of wire with lead attached to it and a stamp on it?

The Witness. Yes, sir.

By Mr. Herbert.

Q If a car door is open,—if a car door is closed, does that seal have to be broken in order to open the car? After the door is closed, before that door can be opened, does that seal have to be broken? A Yes, sir.

Q As you went through the yard each day, you saw that each of the various cars were sealed? A Yes, sir.

Q Did you make any other inspection besides simply sealing the cars? A All I did was just simply take my seals and sealed the cars when I went through that yard.

Q Did you look after the yard generally? A Yes, sir; on my hours.

Q And that you did three times a day? A Yes, sir.

Q Every day? A Yes, sir.

Q You said something about sometimes going through more than three times? A That was when I went with the salesman. They came up into our office to have the cars opened. We have locks on every one of these cars, and when I got a slip for our check; when I saw that everything was all right, he was welcome to the car.

Q You then delivered the car to him? A It was simply sealed right there in front of him. If there was no seal to it, we used a lock.

Mr. Herbert. That is all.

Cross examination by Mr. Brown.

Q How long have you been employed by that road? A Close to two years.

J. Niverth, cross.

Q You are simply employed by the road? A Yes, sir.

Q To look after that yard? A Yes, sir.

Q Your duty, you say, is sealing cars? A Yes, sir. I was at that time.

Q Was it sealing cars? A Yes, sir.

Q What time did they take the seals to the cars up in the yard? A My hours were from half past four to five o'clock in the Yellowdale yard; half past four to twenty minutes of five in the Yellowdale yard.

Q That is in the Dundee yard? A Yes, sir.

Q Then your working time was from four to five, anywhere around there, sealing cars? A My last run was around five.

Q Your last run? A Yes, sir.

Q And if there were any cars to be sealed, you would go down to the yard, or you would not go down to the yard? A Would go through just the same.

Q Looked out for every car? A Yes, sir.

Q You did that how many times a day? A Three times a day and over.

Q It was a great distance from where you were, to the yard, was it not? A Two blocks.

Q You could not see the yard from your position? A No, sir.

Q And you simply walked through that yard three times a day, to find out whether there were any cars wanted to be sealed, is that right? A Yes, sir.

Q And if anyone came there and wanted to go into the yard, they would send for you to come and go with them, is that right? A Send to the office.

Q How was the office notified? A They would notify me.

J. Niverth, cross.

Q You never had a watchman come down to tell you there was anybody wanting to look at a car? A My boss was Mr. Paulison. I did not go on anything said by anybody else.

Q And when you went into that yard to seal these cars, did you ever see a watchman around there? A Many times.

Q And many times you did not see him? Is that true? A Once, possibly; I don't know.

Q Do you know these two gentlemen were there? A I saw them many times.

Q You saw them every time you were looking after cars? A Many times—I don't say every time; no, sir.

Q You went all through that yard, you say, each time? A That is what I did, day by day.

Q Where were you at the time of the fire? A At the freight house.

Q In this yard? A Yes, sir.

Q How do you know there was a fire? A I was informed, and went down to see the fire.

Q Did you see the watchman of the yards around there? A Not at the time of the excitement, because I did not have time. I was checking cars up at the time.

Q All you know about the yard is that about three times a day you went there and sealed up cars. How long did it take you to seal up these cars? A It might take an hour.

Q If you had one car, how long would it take you? A One car would not take very long.

Q You always spent an hour in the yard? A I did, I certainly did, and over, sometimes—to seal the cars.

Q To seal the cars? A Yes, sir.

Q Did you know of any fires occurring in that yard prior to this fire?

J. Niverth, cross.

Mr. Herbert. That is objected to.

A I know there had been fires down there—that is all I know.

Q You went around the yard; went through the yard three times a day? Were not other cars burned in that yard?

Mr. Herbert. That is objected to.

The Witness. Yes, sir.

The Court. What is the question?

Mr. Brown. I have asked him; I want to ascertain what his knowledge is to fortify his statements. I have asked him whether he ever knew of any other cars being burned in that yard.

The Court. Objection sustained.

Mr. Herbert. The objection is as to what took place at other times other than the accident to this car.

The Court. It was already answered.

Mr. Herbert. Does your Honor overrule the objection?

The Court. It is already answered.

Mr. Herbert. I move to strike out, as immaterial and not within the issue.

The Court. Request to strike out denied.

By Mr. Brown.

Q You were the sealer of cars, were you not, in that yard? A Yes, sir.

Q And you know of instances where the seal

on cars has been broken in that yard? A No, sir.

Mr. Herbert. Wait a minute, I object to that.

The Court. Objection sustained.

Mr. Herbert. I withdraw the objection.

By Mr. Brown.

Q You knew of robberies and other thefts taking place in that yard, did you not? A No, sir.

Q Did you never hear of such a thing? A No, sir.

Mr. Brown. That is all.

Mr. Herbert. That is all, Mr. Niverth.

Witness excused.

Witness recalled.

Mr. Brown. Just one question—isn't it a fact that a man can go there and open a car, and simply take out his goods, without your going there?

Mr. Herbert. Objection.

The Court. Objection sustained.

Witness excused.

J. C. PAULISON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

J. C. Paulison, direct.

Direct examination by Mr. Herbert.

Q What is your name? A J. C. Paulison.

Q Where do you live? A North Paterson.

Q By whom are you employed? A New York, Susquehanna & Western.

Q In what capacity? A Freight agent.

Q In what yard? A Dundee yard.

Q That is the yard in which this car of hay is alleged to have been burned? A Yes, sir.

Q Have you any warehouse at that yard? A A yard house there, used for local shipments.

Q What do you load and unload in that freight house? A Merchandise of all kinds—

Q Do you not load and unload carload shipments? A No.

Q What do you do with carload lot shipments? A We hold them for disposition.

Q What is done with shipments that come into the yard—carload shipments? A If the car is refused, we take it up with the shippers and the consignees.

Q If a car is not refused, do you unload it? A We leave it in the car and get disposition.

Q You leave it in the car in the position to be unloaded? A Yes, sir.

The Court. To be unloaded by whom?

The Witness. By the Claim Department.

The Court. If you receive a car, you do not take it up with the Claim Department unless it is refused?

The Witness. No, sir.

By Mr. Herbert.

Q If a car is refused, what do you do with

the car? A We hold the car six or eight days.

Q What for? A Disposition.

Q Disposition of the car? A Yes, sir.

Q When the car in question is put on the side track to be unloaded? A Yes sir.

By the Court.

Q If a car is not refused then you put it on the side track to be unloaded by the consignee? A Yes, sir.

By Mr. Herbert.

Q I show you a postal card. Was that sent out by you? A Yes, sir.

Q When? A On November first.

Q What is the practice of your office—to send out notice when goods are received? A To send out notice as soon as the car has arrived.

Q As I understand it, you don't unload any car lots in the freight house? A We don't unload any car lots at all.

Q Is that the general practice in that yard? A Yes, sir.

Q And has been ever since you have been there? A Yes, sir.

Q How long has that been? A About ten, twelve to thirteen years.

Mr. Herbert. That is all.

Cross examination by Mr. Brown.

Q You are not general agent in charge of that yard, are you, Mr. Paulison? A Yes, sir.

Q Isn't it a fact that Mr. Levine, Mr. Champlin and others go into that yard and sample the cars without any attention from anybody else connected with the company there? A There may be times when a car would be opened. I

don't think they go there and break a seal without my permission.

Q Don't you know that seals have been broken and cars sampled? A I could not say that. Cars may have been open and they may have looked at goods.

Q And then when people do go there and look at the cars they notify your office; isn't that a fact? A They might; I could not say that.

Q How long have you been in the employ of the railroad company? A About 25 years.

Q You are the agent of the defendant in this city, are you not? A Yes, sir.

Q Isn't it a fact that a number of fires have occurred and cars of hay have been burned in that yard, during the past two years?

Mr. Herbert. If your Honor please, I object to that on the ground that it is not proper cross examination. You have not shown to this witness one particle of police protection, and that is the only theory upon which this question could be asked.

The Court. Upon what theory do you ask the question?

Mr. Brown. I am assuming — he is the agent and I am asking him these things to ascertain his knowledge and find out how far they are negligent in that yard.

The Court. Objection sustained.

Mr. Brown. Exception.

By Mr. Brown.

Q Don't you know that merchandise has been stolen from that yard?

J. C. Paulison, cross.

Mr. Herbert. That is objected to, if your Honor please. It is objected to on the ground that it is not proper cross examination. It is objected to upon the further ground that it is incompetent, irrelevant and immaterial and not within the issues of this suit.

The Court. Objection sustained.

By Mr. Brown.

Q Is it not wholly unprotected?

Mr. Herbert. That is objected to.

The Court. Objection overruled.

Mr. Herbert. Exception.

The Court. Exception allowed.

A It is not wholly unprotected—I could not say that. Of course, I patrol the yard once every morning; sometimes in the afternoon. I have a man who goes through this yard at least three times a day.

Q There is no regular watchman kept in this yard during the day and night, is there?

Mr. Herbert. That is objected to, if your Honor please. It is absolutely immaterial.

The Court. Did anybody state there was such a watchman. That is not cross examination.

Mr. Brown. He is general agent of this company. I am in a position where I have got to show that this was an open place where this car was and there was not sufficient protection.

J. C. Paulison, cross.

The Court. The Court will deny your request. Objection sustained.

Mr. Brown. My position is that they took this car of hay and it was not afforded proper protection.

The Court. This question is not allowed, because it is not cross examination. Not under any consideration.

By Mr. Brown.

Q You have testified that you are general agent of the defendant in this case? A Yes, sir.

Q And you are, are you? A Yes, sir.

Q That yard was under your charge and in your care? A Yes, sir.

Q Did you have in that yard at any time an agent or watchman to take care of goods and chattels and cars that came into this yard, whose duty it was to stay there and look after these goods and chattels and cars?

Mr. Herbert. That is objected to upon the ground that it is incompetent, irrelevant and immaterial. There is no duty upon the defendant and there is no duty claimed upon the defendant, that it was necessary to keep in that yard such watchman.

The Court. It may be allowed if in the pleadings.

Mr. Herbert. The pleading is that the defendant failed to perform the particular duty imposed upon him as warehouseman. There is no duty to keep a watchman around the yard. Does the Court overrule the question?

The Court. Objection sustained.

J. C. Paulison, cross.

Mr. Brown. I ask an exception.

By Mr. Brown.

Q Did you ever tell Mr. Champlin, the plaintiff in this action, when he came to see you about this car of hay which was burned, that fires frequently had occurred in that yard, and that you did not purpose selling that car, but you purposed taking it away, because the people were burning up cars in order to buy at cheaper prices?

Mr. Herbert. That is objected to on the ground that it is not proper cross eamination; secondly, on the ground that it is incompetent, immaterial and irrelevant; and, thirdly, that any alleged conversation between this witness and Mr. Champlin cannot be binding upon this company.

The Court. What is the question?

Q (Read by stenographer.)

Mr. Herbert. I call your Honor's attention that it absolutely does not come under cross examination.

Mr. Brown. This witness is the agent of the defendant.

Mr. Herbert. If he is, it is not cross examination.

The Court. Objection overruled.

Mr. Herbert. Exception.

The Witness. I do remember telling Mr. Champlin that if the company put it up to

me to sell the hay, that I would not sell it in Passaic unless I had the right from the New York office to do so. I would like to hear the question again.

Q (Read by stenographer.)

The Witness (Continuing). I do not recall this particular car. I remember talking with Mr. Champlin at different times. We had several conversations, but this particular car I do not remember.

Mr. Brown. That is all.

Re-direct examination by Mr. Herbert.

Q Did you ever talk with him—had you ever talked with him before this fire took place, about this? A I don't know about this particular car. He had been in my office different times.

Q At any time prior—you say you had various conversations with him—had you had any of these conversations prior to this fire? A I remember talking with Mr. Champlin about that; but I don't know or I don't remember what car our conversations referred to.

Mr. Herbert. That is all.

Mr. Brown. That is all.

WITNESS EXCUSED.

AUGUSTUS E. PASMAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Stevens.

Q What is your name? A Augustus E. Pasman.

A. E. Pasman, direct.

Q Where do you live? A 22 Franklin avenue, Passaic.

Q Mr. Pasman, you heard Mr. Champlin state on the stand this morning, that you called to see him on November 22, 1915? A Yes, sir.

Q What did you call to see Mr. Champlin for? A In regard to this particular car; to make disposition of it.

Q Will you explain to the Court and the jury just what took place at that visit? A I called to see Mr. Champlin, with a view to securing some disposition of the hay, for the reason that he was the consignee of the hay, and it having been damaged by fire, we felt that it was the duty of the consignee to take delivery of this property and dispose of it to the best advantage.

Q Go ahead. Tell the rest of what happened. A (Continuing). Mr. Champlin stated that the plaintiff had no interest in it. That it was up to the railroad company. He said it was up to the railroad company to do what they thought best with the property. I explained to him then that if he refused to dispose of the car, the railroad company became the custodian, and, it being perishable property, would have to be disposed of, and that the question as to the responsibility of the railroad company for the damage to the property was one that would have to be determined after, and the question as to the cause of the fire was one that would have to be determined also.

Q Did you hear Mr. Champlin state this morning, that when he went to Mr. Barlow's office, to see some one in regard to this claim—did you hear him state this morning that you had promised that he would be paid? A I heard that statement.

Q Did you make any such statement? A I did not.

A. E. Pasman, direct.

By Mr. Herbert.

Q What did you do with the car? A We arranged to have our office consult Mr. Paulison to have the car shipped to Weehawken, New Jersey, as it appeared there was an opportunity there, in my judgment, where same could be disposed of to best advantage—where we could get more money for the hay than here in Passaic.

Q Was that done? A That was done; yes, sir.

Q Did you have anything further to do with the transaction after that? A Not directly—the agent at Weehawken reported to me that he had an offer for the car, and I told him to go on and sell it; that is my recollection. I have forgotten the amount that he reported. But he had an offer, I think, of $10 for the car.

Q You understood it was sold? A Beg pardon?

Q You understood it was sold? A It was sold.

Q Do you know how much was realized on the sale? A I never saw the result finally.

Q What is your position; what office do you hold in the company? A I am agent for the claim department.

Q Travelling agent for the claim department? A Yes, sir.

Q As travelling agent for the claim department, do you go around to many parts of the country? A I go to many places within a radius of a thousand miles.

Q On other roads within the radius of a thousand miles from here? A Frequently.

Q And do you come in contact with various freight yards of other railroads in the East, besides here? A Very often.

Q Have you ever seen or come in contact with

freight yards similarly situated to this yard in question in this suit? A Frequently.

Q Is the protection, so far as location, as far as this yard is concerned, which you find on other roads throughout this part of the country, the same as in this yard? A As a general proposition, they are pretty much the same.

Q Do you know anything about police protection on other roads?

Mr. Brown. That is objected to—that has nothing to do with the case.

The Court. Objection sustained.

Mr. Herbert. May I have an exception? If your Honor please, this man goes around the country doing the very same thing and he knows the conditions, as he says, on other roads. Certainly, he can testify as to what the conditions on other roads are and what the custom is. He can testify what the other roads do. We are not charged outside of being warehousemen; we are not charged with anything more than what is custom, and what is done by other carriers under similar circumstances. We do not have to protect beyond what is customary.

The Court. You were not sued as carrier; you are sued as warehousemen.

Cross examination by Mr. Brown.

Q Did you, in your conversation with Mr. Champlin or Mr. Paulison, ever state to him that he would be paid in full for that car? A I did not.

Q Did you tell him that you thought it was better to take the car to Hoboken or out of Passaic and sell it, because they had previously burned cars in that yard and that possibly they

were burning them for the purpose of getting goods cheaper?

Mr. Herbert. That is objected to on the ground it is not proper cross examination.

The Court. Overruled.

A My recollection of conversations is that I stated to Mr. Champlin that there might be an incentive for such fires, and with that object in view and with a view of removing such an incentive, I thought it advisable to take the car away from here, as we had done at other places.

Q What led you to believe that there was an incentive, by reason of other fires?

Mr. Herbert. That is objected to.

The Court. Objection overruled.

Mr. Herbert. Exception.

By Mr. Brown.

Q You have no knowledge as to what the incentive was? A Of course, there might be an incentive.

Q You spoke of fires there—other fires. What do you mean? A There had been other fires on the Erie Railroad at other places, as well as here. It was our general policy not to dispose of that property at the point where the fire occurred, if we could dispose of it to advantage at some other place.

Q When a car is burned, the matter comes to your office for adjustment? A It might come into our office.

Q But you are the adjuster who settles for these burned cars, are you not? A I might, sometimes—not always.

Q Did you ever settle any other losses that occurred here in this yard, by reason of fires?

J. O'Rourke, direct.

Mr. Herbert. That is objected to.

The Court. Objection sustained.

By Mr. Brown.

Q Did you ever sell any other cars of hay out of the yard in question, by reason of their having been burned or damaged?

Mr. Herbert. That is objected to on the ground of relevancy?

The Court. What is the purpose?

Mr. Brown. To show that there were continual fires.

The Court. Then, it is overruled.

Mr. Brown. That is all.

Mr. Herbert. That is all.

WITNESS EXCUSED.

JAMES O'ROURKE, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Herbert.

Q What is your name? A James O'Rourke.

Q Where do you live? A 1113 Garden street, Hoboken.

Q By whom are you employed? A The Erie Railroad.

Q In what capacity? A Agent.

M. May, direct.

Q At what place? A New York and New Jersey.

Q Do you recall the sale of this car of hay at the time it took place? A Yes, sir.

Q To whom was the car sold? A It was sold to the firm of Jacobus and Baylis.

Q At what price? A $115.50,—$10 a ton, realizing $115.50.

Q Was that the best price you could secure for this car? A That was the best price at which it could be sold.

Q What was done with this $115.50? A Remitted to the Treasurer to apply for the account of freight charges and to whom it might concern.

Q Was the entire amount remitted? A $115.50.

Q You had nothing to do with the freight charges? A Oh, yes!

Q Did you deduct any amount from that $115.50? A No, it is only a matter of book-keeping; the whole thing was remitted.

Q The whole $115.50 was remitted to the Treasurer? A Yes, sir.

Q Do you know what the amount of freight charges were, charged against this car? A $57., I think,—$58.

Q That left a balance of how much, do you know? A It was about equally divided,— my recollection is.

Q Do you know whether, as a matter of fact, $58.07, was the balance? A Yes, sir; that is it.

No cross examination.

MATTHEW MAY, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Herbert.

M. May, direct.

Q What is your name? A Matthew May.

Q Where do you live? A Suffern, N. Y.

Q By whom are you employed? A The Erie Railroad.

Q In what capacity? A Adjuster of losses and damages, arising from wrecks and fires.

Q I show you three certain letters which have been marked in evidence,—Plaintiff's Exhibits, 3, 4, and 5. What are those letters? A Those letters were dictated by me to the stenographer.

Q You had charge of this matter for Mr. Barlow? A Yes, sir.

Q Do you know what the amount is that was realized on that sale of this hay? A $115 and some cents.

Q Was any charges against that? A Freight charges, demurrage charges.

Q This item of $58.07 was the balance after the deductions were made? A Yes, sir.

Q Do you know whether any tender of this balance was ever made to Mr. Champlin? A In my letter to Mr. Champlin declining his claim, I offered him the $58.07.

Q These are the letters? A Those are the letters.

Q How long have you been working for the Erie Railroad? A Twenty-six years.

Q Prior to that time, did you work for any other railroad? A I was three months out of the Erie, working for the New York Central at Weehawken yards, and prior to that time was working for the B. & O. in the freight department.

Q In the freight department? A In the freight department—yes.

Q Did you, while working for the New York Central and the B. & O. have any occasion to come in contact with their various freight yards?

M. May, cross.

A I did, sir.

Q Can you tell us what is the practice of those two companies as to fencing and protecting and policing such yards, located similarly to the manner in which this yard is located?

Mr. Brown. That is objected to—that has nothing to do with the case.

The Court. Objection sustained.

Mr. Herbert. I am qualifying him as an expert. He can show what the conditions are. You can qualify him.

The Court. What is the question?

Q (Question read by stenographer).

The Court. Answer the question "yes" or "no."

Mr. Herbert. Can you tell us—do you know?

The Witness. Yes, I know.

By Mr. Herbert.

Q Will you kindly tell us?

Mr. Brown. That is objected to.

The Court. Objection sustained.

Mr. Herbert. Exception.

Cross examination by Mr. Brown.

Q When you say you tendered Mr. Champlin the balance of that money, how did you tender it to him? Did you tender it to him by check or

bill, or did you go to him and say, "Here it is?"
A I told him if he would amend his claim, we would remit the $58.07.

Q Yes, if he would amend his claim?

Mr. Brown. That is all.

Mr. Herbert. That is all.

Witness excused.

REGINALD H. BOWKER, recalled.

By Mr. Brown.

Q Mr. Mault testified that while he was watchman, while he was watchman in that yard for a year previous—for a year and a half previous to 1915, that no fires had occurred in that yard?

Mr. Herbert. That is objected to.

The Court. Objection sustained.

Mr. Brown. Your Honor, that is clearly rebuttal.

The Court. In your cross examination of this witness, you asked a question to test something as to the witness—his credibility or recollection.

Mr. Brown. It seems to me, your Honor, that where a witness goes on the stand and testifies that he was there; may we not ask that witness a question for the purpose of contradicting or introducing something otherwise incompetent and irrelevant?

The Court. (To Mr. Herbert). Did you ask him where any fires had occurred?

Motion for Non-suit (renewed).

Mr. Herbert. I did not.

Mr. Brown. That is all.

Mr. Herbert. That is all.

Mr. Herbert. (Continuing). I now move, your Honor, upon the grounds that have heretofore been stated, and renew my motion for a non-suit, to wit: that it has not been shown that the loss of fire was due to any lack of care or to any negligence upon the part of the defendant. And upon the further ground that the plaintiff has further failed to prove the fact that is alleged in his stated demand. There is no evidence from which the jury may reasonably infer that the defendant was negligent in the case. And upon the further ground that there is absolutely no evidence whatever of negligence on the part of the defendant company. The burden of proof is upon the plaintiff. It is not a case of *res ipsa loquitur*. We are not insurers at all. We are simply ordinary warehousemen. This is admitted. The theory under which they bring their cause of action would indicate extraordinary care on our part. They have got to show, so far as this cause of action is concerned—so far as this car is concerned, negligence upon the part of the defendant. This, they have absolutely failed to do.

Next, upon the further ground that this fire, if from any cause whatever, was certainly due, if at all, to the wrongful act of a third party. It has been testified as far as that is concerned, that these cars are sealed every day—three times a day they are gone over by a man of the company. Levine came in here and said that he opened the car. He

does not say anything about closing the doors of the car in any way. He opened the car doors. The great probability is that this very day the fire happened.

I now renew my motion upon the further ground that as far as the weight of the evidence is concerned, that any part of a verdict which is rendered in this case, would have to be set aside as again the weight of the evidence, so far as negligence on our part is concerned; because we have shown by an overwhelming weight of the evidence that we were not negligent. This is not a case of *res ipsa loquitur*. We police this yard constantly. Every day—three times a day one man goes there and examines it. Other men come through it and go through this yard and examine it. There is not one scintilla of evidence by the plaintiff to show lack of due care upon our part. That being so, as far as this cause of action is concerned, it appears there is no negligence as against the defendant, and any verdict that might be rendered, would have to be set aside; that being so, the duty of this court is at this time to direct a verdict in our favor. I renew the motion upon the further grounds—I might add this: that where the plaintiff had equal knowledge with the defendant of the conditions existing in this yard, which it now appears he did know and have—

The Court. (Interrupting). Right there; do you want to ask the Court to strike out where the witness testified something of that kind? If the defendant had made an objection, the Court would have stricken it out.

Mr. Herbert. My recollection of that, is

this: I objected to it upon three grounds. Thereupon your Honor still allowed it in upon the ground that it was cross examination. That being so, it is before the Court in this case. It must have been in, because that man testified, Pasman or Paulison, that he had talked to this man about the fact of the condition, that that condition had existed before. This being so, and the company being simply warehousemen, then the plaintiff was guilty of contributory negligence in not putting his own men there to guard his stuff and there must be a direction of a verdict. I, therefore, insist upon these grounds; that the duty is upon the Court to direct a verdict in this case; and I so move the Court.

Mr. Brown. Your Honor, the burden in this case, I do not think the burden in this case is in favor of them. The plaintiff is bailee of the goods. He had an open warehouse where he received the goods in proper condition and carried them to destination, and they are destroyed. The Courts in innumerable cases, have said the burden of proof is upon the warehousemen and upon the carrier to make good. The matter of negligence is clearly a matter for the jury. That has been so often decided in different questions of negligence, and the question of negligence is one for the jury; be that negligence great or small. It is a matter of fact which must go to the jury in each and every instance. The statement as to Mr. Champlin's knowledge of the condition of the yard —one employee of the railroad company testified that there was some conversation as to the condition of the yard as to being fenced, that is, when they were carriers. When they

Motion for Non-suit (renewed).

became warehousemen Mr. Champlin had a right to believe, or any one else had a right to believe that they would take that car as warehousemen and would protect it. The Courts have held in so many cases, and it is laid down clearly, if you will permit me to read; in the case of Jackson against McDonald, 41 N. J., where the plaintiff delivered chattels and goods to the defendant and their destruction occurred thereafter by fire, the law presumes negligence of the bailee to be the cause of the loss, and it is held that this presumption could be rebutted only by affirmative proof of reasonable care on the part of the defendant.

Further, in the case of Jackson against McDonald, the Court says that when goods and chattels are delivered to the bailee in good condition and are returned in a damaged state or not returned at all, which is the case here, the law will presume negligence upon the bailee and it is upon the bailee, the burden of showing the loss, that the loss did not occur through his negligence is upon the bailee. These are cases which require absolutely the defendant to show that he was not negligent. If he was negligent of carelessness, it is a matter to be determined by the jury—it is a matter of fact for him to show that he was not careless in the management of these things. It seems to me that such a motion cannot have any weight with the Court. It should not have any weight under existing laws of this state, to the effect that the bailees are responsible for these goods and it is their duty to show that they were not negligent in any way.

The Court. I wish you would show the

Court wherein negligence of the defendants caused this loss. We first have to consider the circumstances. Now you recall the circumstances in this case. A car was purchased by the plaintiff, of some goods, in New York state, with directions to the railroad company that the car be shipped to Passaic. The purpose of that shipping contract with the railroad company, was transportation from the place at which the car was purchased to the City of Passaic. Transportation was the sole thing in contemplation. The goods were, of course, to be unloaded, unloaded by the consignee or his agents. Now, it seems that the consignee had not secured a sale for these goods. Instead he intended to find a purchaser and cause that purchaser to unload, intended solely to cause the transportation of the goods and use the railroad company, the carrier—he had distinctly in his mind that he might use them for storage purposes and he did not unload the car. It seems that the situation was this—he was causing goods to be transported by a carrier, having in mind the possibility of converting them into warehousemen, because he contemplated finding a customer, and after he found such customer and awaited the convenience of this customer in unloading, the car was to be unloaded. Now, all of this is something possibly unusual. It might not have been unusual with this shipper or this consignee, but it was an unusual thing and was not contemplated by the contract of the carrier.

Mr. Brown. The bill of lading does not provide for that, so that every car of goods accepted by the railroad company or shipped

by a shipper, the bill of lading provides for that very contingency, in cases where goods are left there more than forty-eight hours.

The Court. The bill of lading provides for certain contingencies. The question is what is the purpose of the shipper? Here is the situation: If the railroad company knows that the goods are to be stored for a week, say, or whatever time is in the mind of the shipper, they would be able to conduct themselves accordingly; but are they not, in such circumstances, entitled to believe that they will be unloaded and put them on the unloading switch for unloading purposes?

Mr. Brown. Yes, after two days expires; then their contract provides that they shall be taken care of.

The Court. Are they interested more than slightly or momentarily in that knowledge of the shipper's intention to look for a customer? Are they not entitled to expect him to come and unload the goods?

Mr. Brown. That is the rule. It is universal. Every car which comes in on that track, every car is subject to that same condition. It does not make any difference what the contemplation of Mr. Champlin or any one else was in the matter. Mr. Champlin had a customer; he had a man to go and look at the car. And expected to unload it. Of all the cars that come in there, very few are unloaded within two days. All are kept on the track over forty-eight hours. The contract provides for that contingency. Mr. Champlin saw fit to take advantage of the contingency. He was charged demur-

rage for that privilege. It is the railroad's custom to charge demurrage. They charge demurrage for the purpose of protecting the company. They were still bound as carriers and as warehousemen on their own terms.

The Court. The thought the Court wishes to impress is this: He testified as to knowledge of the facts at Dundee. He knew to what point it would be shipped. He had in contemplation storing of the goods, and at the time of shipment, he contemplated this; he did not intend to unload. It seems he intended finding a customer.

Mr. Brown. That is the custom; they all ship in that way. After the hay or the goods are on the track, they are to be sold, and this is the custom. It is universal with all railroads.

The Court. Now, then, I will take you to another matter. The goods were destroyed by fire.

Mr. Brown. Yes.

The Court. Now, as a matter of policy, it seems to the Court that the rule ought to be that no non-suit ought to be granted on your failure to give some specific act of negligence, to put the burden upon the defendant to show that due care was used. On what theory are you basing your contention now, that through lack of care of the defendant, the fire destroyed these goods? I mean in what way did the lack of care cause the destruction by fire?

Mr. Brown. If the defendant had taken these goods—if they had had watchmen in that yard continually, as they should have had, there would have been no fire.

Motion for Non-suit (renewed).

The Court. How would the presence of a watchman have prevented a fire?

Mr. Brown. If he had been there continually, to look after the car of hay, the fire would not have gone on.

Mr. Herbert. The fire might have been caused by spontaneous combustion, for all we know.

Mr. Brown. It is entirely a matter for the jury, the question of negligence. The Court has held that in so many cases. This is a case of storage. Where the proprietor of a public entertainment conducts a cloak-room in which the goods are checked for hire, the Court held it was a matter for the jury. This car was left there for hire. They paid him a dollar a day, I think that is the charge—a dollar a day for the use of the track. It appears that the goods in this case were received in good order and it implies negligence on the part of the defendant when the goods are placed in his cutsody in good order, if not delivered in like good order. And the burden was upon the defendant to show that it is not negligent. The carrier will not be excused from loss or liability of a third person's acts; that is a fact of law which is undisputed in this state. These cases are all reported, and the question of negligence is one for the jury. In the case of Levy vs. Postalwaite, where the property was delivered to carrier for shipment, and destroyed or otherwise damaged, it was held that where goods are destroyed, they are to be settled for at the value of the nearest market, and it is a matter of fact for the jury to determine from the testimony

as to the value. The proof of loss or injury to the goods, is sufficient *prima facie* evidence of the case against the bailee and is sufficient to put him upon the defense, and when goods are delivered to the bailee in good condition, if not returned or if returned in a damaged state, the law presumes negligence to have occurred. The cases all bear on that point—each and every case—and it does not seem to me—here I cite again the case of the storehouse. It says, therefore it was a question entirely as to whether the storing of these goods by the defendant upon a wagon for two days and nights, upon a contract with the defendant as warehouseman, was the use of such reasonable care in storing them as would be required. The Court said it is a matter for the jury entirely. Your Honor, that was a case in which the warehouseman put the goods in a wagon, drove them to his stable, instead of storing, and he was held to be responsible for the care of those goods. The stable burned and the goods were destroyed. The Court directed in that case that it was negligence to have taken these goods in the stable and not to have taken them to warehouse. It is a case where the goods were lost. It is a question of fact, which rests entirely with the jury, as a matter of fact, governing the surroundings and the circumstances.

The Court. After all, each case stands upon the particular circumstances. Your citation as to the cloak room. It devolves upon the cloak room manager—he had certain goods to be kept for a certain length of time, but in this case, it does not devolve upon the warehouseman—it is not the same

case; he is to be ready for delivery at all times when the consignee may wish to unload his own car. He is contemplating these goods to be kept in the car. That is the first thing. Contemplating that the goods are to be kept in the car, kept on the track ready for delivery. The Court will grant the motion.

Mr. Brown. Absolutely, I am correct in this statement. That is a case—this is a case in which the facts must go to the jury. Every decision in this state shows that the carrier after having taken the goods, no matter how they take them, is responsible for them. The defendant when he took these goods, took them as bailee, and if he is guilty of carelessness, it is up to the jury to decide as a matter of fact whether he was careless and negligent.

The Court. I feel a non-suit should be granted in such case. It would seem that public policy would demand that the defendant disclose a degree of care and should have accounted for the goods; but there is absolutely nothing from which we may infer negligence. That being so, understand we are not dealing with them as carriers. They accepted these goods as warehousemen.

Mr. Brown. They accepted these goods as warehousemen.

The Court. The Court has considered that. We will save the jury further suggestion. The Court directs you to find a verdict for the defendant. Of course, understand that does not relieve the defendant of their

obligation to give you actual proceeds of the sale.

Mr. Brown. I object to the direction on the grounds I have before stated.

The Court. Exception allowed.

CASE CLOSED.

STENOGRAPHER'S CERTIFICATE.

I, W. H. D. Marr, do hereby certify that the foregoing is a true transcript of the testimony and proceedings on the trial of the suit of Frank A. Champlin v. Erie Railroad Company in the District Court of the City of Passaic, on June 7th, 1916.

W. H. D. MARR,
Sworn Stenographer.

Dated, June 20, 1916.

JUDGE'S CERTIFICATE.

To the Justices of the New Jersey Supreme Court.

I hereby certify, as the state of the case, the foregoing transcript of the proceedings and testimony in the above stated cause, made by the said stenographer, W. H. D. Marr, who was duly sworn as such stenographer, to be used on the hearing of the appeal herein.

W. CARRINGTON CABELL,
Judge of the District Court of the City of Passaic.

Dated, June 21, 1916.

OPINION OF SUPREME COURT.

(Filed February Term, 1917.)

NEW JERSEY SUPREME COURT.

FRANK A. CHAMPLIN, TRADING AS F. A. CHAMPLIN & COMPANY, *Appellant*, *v.* ERIE RAILROAD COMPANY, *Appellee.*	*Appeal from District Court of Passaic.*

Argued November Term, 1916, before Justices Garrison, Parker and Bergen.

BROWN & BEECHER, for appellant.

COLLINS & CORBIN, for appellee.

PER CURIAM:

The defendant received, as a common carrier for transportation from Friendship, in the state of New York to the city of Passaic in this State, a car load of baled hay consigned to the plaintiff, of the arrival of which at Passaic he was notified, and it not being unloaded within 48 hours the defendant thereafter held it as a warehouseman, and while so held it was destroyed by fire. The plaintiff brought this suit to recover the value of the hay, alleging that the loss occurred because of defendant's negligence, and the Trial Court directed a verdict for defendant from which plaintiff appeals. If there was any evidence from which a jury might infer negligence, then the direction was erroneous. There were facts proven which justify the inference that defendant transported the hay to its destination and notified plaint-

iff of its arrival, who neglected to remove it within 48 hours and thereupon the duty imposed on defendant was that of warehousing the hay; that it was not put in any building but in an open railroad yard readily approachable by any one from the adjacent public street, and that while in this position the hay was partially destroyed by fire. We are of opinion that when a warehouseman places a car of inflammable material like hay in an open yard, subject to approach by any stranger, without sufficient guarding to prevent its ignition, the question whether the defendant exercised such reasonable care as its duty as warehouseman required was for the jury, and a direction for defendant was error.

We also think it was error to exclude proof of the occurrence of other cases of burning of hay stored in this yard, for it had a tendency to show that hay stored in this place was liable to ignition and had a bearing upon the question of care necessary to be exercised in preventing fires in the place chosen as a warehouse. Plaintiff also urges that it was error to exclude a question asked of a witness who, after testifying that he was in the yard nearly every day, was asked whether he ever saw or knew of a watchman being in the yard; this was overruled and an exception taken. This ruling was erroneous for at least two reasons, (a) the defendant had offered proof that it maintained a watchman in the yard, and the rejected testimony tended to contradict this; (b) the witness had already testified that the yard was open, so that anyone could pass through and about it, so that if under such conditions the jury could find that a watchman was necessary, the absence of one would have a bearing on the degree of reasonable care exercised.

The judgment will be reversed.

RULE FOR REVERSAL.

(Filed February 26, 1917).

SUPREME COURT OF NEW JERSEY.

FRANK A. CHAMPLIN, TRADING AS F. A. CHAMPLIN & COMPANY, *Plaintiff-Appellant,* *vs.* ERIE RAILROAD COMPANY, A CORPORATION, *Defendant-Appellee.*	*In Tort.* *On Appeal from First District Court of the City of Passaic.* *Rule on Reversal.*

This cause having been duly argued at the present term of this Court, on brief, and the Court having inspected the record and judgment below and considered the determinations and directions appealed from;

It is thereupon ordered, that the judgment of the said District Court of the City of Passaic be in all things reversed, set aside and for nothing holden, with costs of this Court to be taxed; and that the said plaintiff-appellant do recover his costs in the said District Court to be taxed; and the record and proceedings be remitted to the said District Court of the City of Passaic to be proceeded with in accordance with this judgment and the practice of said Court.

On motion of

BROWN & BEECHER,
Attorneys of Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

FRANK A. CHAMPLIN, trading as F. A. Champlin & Co., *Plaintiff-Respondent,* *vs.* ERIE RAILROAD COMPANY, a corporation, *Defendant-Appellant.*	*In Tort.* *On Appeal.*

Brief of Brown & Beecher for Plaintiff-Respondent

FACTS.

This case was tried by the District Court and a jury June 7, 1916, and at the close of the case the court directed a verdict for the defendant, whereupon judgment was entered. Plaintiff appealed. Judgment reversed by Supreme Court.

The uncontroverted facts are as follows:

Plaintiff is a wholesale hay dealer and hay shipper selling to retail dealers. On October 26, 1915, plaintiff's agent, F. C. Mulkin, delivered to the defendant, at Friendship, New York, subject to freight and demurrage, one car of No. 2 baled hay in good order, for shipment to plaintiff at Passaic, New Jersey, under bill of lading contract of that date.

The car arrived at Passaic on or about November 1st, 1915, and was damaged by fire on November 6, 1915, while in defendant's freight yard at Passaic, sometimes called the Dundee

yard. Defendant notified plaintiff by postal card November 1, 1915; and, under the contract, the defendant became warehousemen as to this car of hay 48 hours thereafter. (Pltf's Ex. 1, test'y pages 22 and 38; pltf's Ex. 3, test'y page 59, lines 1-8, and page 60.) The yard was located on First street and was open to it, there being no fence or wall between. (Test'y, page 47, lines 23 and 31; page 42, lines 28-29.) There was no regular watchman. Such watchmen as came there merely did so on their way to and from other places (test'y, pages 65, 67, 68, 75, 76, 79 and 82, also *infra,* Point I., sub-division B, last four paragraphs).

The damaged hay, after the fire, was sold by defendant and the net proceeds, after deduction of freight and demurage, were $58.07. This sum the defendant, without a legal tender, offered to pay to the plaintiff "upon receipt of amended bill supported by the original invoice or certified copy thereof." (Test'y, page 62, Ex. p. 5; also page 99, lines 18-21.)

Plaintiff paid $198.00 for the hay. Its carload, wholesale, market price at New York and Passaic on the day of the fire was $23.00 per ton of 2,000 pounds. The hay weighed 23,368 pounds. (Test'y, pages 37, 38, 39, 52 and 54.)

POINT I.

At the close of defendant's case the trial court erroneously directed a verdict for the defendant. (This was error for two reasons.)

A.

Assuming for the moment that the evidence did not present a case for the jury on the question of damages for the full loss of the hay through defendant's negligence, still THE COURT SHOULD EITHER HAVE DIRECTED A

VERDICT FOR THE PLAINTIFF FOR $58.07, WITH INTEREST, OR ELSE HAVE SUBMITTED TO THE JURY THE QUESTION AS TO WHETHER THAT AMOUNT WAS DUE THE PLAINTIFF.

The testimony of defendant's witnesses and the defendant's letters (test'y, page 60, Ex. 3, and page 62, Ex. P. 5) showed that defendant sold the hay in question for plaintiff's account at $10.00 per ton, receiving therefor $115.50; and that the net proceeds of said sale, after deducting all charges, were $58.07 (test'y, page 36, line 31; page 60, line 35; page 62, lines 33 and 36; page 98, lines 9-34, and page 99, lines 15-25). And finally it appears that the trial judge, at the close of his charge, in language which seems to have been addressed in part to counsel and in part to the jury, says: *"The Court directs you to find a verdict for the defendant. Of course, understand, that does not relieve the defendant of their obligation to give you actual proceeds of the sale."* (Case, page 111, lines 38-40, and page 112, line 122). In other words, the fact of this sale for the plaintiff's benefit was recognized and admitted by counsel for both parties and recognized by the court. The defendant, on its own sworn statements, after being paid in full for all charges and for all services rendered, was awarded $58.07 of plaintiff's money and actually induced the trial court not only to ignore this claim but also to close the door to the plaintiff for any future recovery of it by making the question *res judicata.*

B.

The plaintiff was entitled, however, to more than the said $58.07. THE TRIAL COURT SHOULD HAVE SUBMITTED THE CASE TO THE JURY TO ASCERTAIN WHETHER THE DEFENDANT KEPT THE CAR OF

HAY IN A REASONABLY SAFE PLACE AND EXERCISED PROPER CARE AS WAREHOUSEMEN IN CONNECTION WITH IT, OR IN THE LANGUAGE OF THE STATUTE, "SUCH CARE AS A REASONABLY CAREFUL OWNER OF SIMILAR GOODS WOULD EXERCISE"; AND IF IT DID NOT USE SUCH CARE, THEN TO ASCERTAIN AND AWARD TO THE PLAINTIFF THE AMOUNT OF DAMAGES HE SUSTAINED BY THE LOSS OF THE HAY.

"A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise."

Warehouse Receipts Act (1907), 4 Comp. Stat. 5780, sec. 21.

1. The burden of proof as to negligence ("failure to exercise reasonable care") is upon the defendant.

"When, therefore, the plaintiff proved the delivery of the chattels in good condition to defendant, and their destruction thereafter by fire upon defendant's premises, the law presumes the negligence of the bailee to be the cause of the loss, and this presumption could be rebutted only by affirmative proof of reasonable care upon defendant's part."

Jackson v. *McDonald,* 41 Vroom 594.

"Therefore it was a question entirely of fact whether the storing of these goods in defendant's stable upon a wagon for two days and nights, under a contract with defendant as a warehouseman, to use such reasonable care in storing them as men in that line of business usually take of goods committed to their care, was a compliance with the duty thus imposed upon this defendant

by law, and the court having found as a fact that it was not, we cannot disturb that finding."

Levine v. *D. Wolff & Co.,* 78 N. J. L. (49 Vr.) 306, at 308, 309 (Sup. 1909).

"The rule adopted in the more modern decisions is that proof of loss or injury establishes a sufficient *prima facie* case against the bailee to put him upon his defence. *When chattels are delivered to a bailee in good condition and are returned in a damaged state, or not returned at all, the law will presume negligence to have been the cause and casts upon the bailee the burden of showing the loss did not occur through his negligence;* or if he cannot affirmatively do this, that at least he exercise a degree of care sufficient to rebut the presumption of it."

Jackson v. *McDonald,* 70 N. J. L. (41 Vr.) 594 at 595 and 596 (Sup. 1904).

"Where the proprietor of a public entertainment conducts a cloakroom at which coats and hats are checked for hire, *the mere loss of articles so checked raises a prima facie presumption of negligence which can only be rebutted by affirmative proof."*

Manson v. *Pullman Car Co. Porters Ben. Assn.,* 60 At. 1120 (Sup. 1905).

2. The question of negligence was one of fact for the jury.

Carr v. *D., L. & W. R. R.,* 81 N. J. L. (52 Vr.) 532, at 534 (E. & A.).

Durant v. *Palmer,* 29 N. J. L. (5 Dutch.) 544 (E. & A.).

Levine v. *D. Wolff & Co.,* 78 N. J. L. (49 Vr.) 306 at 308-9 (1909).

A carrier will not be excused from liability

for the loss of goods by the negligence or misconduct of a third person.

Merson v. *Hobensack,* 22 N. J. L. (2 Zab.) 372.

3. Aside from the testimony offered by plaintiff and wrongfully overruled by the court, there was evidence in the case to go to the jury on the question of defendant's negligence.

Defendant's freight yard at Passaic was wide open along its entire length on the First Street side, having no fence whatever, thereby presenting to thieves, marauders and bad characters of all sorts, the constant temptation (almost an invitation) to enter and commit various depredations and acts of malicious mischief, such as stealing and setting on fire the goods stored there. (Test'y page 47, lines 23 and 31; page 42, lines 28-29). Furthermore, these yards were six blocks away from the Passaic station and could not be seen from the freight office and hence were beyond the care and protection of the depot employees. (Test'y page 42, lines 8-9; page 68, lines 17-21; page 72, lines 33-36; page 76, lines 31-33).

Mr. Pasman, an official in charge of fire adjustments for the defendant company, testifies he told the plaintiff "that there might be an incentive for such fires and with that object in view and with a view of removing such an incentive I thought it advisable to take the car away from here as we have done in other places." There is but one possible meaning to this, namely, that the company knew this Passaic yard to be dangerous and considered it wise to discourage or remove incendiary incentives. (Test'y page 96, lines 9-15).

By no means the weakest point in plaintiff's

favor is the complete silence of the defendant—the only interested party on the ground in a position to know the facts—as to the real cause of the fire. *They do not even disclaim knowledge of such cause.*

Mr. Niverth, another of defendant's employees, testifies on cross-examination: "I know there had been other fires down there" (test'y page 84, lines 2-3); and plaintiff says he knows of other fires which occurred previously in that yard (test'y, page 44, lines 31-32).

Yet, in spite of these facts and admissions, the testimony nowhere shows any watchman regularly stationed in that yard. There appear to have been one or two policemen who strolled through the yard, sometimes several times a day, but they also had other duties to perform. Niverth, a checker and defendant's witness, also went down to the yard three times a day, he says, to seal cars (test'y page 79, lines 38-40), but there was no one whose duty it was to watch that yard, open as it was throughout its full length to the public street in the "tough" railroad section of Passaic,—no one really having actual charge of the yard to protect the freight stored there from thieves, marauders and malicious mischief makers.

In view of the testimony above referred to along these lines, which is unchallenged, and of the law which imposes upon the defendant railroad company the duty of showing that it used the care required by law to protect the goods on storage in its yard, we think the case is beyond doubt a case for the jury on the question of defendant's negligence or failure to exercise due care; and, taking the case as a whole, this question of negligence appears to

be the only issue of fact raised by the testimony. Every other allegation of the plaintiff is either admitted or uncontroverted.

POINT II.

The exclusion of testimony offered by plaintiff's counsel to show that other fires had frequently occurred in the freight yard and thefts and depredations had often been committed there, prior to and about the time of the fire in question (specifications 8, 9, 15, 17, 18 and 21 printed case, pages 2-4), *and also that no watchman was regularly stationed there to watch and protect the goods* (specifications 5, 6 7, 10, 19 and 20 printed case, pages 2-4), *was entirely erroneous.*

Following are references to the pages and lines in the testimony where are to be found each of the erroneously excluded questions respectively quoted in ~~No~~. 20 of the specifications in the printed case:

Specification, No. 2	pages 42-43
" " 3	" 43
" Nos. 4, 5, 6	" 46
" No. 7	" 47
" " 8	" 48-49
" " 9	" 49
" Nos. 10, 11, 12	" 50
" " 13, 14	" 55
" No. 15	" 58
" " 16	" 71
" Nos. 17, 18	" 88
" No. 19	" 89
" " 20	" 90
" " 21	" 97

The plaintiff's purpose in this line of testimony was not to prove the fire or the loss—that was admitted—but *to show facts and circumstances, existing in and about that yard and in connection therewith, which made it a dangerous place to store such goods without constant care and supervision on the part of at least one competent day and night watchman.*

Take, for example, the question quoted in specification No. 15 (Case p. 3), asked of Fire Chief Bowker, plaintiff's witness: "Were you ever called in 1915 at any time to put out or extinguish fires which occurred to cars of hay in the Dundee yard?" (Test'y page 58.) Had the witness been permitted to answer, his answer would have been in the affirmative; and it was counsel's purpose then to prove frequent fires, prior to this one, and the causes occasioning some of them. This would have been evidence tending to show the character of the place as to safety or danger for the storage of goods. It would have disclosed additional reasons why a regular watchman, constantly on the job, was necessary—a most pertinent and material point in the case. Surely "an ordinarily careful man" would not store "his own goods" of any value in such a place without a regular watchman. Where policemen or workmen come occasionally to such a place we should hardly expect marauders to choose the times when the policemen were there to commit their depredations. Naturally they would wait until such officers or workmen had gone. *A steady, competent watchman always on hand would deprive the thief or incendiary of his opportunity.* Hence the testimony offered in this line of questions also was relevant and material as furnishing the jury with a basis for determining *first,* whether the reasonable care required by the situation was exercised by the defendant, and *second,* the extent of defendant's negligence in failing to take such precautions as that care demanded.

The exclusion of the questions asked of plaintiff's witness, Levine, regarding the general condition of the yard and the absence of a watchman (specifications 4, 5, 6 and 7 and test'y pages 46

and 47), deprived the jury of much valuable aid in determining the condition of safety for goods stored in the yard. The objection by defendant's counsel that the questions regarding the watchman were "leading" is ill-founded, because there was absolutely no way of directing the mind of the witness to the subject without using the word "watchman." These questions were capable of being answered by either "yes" or "no," and were not framed so as to indicate which way counsel desired or expected them answered. Had the questions been permitted the subject could have been developed fully, as it should have been.

In fact, the trial judge contradicted himself and seems to have been altogether confused regarding these questions. Upon defendant's objection to the question asked on direct examination of plaintiff's witness: "Will you state to the court and jury what the conditions in that yard are *generally?*" the Court says: "Strike out the word '*generally*' and reframe your question again (test'y page 46, lines 1-8), while on the very next page, referring to the question of plaintiff's counsel: "What was the condition of that yard in relation to a watchman or any person to look after property there?" the Court directs, on objection: "Ask him if he knew about the *general* condition of the yard" (test'y page 47, lines 10-18).

We submit that no witness, however intelligent, could possibly be directed, by such a general question, to testify about a watchman in that yard. It would never suggest to his mind the subject of a watchman.

While the Court would not permit plaintiff to get in any testimony regarding watchmen (see specifications 4-7 and test'y pages 46-47), it is

perfectly evident from the defendant's case that no regular watchman was in charge. John and William Mault were the only persons who undertook to watch; and they were police officers who patrolled the yard incidentally with other duties.

John Mault's "operations" extended from Passaic to Paterson and from Passaic to Newark." *He took care of different yards along the Erie.* On the day of the fire, November 6, he was in this freight yard between 11 and 11:30. He was not there when this fire occurred (test'y page 65, lines 21-30; page 67, lines 31-40). He spent sometimes ten minutes, sometimes more, in that yard (test'y page 68, lines 27-28).

William Mault was acting Sergeant of Police of the Susquehanna R. R. He went through the yard every day, *"as a general rule,"* usually about 10:30 A. M. He did not stop long. If there was nothing the matter he came back and took the train to Jersey City (test'y page 75, lines 19-20; page 76, lines 10-19).

Niverth, the defendant's checker and car sealer, states he went to the yard generally three times a day to check or seal cars. He was not a watchman of any kind (test'y page 79, lines 39-40; page 82, lines 27-34).

POINT III.

The evidence of admissions by Paulison, defendant's agent at Passaic, in conversation with plaintiff after the fire, as to depredations committed and fires occurring in the yard prior to November 6 (specifications 2 and 3 printed case pages 1 and 2; test'y pages 42-44), *was wrongly excluded.*

Paulison was general freight agent of the defendant in charge of the yard (test'y page 32,

Ex. 2 and page 87, lines 32-33). No other man, no officer of the company, was as well qualified to know the facts as he was. As to such knowledge he was the company. Anything occurring in that yard was a subject of his especial care and supervision.

The objections of counsel and court to these two questions seem to be based upon the theory that they are irrelevant and immaterial. They are, so far as proof of loss—proof of damage to this car of hay-- is concerned. But, as before stated, they have quite another object, namely, to show the danger or safety of that yard for storage of goods and the necessity for keeping a regular watchman or watchmen there.

A declaration respecting the management of a canal made by the supervisor is competent evidence against the company.

Halsey v. *Lehigh Valley R. R. Co.*, 45 N. J. L. 26 at 27 Syl. sec. 6 and page 35.

Jones v. *Mount Holly Water Co.*, 87 N. J. L. 106 at 111 Citing *Halsey* v. *Lehigh Valley.*

As the conditions are the same this principle should apply with equal force and logic to a person in charge of a railroad or a freight yard.

POINT IV.

The question, "did you ever discuss the condition of that yard with the agent, Mr. Paulison?" was wrongly excluded (printed case, page 3 specifications 11; test'y page 50, lines 21-22); *likewise the question, "Do you know what the reputation of that yard is in that community?"* (case, page 3 specifications 12; test'y page 50, lines 32-33).

Same reasons as are applicable to specifications Nos. 2 and 3 treated above under Point III.

POINT V.

The question, "Do you know whether that yard is used as a sort of playground?" was erroneously excluded, because its purpose was to show the condition of the yard with reference to its safety for storage of goods (case, page 3 specifications 14; test'y page 55, lines 38-39). The same reasoning and principles are applicable as those treated under Point II.

POINT VI.

Some misconceptions of the trial court as disclosed by his language on defendant's motion to non-suit at the close of defendant's case (case, pages 106-111).

The remarks of the court show conclusively that both his conception of the facts and his theory of the law, upon which he directed a verdict, were erroneous.

The court says (pages 106, lines 10-14), "The purpose of that shipping contract with the railroad company was transportation * * * . Transportation was the *sole thing* in contemplation." Yet, on page 111, lines 29-31, he flatly contradicts this statement in the following language: "Understand we are not dealing with them as carrier. They accepted these goods as warehousemen." Of course, the latter statement is the correct one.

Reference to section 5 of the bill of lading contract (case, page 25, Ex. 1 Sec. 5) shows that the defendant, at the time of the fire, were warehousemen and also that as warehousemen they had the option of either holding the hay under their warehouseman's liability or of stor-

ing it in a public licensed warehouse without further liability and subject to a lien for freight and storage charges.

The court seems to have had some idea that because plaintiff shipped the hay before he had sold it to a customer, he was practicing a fraud, or at least committing a wrong, against the railroad. He says (page 106, lines 25-38), "It seems that the situation was this—he (the plaintiff) was causing goods to be transported by a carrier, having in mind the possibility of converting them into warehousemen, because he contemplated finding a customer, and after he found such customer and awaited the convenience of this customer in unloading, the car was to be unloaded. Now, all of this is something *possibly* unusual. * * * It was an unusual thing and was not contemplated by the contract of the carrier." Quite to the contrary, it was most usual and customary and very particularly contemplated and provided for in the contract (test'y page 25, Ex. 1, Sec. 5). Railroads are well paid by storage and demurrage charges for warehouseman services; but whenever they are dissatisfied it is their privilege, by custom and by contract, to shift the obligation to "public warehousemen."

Again the court says (page 107, lines 8-14): "The question is, what is the purpose of the shipper. Here is the situation: If the railroad company knows that the goods are to be stored for a week, say, or whatever time is in the mind of the shipper, they would be able to conduct themselves accordingly." It hardly seems possible that the trial court could misconceive the true situation to the extent this language would indicate. Does any railroad company ever know—or, if it knows, does it ever take into consideration—what is in the ship-

per's mind as to the length of time the goods will remain uncalled for at destination?

"He (meaning the plaintiff) testified as to knowledge of the facts at Dundee," says the court. "He knew to what point it would be shipped." If the court implies knowledge on the plaintiff's part of the condition of the Dundee yard before the fire occurred he certainly is mistaken. The fire was November 6. On November 8 plaintiff came to Passaic and saw the car (test'y page 29, lines 8-12); and on November 8 he rendered a claim to defendant company (test'y page 19, lines 25-28). But there is no testimony anywhere in the case to indicate that the dangerous condition of this yard was known to plaintiff prior to the fire. Of course, "he knew to what point it would be shipped." There is no especial significance to that knowledge.

On the question of negligence and due care, the court says, addressing plaintiff's counsel (page 108, lines 25-31): "Now, as a matter of policy, it seems to the court that the rule ought to be *that no non-suit ought to be granted* on your failure to give some specific act of negligence, to put the burden upon the defendant to show that due care was used." This is a plain recognition of the plaintiff's insistance that the burden of proving due care or the absence of negligence is upon the defendant. Yet the remaining portion of the same paragraph, when compared with the language just quoted, discloses utter confusion in the court's mind on that subject, when he asks plaintiff's counsel: "On what theory are you basing your contention now, that through lack of care of the defendant the fire destroyed these goods?"

In other words, the court, in one breath, tells

us that we are not obliged to "give some act of negligence" in order "to put the burden on defendant to show due care" (of necessity thereby implying that such burden is already on the defendant anyway), and then, by asking us to show how lack of care on defendant's part destroyed the goods, implies that we must, after all, show lack of care on defendant's part, before obligating defendant to show due care.

The court again comes back to the correct idea when he says (page 111, lines 24-28): "It would seem that public policy would demand that the defendant disclose a degree of care and should have accounted for the goods"; but he then repudiates it again by adding, "but there is absolutely nothing from which we may infer negligence," thus advancing the positively contradictory alternative that the plaintiff, on the one hand, must produce evidence from which negligence on the part of the defendant may be inferred, while the defendant, on the other hand, shall in any event be required to "disclose a degree of care"—a mental attitude of complete confusion as to any precise principle of law. Furthermore, in his conclusion that "there is absolutely nothing from which we may infer negligence," the court usurps the province of the jury by undertaking to decide the question of negligence on the facts (see *ante, Point I. B.,* par. 1).

Throughout the whole of the above discussion (pages 106-111) the trial court's remarks are full of doubt and uncertainty; and we see no way to avoid the conclusion that in some manner the mind of the court became so unalterably confused, both as to the facts of this case and the law applicable thereto, that no clear or logical conception thereof was possessed by him at the time he directed a verdict.

POINT VII.

Some points in defendant's Supreme Court brief considered.

A.

Defendant's brief quotes at length almost the entire opinion in *Southern Railway Co.* v. *Prescott,* 240 U. S. 632.

In the Prescott case certain boxes stored in the railroad's warehouse were destroyed by fire. "The fire occurred in the early morning when depot and warehouse were closed." While the U. S. Supreme Court held, contrary to the New Jersey decisions, that the plaintiff had the burden of proving the railroad's negligence where goods are destroyed by fire, nevertheless the U. S. decision rests flatly upon the ground that "*there was nothing in the circumstances to indicate neglect on the part of the Railroad Company.*"

In the case at bar quite the contrary is true; and as our Supreme Court decided, the facts on the question of negligence should have been submitted to the jury.

B.

In the effort to explain why "defendant's counsel did not question his witnesses as to the cause of the fire," defendant's brief states that said witnesses "had no information as to its cause," a statement wholly unproved and extraneous to the evidence and hence, it would seem, unfair and unwarranted. Defendant's counsel cannot know the facts of his own knowledge. What is told him is mere hearsay and not even sworn to. His further point that "it is important that this situation be understood as it absolves the railroad from any *active* negligence through its agents," might be well taken if based

upon fact, but, being based upon an unproved assumption which it was entirely within the defendant's power to prove if it were true, it would appear rather to impute negligence to the railroad than to absolve them from it. Furthermore, the question as to whether defendant's negligence was "active" or not, is unimportant. Passive negligence, failure to do something which it should have done, is the basis of this action.

For the reasons stated, we respectfully submit, the judgment of the Supreme Court should be affirmed with costs to the plaintiff-respondent.

BROWN & BEECHER,

Attorneys for Frank A. Champlin,
Plaintiff-Respondent.

HENRY C. BEECHER,

Of Counsel.

New Jersey Court of Errors and Appeals.

FRANK A. CHAMPLIN, trading as F. A. CHAMPLIN & Co., *Plaintiff-Respondent,* *vs.* ERIE RAILROAD COMPANY, a corporation, *Defendant-Appellant.*	In Tort. On Appeal from Supreme Court.

BRIEF OF COLLINS & CORBIN IN FAVOR OF THE DEFENDANT-APPELLANT.

(1)

Statement of the Case.

The appeal in this case brings before this Court for review a judgment entered in the Supreme Court, February Term, 1917, reversing a judgment of the District Court of the City of Passaic wherein Frank A. Champlin brought suit against the Erie Railroad Company to recover damages for the loss of a car of hay. The hay stood in a car on a sidetrack in the freight yard known as "Dundee Yard" in Passaic, New Jersey. The hay was consigned to the plaintiff (p. 20, l. 20, to p. 27, l. 20), who was regularly notified of its arrival (p. 32, ll. 1-30). Under the contract of carriage the defendant held the hay at the time this cause of action arose, in the capacity of a warehouseman, more than forty-eight hours after notice of arrival had been sent, having elapsed

(p. 29, ll. 9-24). Due to causes unknown to either party the car of hay was partially destroyed by fire. After the refusal of the plaintiff to accept the hay in its damaged condition the defendant sold it (p. 98, ll. 1-35), and offered the proceeds to the plaintiff, but he refused to accept the same (p. 99, ll. 20-25; p. 36, ll. 25-35) and elected to sue the defendant for the full value of the hay at the time and place of its loss.

At the close of the defendant's case counsel for the defendant moved for a direction of verdict on several grounds. This was granted on the ground that there was nothing to show any negligence on the part of the defendant who was acting in the capacity of a warehouseman (p. 111, ll. 20-40). It is from this direction of verdict that the appeal to the Supreme Court was taken.

Although the trial judge granted the motion for the direction of verdict on the sole ground that there was nothing to show negligence on the part of the defendant, under the well settled rule, a judgment entered upon a verdict directed by the trial judge and brought up for review will be affirmed if it can be sustained on any legal ground even though the reason advanced by the trial court is erroneous.

Gillespie vs. Ferguson Co., 78 N. J. L., 470, 473;
Sadler vs. Young, 78 N. J. L., 594, 597;
Meisel vs. Merchants' Natl. Bank, 85 N. J. L., 253;
Herrara vs. Manhattan Electric Co., 85 N. J. L., 248.

(2)

Grounds of Appeal.

The grounds of appeal are as follows (p. i):

1. The Supreme Court erred in holding that the trial court erred in directing a verdict for the defendant.

2. The judgment of the trial court in directing a verdict for the defendant was not erroneous.

3. There was no evidence that the defendant was negligent.

4. The trial court did not err in excluding proof of the occurrence of other cases of burning of hay stored in its yards.

(3)

Brief of the Argument.

I.

The trial court properly directed a verdict for the defendant because on the undisputed facts there was no proof of negligence on the part of the defendant in its capacity as a warehouseman.

The facts as set forth in the Statement of the Case, supra, are substantiated by a number of witnesses. The plaintiff relied on three witnesses. None of them gave any testimony from which the issue of negligence might be determined. A review of the testimony makes clear that the facts stood without dispute when they were finally ascertained.

The first witness for the plaintiff was Frank A. Champlin. He testified that he had shipped this car of hay from Friendship, New York, to himself at Passaic, New Jersey (p. 18, ll. 25-35). The original bill of lading was introduced in evidence. This bill of lading contained certain conditions

under which the shipment was accepted, transported and held for the consignee at destination (p. 20, l. 10, to p. 27, l. 20). The plaintiff further testified that the car and its contents were partially destroyed by fire (p. 29, ll. 15-25). The usual arrival notice advising the plaintiff that the car had arrived was received by him and put in evidence (p. 32, ll. 1-30). It was also shown that the fire occurred several days after the forty-eight hour limitation as contained in the bill of lading so that at the time of the fire the carrier held the hay as a warehouseman (p. 22, ll. 1-30).

The plaintiff then attempted to prove the absence of watchmen, but questions on that point were overruled (see Point III). We submit that it was incumbent upon him to produce witnesses whose duty it was to be acquainted with the management of the yard and who would know what protection was afforded this yard. The plaintiff did not offer the slightest scintilla of evidence to show that this yard was not guarded, that it was not protected by watchmen, that it was not policed by railroad policemen employed solely for that purpose, that every car in the yard was not checked many times each day and that the yard was not inspected by the agent in charge of the yard. Indeed, he could not prove to the contrary.

We submit that a non-suit at this point would have been proper.

As opposed to the plaintiff's witnesses who proved nothing material to the issue and nothing detrimental to the defendant, the defendant offered five witnesses from whose undisputed testimony the conclusion must be drawn that the yard was given the full amount of protection which the defendant owed to the plaintiff.

John F. Mault testified that he was engaged by the Erie Railroad Company at and before the

time of the fire in question, on their Police Department (p. 64, ll. 1-10); that this particular yard came under his supervision; that he was in the yard every day for the purpose of protecting the property (p. 64, ll. 10-20); that he went through the yard and looked it over carefully to see that everything was in good condition (p. 64, ll. 20-25).

William Mault testified that at the time of the fire and for some time previously he was employed as Sergeant of Police by the defendant company and that he made a regular practise of going into this yard once a day for the purpose of policing it and ascertaining whether or not everything was in proper condition (p. 74, ll. 10-20).

John Niverth testified that he was yard checker in this particular yard (p. 79, ll. 10-30) and that he had occasion to go down through the yard at least three times a day and very frequently more often (p. 79, ll. 35-40). Mr. Niverth went through the yard to look after the cars, and closed up all the cars that were open, and sealed the doors if they contained merchandise (p. 80, ll. 15-25). He testified also that he saw a watchman in the yard many times and that there was only once possibly when he made trips through the yard when he did not see a watchman (p. 83, ll. 1-15).

J. C. Paulison testified that he was agent for the yard in question and that he also looked after the yard (p. 86, ll. 1-10). These are the undisputed facts upon which both plaintiff and defendant rely. Since this is so it was the duty of the trial court to take the case under its control and direct a verdict.

It is established that the trial court has the right to direct a verdict in proper cases. Such a case arises when there are no facts from which

a jury might reasonably find negligence and when the facts are not in dispute. The case at bar is clearly one which falls under this line of decisions, as there is nothing in the entire case from which negligence might reasonably be inferred.

In another case somewhat similar in its facts to the case at bar, a box of merchandise was delivered to an express company to be carried. It was destroyed by fire while in the possession of the express company. There was no direct proof that there was negligence on the part of the express company in causing the fire. The court directed a verdict, appeal was taken, and the direction sustained.

A. J. Michaels et al. vs. Adams Express Co., 71 N. J. L., 41.

The defendant in the last cited case proved that the goods of the plaintiff had been accepted under a stipulation that the carrier should not be held liable for the loss of the goods through fire unless the fire occurred by the carrier's negligence. There was no evidence of negligence on the part of the carrier and therefore the trial court directed a verdict for the defendant.

> "This ruling was clearly correct and disposes finally of the case. Mere non-delivery and proof of loss by fire did not make out the case of the plaintiffs which, in view of the contract of carriage, must rest upon the negligence of the carrier with respect to the loss by fire. Such negligence not appearing in the testimony of either party, the defendant was entitled to judgment for costs against the plaintiff."

A similar clause may be found in the bill of lading controlling our case. There was no evidence that the defendant was negligent in causing the fire, and the only proof was that a fire occurred and the hay was partially destroyed. Therefore, direction of verdict was proper.

Newark Passenger Railroad Co. vs. Fannie Block, 55 N. J. L., 605;
Crue vs. Caldwell, 52 N. J. L., 215;
Baldwin vs. Shannon, 43 N. J. L., 596;
McCormick vs. Standard Oil Co., 60 N. J. L., 243;
Loper vs. Somers, 71 N. J. L., 657;
Crosby vs. Wells, 73 N. J. L., 790.

It must be remembered that the verdict as directed was to decide the issue, namely, whether the defendant was negligent, and therefore liable to the plaintiff for the loss occasioned by the fire. That issue does not embrace the question of the defendant's duty to turn over to the plaintiff the net proceeds of the sale of the damaged hay. The defendant has always stood, and still does stand ready to pay over this sum, to wit, $58.07, upon the presentation by the plaintiff to the defendant of proper credentials as governed by the Interstate Commerce Act and rulings thereon.

The case of *Levine vs. Wolff & Company,* 78 N. J. L., 306, considers the storing of the plaintiff's goods upon the defendant's wagon for two days and two nights. The wagon was kept under a shed belonging to the defendant. The goods were destroyed by fire. This case is distinguishable from the case at bar because it was not contemplated by the parties that the defendant would store the plaintiff's goods on his wagon for a length of time which might be considered unreasonable, and therefore there was a question for the jury as to whether the defendant had given proper care to the goods of the plaintiff. But in the case at bar no such question can arise because the parties are bound by the terms of the contract bill of lading which gives to the defendant the right to store the goods in the car, and it was contemplated by the parties that this car should be kept in the precise freight yard

where it was later destroyed. Therefore, the case above cited is not in point for two reasons: first, the nature of the business in the *Levine* case made it reasonable to expect that he would store the goods in a warehouse and not on his wagon, while in the case at bar the nature of the business is such that goods are usually left in freight cars until the consignees come and take them away; secondly, the rights of the parties in the *Levine* case were not stipulated by contract as they were in the case at bar. Another New Jersey case to be distinguished from the case at bar is *Bobbink & Atkins vs. Erie R. R. Co.,* 82 N. J. L., 547. In delivering the opinion Chancellor Pitney referred to the provision in the bill of lading that property not removed by the consignee within 24 hours after its arrival at destination might be kept in the car at the sole risk of the owner of the property. There was a dispute as to the time of the arrival of the car and whether it had been at its destination for a period of 24 hours and whether the consignee had received arrival notice for a proper period.

In the case of *Burr vs. Adams Express Co.,* 58 Atl., 609, Pitney, J., delivering the opinion, said in part:

> "In our opinion it is clear that the duty of the common carrier is not complete upon the mere arrival of the goods at destination. Delivery to the consignee or to some *place of deposit expressed in the contract,* or implied from the usage of the business is a part of the carrier's duty as such.
>
> * * * * * * *
>
> "Upon the appeal, limited as it is to questions of law only, this court will not reverse a judgment that is based upon a conclusion of the district court upon a mixed question of law and fact if the conclusion is legally inferrable from the facts proved."

Here again the right of the court to direct a

verdict was sustained. In the case at bar the place of deposit was expressed in the contract and was also implied from the usage of business and there is no question but that the carrier was fulfilling his duty in placing the shipment of hay on a sidetrack in a freight yard at the point of destination and contained within the car in which it was shipped.

It was held in the case of *Creighton vs. Chicago I. R. & P. R. Co.,* 94 N. W., 527, that a railroad company is not an insurer against loss or damage that may occur by reason of fire, even though that fire may escape from its own engines, unless there is negligence shown on the part of the rail road company. Here the fire was caused by sparks coming from the defendant's locomotive and plaintiff sued for damages, with the result as outlined above. Surely if a railroad company is not liable for a fire caused by one of its own engines in the absence of positive proof of negligence on the part of that railroad company in not having its engines equipped with proper spark arresters, or for some other reason, then *a fortiori,* when a fire occurs from a cause unknown in a yard where great care is given to protect the freight and no negligence is shown on the part of the railroad company, no recovery could be had and a direction of verdict is proper.

In another case, the charge of the trial court required a carrier to keep a sufficient watch to preserve the goods stored in its depot from loss by fire. Held that the charge imposed too great a burden on the carrier as it was only liable for the exercise of reasonable care and diligence.

L. & N. R. R. Co. vs. Gidley, 24 So., 753.

In another case, *Sanasack vs. Ader et al.,* 77 N. E., 675, it was held that where a carrier does not maintain a warehouse for goods at a place to which the plaintiff has assigned goods to be car-

ried, the carrier has the right to hold the goods as a warehouseman in its cars and on a sidetrack. This is an Illinois case, where there was no freight yard and the sidetrack on which the car was placed was not policed, nor was the car checked many times a day, and still it was held that there was no negligence in so placing the cars. In our case even a stronger reason is present in that it has been shown that the plaintiff was well aware of the precise yard to which this consignment of hay was destined and that the hay was placed on the particular sidetrack on which it was later burned.

In the case of *Davis, et al. vs. Central Vermont R. Co.*, 29 Atl., 313, there was a condition in the bill of lading exempting a carrier from liability for loss by fire except such as occurred through its own negligence. It was held that this was a reasonable condition and bound the consignor even though he neglected to read its terms. It was further held in this case that:

> "If the proximate cause occurs without the fault of the carrier, in other words as to him is accidental, he cannot forecast when or where it may fall upon the goods entrusted to him to carry or whether it would fall upon them at all. It is as likely to fall upon them when being moved with dispatch as when delay occurs. Being unconnected with it he cannot forefend the property entrusted to him against it by the exercise of the utmost prudence and diligence. * * *
>
> "Inasmuch as he cannot forecast that it will occur, nor when, nor where it will occur, and is himself in no respect responsible for the occurrence, he is under no duty to the consignor or owner of the goods in regard to its occurrence."

Judgment for defendant was entered with costs.

The most recent case involving the points of this case is *Southern Railway Company vs. Pres-*

cott, 240 U. S., 632, in which the opinion was delivered by Mr. Justice Hughes. The action was brought to recover for the loss of nine boxes of shoes which were destroyed by fire, while in the possession of the railroad. The usual standard bill of lading having the same or similar conditions as the bill of lading used in the case at bar, was employed. As the bill of lading showed the shipment to be an interstate shipment, the federal decisions controlled. The company was held to be liable as warehousemen only, since the proper notice had been given.

> "Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question. * * * And the question as to the responsibility under the bill of lading is none the less a Federal one because it must be resolved by the application of the general principles of the common law. * * * It was explicitly provided that in case the property was not removed within the specified time it should be kept subject to liability 'as warehouseman only'. The railway company was therefore only liable in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. * * *
>
> "Judgment reversed."

In a leading New York case, *Stewart vs. Stone,* 127 N. Y., 500, 28 N. E., 595, the plaintiff delivered milk at the defendant's factory to be manufactured into cheese and butter and marketed. The cheese factory and its contents were destroyed by fire and the plaintiff brought an action against the owners of this factory for the loss which he sustained, alleging that the fire was occasioned by the defendant's negligence. It was held that this was a bailment and the cause of the loss being fire the burden of proof was on the plaintiff to show negligence. In 3 Am. & Eng.

Ency. of Law, 2nd Ed., p. 751, we find the following citation:

> "But the rule does not go so far as to hold that in all cases the bailee must positively acquit himself of all negligence. If he proves the loss to have occurred from some cause which prima facie exonerated him, it is sufficient. Thus, if he proves that the loss was occasioned by burglary, fire, the falling of the warehouse in which the goods were stored, the death of an animal bailed or the death of bailor to prove the defendant's negligence."

And in Lawson on Bailment, p. 87, the following citation adds to the array of authorities already marshaled, as to the duty the warehouseman owes to the plaintiff:

> "A warehouseman or depositary of goods for hire is bound only for ordinary care and is not liable for a loss arising from accident where he is not in default; and he is not in default when he exercises such due and common diligence in care of goods intrusted to him as the ordinary man bestows in the care of his own. * * * As in all bailments, the nature and value of the property affect the question of ordinary care. The warehouseman is not expected to take the same care of a bag of oats as of a bag of money; of a bale of cotton as of a box of jewelry." * * *

Evidence in an action for the destruction of freight by fire when the fire also destroyed the warehouse of the defendant carrier, wherein it appeared that the liability of the defendant was that of a warehouseman, it was held that the evidence was insufficient to show any negligence or want of care on the part of the defendant. *Chicago, R. I. & P. R. R. Co. vs. Tiner,* 153 Pac., 857. And in *Batell vs. Mercantile Warehouse Co.,* 124 N. Y. S., 125, 139 App. Div., 649, the defendant warehouseman was held not liable for negligence when he failed to provide any burglar alarm system or inside watchman for his warehouse.

On the foregoing facts we submit that the only conclusion to be drawn is that the defendant company used the full degree of care required by law. The bill of lading gave the company (p. 25, ll. 1-15) the right to retain the hay on storage in its cars. It was so held in the car and there kept ready for delivery to the consignee at any and all times. The yard was the usual kind of a freight yard, accessible, but policed, and the cars were checked by a yard checker and inspected by an agent of the company many times each day. There was not a particle of evidence to show that this was an unusually dangerous yard; on the contrary it was shown to be the customary sort of yard in use by all railroads throughout the country (p. 95, ll. 1-10). There was no evidence to show that the yard was not guarded and policed and the cars checked and inspected. There was no evidence to show the cause of the fire. There was no attempt to discredit any of the defendant's witnesses whose testimony it was that brought the facts before the court. The only facts before the court are, therefore, that the car arrived loaded with hay at its proper destination, consigned to the plaintiff who was notified of the arrival of the car but he did not give any disposal orders and did not unload and take away the hay. The defendant held the hay in the car. It was the right of the company under the bill of lading, and it was customary to hold the hay on storage in the car in a freight yard at point of destination. The defendant policed the yard by two men employed solely for that purpose. The yard was further guarded by a yard checker and by the defendant's freight agent. The fire occurred due to causes unknown to either party and the hay was partially destroyed by this fire. The fire not only destroyed the hay belonging to the plaintiff but also the car belonging to the defendant, which

was worth many times more than the hay. The defendant salvaged the hay and offered the plaintiff, and still offers the plaintiff the net amount realized on the sale of the burnt hay, to wit, $58.07.

This point we submit was overlooked in the opinion below where it was declared that the defendant's duty was not carried out "without sufficient guarding to prevent its ignition" by a stranger. This would impose an absolute liability and would make the responsibility of the defendant in its capacity as a warehouseman equally as great as its responsibility as a common carrier where the defendant is an insurer.

In the case of *L. & N. R. Co. vs. Brownlee,* 77 Ky. 590, it was held that in an action against a common carrier for the loss by fire of goods stored in a warehouse an instruction making it the defendant's duty to provide "a safe depository" for the goods, was erroneous since it made the defendant's duty to store the goods in a place free from any danger of any kind whereas the defendant was only bound to use ordinary care and prudence in providing a depository.

Further, in the opinion it was stated "the duty imposed upon the defendant was that of warehousing the hay." It was not the duty of the carrier to warehouse the hay for three reasons, (1) it was physically impossible to warehouse hay in Passaic because there were no warehouses there for this purpose and the carrier is under a duty to maintain the hay ready for delivery to the plaintiff at the point of destination; (2) it was physically impossible to warehouse the hay because even though there were houses there they would not accept hay for storage. This is because of the bulk of hay in proportion to its value and the short time for which it would usually be stored; and further because of the risk of storing

such inflammable material in a warehouse. The law must be interpreted and applied so as not to demand an impossibility. Surely the defendant company was not obliged to construct a fire and burglar-proof warehouse on its premises in which to retain this particular hay in absolute safety, and (3) the plaintiff and defendant are bound by the precise terms of the bill of lading, which states:

> "* * * for loss, damage or delay by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination, * * * the carrier's liability shall be that of warehouseman only."

Further, in the same bill of lading:

> "Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given, may be kept in car * * * subject to the carrier's responsibility as warehouseman only * * *."

The contract under which this hay was shipped was a bill of lading which was made part of the evidence and which covered an interstate shipment. The terms of carriage were stated on this bill of lading and are binding upon both plaintiff and defendant whether or not the plaintiff has knowledge of them, and the plaintiff is further bound by the Interstate Commerce Act and Federal cases construing it. The Interstate Commerce Act makes it clear that where tariffs are filed they are binding upon the railroad and upon the parties who enter into relations with the railroad as a carrier. A part of these tariffs is the uniform bill of lading including the contract or terms on the reverse side of the same. The filing of this bill of lading makes it as though it were a part of the Federal law and like other law the

plaintiff in this case is presumed to have notice of its terms. On this point see *Texas & Pac. R. R. Co. vs. Mugg,* 202 U. S. 242.

The opinion further makes particular mention of "the open railroad yard readily approachable by anyone." It is the nature and purpose of railroad yards to be open to the public, readily accessible at all times, and we refer to evidence on that subject (p. 95, ll. 1-10) given by Mr. Pasman. Railroad freight yards are in general open and are readily accessible and almost without exception and unfenced. This is the usual sort of freight yard and the necessity of having them open and readily accessible is self-evident. Even though this yard was open and readily accessible still it was well policed and guarded and every reasonable precaution taken to safeguard the cars that might be stored therein.

Further, in the opinion (p. 114, ll. 25-40) regarding a question asked to which exception was taken after having been overruled, we wish to call the court's attention to the fact that this question (see p. 50) was asked at a time when the defendant had not yet offered any proof that watchmen were or were not on duty in the yard and that this was in the plaintiff's direct examination. So the rejected testimony could not contradict anything then in evidence since no evidence had been offered. Consequently it was immaterial whether this man saw watchmen or not. We have already argued the question of relevancy and materiality and knowledge of this witness.

Summing up this point we submit that the direction of verdict was proper because under the undisputed facts the only conclusion to be drawn was that proper care in placing and guarding the hay had been exercised by the carrier acting as a warehouseman and that no negligence on the part of the defendant had been proved or could be inferred from anything which is properly before this court.

II.

The judgment of the trial court in directing a verdict for the defendant was not erroneous.

The trial court had the facts in this case and the law as applicable thereto very well in mind, as evidenced by the court's reasoning on the motion for direction of verdict. This in spite of the urgings of the plaintiff's counsel that a watchman should be provided for this car. If it were so that a watchman should have been provided for this car, then it follows that a watchman should be provided for all cars in which delinquent shippers have left merchandise. In this event, all the male inhabitants of the United States would be busy watching freight cars (pp. 106 to 114). The trial court found nothing from which a reasonable man might infer negligence and the plaintiff's counsel failed to offer any reasonable suggestion in his arguments with the court in support of his plea that a direction should not be granted.

The plaintiff seems to be complaining on two grounds. First, that the defendant did not have the right to store the hay in the car. This point has already been argued. The second point that the plaintiff tried to make was that the carrier was negligent in placing the car of hay in that particular yard. Now, if that is so, then the complaint as to the yard must be based on some facts that would show negligence on the part of the defendant in placing the car of hay in that particular yard. No such facts were shown. Furthermore, since the plaintiff knew of the arrival of the car of hay and knew precisely where it was being kept (p. 44, ll. 30-32; p. 29, ll. 25-28), then if he was not satisfied with the way the rail-

road was caring for his consignment of hay he then should have complained at that time. In other words, since he alleges that he was familiar with the yard and the manner of doing business there and conditions in that locality, and that he knew of previous fires, then from his own testimony clearly he was guilty of contributory negligence.

The burden of proof as to the negligence of the defendant, when once it has been shown that the destruction of property was by fire, is upon the plaintiff, as the destruction of property by fire is entirely consistent with ordinary care.

Yazoo & M. V. R. Co. vs. Hughes, 47 So. 662.

In the case of *Lamb vs. Western R. R. Corp.,* 89 Mass., 98, it was held not sufficient to prove that a depot was broken open and goods taken out and stolen since this might have occurred when the defendants were in the exercise of the most careful vigilance and foresight. It was necessary for the plaintiff to go still further and offer some definite evidence of acts of carelessness on the part of the defendants. Again, in *Straus vs. Wilson,* 17 Fed., 701, a leading case which is still followed, it was held that where goods were ready for delivery and were then destroyed by fire that the burden of proof of negligence as to the origin of that fire is on the plaintiff.

It is clear from the above cases that some specific negligence must be shown by the plaintiff as to the defendant in the case at bar. Since the plaintiff failed to show any such negligence, and moreover, since the defendant in this case proved that reasonable care was exercised with respect to this yard, and since no cause for this particular fire was adduced by the testimony given by either side, it was clearly the duty of the trial court to direct a verdict.

It was suggested by plaintiff's counsel that the fire might have been due to incendiarism. Evidently it was intended that the jury be allowed to decide as to whether this was in fact the cause of the fire, but in the case of *Stumpf vs. D. L. & W.*, 76 N. J. L., 153, it was held that where it appears that injuries were occasioned by one of several causes, for one of which the defendant would be responsible but not for the others, the plaintiff must fail if the evidence is not clear that the injury was the result of the cause which would make the defendant responsible. If, under the testimony, it is just as probable that the injury was occasioned by one of the other causes, then the plaintiff cannot recover.

Again in the case of *Miller vs. West Jersey Seashore R. R.*, 79 N. J. L., 499, the Court of Errors and Appeals held:

> "If the plaintiff in an action of negligence fails to prove the facts alleged in his declaration as giving rise to the duty owed to him by the defendant for the breach of which damages are claimed, a non-suit directed at the trial will be sustained on error."

From this decision it follows that unless the complainant alleges what the acts are of which it complains and which are alleged to constitute negligence and subsequently proves these acts to have occurred and that the occurrence of them predicated negligence, then the plaintiff has failed to maintain the essential allegations of his complaint and no suit or direction of verdict should be sustained.

In the case of *Whitworth vs. Erie*, 87 N. Y., 413, the plaintiff shipped from Memphis to Liverpool, a transportation of cotton. The shipment was made under contracts with dispatch companies to carry to Jersey City. The bills of lading contained a clause to the effect that the

carrier should not be liable for loss or damage by fire to the property while in transit or while in deposit. While the cotton was in the freight house in Jersey City, part of it was destroyed by fire. In an action to recover for the loss it was held that the defendant was entitled to the benefit of the restrictive clause in the bill of lading and was not liable unless the fire resulted from its negligence, that it was incumbent on the plaintiff to show that the fire was due to the defendant's negligence. There was no evidence as to the origin of this fire. The evidence, it was held, failed to show any negligence on the part of the defendant, and the trial court was justified in refusing to submit the question to the jury. A case more analogous to the one at bar could hardly be found, and, as in that case cited, so in the case at bar, since there was no evidence as to the origin of the fire and nothing to show that any acts or omissions on the part of the defendant were negligent, the trial court was justified in directing a verdict.

On the point that the burden of proving negligence of the carrier acting as warehouseman is upon the plaintiff, see *Lamb vs. Camden & A. R. R. Transportation Co.*, 46 N. Y. 271;

East Tennessee V. & G. R. Co. vs. Kelly, 91 Tenn. 704;
Chicago, R. I. & P. R. Co. vs. Kendall, 72 Ill. App., 105;
Jackson vs. Sacramento Valley R. Co., 23 Cal., 269;
Wilson vs. So. Pac. R. Co., 62 Cal., 164.

There is no evidence in this case on the part of either plaintiff or defendant as to the actual cause of the fire. However, it is reasonable to assume that a railroad company will afford that degree of protection to its own property which, in the nature of events, is deemed sufficient to protect it. The fire which partly destroyed the plaintiff's

hay completely destroyed the defendant's box car. These cars are valued in the neighborhood of $2,000. Had any cause been shown for the fire, then it might be a question of fact as to whether there was negligence on the part of the defendant as to that cause; but when there is no knowledge on the part of either party as to the cause of the fire, and when that fire not only destroyed $250 worth of hay belonging to the plaintiff, but also a $2,000 box car belonging to the defendant, it hardly seems necessary to urge the point that reasonable care, or that that degree of care which an ordinary man of reasonable prudence would give to his own property had in fact been given in the case at bar. *Tallman v. Nelson,* 125 S. W., 1181. In the case of *Gregory v. American Thread Co.,* 187 Mass., 239, 72 N. E., 962, an employe of the Thread Company was operating a winding machine. She was injured because the machine started of itself after she had stopped it with the proper lever. On the question of negligence of the defendant, it was shown that the superintendent had said to the operator on that very day that he had repaired the machine. It was held that evidence that eleven weeks before when the same machine had so started the superintendent had taken it apart and made an attempt to repair it, which attempt the plaintiff contends was ineffectual, may, in the discretion of the court, be excluded for remoteness. The analogy between this case and the case at bar is obviously applicable to the testimony offered by plaintiff's counsel as to previous fires.

In the case of *King v. N. B. A. & N. Y. Steamboat Co.,* 73 N. Y. S., 999, the consignee of goods allowed them to remain in the carrier's warehouse three days. At the expiration of this period the goods were stolen from the warehouse without

any fault on the part of the carrier. It was held that the consignee could not recover their value from the carrier.

There is a line of cases as to similar facts, dealing with defective crossings or portions of streets or railroad tracks. Such a case is *Olcott v. Public Service Corporation,* 74 Atl., 499, decided by the Court of Errors and Appeals. In these cases the presence of a defect in the sidewalk or in the street or on the railroad track might have been ascertained by inspection previous to the time it did the damage. It does not follow that a fire in a car of hay may be ascertained by inspection before any damage has been done by that fire so that these cases are clearly distinguished from the case at bar.

There is another line of cases in which one of the early decisions is *Cass v. Boston etc. R. Co.,* 14 Allen (Mass.) 448, which hold that where carriers use the same care with regard to certain goods as is given similar goods by other carriers, that this is strong evidence of reasonable care. This doctrine is found again in 40 Cyc., 429, paragraph H; 40 Cyc. p. 431, par. 2. See also *Laing v. Boston & Albany R. R. Co.,* 112 Mass., 455; *Morris & Essex R. Co. v. Ayres,* 29 N. J. L., 393.

As in the above decisions, so in the case at bar, the defendant provided a storage place such as is customary to provide. The defendant's duty was to keep the hay in a place convenient for the plaintiff so that he might unload it at any time. As a warehouseman the defendant was not required to store the hay in a place free from all danger. It did not owe such a high degree of care to the hay as it did while responsible as a common carrier. Defendant was no longer absolutely responsible. The plaintiff himself contemplated that the car was to be kept in that particular yard

where it was at the time of the fire, as shown by the fact that he sent a sampler there to test the hay (p. 51, ll. 15-20; p. 52, ll. 1-5). For the above reasons the hay could not have been stored in a warehouse. Further than this, there was no warehouse in the vicinity where hay might have been stored (p. 64, ll. 25-35; p. 86, ll. 15-20). The warehouses in that locality were for the storage of small articles and less than carload shipments.

III.

There was no error in overruling questions as to watchmen.

We shall not consider questions asked, which were ruled out, and on which no exception was taken, because these were clearly not evidence before the court. It is essential that some objection be noted on the record by the counsel who is to take advantage of it. On this point there are two recent cases in New Jersey.

Kargman vs. Carlo, 85 N. J. L., 632.
Clark vs. Hudson & Manhattan Railroad Co., 89 N. J. L., 708.

The second witness for the plaintiff was Morris Levine, who testified that he was in the feed business in Passaic (p. 45, ll. 30-35) and that he frequently used the freight yard in question as a receiving point (p. 45, ll. 35-40). He was asked if he ever saw a watchman in the yard (p. 50, ll. 10-20) and upon objection being sustained his counsel took exception. Exception was again taken to an overruled question concerning the discussion of the condition of the yard with Mr. Paulison, agent of the railroad (p. 50, ll. 20-30). Exception was also taken to an overruled question concerning the reputation of the freight yard in the community (p. 50, ll. 30-40). Supposing

for the sake of argument that Mr. Levine had testified that he had never seen a watchman in the freight yard. Mr. Levine did not show that he was acquainted with the employes in the yard and he could not have distinguished without personal acquaintance and special knowledge which men present in the yard were watchmen and which men were employes of the railroad company and which men were consignees or consignors of freight coming into the yard and which men were licensees and which men were trespassers. Mr. Levine was obviously incompetent to testify on the question as to whether he ever saw a watchman in the yard or not, and the objection was properly sustained (p. 50, ll. 10-20).

The second exception was taken to a question concerning a discussion with the agent Paulison as to the condition of the yard (p. 50, ll. 20-30). Supposing for the sake of argument that Mr. Levine had discussed the condition of that yard with the agent. The question was improper because it was suggestive and leading. It was also improper because Mr. Paulison is the agent of the company to receive and to distribute freight and any discussion that he might have had with Mr. Levine concerning the condition of the yard would not have been relevant or material, it being outside the scope of his employment. The question was improper on the further ground that the "condition of the yard" might have meant any one of a number of things, and consequently was too general. For these reasons it was proper to exclude the question.

Supposing, thirdly, for the sake of argument that Mr. Levine had been allowed to answer the question to which objection was noted and exception taken, namely, "Do you know what the reputation of that yard is in the community?" This question was properly excluded because it was

too general. It was irrelevant to the issue and was further improper since it would first be necessary to show that this fire was the proximate result of lack of proper precautions on the part of the railroad before any evidence as to the reputation of the yard would be material or relevant. We urge further that a railroad freight yard is not such an entity as may enjoy a "reputation," since the term "reputation" must necessarily refer to a person. See *Bouvier's Law Dictionary.*

Mr. Levine's testimony concluded in stating the value of the hay in question as determined by his inspection except for one further question (p. 54, ll. 30-40). This question was objected to, objection sustained and exception taken. "Was there anything to obstruct any person that was walking along First Street from walking right into that yard and setting fire to that car?" Mr. Levine was not a person who could answer this question from his own personal knowledge for the reasons stated *supra.* Further, this question was immaterial to the issue since it had not been shown that this car was set on fire by some person walking into the yard from First Street. This question was further objectionable on the ground that to answer it would call for a conclusion on the part of the witnesses. If it is argued that an affirmative answer to this question would in any wise predicate negligence on the part of the defendant, then we submit as a self-evident proposition that in every case of fire in a dwelling house, whether arising within the house or without, that the owner could not recover insurance unless he had provided watchmen both within and without the house to guard against such a fire, for in the absence of such care he would be guilty of contributory negligence.

IV.

The trial court did not err in excluding proof of the occurrence of other cases of burning of hay stored in the defendant's yard.

First consider the occasion of the offering of all such testimony by the plaintiff and in which consideration no testimony offered to which objection was made and sustained and no exception taken will be mentioned, because it is not before the court as evidence and may not be urged now since no objection was taken at the trial to the ruling of the trial court upon those questions.

> "Q. Do you know of your own knowledge? A. Yes, I do" (p. 44, ll. 30-35).

This question has no meaning because the question from which it would draw its meaning, if it is to be given any, was successfully objected to and this gives the original question the status of never having been asked. Consequently the succeeding question, as quoted above, is without meaning.

> "Q. During the time that you were in that yard, unloading, which you say was about every day prior to November 6, 1915, did you ever see or know of a watchman being in the yard?" (p. 50, ll. 10-15).

Cass v. Boston etc. R. Co., 14 Allen (Mass.), 448; 40 Cyc., 429 Par. H. 40 Cyc., 431, Par. 2;
Laing v. B. & Albany R., 112 Mass., 455;
M. & E. R. Co. v. Ayres, 29 N. J. L., 393.

The answer would be of no consequence; Levine was not a proper person to answer it, and even if he answered that he had not seen any watchman it would not in anywise be proof that watchmen were not there (see argument supra).

"Q. Did you ever know of a fire in that yard while you were a watchman there? A. No, sir (p. 70, ll. 20-25).

"Q. Did you ever see any other cars in the yard after they had been burned? A. No, sir (p. 71, ll. 30-35).

"Q. Did you ever catch anyone in that yard stealing anything or burning anything? A. No, I did not.

"Q. Do you know of any thefts which occurred in that yard? A. No, I do not.

"Q. Do you know of any fires which ever occurred in that yard while you were sergeant of police? A. No, not for the time I was there (p. 75, ll. 30-40).

"Q. The question was as to whether during 1915 while he was protecting that yard he knew of any thefts occurring there * * *. A. No, I did not (p. 78, ll. 5-15).

"Q. Do you know whether any fires occurred or any other cars of hay were burned in that yard? A. Not at the time I was acting sergeant.

"Q. You don't know—is that right? A. Only just that one car (p. 78, ll. 20-25).

"Q. You went around the yard; went through the yard three times a day? Were not other cars burned in that yard? A. Yes, sir (p. 84, ll. 1-10).

"Q. You knew of robberies and other thefts taking place in that yard, did you not? A. No, sir.

"Q. You never heard of such a thing? A. No, sir (p. 85, ll. 15-20).

"Q. Isn't it a fact that a number of fires have occurred and cars of hay have been burned in that yard during the past two years?" (p. 88, ll. 15-20).

This question was objected to on the ground that no proper ground was laid for the question; that this witness must have been shown some police protection before he could be asked the question. To this objection exception was taken.

That is all of the evidence in the case as to previous fires, and we contend that this evidence

as to previous fires was properly excluded by the trial court.

It seems hardly necessary to urge that evidence concerning depredations in a freight yard should be excluded when the case at bar concerns a certain specific fire.

As to the exclusion of evidence of previous fires, we are here concerned with the doctrine of admission of evidence of similar facts. This doctrine is expressed in Chase's Stephen's Digest of the Law of Evidence, 2nd ed., p. 34. The doctrine of similar facts is based upon the theory that when one set of facts give rise to a certain condition that it is relevant to show that another set of similar facts would at least by inference give rise to a similar condition. In order to invoke this doctrine to the case at bar, however it would have been necessary for the plaintiff to show that absence of watchmen gave rise to previous fires and that absence of watchmen at the time of this fire was also the proximate cause, but the plaintiff failed completely, since it did not show that there was any single occasion on which there were no watchmen.

In the case of *Diamond Black Coal Co. v. Edmonson,* 43 N. E., 342 (Ind.), the appellee was injured while descending into the appellant's coal mine by reason of the breaking of the hoisting cable and the consequent fall of the cage in which he was riding. Defects in and unfitness of both the rope and the safety catches are urged as grounds of recovery, knowledge of and negligence with reference to both being alleged against the appellant. It was held in this case that it was error to admit testimony of the state mining inspector that on a prior occasion he was at the defendant's mine and found the safety catches removed from the cages and that he notified the de-

fendant to put them on again. In *Mier v. Phillips Fuel Co.,* 107 N. W., 621, wherein a mining Company was sued for the removal of coal from beneath the plaintiff's adjoining land, evidence tending to show that the defendant had taken coal from beneath other lands in the neighborhood was inadmissible. In 17 Cyc., p. 283, par. C, under the heading of similar occurrences, we find that evidence of other facts or occurrences may be admitted in the course of a wise exercise of the administrative discretion of the trial court. In another case against the railroad company for killing a mule, it was held to be error to permit a witness to testify that the same railroad killed a great many mules and cows in the same way, and that they killed a mule belonging to the witness very near where the mule in question had been struck. *Central of Georgia Ry. v. Ross,* 32 S. E., 904. And in the case of *N. & W. M. Ry. Co. v. Briggs,* 48 S. E., 521, the refusal of the trial court to permit a witness to testify with reference to fires in the same vicinity was a proper refusal.

In introducing any evidence as to similar facts there must be preparation made before such evidence may be introduced. In the case at bar, there was no such preparation. There was no evidence to show that other fires had occurred through lack of competent care and that the care was lacking in this case from which the conclusion might be drawn that this lack of care having caused other fires, a similar lack of care might have caused this fire. In fact no such preparation was even offered. And there must have been the further preparation to show that precisely the same conditions were present in previously occurring fires as were present upon the occurrence of the fire which caused the damage in the case at bar. For these reasons the only conclusion to be drawn is that the exclusion of evidence as to

previous fires by the trial court in the case at bar was proper.

CONCLUSION.

We respectfully submit that the judgment of the Supreme Court should be reversed and the judgment of the trial court should be affirmed with costs.

COLLINS & CORBIN,
Attorneys for Erie Railroad Company.

GEORGE S. HOBART,
Of Counsel.

Telephone 1697 Worth THE WEIBEZAHL PRINT Elm St., N. Y.
—1917—