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TESTIMONY.

EXHIBITS.

Notice of Appeal.

(Filed, Jan. 4, 1916.)

New Jersey Court of Errors and Appeals

GEORGE SPROTTE, *Respondent,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Appellant.*	On Contract.

To King & Vogt,
Attorneys of Respondent.

Gentlemen:

YOU WILL PLEASE TO TAKE NOTICE that the above appellant, The Delaware, Lackawanna and Western Railroad Company, appeals to the Court of Errors and Appeals for the State of New Jersey from the whole and every part of the judgment in the above entitled cause upon the following grounds:

1. Because the Supreme Court affirmed the judgment of the District Court for the First Judicial District of the County of Morris.

2. Because the Supreme Court held that the clause in the bill of lading that stated the property was in apparent good order except as noted (contents and condition of packages unknown) was prima facie evidence of the fact that the goods were apparently in good condition when

received and that the burden was on the common carrier, this appellant, to show the contrary.

3. Because the Court held it was not error to admit the contract with the Los Angeles Moving Company, the initial shipping company, and that the admission of said document did not injure the appellant.

4. Because the Supreme Court held that there was no error in refusing to allow the defendant appellant's train conductor to testify that nothing unusual happened to the car between New York and Dover and that said testimony would have been immaterial and proved nothing.

5. Because the Supreme Court held that the District Court was without error in refusing to grant the defendant appellant's motion for a new suit.

6. Because the Supreme Court held that the District Court did not commit error in refusing to direct a verdict or give judgment for the defendant appellant because there was no proof that the goods were damaged while in the defendant appellant's possession.

Yours truly,

FREDERIC B. SCOTT,
Attorney of Appellant.

Notice of Appeal.

(Filed, Feb. 15, 1915.)

SUPREME COURT.

OF MORRIS COUNTY.

GEORGE SPROTTE, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	On Contract.

King and Vogt,
Attorneys of Plaintiff.

Gentlemen:

TAKE NOTICE that the defendant, the Delaware, Lackawanna and Western Railroad Company, hereby appeals to the New Jersey Supreme Court, from the judgment of the District Court for the First Judicial District of Morris County rendered in the above stated action on the 4th day of February, 1916.

FREDERIC B. SCOTT,
Attorney of Defendant.

Specifications of Error.

(Filed, Feb. 19, 1915.)

NEW JERSEY SUPREME COURT.

MRS. GEORGE SPROTTE,
Plaintiff-Respondent,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant-Appellant.

Specifications and Determinations and Directions of Error.

The above appellant hereby within ten days from the expiration of the time limited by the statute for the giving of its notice of appeal in the above case herewith files its specifications of the determinations and directions of the District Court with respect to which it is dissatisfied in point of law.

1. Because the Court refused to non-suit the plaintiff as and when requested so to do for the reasons set forth and shown in the record of this case.

2. Because the Court improperly received in evidence Plaintiff's Exhibit P-1, same being the bill of lading or shipping receipt of the Trans-Continental Freight Company.

3. Because the Court improperly received in evidence Plaintiff's Exhibit P-2, same being receipted bill of the Trans-Continental Freight Company.

4. Because the Court refused to allow the defendant to ask of the witness Osman W. Fitzgerald the following question:

"Q. Look at your record Mr. Fitzgerald, will you and tell us whether anything unusual occurred in the handling and movement of the train in which Delaware, Lackawanna and Western Railroad Car Number 31,482 was handled by you from Hoboken to Dover in April 23, 1913, and if so what it was?"

5. The trial court erred in allowing the plaintiff to ask the witness Mrs. Sprotte on rebuttal the following questions:

"Q. You go right down the list when you see the figures opposite the head of damage? A. The commode, you mean?

"Q. Yes? A. It was wrecked."

6. The trial court erred in that it allowed the following questions to be asked of the witness Mrs. Sprotte:

"Q. Was the piano boxed and crated by you in California the article delivered to you at Dover A. Yes.

"Q. In all respects? A. It was scratched and all bruised up."

7. The trial court erred in that he gave a judgment for the plaintiff when under all the evidence and the law he should have given judgment for the defendant.

FREDERIC B. SCOTT,
Attorney of Defendant-Appellant.

Summons.

MORRIS COUNTY, SS:

The state of New Jersey. To any Constable in said County, or to the Sergeant-at-Arms of the District Court of the First Judicial District of the County of Morris: Summon Delaware, Lackawanna and Western Railroad Company, a corporation, to appear before the District Court of the First Judicial District of the County of Morris, to be held at the Court House, Washington Street (entrance on Court Street), in the Town of Morristown, on the 5th day of November, 1914 at ten o'clock in the forenoon to answer unto Mrs. George Sprotte, in an action upon Contract to the damage of the plaintiff, Five Hundred Dollars. Hereof fail not.

WITNESS, Oliver K. Day, Esq., Judge of said Court, at Morristown aforesaid, the 29th day of October, in the year One Thousand Nine Hundred and Fourteen.

HARRY G. ZWENGER,
Clerk.

State of Demand.

DISTRICT COURT FOR FIRST JUDICIAL DISTRICT.
MORRIS COUNTY.

MRS. GEORGE SPROTTE,
Plaintiff,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

On Contract.

The plaintiff demands of the defendant Five Hundred Dollars. For that whereas heretofore to wit; on or about the twenty-second day of April, one thousand nine hundred and thirteen, the defendant being a common carrier of goods and merchandise did undertake and contract for a good and valuable consideration to carry and transfer for the plaintiff certain goods and other property of the plaintiff from New York City to Dover in this County; for which goods so delivered to this defendant by the plaintiff or her agents, the said defendant gave its usual receipt therefore, that when said goods arrived at and were delivered in Dover they were in a greatly damaged and destroyed condition, notwithstanding that when they were delivered to the defendant they were in apparent good order, by reason whereof the plaintiff has suffered damages in the sum of Five hundred dollars and thereupon brings suit.

KING & VOGT,
Attorneys for Plaintiff.

Transcript of Record.

DISTRICT COURT—FIRST JUDICIAL DISTRICT.

MORRIS COUNTY.

Before:

JOSHUA R. SALMON, ESQ., Judge.

State of New Jersey, } ss.:
Morris County. }

MRS. GEORGE SPROTTE,

Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Defendant.

On Contract. Transcript, &c.

King & Vogt, Plaintiff's Attorneys.
Frederic B. Scott, Defendant's Attorneys.

Costs.	Al.
Summons, copy,	$1.50
Service,	.60
Trial fee,	1.50
Attorney's fees,	8.45
	$12.05

The summons was issued tested October 29, 1914, at 10 o'clock in the forenoon at the Court Room of said Court. The Constable returned the summons as follows:

I served the within summons October 31, 1914, on F. Wainright, he being the agent of said D. L. & W. R. R. Co., by reading it to him and giving him a copy thereof.

GEORGE W. PIERSON,
Constable.

Plaintiff's demand was filed on December 3, A. D. 1915. Said cause being adjourned from time to time until December 3, 1915.

The Judge of said Court requested Joshua R. Salmon, Judge of the Common Pleas Court for the County of Morris, to preside and conduct the business of said Court, and said cause was tried before him on December 3, A. D. 1915.

The plaintiff and defendant appeared for the trial of said cause and it was proceeded with as follows:

Upon application of the defendant, the Court appointed Frederic Cobbett stenographer, who was duly sworn.

On the part of the plaintiff the following witnesses were sworn: Mrs. George Sprotte; John Butler.

On the part of the defendant, the following witnesses were sworn, and testified: Mrs. George Sprotte; William H. T. Cocking; Osman W. Fitzgerald.

The following exhibits were offered and received in evidence: Agreement, Exhibit P-1; Receipt, Exhibit P-2; Freight Bill, Exhibit P-3; Bill of Lading, Exhibit P-4.

The Trial Court, after due deliberation, made the following findings of fact:

Findings.

DISTRICT COURT FOR FIRST JUDICIAL DISTRICT.

MORRIS COUNTY.

MRS. GEORGE SPROTTE,
Plaintiff,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a Corporation,
Defendant.
On Contract.

Messrs. King & Vogt (by Mr. Robert H. Schenck) attorney of Plaintiff.

Mr. Frederic B. Scott, Attorney of Defendant.

This case was tried before Judge Joshua R. Salmon, (sitting for Judge Joseph Hinchman, on request under the Statute) without a jury in said District Court, on December 3rd, 1915.

After hearing the evidence and counsel for plaintiff and defendants, the Court finds:

The goods in question were shipped on or about March 8, 1913, from Los Angeles to New York, with total freight charges paid from Los Angeles to Dover, N. J.; that Fidelity Storage and Moving Co., a corporation with its principal office in Los Angeles, California, was the forwarding agent of the shipper, the plaintiff herein; that said agents were authorized by said shipper to make terms with the carriers over whose lines said goods were to be transported and further agreed on arrival of said goods at New York to undertake to obtain a bill of lading for said goods from New York and agreed to forward said goods to

a point or place unnamed, but impliedly to Dover, N. J.; the notice in writing appears on the receipt of said agents as follows: "For delivery of this shipment, make application in person or by letter to Trans-Continental Frt. Co., 25 Broadway." That receipt was given said shipper by Fidelity Storage and Moving Co., dated March 8, 1913, showing payment of total charges agreeing in amount with those indicated upon agreement (Exhibit No. 1) between said agents and said shipper, which receipt is (Exhibit No. 2); that freight bill was issued by defendant to plaintiff for said goods and marked (Exhibit 3) payment of which freight bill is receipted; that bill of lading was issued by defendant showing receipt of said goods, the property described in said bill of lading being in apparent good order which defendant agreed thereby to carry to its usual place of delivery at destination named in said bill of lading as Dover, N. J., according to all of the conditions of said bill of lading, the person to whom said goods were consigned being the plaintiff herein.

The Court finds, under all of the circumstances of the case, the defendant to be the initial carrier from New York to Dover; that the covered box or shirt waist box mentioned was not damaged or injured while in the custody and control of the defendants; that the goods in the bill of lading mentioned and in question in this suit, excepting the said covered box, or shirt waist box, were received by the defendant in good order; that they were delivered by defendant to plaintiff in a damaged and injured condition.

The Court finds for the plaintiff and against the defendant and assesses the damages at the sum of One hundred and sixty-nine dollars and five cents, besides costs of suit.

JOSHUA R. SALMON,
Judge.

Judgment.

The evidence being closed the Court rendered judgment in favor of the plaintiff, and against the defendant, in the sum of one hundred and sixty-nine dollars and five cents damages and twelve dollars and five cents costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of One hundred and sixty-nine dollars and five cents with costs of twelve dollars and five cents.

Certificate.

I, Harry G. Zwenger, Clerk of the District Court for the First Judicial District for Morris County, Joseph Hinchman, Esq., Judge, having requested the Hon. Joshua R. Salmon, Common Pleas Judge of Morris County, to preside and hear said cause do hereby certify that the following is a true copy of the summons, state of demand, and record of the judgment and notice of appeal filed of said Court.

In witness whereof, I do set my hand as the Clerk of said Court and affix the seal of the said Court this 19th day of February, 1916.

Harry G. Zwenger,
Clerk.

State of Case.

DISTRICT COURT FOR FIRST JUDICIAL DISTRICT.
MORRIS COUNTY.

MRS. GEORGE SPROTTE,
Plaintiff
v.
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a corporation,
Defendant.
Transcript.

Testimony of witnesses taken in the above stated matter at the Court House in Morristown, New Jersey, before Honorable Joshua R. Salmon, Judge, etc., on Friday, December 3, 1915 by Frederick B. Cobbett, a stenographer, previously sworn to take and transcribe the same to the best of his knowledge and skill, honestly and impartially, in the presence of Robert H. Schenck, Esquire, of the firm of King & Vogt, Attorneys of the plaintiff and of Frederic B. Scott, Esquire, the attorney of the defendant.

Stipulation.

It is hereby stipulated and agreed by the attorneys of the respective parties that if the Court should find as a matter of fact, that the total loss and damage claimed to the shipment in question occurred through and by the negligence of the defendant then it is agreed and stipulated that the total loss as per its limited liability is $249.55, and further that if the Court should find as a matter of fact that a certain box of personal effects, known as a covered box, a shirt waist box,

Number 292 valued at $150 was not damaged through the negligence of the defendant, then the defendant's total loss according to its limited liability is reduced making its total loss amount to $169.05.

THE COURT: I take it there is a question of fact here to be determined, as to the amount of damage.

MR. SCOTT: Yes, if the whole shipment was damaged by us as claimed, then if the Court find that, as a matter of fact, the total damage is $249.55 and if we damaged everything except this box then our total liability is $169.05, so that it is a question of fact whether the proof will satisfy the Court where the damage took place.

MR. SCHENCK: Our only objection I think there to the stipulation is this, he says there, "through the negligence of the company." It don't make any difference to us whether it was negligence or wilful intent; it is up to the railroad company while they have them in their control.

THE COURT: If they admit negligence that is not prejudicial to you.

MR. SCHENCK: We want you to find that the railroad is responsible for the damage, and we don't care whether you find that it was through their negligence, or wilful neglect.

MR. SCOTT: I cannot stipulate myself out of Court. I stipulate that if the Court find that we damaged the goods, we are liable.

(After argument.)

MR. SCHENCK: I offer in evidence the bill of lading or shipping receipt given to us or given to the plaintiff by the Trans-Continen-

tal Freight Company, and now marked P-1 for the plaintiff. I also offer in evidence the receipted bill given the plaintiff by the Trans-Continental Freight Company.

MR. SCOTT: I admit that as to its form and only object to it on account of its immateriality.

MR. SCHENCK: I also offer the freight bill and that is receipted too of the D. L. & W. R. R. Company, and also its bill of lading delivered by it to the Trans-Continental Freight Company for the goods in question. These exhibits are marked Exhibits P-2, P-3 and P-4. I think that proves our prima facie case. You see the delivery of the goods to the railroad, and our damages, as between the time when we delivered them and the time when we received them. I think that is the plaintiff's prima facie case.

MR. SCOTT: I think under these circumstances that I should ask the Court for a non-suit on the ground that it appears that this is a shipment and moving from Los Angeles, California, on March 8th, 1913, by the plaintiff in this suit, and that the same was carted by the Trans-Continental Freight Company to some place not known or designated; that there is no proof that the Los Angeles shipment in question was the shipment for which the bill of lading issued by the defendant company Exhibit P-4 is the identical shipment and the further fact that under the defendant's bill of lading P-4 it is apparent that the majority or a larger part of the items described in that bill of lading are boxed, crated or covered and that the provision in the defendant's bill of lading that the property described below in apparent good order

except as noted, contents and condition of packages and contents unknown is not sufficient proof of the condition of the goods when delivered to the carrier defendant in this suit; and that the bill of lading under the cases and the terms of the bill of lading is such and has been so construed as not to concede that the goods when delivered were other than when they had been received.

MRS. GEORGE SPROTTE, being duly sworn for the defendant according to law testifies as follows:

MR. SCOTT:

Q. What is your first name? A. Julia.

Q. Mrs. Sprotte, you are the plaintiff in this case? A. I am.

Q. Among the goods which you claim to have shipped from Los Angeles to Dover, and which is part of the subject in this suit was a covered box, known as "shirt waist box"? A. Yes.

Q. And the box was valued at one hundred and fifty dollars? A. Yes.

Q. Do you remember when you received the main part of this shipment at Dover? A. Yes.

Q. Will you tell us what day was that? A. I cannot give the date, I think it was about the 28th day of April, 1913.

THE COURT: 1913?

WITNESS: Yes, 1913.

Q. At that time when you received the main shipment did you receive this shirt waist box? A. No.

Q. How long after you received that main shipment did you receive the shirt waist box, I mean approximately, a week or a month? A. Probably two months, somewhere around that, I cannot give the exact time.

Q. Before you received this shirt waist box did you see the shirt waist box any place? A. About two months after; I saw it in New York.

Q. Where did you see it? A. Trans-Continental freight office.

Q. Where was that? A. I don't know the streets, down at their office.

Q. Up town? A. I don't know.

Q. And who was there with you at that time? A. Mrs. Pierson and the Trans-Continental agent; one of the office men.

Q. You say it is up town? A. I don't know where their office is.

Q. As far up as Twenty-third Street? A. You will have to ask that from the company; I don't know where their office is.

Q. At that time did you examine that box? A. I did.

Q. What was the condition of it? A. It was opened when I got there.

Q. Did you look into it? A. I could not help it; it was opened.

Q. It was open? A. It was open; I don't know when the first was they opened it.

Q. What was the condition of it? A. The contents were gone.

Q. Have anything in it? A. Very little.

Q. With relation to what you put in that box when you first shipped it at Los Angeles, what have you to say as to the contents of the box? A. The contents of the box were in first-class condition.

Q. When you shipped it? A. Yes.

Q. When you saw it at the Trans-Continental office what was the condition of it? A. There was nothing there to tell the condition of it.

Q. Do you mean to tell the Court there was nothing in the box? A. Very few things.

Q. With relation to the things you found in the box at the time you saw it at the Trans-Continental freight office in New York City were they the same things in the box then as you shipped in the box out at Los Angeles? A. Some of them, and they were mussed up by handling.

Q. Were there any other goods in the box at that time appearing in the main shipment which you had not placed in the box at Los Angeles when you packed it? A. I don't remember.

Q. You know what you put in that box? A. As near as I can remember.

Q. What I desire to have the court informed about is whether some of the goods you found in the box when you examined it at the Trans-Continental freight office in New York were things that belonged to you in the original shipment, but which you had not put in the box then? A. I cannot say to that.

Q. When you received this box, Mrs. Sprotte, at Dover, what have you to say as to the condition of the box with relation to its condition when you saw it then in the Trans-Continental? A. They tied it up at the office of the Trans-Continental and shipped it out.

Q. When you received the box was it in the same condition as when you saw it in the Trans-Continental, except tied up? A. Tied up, yes.

Q. In the packing of this box at Los Angeles, you did it yourself? A. Yes, I had the freight agent, a gentleman who helped me, he was there to inspect it, and I did it.

Q. And looking at this Exhibit P-1 can you point out on that anything that was not crated, or packed, or done up in a bundle, or I may assist you by reading them off.

MR. SCHENCK: Can I interrupt; why not

just direct her attention to the items that make up our elements of damage and in that way save going over the whole list; because these things that we don't claim damage for it is not necessary to concern ourselves about those.

MR. SCOTT: Another question; Mrs. Sprotte you shipped some chairs in that shipment, were they crated?

A. No, they were not, they were two, tied together.

Q. You shipped a willow rocker, was that crated? A. No, it was wrapped up with excelsior.

Q. That was wrapped up with excelsior? A. Yes; that is the upper part where the roll is.

Q. With reference to the other articles were they crated? A. No.

Q. With reference to the high chair that was crated? A. No.

Q. There was a sewing machine, was that crated? A. Yes.

Q. There was a stool, was that crated? A. No

Q. There was a stand, was that crated? A. No.

Q. There was a table base, was that crated? A. No.

Q. The piano, was that boxed? A. That was boxed by the Trans-Continental people at my residence.

Q. And the chiffonier, was that crated? A. No

Q. Did you ship that without any wrapping? A. It was wrapped with burlap around the top and side.

Q. And the dresser was burlapped? A. Yes, to keep it from scraping.

Q. Was all the furniture burlapped? A. Just with the paper, to tie it around, not all the fur-

niture, just the dresser. The desk was crated; that came as a bundle of kindling wood.

MR. SCOTT: I ask that that be stricken out as not responsive.

THE COURT: The question was, "was it wrapped"?

MR. SCOTT: Yes.

THE COURT: Eliminate that latter part.

MR. SCOTT: I know the Court will disregard it, but I want the record in proper shape.

Q. This washing machine, was that wrapped? A. No, that came just as it was.

Q. Mrs. Pierson, she was not out in Los Angeles with you? A. No.

BY MR. SCHENCK:

Q. How was the oil heater? A. Tied up with a tag.

Q. There was a B. B. stand? A. Bamboo stand.

Q. How was that? A. Same way.

Q. And the bundle of tools? A. That was just tied up. It was missing, the tools all gone tied up with a tag.

Q. The whole set? A. They was done up in burlap.

William H. T. Cocking—for Defendant—Direct.

WILLIAM H. T. COCKING, of full age, being duly sworn on the part of the defendant, testifies as follows:

BY MR. SCOTT:

Q. You are the freight agent in the Lackawanna freight office at Dover? A. Yes.

Q. You were the freight agent there in 1913? A. Yes, 1913.

Q. Do you remember of this shipment of goods to Mrs. Sprotte? A. I do.

Q. Will you tell the court what car they arrived in. I note that you are going to look at a paper, what paper is that? A. That is a record of the damage to the goods which arrived in a certain car.

Q. Can you without looking at the paper tell us the number of the car? A. I cannot.

Q. Did you make that record yourself? A. That is my handwriting, the record I have here.

Q. Will you tell us the number of the car, using that paper to refresh your recollection as to the number of the car? A. I will, yes.

Q. When did you make that record? A. 25th day of April, 1913. Car Number 31,482, D. L. & W. R. R. Co.

Q. How long have you been the agent of the Lackawanna Railroad? A. Since sometime in November, 1900. I think the 28th of November.

Q. Are you familiar with the route of the Lackawanna Railroad? A. I am.

Q. Will you tell the Court the line of the Lackawanna Railroad. A. From Buffalo to Hoboken, D. L. & W. R. R.

Q. That is all.

MR. SCHENCK: No cross-examination.

OSMAN W. FITZGERALD, a witness produced on the part of the defendant, being duly sworn, testifies as follows:

BY MR. SCOTT:

Q. What was your position in 1913? A. Freight conductor.

Q. You ran from what point to what pomt? A. In the whole year or what date?

Q. In the early part of the year? A. I ran from Elmira to Hoboken, between those points; Scranton to Elmira, Scranton to Elmira and return.

Q. Have you the records of handling D. L. & W. R. R. Car Number 31,482? A. What date?

Q. Have you a record of the date of the car in or around April 20th? A. The twenty-third.

Q. When did you make that record? A. On the twenty-third.

Q. Is that record in your hand writing? A. Yes.

Q Without looking at the records could you tell anything about that car at that time? A. No, sir.

Q. Will you tell us what the record is? A. My record is a train book that we have to keep and put down the number of every car down; the place we pick it up and the place we drop it and whether the car is sealed or unsealed. My record is 31,482 taken from Hoboken and left at Dover.

Q. When do you take the numbers of the car? A. While the train is being made up or before I get the bills. I have to take the number before I can get the way bills.

Q. You said that you took the car at what point? A. At Hoboken.

Q. Where did you deliver it? A. To Dover.

Q. Do you know what the date of your delivery

at Dover was? A. The same date, the twenty-third.

Q. In the handling of your trains, Mr. Fitzgerald, if anything unusual occurs do you keep a record of that? A. I do.

MR. SCHENCK: I want to object to that question, Judge. I don't see how it is material.

THE COURT: The custom of their affairs?

MR. SCHENCK: What difference does it make about their custom, they have got our goods and insured them. We don't care whether they bring them up from Hoboken in a battleship or a submarine. We don't care anything about that; they undertake to carry them from Hoboken to Dover, and the train in which they do it, or the men who do it, or the man who kept the records of it has nothing to do with our case, or the damaged condition we found them in.

THE COURT: This question goes to their custom.

(After argument.)

THE COURT: Let us get the next question.

Q. Look at your record Mr. Fitzgerald, will you, and tell us whether anything unusual occurred in the handling and movement of the train in which Delaware, Lackawanna and Western Railroad car Number 31,482 was handled by you from Hoboken to Dover on April 23, 1913, and if so what it was?

MR. SCHENCK: Objection is entered to this question, and not repeating all I said before, but all I said before is repeated now.

THE COURT: I will sustain your objection and grant an exception.

WILLLIAM H. T. COCKING, re-called.

BY MR. SCHENCK:

Q. Did you see the inside of the car?

MR. SCOTT: I object, it is immaterial.

THE COURT: I think that should be sustained; he has not testified on the subject.

Q. What kind of a car was it? A. A box car.

Q. What was its condition outside?

MR. SCOTT: I object, as not proper cross-examination.

THE COURT: I think that is a proper objection, and will sustain it.

MR. SCHENCK: He told what kind of a car it was, or he told us the number, and I want him to tell us what kind of a car it was, and I want him to describe it.

THE COURT: Well, he told us general information about the number of the car and the length of the road.

Q. Describe a box car inside and outside. A. I cannot describe this particular box car, but I can describe what a box car is.

Q. Your general recollection about this particular car? A. A box car is an enclosed car, doors on each side, parallel, plain ordinary wood car for freight; built in the shape of a box.

Q. The inside what is it like? A. I cannot tell you of this particular car; they vary, different kinds of cars are lined differently.

Q. Do you recall whether or not this car was wet or dry?

MR. SCOTT: I object.

THE COURT: What do you mean, wet?

MR. SCHENCK: Inside.

THE COURT: He describes this car and I think he ought to give all the physical conditions of this car.

MR. SCOTT: I state my objections on the ground that it is not proper cross-examination.

THE COURT: Overrule your objection and grant you an exception.

BY THE COURT:

Q. Do you recall whether the car was wet or dry? A. I do not.

Q. Was there mud on the floor?

MR. SCOTT: I object as it is not proper cross-examination.

THE COURT: Overrule your objection and grant you an exception.

MR. SCOTT: And further on the ground that the question has a tendency to prove matters there which should have been offered by the plaintiff in her direct case or matter of rebuttal.

THE COURT: It may go to the question of identity of a particular car. I overrule your objection.

A. I cannot say.

Q. And was the roof tight? A. I cannot say.

MR. SCOTT: Objected to on the same ground.

THE COURT: Objection is overruled.

REBUTTAL.

Mrs. George Sprotte—for Defendant—Direct.

MRS. SPROTTE, recalled.

BY MR. SCHENCK:

Q. Mrs. Sprotte, this morning, you were asked about these chairs on this list; what was their condition when packed by you? A. First class.

Q. What was their condition when received by you? A. Broken, scratched.

Q. As to stability? A. What do you mean?

Q. If you sat on them? A. You could not sit in them without wiggling, and they was all coming apart. You could not sit on them for one thing and they did not have any legs.

Q. You go right down the list where you see the figures opposite, under the head of damage? A. The commode, you mean?

Q. Yes? A. It was wrecked.

MR. SCOTT: I object as not a proper matter of rebuttal. This morning, the defense consisted in showing the packing of the goods, whether burlapped or crated by Mrs. Sprotte, or uncrated. We showed the number of the car and the route of the road, and the handling of the car by Fitzgerald; now, anything that goes outside of that is not proper matter of rebuttal. They had their opportunity to present their main case, and I don't think it is fair that the defendant now be called upon to meet in rebuttal, a matter which is part of their main case, and which I have continuously requested and insisted was a part of their main case and which I have not opened on my defense.

THE COURT: And which you have not attacked or questioned on your defense?

MR. SCOTT: And which I have not attacked or opened on my defense.

THE COURT: What have you to say about that, Mr. Schenck?

MR. SCHENCK: What I asked of her this morning, was of their condition when packed.

(After argument.)

Q. Was the burlapped chiffonier that you packed and shipped in California the burlapped article that you received at Dover? A. Well, you mean the one that was handed to me as a bundle of wood? It was a writing desk, I burlapped and crated when I left Los Angeles.

MR. SCOTT: I object to that.

THE COURT: You refer to the chiffonier?

MR. SCHENCK: I don't know whether it was a writing desk or a chiffonier, she referred to this morning.

THE COURT: Substitute writing desk for chiffonier.

MR SCHENCK: All right. (Question repeated.)

A. Yes, I burlapped it as a writing desk, and when it was received at Dover, it was put in as a bundle of kindling wood.

Q. Take up your list and refer to the commode, was it the article you received in Dover? A. Yes, that is the article, but in such shape, when it left I had the drawers locked, but when it came there was not a drawer locked. There was not a bureau drawer locked.

MR. SCOTT: May I ask that Mrs. Sprotte's answer in regard to the other things than the commode be stricken out.

THE COURT: Yes, is the beginning of the answer. That motion is granted.

Q. Coming down to the piano stool? A. Leg broken.

Q. How was it as to stability? A. It could not stand on three legs.

Q. The chiffonier? A. Back all out.

Q. Dresser? A. Back all out, split down in front.

Q. These other articles right there? A. Chiffonier collapsed.

Q. Oil heater? A. Smashed.

Q. Bamboo stand? A. Legs broken.

Q. And the bundle of tools? A. All gone, missing.

Q. What was the condition of the car in which the goods arrived at Dover?

MR. SCOTT: I object to that as not a matter of rebuttal.

Q. Was there mud on the floor of the car? A. About three inches.

MR. SCOTT: I ask that the answer of Mrs. Sprotte be stricken out.

(After argument.)

Q. Was the car wet or dry?

MR. SCOTT: I object on the same ground; that it is not rebuttal.

THE COURT: How is that proper at this time?

MR. SCHENCK: What did I ask that man Cocking?

THE COURT: I shall sustain the objection, and grant you an exception.

Q. We had a piano in here, I neglected to ask her a similar question there on the second page. Was the piano boxed and crated by you in California the article delivered to you at Dover? A. Yes.

Q. In all respects?

MR. SCOTT: I object to that as not a matter of rebuttal.

THE COURT: It is the same class as those questions heretofore asked.

MR. SCHENCK: That is what I expect it to be.

THE COURT: My difficulty in this matter is to appreciate how far counsel have gone by their stipulation. That is the same class as heretofore and I overrule it and grant an exception to that.

A. It was scratched and all bruised up.

Q. I guess that is all.

CROSS EXAMINATION BY MR. SCOTT:

Q. Was it in the same crate? A. Part of it.

Q. Was the piano in the same crate that it came in? A. Well, I cannot say to that. I did not have any number on the crate when it left Los Angeles.

Q. Didn't you see the crate when it left Los Angeles? A. Yes, but there are many other thousands of box crates.

Q. Was there anything to show you it was the same crate? A. No, nothing to tell you whether it was the same crate at all.

Q. You could not tell whether it was the same crate? A. I don't think it was, although I won't say. I know my piano was scratched and bruised.

Q. The crate itself was intact? A. The crate was broken; smashed.

Q. Whereabouts? A. In front.

Q. You don't know whether it was the same crate or not that came from Los Angeles? A. No, I do not.

Q. Although you saw the piano packed in the crate? A. Yes.

JOHN BUTLER, sworn for plaintiff in rebuttal.

BY MR. SCHENCK:

Q. You saw the car at Dover in which Mrs. Sprotte's goods arrived? A. Yes.

Q. Was there mud on the floor of it?

MR. SCOTT: I object to that.

A. Yes.

MR. SCOTT: I ask that the answer be stricken out.

THE COURT: That motion will be allowed.

MR. SCOTT: The objection is for the reason that it is not a proper matter of rebuttal.

THE COURT: I think it should be sustained on the ground that it was answered before.

MR. SCOTT: And the further objection to this question is these goods are claimed to have been in a damaged and destroyed condition. There is no claim that there is damage due for mud and no evidence that the damage was due to mud so that it is not only not a matter of rebuttal but immaterial. If they are claiming that it was due to mud then I think we should have been apprised of that in their case.

THE COURT: If I recollect you objected to the same question when propounded to Mrs. Sprotte.

MR. SCHENCK: That question is overruled?

THE COURT: On the same theory that it rebuts nothing.

Q. Was the car wet or dry?

MR. SCOTT: I object on the same ground.

THE COURT: Your objection is sustained.

Q. That is all.

Motion.

MR. SCOTT: I ask that the Court find first that the covered box or shirt waist box valued at one hundred and fifty dollars, Number 292, and included in our stipulation for the purpose, if the Court should so find in reducing the damages, was not damaged or injured while in the custody and control of the defendant company. The evidence on that point, if your Honor recollects was that Mrs. Sprotte saw it over in New York and that it was opened and in the care of the Trans-Continental Freight Company; that they tied it up and shipped it to her and received in the same condition except that it was tied up. I ask that the Court find as a fact that there was no evidence of the condition of the goods composing the shipment in question, shipped at Los Angeles or packed at Los Angeles, California when they were delivered to the defendant. I ask the Court to find as a matter of fact that there was no proof of total loss or damage, exclusive of the articles relative to the shirt waist box on the line of the defendant, while in the control and custody of the defendant, and fourth I ask the Court to find under the evidence the shipment in question was packed at Los Angeles, California, and it appears that the Fidelity Storage and Moving Company received a shipment in Los Angeles, and made an agreement with Mrs. Sprotte to ship these goods and that the goods were apparently crated by the Trans-Continental Freight Company as shown in Exhibit P-2 and that there was no proof of the condition of the goods when received by the Storage Company, and no proof of the condition of the goods received by the Stor-

age Company when they were delivered to the defendant company, and that as this is not a suit against us as, a terminal or destination carrier—your Honor will look at the state of demand, and also look at the bill of lading, the Lackawanna bill of lading, which shows that we are not a destination carrier, but an initial carrier from New York to Dover, and that the plaintiff has failed to prove the condition of the goods when they were delivered to the defendant in New York by its agent, or the agent of the Trans-Continental Freight Company, and last I ask the Court to find as a matter of law and fact under the stipulation that no judgment if any judgment at all be entered against the defendant company be more than one hundred and sixty-nine dollars and five cents because the box in question as a matter of fact has been eliminated from the consideration of the matter of damages. I don't know whether the Court is going to decide this matter right off, or whether the Court would like a copy of the testimony so as to read the effect of the stipulation and the evidence. If so I am perfectly willing to get a couple of copies and let Mr. Schenck and I have it, and furnish a copy to the Court.

THE COURT: That better be done. Mr. Schenck, what have you to say?

MR. SCHENCK: Only this, the one hundred and fifty dollar box is separate and apart from the whole proposition, and that is that if the rule that the last carrier is responsible for the condition in which the goods are delivered, prevails in New Jersey, there can be no deduction on account of this box being de-

livered in the condition it was. As to the whole proposition I think that the plaintiff has satisfactorily proven her case and that the defendant has not discharged itself of the presumption and burden of proof that devolves upon it, because this very bill of lading speaks of what it got in "apparent good order," which certainly would not admit that these same things were four hundred and fifty eight dollars less in value than their true value. The whole thing seems to be a matter of law and the application of the facts that were stipulated to that law, rather than depending on the testimony produced because the testimony of the defendant is, while it might be more in bulk, so far as weight in determining the issues go, it is even less than our, and what there is of its bulk that amounts to anything is decidedly in our favor because it goes to the condition of the goods as packed and received; and the manner in which they were delivered, so that there is no summing up to be done. I might say that I would like to submit such law or a memorandum of such cases as I have as seem pertinent, if the Court so wishes.

THE COURT: Well, it is a nice situation of common carriers.

MR. SCOTT: I think it is a clean cut case as Mr. Schenck has presented it.

THE COURT: You have not either of you been able to find anything on the law?

MR. SCHENCK: I think Mr. Scott ought to be able to tell us that, he has these things all the time. I would be glad to submit a brief.

Judge's Certification.

I herewith certify the transcript of the foregoing proceedings and testimony made by the stenographer in the within case shall be the state of case to be used on the hearing of the appeal in said matter.

JOSHUA B. SALMON,
Judge.

Opinion of Supreme Court.

(Filed October 13th, 1916.)

NEW JERSEY SUPREME COURT.

GEORGE SPROTTE,
Respondent,
v.
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Appellant.

On Contract. Appeal from District Court.

Argued June Term, 1916, before Justices Garrison, Parker and Bergen.

ROBERT H. SCHENCK and KING & VOGT, for Respondents.

FREDERIC B. SCOTT, for Appellant.

PER CURIAM:

The plaintiff employed a shipping company in Los Angeles to ship a carload of furniture from that point to Dover, N. J. When the goods arrived in New York they were forwarded by the shipping company to Dover over the defendant's line and some of the goods were damaged when they arrived.

Opinion.

The defendant issued a way bill in which it was stated that the property was in apparent good order except as noted (contents and condition of packages unknown). The list contained specific items, some of which were boxes. There was a stipulation that if defendant was found liable the damages were to be assessed at $169.05, and this sum the District Court found. Under the record all we have to deal with is the liability of the defendant between New York and Dover. The defendant claims that the Court should have granted its motions for a non-suit, or directed a verdict for the defendant because there was no proof that the goods were damaged while in defendant's possession, beyond that the way bill certified that they were received in apparent good order in New York, and the fact that they were received in a damaged condition at Dover.

Such a recital in a bill of lading is prima facie evidence of the fact that the goods were in apparently good condition when received, and while the common carrier may show the contrary the burden is on it. No attempt was made in this case to show that the goods were not in good condition when delivered to the defendant, and where a carrier receives freight in good condition and it is found in its possession damaged at point of destination, negligence will be presumed, unless removed by explanation.

The next point is that it was error to admit the contract with the Los Angeles Moving Company, the initial shipping company. This did not injure the defendant and if error was harmless.

The next objection is refusal to allow defendant's train conductor to testify that nothing unusual happened to the car between New York

and Dover. This was immaterial for if he so testified which is the best defendant could expect, it would prove nothing, for the goods were in a closed car and it was not pretended that anything happened to the car.

As we find no error in this record, the judgment will be affirmed with costs.

Exhibit P-1.

Original. No. 787.

FIDELITY STORAGE AND MOVING COMPANY,
(Incorporated)
Forwarding Agents.
Los Angeles, March 8, 1913.

This agreement entered into by and between the FIDELITY STORAGE AND MOVING COMPANY, a corporation with its principal office in Los Angeles, California, party of the first part, and MRS. GEO. SPROTTE, of Los Angeles, party of the second part,

WITNESSETH:

That for and in consideration of the charges hereinafter mentioned, to be received by the party of first part from party of the second part, said party of first part agrees to receive, and hereby does receive from party of the second part, a lot of second-hand household goods described as follows:

No. Packages. Description of Articles.

(NOTE:—By consent the list of articles is omitter here, being the same as in Exhibit P-4.)

Exhibit P-1.

MRS. GEO. SPROTTE,
Dover, N. J.
(36 West Blackwell St.)

	Weight.	Rate.	Amount.
H. H. Goods.....	5290	$2.75	$145.48
Piano	900	3.60	32.40
Advance Chgs.			15.00
Total Chgs.			192.88

and advance freight, storage, packing and hauling charges thereon, whenever necessary, and deliver the same to any railroad company said party of first part may select, as part of a carload, and to obtain from the carrier receiving said goods a bill of lading covering said car from Los Angeles to New York. When said goods arrive at New York all charges must be paid to party of first part by party of second part. If charges are not so paid, then, it is hereby agreed, said goods shall be stored by party of first part at an additional expense to party of second part, and party of first part is hereby given a lien on said goods for all charges.

If all charges are promptly paid when said goods arrive at New York, and in that event, party of the first part undertakes and agrees to obtain a bill of lading for said goods from said last mentioned place and forward said goods to

.....

The party of first part is hereby expressly authorized by party of the second part to make terms with the carriers over whose lines said goods are to be transported, to release in writing, in bill of lading, or otherwise, all claims for loss or damage to said goods while in possession of said carriers, to an amount not exceeding $10.00 per hundred weight.

The total freight charge from Los Angeles to Dover, N. J., are: H. H. Goods, $2.75; Piano, $3.60, per hundred weight.

Exhibit P-2.

WITNESS the signatures of the parties hereto this .....day of ....., 19....

FIDELITY STORAGE AND MOVING COMPANY,
By E. H. Pope.
JULIA I. SPROTTE.

NOTICE.—For delivery of this shipment, make application in person or by letter to

TRANS-CONTINENTAL FRT. CO.,
29 Broadway, New York.
At.....

Exhibit P-2.

Stamped—D. L. & W. R. R. Co., W. H. G. Oct. 7, 1914. Office of Freight Claim Agent.

Los Angeles, Cal., 3/8, 1913.

Received of Mrs. Geo. Sprotte

The Following Amounts

Freight, East	177.88
Storage	
Cartage	15.00
A—546821	
Packing	
Taxes	

Stamped—Fidelity Storage & Moving Co., Paid Mar. 8, 1913.

50295 Total 192.88

Trans-Continental Freight Co.,
By P. S.
Original.

Exhibit P-3.

FREIGHT BILL.

Lackawanna Railroad Pro. 2127

Consignee Mrs. Geo. Sprotte Dover, 4/23 1913.

To The Delaware, Lackawanna & Western R. R. Co., Dr.

For Charges on Freight from	No. Pkgs.	Articles & Marks	Weight	Rate	
Pier 68		H.H. G'ds (over)	6190	21	Pd.

Way Bill No. and Date 1320 4/22

Car Number 31482

Initial D-1

Consignor Trans-Con. Frt. Co.

Released

Total to collect——

Rec'd 4/23 J. Butler Drayage——

Original paid freight bills should accompany all claims for overcharges, loss or damage.

Make checks payable to the Delaware, Lackawanna & Western R. R. Co.

3 Bdls Chairs
3 " Rockers
1 High Chair
1 Chair
1 Commode
1 Spring
1 Sack Carpet
2 Bdls "
1 Bamboo Stool
1 " Stand
1 Ir. Board
1 Bdl (in Blp)
1 Stool
1 S. Mach
1 Stand Top
1 Commode
2 Bxs
1 Bdl Boards
1 Rocker
1 Tub
1 Washer
1 Roll Rugs
1 Bxd Piano
2 Bxs
1 Piano Stool
2 Bdls Frames
1 Chest
1 Couch
1 Chiff.
1 Dresser
1 Chiff (Blpd)
1 Dresser
1 Hall Seat
1 Desk Crtd

1 Matress
5 Bbls
1 Drum
1 Bbl
1 Bx Covd
1 Table Base
1 Chest
1 Table Top
1 B. Stand
3 Bdls Tools
1 C. Sweeper

3 Bxs
2 Bxs
1 Box M.
2 Bxs
1 Bx
1 Dresser
1 Crt Table Leaves
1 " Bike
1 Oil Heater
1 Bdl (2) Chairs
1 Bbl
1 Chest

Exhibit P-4.

1 Bdl Boards 1 Rocker billed short.
Uniform Bill of Lading—Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908.

(Form G. F. D. 56.) 6-'09

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

Shipper's No. E. B. 154

Straight bill of lading—Original—Not negotiable. Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading.

at New York, N. Y.

from Trans-Continental Freight Co., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said

Exhibit P-4.

route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from
to is in cents per 100 lbs.

(Mail Address—Not for purposes of delivery.)
36 West Blackwell St.
Consigned to Mrs. George Sprotte
Destination, Dover State of New Jersey.
Route Car Initial Car No.
No. Description of articles and special Marks
Packages

3 Bdles chairs
3 Rockers 264/266
1 High chair 267
1 Chair 268
1 Commode 269
1 Spring 270
1 Sack carpet 271
2 Bdls Carpet 272/273
1 Bamboo stool 274
1 Bamboo board 275
1 Ironing board 276
1 Bd. in Prib. 277
1 Stool 278
1 S. Mach. 279
1 Stand Top 280
1 Commode 281
2 Boxes M 282/283
1 Mattress 284
5 Bbls 285/289
1 Drum 290
1 Bbl 291
1 Box covered 292
1 Table Base 293
1 Chest 294
1 Table top 324
1 Tub 332
1 Washer 333
1 Roll rugs 334
1 Piano Boxed 335
(2) each 261/263
2 Boxes M. 295/296
1 Piano stool 297
2 Bdles frames 298/299
1 Chest No. 300
1 Couch 301
1 Chiffonier 302
1 Dresser 303
1 Chiff. Brlp 305
1 Dresser Brlp 305
1 Hall Seat 306
1 Desk crtd 307
3 Boxes M 308/310
2 Boxes S 311/312
1 Box M. 313
2 Boxes L. 314/315
1 Box M. 316
1 Dresser 317
1 Crt table leaves 318
1 Crt Bike. 319
1 Oil Heater 320

Exhibit P-4.

1 B. B. Stand 325	1 Bdl 2 chairs 321
3 Bdls. tools 326/328	1 Bbl 322
1 Carpet sweeper 329	1 Chest 323
1 Bdl Boards 330	1 Rocker 331

[The following are set on the right hand side of the Bill of Lading.]

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

Stamped—Prepaid.

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

Stampel—H. H. Goods released to the valuation of $10.00 per hundred pounds.

For the purpose of enabling the carrier to apply the proper published rate, as explained in its classification and tariffs I hereby declare that the value of the property herein described does not exceed ten (10) dollars per one hundred (100) pounds, and that in case of loss or damage thereto I will not assert claim against the carrier on a higher basis of value than ten (10) dollars for each one hundred (100) pounds or fraction thereof in weight of the property so lost or damaged.

Trans-Continental Freight Co., Shipper.

Per D. E. Dealy, Jr.

Short 1 Bundle Boards, 1 Rocker

New Jersey Court of Errors and Appeals.

GEORGE SPROTTE,

Respondent,

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Appellant.

BRIEF OF APPELLANT.

Statement.

The appellant in this case was sued by the respondent in the District Court for the First Judicial District of Morris County as an initial carrier for damages to a shipment of goods from New York City to Dover, New Jersey.

On the trial of the case the respective parties entered into a stipulation with respect to the amount of damages, but said stipulation in no wise admitted that the goods in question were damaged while in the possession of the appellant (p. 13, l. 29 et fol.).

The shipment itself originated at Los Angeles, California, from which place it was shipped to New York City by the Fidelity Storage and Moving Company which had contracted with the respondent that when all the charges had been paid, the forwarding company would agree to obtain a bill of lading for said goods and ship them to the respondent at Dover, N. J. (p. 37, l. 20 et seq.).

Part of the shipment became separated after its arrival in New York City and prior to its delivery to the appellant (p. 17, ll. 1-4) and damages for this separate portion of the shipment were disallowed by the District Court (p. 11, l. 29 et seq.).

The stipulation between the respective parties (p. 13, l. 29 et seq.) left the ascertainment of whether the goods were damaged while in the possession of the appellant a question of fact to be determined by the District Court. The course of the trial in the District Court best illustrates the situation with respect to which the appellant claims the District Court erred and the Supreme Court was wrong in the affirmance of the District Court's judgment.

The respondent, in proceeding with his proof, took the following course of action, to-wit:—

He first relied upon the stipulation hereinbefore referred to (p. 13), contending that it was an admission that the goods were damaged while in the appellant's control, but this was not the effect of said stipulation, and it was positively disavowed by the appellant to be within the terms or contemplation of said stipulation (p. 14, l. 35 et seq.).

The respondent then offered in evidence an agreement with the Fidelity Storage and Moving Company of Los Angeles, California, with respect to the carriage of the goods in question from Los Angeles, California to New York. This Exhibit P-1, (set forth at page 36 of the printed case), was objected to on the ground of its immateriality because the instant suit was against the appellant as the initial carrier receiving the goods in question at New York City.

The respondent next offered in evidence a receipted bill from the Transcontinental Freight Company of Los Angeles, California, showing that the respondent had paid certain freight, cartage and packing charges for the movement of the

goods from Los Angeles, California, to New York City. This exhibit, printed at page 38 of the State of Case, was also objected to because of its immateriality (p. 15, ll. 13-5).

Thereafter the respondent offered in evidence a freight bill of the appellant for the shipment of the goods in question from New York City to Dover, New Jersey, together with a bill of lading issued by the appellant from which it appeared the Transcontinental Freight Company was the shipper and the respondent the consignee, the goods appearing to have been covered by the said bill of lading concededly being part of the goods shipped by the respondent from Los Angeles, California to New York City. These last two exhibits (P-3 and P-4) are printed at pages 39 and 40 of the State of Case. In both of these exhibits, P-3 and P-4, the Court will note that one of the items alleged to have been shipped from New York City to Dover was a box designated as "1 box covered" (p. 41, l. 38) and "1 box covered, 292" (p. 41, l. 38), the said box being designated in the stipulation as a certain box of personal effects known as "a covered box, shirtwaist box, No. 292", (p. 13, l. 38 et seq.) which box the Trial Court found was not delivered with the shipment in question to the appellant or damaged while in the control and custody of the appellant (p. 11, l. 28 et seq.).

After the introduction of this evidence the respondent rested, contending that together with the stipulation it constituted a prima facie case.

This appellant then moved for a non-suit on the ground that, as it was being sued as an initial carrier, there was no proof of the condition of the goods when delivered to it, the evidence showing that the shipment in question originated in Los Angeles, California, and not on the line of the appellant nor on any line connecting with the appellant. The motion was denied.

Thereupon the appellant proceeded to show that the covered shirtwaist box referred to in the stipulation was in a damaged condition before it was ever delivered to the appellant and that it was not received by the appellant with the main shipment, which facts the Trial Court found to be true.

The appellant then showed through the respondent that he did not know of the condition of the goods on their arrival in New York City after their journey across the continent.

The appellant further sought to prove the character of the train movement of the shipment from the time of its receipt until its arrival at Dover for the purpose of showing that the condition of the goods when received was the same as when they were delivered to it as an initial carrier. This proof the Trial Court refused to allow, whereupon the appellant rested.

The respondent thereupon called the appellant's agent at Dover with respect to the condition of the appellant's car in which the shipment arrived at destination (p. 28, ll. 14-15), which was objected to as not proper matter of rebuttal, especially in view of the fact that the appellant had been refused allowance to prove the character of the identical car's movement in carrying the freight in question. However, over objections, the appellant's agent was obliged to testify.

Further, over the objection of the appellant, the respondent was allowed, in rebuttal, to show the condition of the goods when packed at Los Angeles, California and their condition on arrival at Dover, New Jersey.

At the end of the whole case it appeared through the benefit of the objected to, but admitted, exhibits, P-1 and P-2, that the shipment in question originated at Los Angeles, California; that in some way or manner it arrived in New York City; that some of the goods in the original shipment were actually damaged before they

were delivered to the appellant and that others were damaged when the appellant's car was opened at Dover, New Jersey. There was no direct proof offered by the respondent as to the condition of the shipment when it was delivered to the appellant as initial carrier in the City of New York.

The judgment of the District Court (p. 11, l. 29 et seq) was in favor of the respondent on the ground that

> "* * * the covered box, or shirtwaist box, mentioned was not damaged while in the control or the custody of the defendant; that the goods in the bill of lading mentioned and in question in this suit, excepting said covered box or shirtwaist box, were received by the defendant in good order and that they were delivered by the defendant to the plaintiff in a damaged or injured condition."

The Supreme Court's affirmance of the District Court's judgment held that the proof made by the respondent's offer of the bill of lading of the appellant containing the terms that the property received "was in apparent good order, excepting as noted (*Contents and condition of packages unknown*)" (p. 35, ll. 3-4) was prima facie evidence of the fact that the goods were in apparent good condition when received (p. 35, l. 20 et seq); that the admission in evidence of the contract with the Los Angeles Moving Company, the initial shipping company, was at most harmless error and the refusal of the Trial Court to allow the appellant's train conductor to testify that nothing unusual happened in the handling of the shipment in question, while on the rails of the appellant was immaterial.

From a resume of the foregoing facts, both in the giving of the judgment by the District Court and its affirmance by the Supreme Court, we think error is manifest and herewith cite our authorities for so believing.

Argument.

POINT I.

The recital in the bill of lading that "the property described was in apparent good order, excepting as noted (Contents and condition of contents of packages unknown)" casts upon the shipper the burden of proving the condition of the goods when delivered to initial carrier.

The Supreme Court, while noting the recital in the bill of lading just above referred to, (p. 35, l. 3 et seq) immediately seems to have lost sight of the portion thereof in parentheses, namely, *"Contents and condition of contents of packages unknown"*, when it laid down the rule applicable to the instant case that,

> "Such a recital in a bill of lading is prima facie evidence of the fact that the goods were in apparently good condition when received."
>
> (Opinion of Supreme Court, p. 35, l. 21, et seq.)

Standing alone, that portion of the recital in the bill of lading that "the property described below was in apparent good order, excepting as noted" undoubtedly was properly interpreted, but when taken together with the omitted portion of said recital in its application to the instant case and as representing a correct statement of the law, the appellant contends that both the Trial Court and the Supreme Court committed error, first because the finding of fact was unwarranted by the record and secondly because the reason, purpose and legal effect given to the recital in the bill of lading by the Supreme Court is without justification in all of the adjudicated cases. The record in the instant case, we urge,

bears us out in our contention that nearly everything of importance in the shipment in question which was damaged was covered by the clause "Contents and condition of packages unknown" The goods in question were either wrapped in excelsior, as the willow rocker (p. 19, l. 15) ; created as the sewing machine (p. 19, l. 23) boxed, as the piano (p. 19, l. 30) wrapped with burlap, as the chiffonier (p. 19, l. 33) or tied around with paper, as was a part of the furniture (p. 19, l. 39 et seq) all of which effectually concealed the condition of the packages and the subsequent proof of whose damaged condition at destination was no evidence whatsoever of their condition at the time of the delivery to the appellant.

Justice Bergen, in *Gude vs. P. R. R. Co.*, 77 N. J. L., 391, recognized the rule with respect to the burden of proof against an initial carrier when he said:

> "There is no reason why goods may not be shipped although damaged and without proof to the contrary, the presumption that they were, when shipped in the condition found at destination, is at least as strong as that they were not.
>
> "The condition in which they were delivered for shipment is within the knowledge of the shipper and proof of it readily obtainable." * * *

The exception to this rule the Court noted as being in actions against an intermediate or destination carrier.

The rule applicable to the instant case being that the shipper, or owner of the goods, the respondent, was obliged to prove the condition of the goods when delivered to the appellant, the question here to be considered is, did the mere proof by the offering of the appellant's bill of lading (l. 4, p. 40) containing therein the following provisions or recital that "the property des-

cribed was in apparent good order, excepting as noted (Contents and condition of contents of packages unknown)", constitute upon the part of the respondent prima facie proof of the condition of the goods in question on delivery."

As said in 4 R. C. L., see 369, p. 915,

> "the consignor must be able to establish the value and cannot require the carrier to furnish evidence for him."

A fortiori, where the condition of goods is within the knowledge of the shipper, sic respondent, the appellant having expressly recited that the "contents and condition of contents of packages" were "unknown" to it, it cannot by any rule of law be made to be an appraiser of the condition of goods, the condition of which very goods by the nature of their packing and wrapping is concealed from it.

The identical provision in the bill of lading in the instant case has been passed upon in the case of *Mears vs. N. Y., N. H. & H. R. R. Co.*, 75 Conn. 171, 56 L. R. A., 884. In that case the plaintiff requested the Court to charge that the shipping receipt raised a presumption that a piano was delivered to the carrier in good condition. The piano being boxed, the description of the goods "as in apparent good order, except as noted (Contents and conditon of contents of packages unknown)", the Court held that did not relate at all to the condition of the piano, but,

> "could only have related to the exterior of the box."

One of the purposes of such qualifying representations, the Interstate Commerce Commission said was to guard the carrier against an estoppel that it had received goods of the quantity or quality recited in the bill of lading. (Investiga-

tion and Suspension Docket 76, 25 I. C. C. Rep. 442, at 492.)

Hutchinson on Carriers says, with respect to similar provisions, that the carrier

> "is not presumed to know the quality of the goods, nor can he refuse to carry them, whatever it may be, if they are fit to carry and are of the kind he usually carries, * * * It cannot be supposed, therefore, that he intends by said recital to admit more than that the goods are in an apparently fit condition for shipment." (1 Vol, Sec. 163.)

The carrier may limit his undertaking by inserting a provision that the contents and condition of contents are unknown to it.

> "When such language is used, the carrier will not be responsible for the stated amount, number, weight or kind when he is ready to deliver the quantity or kind of goods actually received." (*Hutchinson vs. Carriers,* Sec. 165.)

As said in a leading case in New York:

> "Applying these settled rules to the instrument in question, it is, we think, reasonably clear that the defendant did not make any representation *as to the contents of the packages.* Its agent simply certified, in effect, that they were described as containing eggs, accompanying this with the statement that the contents were not in fact known."
>
> *Miller vs. H. St. J. R. R. Co.,* 90 N. Y., 430.

In *Haddon vs. Parry,* 3 Tauton, 303, Lord Mansfield said:

> "If the master qualifies his acknowledgment by the words *contents unknown,* he acknowledges nothing."

So the United States Supreme Court has held where a bill of lading covering a large number of

bales of cotton described them as "contents unknown," such a recital did not bind the carrier as to the quality, sic, condition, of the goods (*I. Mt. Ry. Co. vs. Knight,* 122 U. S., 78).

In I Michie on Carrier, Sec. 491, it is said that the

> "recital in a bill of lading that the contents of certain boxes are unknown and 'in apparent good order' does not make a prima facie case, as against the carrier, that the goods were in good order when received, and were injured during transportation."

Such a recital "in apparent good order," relating to the external apparent condition of the goods, creates no presumption with reference to the condition of the contents of the packages, bales, boxes, etc. (*G. R. Co. vs. Holden & Co.,* 30 S. W., 383).

Such being the law with regard to the effect of such a recital, the District Court erred in finding that the goods were delivered to the appellant in good order (p. 11, l. 34, et seq.) and the Supreme Court erred in affirming said judgment, besides wrongly interpreting the recital in the bill of lading in question.

No proof at all (aside from the mere introduction of the bill of lading) was offered by the respondent as to the condition of the shipment when it was delivered to the appellant at New York City.

The evidence, however, did show that this shipment had traveled across the continent and that it was damaged when it reached New York *and before* it was received by the appellant (p. 16, l. 21, et seq., and p. 18, l. 6).

Having failed to show the condition of the shipment when delivered to the appellant, the respondent endeavored to show in rebuttal its condition on arrival at destination, this, aside from

being violative of the ordinary mode of proof, was also no proof at all of the condition of the goods when they were delivered to the appellant in New York City, for, as Justice Bergen said in *Gude vs. P. R. R. Co.*, supra:

> "There is no reason why goods may not be shipped although damaged" (p. 391).

To uphold the Supreme Court's interpretation of the recital in the bill of lading in question, is to open the door to the perpetration of grievous frauds on common carriers.

All it seems would be necessary to do to accomplish such a fraud is to wrap or cover the shipment in question so as to effectually conceal the actual condition of the shipment's condition and then rely upon such a recital in the bill of lading (as interpreted by the Supreme Court), to recover damages.

The judgment of the District Court falls when the recital in the bill of lading is interpreted as we contend it should be, for it is not based upon any evidence, but supported by a mere presumption.

For the reasons stated the judgment of the Supreme Court should be reversed.

POINT II.

It was error to exclude evidence that nothing happened to the goods while in transit on appellant's line.

Bearing in mind the statement by Justice Bergen in the case of *Gude vs. P. R. R. Co.*, 77 N. J. L., 391,

> "that there is no reason why goods may not be shipped although damaged,"

the appellant endeavored to prove *that the goods*

were in the same condition when they were received by it as they were when delivered to the respondent at Dover, N. J. Its endeavor to prove this was by calling a witness, Osborne W. Fitzgerald, its conductor who had charge of the train containing the car which carried the shipment in question to Dover. On proper identification and production of his record the appellant sought to ascertain whether in the handling of said car over the rails of the defendant anything unusual happened in the handling and moving of the car containing the shipment in question. This witness was asked the following question (p. 23, l. 28 et seq):

> "Q. Look at your record, Mr. Fitzgerald, will you, and tell us whether anything unusual occurred in the handling and moving of the train in which D. L. & W. R. R. Car No. 31482 was handled by you from Hoboken to Dover on April 23, 1913, and if so, what it was?"

This question the Trial Court refused to allow the witness to answer. An objection was noted to said refusal (p. 23, l. 40).

In affirming said judgment the Supreme Court, dealing with this alleged error of the Trial Court, said that such a question was immaterial, for if the conductor had so testified, which was the best the appellant could expect him to do,

> "it would prove nothing for the goods were in a closed car and it was not pretended that anything happened to the car" (p. 36, ll. 1-5).

It is apparent that the refusal of the Trial Court to allow this evidence to be introduced was prejudicial to the appellant and that the Supreme Court misconceived the purpose for which said question was put to the witness.

While there was no claim on the part of the respondent that anything happened to the car in which the shipment moved, the answer to said question had a material bearing on the fact *that while the goods were in the charge of the appellant nothing happened to them which would have or did change their character or nature from the concealed condition in which they were when they were received from the Transcontinental Freight Company.*

POINT III.

The judgment in this case should be reversed and a final judgment entered in favor of the defendant-appellant.

This proposition is fully sustained by

Garr vs. Stokes, 16 H. J. L., 407;
Lehigh Valley R. R. Company vs. McFarland, 44 N. J. L., 678;
Newark vs. East Side Coal Company, 77 N. J. L., 732.

Respectfully submitted,

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—1917—

New Jersey Court of Errors and Appeals.

MRS. GEORGE SPROTTE, Respondent. vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant.	*On Appeal from District Court.* *Brief of Respondent.*

Suit was brought in the District Court for the First Judicial District of Morris County to recover damages sustained to furniture shipped by respondent from Los Angles, California, to Dover in this State. The Fidelity Storage and Moving Company received respondent's goods from her at Los Angeles (36), to whom she paid the necessary freight charges to New York (38). Respondent's goods were consigned to the Transcontinental Freight Company of New York City and from whom appellant Company received them IN APPARENT GOOD ORDER, as appears by appellant's bill of lading (40).

At the trial it was admitted and stipulated that respondent's goods had been damaged in transit, but that under the limited liability clause of appellant's bill of lading, appellant's liability in case of total loss of shipment could not be more than $249.55, and if the loss of a box valued at

$150.00 was not attributable to the appellant. the appellant's liability would be proportionately reduced to $169.06 (13).

Respondent offered in evidence her receipt from the Fidelity Storage and Moving Company and freight receipt, Exhibits P-1-2 (36) and (38), and appellant's freight bill and bill of lading issued to the Transcontinental Freight Company, The Fidelity Storage and Moving Company's New York representative, Exhibits P-3-4, (39) and (40) and rested her case.

Appellant's motion for a non-suit was properly denied.

Appellant then requested that respondent be sworn and she testified that about two months after receiving the main shipment from appellant company at Dover, she saw the box valued at $150.00 at the Transcontinental Freight Company's Office, and that it was then in damaged condition. Appellant also offered testimony to show the manner of handling and the movements of train by which it brought respondent's goods from New York to Dover.

Upon cross-examination and in rebuttal it was shown conclusively that respondent's goods as received in Dover were damaged and not in APPARENT GOOD ORDER as when received by appellant.

The District Court upon the conclusion of the case reserved its decision and later filed its findings rendering judgment in favor of the respondent and against the appellant for $169.05 (10)

From that judgment appellant Company appealed to the New Jersey Supreme Court urging seven different reasons why the judgment in the District Court should be reversed (4). In a per curiam opinion (31) the Supreme Court disposed

of each of these reasons and affirmed the judgment below.

The appellant now seeks to have this Court on review, reverse the judgments below and enter judgment final in its favor, for the two following reasons:

1. The recital in the bill of lading that "the property described was in apparent good order, excepting as noted (Contents and condition of contents of packages unknown)" casts upon the shipper the burden of proving the condition of the goods when delivered to initial carrier.

2. It was error to exclude evidence that nothing happened to the goods while in transit on appellant's line.

ARGUMENT.

1. THE RESPONDENT SHIPPER PROVED THE CONDITION OF THE GOODS WHEN DELIVERED TO THE CARRIER; APPELLANT ADMITS THEIR DAMAGED CONDITION WHEN RECEIVED BY RESPONDENT IN DOVER; AND THE RECITAL IN APPELLANT'S BILL OF LADING DOES NOT AVAIL TO DEFEAT APPELLANT'S LIABILITY.

It was admitted in this case that respondent's goods were damaged while in transit from Los Angeles, California, to Dover, New Jersey, and stipulated (13) that the damages to which respondent was entitled were either $249.55 or $169.05, dependent upon whether or not the loss of a certain box valued at $150.00 was chargeable to appellant. The Court rendered its judgment for the latter amount Appellant's freight receipt and bill of lading, stating that respondent's goods IN APPARENT GOOD ORDER were received by it, are in evidence (39) and (40).

The Supreme Court specifically dealt with the pretended availing clause of appellant's bill of lad-

ing in the second paragraph of its opinion (35 L-1-20).

Appellant would evade liability if possible, although by its bill of lading it- --received in apparent good order; A willow rocker (42 L–4), three bundles chairs (41 L-20), three rockers (41 L-21), delivered by it to respondent "All coming apart" (26 L-14); a commode (p–41 L-24) delivered to respondent "wrecked" (p-25 L-20); chiffonier (p–41 L-28) delivered to respondent "a bundle of kindling wood" (27 L-26); piano stool (41 L-26) delivered "leg broken")27-40); chiffonier (41 L 30) delivered "Back all out" (28 L 3); dresser (41 L 31) delivered "back all out, split down in front" (28 L-4); oil heater (41 L–41) delivered "smashed" (28 L-10); Bambo stand (42 L-1); delivered "legs broken" (28 L–11); Bundle of tools (42 L-2) not delivered "All gone, missing" (28 L–12). The foregoing are only a few of the many items of respondent's loss.

4 R. C. L. Section 372 page 917.

> "The mere proof of delivery of the goods to the carrier in good order, and of their arrival at the place of destination in bad order, makes out a prima facie case against the carrier."

In the case of Gude vs. Pennsylvannia R. R. Co., 77 N. J. L. 391, damages to goods shipped from Brighten, Ohio, to Newark, New Jersey, were sought to be recovered, and our Supreme Court, in an opinion by Justice Bergen, at page 393 says:

> "The rule undoubtedly is that the last of a line of connecting carriers is presumed in the absence of proof to the contrary, to have received freight in the same condition in which it was delivered to the initial carrier, and if it appears to have been shipped in good order, and is in a damaged condition when the last carrier offers to deliver it, a presumption arises that the injury resulted from the negligence of the last carrier."

This case is cited with approval by our Court of Errors and Appeals in Blumenthal, et als vs. Central R. R. Co. of N. J. 88 N. J., L 254.

In this last mentioned case (Blumenthal vs. Central R. R. Co.), the Court of Errors and Appeals in speaking of company's defense as to the bad condition of goods when received by it, said at page 255:—

> "The presumption would be against the hypothesis x x x x, especially as the defendant receipted for it in apparent good order."

In the case at hand, the damage being admitted upon the proofs submitted, the presumption arose against the appellant Company and the burden of proof devolved npon it.

The admission of and stipulation as to damage in the instant case is certainly abundant proof that respondent's goods were damaged in transit, and that their condition when received by the company, IN APPARENT GOOD ORDER, was not their condition when delivered to respondent at Dover.

2. EVIDENCE OFFERED BY APPELLANT THAT NOTHING HAPPENED TO RESPONDENT'S GOODS WHILE IN TRANSIT ON APPELLANT'S LINE WAS NOT MATERIAL AND PROPERLY EXCLUDED.

Under the bills of lading in this case, Exhibits P-1 (36) and P-4 (40), the only exemption from liability is that, in this case, carrier shall not be liable for damages greater in amount than $10 00 per hundred weight, and of this exemption appellant has had the benefit. No other exemption from liability is made.

In the case of Paul vs. Pennsylvannia R. R. Co. 70 N. J. L. 442, our Supreme Court in an opinion

by Justice Swayze, affirmed and applied the following rule:

> "A common carrier cannot by a special contract secure exemption from liability for losses occasioned by its negligence."

Affirmed and followed in

Russell vs. Erie R. R. Co., 70 N. J. E. 808.

Hayes vs. Adams Express Co., 74 N. J. L. 537 at 542.

Michern vs. United States Express Co., 83 N. J. L. 241.

It is submitted that the movement of appellant's trains cannot be shown to relieve itself of liability in this case.

As the Supreme Court in its opinion (35 L 37 &c.) very properly said of this offer: –

> "The next objection is refusal to allow defendant's train conductor to testify that nothing unusual happened to the car between New York and Dover. This was immaterial for if he so testified which is the best defendant could expect, it would prove nothing, for the goods, were in a closed car and it is not pretended that anything happened to the car."

Nowhere does appellant assume or pretend to show that respondent's goods were not received by it in apparent good order as set forth in its receipt It does not assume or pretend that it unknowingly gave receipt for a willow rocker, commode, chiffonier, piano stool, dresser, oil heater, bambo stand, bundle of tools and the other items in apparent good order. It did receive the goods in apparent good order with full knowledge of what they were and their condition By its contract with respondent, appellant obligated itself to safely carry respondent's goods to Dover. This it did not do. Therefore, it should answer in damages.

IT IS RESPECTFULLY SUBMITTED THAT NEITHER THE TRIAL COURT, OR THE SUPREME COURT ERRED, AND THAT THE COURT'S JUDGMENT WAS IN ACCORDANCE WITH THE FACTS AND THE LAW APPLICABLE THERETO, AND SHOULD BE SUSTAINED.

KING AND VOGT,
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