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Notice of Appeal.

Notice of Appeal.

Served and Filed September 20, 1918.

Hudson County Circuit Court

LOUIS DRAGO,

Plaintiff-Appellee,

vs.

CENTRAL RAILROAD COMPANY OF
NEW JERSEY,

Defendant-Appellant.

*Action at
Law.*

*Notice of
Appeal.*

10

To Alexander Simpson, Esq.,

Attorney of Plaintiff-Appellee.

20

Take notice that Central Railroad Company of New Jersey, body corporate, does hereby appeal to the New Jersey Court of Errors and Appeals in the last resort in all causes, from the whole and every part of the judgment entered in the Hudson County Circuit Court in favor of the plaintiff Louis Drago, and against the said defendant on the eighteenth day of June, 1918, for ten thousand dollars damages, and plaintiff's costs of suit to be taxed.

30

Further take notice that the following are the grounds of appeal:

Because the Judge of the Circuit Court before whom the said action was tried:

- (1) Refused defendant's motion for a non-suit.
- (2) Refused to direct a verdict in favor of the defendant and against the plaintiff.

40

Grounds of Appeal.

(3) Refused to charge the jury as follows:
(Defendant's first request to charge):

10 "The plaintiff in this case under the evidence was not an employee of the Central Railroad Company of New Jersey, the defendant, at the time he received the injuries of which he complains, and the verdict of the jury must be for the defendant."

(4) (Defendant's second request to charge):

"The plaintiff at the time of the happening of the accident of which plaintiff complains was an employee of Railroad Stevedoring Corporation, a corporation of New Jersey."

(5) (Defendant's third request to charge):

20 "The plaintiff is not entitled to recover any verdict in this action against the Central Railroad Company of New Jersey under the provisions of an act of Congress entitled 'An act relating to the liability of common carriers by railroad to their employees in certain cases.'"

(6) (Defendant's fourth request to charge):

30 "Neither the employment of the plaintiff by the Railroad Stevedoring Corporation, a corporation of the State of New Jersey, in the course of which employment plaintiff was injured, nor the contract between the Central Railroad Company of New Jersey and the Railroad Stevedoring Corporation, constituted a contract, rule, regulation or device, the purpose and intent of which was to enable the Central Railroad Company of New Jersey to exempt itself from any liability created by the act of Congress commonly known as the Federal Employers' Liability Act."

Grounds of Appeal.

- (7) (Defendant's fifth request to charge):

"The defendant, a common carrier by railroad, had the legal right to make the contract, which has been offered in evidence, with the Railroad Stevedoring Corporation, and to employ the Railroad Stevedoring Corporation to do stevedoring work at Communipaw, Jersey City, N. J., for the Central Railroad Company of New Jersey, and neither such contract nor the making thereof can be considered a contract, rule, regulation or device, the purpose and intent of which was to enable the Central Railroad Company of New Jersey to exempt itself from the liability created by the Federal Employers' Liability Act."

10

- (8) Because the Trial Court charged the jury as follows:

20

- (a) The first question to be decided by you is:

"Has the plaintiff satisfied you by a fair preponderance of the evidence that at the time of the occurrence in question he was an employee of the defendant company in and about this alleged work?"

Whereas there was no evidence that plaintiff was in the employ of the defendant at the time of the happening of the occurrence complained of.

30

- (b) "Has the plaintiff satisfied you by a fair preponderance of the evidence that this contract of December, 1914, (between railroad company and stevedoring company) was a contract the purpose and intent of which was to enable the defendant common carrier to exempt itself from the liability created by that act of Congress? If he has satisfied you of that, then he may have a recovery, provided

40

Grounds of Appeal.

the question of negligence has been satisfied in such manner as the law requires."

10 Whereas there was no evidence that the said contract was a contract, the purpose and intent of which was to enable defendant to exempt itself from any liability created by the act of Congress, nor did said contract have such effect.

20 (c) "The master's duty to his servant requires of the master the exercise of reasonable care and skill in furnishing safe machinery, tools and appliances for carrying on the business in which he employs the servants, and in keeping such machinery and appliances in repair, including the duty of making inspections and tests at proper intervals; and besides the master is responsible for negligence of his servants whom he may select to perform this duty for him if the agent fails to exercise reasonable care in its performance."

There being no evidence that plaintiff was in the employ of defendant, and the plaintiff being on the lands and premises of defendant by license only as an employee of Railroad Stevedoring Corporation, which had contractual rights with defendant.

30 (d) "Has the plaintiff satisfied you by a fair preponderance of the evidence that defendant company failed in the duty of exercising reasonable care in and about providing, furnishing and maintaining tools and appliances which were reasonably safe";

Whereas there was no duty on the defendant to furnish tools and appliances for the plaintiff, or any servant of Railroad Stevedoring Corporation.

Grounds of Appeal.

- (e) "If plaintiff has satisfied you of that and has satisfied you of these other things which I have in the opening of my charge spoken to you of, so as to bring himself under the terms of this act, then he may have a recovery";

Whereas plaintiff under the evidence was not entitled to recover against defendant under the terms and provisions of Federal Employers' Liability Act, and the Court should so have charged.

10

- (f) Because the Court charged the jury that the burden was upon the defendant to satisfy the jury that plaintiff was guilty of contributory negligence before the jury should reduce the amount of the verdict in proportion to plaintiff's contributory negligence.

20

- (g) Because the Court erroneously charged the jury on the law of master and servant, whereas under the evidence in the case as a matter of law plaintiff was not a servant or agent of defendant.

- (h) Because the Court erroneously charged the jury as to the rule of conduct of master toward employee, whereas under the evidence as a matter of law plaintiff was not an employee of defendant at the time of the happening of the accident complained of.

30

- (i) Because the Court left it to the jury to find as a fact whether or not the contract between the defendant and Railroad Stevedoring Corporation was a contract prohibited by section 5 of Federal Employers' Liability Act; whereas as a matter of law such contract was not within the provision of said section 5.

40

Grounds of Appeal.

(9) Because the Court refused to strike out the following answer to the following question over objection of defendant:

“Q Well, did he say anything else about for whom you were working? A Certainly, for the Central.”

10

(10) Because the Court refused to strike out on proper objection made by defendant the following answer to the following question:

“Q What office was it? Where you were paid for the first time? A Of the Central.”

(11) Because the Court refused on proper objection made by defendant to strike out the following answer to the following question put by defendant on cross examination:

20

“Q Now, you knew, did you not, that you were working at the time of this injury for the contracting company? A The only thing I know is that I always work for the Central Railroad.”

Whereas the said answer was not responsive to the said question and should have been struck out on defendant's motion.

30

(12) Because the Trial Court overruled defendant's objection to the following question put to plaintiff's witness Cosgrove:

“Q And if that wire rope was in good condition and the wire properly attached it should lift that without breaking, shouldn't it?”

Whereas the said question called for a conclusion, was argumentative and did not contain sufficient facts to be the subject of a hypothetical question to be propounded to an expert witness.

40

Grounds of Appeal.

(13) Because the Hudson County Circuit Court entered judgment final in favor of plaintiff and against the defendant.

(14) Because the Hudson County Circuit Court did not enter judgment in favor of the defendant and against the plaintiff.

10

(15) Because the Hudson County Circuit Court did not have jurisdiction to enter judgment in favor of plaintiff, an employee of Railroad Stevedoring Corporation, and against defendant railroad company under the provisions of an act of Congress, known as the Federal Employers' Liability Act.

McDERMOTT & ENRIGHT,
Attorneys of Appellant.

20

Service of a copy hereof is hereby acknowledged this 20th day of September, 1918.

ALEX SIMPSON,
Attorney of Plaintiff-Appellee.

30

40

Complaint.

Complaint.

Filed December 31, 1917.

HUDSON COUNTY CIRCUIT COURT.

10 LOUIS DRAGO,

Plaintiff,

vs.

CENTRAL RAILROAD OF NEW
JERSEY,

Defendant.

*Action at
Law.*

Complaint.

20 The plaintiff, who resides at No. 151 Bright
street, in the City of Jersey City, in the County
of Hudson, says that:

1. The defendant is a common carrier by rail-
road engaged in transporting freight and passen-
gers from the State of New Jersey into other
states and territories of the United States, and
was at all the times hereinafter mentioned.

30 2. The plaintiff was an employee of the said
defendant, engaged as a laborer in interstate com-
merce, unloading trucks from railroad cars to a
scow.

3. That on the 18th day of June, 1917, on Pier
13, at Jersey City, in the County of Hudson, while
the plaintiff was so working, he was injured
through the negligence of the defendant.

4. The negligence of the defendant consisted
in this:

40 That while the plaintiff was so working as afore-
said, a movable crane, running on the railroad
tracks, was used for unloading said trucks, and

Amended Answer.

the cable of said crane was not strong enough to lift the truck and was unsuitable and broke, and one of the trucks fell to the pier and rolled over on the plaintiff, cutting off his leg.

5. The plaintiff was at all times in the exercise of due care for his safety.

10

6. By reason of said accident, the plaintiff was compelled to expend money for medical expenses and lost earnings he otherwise would have made, and has been permanently incapacitated.

The plaintiff demands \$25,000 damages.

ALEX. SIMPSON,
Attorney for Plaintiff.

Amended Answer.

20

Filed 1918.

Defendant, a common carrier by railroad, incorporated under the laws of New Jersey, says that:

1. It admits the defendant is a common carrier by railroad engaged in transporting freight and passengers from points in the State of New Jersey to other points in the State of New Jersey, as well as being engaged in interstate commerce.

30

2. Defendant denies all the allegations in paragraph 2 of the complaint.

3. Defendant denies all the allegations in paragraph 3 of the complaint.

4. Defendant denies all the allegations in paragraph 4 of the complaint.

5. Defendant denies the allegations in paragraph 5 of the complaint.

40

Amended Answer.

6. Defendant has no knowledge as to the allegations in paragraph 6 of the complaint and leaves plaintiff to his proof thereof.

FIRST SEPARATE DEFENSE.

10 Defendant by way of separate defense will prove that if plaintiff sustained injuries as alleged in the complaint he was guilty of negligence which contributed to the happening of said accident and the injuries sustained.

SECOND SEPARATE DEFENSE.

20 1. Defendant will object on the trial of this action that the complaint does not set forth a cause of action for the reason that if plaintiff was in the employ of this defendant, as alleged, his recovery is limited by the Workmen's Compensation Act of the State of New Jersey to the compensation provided to be paid by his employer under the provisions of the said Workmen's Compensation Act of the State of New Jersey.

2. The complaint does not in other respects set forth a cause of action against the defendant.

THIRD SEPARATE DEFENSE.

30 The plaintiff did assume the risk of the happening of the accident complained of in plaintiff's complaint.

FOURTH SEPARATE DEFENSE.

40 1. Defendant by way of further separate defense to plaintiff's complaint, says on information and belief that plaintiff on said 18th day of June, 1917, was an employee of Railroad Stevedoring Corporation, a body corporate, and was not in the employ of this defendant.

Amended Answer.

2. That the plaintiff at the time of sustaining the injuries mentioned in the complaint was upon property owned by the defendant.

3. That plaintiff's right to be on defendant's property grew out of and was limited by the terms of a certain contract in writing between the defendant and said Railroad Stevedoring Corporation, in and by which said contract permission was given to the employees of the Railroad Stevedoring Corporation to enter upon defendant's said property for the purpose of doing work for said Railroad Stevedoring Corporation; that said permission to enter upon defendant's said private property was accorded to said Railroad Stevedoring Corporation and to plaintiff upon the condition that this defendant would not be liable for any injury to plaintiff or any other employee of said Railroad Stevedoring Corporation, and that plaintiff was upon said private property of the defendant as a mere licensee.

McDERMOTT & ENRIGHT,
Attorneys of Defendant.

Common reply joining issue filed by plaintiff in time.

30

40

Opening.

HUDSON COUNTY CIRCUIT COURT.

	LOUIS DRAGO,	} <i>At Law.</i>
	<i>Plaintiff,</i>	
	<i>vs.</i>	
10	CENTRAL RAILROAD COMPANY OF NEW JERSEY,	} <i>Defendant.</i>

Appearances:

Alexander Simpson, Esq., for the plaintiff.

James D. Carpenter, Jr., Esq., for the defendant.

20 The above entitled case was tried June 12 and
13, 1918, before Hon. Luther A. Campbell, Judge,
and a jury.

Mr. Simpson opened the case to the jury on
behalf of the plaintiff.

Mr. Carpenter opened the case to the jury on
behalf of the defendant.

30 *Mr. Simpson.* I was to stipulate that the land
was owned by the Central Railroad, and that a
certain contract had been executed which you were
to produce, which I do. You were to stipulate
that this was an interstate commerce shipment.

Mr. Carpenter. This shipment was a shipment
of 300 car tires out of car P. R. 25535, account
Midvale Steel Company, consigned to steamship
Nordharit, Pier 39, Brooklyn. Drago was un-
loading—

Mr. Simpson. This shipment.

40 *Mr. Carpenter.* Some of these 300 steel car tires
from the car at Communipaw, so that they might
be carried over—

Opening.

Mr. Simpson. To Brooklyn.

Mr. Carpenter. —to the steamship in Brooklyn.

The Court. And what you say in effect is this: That the act or the transaction that was going on, irrespective of the other questions that you have raised, Mr. Carpenter, as to whether or not the plaintiff was in the employ of the Central Railroad Company or in the employ of somebody else, and irrespective of your other defense—contributory negligence, and so forth—do I understand this to amount to an admission that the transaction was one that had to do with interstate commerce? 10

Mr. Carpenter. I will say this: That the car tires themselves were moving from a point in New Jersey to a point in New York at the time this accident happened. 20

Mr. Simpson. In custody of a common carrier by railroad.

Mr. Carpenter. They were being shipped.

Mr. Simpson. But they were in the custody of the Central Railroad.

Mr. Carpenter. I am not going to go that far. I will admit that they were in transit between a point in New Jersey and a point in New York. 30

Mr. Simpson. But that was not your stipulation.

The Court. I suppose what Mr. Simpson is reaching for is that this was a part of the undertaking of the Central Railroad Company as a carrier. Whether it was part of the undertaking of the Central Railroad as a carrier to carry this or transport this merchandise from a point in the State of New Jersey to a point outside of the State of New Jersey. 40

Louis Drago, direct.

Mr. Carpenter. This was a shipment of those tires from that car which the Central Railroad Company had taken to that point in Communipaw, consigned to the steamship, Pier 39, Brooklyn.

The Court. As a part of its contract as carrier?

10 *Mr. Carpenter.* Well, the Central Railroad paid the Stevedoring Corporation for stevedoring.

Mr. Simpson. Where were they to go after they got them out of the car?

Mr. Carpenter. They were to go into Brooklyn.

Mr. Simpson. Well, on a Central Railroad lighter or boat, or how were they to go?

Mr. Carpenter. Central lighter.

Mr. Simpson. Central Railroad lighter and be transferred to Brooklyn?

20 *Mr. Carpenter.* Yes. The car, Mr. Simpson—the car P. & N. 25535 was on a track up at the north center of the dock, Pier 13. It is also admitted by the plaintiff that the land at Communipaw, where this accident happened, and the dock's tracks were owned by the Central Railroad Company of New Jersey, the defendant; and the execution of this contract—

30 *Mr. Simpson.* The contract you are going to put in later. I will admit it without calling the subscribing witness.

The Court. It is admitted without formal proof.

LOUIS DRAGO, the plaintiff, sworn as a witness in his own behalf through an interpreter, testified as follows:

Direct examination by Mr. Tumulty.

Q What is your name? A Louis Drago.

Q And where do you live? A Bright street.

40 Q Where? A 151.

Louis Drago, direct.

Q 151 Bright street, Jersey City? A Yes, sir.

Q How long have you lived there? A Two years.

Q Are you married? A Yes, but my family is not here; it is in Italy.

Q Well, where did you work on the 18th day of June, 1917? A Pier 13. 10

Q Well, for whom did you work?

Mr. Carpenter. I object to that as calling for a conclusion.

The Court. Well, in a sense it may be so. He may tell at what he was employed and all such facts and circumstances. It is a very important question in this action, otherwise I would not stand upon it very much.

Q How long were you working at the pier which you mentioned? A I want to tell you that the one day I would work on one dock, and the next day I would work on another dock. 20

Q Well, how long had you been working at that kind of work? A About eight years.

Q When you were employed to do this work, who was it that hired you?

Mr. Carpenter. I object to that. We are not concerned with who employed him eight years ago, who employed him at the employment— 30

The Court. I think, Mr. Carpenter, I do not want to go back eight years if I can help it. If a period at the present time can be found when he was employed either by the Central Railroad Company or by this other company whom you claim was his real employer, why, I would prefer, of course, to come nearer to date; but it may be for all I know 40

Louis Drago, direct.

about the case, we may have to go back the eight years and show his original employment.

Mr. Simpson. That is our contention: That the original employment carried right on down through. He undertakes to show the contrary.

10 *Mr. Carpenter.* You are not dealing with uncertainties.

The Court. What is the question?

Q (Question repeated by the stenographer.) When you were employed to do this work who was it that employed you? A The Central.

Q The Central what? A The Jersey Central.

20 *Mr. Carpenter.* I object to that and move to strike that out on the ground that it is a conclusion of the witness. He may say who it was that employed him.

The Court. That may be so. I will let it stand for the present until I see who was the actual person with whom he had dealings.

Q How did you get employment there? Where did you go? A Mr. Tice.

Q Well, who is Mr. Tice? A He is not here.

30 Q Well, who is he? A He was the boss.

Q The boss of what?

Mr. Carpenter. I object unless he knows of his own knowledge.

A The Jersey Central.

Mr. Carpenter. I move to strike it out. He cannot prove that Tice was boss of the Central.

40 *The Court.* No, it amounts to a conclusion, gentlemen, unless he gives us the facts.

Louis Drago, direct.

Q Where was this man Tice when you got your employment? A He was not on the job. He would go from one dock to another.

Q But where was he located?

Mr. Carpenter. I object to that. It is immaterial.

10

A Well, there were five men—there are five or six docks and the boss going from one place to another. They are not standing in one place all the time.

Q Now, where are those docks? A Pier 10, 11, 12, 13 and 14.

Q Where are those located? A Jersey City.

Q Where in Jersey City? A Near the Statue of Liberty.

Q Well, are there any railroad tracks connecting with those docks that you speak of? A Yes, but the docks are close to the sea.

20

Q Well, now, what railroad tracks connect with those docks? A The Central Railroad.

Q When you were employed to do this work and you say you spoke to Mr. Tice, what did he say to you? A After two days give me the job.

Q Well, did he say anything else about for whom you were working? A Certainly; for the Central.

30

Mr. Carpenter. I object and move to strike it out. That is a conclusion.

The Court. How is that a conclusion?

Mr. Carpenter. I think that no time has been shown that this thing took place, and I think that is a conclusion.

The Court. I will overrule the objection upon the reason urged. It is not a conclusion. The question was really what Mr. Tice

40

Louis Drago, direct.

said to him, if anything, at the time he sought employment, as to whom he was being employed by. He was asked in that way, if at the time he did say anything in that direction, and he said: "Certainly, for the Central." I will overrule the objection.

10 *Mr. Carpenter.* Objection noted.

The Court. You may have it.

Q When did he ask you to return? A After we have this conversation, two days after that he gave me the job.

Q Did you come back two days after that? A Yes, sir; he gave me the job.

Q And where did you come to? A For the first part I worked on the dock 10, and then later
20 on I worked for about a year on Pier 5.

The Court. Pier 5?

The Witness. Pier 5.

Q Now, do you know to what railroad those piers are connected? A The Central Railroad.

Q When you came back to get work did you see Mr. Tice again? A Yes.

Q And did he direct you what to do?

30

Mr. Carpenter. I object to that as leading.

The Court. I will overrule the objection on that score, on that question. I do not very well see how you are going to get at it. If he asked him "What did you do," probably we would be all over the lot with a witness of this character before we got to the point.

Mr. Carpenter. There is danger and I would like to be protected.

40

The Court. Very well; take your objection.

Louis Drago, direct.

Q (Question repeated by the stenographer.)
And did he direct you what to do?

The Court. He can answer that "Yes" or
"No."

A He would leave that to the foremen.

Q Now, who was the foreman? A There were 10
four or five.

Q Well, the first day that you went to work
did you report to any foreman? A The office
give me the job and then I went to work.

Q Who was your foreman? A I don't remem-
ber the name of the foreman.

Q Well, what kind of work did you do? A Any
work that was to be done.

Q Well, now, tell us the character of the work?
A Unload.

Q Unload what? A Flour, iron, pumping. 20

Q What did you unload flour or other material
from? A From the cars and then we placed
that on board.

Q On board what? A Barges.

Q Where were the cars that you unloaded?
A They were on tracks.

Q And what tracks were they on? A On the
tracks of the Central Railroad.

Q And what kind of barges did you load the 30
merchandise into? A They were covered barges,
steam boats, canal boats, all kinds of ships.

Q When were you paid, how often? A Every
fifteen days.

Q Do you know who paid you? A We would
get paid in the office of the company. Who else
would pay except the company.

Q What office was it?

Mr. Carpenter. I object unless the time is
shown.

Louis Drago, direct.

Q Well, we will say the first time you were paid?

Mr. Carpenter. We do not know when that was.

10 *Mr. Tumulty.* Eight years ago when he went to work.

Q (Repeated by the stenographer.) What office was it? A Of the Central.

Mr. Carpenter. That is a conclusion. I move to strike it out.

Mr. Simpson. It would be a conclusion if he said it was in the Court House.

20 *The Court.* I will refuse to strike it out. Take your exception to it. I know that you are entitled to formal, strict proof, but I cannot do any better. We will be see-sawing this way all day long.

Mr. Carpenter. I hate to do it, but I have to.

The Court. I will overrule your objection. Take your objection.

Q Were you always paid at the same office?

A Yes.

30 Q How were you paid? A Cash money.

Q Was the cash in an envelope or anything?

A Yes. (Witness produces an envelope.)

Q Have you got one of those envelopes with you? A (Handing it to counsel.)

Q I show you an envelope and ask you if that is the character of envelope that contained your money when you were paid? A Yes.

40 Q Is that the kind you got when you were first employed?

Louis Drago, direct.

Mr. Carpenter. I have no objection to showing when he got that one. But what difference does it make if he got it a long while ago?

The Court. Except that we may have to lead up to the present day. I do not know myself when he got this one. It may be eight years ago or eighteen years ago, although he seems to have set eight years ago as his first employment. 10

The Witness. Yes, and they were open; they were even open.

Q Well, on any of the envelopes you got containing your money was there ever any printing on it? A No, sir; never.

Q Where do you receive these envelopes, in the office of the Central Railroad Company? 20

Mr. Carpenter. I object unless the time is shown.

Q Take the time you were employed. Did you receive these cheques at the office that you say was the Central Railroad office?

The Interpreter. Do you want me to use the word "cheques"?

Q These envelopes? A In the same dock; upstairs there was located the office, and that is the place we get it. 30

Q Did you always receive your pay there up to the time you were injured?

Mr. Carpenter. I object to that. Let him say it in his own words. I cannot from this get any idea where it was. He is not testifying. His counsel is testifying.

The Court. There were several docks spoken of. 40

Louis Drago, direct.

Mr. Simpson. There were only the Central Railroad docks spoken of.

Q What dock was the office on? A Pier 11.

Q Was it on Pier 11 that you were always paid? A First it was on Pier 10 and then they built the new dock on Pier 11.

10 Q Do you remember the day that you were injured? A June 18th.

Q What time of the day was it? A About quarter after four.

Q What were you doing when you were injured? A We were hoisting up some wheels. We had just put a wire through.

Q What kind of wheels? A Maybe this kind of wheels they use for trains.

20 Q Were they iron wheels or wooden wheels? A Iron wheels.

Q How large were they? A About so big (indicating).

Q Were they as big as car wheels that you see? A Yes; this kind of wheels that they use for cars.

Q You say you were putting a wire on them? How did you put the wire on them? A Put a wire through the hole.

30 Q How many wheels did you put the wire through? A No more than nine or ten.

Q To what was the wire attached? A To the crane.

Q Where was the crane? A It was on the track.

Q Near where? A Near Pier 13.

Q Was it on Pier 13 or near Pier 13? A On the proper—proper on the Dock 13.

40

Louis Drago, direct.

Q Had you been working on those wheels before? A Certain days we had to work at it just the same.

Q Now, what were you doing with the wheels? A Taking from the cars and put them on board.

Q Well, were you standing on the ground or on the car when you put the wire through? A I also work on the car. 10

Q Were you working on the car when you put the wire through the wheels? A Yes, but I went a little further away.

Q (Repeated by the stenographer.) Were you working on the car when you put the wire through the wheels? A I was on the car.

Q On the car? A But when we were hoisting this stuff up then I went further away.

Q Well, where did you go? A In the same car, inside the car. 20

Q Well, now, after you put the wire in the wheels what happened? A And while we were hoisting up the wheels—

Q Who was hoisting? A —then the wire broke and then came down.

Q Now, who was hoisting the wheels? A The engineer by the machine.

Q Was the crane lifting the wheels? A Yes, the crane would hoist it up, and then place them on the boat. 30

Q Now, before you put this wire in these wheels had any other wheels been lifted from the car into the boat? A Well, they had already placed two draft on the boat.

Q Do you mean that you put other wheels on the scow? A Yes, sir.

Q Now, after the wheels were raised by the crane where were you standing? A I went further 40

Louis Drago, direct.

back to the car, because there was a chance to get away from it.

Q Did you always do that? A All the time, when there was big stuff like pipe, and so forth; then we would get off the car and get on the ground, but not at this time with this kind.

10 Q Well, now, tell us what happened? A What happened—that I lost my leg.

Q Well, did the wheels go up? A It was about as high as— (*The Interpreter:* And he pointed with his crutches), and then broke off, and I didn't do in time and and it caught my leg.

Q How did it catch your leg? A As I received the blow, then my leg was crushed. I didn't see nothing else.

20 Q Were you unconscious? A Sure; I was nearly dead.

Q Did you know what broke? A I felt that my leg was all crushed.

Q Did you know what broke on the crane? A The wire.

Q How do you know that it was the wire that broke? Did you see it at the time? A Yes; yes; even a companion of mine said watching it, "The wire is broken," and while we were trying to dodge it I was crushed.

30 Q Who was that companion? A He is here.

Q Do you know the engineer who was handling the crane on that day? A Yes.

Q Did he work at that kind of work before, do you know? A Sure; he would do the same work I was doing and then after placed him on the machine.

40 Q How long had he been working on the machine before you were injured?

Louis Drago, direct.

Mr. Carpenter. I object to that. There is no allegation that the engineer was not a proper engineer.

Mr. Tumulty. All right; we will withdraw the question.

Q What happened to you after you were injured? A They took me to the hospital. 10

Q And how long were you in the hospital? A Forty-four days.

Q Do you know what they did to you there? A I was nearly dead. I did not know what they did; but I remember they were telling me that probably I would lay until the following day, and if it was necessary, to amputate my leg.

Mr. Carpenter. I object and ask to have it stricken out as hearsay. 20

The Court. It may be.

Q Well, while you were there did you feel any pain? A Sure; I suffered pain.

Q When you left the hospital did you have your both legs? A Only one.

Q Where was your leg taken from you? A Why—(witness points to his knee).

Q Was it while you were in the hospital? A Yes, in the hospital. 30

Q What pay did you receive when you were injured? A Twenty-four or twenty-five dollars per week.

Q Have you worked since you left the hospital? A I was home all the time. How could I work?

The Court. The real question is, has he worked?

A I did not. 40

Louis Drago, cross.

Cross examination by Mr. Carpenter.

Q Have you earned any money since the time of this accident? A Not a cent.

Q You say that eight years ago you were employed by a Mr. Tice? A Yes.

10 Q Have you ever seen that man since that you call Tice? A Always on the job.

Q Do you see him here in court? A Yesterday he was here, but I don't think to-day he is here.

Q Do you know Mr. McBride?

Mr. Carpenter. Is Mr. McBride here? (No answer.)

Q Do you know Mr. Ahearn back there?

Mr. Carpenter. Stand up.

20 A Yes; he was the checker. He was the one who put down in writing the loaded stuff.

Q And do you see the man in court who paid you your wages? A Yes.

Mr. Carpenter. Stand up, will you?

Q That is the man that paid you your wages?

A They are not always the same men who pay, there are so many.

30 Q That man who stood up paid you your wages for a long time, didn't he? A I did not put it down in writing for a long time, but he did pay me.

Q Well, he paid you for a good many months before this accident of yours, didn't he? A He did pay, but I don't know for how many months.

Q Well, you know his name is Mr. Nolan, don't you? A I don't know his name, but I know him by sight.

40 Q Now, you knew, did you not, that you were working at the time of this injury for the con-

Louis Drago, cross.

tracting company? A The only thing I know is that I always work for the Central Railroad.

Mr. Carpenter. Didn't he say yes to that question—"Si"?

The Interpreter. I gave you what he said.

Mr. Carpenter. I move to strike that out. 10
I asked if he knew a certain particular thing.

The Court. What is the question?

Q (Repeated by the stenographer.) Now, you knew, did you not, that you were working at the time of this injury for the contracting company?

A (Repeated by the stenographer.) The only thing I know is that I always work for the Central Railroad.

Mr. Carpenter. I ask to have that stricken 20
out.

The Court. I decline to strike it out. Take your exception.

Mr. Carpenter. I ask an exception.

Q Is that your signature to these answers to interrogatories? A I did not sign my name there; I did not sign.

Q Is that your signature?

Mr. Simpson. I object. That is answered. 30
He said that he did not sign his name and that is not his signature.

A I did not write it; I don't know how to read—to write.

Q Is that your signature to the affidavit to these answers to interrogatories?

Mr. Simpson. I object to his stating what the contents of this document are, which is 40

Louis Drago, cross.

not in evidence. I have no objection to asking him about his signature.

The Witness. I did not sign my name to no paper.

10 *The Court.* The signature to which you point, Mr. Carpenter, he says is not his signature because—I will use his language as nearly as I can—"I did not sign my name to any paper."

Q Did you swear to this paper dated the 11th day of May, 1918, before—

Mr. Carpenter. What is this, Charles Lifland?

Mr. Simpson. Let me see it.

20 *Mr. Carpenter.* It is from your office.

Mr. Simpson. I object to that statement. There is no proof at all that it came from my office yet.

The Court. It may be it is of no relevancy in the case.

Mr. Simpson. Charles Lifland, I think it is.

30 Q (Repeated by the stenographer.) Did you swear to this paper dated the 11th day of May, 1918, before Charles Lifland, a notary public of New Jersey? A Where was this paper was made?

Mr. Carpenter. I ask the Court to compel the witness to answer.

Mr. Simpson. Ask him over again.

The Court. Read the question over again.

40 Q (Repeated by the stenographer.) Did you swear to this paper dated the 11th day of May, 1918, before Charles Lifland, a notary public of New Jersey? A I couldn't think so.

Louis Drago, cross.

Q Did you swear to that paper? A I don't remember.

Q How long have you been in this country? A About nine years; I was nine years last March.

Q When did you get the envelope with your name on it, Louis Drew? A That is the way—

10

The Court. No, when did he get it? The question is when, not how.

A I do not know; some times they pay with checks.

Mr. Carpenter. He says, "I do not know."

Q Isn't this the last pay envelope that you got? A I do not know. Some time I would say this, some times I do not.

Q Your check number was No. 42, wasn't it? A No. 42, yes. 20

Q And your salary at the time you got this envelope was \$48.19, wasn't it, or your wages? A Sometimes I get more.

Q At the time you got this envelope your wages were \$48.19; isn't that so? A If it is there; it is there.

Mr. Carpenter. I would like to have this marked for identification.

30

(Paper marked P. 1 for identification.)

Q Did you get this envelope with your salary in it in the year 1917? A Yes.

Q You had had this check number, No. 42, for several years, hadn't you? A I don't know if I have it three or four years.

Q You had it over three or four years, did you? A I do not know whether it was three or four; another time we had a different check. They changed the check. 40

Louis Drago, cross.

Q I see. But for several years then you had the check No. 42, did you? A This one.

Q Your check number was 42 for several years? A Yes, but I couldn't tell you if it was for two or three or four years.

10 Q Do you remember what your number was before it was 42? A I think it was 38.

Q Who was the man—

Mr. Carpenter. Strike that out.

Q Was Mr. Nolan the man that paid you your wages? A Sometimes it was people it was people who are sitting down here now; sometimes it was other people; and also the man with eye-glasses happened to be there at times.

20 Q The last time that you were paid wages, do you remember that time? A The last pay I got that through a boy or a girl who came to the—some young man who came to the hospital.

The Court. Same pay he received last before he was hurt?

A Always in the office.

Q And do you remember the man who gave you the money, who he was?

30 *The Court.* That is for the last pay he received before he was hurt.

A There was three or four men in the office; I don't know who paid me the money.

Q Mr. Nolan was one of them, wasn't he? A Certain times he paid; other times somebody else would pay.

40 Q You were always paid in the office that Mr. Nolan paid you in, weren't you? A Sometimes I have been.

Louis Drago, cross.

Q His office was the office you went to for your pay, wasn't it? A I saw him there; I don't know if he had separate office or what he had.

Q Well, you always went to the same office to get your money every time, didn't you? A Yes, same office.

Q And that office was the office that Nolan paid you in, wasn't it? A Some other times somebody else would pay, another boy. 10

Q But it was always in the same office? A Yes, the same office.

Q And that was on Pier 11, Jersey City, wasn't it? A Yes.

Q Upstairs? A Yes.

Q Now, one more question— A The carpenter, the man who gave me the job, is here now, just came in. 20

Mr. Simpson. The man who gave him his job is here now, just came in.

Mr. Carpenter. Stand up, Mr. Cosgrove.

Q Mr. Cosgrove is the man who gave you this job originally? A Eight years ago.

Q Mr. Cosgrove of the Central Railroad? A Yes.

Q Now, then, do you know a man named McBride? A I don't know him by name, but during my eight years that I was employed there there were many bosses. One come in, one go out. 30

Q And the boss gave you the orders that he wanted you to execute, didn't he? A Certainly; the foreman—the foremen they would give us commands.

Mr. Carpenter. Stand up, Mr. McBride.

Q Did you ever work under that man? A Also. 40

Louis Drago, cross.

Q Did you work under that man in 1917? A He always was there. I did.

Q And what did you call him? What name did you know him by? A I don't know. I did work there. I know them by sight, but I don't know by name. I was taking care of my work.

10

Mr. Carpenter. Will you stand up, Mr. McCarthy?

Q Do you know Mr. McCarthy who is standing up there now? A I know him for four or five years.

Q And did you know his name? A Not the name; not by name.

Q Where did you see him, in the office? A I saw him in the office; sometimes I would meet him in the morning.

20

Q Was he there in the same office that you were paid your wages? A Sometimes he was there.

Q And did he ever pay you your wages? A Certain time, yes.

Q And in the year 1917 or before did Mr. McCarthy pay you your wages? A I think he was there also before that, but I am not sure.

Q But you know he was in the office—you saw him there in 1917? A I think so.

30

Q You have not been back to the office since you had the accident, have you? A I went to the office proper, down the ferry of the Central.

Q After you were hurt? A After I came out from the hospital about a month or a month and a half.

Q But you have not been back there to work since, have you? A How could I work?

Q These times that you saw Mr. McCarthy and Mr. McBride and Mr. Nolan in the office were all

40

William F. Cosgrove, direct.

times before you were hurt, weren't they? A Yes; after that I didn't see nobody else.

Q How old are you? A Thirty-nine.

WILLIAM F. COSGROVE, a witness sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Simpson.

10

Q Where do you live, Mr. Cosgrove? A 174 Danforth avenue, Jersey City.

Q And in 1910 in whose employ were you? A Central Railroad of New Jersey.

Q Did you hire this plaintiff who has just left the stand? A Yes.

Q What did you hire him to do?

Mr. Carpenter. I object unless the time is shown when he employed him.

20

Mr. Simpson. 1910, he said. What do you want, the day of the week?

The Court. Well, there might be some question about it.

Q Do you remember the month that you employed him? A No, I do not.

Q But it was in the year 1910? A Well, that I am not positive about.

30

Q What are you positive about as to the time of his original employment? A Well, I know that I employed him.

Q For the Central Railroad? A But about that year, about 1910.

Q What kind of work did you employ him to do? A Shenango work, what we call 'longshore work.

Q What is shenango work? A 'Longshore work.

40

William F. Cosgrove, direct.

Q Unloading and loading freight cars? A Unloading and loading freight cars.

Q What piers did he work on when you employed him first? A When I employed him I put him in Dock 5.

10 Q Were you his immediate superior after he worked, or did you merely employ him and then leave his supervision to others? A I had a foreman of the other pier. I was the general foreman.

Q What was the name of the foreman on Dock 5? A Cervera.

Q Any of them here, your foremen? A No, sir.

Q Were you working for the Central Railroad on the day of this accident? A Yes.

20 Q And do you know this crane by which he was injured? A Yes.

Q That is the property of the Central and was at the time of the accident, wasn't it? A Yes.

Q Where was it located? A It was located on Dock 13.

Q And what was it used for? A Well, it is used for loading and unloading shipments.

30 Q From the cars? A Principally structural iron, iron of all characters.

Q And can you describe it briefly as to the crane? A Yes. Well, it is a crane—it is rated at thirty tons; it will lift thirty tons; it has got a boom on it. Of course, it is what we call a Browning—Browning Engineering Company are the builders of it; and it has got three-part fall, has a settle chain on the hook.

Q What does it lift the objects with? What does it lift with, wire? A Wire rope.

40 Q Wire rope? A Yes, sir.

William F. Cosgrove, cross.

Q And do you know the diameter of the rope on the day of the accident? A Of the wire rope? Of the fall?

Q Yes. A Yes, three-quarters of an inch.

Q And do you know the tire wheels that it was lifting? Did you see these on the day of the accident? A Yes. 10

Q You have had experience with that crane, haven't you? A Oh, yes.

Q And if that wire rope was in good condition and the wire properly attached, it should lift them without breaking, shouldn't it? A Oh, yes.

Mr. Carpenter. I object to that as calling for a conclusion. Various things, I assume, will make a rope break. 20

The Court. Oh, I suppose if you took an axe, yes, you could sever it; or if you took any other object you could probably sever it. I understand the question couldn't possibly go in that direction. I won't strike it out. Take your objection.

Cross examination by Mr. Carpenter.

Q Mr. Cosgrove, what is your position with the Central Railroad now? A What is that? 30

Q What is your position with the Central Railroad Company now? A General foreman, still general foreman.

Q You were in 1910? A Yes.

Q How long did this Louis Drago remain in your employ? You say you employed him in 1910, about that year— A How long what?

Q Did he remain in your employ? A Well, up to about 1915. 40

William F. Cosgrove, cross.

Q Did he, the plaintiff, work under your supervision from about 1910 to about 1915? A Yes, up to about January 1st, 1915.

Q Can you say whether you saw him constantly? A Oh, yes.

10 Q Can you say whether he was on your payroll during that period? A Previous to 1915?

Q Yes. A Yes; he was on our payroll previous to 1915.

Q Has he been on your payroll since the first of January, 1915?

Mr. Simpson. I object to that on the ground the payrolls should speak for themselves. It does not seem to me proper to ask Mr. Cosgrove.

20 Q Have you got your payrolls with you? A I have got the time-rolls here.

Mr. Simpson. Well, that is very good.
(Witness produces papers.)

Q Have you gone through them? A Oh, yes.

Q What payrolls are those? A These are for 1917.

Q Is the plaintiff, Louis Drago— A The name
30 Drago does not appear on here.

Q At any time in the year 1917? A No, January 1st, 1917, to December 31st, 1917.

Q Payroll for the entire year of 1917. Now, did the Central Railroad Company of New Jersey do any more stevedoring work—that is, the work of unloading the cars from the piers from the piers in Communipaw, Jersey City, to boats or floats— A Not since 1915.

Q Went out of that business what time? A
40 January 1, 1915.

William F. Cosgrove, re-direct.

Q And since that time by whom has that work been done? A The Railroad Stevedoring Corporation.

Q What is the Railroad Stevedoring Corporation, if you know? Is that a separate corporation or is it— A They are doing our work.

Q What? A They are doing the work. The laboring work for the Central Railroad, the stevedoring work. 10

Q Now, the plaintiff, Louis Drago, said that he was paid his wages upstairs on Pier 11, Jersey City. Does the Railroad Stevedoring Corporation have an office there? A They have on one side of our dock, Dock 11.

Q Did you have anybody in your employ—I will take up check 42. Do you know what— 20

Mr. Simpson. We will admit that is Louis Drago's.

Q Was that his pay envelope? Can you tell by looking at it, the No. 42 which was the check number and Louis Drew on a pay envelope of the Central Railroad of New Jersey? A No, sir.

Q Do you know whose pay envelope that is? Can you tell by looking at it? A Well, it looks to me like the Railroad Stevedoring Corporation envelope. They pay in such envelopes as that. 30

Q And did the Central Railroad in 1917 pay in such envelopes as this? A No; they paid by check.

Q Paid all their employees by check? A All their employees by check.

Re-direct examination by Mr. Simpson.

Q Now, you say, Mr. Cosgrove, that up to 1915 the Central Railroad unloaded its own cars and 40

William F. Cosgrove, re-direct.

attended to the unloading of freight and the loading of freight; is that right? A Sure.

Q Since that time it has done that through the Railroad Stevedoring Company hasn't it? A Yes, sir.

10 *Mr. Carpenter.* I object—withdraw the objection.

Q And the Railroad Stevedoring Company has an office on Pier 11, hasn't it? A Yes.

Q So that now and since 1915 the Central Railroad instead of hiring men to discharge its cars and cargoes contracted that work to this Railroad Stevedoring Company? A Yes, sir.

Q And the Railroad Stevedoring Company would bring the men and unload the cars? A Yes.

20 Q But the appliances for unloading the cars remained the property of the Central Railroad, didn't they? A Oh, yes.

Q The docks and the cars remained the property, and the tracks and the boats remained the property of the Central Railroad? A Yes.

Q All that was done was the actual manual labor by men employed by the Railroad Stevedoring Company? A We furnished the equipment.

30 Q You furnished the equipment. And on this—the time you employed this man you had foremen under you to attend to this discharging of cargoes, didn't you? A Oh, yes.

Q Now, what did you have to do with him—
A That was up to 1915.

Q Do you remember the date in 1915?

The Court. January 1st; January 1st, he said.

40 *The Witness.* January 1st.

William F. Cosgrove, re-direct.

Q Well, after the first of January what did you have to do with any of the discharging of cargoes?

A Well, I am general supervisor. I look after the interests of the railroad so far as the handling of the freight is concerned.

Q Well, if you were in general supervision of the discharging and loading of the freight, as you say, what would you do, if anything, about it if things were not being done right? A I would stop it. 10

Q Stop this corporation? A Stop it immediately.

Q Whom would you stop it through? A Right through their foremen, foremen first on the job, and then their general foreman.

Q Tell him what to do? Well, if the foreman on the job wouldn't stop, you would see the general foreman and stop it? A Oh, yes. 20

Q You looked at those payrolls. Did you find the name of the Railroad Stevedoring Company on the payrolls, or is that not on the payrolls? A No mention of that here at all.

Q That would be on a different sheet? A I will just show you. There is the month of May, carried right down by the chief clerk—assistant foreman, chief clerk, west-bound clerk, and so on down. 30

Q Now, I notice McCarthy. Is he the same man that has been identified here? A No, that is my west-bound clerk.

Q Are any of these men that have been mentioned here as paymasters or foremen on your payroll? A No.

Q None of those men. Were they on your payroll previous to the Railroad Stevedoring Company coming in to take charge of discharging the cargo? A No. 40

William F. Cosgrove, re-direct.

Q Any of those men? A None of the gentlemen from the Railroad Stevedoring Corporation were ever on my payroll.

10 Q Do you know whether any man who acted as general foreman or under foreman for the Central Stevedoring Company after the Central Railroad made this contract with them was on your payroll before that date, and was simply transferred to the Railroad Stevedoring Company? A Yes; there is two.

Q In other words, when your company made this deal whereby it transferred this work to another corporation it did not discharge all the men it had working for it as foremen, and so on, on that work; did it? A No; they were all turned over to the Railroad Stevedoring, and it was up
20 to them whether they wanted to keep them or not.

Q And that was on January 1st, you say, 1915?
A 1915.

Q Now, this office that the Central Stevedoring Company has, what kind of an office was it—on Pier 11, I think you said? A Yes, it is on Pier 11.

Q What kind of an office was it? A They now—he has a private office there—they have got that private office, I mean; so that now I am in
30 my general office there.

Q Well, is your general office connected with their— A It is on the south side.

Q Of their private office? A Oh, no.

Q I mean are they anyway near you? A Across the hall, a matter of about fifty feet.

Q And how long have they had that office there?
A Since January 1, 1915.

Q And who is the man in charge of that office, or was? A Well, Mr. Kiely is the man in general
40 charge of the stevedores.

William F. Cosgrove, re-cross.

Q Mr. Kiely? A Kiley.

Re-cross examination by Mr. Carpenter.

Q How many men does the Railroad Stevedoring Company employ, if you know, in that stevedore work on the piers in Jersey City of the Central Railroad Company? A About 130. 10

Q Is that more or less than you employed prior to January 1st, 1915? A Well, I had more.

Q You had more? A I employed more men. I had on an average of 180 men.

Q How many foremen have they—the Railroad Stevedoring Company I mean? A They have got four foremen on the docks.

Q How many did you have before? A I had the same number.

Q And two of these foremen are men that you did not have before? A Yes. 20

Q Did you employ any of these four foremen for the Railroad Stevedoring Company? A Oh, no.

Q Have you exercised any control over the Railroad Stevedoring Company's men since they were— A No; I have no control over them only so far as if I see any wrong, stopping the work, as I told Mr. Simpson.

Q That is to see that your contractor does the work in the way that the railroad company wants it done? A Yes. 30

Q Do you exercise any other control over the Stevedoring Corporation? A Have I what?

Q Do you exercise any other control over the Stevedoring Corporation than to direct them—to complain about the work being done if it is not done to your satisfaction? A Well, there—which has not often been the case—if the Railroad Stevedoring Corporation didn't handle the freight the 40

William F. Cosgrove, re-cross.

way I wanted it to be handled I would report to my superior.

Q Have you ever had to do that? A No.

By Mr. Simpson.

10 Q Did you have any other duties, Mr. Cosgrove, on the day of this accident, June 18th, 1917, other than the supervision of this stevedoring work? Did you have any other duties for the railroad? A No, no; that is all I have. I supervise all of the Central Railroad work in that terminal.

Q In that particular— A In that particular terminal of the lighterage.

Q The lighterage. That is all.

By Mr. Carpenter.

20 Q That is, entire supervision of the work of loading and unloading cars of the railroad, the disposition of cars? A The lighterage, the lighterage work.

Q The lighterage work of the Central Railroad Company? A That is, of course, put on the dock and put on lighters, and put on dock for storage.

Q You said a while ago something about the breaking of a wire. Was you present—did you see this wire break? A No, no; I did not.

30 Q Were you there before the accident? A Was I there before? No.

Q You said that slings were furnished and the equipment was furnished by the railroad company to the Stevedoring Corporation. Had you furnished new slings for that particular derrick or hoist or apparatus? A Yes; I furnished the slings.

Q How long before that did you furnish new slings? A Fifteenth.

William F. Cosgrove, re-cross.

Q Fifteenth? A Fifteenth of June.

Q How many slings did your furnish on the fifteenth? A One pair.

Q And what was their condition? A Five-eighths.

Q Well, were they new or old slings? A Oh, 10
new slings; all new wire we used.

Q And if one of those wires should be kinked, what would happen? A If it is kinked it will break with a slight strain.

Q I see. How many slings are used at a time? You say you furnished two on the fifteenth? A Well, these boys were only using one, using one sling.

Q And you had two there for use? A Yes; 20
they had two to use; but they run one sling through the tires, these locomotive tires; they run one sling through and then run it into a sort of slip-knot so it will hold fast when the strain comes on it.

Q And they had two there for that purpose? A They used one; that is the general practice, to use one.

Q And you furnished two and they used one? A They can use two if they wish, because they 30
are there.

Q Now, if two had been used what can you say about the probability of these wheels falling?

The Court. I do not get that question right.

Q Suppose two of them had been used instead of the one, is it probable that these wheels would have come down on Drew or Drago? A Well, there is less chance of any accident if they use two slings.

William F. Cosgrove, re-cross.

Q Naturally because two are stronger than one.
A Naturally if one would part the other would hold.

10 Q Do you know whether after the accident there were slings there that had not been used at all? A Oh, yes; there were a brand new pair of three-quarter wire slings on the side of the crane.

Q Did you go there right after this accident happened? A The man was being taken away on the tug-boat that I had furnished. I thought better for me to stay in the office and get the report, and have the tug-boat put in there so as to move the man quick, than to have me run away and run to the office again and get a tug-boat; because in an accident of this kind we have to
20 move quick.

Q When you went there what did you observe? A I went there right as the tug-boat was going out of the slip.

Q And you found what? A He was probably fifty or sixty foot away from it, and I walked along the bulkhead.

Q And those two new slings that you had furnished three days before were lying there and had
30 not been used; is that right? A Yes; they were on the side of the crane.

By Mr. Simpson.

Q Well, did you see the broken sling? A Yes.

Q What was the broken sling? A It was cut.

Q I know, but what was it? A It was five-eighths.

Q Same as you say you had furnished? A Yes.

Q Same size? A Yes, same slings I had furnished; but new slings.
40

William F. Cosgrove, re-cross.

Q How long had it been in use, do you know?

A Well, I should judge three or four days.

Q And when had you supplied the new slings?

A Well, I supply new slings every time the boys ask me for them.

Q What I want to find is this: As I understand you, there were two new slings unused after the accident? A Yes, sir. 10

Q And one sling there broken, which was a used sling? A Yes.

Q So there were three altogether there? A No; there were more than that. They were using three slings in the car.

Q Oh, they were actually using three slings. How many men were working? A There were two men in the car.

Q They would use three slings, would they? A Yes. 20

Q How many slings were there there altogether? A There was six slings right on that crane.

Q Hanging on the crane? A No, not hanging on; there were two hanging on the side, two new ones.

Q They had not been put in use yet? A Yes.

Q And four were in use? A Yes. 30

Q And out of those four three were being used by the men? A Three were being used.

Q And these slings were all of the same diameter? A No, the one on the side of the crane was three-quarter inch.

Q What were the ones they were using? A Five-eighths.

Q And the other were three-quarters? A Yes.

Q Did you know who was operating the crane? A Oh, yes. 40

John Palino, direct.

Q Who was it that was operating it? A We call him Sandy. I don't think that that is his right name—Sandy, we called him.

Q Sandy? A That is what he is known to me as.

10 JOHN PALINO, a witness sworn (through interpreter) on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Tumulty.

Q Where do you live? A 318 Grand street, Jersey City.

Q Where did you work on the 18th day of June, 1917? A On the dock.

Q What dock? A Thirteen.

20 Q For whom were you working, do you know?
A The Central Railroad.

Q How long did you work there? A Eighteen years.

Q Eighteen years. Do you know the man that was just testifying? A Yes.

Q Were you with him the day he was injured?
A Yes.

Mr. Carpenter. You don't mean Mr. Cosgrove, do you?

30 *Mr. Tumulty.* No.

Mr. Carpenter. Drago, the plaintiff.

The Witness. Yes.

Q Were you working with him? A Yes.

Q Where were you working? A In the car.

Q What were you doing? A We were working on the car by the wheels.

Q What were you doing with the wheels? A We put a wire through; we put a wire through and
40 then we hoist up the wheels.

John Palino, direct.

Q Who put the wire through the wheel? A Myself and my companion.

Q Do you remember the wheels that fell and struck Drago? A Sure, I remember.

Q Now, tell us how it happened? A After we put the wire through and then we placed the hook, and then he says: "Go ahead;" and then after he said: "Go ahead" and when this—the wheels were about level—on the level with the car, and then the wire broke off in two pieces, and then my companion was struck with it. 10

Q How many wheels were held by the wire, do you know? A Ten.

Q Do you ever help to hoist wheels like that before? A Yes.

Q By putting wires through them? A Same way. 20

Q What kind of a wire was it that you put through the wheels? A It is a steel wire.

Q How many wires did you use? A There were two wires on this crane and we used both wires.

Q Are you sure you used both wires? A Yes; we used both one at a time.

Q Well, how many wires held these wheels that you speak of? A One.

Q Was that your custom to always use one? 30

Mr. Carpenter. I object to what the custom was.

Mr. Simpson. It has already been testified it was the general custom to use one.

The Court. That is my recollection.

The Witness. One, one especially when they are small wheels.

Q Were these small wheels? A They were not large nor small; they were usual. 40

John Palino, cross.

Q Where did the wheels strike Drago when it fell? A It struck on top of another wheel and then struck Drago on the leg.

Q Was this a carload of wheels that you were emptying? A Yes.

10 Q How long had you been working on them before Drago was injured? A We had taken away two draft.

The Interpreter. He used the word "draft."

Mr. Simpson. He means load, I guess.

Q How long had you been lifting? A About a quarter of an hour.

Q How many had you lifted? A Ten, sometimes eleven.

20 Q Well, how many times did the crane— A Three.

Q Three different loads? A With the one which broke off; this was the third.

Q You had assisted in lifting those kind of wheels before, hadn't you? A Yes.

Cross examination by Mr. Carpenter.

30 Q There were just you and the plaintiff, Louis Drago, in the car at the time this happened, weren't there? A Yes.

Q And did you both put this wire through the wheels, you one end and Louis the other? A Yes.

Q Who was it selected the wire that was used? A The crane.

40 Q (Last question repeated.) A I took myself. I inserted the wire through the wheels and then Louis went to the other side in the back and pulled the wire through.

John Palino, cross.

Q Who hooked the wire up into the hook from the crane? Who looped the wire over the hook on the crane? A Both of us, both of us.

Q And did Louis give the signal to raise her up? A We said, "Go ahead."

Q Did Louis say, "Go ahead"? A Yes.

Q Now, what happened when the wheels got up a little ways? A As they fell down, and then went up again it struck this fellow on the leg. 10

Q Well, what was it that cut the wire—was the wire cut or broken? A It broke off.

Q Well, what were these car tires like; did they have a sharp edge? Did those car tires have a very sharp edge on them? A Yes.

Q And when the crane lifted those up did the wheels slip in the sling? A The wire broke off in two parts, the wheels cut it. 20

Q The wheels cut it. Did you see the wire before it was used? A Yes, we did.

Q Did it look all right or not? A It looked all right; it looked good.

Q Was there anything to indicate to you that it would break or was in bad condition? A No, it was not in bad condition; did not look to be in bad condition. 30

Q What time of the day did this accident happen? A Half-past four.

Q And you had only been working on that particular kind of work about fifteen minutes, had you? A Yes, about fifteen minutes.

Q And before that had you been working some place else on the piers? A Yes; we were with this boss for a long time.

Q I mean the same day? A Yes; we were on the dock. 40

John Palino, cross.

Q But you were not unloading car wheels or car tires earlier in the day, were you? A Yes, all kinds of iron.

Q How big around was this wire rope that was broke or was cut? A It could be about a finger and a half.

10 Q Let us see the size of your finger? A Of course, the wire didn't look bad; (in English) nice, good.

Q It looked good, looked nice, did it? A It looked nice.

Q Was anybody else inside of the car but you and Louis at the time? A Yes, myself and him.

Q Where was the man that was operating the engine which hoisted up the car tires? A He was in the crane.

20 Q Outside of the car, of course? A Yes.

Q You were employed by the Railroad Stevedoring Corporation, weren't you? A No, sir; by the Central Railroad; no, sir; I was employed by the Central Railroad.

Q You knew that you were working for the contractor, didn't you? A I did not know for whom I was working. I was always with the same people and doing the same kind of work.

30 Q Well, what was your check number? A Forty-one.

Q Who paid you? Did Mr. Nolan pay you? A Yes, lately he paid.

Q And you knew that you went to get your pay to Mr. Nolan's office, Pier 11, didn't you, upstairs? A Yes.

40 Q What you meant was that you were working over on the Central Railroad property; that is what you meant isn't it? A Yes; always worked for the property of the Central.

John Palino, cross.

By Mr. Carpenter.

Q Have you got that brass pay check with you?

A No; I haven't got it here; it is home.

Q Did you have a brass pay check with your number on it? A No, the check that I had was only a check for the closet where we keep our clothes. 10

Q Didn't you have a check No. 38? A No.

By Mr. Tumulty.

Q When you raised the other car wheels before the car wheels that fell and struck Drago, what wire did you use?

The Interpreter. You mean on the same day?

Mr. Tumulty. On the same day. 20

A The same wire we used at other time.

Q Who was your foreman that day? A I don't know the foreman. There is one or two foremen, one foremen, two foremen—I don't know at that time the foreman. There are too many foremen; two or three.

Q Well, who was your foreman before this day?

A Bill Park.

Q Do you see him here in court? A Yes, he is here; there, back of the room (indicating). This man here standing up now? 30

Mr. Carpenter. Mr. McCarty.

Q Did he tell you to go on the car and lift the wheels on this day? A Yes.

By Mr. Carpenter.

Q Have you been working for the same employers for the last two years? A Yes. 40

John Palino, cross.

Q You in person applied for your war zone pass, did you not, on or about the 16th of January, 1918? A No, sir; I did not.

Q Didn't you make your thumb-print, there? A No answer.

10 Q Didn't you furnish a picture of yourself and make your own finger-prints on that card before it was given to you? A Yes.

Q And where did you go to this? A I was in the car with that man (indicating).

Mr. Carpenter. Stand up, Mr. McBride.

A The checker called me first. The checker called me.

Q Have you been carrying this with you ever since? A Yes.

20 Q You have to show it in order to get to your work every day, don't you? A Yes.

Mr. Carpenter. I offer it in evidence.

Mr. Simpson. I object to it.

The Court. I will not admit it at this time.

Q Now, you have a brass check that you show when you draw your pay, is that so? A No; it is not brass.

30 Q Well, what is it made out of? A It is leather.

Mr. Simpson. That is all. Now, I would like to have the plaintiff exhibit his stump to the jury, to show the condition of his stump.

Mr. Carpenter. I object to that.

Mr. Simpson. We would like to show the jury. You may say that he can wear an artificial leg.

Mr. Carpenter. I object to that. It is for the purpose of prejudicing the jury.

Motion for Non-Suit.

The Court. It has always been done here, Mr. Carpenter. Take your objection.

Mr. Carpenter. I ask an exception.

The Court. It is the first time that I have had an objection raised in this court in four years on that subject.

(Witness exhibits his stump to the jury.) 10

Defendant's Motion to Non-Suit.

Mr. Carpenter. If the Court please, I move for a non-suit in favor of the defendant for the reason, first, that the plaintiff was not employed by the defendant in interstate commerce at the time he received the injuries complained of, and hence there can be no recovery under the act of Congress commonly known as the Federal Employers' Liability Act. 20

Second. The plaintiff at the time he sustained the injuries complained of was an employee of Railroad Stevedoring Corporation. He was not an employee of the defendant. Therefore, he has not proved the cause of action set forth in the complaint and there can be no recovery against the defendant.

Third. Since the plaintiff was an employee of the Railroad Stevedoring Corporation, and since he was injured, as he says, by an accident arising out of and in the course of his employment with the said Railroad Stevedoring Corporation, his rights are fully and amply protected by the Workmen's Compensation Act of the State of New Jersey. This Court would have jurisdiction to enforce those rights; hence this action should be dismissed. 30

Motion for Non-Suit.

Fourth. To permit the plaintiff to recover damages in this suit, wherein it appears that plaintiff is an employee of Railroad Stevedoring Corporation at the time of the happening complained of, would deprive the defendant of his property without due process of law, in violation of the
10 United States Constitution.

Fifth. To permit the plaintiff to recover damages in this suit, wherein it appears that he was an employee of Railroad Stevedoring Corporation at the time of the happening of the accident complained of, would deprive this defendant of the protection of the law in violation of the Federal Constitution and its amendments.

Sixth. Plaintiff at the time of the happening of the accident complained of was an employee of the
20 Railroad Stevedoring Corporation, which was separate and distinct from this defendant. As a matter of law it cannot be said that either the employment of the plaintiff by the Railroad Stevedoring Corporation or the doing of work by the Railroad Stevedoring Corporation for the Central Railroad Company of unloading cars, and so forth, constituted either a contract, rule or regulation or device the purpose and intent of which was to enable the
30 Central Railroad of New Jersey to exempt itself from any liability created by the act of Congress commonly known as the Federal Employers' Liability Act.

Seventh. There is no proof that the defendant was guilty of the negligence charged in the plaintiff's complaint.

Eighth. That under the evidence introduced plaintiff assumed the risk of just such an accident as he complains of, and the action should be dismissed.
40

Motion for Non-Suit.

Ninth. The slings—perfectly good and proper slings—had been furnished to this plaintiff, or to this particular crane, three days before the accident happened. Two slings that were perfectly new and had never been used were on this crane at the time the accident happened. The sling which was actually used, as testified to by the men themselves, look good, all right; nothing the matter with it. Where is the negligence? I say that they must prove first some omission on the part of the defendant, something that the defendant did which a reasonably prudent person should not have done, before there can be liability; and, furthermore, since this man was employed by the Railroad Stevedoring Corporation— 10

The Court. I think under the circumstances I am going to decline to non-suit. I will do so without any comment, however, because it might be prejudicial if I did express myself on the subject to either one side or the other. So I will simply decline to non-suit without any statement. 20

Mr. Carpenter. Allow me an exception.

The Court. You may have it.

DEFENDANT'S CASE.

Mr. Carpenter. I first offer in evidence a contract made the 18th day of December, 1914, between the Railroad Stevedoring Corporation, a corporation of the State of New Jersey, and the Central Railroad Company of New Jersey for the doing of stevedoring work by the party of the first part for the Central Railroad Company of New Jersey, party of the second part, under which the work in question was being done at the time of the happening of this accident on the 18th day of June, 1918. It is executed under the seal of both 30 40

Morris McBride, direct.

corporations and signed by the president of both companies, attested by the secretaries of both companies.

(Paper marked as D. 2 in evidence.)

10 *Mr. Carpenter.* I now offer in evidence a certified copy of certificate of incorporation of Railroad Stevedoring Corporation, showing that it was incorporated the third day of December, 1914, this being certified to by the Secretary of State of New Jersey.

(Paper marked D. 3 in evidence.)

MORRIS McBRIDE, a witness sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Carpenter.

20 Q Mr. McBride, where do you live? A 40
East Twenty-seventh street, Bayonne.

Q And by whom are you employed? A Railroad Stevedoring Corporation.

Q How long have you been employed by it? A Since the latter part of 1915.

Q What is your job? What is your employment? A Foreman, foreman of the steel yards, and during the summer when the other foremen of the piers are on their vacations I relieve them,
30 and act in their place.

Q Have you been in the employ of the Central Railroad Company of New Jersey? A Why, I guess about twelve or fifteen years I worked as a machinist, and I worked in their marine department. I ain't just sure of the years. I know it is either twelve or fifteen.

Q Did you work for them up until the time you were employed by the Railroad Stevedoring or not? A No; I was only in their employ and
40 was discharged.

Morris McBride, direct.

Q Now, then, were you employed by the Railroad Stevedoring Corporation on the 18th day of June, 1917? A Yes, sir.

Q What were your duties that day? A Sir?

Q What were your duties that day? A Why, Mr. Bart, the regular foreman, was on his vacation that week, and I was acting in his capacity. It was up to me to see that the cars on the dock were unloaded onto their proper boats. 10

Q Now, then, on what dock were you working that day? A I had charge of 12 and 13 docks.

Q Did you see on that day the plaintiff here, Louis Drago, or Louis Drew, at work that afternoon? A I didn't know what his name was, but I know him, Louis—at least, I seen Louis, and I didn't know what his last name was. 20

Q He is the man who is plaintiff now? A This Louis, the gentleman there (indicating the plaintiff). 20

Q What did you see him at that day? A Why, he was working in Palino's gang. The two of them were working in the car; the other two men were on the boat.

Q And who was their foreman? A I was.

Q What did you direct them to do that afternoon? A Why, whenever I had a car to unload I gave—we call it a "pro"; it is a sort of an order on a car; it takes care of the work, and it is in the car, in the shed of the car. Some don't have it on. And I gave that to the checker, as the checker goes down and takes his gang, looks at this particular car, gets your boat boss to go on right alongside of the car, and then unloads the car to the boat. 30

Q What time of day did you go to work on the morning of the 18th of June, 1917? A Why, 40

Morris McBride, direct.

I was there—I was there around six o'clock. See? But then the gangs don't start to work until seven-thirty in the morning; it would be about a quarter to eight sometimes before they get started; seven-thirty is the starting time.

10 Q Did you see this derrick with which these men were working in the afternoon? A Did I what?

Q Did you see in the morning of that day, the derrick on which these men worked? A Yes. I saw all the slings because I have got to see that all the engineers is in on the crane in the morning, and in going along to see if the engineers is on their machines I also looked the wires over, as we call them; they are slings.

20 Q Did you see the slings that these same men used in the afternoon—did you see them in the morning? A Why, I seen them—I seen them before they used them, not only them but those that were hanging there also.

Q Did you ever work with those slings? A Yes, sir; I worked around with those slings four years on the Pennsylvania, down here in the Greenville station at the same class of work, and from the last part of 1915 up to the present time I am

30 working right with them. Q Can you tell whether those slings, when they are in good condition, or bad condition? A Why, yes; you can very easily tell, because the strands of the wire would be broke.

Q Were there any broken strands on any of these slings that were in the car that Louis and the other man were working in, or on the derrick at any other time about that that you know of?

A There were no broken strands on—no broken slings on No. 12 crane that day.

40

Morris McBride, cross.

Q Did the accident happen when the No. 12 crane was lifting up these tires? A Well, the time the accident happened I was making out my slip. I didn't see the accident. I didn't see the sling break. But I saw it; it comes down in such a way that you have to be over there to see how that switch is thrown. It is likely to go bumping into some cars. But not only that, they have to see that the beam is over. So as a general rule when any one of the cranes is coming down back, the foreman generally make it their business to be there. 10

Q Can you say you saw the same thing that was broken earlier on the same day? A Did I see?

Q Did the sling which broke, earlier the same day? A Why, I saw it probably fifteen or twenty minutes, at the most; I saw it after four o'clock. 20

Q Well, was that before it broke? A That was before it broke; yes, sir.

Q Now, then, did you notice anything the matter with it at that time? A No, sir.

Mr. Simpson. May I cross examine him as an expert before he gives his opinion?

The Court. You may. 30

Cross examination by Mr. Simpson (as to qualification).

Q Have you ever made these slings? A Made them?

Q Yes. A No, sir.

Q Have you ever been present when they were made? A Yes.

Q Where? A In Greenville, the Greenville Steel yard, Pennsylvania Railroad. 40

Morris McBride, cross.

Q Did you work in the Greenville yard? A No, I worked on the pier. There were different days when there would not be much work on the pier; we would be sent up to unload what we call "lumber."

10 Q But did you ever take part in the manufacture of these slings? A No, sir.

Q Do you know what their textile strength is per square inch? A No, sir.

Q Did you notice what kind of steel they are made of— A No, sir.

Q As to what it is. And do you know what the length of its life is? A Their length of life?

Q Yes. A Why, yes. They run from two weeks to three weeks, and sometimes a month. That all depends on the calibre of stuff you have been using them on.

20 Q They last two or three weeks or a month; is that it? A Yes, sir.

Q And you say that a broken strand would affect them. How would that affect them? A How would it affect them?

Q Yes. A Why, wouldn't it reduce their strength?

Q Well, if there were broken strands would the strength be reduced? A Why, certainly.

30 Q And this sling that you say you saw a quarter of an hour before the accident, how many strands did it have in it? A How many strands did it have in it?

Q Yes. A Well, the way the wire is made there is small strands into one large strand. They generally take four of those large strands and wrap them around with a piece of rope; that is the way they are made, because when they break

40 you can see them.

Morris McBride, cross.

Q You can see what, the rope? A The rope, and the four or five strands, whatever they may be.

Q How long are they? A How long are the slings?

Q This one that you saw? A They are made different lengths.

Q Well, this one that you saw, that you have been describing, how long was that? A Well, that was about twenty or twenty-five feet long.

Q Where was it when you saw it? A Where was it?

Q Yes. A When I first seen it?

Q No, when you saw it fifteen minutes before the accident? A That was when I first seen it, when it came to the dock.

Q Where was it, on the ground or on the crane? A No, lying on the floor of the crane, you might call it.

Q Rolled up? A Rolled up? Well, just stood there—

Q Stood in a heap? A Not exactly a heap.

Q How was it lying? A Well, I imagine it took up a space from about the end of that desk to here; the three wires, pair of slings, took up about that much room.

Q Then they were thrown on top of each other, certain parts covered certain other parts; didn't they? A Well, they did in one sense, but you could see all of the sling.

Q Of course you could see; I know that. But if you will only stick to the facts. Did one part cover another part? A Well, one part did cover another part to a certain extent; yes, sir.

Q And they were lying where when you saw them? A On the platform of the crane.

Morris McBride, cross.

Q Of the crane? A Well, the machine, as you call it.

Q Did you assist in putting them in through the crane? A Sir?

Q Did you assist in putting them in through the crane? A Oh, no.

10 Q They go over a pulley, do they? A No, sir.

Q How do they go into the crane? A Why, there are two eyes on each end of the hook—each end of the sling, and when you want to hook up your freight, for instance, with this job that they were working on, you take and run one end of the wire through the tires, and as a general rule there is one man on this end will take the end that goes through, and he puts that on one hook; the
20 fellow on this end will put it on the closest hook to him.

Q And then what lifted, the crane itself? A Yes.

Q The arm goes up, then—the arm of the crane? A No, the block goes up.

Q What do you mean by the block? A There is a crane, built this way; there is wires running from the drum of the machine out in a pulley; it comes right on down—the wires come on down
30 through here, and there is a block with a hook attached through her.

Q Don't they put the eyes on the block? A The what?

Q The eyes on the block? A No. The hooks are attached to chains, two long chains, and them chains have a rig on the end of it, and they are on to the big hook on the block.

Q What is the lifting force? What is it that reduces the distance? A What is the lifting
40 force?

Morris McBride, cross.

Q What is the lifting force? What reduces the distance? What lifts the thing up?

A Why, when the engineer goes ahead the drums on the machine start turning up, and they wind this cable around it, and lift this thing up.

Q You don't mean slings by cable? A No.

Q Cable is separate from the sling? A Oh, yes. 10

Q Have you ever seen these slings before this day? A These particular slings?

Q Yes. A Yes, sir.

Q How long before this day had you seen them?

A I seen them that morning.

Q Well, before this day I am talking of. The morning was part of the day. Before this day had you seen the slings? A Why, I had seen them the day before. 20

Q And how long before that had you seen them?

A Well, now, I couldn't just say whether they were the same ones, but I seen the slings that is on the machine every morning, sir.

Q Well, when was the first that you saw these identical slings? A I cannot identify them particular slings.

Q You don't know how long before the accident? A No, because when five-eighths wire is used it is all five-eighths wire. 30

Q In other words, you don't know how long before the accident you had seen these identical slings for the first time, do you? A For the first time? Well, I would say yes to that; because I am sure those were the slings that were used.

Q But how long before this day—you have got that, have you?—was the first time that you saw these identical slings, a week, a month, a year?

A Well, I will say the day before. 40

Morris McBride, cross.

Q Was that the first time that you have seen them? A That I remember seeing them.

Q How do you identify them, that these are the same ones you saw? Were they marked? A No; they looked pretty new.

Q They looked pretty new; that is the way you identify them? A Exactly.

Q Well, weren't there three new slings lying alongside of the crane? A No, they were three-quarter slings, larger slings.

Q Larger slings. But those five-eighths slings, were they the only five-eighths on the sling that you saw? A The only five-eighths wire that was there?

Q No, the only five-eighths slings that were there?

20 *The Court.* On the crane; were they the only five-eighths slings that were on this particular crane?

The Witness. That is the only ones I seen.

Q Did you see the man who brought them there? A No.

Q Don't know who brought them there? A No.

Q And whom do you say you worked for—
30 Railroad Stevedoring Corporation? A Yes, sir.

Q And when Mr. Cosgrove complained to you about the work—

Mr. Simpson. I withdraw that.

Q Were you the superintendent or foreman of the Railroad Stevedoring Company, or work foreman? A No; I was only a foreman on the dock.

Q Who was the superintendent foreman? A I imagine it was Mr. James Kiely, because he is
40 my boss.

Morris McBride, direct.

Q Did you see Mr. Cosgrove along that dock that you were working on at all? A Oh, yes; he is in and out of the dock all day long.

Mr. Carpenter. Are you satisfied he knows all about slings?

Mr. Simpson. No; I don't think he knows much about them. He thinks he knows a lot about them. 10

Direct examination by Mr. Carpenter (continued).

Q Now, how long had Drago, the plaintiff here, been working under you? A How long had he been working under me?

Q Yes. A Why he was only working under me that week, you might say, because I was the only foreman on the dock that week. See? 20

Q And was he at the time this accident happened actually doing work which you had given him to do? A I had given him his check with that order; these checkers—the foreman gives the orders out, the checker of the gang.

Q And who was the checker? A Why, Mr. Ahearn.

Q And was he the man who was immediately in charge of the work of unloading and loading that car? A Yes, sir. 30

Q By whom was Mr. Ahearn employed? A Railroad Stevedoring Corporation.

Q Do you know whether Drew or Drago had a check number, or a check, an identification check? A I am not sure but what the men working there—how I know is when we work on a Sunday the man who is supposed to give the checks out he generally brings checks out to me to give to the men who are right under me. Now, whether he had a check that day, I don't know. 40

Morris McBride, cross.

Cross examination by Mr. Simpson.

Q What did you see Mr. Cosgrove do around your dock? A That day?

10 Q No, generally? A Well, when we are working on the dock—for instance if we are hooking up—say we are hooking up plates and they have got a draft there, and the slings happen to bend the plate; well, he will come along and tell you to knock off, to use hooks, cut out the wires, use hooks on that, not be damaging the plate; and if he sees any other things going on that is not just right in that line he will generally tell the foreman. If we don't stop, why, he will tell Mr. Kiely.

20 Q You say that Mr. Cosgrove was there all the time. Now, will you tell us everything he did as a general proposition in relation to your work?

Mr. Carpenter. I object to that as immaterial, what Cosgrove did as a general proposition in reference to their work.

The Court. Well, why?

Mr. Carpenter. I cannot see any relevancy.

30 *The Court.* Well, I will overrule the objection. If you cannot make it known to me and plain to me I cannot rule on your objection.

Mr. Carpenter. The question is—

The Court. I know what the question is.

40 *Mr. Carpenter.* —that the defendant was employed in interstate commerce by the defendant company. Now, if he was not employed by the Central Railroad it does not make a particular of difference what Cosgrove did with reference to this man or other men.

Morris McBride, cross.

The Court. There is another question, too, Mr. Carpenter, and that is whether or not this contract with the railroad of the Stevedoring Corporation was a contract in good faith, or whether it was good simply for the purpose of evading the provisions of the Federal Employers' Liability Act. It seems to me a question of this character would be a perfectly proper one in the direction of establishing such a situation. You see, if the contract be shown, and be shown to be a legal contract in every other sense, still Section 5 of the act says that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void. 10 20

Mr. Carpenter. Now, what liability does that mean? That means the liability of the carrier to its employee, not the employee of somebody else.

The Court. If that be so, if that be taken in the strict sense that you are now speaking to, why we need not go into that question at all; because all that you would need to show then would be that the plaintiff was the employee of the Stevedoring Corporation. Then the question of whether the contract between the Railroad Company and the Stevedoring Corporation was an evasion of this act would not amount to anything. Certainly you must go further— 30

Mr. Carpenter. No. This statute is an act relating to the common carrier by railroad and their employees in certain cases.

The Court. Yes. 40

Morris McBride, cross.

Mr. Carpenter. The first section is—

The Court. Oh, I know what the first section is. I know it very well.

Mr. Carpenter. Also for negligence of any—

10

The Court. The real question, it seems to me, is whether or not it may be established with such a contract as this—as to whether, as a matter of fact, the making of the contract was not for the purpose of evading the provisions of this act; and it seems to me that if that is established—I do not say it is established or being established—but if it is established it practically puts that company in the position of being an agent of the railroad company to the extent that agent is spoken of in the first or second section of the act.

20

Mr. Carpenter. If you read the contract they have offered you will see exactly what it does.

The Court. I will overrule the objection. Take your exception.

Q (Repeated by the stenographer.) You say that Mr. Cosgrove was there all the time. Now, will you tell us everything he did as a general proposition in relating to your work?

30

The Court. I am ruling that way not knowing what the answer is going to be, of course; but it may be an answer which would go to the question of whether or not this was a bona fide contract, or whether it is in contravention of Section 5 of the act.

Mr. Carpenter. Exception.

40

The Court. You may have it.

Morris McBride, cross.

A Why, as far as he was concerned, that is all I know that he done. I know that he didn't give me any orders—for instance, there has been lots of times when he asked me to go and get some slings off this crane and get them to another crane, and I would tell him no, I was too busy, I didn't have time to be there. If he gave me any other orders—he might suggest handling hooks, using hooks, as I said before, instead of using slings on the plates. 10

Q You said this morning that he would stop you if you were not doing your work right, would he? A Well, that is the way he would stop us.

Q Well, he would stop you, wouldn't he?

Mr. Carpenter. I object. It is calling for a conclusion.

The Court. Well, did he stop you? 20

The Witness. Well, the occasion never arose where I was present.

Mr. Simpson. You never saw it done?

The Witness. He never stopped me.

Q But you saw him around overlooking what you were doing? A Yes, I seen him walking around the docks every day.

Q And seeing that the freight was not damaged that was handled by you? A I suspect that is what he was doing. I don't know what he was doing. 30

By Mr. Carpenter.

Q In other words, since you were handling the freight for which the railroad company was responsible, if he saw you doing anything that would be apt to damage the freight, he would tell you to quit it? A He would tell us to stop it. He would report us to our general foreman, Mr. Kiely. 40

Morris McBride, cross.

Q That is what he told you? A Yes, he said: "Stop or I will tell Jimmy on you."

By Mr. Simpson.

Q You were not the paymaster, were you? A Paymaster?

10 Q Yes. A Why, no.

Q Where were you paid? A I was paid in the railroad stevedore's office.

Q Where? A They were on one side of the hall and the Central Railroad was on the other side.

Q It was on the Central Railroad pier? A Oh, yes.

Q The Central Railroad stevedore didn't own the pier? A There is no such company.

20 Q Well, what is the company? A The Railroad Stevedoring Company.

Q Well, did they own the pier or— A They didn't, no, as far as I know.

Q Did it own the cars? Did it own the tracks? A Not that I know of.

Q Did you ever work for anybody besides this company? A Did I? Yes.

Q Whom did you work for? A For the Standard Oil Company in Bay Way.

30 Q Did you work for the Standard Oil Company before you went to work for the Stevedoring Company? A Only about twelve or fifteen years. I ain't sure about the years. I know I was only there three months when I was fired.

Q Where were you working when you were employed by the Railroad Stevedoring Company?

A On the Greenville Pennsylvania Railroad, as a checker.

40 Q How long did you work there? A I think it was around four years. I ain't sure exactly.

Morris McBride, cross.

Q When did you go to work for the railroad—

A The latter part of 1915.

Q When in 1915? Do you know the month? A Well, now, just wait. I can help you out.

Q You do not help me out; you help yourself out. A Well, I am just trying to assist you. We went on strike in Greenville and that is why we went up there. We were out four or five weeks, and that is why I went up there to look for the job; so I ain't sure just when it was. 10

Q Did you, while you say you were working for the Railroad Stevedoring Company, ever work for any other company beside the Central Railroad of New Jersey? I am not trying to catch you with this question; I am trying to find out whether you, as a representative of the Railroad Stevedoring Company—keep that fact in your mind— A Yes. 20

Q —since your employment with them, ever worked anywhere but for the Central Railroad of New Jersey? A I only worked for the Railroad Stevedoring Company.

Q Yes, but where? A Why, I worked—I don't know whether it was five weeks or four weeks for them out in Bayonne.

Q Doing what? A Reloading cars with coal.

Q Of what, the Central Railroad? A No, the stevedores, working through the stevedores. 30

Q But what railroad cars? A Oh, the Central.

Q Don't be afraid to mention the Central Railroad? A Central Railroad, out in West 8th street.

Q You always worked for the benefit of the Central Railroad, while you have been employed by the Railroad Stevedoring Company? A Yes.

Q You never worked for the Pennsylvania, the Erie, or the New York Central? A No. 40

Walter J. McCarty, direct.

Q You are always confined to this one railroad? A Yes.

Q Well, where do you do your work for the Central Railroad of New Jersey? A Where?

10 Q Yes. A Well, with the exception of the Bayonne job I always done it down in Communipaw.

Q That is shifting freight from the cars to the boat? A Always.

WALTER J. McCARTY, a witness sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Carpenter.

20 Q Mr. McCarthy, where do you live? A I live in New York City.

Q Are you in any way connected with the Railroad Stevedoring Company? A I am secretary and treasurer.

Q And how long have you been secretary and treasurer? A Since December, 1916.

Q Does the Railroad Stevedoring Company do work for any other corporation other than the Central Railroad of New Jersey? A We do.

30 Q Where? A Pier 80, for the United States Steel Corporation.

Q What kind of work do you do there for them? A Why, we unload cars and load their boats for them at Pier 80.

Q Stevedoring work? A Stevedoring work. It is freight handling work in the true sense of the word; and from July, 1916, until January, 1918—or about December—I think we finished in December—we were working for the Pennsylvania Railroad at Pier 90 and at Pier 61, New York.

40 At the present time we have a contract with the

Walter J. McCarty, direct.

United States Government for stevedoring work at Hoboken.

Q Now, then, do you know the plaintiff, Louis Drago? A I know his face. I didn't remember his name when I saw him first.

Q Do you know how long he has been in the employ of the Railroad Stevedoring Company? 10
A I believe he was one of the men we took over when we took the contract in 1915 with the Central Railroad.

Q And since that time has your company been doing the stevedoring work, at Communipaw, Jersey City? A Yes.

Q The railroad terminal of the Central Railroad of New Jersey? A All of it; yes, sir.

Q Who employs the men who are engaged in doing that stevedoring work for your company? 20
A Mr. Kiely, our general foreman.

Q By whom are they paid? A What is that?

Q By whom are they paid? A Paid by the Railroad Stevedoring Corporation.

Q Under whose supervision and control are they? A Railroad Stevedoring Corporation.

Q Now, do you know the officers of the Railroad Stevedoring Corporation? A I do. 30

Q Are any of them officers of the Central Railroad of New Jersey? A No, sir.

Q How does the Railroad Stevedoring Corporation get paid for the stevedoring work it does for the Central Railroad of New Jersey? A We render a semi-monthly bill to them and we are paid by check from the Central Railroad of New Jersey.

Q Then you pay your employees? A We pay our employees on our own payroll. We have our own system. 40

I. Charles Lifland, direct.

Q Do you know whether this man, Louis Drago, was on the payrolls of the Railroad Stevedoring Corporation in the year 1917? A I do.

Q Have you the payroll here? A I think they are, for the month of June.

Q Oh, just for the month of June? A Yes.

10 Q By whom were these payrolls made up? A Why, at this time they were made up by a young man in the office by the name of Hill. He came under Mr. Caul. Mr. Caul was chief clerk in the office in Jersey City. There is Louis Drew's name for a period ending June 15th (indicating), and for the few days that he work between June 15th and June 30th.

Q What days did he work after June 15th? A Why, you have a sheet there; that is made out; this just shows the total amount.

20 Q Well, what is the total amount that he earned after that date? A \$8.26.

Mr. Carpenter. If the Court please, at this time may I call a witness from Mr. Simpson's office that I subpoenaed to be here just to prove the answers to these interrogatories?

30 I. CHARLES LIFLAND, a witness sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Carpenter.

Q Mr. Lifland, you are a notary public in New Jersey? A I am.

Q You are connected with Mr. Simpson, attorney for plaintiff? A No; I am not; I am employed by Judge Butler.

40 Q What is that? A I take an affidavit sometimes for Mr. Simpson.

I. Charles Lifland, cross.

Q I show you an affidavit here and ask if that was taken by you? A Yes, that was.

Q And the signature, "Louis Drago," was that made in your presence? A Yes.

Q And the signature up here to the answers, was that taken in your presence? A Yes, sir.

Q And by whom? Who swore to that before you? A Well, I don't know; but I think it is—

Q This man here on the end with the crutches? A The man with the moustach; yes.

Q That is the plaintiff in this case? A I think that is the man.

(Paper marked D. 4 for identification.)

Cross examination by Mr. Simpson.

Q He didn't have any interpreter there? A If he can't speak English, he must have, because I am only—

Q But you cannot identify the interpreter, if there was? A No.

Mr. Simpson. That is all.

The Court. What is the situation? Is there a contest as to that?

Mr. Simpson. I don't think there is.

The Court. Because he is entitled to the benefit of the interrogatories. If they were impugned he could ask a continuance.

Mr. Simpson. Yes; they were regularly served upon him in the course of business and this man is just an ignorant man—

Mr. Carpenter. It was heard by you in your office.

The Court. The only thing I want, if there was any—

Walter J. McCarty, direct.

Mr. Simpson. No, he got off these interrogatories in the ordinary course of the suit.

The Court. If there was any question and Mr. Carpenter was not able to properly substantiate them I would give him the opportunity to have them substantiated.

10

Mr. Simpson. There is no question that he got them as answers to interrogatories.

Mr. Carpenter. That is all.

WALTER J. McCARTHY (recalled).

Direct examination by Mr. Carpenter.

Q Now, I see on this payroll check No. 42 is spelled "Louis Drew." Is that the same man that is shown here in the name "Louis Drago"?
A It is.

20

Q Were these payrolls after being made up submitted to you? A I ~~took~~ ^{look} them over all the time.

Q Is it from these payrolls that the men are themselves paid their wages? A It is.

30

Q Do you know what week it was that Louis Drago was paid wages amounting to \$48.19? Can you tell without these papers? A I cannot tell from this payroll. It must have been, though, about the 7th of June. That is very likely his last envelope. He would have been paid then for the period ending May 31st, because he was hurt before another pay-day came around.

Q Did you see the pay envelope which he produced here this morning? A Yes; I saw it.

Q Do you know whose—who furnished that pay envelope or whose it was, what employer? A Why, it is an envelope similar to the one that they use.

40

Walter J. McCarty, direct.

Q And with the number 42 in the left-hand corner and the name "Louis Drew"? A And the amount down in the right-hand corner.

Q That indicates it? A That is the form we use to make up our envelopes.

Q Now, one of the witnesses this morning testified that he, working for the Railroad Stevedoring Corporation, unloaded some coal from some cars down—I think it was 8th street, Bayonne. Do you know whom that coal was unloaded for down there? 10

A It was loaded into cars for B. Nichol & Company.

Q B. Nichol & Company? A Yes, sir.

Q Who are they? A I think they are coal people or else coal agents. They are over in the Singer Building on Broadway, New York.

Q Did the Railroad Stevedoring Corporation unload that coal? A We loaded it. 20

Q Who paid you for it? A B. Nichol & Company.

Q It was not a job for the Central at all? A Not at all.

Q It was loaded on property of the Central Railroad? A Yes; it was property of the Central Railroad.

Q Now, do you know whether there is a company or corporation by the name of Central Railroad Stevedoring Corporation? A Never heard of it. 30

Q If it is, however, it is the Railroad Stevedoring Corporation? A Railroad Stevedoring Corporation.

Q Now, do you know whether any of the stock of the Railroad Stevedoring Corporation is owned by the Central Railroad of New Jersey, or any of the officers or officials of the Central Railroad Company of New Jersey? A I know that it is not. 40

Walter J. McCarty, direct.

Q None of it is owned by anybody connected with the Central Railroad of New Jersey? A None at all.

10 Q Now, then, what do you know about the employees of your company, the workmen, laborers, having a check? A I know that each man as he comes to work is given a check with a number on it.

Q And what is on those checks? A R. R. S. C. and then the number in the middle of the check.

Q And what number did this man Drew or Drago have? A Well, according to the payroll he had 42; that is very likely the check he carried at all times.

20 Q And how would he get his pay envelope? A By going up to the office on pay day and calling out his name and number, and the boys in the office would give him money from the envelope.

Q Now, is there any connection whatsoever between the Railroad Stevedoring Corporation and the Central Railroad of New Jersey excepting the fact that your company under this contract does work for the Central Railroad Company of New Jersey? A Absolutely none.

30 Q So that the whole thing may be clear, I show you another contract amendatory and supplemental agreement made the 25th of March, 1916, between the Railroad Stevedoring Corporation and the Central Railroad Company of New Jersey. Is that contract in force between the two of you? A That contract is in force.

40 Q Does it do any more than fix the rate at which your company is paid for handling freight for the railroad? A Nothing at all. It is just amendatory to that one section where we had

Walter J. McCarty, cross.

an increase due to the increasing wages of the laborers.

(Paper marked D. 5 in evidence.)

Q Who is it that employs the men to work for the Railroad Stevedoring Corporation? A Mr. Kelley, who is our general foreman in Jersey City. 10

Q And under whom does he do his work? A Mr. James, our president.

Q Your president. And they are all paid by your company direct? A Every one.

Cross examination by Mr. Simpson.

Q When did you become secretary of this corporation, the Railroad Stevedoring Corporation? A December, 1916.

Q What did you do before that? A I was chief clerk in the Jersey City office from March 15, 1915. 20

Q Jersey City office of what? A Railroad Stevedoring Corporation.

Q Before you became connected with this what were you? A I was clerk and bookkeeper for the Brooklyn and Manhattan Ferry Company in Brooklyn.

Q Where? A In Brooklyn, Brooklyn and Manhattan Ferry Company. 30

Q Were you connected with the Central Railroad before you got employment with the Railroad Stevedoring Corporation? A No connection whatever.

Q And do you hold stock in this company? A I hold one share of stock.

Q Who holds most of the stock? A Mr. James owns all the stock except two shares.

Q Is he a stockholder in the Central Railroad of New Jersey? A He is not. 40

Walter J. McCarty, cross.

Q How do you know? A I know he is not because I keep his personal affairs, and I know he has no stock in it.

Q In what? A In the Central Railroad of New Jersey.

Q Did he have stock in it when he formed this corporation? A Never had any stock.

Q How do you know? A Because I know. I know all that he has in his book.

Q Well, you didn't know anything about his affairs until you worked for him, did you? A Well, I know he didn't own because he has told me what he had, and because I can see from what he has now that he had none before.

Q When did you first become aware of his stockholding? A About six months after I began to work for him.

Q And when did you begin to work for him? A March, 1915.

Q So that you have no knowledge of what his holdings were of your own personal knowledge—except after a period of five months when you began to work for him, is that right? A That is right.

Q And did you—you say that your company took over all the employees of the Central into your stevedoring company? A That is right.

Q Did you notify Drago personally that you had taken him over? A We did not, not that I know of; I wasn't there.

Q Did you do it? A I did not do it.

Q And what is your connection with the Railroad Stevedoring Company? A I am secretary and treasurer.

Q What do you do as secretary and treasurer?

A Well, I have supervision over all the work that is done in Jersey City and wherever else we

Walter J. McCarty, cross.

have any work to do so far as the financial end of it is concerned.

Q Tell me from this contract how much you were to get for moving this freight? A We were to get 14 cents a ton.

Q Show it to me in the contract?

The Court. That is a copy. I think the amount is blank. 10

Mr. Simpson. That is what I want him to show me.

(Mr. Carpenter hands the witness another paper.)

Mr. Carpenter. What is the amount?

The Witness. 14 cents per ton gross.

Q And this contract provides that all employees of your company, if they shall be injured, will hold the Central Railroad harmless, doesn't it? A It does. 20

Q The purpose of this contract was so that none of the men who were moving the freight out of the cars of the Central Railroad should be able to sue the Central Railroad without your making good, wasn't it?

Mr. Carpenter. I object to that. The contract speaks for itself.

Mr. Simpson. I want to show the purpose of it. I am not limited to the contract. Suppose the contract does not show anything on its face at all. Am I limited? 30

The Court. If you insist on it, take your exception to it, Mr. Carpenter.

Mr. Carpenter. Thank you, I will.

Q The purpose of this contract was so that the Central Railroad should not pay for anyone injured in handling freight, wasn't it? A It was. 40

Walter J. McCarty, cross.

Q Now, where is the office of your corporation in the Central Railroad piers? A We have an office in Jersey City which is provided for in the contract. We were to get office room on their pier. We are on the north side of Pier 11. We have two rooms.

10 Q Pier 11 is your own office? A Yes.

Q How much room? A We have a room about 21 by 20, and we have another which is about 8 by 8.

Q Is that where these men are paid? A That is where the men are paid.

Q Do you know whether that is the same pay office that there was before you took this contract? A I do not. I think they were paid on the other side of the hall.

20 Q You do not know of your own knowledge? A No.

Q Who is the man who pays your employees, or did pay them after the making of this contract up to and including the 18th of June, 1917? A Up until December, 1916, I was there personally and paid the men with the assistance of Mr. Nolan, and after I left Mr. Nolan and a young boy by the name of Hill paid the men off.

30 Q When did you leave? A I left in December, 1916. We opened an office in New York.

Q How many employees of the Central did you take over? Did you take over the entire force that was moving this freight? A For a few days they were, and we brought our own general superintendent and started the first day.

Q Without this general superintendent, you took all the laborers? A All the laborers.

40 Q In addition to the laborers did you take some of the foremen? A Yes.

Walter J. McCarty, cross.

Q How many? A All of them; I don't remember the number.

Q Well, how many did you take? A We took over four.

Q How many were there altogether? A I don't know how many they had.

Q Well, you know of four that you took over? 10
A We took over four.

Q As I understand you, after this contract was made when you assumed to do this work, you stepped in, took over the working force that had been doing it for the Central and did it with that force? A We did.

Q And you paid that force, and they paid you?
A We did.

Q And you made a price per ton? A We made a price per ton. 20

Q Did you pay the men any different wages than they had been receiving? A We did.

Q How much? A We paid them on a tonnage basis.

Q How much had Drago been receiving before you made this contract, do you know? A Twenty cents an hour.

Q And how much did you pay him on the 18th day of December, 1914? A They didn't get paid until the first of January. 30

Q Well, the first of January, 1915? A We paid them twenty cents an hour up to April first.

Q What year? A 1915, and then—

Q I do not care for after that. I am only asking you for that date. Your own counsel will bring it out. Now, Mr. Witness, were you one of the incorporators of this company? A I was not.

Q When did you say that you went to work for them? A December 15, 1915. 40

Walter J. McCarty, cross.

Mr. Carpenter. You were not present at the original incorporation meeting?

The Witness. I was not.

Q You do not know whose scheme it was, or who called the incorporators together, do you? A I know it was the idea of Mr. James to form this company.

Q Is he here today? A He is not here today.

Q What is his business outside of this? A He has any number of businesses, but he is president of the Interstate Lighters and Transportation Company and Columbus Manufacturing Company. They are the two most important. He is president of this company and president of the Boat Repairing Corporation.

Q Who acted in behalf of the railroad in making this contract? A I don't know.

Q Now, as to the cranes and the slings that the work was done with, they were to remain the property of the Central Railroad and to be used by you? A Yes.

Q The appliances were then to be furnished by the Central Railroad, and you were to furnish the workmen? A We were to furnish the workmen.

Q And you had their leave as per this contract to use these slings and cranes? A Yes, sir.

Mr. Carpenter. I object. The contract speaks for itself.

Q Did you use the slings and cranes under this contract? A Certainly we did.

Q Now, you became connected with it up until the day of this accident? A We did.

Q And what, if anything, did you do—did you have any man whose business it was to see whether

Walter J. McCarty, cross.

the slings were in proper condition? A We had our foreman, who used to inspect them every morning.

Q Who is he? A Mr. McBride for one.

Q Is he here now? A Yes.

Q Anybody else? A Mr. Tarr. He is one of our foremen. 10

Q Is he here to-day? A He is not here to-day. Mr. Lane and Mr. Kiely, the general foreman.

Q Mr. who? A Mr. Kiely.

The Court. I did not pay any attention to your objection, Mr. Carpenter, because, as I recall the contract, it seems to be a fair statement.

Q Where did you say you handled the steel for this company? A Pier 80, North River. 20

Q Whose pier is that? A Belongs to the Central Railroad of New Jersey, leased by the United States Steel Corporation.

Q And you were handling steel on that pier owned by the Jersey Central, you say, for whom? A For the United States Steel Corporation.

Q What did you do with that steel? A We put it on the dock, and took it all off the dock as they ordered us to. 30

Q Where did you put it when you took it off the dock? A On lighters.

Q Where was it taken? A Taken to various steamships around the harbor here.

Q How did it get on the dock? A We took it from the Pennsylvania Railroad and the Central Railroad of New Jersey.

Q And you were paid by the United States Steel Company? A We were paid by the United States Steel Company. 40

Walter J. McCarty, re-direct.

Q But it was really to make a shipment of the Central Railroad Company? A It was not; it was part of the shipment of the United States Steel on the Central Railroad. Most of it came from the Pennsylvania Railroad.

10 Q Where did you take it from, the Central Railroad lines or the Pennsylvania Railroad lines? A Both.

Q Did you ever handle any shipment that was purely and exclusively a shipment over the Pennsylvania Railroad Company lines, one not connected with the Central Railroad Company? A Yes, at Pier 90 and Pier 61.

Q When? A We handled at Pier 61 from July, 1916, until December, 1917, and at Pier 90 we handled from July, 1916, until February, 1917.

20 Q And that is the only work you have done outside of the work that you have described? A Except that we are working for the United States Government on stevedoring work.

Q Where do you do that work? A Hoboken.

Q Is that in connection with the Central Railroad? A Not at all.

Q How long have you been doing that work? A Since the latter part of April, this year.

30 Q You were not doing that work at the time of this accident? A No, sir.

Re-direct examination by Mr. Carpenter.

Q Is it a fact that your company would do stevedoring for anybody if you get the fair price?

A Anybody who asks us to do it. We are now handling in Jersey City for the American Metal Company; shipments come over the Central line, and we handle the shipments direct, and for various other companies since the new law—

40

Walter J. McCarty, re-cross.

Q The business in January, 1914, was new and young and gradually becoming known and increasing; is that so? A Yes, sir.

Q Now, then, this pier where you handled steel for the United States Steel Corporation, was that at the time leased by the Steel Corporation from the Central Railroad? A It is leased by the United States Steel Corporation. 10

Q You were engaged to do that by whom? A United States Steel Corporation.

Q And you were paid by them? A Paid directly by the United States Steel Corporation.

Q In case any of your men are injured do you take care of them? A We do.

Re-cross examination by Mr. Simpson.

Q I call your attention to this paragraph in the contract: "Whenever the Railroad Company shall call upon the Stevedoring Corporation for help * * * the Stevedoring Corporation shall promptly furnish the men therefor and the Railroad Company shall pay to the Stevedoring Corporation for such other services at the rate per hour per man for the actual time of employment under this article paid by the Railroad Company to its own regular men." Did you ever supply men under that clause? A We always do. Before we took over the contract the Central Railroad men had to have men there to do odd jobs; for instance, shovelling snow in the winter time, and anything of that nature that might come up. And when we took over the men we agreed to give them men when they asked for, charging them at the rate that the railroad paid the men. 20 30

Q In other words, you would supply the men at the same rate they had paid them; they would 40

Walter F. Nolan, direct.

pay you what they paid, and you would pay the men? A We would pay the men at our own rate regardless of what they paid us.

Q But you would furnish the men for them for the price they paid prior to the making of this contract? A Yes.

10 Q And you say that was frequently done from the making of this contract down to the time of the accident? A It is done down to the present time.

Q Was that done frequently from the time of the making of the contract up to the time of the accident? A Yes.

Re-direct examination by Mr. Carpenter.

20 Q When you do that do you pay your men one rate and the railroad pay you a lower rate? A We pay our men whatever rate we are paying, and the railroad pays the going rate. Whatever the railroad pays to that class of men the railroad pays us, regardless of what we have to pay the men. We have to—even if we have to sustain a loss, we have to supply the men according to our contract.

30 *Mr. Carpenter.* I offer in evidence these payrolls.

(Papers marked D. 6 in evidence.)

WALTER F. NOLAN, a witness sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Carpenter.

Q By whom are you employed and how long have you been employed? A I am employed by the Railroad Stevedoring Corporation since May, 40 1915.

Walter F. Nolan, direct.

Q And what is your employment? A Right now I am chief clerk of the Jersey City office.

Q What was your employment in June, 1917?

A June, 1917, I was chief clerk of the Jersey City office.

Q As such chief clerk what did you have to do? A Why, I had to look over all the work in connection with our operation over there, such as paying the men, making out our bills to the railroad. 10

Q And did you know the employees of the Railroad Stevedoring Corporation? A Do I know who—

The Court. The men that worked?

The Witness. You mean the laboring men?

Q Yes. A Sure.

Q Was the plaintiff here—were you acquainted with the plaintiff here, Louis Drew or Drago? A Yes; I knew him. 20

Q In what connection did you know him? A I only knew him from paying him off, probably. If he had a slight accident I would take a report of it, a very serious accident, for that matter.

Q Did you ever pay him off? A Yes, I paid him off many times.

Q How often did you pay him? A Paid him twice a month. 30

Q And with whose money did you pay him? A The Railroad Stevedoring Corporation.

Q Was he on the payrolls of the Railroad Stevedoring Corporation? A Oh, yes.

Q Do you know whether he was on the payrolls of the Central Railroad Company of New Jersey? A On the payrolls of the Central Railroad Company of New Jersey? No; I know he was working for the Railroad Stevedoring Corporation. 40

Walter F. Nolan, direct.

Q How many hours a day did he work for the Railroad Stevedoring Corporation? A Why, they had no fixed hours. They probably then worked on an average of eight or nine hours a day.

10 Q Was Drew or Drago in your employ, in the employ of the Stevedoring Corporation on the 18th of June, 1917? A Yes, sir.

Q In what capacity? A Laborer.

Q Do you know whether he had an accident that day? A Oh, yes; I know that.

Q What time of day was that about? A It was about four-thirty; probably a little nearer to five.

Q When he was paid how was he paid? A You mean—he was paid in cash.

20 Q Paid by cash or check? A Paid in cash.

Q I show you an envelope typewritten with the number 42 in the upper left-hand corner, with the name Drew, Louis, in the center, and 48.19 in the lower right-hand corner, marked Exhibit D. 1. Do you know whose pay envelope that is? A That is our pay envelope with all the marks with the exception of the exhibit number, and we had nothing to do with that.

30 Q Do you know whose handwriting that is, "Louis Drew," on there? A Yes, sir; that is made out by Louis Hill.

Q And whom is he employed by? A He is employed by the Railroad Stevedoring Corporation, working under me.

Q How long had this man been in your employ, so far as you know? A Why, I couldn't say. I know he was there when I came.

Q When did you come? A In May, 1915.

William J. Ahearn, direct.

Cross examination by Mr. Simpson.

Q What has been your employment before you were connected with this company? A I worked for the United States Government in the New York Post Office.

Q How long? A About six months.

10

By Mr. Carpenter.

Q That is before you went to the Stevedoring Corporation? A That is before I went to the Stevedoring Corporation.

WILLIAM J. AHEARN, a witness sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Carpenter.

Q Mr. Ahearn, where do you live? A 341 York street, Jersey City. 20

Q By whom are you employed? A Railroad Stevedoring Corporation.

Q How long have you been employed by them? A March, 1915.

Q Down to date, from that time down to date? A To the present time; yes, sir.

Q In what capacity? A Checker.

Q Were you checker on the 18th day of June, 1917? A Yes, sir. 30

Q What do your duties of checker consist of? A Tally the freight, directing the men what cars to unload.

Q Did you know a man by the name of Louis Drew or Drago? A Yes, sir; he was in my gang.

Q His name was carried on the payroll as Louis Drew. Is that the same man as Louis Drago here? A Yes, sir.

Q How many men were in your gang? A Eight. 40

William J. Ahearn, direct.

Q Was he in your gang on the 18th of June, 1917? A Yes, sir.

Q What did he do that day? A Well, I could not just recall what cars were unloaded, but this particular car in question he was one of the gang that were unloading that car.

10 Q And who was giving the orders? A Why, I directed the men to unload that car with the crane on to the scow.

Q And what men did you instruct or direct to do that? A Why, there were four of them—John Palino, Louis Drew, and two others.

Q Now, about what time did they start on that car? A About twenty minutes past four, quarter-past four; something like that.

20 Q What time did this accident happen? A About four-thirty.

Q Now, did you see this particular sling before it broke? A Yes, sir.

Q Did you see anything—did you see whether it was in good condition or anything the matter with it? A It was so far as I knew in apparently good condition.

Q Where were you when it broke or was cut? A When it broke I was over on the other pier.

30 Q How far away? A I should judge about a hundred and fifty feet.

Q How long before had you left this car where they were working? A Just about long enough to walk across.

Q What kind of cargo were they unloading? A Steel tires.

Q Do you know how much they weighed apiece? A I should judge about three hundred pound apiece.

40

William J. Ahearn, direct.

Q And how about the edges of those tires? What have you got to say about them? A The edges of the tires were very sharp.

Q And were they steel tires? A Steel tires; yes, sir.

Q What size was that sling and the wire rope? A Five-eighth sling.

10

Q Five-eighths of an inch? A In diameter, yes.

Q How many tires—were you there when they took any drafts out of the car? A I told them not to take more than ten at a time. They took ten the first two times when I stood there and they were hooking ten on when I left there; and just as I got over to 12 dock I heard the holler and the crash, and I looked back and saw that the sling had broke.

20

Q Do you know how many they had actually hooked on? A They didn't have more than ten because the sling wouldn't hold more than ten.

Q What is that? A The sling wouldn't hold more than ten, the length of it.

Q I see. Now, then, how long had Drago been working in your gang? A That I could not swear to, but he had been in different gangs from the time I went there in March, 1915, up until the time of the accident.

30

Q Was he working under different foremen? A He had been working in different gangs under different checkers and on different piers.

Q Who was he employed by all the time? A Railroad Stevedoring Corporation.

Q Who gave him—when he was working in your gang who gave him the orders? A I did.

Q Did anybody connected with the Central Railroad Company of New Jersey ever give him any instructions? A No, sir.

40

William J. Ahearn, direct.

Q To your knowledge? A They have nothing whatsoever to do with us.

Q What is that? A The Central Railroad has nothing whatsoever to do with us at all.

10 Q How many hours a day did he work under you? A Why, there is no stated number of hours. We work until we get through. We quit around four, half-past four, five o'clock is about the latest we work.

Q What time do you start in the morning? A Seven-thirty.

Q Every day? A Excepting Sundays; we generally start in about eight o'clock if we work on Sunday.

20 Q Now, did Drago have a check number, do you know? A He did, yes.

Q What kind of a check was it? A Why, it was fiber.

Q Was it the shape of a disk, or square, or what? A Circular.

Q And what did it have on? A R. R. S. C., reading Railroad Stevedoring Corporation, and then a number in the center—number 42.

Q His number was 42? A Yes, sir.

30 Q Had he had that number all the time he worked for you? A He had that number all the time he worked in my gang; yes, sir.

Q And whereabouts was he paid, if you know? A He was paid at the same office, the north side of Pier 11.

Q Had you been employed there before the Railroad Stevedoring Corporation started that work? A No, sir.

40 Q When did you start in? A I started it in March, 1915.

William J. Ahearn, cross.

Cross examination by Mr. Tumulty.

Q Did you look at the tire after the accident?
A No, sir; I did not.

Q You don't know where it broke; you don't know the character of the break? A (Witness shakes his head from side to side.) 10

Q You say you looked at it? A I say that it was O. K. when they started to use it.

Q Do you always do that? A It is very seldom that I have anything to do with the crane, but when I do I always look over the wires before I let the men go to work on them, because I realize that if anything happened it would be up to me, being checker over the men; I should not let them go to work on wires that were not suitable for them to go to work with. 20

Q How many men were working in the car? A Two on the car and two on the boat.

Q Those wheels are very heavy, aren't they?
A They weigh about three hundred pounds apiece.

Q Did you ever supervise the drafting of wheels before? A Oh, yes; we have had cars with the same kind of stuff before.

Q Did you know whether or not this wire that was used—did you know when the men got it and from whom they got it? A Why, I only know that all gear is furnished by the Central Railroad, and I assumed that that company— 30

Q You did not know how old it was? A No, I did not.

Q And you did not know how long the life of a piece of wire like that is—do you? A I have not the slightest idea.

Q You knew by looking at it whether it would stand the weight or not? A Well, from general 40

William J. Ahearn, cross.

observation and being around wires all those years I thought the wire was in good condition.

Q Well, if you did not know how old it was—you realize, don't you, that these wires have a certain life? Do you know that? A It all depends on what you use them for.

10 Q Well, you know that you cannot use them forever? A I know that, yes.

Q And you know after a certain length of time they become dangerous? A Yes.

Q Can you tell by looking at a wire just whether it is old or new, how long they have been used? A Well, if I saw any chips or any kinks in them I would not use them.

Q Well, outside of that you would not know whether they were good or bad? A Well, that is
20 all I would think of. If I saw any kinks or chips I would not think the wire would be any good and I would go to Mr. Cosgrove and get some new wire.

Q Has your experience led you to think that you would go to Mr. Cosgrove for wire? A Yes. If they were all right I would take a chance.

Q In bad condition you mean if the wire had any kinks. Well, even if it had no chips, if none of the strands were chipped, so that the wire could
30 be used there for ages, so far as you are concerned, you would not say it was good or bad? A I would not say there were any chips in it.

Q That is all; you would not say there were any chips in it? A Well, that would be enough, wouldn't it, to know whether the wire was in good condition or not?

Q Did you look at all the wires there that morning? A No; I didn't look at the wires until the crane got down and the boom put up, this particular one on the stick.
40

William J. Ahearn, cross.

Q How many wires did they have? A One on the side of the crane and the other working.

Q Did you look at them? A No, because the one on the side I did not intend using. The two that were hanging from the hooks, from the boom of the crane as she came down from the decks—those wires were in A1 condition to do the work they were required to do. 10

Q You did not see those wires until you saw them hanging on the crane? A There was not any reason why I should.

Q Well, you didn't, did you? A No.

Q Did you go up and take hold of them to examine them? A It was not necessary.

Q You just looked at them? A That is all.

Q As they were coming down? A No, they were still on the deck. While it was on the deck and I was in the car. I looked the wires over. 20

Q How far were you from them when you looked at them? A Well, there was a difference of about six feet between the north center and the north side of the dock.

Q How long are those wires? A About twenty feet long.

Q And you want to have this jury understand that you looked at those wires at a distance of six feet when you were in a car, and you are able to tell whether or not they were fit for the work that they were to do? A I think they were fit. 30

Q You think that? Do you know whether or not there were any kinks in the wire? A I know there were not.

Q Could you see that from the car? A I certainly could.

Q The whole wire? A This is a revolving crane, you know. You can turn it around. 40

William J. Ahearn, cross.

Q Could you see—could you from the car where you were standing see the entire wire on both sides? A I certainly could, because it was hooked up on both sides, two eyes on each hook, and there were two slings in.

Q You say the crane was resting when you looked at it. Was it on the ground? A The crane on the ground?

Q The wire? A The wires were dangling from the boom.

Q Now, where were the wires when you looked? Were they dangling or down on the ground? A They were dangling from the boom.

Q Moving, weren't they? A Yes.

Q What part of the wire was nearest to you? Was it the end of the wire from the crane or the end of the wire— A I had a full view of the whole length of the wire.

Q One part of the wire must have been over twenty feet from you, wasn't it? A Well, I don't know; I was up on the car.

Q You say the wire is twenty feet long? A Yes, sir.

Q And it was dangling from this block attached to the crane, wasn't it? A Yes.

Q So that, therefore, part of that wire must have been at least twenty feet from your vision; is that right? A Not necessarily. It is only about ten feet, because there is two ends to the wire; there were two eyes. Now, the naked eye at six feet distance can easily detect anything that would be wrong with the sling.

Q Yes. You say you were six feet away from any part of the wire? A Yes.

Q Now, there were parts of that wire that were over six feet? A Parts of the wire was over six feet?

William J. Ahearn, cross.

Q Away from you? A No.

Q Well, was the wire over your head? A I don't know, because the engineer had to turn around to go further down the track. There is a switch there at the head of the dock.

Q The wire was over your head? A It was not over my head, it was close to it. 10

Q It was close to it? A Yes.

Q Well, one end was further from you than the other? A Undoubtedly.

Q Well, then, how far was the furthest end of the wire from your vision? A Well, I didn't measure it. I just measured it with my naked eye.

Q It was over six feet, wasn't it? A I would not swear it was.

Q You have already said the wire was six feet away from you. A I was six feet away from the track that the crane was on. 20

Q Well, if you were six feet away from the track that the crane was on, then that wire was over six feet away from your vision; is that right? A No, because it is a revolving crane. You can turn around and those wires will come outward as it turns.

Q Was the wire hanging? A Dangling from the boom. 30

Q And wasn't one part of it nearer to you than the other? A I suppose it was.

Q You understand that, don't you? A Yes.

Q So that there was some parts of it more than six feet away from you? A There was no part of it six feet away.

Q And you want to tell this jury that you can tell there was not any kink or any defect in any part of that wire? A There were not any defects in any part of that wire. 40

William S. Cosgrove, direct.

Q Although from the place that you were standing you could not see both sides of the wire?

A I could see all parts of the wire.

Q At the same time? A At the same time.

Q Can you see— A I can see two men sitting back there. Why can't I see two?

10 Q Can you see the back of my head? A No.

Q Well, could you see the back of the wire unless you walked around and looked? A We would not be using all of the wire.

Q Well, you are using all of the wire when you are using the sling, aren't you? A Oh, where the slings are they go in; there is no back or front to them.

Q I am asking you could you see all parts of that wire from the place where you were standing at the same time? A As far as I could see the wire was in A1 condition.

Q As far as you could see? A Yes.

WILLIAM S. COSGROVE, recalled.

Direct examination by Mr. Carpenter.

Q Mr. Cosgrove, do you know where the men were paid that worked for you doing stevedoring work, prior to the first of January, 1915—where they were paid? A Yes. I paid them down on the dock in the time office.

Q And how did you pay them? A By check.

Q Pay them cash before the first of January, 1915? A No cash.

The Court. He has been all over that in his other examination. He said that they always paid their men by check, not cash.

The Witness. By check up until the time the pay car was abolished, and that was abol-

William S. Cosgrove, direct.

ished in about 1909. About 1909 the pay car was abolished. Up to this time we were paid in cash. After that time we were paid by check.

Q Checks payable to the man's own name? A What is that?

Q Payable to the name of the worker? A Men would come in and I would have my timekeeper alongside of me. The man come along and he gave me his name and number, and I would have the checks in numerical order and identify the man that I was paying them to. The company insisted on that, that I knew every man that I put on and that I should be the man that paid them.

10

Q Now, do you know where the men have been paid that have worked for the Railroad Stevedoring Company since the first of January, 1915? A Yes.

20

Q Where have they been paid? A Well, they are paid up in my old office.

Q Now, were they ever paid up in that office before January first, 1915? A No. The only time that the man would receive his check in my private office was if he didn't show up in time, or the time the gang was paid off. Then I would hold his check in my drawer, in my desk, in my office, and that man had to present himself to me. He come the next day and I would give him his check. Any hold-over checks I would hold in my desk.

30

Q But you did not make a practice of paying men up in your office? A Oh, no; they were paid in the time office on Dock 11 proper.

Q Now, do you, or does the Central Railroad Company exercise any control whatsoever over the

40

William S. Cosgrove, direct.

men employed by the Railroad Stevedoring Corporation, or have you— A No.

Q —or have you since the first of January, 1915, except to complain when you find that they are damaging the freight in their handling of it?

10 A No, sir; we have no control over those men. I don't either hire or discharge them.

Q Have you hired or discharged any of them since the Stevedoring Company took over the stevedoring work the first of January, 1915? A No, sir; any jobs that the railroad want us to do we go to the general foreman, Mr. Kiely. If I want a job done I will tell Mr. Kiely I want three or four, a dozen or a hundred men. I tell him I want that job done and he must furnish me with the men, as many men as called for, he must give

20 me.

Q And whose foremen direct the men in doing that work? A Mr. Kiely is the general foreman there of the stevedores.

Q Mr. Kiely is the general foreman, but whose foreman—whose men do the work of handling the freight which you tell him you want done? A The Railroad Stevedoring Corporation's men.

30 Q Now, then, you have some payrolls here, have you not, that were identified here this morning? A Yes.

Q Now, that covers what period? A The entire year of 1917 from January first to December thirty-first.

Q And what men do they cover? A They cover all my office force and myself, and the chief clerk, and time records; and the clerks in the office, of course.

40 Q Whereabouts? Communipaw, Jersey City, railroad terminal at Jersey City? A Well, it is

William S. Cosgrove, cross.

the lighterage department. I have nothing to do with the Jersey City, the local end of it.

Q What do you mean by the local? A Well, the local is all freight that is billed into Jersey City. We call it Jersey City local account, except freight that is for lighterage it comes under me.

10

Q Can you say whether or not that includes—on that payroll—includes all the men who are employed by the Central Railroad of New Jersey in the year 1917, who were employed on the docks or piers of the Central Railroad Company? A Yes; this includes watchmen and all—watchmen, laborers, sweepers, messengers, clerks.

Mr. Carpenter. I offer it in evidence so there won't be any question about his name not being there.

20

(Marked D. 7 in evidence.)

Q And you say that Drew's name or Drago's name is not there in any way? A No, it is not there.

Cross examination by Mr. Simpson.

Q Whenever you want freight moved you go to this man and he gives you as many men as you want—ten, twenty, a hundred, and they do the work you want done? A Yes.

30

Q And under this contract you also know the manager of the Marine Department can remove objectionable employees of the Railroad Stevedoring Corporation—you know that, don't you? A He can remove them?

Q Yes. A Well, I didn't read the contract.

Q You don't know? A I didn't read the contract.

40

William S. Cosgrove, re-direct.

Q How is it that you know whether you would get whatever men you wanted to do the work of moving freight from this Mr. Kiely? A I had instructions to that effect from Mr. Joyce, the manager of the Marine Department, my superior.

10 Q He is your superior. But what I want to get clear in my head is when you wanted to get a thing done you went to Mr. Kiely, told him how many men you wanted, and he supplied the men to do the work? A Yes.

Re-direct examination by Mr. Carpenter.

Q That is all you had to do? A That is all. He furnished the foremen, furnished the checkers—the man in charge, and done the work to my satisfaction.

20

Mr. Carpenter. Now, there are certain interrogatories and answers that I would like to read in evidence.

Mr. Simpson. Read them all.

30 *Mr. Carpenter.* I want at this time to object to this first answer. I want to read part of it. I do not want to read it all. The first interrogatory is: "Were you in the employ of the Railroad Stevedoring Company on the 18th of June, 1917, at the time you received the injury?" and the answer was: "Was working for the Central Railroad Stevedoring Corporation." (Side bar discussion.) If your Honor will allow me to strike it out over his objection—

The Court. You may strike it out over his objection. Take your exception, Mr. Simpson.

40 *Mr. Carpenter.* The first interrogatory is addressed to the above-named plaintiff and Alexander Simpson, Esq., his attorney: "Were you in

Motion for Direction of Verdict.

the employ of the Railroad Stevedoring Corporation on the 18th day of June, 1917, at the time you received your injury?" (A) "Was working for the Central Railroad Stevedoring Corporation."

2. "Were you in the employ of the Railroad Stevedoring Corporation at any time or all the week ending June 18, 1917?" (A) "Yes, for the Central Railroad Stevedoring Corporation." 10

3. "When do you claim that you were employed by the Central Railroad Company of New Jersey?" (A) "Was working for the Central from 1910 to 1915."

6. "How long had you been in the employ of the Central Railroad Company of New Jersey before June 18, 1917?" (A) "For about five years for the Central Railroad." 20

7. "Did you work for the Railroad Stevedoring Corporation at any time in the year 1917, and, if so, from what date to what date?" (A) "Worked for the Central Railroad Stevedoring Corporation until the day of the accident." 20

8. "Did you work for the Railroad Stevedoring Corporation from the first to the 18th of June, 1917?" (A) "Yes, for the Central Stevedoring Corporation." 30

The rest is about the money. 30

Defendant's Motion for a Direction of Verdict.

Mr. Carpenter. The defendant moves for a direction of verdict in favor of the defendant and against the plaintiff on the following grounds:

First. The plaintiff, as now established by the evidence, was not employed by the defendant company in interstate commerce at the time he received the injury complained of, and hence there 40

Motion for Direction of Verdict.

can be no recovery under the act of Congress commonly known as the Federal Employers' Liability Act, and upon which this suit is based.

10 Second. The plaintiff at the time he sustained the injuries complained of was an employee of Railroad Stevedoring Corporation, a corporation of New Jersey. He admits in his answers to interrogatories, by which he is bound, that he was not employed by the defendant and was an employee of the Railroad Stevedoring Corporation. He was not an employee of the defendant, and, therefore, he has not a proper cause of action stated in his complaint, and there can be no recovery against the defendant.

20 Third. Since the plaintiff was an employee of Railroad Stevedoring Corporation, a corporation of New Jersey, or, as he says in his answers to interrogatories, Central Railroad Stevedoring Corporation, and since he was injured, as he claims, by an accident arising out of and in the course of his employment with the Railroad Stevedoring Corporation, or Central Railroad Stevedoring Corporation, as he says, the plaintiff's rights are fully and amply protected by the Workmen's Compensation Act of New Jersey, and this Court
30 having no jurisdiction to enforce those rights, this action should be dismissed.

Fourth. To permit the plaintiff to recover damages in this suit, wherein it appears that plaintiff was an employee of Railroad Stevedoring Corporation, or, as he admits in his answer to interrogatories, Central Railroad Stevedoring Corporation, would deprive the defendant in this action of its property without due process of law, in violation of the United States Constitution; and also it would be depriving this defendant of the equal
40 protection of the law.

Motion for Direction of Verdict.

Sixth. The plaintiff at the time of the happening of this accident was an employee of Railroad Stevedoring Corporation, a New Jersey corporation, separate and distinct from this defendant. As a matter of law it cannot be said that either the employment of the plaintiff by the Railroad Stevedoring Corporation or the making of the contract between the Railroad Stevedoring Corporation and the Central Railroad Company of New Jersey, offered in evidence, which is also a separate and distinct corporation, constituted a contract, rule, regulation or device the purpose and intent of which was to enable the Central Railroad Company of New Jersey to exempt itself from any liability created by the act of Congress commonly known as the Employers' Liability Act.

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Seventh. There is no proof that the defendant was guilty of the negligence charged in the plaintiff's complaint.

Eighth. Under the evidence introduced plaintiff assumed the risk of just such an accident he complains of, and the action should be dismissed.

Finally, the plaintiff was guilty of contributory negligence. He was the one that used—

The Court. That does not defeat the action.

30

The Court. Now, you have just raised one point. You say that he has admitted by his answers to the interrogatories that he was employed by the Central Railroad Stevedoring Corporation. He has also said that he was employed by the Central Railroad Company.

Mr. Carpenter. Eight years ago.

Mr. Simpson. Up to the time he was hurt.

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Motion for Direction of Verdict.

The Court. The point I want to make is, is there any difference between answers to interrogatories and what the witness may himself upon the stand say? I think not, if I may answer the question myself; and if he answers two different ways upon the stand which way is he to be held—
 10 for that which he happens to have last said or that which he first says?

Mr. Carpenter. But that is the crux of the matter. It is not what corporation or employer he thought he was working for. What is the fact? Now, the fact is they produced Mr. Cosgrove from the Central Railroad, who said that this man was not employed by him nor his company, was not paid by his company, was not on our payroll, had not been since 1915—the defendant himself in
 20 his answer says he quit work in 1915—worked for the Central Railroad from 1910 to 1915. We produce the payrolls of the Railroad Stevedoring Corporation, which show that he was working for them. We produce the books of the Central Railroad to show that he was not working for us. He worked under the direction of the employees of the Stevedoring Corporation. It is not what he thought. It is by whom was he employed? It relates to the employees of the railroad, and the employees themselves, not what they thought. If he
 30 was not employed by the Central Railroad Company of New Jersey he does not come under the act.

The Court. He does not if the plaintiff had failed to show and establish that this was a contract or device with the purpose or intent of exempting the Central Railroad Company of New Jersey from its liability under the act.

Mr. Carpenter. We have to reason this out for
 40 ourselves because there is no case right on it. Sup-

Motion for Direction of Verdict.

pose I am a baker here in Jersey City, and was at the time our Workmen's Compensation Act went into force. Suppose I had wagons upon which I hauled flour to my shop and other wagons upon which I carted bread to the station. Suppose I determine that the expense of doing that business when the expense of carrying workmen's compensation was added to it made it too big a burden for me. I could discontinue that business; I could engage you or anybody else to cart that bread or flour from the depot to my shop, and my bread from the shop to the railroad. Now, then, it could not be said that that was a device to take those employees who formerly had worked for me out of the Compensation Act; they would have their rights against their subsequent employer. The mere fact that the contractor afterwards took over the business of carting the flour and bread, engaged the men who had been working for me, would not show any intent on my part to do anything unlawful. I could discontinue that business. So the Railroad Company here perhaps came to the conclusion that to carry on this business of stevedoring, handling the freight from the cars to the boats and from the boats on to their cars, was too hazardous a business. The cost of the labor plus the cost of the insurance and what-not was too great, so that they could not afford to do it, and they had a perfect right to discontinue.

The Court. Doesn't it all come down to the question of purpose and intent, of the making of the contract

(Quoting *Richie on Phil. vs. Shepard.*)

Mr. Carpenter. It is a question of law. You cannot escape that.

Charge to Jury.

The Court. Very well. I am going to escape it by denying your motion and letting you take an exception.

Mr. Carpenter. Very well.

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June 13, 1918.

Court's Charge to the Jury.

Gentlemen of the Jury:

This is an action by Louis Drago against the Central Railroad Company of New Jersey. The plaintiff, Drago, seeks by means of this action to recover damages for what he alleges he has suffered and is suffering, which suffering in turn he alleges proximately resulted to him and came to him through negligence chargeable or imputable to the defendant company. The action is brought under what we know as the Federal Employers' Liability Act. That is an act which gives a right of action to one who is engaged at the time of the happening in question in interstate commerce, a company, such as this company, the defendant, being likewise at the same time engaged in interstate commerce—and that is commerce between the several states of the Union; that is, between the State of New Jersey and the State of New York, or between the State of New Jersey and the State of Pennsylvania, or commerce which is moving from one state to another or through more than one state. If the commercial transaction or movement was simply confined to the State of New Jersey it would be called intrastate commerce, and this act under which this action is brought would not apply. But where the action, or where the

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Charge to Jury.

transaction out of which the occurrence grew was one of the movement of commerce, or a transaction of that character from and through one state to another, or more than one other, it is what we know as interstate commerce; and for one to recover, aside from the question of negligence which I will speak to you of almost immediately hereafter, this condition must exist at the time and must be satisfied to you as having existed at the time of the happening of the occurrence—that is, that the party complaining and asking a recovery must have been in the employ of the defendant carrier; that the defendant carrier and likewise the employee who is seeking the recovery were both engaged in interstate commerce at the time of the happening complained of. And then the act goes on and says that a person showing those situations, and who has suffered injury resulting in whole or in part because of the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence (that is, the carrier's negligence) in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment may have a recovery for such damages as such employee may show he has received and suffered or is suffering as the result of such negligent act.

So you will see, gentlemen, that at the outset the important, or one important thing necessary to be so shown and satisfied to you is that this plaintiff, Drago, was an employee of the defendant company.

Now, to start out, gentlemen, you must keep this in mind: That upon this point as well as others which I will immediately bring to your at-

Charge to Jury.

tention, the burden of satisfying you as to that is upon the plaintiff, and he must satisfy you of it by a fair preponderance of the evidence; because, you see, he is seeking to bring to himself the right to have the benefit of this act of Congress under which he is bringing his action. So, therefore, the law very properly says of him that he must show to you, who are trying the issue, by a fair preponderance of the evidence that he is such a person as is entitled to have the benefit of an action under this act. If he fails to do that then he has not put himself in a position which the law requires him to be in in order to have the benefit of the act. So that the first question before you is, has the plaintiff by a fair preponderance of the evidence satisfied you that at the time of this occurrence, which was June 18th, 1917, he was in the employ of the defendant company, the Central Railroad of New Jersey?

Now, the plaintiff alleges and seeks to establish this: That sometime in the past, or prior to the happening in question—I think it was a period of some eight years prior thereto. As to that, however, you will recall the exact time as the evidence shows it to you—he was employed by the defendant company, the Central Railroad of New Jersey, and he seeks to show you and satisfy you that that employment thus entered upon, thus accepted by him and the Central Railroad Company, continued and was not interrupted or broken up to the time of the occurrence in question of June, 1917.

The defendant company, however, asserts and attempts to establish a different situation—in part a different situation. I do not understand that there is any denial or any attempt to deny that there was sometime in the past—some eight years

Charge to Jury.

in the past, I will say again, as I recall it—there was an engagement of this plaintiff by the defendant company and there was an entering upon the duties under such engagement, and that they continued for some period of time. I think the defendant alleges that that relationship as between the defendant company and the plaintiff, as master and servant, or employer and employee, continued until on or about January 1st, 1914. As to that date, I am not entirely satisfied of the correctness, of course; but if in that respect I am at fault, of course, again you will correct my fault by your recollection of what the testimony was. But, however, it was sometime prior to the occurrence in June of 1917, when the plaintiff ceased to be the employee and the servant of the defendant company and went into the employ of and became the servant and the employee of another company known, I believe, as the Railroad Stevedoring Corporation, in the employ of which company it is alleged and sought to be established he continued until the time of the happening in question.

Now, gentlemen, the relationship of master and servant or of employer and employee is a contractual one, as we say; that is, it is one growing out of and arising by and through a contract between the parties. Such a relationship may be created either by an express contract or an implied contract, and may be either in writing or by parol or verbal agreement, or word of mouth; but, nevertheless, gentlemen, however it is evidenced and brought about, the relationship always comes about by contract as between the parties.

Now, an express contract would mean—and this would be an example of it: If you, Mr. Foreman, were seeking an employee or a servant in any par-

Charge to Jury.

ticular line of work, and juror No. 2 should be
 such a person as would be desirable to you as
 such employee, and the employment which you
 were offering would be one which would be de-
 sirable to him, you and he coming together might
 by express language—by your making an offer to
 10 him in words as to what you wanted him to do
 and the hours of his service, the rate of compensa-
 tion he was to have and all such things as would
 be incidental and necessary to the making of an
 understanding, I will call it, as might be openly
 expressed by you to him in words; and he in turn
 by words might expressly and openly say: I ac-
 cept of this offer of service together with all that
 goes with it, including the compensation as you
 have made it, and a contract would then have been
 20 made between you and him whereby you became
 the master and he became the employee. That is
 what I mean, gentlemen, and that is what is meant
 by an express contract; that is, that is a common
 example of what an express contract would be.

Again, such a contract of employment may come
 about in another way. It may be that a part of the
 arrangement or agreement may be actually ex-
 pressed, but some other portion necessary to fully
 30 make up the contract may not be openly and by
 word of mouth expressed as between the parties;
 but yet by reason of the acts of the parties toward
 each other with respect to the things or being done
 or to be done, and because of the circumstances
 and conditions surrounding the transaction the
 balance of that contract would be in law implied.
 And again, the entire contract may be such a one
 as would be established by implication; that is,
 taking into consideration all of the facts, the cir-
 40 cumstances and the conditions, the manner in which

Charge to Jury.

the alleged employer acted toward the alleged employee, and in turn the manner in which the alleged employee or servant acted toward the alleged employer in and about the work done, how it was done, submitting himself as an employee to the directions and control of the alleged master, the method of payment—all things of that character taken into consideration reasonable men would say by implication a contract exists between these parties, the one as master and the other as servant. Such would be a contract of employment by implication. 10

Of course, in all contracts, gentlemen, there is this one very old rule which you may have heard either in your present jury service or in past jury service, and that is that there must in some manner be shown a meeting of the minds of the two parties: because surely unless your minds meet, unless your minds agree upon the terms under which one is engaging himself to another there cannot be any contract. A contract, of course, is a thing which is mutual. It may, as I have said, come about by all of the terms being expressed or made by the one party to the other, and the one to whom the offer is made may do nothing but say simply: "I accept," or his act may be such as reasonable implication therefrom would show and satisfy reasonable men that he had accepted it. That is sufficient; a contract then exists. 20 30

It may be, however, that the offer or the things going to make up the contract may not come from the one party to the other; it may be that the employer may make a suggestion covering the entire contract which he is willing to make, if one is to be made. The prospective employee may accept some of those offers or some part of that offer 40

Charge to Jury.

and may counter-offer, changing the original offer made by the prospective employer. The prospective employer may accept those changes and thus make the contract complete; or, in turn, after having those counter-offers made, the party who first made the offer may make still a further or
 10 amended or changed offer as to some part of the original offer, and so on, until the two parties have come together and have agreed upon what the terms of the agreement shall be.

Now, I have gone to that length, gentlemen, in an endeavor to show you how in a general way contracts of employment may come about. As I have said to you, it is a contractual relation and it must be established just the same as any other contract should be and must be; that is, all of the
 20 elements necessary and essential about and concerning such a contract as would be a contract of employment must be shown—shown to have happened, come about and been made, either expressly as between the parties, or that the facts, the circumstances, the conditions which have been shown surrounding the affair, the manner in which the parties acted toward each other—all those things would be indications to the reasonable minds of
 30 a contract or engagement or employment and must be shown in order that if the contract is to be shown by implication there may be a basis upon which that implication may be laid and from which it may be drawn by reasonable men.

So that in this matter, gentlemen, as I started off to say to you, the first question to be decided by you is: Has the plaintiff satisfied you—and remember, as I have said to you, the burden is upon him—has he satisfied you by a fair preponderance of the evidence that at the time of the
 40

Charge to Jury.

occurrence in question, namely: June 18th, 1917, he was an employee of and engaged as a servant, an employee of the defendant company in and about this alleged work? If he has not satisfied you of that and in that manner, then so far he has not shown himself entitled to have the benefit of this act; because you will keep in mind what I have said to you—he must show in order to have the benefit of this act (and he cannot have it otherwise) that at the time of the occurrence he stood in the relationship of an employee toward the person he is seeking to hold under the act; that is the carrier, the railroad company which he is seeking to hold under the act. 10

Plaintiff says, however, that if that issue is determined against him, nevertheless he is entitled to have the benefit of this act because he alleges and endeavors to show and satisfy you that the agreement which is in evidence between the defendant company and the Railroad Stevedoring Corporation, and which bears date some time in December, I think, of 1913— 20

Mr. Carpenter. December 18, 1914.

The Court. Then the date I first spoke of must be an erroneous date. It must be January 1, 1915. 30

(Continuing) that this contract bearing date in December, 1914, was a contract which is prohibited, as it were by Section 5 of the act under which he is seeking to have the benefit. That section reads as follows: That any contract, rule, regulation or device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall to that extent be void. 40

Charge to Jury.

In other words, he is alleging—that is, the plaintiff is alleging and is attempting and seeking to satisfy you that this agreement which is in evidence and is before you, whereby and whereunder this particular work was being done, was a contract and is a contract in violation of that section
 10 of the act which I read to you. So that he is saying to you: This defendant carrier by and through its act in executing and entering into and making this contract, acted fraudulently for the purpose of evading and ridding itself of the obligations and requirements of this act of Congress.

Now, the burden, gentlemen, there again is upon the plaintiff; because but for his ability to show that he would not be able to have the benefit of this act.

20 Again, what is being charged, as I have just intimated to you, is what in law we would call fraud. Fraud is never presumed. There is no assumption—you cannot assume in law that a thing is fraudulent. Rather the presumption would be the other way, and, in fact, it is. The law presumes that all men will do right rather than do that which is wrong or illegal, and, therefore, the law says to such a person as this plaintiff, and in turn that is
 30 the rule that comes to you, that if you assert that which in law amounts to fraud as against a party, that fraud or that act which amounts to a fraudulent act in law must be established by you and established by facts and circumstances. It must be proved. It will not be assumed that one does wrong. Therefore, that is the burden that is upon the plaintiff in this action, and the question before you in that direction is this: Has the plaintiff
 40 satisfied you by a fair preponderance of the evidence that this contract of December, 1914, was a contract the purpose and intent of which was to

Charge to Jury.

enable the defendant common carrier to exempt itself from the liability created by this act of Congress? If he has satisfied you of that, and in the manner I have indicated, gentlemen, then he may have a recovery, provided, of course, the question of negligence, of which I will immediately speak to you and other matters of which I will immediately speak to you, have been satisfied in such a manner to you as the law requires that they shall be. 10

If you have not been satisfied by him that he was at the time of this happening an employee of the defendant company, or not having satisfied you that he was an employee at the time of this happening; if he has failed to satisfy you that this agreement of December, 1914, was a contract for the purpose or intent of enabling the defendant to exempt itself from liability under this act, then he cannot have a verdict; because then he has not put himself in a position where he has shown you, as the law requires, that he may have the benefit of the act. 20

If he has put himself in that position, gentlemen, that I have indicated to you, showing that he is entitled to have the benefit of this act, it brings you then immediately to another serious question in this cause; because, after all, you will see from what I have read to you from the act he is entitled even if these other things which would entitle him to have the use of the act have been satisfied to you—he may only have his action when injury to him results in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, road-bed, works, boats, wharves or other equipment. 30 40

Charge to Jury.

10 In other words, he must still satisfy you by a fair preponderance of the evidence that the defendant carrier was negligent in the manner in which he has alleged it was; because these actions are, after all, based upon negligence—negligence attributable to the carrier—being the proximate cause of the happening or occurrence of which the plaintiff complains.

20 Now, what is the negligence of which he complains? He says that while the plaintiff (that is, Drago) was so working as aforesaid, a movable crane running on the railroad tracks was used for unloading said trucks, and the cable upon the said crane was not strong enough to lift the trucks and was unsuitable and broke—and one of the trucks broke and fell on the plaintiff, cutting off his leg.

20 As between master and servant, or employer and employee, there are well-defined rules of conduct, or rules of action or care with respect to the tools, appliances, with which the master requires the work of the employee to be done or accomplished. The rules may be stated in different ways. I will state them to you in two different ways, but you will see that they practically concur and mean the same thing:

30 The master is bound to provide reasonably safe, sound and suitable tools, implements, machinery and materials with which to work. The master is not bound to provide the newest or best possible appliances, but such as are reasonably safe and suitable, and such as are ordinarily used and which are in good repair, and the exercising by the master thereto and toward of reasonable care in inspection for the purpose of discovering obvious defects is sufficient; that is, the master is under the duty of using reasonable care to see and know

40 and provide reasonably safe tools and appliances

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by and through which his servant is to do and perform the work for him.

Again, the rule of law is stated to be that the master's duty to his servant requires of the former (that is, of the master) the exercise of reasonable care and skill in furnishing safe machinery, tools and appliances for carrying on the business in which he employs the servants and in keeping such machinery and appliances in repair, including the duty of making inspections and tests at proper intervals; and, besides, the master is responsible for negligence of his agents whom he may select to perform this duty for him if the agent fails to exercise reasonable care in its performance. 10

You see the whole duty, gentlemen, is based on the rule which we may denominate and call the rule of reasonable care. That is what a reasonably prudent person, as a master, would do under the circumstances, considering the class of the employment, the class of the work being done, rather; what is required to be done, what is required to be accomplished. Has he used that care for and toward his servant in selecting and providing and maintaining tools and appliances which would be reasonably safe for use by the servant? As you have seen from a reading, the master is not called upon to provide the best, perchance, that can be gotten in all the world; he is not obliged daily and hourly to provide new tools and new appliances to take the place of the old—that is not the requirement that is upon him. If that was so, gentlemen, carried out to its full extent, the master would then be made an insurer of his employee, insuring him, guaranteeing practically to him that the tools and appliances which he provided for his use were perfect, and that through them no harm could come to him. But that is not the rule. The 20 30 40

Charge to Jury.

10 master is in the position in law where he must act as a reasonably prudent person considering the work done and the tools and appliances proper for its performances, to provide for his servant such tools and appliances as are reasonably sufficient, proper and good, and to use reasonable care to the extent of inspection, if that be under the circumstances within the lines of what would be reasonable for a reasonably prudent person to do—inspecting them in such manner and at such times, at such frequent intervals as under the circumstances would be a reasonable thing for a reasonably prudent person to do, so as to provide the servants with, and maintain in the servant's hands, tools and appliances which are reasonably safe.

20 The situation as to that issue is this—and this is what you shall have to decide: Has the plaintiff satisfied you, again by a fair preponderance of the evidence, the burden being upon him, that the defendant company failed in that duty of exercising reasonable care in and about providing, furnishing, and maintaining tools and appliances which were reasonably safe, particularly, as all the testimony has been directed, as I remember it, as to this so-called wire sling? With respect thereto has the plaintiff satisfied you that the master
30 fell short in that duty which he owed him under the law and under the rule which I have given to you? If he has not satisfied you of that, even if he has satisfied you of all of the other things which I have so far talked of, he cannot have a recovery; because then he has failed to establish a most essential, necessary and important item of his case, namely, that the defendant was negligent, and without a satisfying of that in the manner in which I have indicated he cannot in law have a
40 recovery.

Charge to Jury.

If he has satisfied you of that, and has satisfied you, of course, of these other things which I have in the opening part of my charge spoken to you of, so as to bring himself under the terms of this act, then he may have a recovery—except for this:

Defendant further says that this thing which happened was a risk which the plaintiff assumed, was a risk incident to his employment. If that is so, gentlemen; if that has been made out, why then, of course, even if all these other things have been shown in favor of the plaintiff and entitling him to have a verdict—if that thing has been shown then under this act, he cannot have a verdict, because what happened to him then would be just such a thing as he might expect, or which one in his position might expect as arising out of a risk assumed. But the burden of satisfying that to you, gentlemen, is upon the defendant. It is a defense which it presents and alleges against the right of recovery, and, therefore, very properly the law deals with the defendant in that respect with the same equal justice that it deals with the plaintiff in respect to those things of which I have already spoken to you. The defendant, having asserted and alleged it, the burden and the duty are upon it to establish it—perfectly fair rule—and it must establish it by a fair preponderance of the evidence.

Now, what our courts have said upon the question of assumption of risk is this, and you shall have to take the facts and circumstances as they appear before you in this case, gentlemen, and apply these rules to them, and then determine whether or not by a fair preponderance of the evidence it is shown that this thing which caused this happening was a risk which the plaintiff as-

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sumed. If it was and has been so established, then he cannot have a verdict.

10 The general rule is that a master is bound to exercise reasonable care to provide a safe place for a servant to perform his work and to furnish and adopt such means that he may be assured reasonable safety and protection in his work, and to exercise reasonable care to maintain the place and means reasonably safe. The qualifications are that the workman takes upon himself during the continuance of his employment all the risks and dangers which are obvious to him or which can be perceived by him in the exercise of his senses and the use of ordinary care and circumspection. The risk must be obvious and apparent and known to the servant or such as he should have known and
20 perceived with the exercise of reasonable care on his part. The rule that the servant assumes not only the ordinary risks incident to the employment but also such special features of danger as are plain and obvious and also such as he would discover by the exercise of ordinary care for his personal safety is well established in this state. The servant assumes as well those risks that arise or become known to him during the service as those in contemplation at the time of the hiring.

30 To repeat, gentlemen, I say to you upon that question, take that rule or those rules which I have just read to you, as it were, those definitions of what would make for and constitute assumption of risk, and apply them to the evidence that you find in the case upon that score, and then determine whether or not this thing which brought about this happening was by and through, and was a risk assumed by the plaintiff. The burden of satisfying you of that, as I have already said,
40 is upon the defendant, and it must do so by a fair

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preponderance of the evidence. If that has been established your verdict must be for the defendant. If it has not been established then let me draw your attention to the next matter, or next thing which seems to be in order, and that is as to the conduct of the plaintiff himself, as to the acts of the plaintiff himself; because he was under an obligation in law to exercise care for and about his own safety. The law required of such a person as the plaintiff that he should exercise reasonable care. He should act, in other words, as a reasonably prudent person should act, considering all of the circumstances and the condition, and the facts showing all sorts of conditions as they were in and about the time of the occurrence in question, as to the work he was doing, the manner in which he was doing it, how he was doing it—all those things taken into consideration, the question is before you: Did the plaintiff himself exercise for and toward, and in the manner in which he was doing this work, that reasonable care which a reasonably prudent person would be expected and should be expected to exercise for and toward his own safety? The burden of satisfying you as to that is upon the defendant also, because again it is a defense which it urges. Therefore, the same rule applies. It must establish it by a fair preponderance of the evidence. If it has it does not necessarily defeat the plaintiff from having a verdict; that is, it does not become under this statute an absolute, total bar to his right to have an action, such as the assumption of risk defense would if established; but as to its place I will speak to you later when I am speaking to you upon the question of what plaintiff may have a recovery for if he is entitled to have a verdict.

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Charge to Jury.

If the plaintiff is entitled to have a verdict he is entitled to be compensated for the pain and suffering, mental and physical, which he has had; likewise for such disability or disabilities as he has had, is enduring, and will in reasonable probability endure in the future, which he may have shown
 10 you are the proximate results of the happening in question; the burden being upon him, of course, gentlemen, to satisfy you as to the pain and suffering he has had, is enduring if he is enduring pain and suffering, and that he will in reasonable probability endure in the future, if he is to have a recovery for past, present and future—as to the degree of it, the intensity of it and its duration; and, furthermore, that it is the result proximately of what happened to him in June, 1917.

20 He is also entitled to be compensated for loss of earnings or loss of ability to earn by reason of disabilities, if any, which he has shown you he has suffered and endured as the proximate result of this happening.

It appears, gentlemen, that he has lost a part of his left leg, at least. I do not remember just what part of it. There is no contest, as I understand it, in this case, that the loss of that limb or
 30 part of that limb was the proximate result of the happening to him of June, 1917. He is entitled to be compensated for the loss of earnings which he may have shown you—and the burden is upon him to show it—he has suffered from the time of the happening in June, 1917, to the present time. He is also entitled to be compensated for such loss of earnings or loss of ability to earn in the future to the same extent as he did prior to the accident, the burden being upon him to satisfy you as to what that loss is, as to what that decreased ability
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Charge to Jury.

is, and he is entitled to be compensated therefor to the extent that he may have so satisfied you.

Upon the question of loss of earnings or loss through and by the medium of inability to earn in the future, that total sum that you may find in the first instance is to be capitalized, so far as the loss for the future is concerned; that is, it is to be reduced to its present-day worth, the idea and reason of that being that if he were not disabled either totally or partially (whatever he may have satisfied you of in that direction) from laboring in the future he could have earned as he was earning prior to the happening, and, of course, those earnings would come to him weekly, or every two weeks, or monthly, or in just such periods as his services would be usually compensated for. He is now seeking to have a recovery for loss in that direction in the future and a recovery at this time. So you see that reasonably he ought not to have that gross sum which you may find, if you find in that direction, he should have for future losses; but he should have that gross sum reduced to its present-day worth, because, you see, by and through your verdict, if he is to have a verdict upon that score, he presently and immediately in contemplation of law gets the benefit of that money and the use of it, where otherwise the benefit of the use of the total sum would be postponed to the future as he earned it. So, therefore, as to any sum of money that may go into your verdict (if any does go) for loss of future earnings, it is not to be the gross sum you find he has established he will lose, but that gross sum reduced to its present-day worth.

And therein, gentlemen, and at that point, the question as to whether or not the defendant has satisfied you that the plaintiff was guilty of con-

Charge to Jury.

tributory negligence becomes of importance. If the defendant has satisfied you that the plaintiff was guilty of negligence which contributed to this happening to him, then this is the situation that you will find yourselves in and this is the application of that finding:

- 10 The law under which he is suing says that in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

- 20 In considering that provision of the act, the Court has said this:

- “It means” (referring to the very language I have just read to you) “and can only mean, as this Court has held, that where the casual negligence” (that is, the negligence which produced and caused) “is attributable partly to the carrier” (such as a railroad company) “and partly to the injured employee, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages” (total damages) “that the negligence attributable to the carrier bears to the negligence attributable to both, the purpose being to exclude from the recovery a proportional part of the damages corresponding to the employee’s contribution to the total negligence.”

- 30 So that, gentlemen, if you find that the plaintiff is entitled to have a verdict, and likewise you find
40 that he contributed by his own negligence to the

Exceptions to Charge.

thing that happened to him, then you will treat of any verdict which he otherwise would be entitled to have in the manner indicated by the rule which I have just read to you.

I have nothing further to say to you, gentlemen, upon the subject, and you may, therefore, take the case.

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THE JURY RETIRED.

The Court. These are the requests of the defendant, none of which I charge. I declined to charge.

Mr. Carpenter. I ask an exception to the Court's refusal to charge each of my requests to charge as they were made.

The Court. As I understand them, Mr. Carpenter, they practically go back to the same things that you urged in your motion for a non-suit and motion for direction of verdict.

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Mr. Carpenter. To the same, but you have gone all over them and refused them, and I desire an exception.

I also ask the following exceptions to the following portions of the Court's charge:

1. I ask an exception to the whole charge because the Court left the case for the decision of the jury. I contend that it is a question of a law and a matter for the Court to pass upon and that it is not a jury question.

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2. Where the Court left it to the jury to say whether or not the plaintiff was employed by the defendant at the time of the happening of the occurrence. I except to that because under the evidence plaintiff was employed by the Railroad Stevedoring Corporation.

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Exceptions to Charge.

3. Where the Court said that the carrier and employee must be shown both to have been employed in interstate commerce at the time of the accident complained of. I except to that because neither the plaintiff's employer, the Railroad Stevedoring Corporation, nor the plaintiff himself
10 was engaged in the employ of the defendant, or in interstate commerce within the meaning of the act at the time of the accident complained of.

4. I also except to the Court's charging the jury that: "You will see that at the outset one important question is that this jury must determine whether the plaintiff was an employee of the defendant." I say as a matter of law he was not

5. Also where the Court said plaintiff must show by a fair preponderance of the evidence that
20 he was such a person as was entitled to the benefit of the act—leaving that question to the jury. I say as a matter of law he was not such a person.

6. Also where the Court left this question to the jury: "Has the plaintiff shown you at the time of this occurrence that he was in the employ of the defendant company, the Central Railroad of New Jersey?" I say that is a question of law and not a question to be passed on by the jury.
30 The Court should have charged that he was not in the employ of the defendant.

7. Also where the Court said that the plaintiff seeks to show that the employment entered upon eight years ago continued and was not interrupted until June, 1917. As a matter of fact, the plaintiff by his answers to interrogatories under oath stated that he was employed by the defendant between 1910 and 1915—thereafter worked for the Central Railroad Stevedoring Corporation, and from that
40 up to the time of this accident he was working for

Exceptions to Charge.

the Central Stevedoring Corporation. The other evidence is that he worked for the Railroad Stevedoring Corporation. For these reasons this was not a proper question to leave to the jury.

8. I also except to all of the charge of the Court with relation to what the relation of master and servant is—that it was contractual; that it may be either express or implied; because I say that in this case as a matter of law there was no relationship of master and servant existing between the plaintiff and defendant, the Central Railroad of New Jersey. 10

The Court. You do not mean to say that the rule of how the relationship may arise was improperly presented to the jury, but you simply say that in this case there was not any question of that sort to be sent to the jury—that is what you mean? 20

Mr. Carpenter. Yes. I do say, however, that your remarks on that subject in this case were not called for by the facts of this case, and that in this case to charge them upon that subject was error. I will put it that way.

9. I also except to leaving this question to the jury: “The first question to be decided by you is: Has the plaintiff satisfied you by a fair preponderance of the evidence that at the time in question, June 18, 1917, he was employed by, and a servant of, the defendant company in and about this work?” That is about the same language. I except to it because I say it is a question of law for the Court under the facts in this case. 30

10. Also to the Court’s charge that “plaintiff says, however, that if that issue is determined against him, nevertheless he is entitled to the ben- 40

Exceptions to Charge.

efit of this act because he alleges that the agreement in evidence between the defendant and the Railroad Stevedoring Corporation was void under Section 5 of the act."

10 11. And to that portion of the Court's charge which was as follows: "This contract was a contract that is prohibited, as it were, by Section 5 of the Employers' Liability Act." Then the Court read the section in question. I say that there was absolutely no question to leave to the jury as to whether or not this contract was in violation of Section 5; that as a matter of law it was not in violation of Section 5. I say that there was no question to be left to the jury that the contract in question was entered into fraudulently or in an effort to evade the requirement of the act of Congress in question, and that that question—the whole of that question was improperly left to the jury.

12. I say it was improper to leave this question to the jury: "Has the plaintiff satisfied you by a fair preponderance of the evidence that this contract of December, 1914, was a contract, the purpose and intent of which was to enable itself, the defendant, to evade this act of Congress?"

30 13. I also except to the Court's stating this to the jury: "If the plaintiff has satisfied you of that in the manner I indicated he may have a recovery provided that the matters hereinafter mentioned in my charge are established by him."

40 14. I except to your leaving it to the jury to say whether the plaintiff has shown by a fair preponderance of the evidence that the contract between the defendant and the Railroad Stevedoring Corporation was made with the intention of trying to evade the act of Congress. My reason

Exceptions to Charge.

is that it is immaterial what the purpose of the contract was as to this particular exception, because it is necessary first, before the plaintiff can recover under this act, that he be an employee of the defendant railroad company, and since he was not it does not matter what the relation between the defendant and the Railroad Stevedoring Company was. He must first be an employee. 10

The Court. Then you mean that any contract of this character would be good?

Mr. Carpenter. I mean that there is nothing in the law which compels a railroad company to continue the business forever which it was doing at the time the act of Congress was passed.

The Court. I am going to leave that stand. I argued that with you before. 20

Mr. Carpenter.

14. Also I except to your leaving it to the jury to say whether the contract entered into by the defendant and the Railroad Stevedoring Company was a contract the intent and purpose of which was to enable the defendant to evade the purposes of the act of Congress upon which this action is based. I also except to your saying that, "If the plaintiff has satisfied you of that in the manner the Court indicated he may have a recovery, provided the other matters hereinafter set forth are established." I say that he cannot recover unless he was employed by the defendant and was an employee of defendant in interstate commerce at the time of the accident. 30

15. I also except to the Court's charge to the jury as to negligence in this case. It was not the duty of the defendant to furnish the plaintiff with 40

Exceptions to Charge.

a reasonably safe place to work or reasonably efficient tools. That was his master's duty, the duty of the Railroad Stevedoring Company. The duty of the Central Railroad Company of New Jersey under the facts of this case was to refrain from wilful injury, because the plaintiff was on
 10 the premises of the Central Railroad Company through license, and the duty owed to a licensee under the cases in this state is not as charged by the Court—to provide a reasonably safe place to work or reasonably safe materials. So, therefore, I except to all that portion of the charge as to the duty of master toward his servant as being inapplicable to this situation.

16. Also I except to the Court's leaving to the jury the question: "Has the plaintiff satisfied you
 20 that the defendant company failed in the duty of using reasonable care to have the premises and the particular instrumentalities with which he was working reasonably safe?"

17. Also to the Court's leaving this question to the jury: "Has the plaintiff satisfied you that the master fell short of that duty? If he has not he may not recover, for then he has not established a necessary part of his case. If he has satisfied
 30 you of that and the matters mentioned in the opening part of my charge then he may have a recovery." I except to that.

18. I also except to the Court's leaving it to the jury to reduce the amount of any damage in proportion to the contributory negligence proved by the defendant by a fair preponderance of the evidence. It is my contention that under the federal act if it appears on the plaintiff's own case that he was guilty of contributory negligence the
 40 verdict must be reduced to the extent or in pro-

Exceptions to Charge.

portion to his contributory negligence, and that it is not necessary, as under the state law, for the defendant to establish that contributory negligence by a fair preponderance of the evidence. That last is—

The Court. A brand new thing.

10

Mr. Carpenter. Yes, sir.

The Court. Now, let me see, Mr. Carpenter, if this is the portion of my charge that you have taken a different view of than I did:

“Plaintiff said, however, that if that issue is determined against him” (and that issue was as to whether or not he was a servant of the defendant company) “that nevertheless he is entitled to have the benefit of this act because he alleges and endeavors to show and satisfy you that the agreement which is in evidence, between the defendant company and the Railroad Stevedoring Corporation, and which bears date some time in December, I think, 1913”—there was an interruption. You said: “December 18, 1914.” Then I continued and said: “Then the date I first spoke of must be an erroneous date; it must be January 1, 1915.” Then the Court continuing: “That this contract bearing date in December, 1914, was a contract which is prohibited, as it were, by Section 5 of the act under which he is seeking to have the benefit. That section reads as follows:” and I read the section. Is that the portion?

20

30

Mr. Carpenter. That is the portion.

(The Jury Returned.)

*Charge to Jury.**The Court.*

10 Gentlemen of the jury, I have asked you to return because there has arisen that by and through which it may to some degree of possibility be said that something that I said to you in my charge might be taken with a meaning entirely different from that which I had any purpose or thought of expressing to you; and, therefore, for the purpose of making it absolutely sure as to what I intended to say and likewise as sure as possible that you understood it in that sense, I have called you back here.

20 You will remember that in my charge I first told you what this act was under which this action was being maintained, and spoke of it as the Federal Employers' Liability Act. I then went on to address you upon the question as to whether or not this plaintiff had satisfied you by a fair preponderance of the evidence that he was an employee of the defendant, Central Railroad Company of New Jersey and was acting in that capacity as employee of that company on June 18, 1917, when this thing happened. You will remember, too, gentlemen, that that was the first thing that I discussed with you. After so discussing that
30 matter with you I then went on and used this language: "Plaintiff says, however, that if that issue" (that is, that he was an employee of the defendant company on June 18, 1917) "is determined against him, that nevertheless he is entitled to have the benefit of this act, because he alleges and endeavors to show and satisfy you that the agreement which is in evidence between the defendant company and the Railroad Stevedoring Corporation and which bears date some time in
40 December, I think, of 1913—" and then there was

Charge to Jury.

an interruption. Mr. Carpenter corrected by saying, "December 18, 1914." Then I went on to make the correction: "Then the date I first spoke of must be an erroneous date; it must be January 1, 1915," and then I went on: "that this contract bearing date in December, 1914, was a contract which is prohibited, as it were, by Section 5 of the act under which he is seeking to have the benefit." And then I went on and read to you Section 5 of the act. 10

Now, gentlemen of the jury, what I intended to say to you, what I intended to have you understand from what I said to you, was this: "That if the plaintiff has not satisfied you by a fair preponderance of the evidence that he was in the employ of, and was the servant and the employee of the defendant company on June 18, 1917, and engaged at that time in interstate commerce, and that likewise the defendant company itself was then engaged in interstate commerce—if he had failed in satisfying you upon that issue that then the plaintiff alleged, not that he was—not that it was a fact—but then that the plaintiff alleged, sought to establish, that he was still entitled to have the benefit of this act because he alleged or said, sought to establish and satisfy you that this agreement between the defendant company and the Railroad Stevedoring Corporation bearing date in December, 1914, was a contract which is prohibited by Section 5 of the act under which he is seeking to have a recovery. That section is that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void. I did not intend to have you understand from what I said that I was saying to you that that contract 20 30 40

Exceptions to Charge.

of December 18, 1914, was void under that section, but I did intend, and my language was intended to convey to you simply that the plaintiff himself was contending, was saying, was urging that that contract of December 18, 1914, was by the showing that he had made from the evidence a contract
 10 which was prohibited by Section 5; and that is what I am saying to you now—that is what the plaintiff alleges. The defendant, on the other hand, still insists that it is not such a contract as is in violation of, and is prohibited by, Section 5. Then you will remember what I said to you upon the question of fraud never being presumed, and saying to you that the burden was upon the plaintiff. I say to you now that the burden of satisfying you as to that allegation is upon the plaintiff,
 20 and he must satisfy you of it by a fair preponderance of the evidence. He must prove it; he must establish it. If he has not then in that direction he has not put himself in a position where he can avail himself of the provisions of this act.

With that, gentlemen, you may retire again.

THE JURY RETIRED.

Mr. Carpenter. I except to the Court's leaving
 30 to the jury the question of whether or not the contract between the railroad company and the stevedoring company was void under Section 5, for the reason that I contend there is no evidence to show it was void, no evidence to show it was fraudulent, and that no matter whether it was void or voidable or fraudulent, if the plaintiff himself was not in the employ of the Central Railroad Company at the time of this accident he is not entitled to the benefit of the Federal Employers' Liability
 40 Act; because it is jurisdictional that he must first

Defendant's Requests to Charge.

prove that he was employed by the railroad in interstate commerce at the time of the accident and that also the railroad was in interstate commerce at the time of the accident, and that there was negligence on the part of the defendant which proximately caused this accident. That is my contention.

10

Mr. Simpson. Plaintiff prays exception to the fact that the Court charged that the burden of proof was upon the plaintiff to establish that this was a fraudulent contract. The act says nothing about fraud, nor is it necessary that the contract be a fraudulent contract to be void under the act.

I except to all that the Court said about fraud with reference to the contract with the Stevedoring Company.

I except to all the Court said about the necessity of proof by the plaintiff of fraud; also to what the Court said in reference to fraud when it recalled the jury, there being no necessity upon the plaintiff to show fraud of any kind, the contract being void if its effect is to exempt the carrier from liability.

20

DEFENDANT'S REQUESTS TO CHARGE.

1. The plaintiff in this case under the evidence was not an employee of the Central Railroad Company of New Jersey, the defendant, at the time he received the injuries of which he complains, and the verdict of the jury must be for the defendant.

30

2. The plaintiff at the time of the happening of the accident of which plaintiff complains was an employee of Railroad Stevedoring Corporation, a corporation of New Jersey.

40

Defendant's Requests to Charge.

3. The plaintiff is not entitled to recover any verdict in this action against the Central Railroad Company of New Jersey under the provisions of an act of Congress entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases."

10

4. Neither the employment of the plaintiff by the Railroad Stevedoring Corporation, a corporation of the State of New Jersey, in the course of which employment plaintiff was injured, nor the contract between the Central Railroad Company of New Jersey and the Railroad Stevedoring Corporation, constituted a contract, rule, regulation or device, the purpose and intent of which was to enable the Central Railroad Company of New Jersey to exempt itself from any liability created by the act of Congress commonly known as the Federal Employers' Liability Act.

20

5. The defendant, a common carrier by railroad, had the legal right to make the contract, which has been offered in evidence, with the Railroad Stevedoring Corporation, and to employ the Railroad Stevedoring Corporation to do stevedoring work at Communipaw, Jersey City, N. J., for the Central Railroad Company of New Jersey, and neither such contract nor the making thereof can be considered a contract, rule, regulation or device, the purpose and intent of which was to enable the Central Railroad Company of New Jersey to exempt itself from the liability created by the Federal Employers' Liability Act.

30

Exhibits D. 1—D. 2.

Judgment.

Filed June 18, 1918.

This action having been tried before Judge Luther A. Campbell with a jury, in presence of counsel of the respective parties, on the 12th and 13th days of June, 1918, and the jury having returned a verdict in favor of the plaintiff for ten thousand dollars (\$10,000) damages; 10

IT IS ORDERED that judgment final be entered in favor of the plaintiff and against the defendant for the sum of ten thousand dollars (\$10,000) and the plaintiff's costs to be taxed.

LUTHER A. CAMPBELL,
Judge.

Rule entered June 18, 1918. 20

On motion of

ALEX. SIMPSON,
Attorney for Plaintiff.

(Circuit Court Minutes, Vol. 63, page 128.)

EXHIBIT D. 1.

Pay Envelope.

42	Drew Louis	48.19
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EXHIBIT D. 2.

(Copy)

THIS AGREEMENT, made this eighteenth day of December, in the year nineteen hundred and fourteen, between the RAILROAD STEVEDORING CORPORATION, a corporation of the State of New Jersey, 40

Exhibit D. 2.

party of the first part, hereinafter called the "STEVEDORING CORPORATION," and THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, also a corporation of that State, party of the second part, hereinafter called the "RAILROAD COMPANY";

10 WHEREAS, the Railroad Company desires to arrange for the prompt, efficient and skillful handling of certain of its Lighterage Tonnage at its TERMINAL in the CITY OF JERSEY CITY, in the COUNTY OF HUDSON and STATE OF NEW JERSEY, and the Stevedoring Corporation claims and represents that it is equipped to so handle the same with efficiency and economy and advantageously to the said Railroad Company and desires to so perform such work thereof as may be offered and ordered by the Railroad Company at said Terminal, and the parties hereto have accordingly
20 agreed as to the same as hereinafter set out;

NOW, THEREFORE, THIS AGREEMENT
WITNESSETH:

That the Stevedoring Corporation, for and in consideration of the covenants and agreements of the Railroad Company as hereinafter set out, hereby COVENANTS AND AGREES to and with said Railroad Company as follows:

30 FIRST: That it will handle promptly for the Railroad Company at said above named Terminal in said City of Jersey City all freight, East-bound and West-bound, as offered and ordered by the Lighterage Department of said Railroad Company, loading onto and stowing into cars or boats in safe condition for transportation, and with due regard to minimum carload weights, as provided for in the tariffs and classifications used by the Railroad Company, and that it will also there
40 unload such freight as may be so offered and ordered

Exhibit D. 2.

for storage into or on piers, bulkheads or lands of the Railroad Company and pile the same safely and neatly and in the best possible manner for economy of space, and that it will at all times both day and night during the continuance of this agreement have on hand a sufficient force of competent men to expeditiously and satisfactorily handle all such tonnage as so offered and ordered and to do and perform well and efficiently the work and services as and in manner herein provided. 10

SECOND: That, for the purposes of such work and services, it will assume jurisdiction and control over, and employ and place on its payrolls and pay, such present employees of the Railroad Company as may be required by it, said Stevedoring Company, and whose such employment by the Stevedoring Company may be assented to by the Railroad Company; it being also understood and agreed that Three Sweepers and One Messenger, now in the employ of the Railroad Company, shall be so as aforesaid employed by, and placed on the payrolls of, the Stevedoring Company to the extent of 50% of their time and wages, and the other 50% of such wages of said Three Sweepers and One Messenger shall be paid by the Railroad Company on whose payrolls they shall continue to be carried to that extent, and it, said Railroad Company, shall have the right according to make use of their respective services as its employees for substantially one-half of their time. 20 30

THIRD: That it will employ, place on its payrolls, and pay the wages of, the Engineers of the Cranes and Electrical Trucks of the Railroad Company, the use by the Stevedoring Corporation of which said Cranes and Electric Trucks shall be permitted as hereinafter provided, and that it 40

Exhibit D. 2.

will, at its own cost and expense, make all repairs to the hand trucks to be furnished to it by the Railroad Company, as also hereinafter provided and return such hand trucks, at the termination of this agreement, to said Railroad Company in as good order and condition as when received usual wear and tear excepted.

10 FOURTH: That it will furnish daily to such of the Officers of the Railroad Company as may be designated by said Railroad Company and on such forms as may be approved by its Comptroller a full, true and exact report of all tonnage handled by it, said Stevedoring Corporation, during the preceding calendar day.

20 FIFTH: That it will, and hereby does, assume all liability and responsibility (1) for all loss of, and damage to, freight or property caused by its employees, (2) for any expense the Railroad Company incurs caused by errors or negligence of said employees, and (3) for all injuries to them, said employees, or to others caused by them, while on and about the premises of said Railroad Company or engaged in the said work, it, said Stevedoring Corporation, hereby agreeing to indemnify and save the Railroad Company harmless of, from or be-
30 cause of any liability so assumed by it, said Stevedoring Corporation; it being fully understood and agreed that the Stevedoring Corporation shall indemnify and save harmless the Railroad Company from any and all loss by reason of injury or damage to person or property connected with, or resulting from, the work to be performed by said Stevedoring Corporation hereunder unless caused by the sole negligence of said Railroad Company.

40 SIXTH: That it will insure its liability for any injury to its own employees while employed on the

Exhibit D. 2.

property of the Railroad Company, and that it will examine all freight before handling the same and if damaged will at once report to the Railroad Company before touching or handling it.

The Railroad Company, in consideration of the true and faithful performance by the Stevedoring Corporation of its covenants and agreements herein contained; hereby COVENANTS AND AGREES to and with said Stevedoring Corporation as follows:

I. That it will permit the use in the work contemplated hereunder of its Cranes and Electric Trucks by the Stevedoring Corporation whenever necessary, the wages of the Engineers of same to be paid by the said Stevedoring Corporation as hereinabove provided, but said Railroad Company shall, at its own expense, maintain said Cranes and Electric Trucks and shall have the right to use the same in its, said Railroad Company's, other work whenever it may so desire, reimbursing the Stevedoring Corporation the proportionate part of the wages of the Engineer or Engineers of the Crane or Cranes or Electric Trucks so and while used in such other work.

That it will furnish to said Stevedoring Corporation for its use hereunder the hand trucks now used by the Railroad Company in its present similar work at said Terminal, and which shall be kept in good repair by, and at the expense of, the Stevedoring Corporation and returned by it to said Railroad Company as provided in Article "Third" hereof.

II. That it will pay or cause to be paid to said Stevedoring Corporation for the said work and services to be done and performed by said Stevedoring Corporation as herein provided and

Exhibit D. 2.

in full for the same at the rate and price of fourteen cents per ton net or gross as per waybilling for all tonnage so handled hereunder, the amount of such tonnage to be determined and fixed by the said daily report thereof as and when certified to be correct by the Light-
10 erage Agent of the Railroad Company or representative of said last named Company having authority to so certify, such payments to be made semi-monthly, to-wit; on the fifth day of each month for the last half of the next preceding month, and on the twentieth day of each month for the first half of such month.

III. That it will furnish to said Stevedoring Corporation desk and office room at said Jersey City for the transaction of its business hereunder.

20 And it is further UNDERSTOOD, COVENANTED AND AGREED by and between the parties hereto as follows:

(a) Whenever the Railroad Company shall call upon the Stevedoring Corporation for help or emergency work, (outside of that of the Lighterage Department of said Railroad Company and to be performed hereunder), the Stevedoring Corporation shall promptly furnish the men therefor, and
30 the Railroad Company shall pay to the Stevedoring Corporation for such other services at the rate per hour per man for the actual time of employment under this Article paid by the Railroad Company to its own regular men.

(b) If, on account of labor troubles or for any other reasons, the Stevedoring Corporation is unable or fails to handle freight for said Railroad Company with reasonable despatch, then the Railroad Company may, with its own employees, do
40 the work and at the expense of the Stevedoring

Exhibit D. 2.

Corporation, which expense, if so incurred, said Stevedoring Corporation hereby agrees to pay promptly to said Railroad Company upon receipt of bills therefor.

(c) In case any of the employees of the Stevedoring Corporation engaged in the work to be done and performed by it hereunder shall prove unsatisfactory or objectionable to the Manager of the Marine Department of said Railroad Company or his agents supervising such work, such unsatisfactory or objectionable employee or employees shall be at once removed by the Stevedoring Corporation from such work upon written request to that effect from said Manager, and another employee or other employees satisfactory to said Manager employed in place of such removed employee or employees.

This agreement shall be in force and effect for the period of one year next ensuing from and after midnight of the night of December 31, 1914, and it shall continue in force and effect after the expiration of said period of one year until terminated by either party hereto upon sixty (60) days written notice to the other of its intention to terminate the same, and at the expiration of said sixty (60) days next following the giving of such notice this agreement shall cease, end and terminate but without affecting or impairing any claim or demands hereunder theretofore arising or then existing in favor of either party hereto against the others.

IN WITNESS WHEREOF, the parties hereto have duly and properly executed this agreement in duplicate the day and year first above written.

RAILROAD STEVEDORING CORPORATION,

By H. B. JAMES,
President.

Exhibit D. 3.

Attest:

EDWARD H. HOOS, (SEAL)
Secretary.

THE CENTRAL RAILROAD COMPANY
 OF NEW JERSEY,

10

By W. G. BESLER,
President.

Attest:

G. O. WATERMAN,
Secretary. (SEAL)

The other duplicate hereof)
 bears 50c war revenue tax stamp)
 cancelled 1914.)

20 INTERNAL REVENUE STAMP canceled and attached
 to copy of the agreement filed with THE CENTRAL
 RAILROAD COMPANY OF NEW JERSEY.

EXHIBIT D. 3.

CERTIFICATE OF INCORPORATION
 OF THE

30 RAILROAD STEVEDORING CORPORATION.

THIS IS TO CERTIFY, That we, Harry B. James,
 Spencer Weart and Edward H. Hoos, do hereby
 associate ourselves into a corporation, under and
 by virtue of the provisions of an act of the Legis-
 lature of the State of New Jersey, entitled "An
 act concerning corporations (Revision of 1896),"
 and the several supplements thereto and acts
 amendatory thereof, and do severally agree to
 take the number of shares of capital stock set op-
 40 posite our respective names.

Exhibit D. 3.

FIRST: The name of the corporation is
RAILROAD STEVEDORING CORPORATION.

SECOND: The location of the principal office in this State is at No. 273 Washington Street, in the City of Jersey City, County of Hudson.

The name of the agent therein and in charge thereof, upon whom process against this corporation may be served, is Edward H. Hoos. 10

THIRD: The objects for which this corporation is formed are to move and pack freight, acquire equipment therefor, employ labor therefor, enter into contracts therefor, and receive compensation for services rendered, and to do any and all things incidental or pertaining to the business of stevedoring.

The corporation shall also have power to conduct its business in all its branches, have one or more offices, and to hold, purchase, lease mortgage and convey real and personal property both inside and outside of the State of New Jersey, and in all other States, and in all foreign countries. 20

FOURTH: The total authorized capital stock of this corporation is Twenty-five thousand (\$25,000.00) Dollars, divided into two hundred and fifty (250) shares of a par value of one hundred dollars each. The amount of capital stock with which the corporation will commence business is One thousand (\$1,000.00) Dollars. 30

FIFTH: The names and post-office addresses of the incorporators and the number of shares subscribed for by each, the aggregate of such subscriptions being the amount of capital stock with

Exhibit D. 3.

which this company will commence business, are as follows:

Name.	Post-Office Address.	Number of Shares.
Harry B. James	The Barnard Central Park West and 71st St., N. Y.	Eight (8)
010 Spencer Weart	273 Washington Street, Jersey City, N. J.	One (1)
Edward H. Hoos	273 Washington Street, Jersey City, N. J.	One (1)

SIXTH: The period of existence of this corporation is perpetual.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the third day of December, A. D. One Thousand Nine Hundred and Fourteen.

020 HARRY B. JAMES, L. S.
SPENCER WEART, L. S.
EDWARD H. HOOS, L. S.

Signed, sealed and delivered
in the presence of

JOHN C. INWRIGHT.

(10c I. R. Stamp Can.)

030 STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.

BE IT REMEMBERED, That on this third day of December, A. D. One Thousand Nine Hundred and Fourteen, before me, a Master in Chancery of New Jersey, personally appeared Harry B. James, Spencer Weart and Edward H. Hoos, who I am satisfied are the persons named in and who executed the foregoing certificate, and I having first
040 made known to them the contents thereof, they did

Exhibit D. 3.

each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

JOHN C. INWRIGHT,
Master in Chancery of New Jersey.

ENDORSED:

10

"RECEIVED in the Office of the Clerk of the County of Hudson, New Jersey, on the 3d day of December, A. D. 1914, at ——— o'clock in the ——— noon, and recorded in Book ——— of ——— for said County, page ———.

JOHN F. CROSBY,
Clerk.

"FILED AND RECORDED DEC. 4, 1914.

20

DAVID S. CRATER,
Secretary of State."

030

040

Exhibit D. 4.

EXHIBIT D. 4.

HUDSON COUNTY CIRCUIT COURT.

10

LOUIS DRAGO,

*Plaintiff,**vs.*CENTRAL RAILROAD COMPANY OF
NEW JERSEY, a corporation,*Defendant.**Action at
Law.**Interroga-
tories.*

To the above named plaintiff and Alexander Simpson, Esq., his attorney.

20

Take notice that the defendant hereby requires the plaintiff to answer the following interrogatories under his oath within ten days after service hereof upon you.

(1) Were you in the employ of the Railroad Stevedoring Corporation on the 18th day of June, 1917, at the time you received your injuries?

(2) Were you in the employ of the Railroad Stevedoring Corporation at any time or all of the week pending June 18th, 1917?

30

(3) When do you claim that you were employed by the Central Railroad Company of New Jersey?

(4) Who employed you to work for the Central Railroad Company of New Jersey, if you claim you were working for the Central Railroad Company of New Jersey on June 18th, 1917?

(5) Precisely what work were you engaged in doing on June 18th, 1917, at the time you received your said alleged injuries?

40

Exhibit D. 4.

(6) How long had you been in the employ of the Central Railroad Company of New Jersey before June 18th, 1917?

(7) Did you work for the Railroad Stevedoring Corporation at any time in the year 1917, and if so from what date to what date?

(8) Did you work for the Railroad Stevedoring Corporation from the first to the eighteenth day of June, 1917? 10

(9) How much did you expend for medical expenses as a result of the said accident?

(10) How much wages or earnings do you claim that you lost by reason of the said accident?

(11) How much did you make per month prior to the said accident, and by whom were such wages paid to you?

(12) Have you worked for anyone since June 18th, 1917, and if so when did you first resume work, how long have you worked, and how much have you made to the date of your answer to this interrogatory? 20

Dated June 16th, 1918.

Respectfully yours,

McDERMOTT & ENRIGHT,
Attorneys of Defendant. 30

Exhibit D. 4.

HUDSON COUNTY CIRCUIT COURT.

LOUIS DRAGO,

Plaintiff,

vs.

CENTRAL RAILROAD COMPANY OF
NEW JERSEY, a corporation,
Defendant.

*Action at
Law.*

*Answers to
Interroga-
tories.*

To Messrs. McDermott & Enright,
Attorneys for Defendant:

GENTLEMEN:

PLEASE TAKE NOTICE that the following are answers to Interrogatories served upon the plaintiff in the above entitled cause.

1st. Was working for the Central Railroad Stevedoring Corporation.

2nd. Yes. For the Central Railroad Stevedoring Corporation.

3rd. Was working for the Central Railroad from 1910 to 1915.

4th. A foreman or boss at the Central Railroad in Jersey City.

5th. Unloading train wheels from the cars to the boat.

6th. For about five years for the Central Railroad.

7th. Worked for the Central Railroad Stevedoring Corporation until the day of the accident.

8th. Yes. For the Central Railroad Stevedoring Corp.

9th. About \$35.00.

Exhibit D. 4.

10th. About \$1100.00 to date.

11th. About \$100.00 per month at Central Railroad dock, in the office.

12th. No. Have not worked for anybody.

LUIGI DRAGO.

STATE OF NEW JERSEY }
COUNTY OF HUDSON. } ss.

010

LOUIS DRAGO, being duly sworn according to law, upon his oath deposes and says:

That he is the plaintiff in the above entitled action; that the answers to interrogatories served upon him in said cause are true to the best of his information and belief.

LUIGI DRAGO.

020

Sworn and subscribed to before me,
this 11th day of May, 1918.

I. CHARLES LIFLAND,
Notary Public of New Jersey.

EXHIBIT D. 5.

THIS AMENDATORY AND SUPPLEMENTAL AGREEMENT, made this twenty-fifth day of March, in the year nineteen hundred and sixteen, between the RAILROAD STEVEDORING CORPORATION, a corporation of the State of New Jersey, party of the first part, hereinafter called the "STEVEDORING CORPORATION," and THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, also a corporation of that State, party of the second part, hereinafter called the "RAILROAD COMPANY";

030

WHEREAS, on or about the eighteenth day of December, in the year nineteen hundred and fourteen,

040

Exhibit D. 5.

the parties hereto entered into, made and executed a certain contract in writing bearing date on that day, relative to the handling of certain of said Railroad Company's Lighterage Tonnage at its, said Railroad Company's Terminal in the City of Jersey City, in the County of Hudson and State of New Jersey; and

WHEREAS, in and by which said contract it was provided among other things (a) by Article "II." on page "3" of said contract as follows:

"II. That it will pay or cause to be paid to said Stevedoring Corporation for the said work and services to be done and performed by said Stevedoring Corporation as herein provided and in full for the same at the rate and price of FOURTEEN (14) CENTS per ton net or gross as per waybilling for all tonnage so handled hereunder, the amount of such tonnage to be determined and fixed by the said daily report thereof as and when certified to be correct by the Lighterage Agent of the Railroad Company or representative of said last named company having authority to so certify, such payments to be made semi-monthly, to wit: on the fifth day of each month for the last half of the next preceding month, and on the twentieth day of each month for the first half of such month."

and (b) by the last paragraph of Article "III." on page "3" of said contract as follows:

"This agreement shall be in force and effect for the period of one year next ensuing from and after midnight of the night of December 31, 1914, and it shall continue in force and effect after the expiration of said period of one year until terminated by either party hereto upon sixty (60) days written notice to the other of its intention to terminate the same, and at the expiration of said sixty (60) days next following the giving of such

Exhibit D. 5.

notice this agreement shall cease, end and terminate, but without affecting or impairing any claim or demands hereunder theretofore arising or then existing in favor of either party hereto against the other."

and

WHEREAS, it has been determined and agreed by and between the parties hereto that the said above quoted Articles "II." and "III." on page "3" of said contract should be amended and supplemented as hereinafter provided, and that said contract of December 18, 1914, should be amended and supplemented accordingly:

NOW, THEREFORE, THIS AGREEMENT,
WITNESSETH:

That the parties hereto, for and in consideration of the premises and of the sum of One Dollar (\$1.00) to each by the other in hand paid, the receipt whereof being hereby acknowledged and confessed, do hereby covenant and agree each to and with the other as follows:

FIRST: That the said above quoted Article II. on page "3" of said contract of December 18, 1914, shall be, and the same hereby is, amended so as to read as follows, such amendment to be and become effective on, from and after the first day of April, 1916, to wit:

"II. That it will pay or cause to be paid to said Stevedoring Corporation for the said work and services to be done and performed by said Stevedoring Corporation as herein provided and in full for the same at the rate and price of SIXTEEN AND ONE-HALF CENTS (16 1-2c.) per ton net or gross, as per waybilling for all tonnage so handled hereunder, the amount of such tonnage to be

Exhibit D. 5.

determined and fixed by the said daily report thereof as and when certified to be correct by the Lighterage Agent of the Railroad Company or representative of said last named company having authority to so certify, such payments to be made semi-monthly, to wit: on the fifth day of each month for the last half of the next preceding month, and on the twentieth day of each month for the first half of such month."

SECOND: The said above quoted paragraph of Article "III." on page "3" of said contract of December 18, 1914, shall be, and the same hereby is, amended so as to read as follows:

"This agreement shall be in force and effect for the period of three years next ensuing from and after midnight of the night of March 31, 1916, and it shall continue in force and effect after the expiration of said period of three years until terminated by either party hereto upon sixty (60) days' written notice to the other of its intention to terminate the same, and at the expiration of said sixty (60) days next following the giving of such notice this agreement shall cease, end and terminate, but without affecting or impairing any claim or demands hereunder theretofore arising or then existing in favor of either party hereto against the other."

THIRD: The said contract of December 18, 1914, so as aforesaid amended and supplemented is in all things hereby approved, ratified and confirmed.

Exhibit D. 5.

IN WITNESS WHEREOF, the parties hereto have
duly and properly executed this agreement in du-
plicate as of the day and year first above written.

RAILROAD STEVEDORING CORPORATION,

By H. B. JAMES,
President. 10

Attest:

EDWARD H. HOOS,
(SEAL) *Secretary.*

THE CENTRAL RAILROAD COMPANY OF
NEW JERSEY,

By W. G. BESLER,
President. 20

Attest:

G. O. WATERMANN,
(SEAL) *Secretary.*

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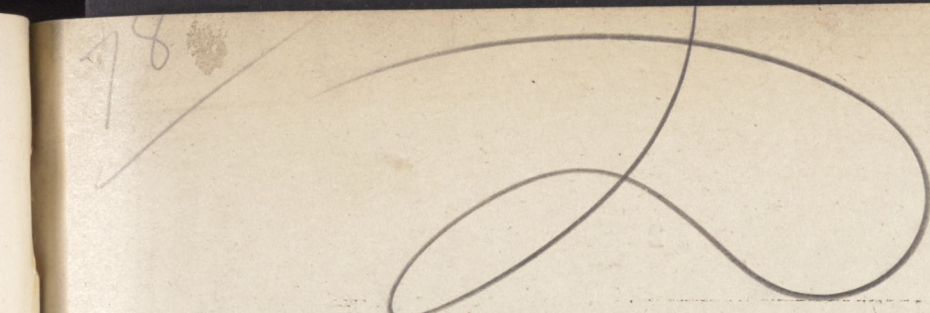
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New Jersey Court of Errors and Appeals

LOUIS DRAGO,
Plaintiff-Respondent,
vs.
CENTRAL RAILROAD COMPANY OF
NEW JERSEY,
Defendant-Appellant.

Action at Law
On Appeal

BRIEF OF PLAINTIFF

Facts

Louis Drago, the plaintiff, was injured while employed in unloading certain steel wheels from cars of the Central Railroad Company (pp. 25 and 26), the defendant. He brought suit under the Federal Employers' Liability Act. The main defense was that he was not employed by the Central Railroad Company but was employed by the Railroad Stevedoring Corporation. The answer to this was that the Railroad Stevedoring Corporation was a device made void by Section Five of the Federal Employers' Liability Act, which device was for the purpose of avoiding the provisions of the Federal Employers' Liability Act. The proof of this was that Drago had been employed by the Central Railroad as a longshoreman; that

some years after he had been employed and working continuously, the Railroad Stevedoring Corporation was formed; that he was then paid by the Railroad Stevedoring Corporation; that although so paid he was under the same persons as superintendents who were employed by the Central Railroad Company, doing the same work and was under the direction and government of the same persons that he was when paid by the Central Railroad Company. The other defenses were that there was no negligence and assumption of risk by the plaintiff.

Argument

The argument for plaintiff is under four heads:

FIRST: That Drago was the employee of the Central Railroad Company actually and within the comprehension of the Federal Employers' Liability Act.

SECOND: That negligence of defendant was a question for the jury.

THIRD: That the assumption of risk by defendant was a question for the jury.

FOURTH: That there were no errors in the charge of the Court.

POINT I

Drago was the servant of the defendant.

If the defendant, a common carrier by railroad engaged in interstate commerce could avoid its

obligations under the Federal Employers' Liability Act to Drago, under the contract in question, it could avoid its obligations to every conductor, engineer, brakeman and fireman and every one on the road by making a contract with an independent corporation to furnish the railroad with servants.

The work that Drago was doing was a necessary and indispensable part of its duties as a common carrier. Drago had been employed by it before the formation of this independent corporation to do this very work which he was doing when injured. The superintendents were not changed after the formation of the corporation and nothing was changed in the work except the manner of paying the man. Was not the contract then a mere device to obtain the service and escape the obligations of the Federal Employers' Liability Act?

Whose employee was Drago, the day he was hurt? If the employee of the Railroad Stevedoring Company he has no suit against the Central Railroad Company of New Jersey. If the employee of the said Railroad Company then he is entitled to the benefits of the Federal Employers' Liability Act, enacted by Congress for the relief of precisely such cases as this case of Drago.

Under the common law, even without the benefit of Section 5 of the Federal Employers' Liability Act, Drago, we contend, was on the date of the accident the servant of the Railroad Company. This we urge has been decided by the Supreme Court of the United States and its decisions on the interpretation of the Federal Act are of course binding on questions other than rules of pleading and mere procedure—arising under the act in the State Courts of the several States of the Union.

Second Employers' Liability Cases,
233 U. S. 1, 55.

So held in *Seaboard Air Line Ry. vs. Horton*, 233 U. S., 492.

“In passing the Federal Employers’ Liability Act, Congress intended that it should be construed in the light of the decisions of the Federal Courts, made prior to the enactment in this respect.”

Central Vermont Ry. Co. vs. White, Admx., 238 U. S., 507.

“As the action is under the Federal Employers’ Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal Courts.”

This precise point of stewardship has been decided by the Supreme Court of the United States in refusing a certiorari to the Court of Appeals of Virginia (1917), in a suit under the Federal Act, in *Atlantic Coast Line Ry. Co. v. Tidway’s Admx.*, 120 Virginia, 735, S. C., 93, S. E. Reporter, 560; 245 U. S., 670.

In this case the Virginia Court said:

“Therefore, while we have not found it elsewhere so expressed in terms, the authorities on the subject have developed and led us to the necessary conclusion, where the duties of the master are nonassignable, that control is not the ultimate fact for which we are in search.

“The ultimate facts are: Was the person in question engaged in the discharge of the duties of a servant of another, and was that service accepted by that other—was such service rendered and accepted? If so, the law applies the contract of master and

servant between the latter and the former—of employer and employee—and the existence of that relationship between them. We are aware that many authorities give no weight to the rendition of the service and predicate the conclusion that one is or is not the master upon the four elements above referred to being present or absent in the conduct of the latter. The effect which a knowing acceptance of the service must have, in principle, is often overlooked.

“Further: Were the service not accepted as that of a servant, and, by express agreement or otherwise, the master were to attempt to escape responsibility by relinquishing control of the servant—where the duty is nonassignable—the master cannot escape the duty resting upon him by relinquishment of control of the servant, or by otherwise making it impossible for himself to perform the duty. *Lucas vs. Mason*, L. R., 10 Ex., 251-253; *Hardaker vs. Idle District Council* (1896), 1 Q. B., at page 340, per Lindley, L. J.; *Dalton vs. Angus*, 6 App. Cas., at page 829. And the duty is nonassignable when it pertains to the operation of a completed railway of a common carrier. See authorities collated in note to 66 L. R. A., pages 140-142. *Boucher vs. New York, etc., R. Co.*, 196 Mass. 355, 82 N. E., 15, 13 L. R. A. (N. S.), 1177, and authorities cited in note.

“So, in the instant case, the duties of the plaintiff’s intestate (among others) were to operate signals connected with the passage of the trains of defendant and to keep a certain light, which served exclusively the

operation of certain of defendant's trains. They were in their nature duties necessarily to be performed by some one for the defendant, to enable the latter to discharge its public service duties as a common carrier—its public employment under its franchise. *Central etc., Co. vs. Pullman Co.*, 139 U. S., 24, 11 Sup. Ct., 478, 35 L. Ed., 55, and authorities next above cited. They were therefore duties of the defendant, and not of the Southern Railway Company, or of any other person or corporation. Their discharge was the discharge of duties of a servant to the defendant. That service by the plaintiff's intestate was knowingly accepted by the defendant. Hence, upon the established principles of the common law, the plaintiff's intestate was a servant—an employee—of the defendant."

In the case of the *Standard Oil Co. v. Anderson*, 212 U. S., 215, Mr. Justice Holmes in delivering the opinion of the Supreme Court of the United States, said on page 220:

"* * * One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, *with his own consent or acquiescence*, to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of the new relation.

"It is insisted by the defendant that the winchman, though in its general employ, had ceased to be its servant, and had become, for the time being, with respect to the work negligently performed, the servant of the master stevedore. This may be true,

although the winchman was selected, employed, paid and could be discharged by the defendant."

On page 222 the Court speaks as follows:

"* * * To determine whether a given case falls within the one class or the other we must inquire 'whose is the work being performed,'—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work."

On page 225 the Court speaks as follows:

"* * * In many of the cases the power of substitution or discharge, the payment of wages, and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control."

This question so vital to the decision of the case now before this Court, is discussed on the Railroad Company's brief under Point II therein. Counsel for the railroad cites five decisions.

They are to be distinguished as follows:

The second Employers' Liability Cases (*Mon-
don v. New Haven R. R. Co.*), 223 U. S., merely held the act to be constitutional and in its decision the Supreme Court laid down the general principles for its interpretation in a most general term, which in the 24 subsequent volumes of the Reports of the Supreme Court of the United States have since been rendered more and more specific.

The decision of the *Philadelphia, Balto. and Washington Ry. Co. v. Schubert*, 224 U. S., 603, the

Supreme Court of the United States, following its decisions in the *Matley* case, held that the Employee's Relief contract between an employee and the Railroad Company, entered into before the enactment of the Federal Employers' Liability Act of 1908, was a device or a contract inhibited by Section 5 of the Act and was therefore annulled by the said Act of Congress, though enacted thereafter, and that the provisions of the Federal Act would control a litigation brought under the Act, just as if said relief contract had not been entered into by the employee with the railroad. In the case of *Hartman v. Chicago & C. R. R. Co.*, 192 Mo. App., 271, F. C., 182, S. H., 148, it was held that a Pullman Porter is not within the Federal Act.

Robinson v. B. & O. R. R. Co. (1913),
40 Appeal cases, District Columbia,
169 F. C. L. R. A., 1915, p. 510.

Robinson was a Pullman porter on the Baltimore & Ohio Railroad, and was held by the Court of Appeals of the District of Columbia not to be within the Federal Employers' Liability Act. He appealed his case to the United States Supreme Court, which sustained the lower Court, *but on the following grounds:*

This case discusses the word employee,

“We are of the opinion that Congress used the words ‘employee’ and ‘employed’ in the statute in their natural sense and intended to describe the conventional relation of employer and employee. *It was well known that there were on interstate trains persons engaged in various services for other masters. Congress familiar with this situation did not use any appropriate ex-*

pression which could be taken to indicate a purpose to include such persons as those to whom the Railroad Company was to be liable under the act."

However, in the act, Congress did specially enact Section 5 of the Act, to forbid contracts and devices to defeat the law and in *P. B. & W. R. R. Co. v. Schubert*, held that the act, being an exercise of the police power and a regulation of Interstate and Foreign Commerce was retroactive, and the Supreme Court of the United States therein discusses the purposes of said Section 5. In the testimony at page 81, line 38 to line 40, McCarty, secretary and treasurer of the Railroad Stevedoring Corporation, was asked (p. 72, ll. 21-24), the following question and elicited the following answer:

Question: "The purpose of this contract (*viz*: Exhibit D-2), was so that the Central Railroad should not pay for any one injured in handling freight, wasn't it?"

Answer: "It was."

The contract in question was entered into by the Railroad Company, six years and six months after the enactment by Congress of this Federal Employers' Liability Act and Section 5 thereof then ~~included, in defiance of the Act itself, and such a contract constitutes a criminal conspiracy against the laws of the United States.~~

A late decision of the Supreme Court of the United States on relief by the railroad company is not in point, *viz*: The case of the *Chicago Rock Island and Pacific Ry. Co. v. Bond Adcr.* of 240 U. S., 449, decided that, one Turner, who was a contractor himself with the Rock Island Railroad Company, to supply its yards with coal, hiring the

labor therefor and to do the cooperage work on its grain cars, was a contractor and not an employee and the Court *expressly limits its decision to this proposition* on page 456 of the report. Mr. Justice McKenna says:

“*Turner was something more than a mere shoveler or under a superior’s command. He was an independent employer of labor, conscious of his own power to direct and willing to assume the responsibility of direction and to be judged by its results. This is manifest from the contract under review and from the cooperage contract. It is also manifest from his contracts with other companies to whose industries the railroad tracks extended * * *.*”

This case is cited on the defendant railroad company’s brief.

The Supreme Court of South Dakota in the case of *Polluck v. Minneapolis & St. Louis Ry. Co.* (March 8th, 1918), 166 N. W., 641 (Cited on the R. R. Co.’s brief), gives the *Bond v. The Rock Island R. R.*, a breadth of decision which is *express terms*. Mr. Justice McKenna in writing his opinion to the Court’s decision. Furthermore, the facts were different from what the jury found by its verdict in favor of Drago were the facts in this, Drago’s case. *Drago, therefore, under the decisions of the Supreme Court of the United States was when injured the employee of the Central Railroad Company of New Jersey, not only by virtue of Section 5 of the Federal Employers’ Liability Act, but, as well also under the common law.*

Missouri, Kansas and Texas Ry. Co.
v. West, 232 U. S., 682 at 690.

The jury had the following testimony from which to find and on which to found its verdict:

Drago was employed four years before the date of the Stevedoring Contract by the Central Railroad to work on these docks and for this work (Drago, pp. 16-20, Cosgrove, p. 33). Drago, under the terms of the contract, when it went into effect in 1915, was "*Taken over*" by the Stevedoring Corporation from the Railroad Company (p. 73, ll. 9 to 15).

There was no difference in the time when the railroad had paid and the Stevedoring Corporation paid its wages each two weeks (p. 73, ll. 32-40).

When Drago was "taken over" his rate of wages continued the same as the Railroad had paid him up to April 1st, 1915, when wages were raised (p. 83, ll. 20-35).

Drago received no notice of the intended change of his employer (p. 80, ll. 28-38). *The same bosses and superintendents directed the work* (Cosgrove, p. 34, ll. 1-20; also pp. 39, 40, 41 and 42, to l. 20).

The only attempt to prove notice to Drago that he was no longer an employee of the railroad was that he had got his pay *in another room in the Railroad Company's office in the Terminal at Communipaw*, and that he was alleged to have sworn to certain *interrogatories but because he could not either read or speak English* these cannot bind him (p. 75, ll. 20-25). It was for the jury to decide the facts.

In any event, no admission of an illegal alleged contract, made so by Act of Congress, could bind Drago.

The evidence of Cosgrove quoted above shows superintendence by both railroad company and Stevedoring Company. Hence, it brings case with-

in the principles of *Oliver v. Northern Pac. Ry. Co.*, 196 Federal, 432.

Drago therefore was an employee of a common carrier by railroad, engaged in handling interstate shipments and is within the terms of the Federal Employers' Liability Act and is entitled to the benefits of this act.

POINT II

Negligence.

There was ample evidence from which the jury could find that Drago lost his leg either because of the negligence of his master, or the negligence of a fellow servant.

The decision of the Court of Errors and Appeals in the case of *Steamship Company vs. Ingebregsten*, 28 U. S., 401, when considered in the light of the Federal Employers' Liability Act is a case of almost precise, if not of entire, incidence. The only difference is that Ingebregsten was at the bottom of a hatch on the floor of the hold of a ship at its pier in Hoboken, and there was injured and killed by the breaking of a "sling," and Drago lost his leg at the knee working in a gondola car at Communipaw, loading a lighter with interstate or foreign merchandise from this pier; also the breaking of a "sling."

Three hundred steel car wheel tires were being lifted, nine or ten at a time, from a gondola car at Pier 13 at the Communipaw yards of the Central Railroad Company of New Jersey, to be put on a lighter and lightered over to Pier 39, Brooklyn, which is in the State of New York, to the Steamship "Nordharit," preparing for export to some foreign port. The tires and car had originated

from a siding of the Nidrale Steel Company, Wayne Junction, Philadelphia, Pennsylvania. In other words, the shipment and gondola of the car were interstate commerce, if not foreign commerce (see admissions by defendant in open Court on papers 12, 13 and 14). Thence under the Federal Employers' Liability Act.

The tires were in the car, there was a hoisting crane on the dock and a steel howser $\frac{5}{8}$ -inch thick went through the hollow of the tires, said howser being called a "sling" (Ahern, p. 93, l. 10), and the sling was attached to the hook on the end of a pulley block which in turn was connected through the beam of the crane with the drum of the donkey engine running the crane and lifting its burdens.

(Drago, papers 22 and 23, Ahern, pp. 92 and 93 to l. 25; Cosgrove, p. 34, l. 30). Palino, a follow servant of Drago's, selected the sling (p. 48, ll. 28-40).

The wire "sling" with the rest of the equipment including the slings, were furnished by the railroad company (Cosgrove, p. 38, ll. 30-35; p. 42, ll. 30-40; see also contract between Railroad Company and Stevedore Company, Exhibit D-1). And inspectors of both the Railroad Company and the Stevedoring Company inspected said equipment and the lightering operations for Central Railroad Company of New Jersey (Cosgrove, p. 42). For Railroad Stevedore Company, McBride (p. 58, l. 10 to p. 59 to l. 20).

The sling which broke had been used for three days (Cosgrove, p. 42, ll. 39 and 40). The average life of a sling is two or three weeks (McBride, p. 60, ll. 15-25), and there were two brand new $\frac{3}{4}$ -inch slings never used before attached to the side of the crane at Pier 13, at the time of the accident (Cosgrove, p. 44, ll. 5-12).

And if two slings had been used one could have been cut and been broken but the remaining sling would have held the load and prevented the accident by the load's consequent fall (Cosgrove, p. 43, ll. 30-40). It will be thus seen from the above testimony that the jury had the right to find from the facts and from the direct inferences of the facts either.

1. Such negligence as to a master, in his furnishing tools and appliances or work to his servant, is inhibited under the decision of *S. S. Co. v. Ingebregsten, supra*, or a failure to inspect as is required by *S. S. Co. v. Ingebregsten, supra*, or on the other hand the negligence of a fellow servant, Palino, for which the master is answerable (*Monodon v. R. R. Company, supra, Illinois Central R. R. Company v. Kaggs, supra*).

The jury could have also found negligence in the master failing to apprise Drago, that if the wire-cable sling "kinked" it was less able to bear the strain of its load and therefore more apt to break and drop its load (Cosgrove, p. 43, ll. 12-15).

This brings the case directly within the decisions of the United States Supreme Court allowing recoveries under the Federal Act.

Gila Valley Globe and Northern R. R.
Co. v. Hall, 232 U. S., 94.

C. & O. Ry. Company v. De Attley, 241
U. S., 311.

Erie R. R. Co. v. Purucker, Admr.,
244 U. S., 322.

The Railway Company's Lighterage superintendent swore to this aptitude to break in a wire cable when "kinked" and so the company had notice of it (*K. & M. Ry. Co. v. Kerse, Admr.*, 239 U. S., 576). There is no evidence in the case that Drago had ever seen such an occurrence before.

POINT III

Assumption of risk.

As to Point Four of the Railroad Company's brief, the question of assumption of risk is for the jury (*Gila Valley, Globe & Northern Ry. Co. v. Hall*, 232 U. S., 94; *C. & O. Railway Company v. De Attley*, 241 U. S., 311), and an employee neither assumes a latent risk nor to his surprise and without notice to him, any risk (*C. & O. Ry. Co. v. Proffitt*, 241 U. S., 462). Nor does he assume the risk of the negligence of a fellow servant of which he had no grounds to reasonably anticipate (*C. & O. Ry. v. Proffitt*, 241 U. S., 462; *Illinois Central R. R. Co. v. Skaggs*, quoted *supra*; *Boldt v. Penna. R. R. Company*, 245 U. S.). The decision cited by the Railroad Company, *viz: Seaboard Air Line Ry. v. Horton*, 233 U. S., 492, merely holds that in the absence of a breach of the Safety Appliance Act, and McHousey Service Act, of Congress, relating to interstate traffic, assumed risk of ordinary and known dangers of an occupation still rendering as a defence under the act. Said defence, however, is subject to and applies only under the conditions specified in the decisions cited by us above. And the burden of proving assumed risks is on the defendant railroad (*Kanawho & Michigan Ry. Co. vs. Krese, Admx.*, 239 U. S., foot p. 488):

“The Trial Court cannot be charged with error in refusing to take the question of the assumption of risk from the jury in an action under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at l. 65, Chap. 149, Comp. Stat., 1913, Sec-

8657), *unless the evidence tending to show such assumption of risk was clear and from unimpeachable witnesses and free from contradiction.*"

Gila Valley R. Co. vs. Hall, 232 U. S., p. 101.

"The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him."

POINT IV

Charge of the Court.

The charge of the Court on the question of burden of proof of contributory negligence under the Federal Employers' Liability Act was correct and accurate.

N. & W. Ry. Co. v. Earnest, 229 U. S., 115;

Seaboard Air Line Ry. Co. v. Tilghman, 237 U. S., 499.

The Trial Court (on p. 128 of its charge), quoted the statute and set up the precise standard as laid down in the above decision, exactly complying with it.

There was no formal request to charge as to burden of proof as to contributory negligence in reducing damages.

The Eighteenth exception taken by counsel, for the Railroad, really operates as a request to charge, inasmuch as the jury were called back to the Court Room and again instructed by the Trial Judge, after the exception was taken. This ex-

ception did not state the law; it would have, if instructed, been misleading and error. It would have violated the principle laid down by the Supreme Court of the United States in *Erie Railroad Co. v. Pumcker, Admx.*, 244 U. S., 322, in which it was stated and held that:

“A request to charge must be calculated to give the jury an accurate understanding of the law with reference to the phase of the case to which it is applicable.”

See also:

St. Louis & San Francisco Ry. Co. v. Brown, 241 U. S., 223.

Union Pacific Ry. Co. v. Hedley, Admr., 246 U. S., 330.

In *Norfolk & Western Ry. Co. v. Earnest*, 299 U. S., p. 114 at 120 and 121, a charge almost identical as that given by the learned Trial Judge was sustained by the Supreme Court of the United States.

Certainly when the State law so holds and the Federal law on the question of burden of proof of contributory negligence, does not forbid, the charge is without error. Any other rule would make nugatory almost every trial and reverse every judgment in interstate master and servant railway cases, because the Railroad Company, would and could then say on writs of error taken out that the plaintiff in describing the accident had not in his case shown by his witnesses quite enough contributory negligence to keep the damages from being just a little too high. Such an interpretation of the act would be to defeat the highly remedial provisions and purpose of the act and no decision sustaining the view urged in

the brief of the appellant Railroad Company can be found in the decisions.

Even if on this point were the contention of counsel of the railroad correct the attention of the Court is called to the portion of the Amendment to Section 6 of the Act, passed by Congress April 5, 1910. The policy of this amendment was to insure to the citizens of each state of the Union their own method of procedure, *especially as to the review of damages*, which in New Jersey is *by a rule to show cause*.

See:

Tunison v. C. R. R. Co., 27 U. S., *supra*.

See:

Gigenheim, Sr. R. Co. vs. Flanagan,
34, *supra*.

Circuit Judge Campbell charged the jury on the method of damages, and how much they should be reduced if contributory negligence should be found. He had the power if the damages found by the jury were excessive to reduce said damages in the light of the evidence heard before him. He did not reduce the amount of the verdict and the last resource of the railroad under the Act of Congress is now gone to raise the question that it was prejudiced or impaired in the progress charged to the jury as to contributory negligence or the measure of damages.

November Term, 1918.

Charles S. Simpson

Attorney of Plaintiff-Respondent,
586 Newark Avenue,
Jersey City, N. J.

Thomas Tumulty,
Wm. Mayo Atkinson,
Counsel.

New Jersey Court of Errors and Appeals

LOUIS DRAGO,

Plaintiff-Respondent,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant-Appellant.

Action at Law.

*On Appeal from
Hudson Circuit
Court.*

Brief of McDermott & Enright, for Appellant.

Defendant appeals from a final judgment in favor of plaintiff for \$10,000 damages.

Allegations and Proofs.

The suit was founded on the Federal Employers' Liability Act, plaintiff alleging that he was an employee of defendant and that on June 18, 1917, while engaged as a laborer in interstate commerce unloading trucks from railroad cars onto a scow the cable of a crane broke, one of the trucks falling and striking plaintiff and cutting off his leg. Defendant's answer denied that plaintiff was an employee of defendant, denied that he was injured through negligence of the defendant, and alleged that plaintiff on the date of the accident was an employee of the Railroad Stevedoring Corporation, a corporation of New Jersey. Defendant also pleaded that plaintiff's right to be on defendant's property grew out of and was limited by the terms of a contract in writing between defendant and Railroad Stevedoring Corporation, under which contract permission was given to employees of Railroad Stevedoring Corporation to enter upon defendant's property for the purpose of doing work for Railroad Stevedoring Corporation. Defendant also pleaded that the plaintiff assumed the risk of the happening complained of, and that plaintiff was guilty of contributory negligence.

The complaint does not mention that the suit was founded on the Federal Employers' Liability Act, but the allegations of the complaint bring the case within that act.

Courts are presumed to be cognizant of the Federal Employers' Liability Act without its being specially pleaded.

Kansas City Western Ry. Co. v. McAdow, (Mo. App.) 164 S. W. 188.

M. K. & T. Ry. Co. v. Wulf, 226 U. S. 570; 57 L. Ed. 355.

(a) The facts as proved as to plaintiff's employment.

The facts proved before the Trial Court establish beyond any question of doubt, and there was no dispute in the testimony, that plaintiff was not employed by Central Railroad Company of New Jersey at the time of the happening of this accident, or at any time

that year. They establish on the contrary that he was employed by Railroad Stevedoring Corporation. This corporation was engaged in the business of doing general stevedoring work and its contract with the defendant under which it worked for defendant was received in evidence. (Exhibit D. 2, p. 141.)

In attempting to establish the allegation that plaintiff was an employee of defendant, plaintiff's counsel went no further than to prove that some eight years before the accident Drago was employed to do stevedoring work at defendant's terminal in Jersey City by Mr. Cosgrove, a superintendent of defendant, and was employed until January 1, 1915, in stevedoring work for defendant. The proof also establishes that plaintiff continued to be employed on defendant's property at Communipaw, Jersey City, until the date of the accident in doing stevedoring work, but the evidence is uncontradicted that from January 1, 1915, to the date of the accident plaintiff was an employee of Railroad Stevedoring Corporation. He was working under foremen of the Railroad Stevedoring Corporation at all times after January 1, 1915, he had a check number given him by Railroad Stevedoring Corporation, his wages were paid by employees of Railroad Stevedoring Corporation out of funds of Railroad Stevedoring Corporation, and plaintiff even produced one of his last pay envelopes showing that his check number was forty-two (Exhibit D. 1, p. 141), and that his wages were \$48.19. Defendant proved to a demonstration that this was a pay envelope of Railroad Stevedoring Corporation; that the check number forty-two was the check number of Railroad Stevedoring Corporation, and that the money which had been put into this pay envelope was money furnished by Railroad Stevedoring Corporation.

Furthermore defendant produced its payrolls for the whole of 1917, including the date of the accident and plaintiff's name did not appear thereon. The Railroad Stevedoring Corporation produced its payrolls for 1917 to date of the accident and the name of Louis Drew (admitted to be Louis Drago, the plaintiff) appeared thereon, with the check number forty-two. Each laborer employed by the Stevedoring Corporation had a check number, an easy method of identification.

Drago admitted that his wages were paid in cash in such envelopes as he produced. It was proved beyond dispute that the Central Railroad at all times in 1917 paid all of their help by check. It was established beyond dispute that every foreman and man under whom plaintiff worked in 1917 and on the day of the accident were employees of Railroad Stevedoring Corporation.

Furthermore before trial defendant served on plaintiff a number of interrogatories (pp. 152-153), in which defendant asked plaintiff whether he was in the employ of the Railroad Stevedoring Corporation on the day of the accident and how long he had been employed by it. In the answers sworn to May 11, 1918, before a notary public (p. 155) defendant stated that he worked for the Central Railroad from 1910 to 1915 (p. 154, answer 3rd); that he worked for about five years for the Central Railroad (6th answer); that he worked in the year 1917 for the Central Rail-

road Stevedoring Corporation until the day of the accident (7th answer), and that he worked from the first to the 18th day of June, 1917, for the Stevedoring Corporation (8th answer, p. 154).

We contend that this was proof to a demonstration that plaintiff was not an employee of the defendant in interstate commerce, and that defendant was entitled to a ruling to that effect from the Court.

(b) Facts as to the happening of the accident.

Plaintiff was a stevedore and the day of the accident he was helping unload steel locomotive tires from a freight car onto a barge. The freight car stood on tracks on one of defendant's piers along the Hudson River and the barge lay alongside the pier. Plaintiff and another laborer were in the flat car and it was their work to make up the drafts which were lifted by a traveling crane out of the car and deposited in the boat. The tires were lifted by means of a twisted wire sling. There was a loop in each end of the sling. One laborer would take an end of the sling and run it through a number of the steel tires. When they had threaded it through a sufficient number they would put the loops at the ends of the sling over the hook of the crane. One or the other laborer would then signal the operator of the crane who would apply the power and the load would be raised. It was while the tires were being hoisted out of the car that the sling broke and the tires suspended from it fell, one of which struck plaintiff's leg, which was later amputated in a hospital.

Plaintiff and his co-laborer had not been working long on this car. They had already placed two drafts in the boat (p. 23, l. 36) and it was when the third draft was being lifted that the accident happened.

Whether or not there was negligence therefore depends upon whether the wire sling which was furnished was suitable for the purpose, whether the defect which caused it to break, if there was a defect, was latent or patent, or whether the accident happened through the improper or careless loading of a proper sling.

It is uncontradicted that neither the plaintiff, nor the man working with him, nor any one else observed any defects in this sling before or after the accident happened.

Likewise it is uncontradicted that the same kind of sling was customarily used on this kind of work.

It is uncontradicted that this sling was properly inspected before it was used the day of the accident, and that no defect was observed in it.

It is likewise undisputed that a pair of new slings of greater thickness and strength than the one used by plaintiff the day of the accident were hanging on the crane at the time of the accident, and that plaintiff and his co-laborer could have used one or both of them in this work if they had so desired. Plaintiff and his co-laborer were the ones to choose and they did choose what slings they would use.

It is likewise uncontradicted that there was not a broken strand of wire in the sling before the whole sling broke.

It is uncontradicted that the breaking of the sling was caused by the razor-like edges of the steel tires. As the sling was raised by the car with the tires suspended from it, the tires having laid promiscuously in the bottom of the car, the tires slipped together in a bunch in the sling and either the cable kinked or the tires coming together in just the right manner to cause the result cut the wire and caused the load to drop.

It is contended (1) that this evidence establishes no negligence on the part of the defendant; (2) that it establishes that the plaintiff assumed the risk of such an accident as this, and (3) that if there was any negligence it was the negligence of plaintiff in overloading the sling or in not selecting one of the new and unused slings that were furnished for the purpose of performing this work.

(c) Facts introduced by defendant to show plaintiff could not recover under the Federal Act.

On plaintiff's case it appeared conclusively that plaintiff on the day of the accident was not in the employ of defendant. Defendant proved by the payrolls of the two corporations that plaintiff was not employed by the defendant, but was in the employ of the Railroad Stevedoring Corporation. Defendant introduced the interrogatories over plaintiff's oath, in which he swore he was not in the employ of the defendant on the date of the accident, but since 1915 had been employed by the Stevedoring Corporation. Defendant likewise proved that the pay envelope produced by plaintiff was a pay envelope of the Stevedoring Corporation and not of the railroad company. This proof left no question for the jury as to who was the employer of plaintiff. Defendant likewise proved that the land and premises on which plaintiff worked were owned by the defendant. It also proved the conditions under which employees of the Stevedoring Corporation were permitted to be upon defendant's premises (Agreement D. 2, p. 141), which shows that they were licensees only.

Theories upon which the trial court submitted case to the jury.

The Trial Court submitted the case to the jury upon the following propositions:

(1) Whether there was negligence proved on the part of the defendant, on the theory that plaintiff was defendant's employee and defendant the master.

(2) Was the plaintiff in the employ of the defendant at the time of the accident.

(3) Whether the contract (Exhibit D. 2) between the railroad company and the Stevedoring Corporation, under which the latter did all of the stevedoring for the defendant at the railroad terminal in Jersey City, was a contract made void by section 5 of the Federal Employers' Liability Act.

(4) Whether plaintiff assumed the risk of this accident; and, finally, whether defendant had proved the plaintiff guilty of contributory negligence.

The Errors Assigned.

At close of plaintiff's case defendant moved for a non-suit for the reasons:

(1) That the plaintiff under the evidence was not employed by defendant in interstate commerce at the time he received the injuries complained of, and cannot recover under the Federal Act.

(2) Because at the time he received the injuries plaintiff was an employee of the Railroad Stevedoring Corporation, under the evidence.

(3) Plaintiff's rights under the evidence were under the Workmen's Compensation Act of New Jersey and not under the Federal Act.

(4) To permit the plaintiff, an employee of Railroad Stevedoring Corporation, to recover of defendant under the Federal Act would deprive defendant of its property without due process of law.

(5) To permit the plaintiff, an employee of Railroad Stevedoring Corporation, to recover of defendant under the Federal Act would deprive the defendant of the equal protection of the law.

(6) Because it cannot be said that either the employment of the plaintiff by the Stevedoring Corporation, or the doing of the work by the Stevedoring Corporation for the railroad constituted a contract, rule, regulation or device, the purpose and intent of which was to enable the railroad to exempt itself from any liability created by the Federal Act.

(7) There was no proof that the defendant was guilty of negligence.

(8) Because the plaintiff assumed the risk of the accident complained of.

The Court declined to non-suit and allowed an exception (p. 55). At the close of the case the defendant moved for a direction for the same reasons (p. 105). The Court declined to direct a verdict and allowed an exception (p. 110).

The Court left all of the questions to the jury above referred to, and in addition charged the jury as to the duty of a master toward his servant. It is contended that it was error to charge the jury on the law between master and servant, for the reason that plaintiff was not the servant of defendant, nor was defendant the master of plaintiff.

Defendant asked the Court to charge five separate requests (pp. 139-140), each of which was refused and to each refusal an exception was taken (p. 129). Proper objection was made by defendant to the refusal of the Court to non-suit, to direct a verdict, and to charge each request, and exceptions were allowed and objections were also duly made to each portion of the charge complained of (p. 129, exceptions 1, to p. 134, exception 18).

The grounds of appeal are included in the notice of appeal (pp. 1 to 7 of record), and each ground of appeal is relied upon.

POINT I.

Plaintiff was not an employee of defendant at the time of this accident; he was employed by Railroad Stevedoring Corporation; consequently he is not entitled to the benefits of the Federal Employers' Liability Act.

The statute upon which this act is based is entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," act of April 22, 1908, chapter 149, 35 Statutes at Large, 65. Section 1 of the act is as follows:

"That every common carrier by railroad, while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

If Drago was not an employee of the Central Railroad Company of New Jersey and if he was not engaged by such carrier in interstate commerce, he is not entitled to the benefits of this statute.

The act "discloses in exact terms that it is not to embrace all cases of injury to the employees of such carriers, but only such as occur while the carrier is engaging and the employee is employed in commerce between any of the several states."

New York Central R. Co. v. Winfield, 244 U. S. 147; 61 L. Ed. 1045.

Plaintiff's attorney sought to raise a presumption which would take the case to the jury by establishing that eight years before the accident plaintiff was employed to do this work by the defendant, and that he continued in the same kind of employment to the date of the accident (pp. 16, 17, 18). That this testimony related to his employment when he was first employed is established by the statement by counsel (page 20, lines 9 and 10). No legal evidence was given by plaintiff himself as to who was his employer at the time of the accident. On cross examination plaintiff pointed out Mr. Nolan in court as the man who paid him his wages (p. 26, lines 30 to 38). He also pointed out Mr. Ahearn, the checker, who put down in writing the loaded stuff (p. 26, line 20). In response to the question put to the plaintiff himself on cross examination as follows:

"Q Now, you knew, did you not, that you were working at the time of this injury for the contracting company?"

plaintiff answered:

"A The only thing I know is that I always work for the Central Railroad." (Bottom p. 26, top p. 27.)

Defendant's counsel immediately moved to strike out the answer because he asked if plaintiff knew a certain particular thing, and was not responsive. The Court declined to strike out, and allowed an exception (p. 27, lines 10 to 25). It is contended that this question put on cross examination called for a "yes" or "no" answer, and that it was error not to strike it out because it was not responsive.

Even if it was proper to permit this answer to stand (and there is not another word in the case from which plaintiff can say that there was any evidence that he was employed by the defendant at the time of this accident), it was not sufficient to take the case to the jury on the question as to who was actually the employer at the time of the accident.

Plaintiff produced on his direct case his pay envelope (p. 20, lines 30 to 39). He said (page 29) that he got this envelope with his salary in it in the year 1917. He also testified (page 29) that he had the check number forty-two either three or four years. The check number appears in the upper left corner on the envelope. (Exhibit D. 1, p. 141.)

Plaintiff testified further that his wages were paid by three or four men in the office, one of whom was Mr. Nolan (bottom of p. 30); that it was Mr. Nolan's office where plaintiff was paid (top of p. 31), and plaintiff always went to the same office every time to get his money (p. 31, lines 5-6). This office was on Pier 11, Jersey City, upstairs (p. 31, lines 15-16). It was the office of the Stevedoring Corporation. Plaintiff identified as the man who gave him his job eight years before Mr. Cosgrove of the Central Railroad Company (p. 31, lines 25 to 30). Plaintiff had testified before Mr. Cosgrove came into court that he was employed by a Mr. Tice (p. 16, line 28), but he said that Mr. Tice was the boss (p. 16, line 30). He identified Mr. Cosgrove personally as Tice on page 31. Plaintiff identified Mr. McBride as one of the foremen he worked under (bottom p. 31), and said that he always was there (top p. 32). Plaintiff knew Mr. McCarthy four or five years (p. 32, line 15), and he saw Mr. McCarthy in the office, and Mr. McCarthy sometimes paid him his wages in 1917 and before (p. 32, line 23). All of these gentlemen were employees of the Stevedoring Corporation.

Mr. Cosgrove, called as a witness by the plaintiff, testified that he was an employee of the Central Railroad Company of New Jersey in 1910; that he then hired plaintiff to do 'longshore work (p. 33). Mr. Cosgrove testified on cross examination and on plaintiff's case that he has been general foreman for the Central Railroad Company at the terminal in Jersey City from 1910 down to the date of the trial. He said that Drago remained in the employ of the Central Railroad up to about 1915 (p. 35, line 39); that plaintiff worked under Mr. Cosgrove's supervision from about 1910 to about January 1, 1915 (p. 36, lines 1 to 3), and Mr. Cosgrove, still plaintiff's witness, produced the payrolls of the railroad company and showed that at no time in the year 1917, from January 1 to December 21, did the name

of Louis Drago appear thereon (p. 36, lines 25 to 40). Mr. Cosgrove further said that on January 1, 1915, the railroad discontinued the business of unloading its cars in Jersey City (p. 36), and that since that time that work has been done by the Railroad Stevedoring Corporation (p. 37). This work is the laboring work for the Central Railroad (p. 37, line 10). Mr. Cosgrove also testified that the Stevedoring Corporation had an office upstairs on Pier 11 (p. 37, line 15), and that is the place where Drago said his wages were paid (p. 31, lines 10 to 20). Mr. Cosgrove testified specifically that the pay envelope admitted by the plaintiff to be his (p. 37, line 20) looked like the Railroad Stevedoring Corporation's envelope; that they paid in such envelopes as that, and that the Central Railroad in 1917 did not pay in such envelopes and they paid all of their employees by check (p. 37, lines 20 to 40).

This testimony on plaintiff's own case required that defendant's motion to non-suit for the reason that plaintiff was not employed by the defendant be granted, and it was error to deny the motion (pp. 53 to 55).

On defendant's case the pay envelope was offered in evidence.

Mr. McBride, a foreman employed by the Railroad Stevedoring Corporation, testified that he was foreman over the gang in which plaintiff worked (p. 57, lines 20 to 30); that as such foreman he gave the orders to Drago to work the day in question (p. 57, line 30).

Mr. McCarthy, secretary and treasurer of Railroad Stevedoring Corporation, testified that he knew plaintiff (p. 73, line 3), and that plaintiff had been in the employ of the Railroad Stevedoring Corporation since 1915, when the Stevedoring Corporation commenced stevedoring work for the defendant (p. 73, lines 10 to 20). He testified that the employees are paid by the Stevedoring Corporation, and he produced the payrolls of the Stevedoring Corporation for June of 1917, and plaintiff's name appeared thereon for the two-week period ending June 15, and for the few days that he worked after June 15 (p. 74, lines 10 to 20). He earned after June 15 \$8.26 while working for the Stevedoring Corporation (p. 74). Mr. McCarthy testified (p. 76) that the name "Louis Drew" on the payroll, check number 42, was the same as plaintiff Louis Drago. Mr. McCarthy (p. 76) corroborated Mr. Cosgrove to the effect that the pay envelope produced was a Stevedoring Corporation envelope (p. 76, line 35).

Mr. Nolan, chief clerk of the Jersey City office for the Stevedoring Corporation, knew plaintiff, several times paid him his wages with the money of the Railroad Stevedoring Corporation, and testified that Drago was on the pay-rolls of that corporation (p. 89). Mr. Nolan also testified (p. 90) that he knew of the accident that Drago had on June 18, and he identified the handwriting on the pay envelope produced by Drago as the handwriting of Louis Hill, an employee of the Stevedoring Corporation.

Mr. Ahearn, checker for the Railroad Stevedoring Corporation, testified that plaintiff was in his gang (p. 91); that he was in his gang the day of the accident and at the time he was hurt (p. 93, line 35). He likewise testified that he, Ahearn, gave Drago his orders

when he was working in his gang and that nobody connected with the Central Railroad Company of New Jersey ever gave him any instructions (p. 93, line 40). Mr. Ahearn likewise testified that Drago had a check number and his check was a fiber disk with the initials "R. R. S. C. 42" printed on it. Drago's number was 42 (p. 94, lines 20 to 30). He had that number all the time he worked in Mr. Ahearn's gang (p. 94, line 30). Drago was employed by the Stevedoring Corporation when Mr. Ahearn went to work for that corporation in March 1915 (p. 94, line 40).

Mr. Cosgrove, called for defendant, testified that the men who worked for the Central Railroad Company prior to the first of January, 1915, were paid down on the dock in the time-office by check (p. 100, lines 25 to 40). Railroad employees were paid by cash until the time the pay-car was abolished about 1909, after which all railroad employees were paid by check (top p. 101). Since January 1, 1915, Mr. Cosgrove testified that the Railroad Stevedoring Corporation paid its men in its office upstairs on Pier 11. He also testified that the Central Railroad Company has exercised no control whatsoever over the men employed by the Railroad Stevedoring Corporation (p. 102, line 2); that the Railroad Company neither hires nor discharges the men. Mr. Cosgrove produced the pay-rolls of the Central Railroad Company of New Jersey for the year 1917 showing all employees on the docks or piers of the Central Railroad Company, and he testified that the name of Drew or Drago was not on any of them (p. 103, lines 10 to 25).

In addition to this testimony are the following interrogatories propounded by defendant to the plaintiff and the plaintiff's answers under oath:

"1st Interrogatory: Were you in the employ of the Railroad Stevedoring Corporation on the 18th day of June, 1917, at the time you received your injuries?

Answer: Was working for the Central Railroad Stevedoring Corporation.

2nd Interrogatory: Were you in the employ of the Railroad Stevedoring Corporation at any time or all of the week ending June 18th, 1917?

Answer: Yes. For the Central Railroad Stevedoring Corporation.

3rd Interrogatory: When do you claim that you were employed by the Central Railroad Company of New Jersey?

Answer: Was working for the Central Railroad from 1910 to 1915.

6th Interrogatory: How long had you been in the employ of the Central Railroad Company of New Jersey before June 18th, 1917?

Answer: For about five years for the Central Railroad.

7th Interrogatory: Did you work for the Railroad Stevedoring Corporation at any time in the year 1917, and if so from what date to what date?

Answer: Worked for the Central Railroad Stevedoring Corporation until the day of the accident." (See interrogatories and answers pp. 152 to 155 inclusive.)

These answers to interrogatories show plaintiff's knowledge of the true facts, namely, that he was employed by the Central Railroad Company of New Jersey from 1910 to 1915 and that thereafter he was employed by the Railroad Stevedoring Corporation. The word "Central" placed in the answers before the name "Railroad Stevedoring Corporation" was evidently used by the draftsman of the answers with the idea that later he might be able to prove the Stevedoring Corporation was a mere subsidiary of the railroad company.

The fact as to employment has been proved beyond any doubt and there was no conflict of the evidence to be submitted to the jury for the finding of the fact. The interrogatories and answers establish not only the fact, but also that the plaintiff knew what was the fact.

We therefore submit that in view of this testimony the Court erred in (1) refusing the motion to non-suit; (2) in refusing to direct a verdict; (3) in refusing to charge defendant's first, second and third requests to charge, and (4) erred in leaving it to the jury to say whether the plaintiff had satisfied them that at the time of the occurrence he was an employee of the defendant in interstate commerce. (Grounds of Appeal 1, 2, 3, 4, 5 and 8.)

POINT II.

The agreement between defendant and Railroad Stevedoring Corporation did not violate Section 5 of the Federal Act.

This section is as follows:

"Section 5: That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Defendant contends that this section is inapplicable for the reason that Drago not having been an employee of the defendant at the time the accident happened he cannot recover in any event. Defendant offered the certificate of incorporation of the Stevedoring Corporation (Exhibit D. 3) and the contract between the Stevedoring Corporation and the Railroad Company (Exhibit D. 2), for the purpose of showing first, that plaintiff's employer was a distinct entity from the defendant, and also to show by the contract the terms under which plaintiff as an employee of the Stevedoring Corporation was permitted to be on the defendant's premises in Jersey City. None of the stock of Stevedoring Company was owned by defendant, or any of its officers; no officer of Stevedoring Company owned any of defendant's stock, and each company had different officers.

The Trial Court charged that even should it be found by the jury that plaintiff was not employed by the defendant, but by the Stevedoring Corporation, that nevertheless plaintiff claims he is entitled to the benefits of the Federal Act because he charges that the agreement (Exhibit D. 2) was a contract prohibited as it were by Section 5 of the Act under which he is seeking to have the benefit (p. 117, lines 18 to 35).

The Court furthermore left it to the jury to say:

“Has the plaintiff satisfied you by a fair preponderance of the evidence that this contract of December, 1914, was a contract the purpose and intent of which was to enable the defendant common carrier to exempt itself from the liability created by this act of Congress? If he has satisfied you of that, and in the manner I have indicated, gentlemen, then he may have a recovery, provided, of course, the question of negligence, of which I will immediately speak to you, and other matters of which I will immediately speak to you have been satisfied in such a manner to you as the law requires that they shall be.”

(P. 118, line 35, to p. 119, line 15.) Exceptions 10, 12, 13 and 14; grounds of appeal 8b.

It is difficult to understand how plaintiff can recover under the Federal Act if he was in fact not employed by defendant common carrier in interstate commerce. That is the essential element to be proved.

The Trial Court went further, however, and said in effect that if plaintiff was not employed by the defendant carrier in interstate commerce at the time of his injury he might still recover if he was handling freight moving in interstate commerce while employed by an independent carrier, which was doing this stevedoring work for the carrier.

In other words the Trial Court has left it to the jury to extend the operation of the Federal Employers' Liability Act to employees of independent contractors having contracts with common carriers. The Federal Act will bear no such construction. It is limited in terms to employees of common carriers by railroad, and hence cannot cover employees of independent contractors which are not common carriers by railroad.

Section 5 of the Act in terms refers to any “contract, rule, regulation or device” to “enable any common carrier to exempt itself from any liability *created by this Act.*”

The liability created by this Act is the liability to “employees of common carriers by railroad,” not employees of independent contractors doing work for railroads.

The kind of contract, rule, regulation or device which Congress intended to avoid by Section 5 is indicated by Justice Hughes in *Philadelphia, B. & W. Ry. Co. v. Shubert*, 224 U. S. 603; 56 L. Ed. 911. Shubert was a member of the Railroad Relief Fund under a contract of membership made in 1905, in which it was agreed that the company should apply as the voluntary contribution from his wages a

certain amount monthly for the purpose of securing the benefits subscribed in certain regulations. One of these regulations made the acceptance of benefits on account of the injury or death of an employee equivalent to a release of the company's liability. Justice Hughes says of Section 5:

"It includes every variety of agreement or arrangement of this nature; any stipulations contained in contracts of membership in relief departments that the acceptance of benefits thereof shall bar recovery, are within its terms."

By use of the words "agreement or arrangement of *this nature*," the Court meant agreement or arrangement between carrier and employee, the purpose and intent of which was to limit the claim of any employee of the common carrier by railroad in interstate commerce to something less than what might be received under the Federal Act.

In speaking of this section of the Act in the *Second Employers' Liability Cases*, 223 U. S. 51, the Supreme Court said that:

"The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines."

The Railroad in this case had no control whatsoever over the employees of the Stevedoring Corporation.

In *Robinson v. Baltimore & Ohio R. R. Co.*, 40 App. Cas. (D. C.) 169; L. R. A. 1915 D, 510, it was held that a Pullman porter is not an employee of the railroad hauling the car on which he is employed so as to come within the provisions of the Federal Employers' Liability Act. When engaged he agreed to protect the Pullman Company in its contracts by which it undertook to insure railroad companies against liability for injuries to Pullman employees. The contract exempting the Pullman Company and the carrier from liability was upheld.

In *Chicago, Rock Island & Pacific R. R. Co. v. Bond*, 240 U. S. 449; 60 L. Ed. 735, an individual independent contractor was killed while in the Railroad Company's yard, in which under his contract he was attending to the business of unloading coal from railroad cars for the railroad. Suit founded on the Federal Act was brought against the railroad by his administrator, and it was alleged that the contract of deceased with the railroad, whereby he independently undertook the unloading of coal for the railroad, was a contract, regulation or device made void by section 5 of this act. It was contended that the independent contractor was an employee and not in fact an independent contractor. The Trial Court submitted the question to the jury whether or not deceased was an employee of the company. Justice McKenna said:

"We do not think that the contract can be regarded as an evasion of section 5 of the employers' liability act."

"Turner (deceased) was something more than a mere shoveler of coal under a superior's command. He was an independent employer of labor, conscious of his own power to direct and willing to assume the responsibility of direction and to be

judged by its results. This is manifest from the contract under review and from the coöperage contracts; it is also manifest from his contracts with the other companies to whose industries the railroad company's tracks extended.

Thus, being of opinion that Turner was not an employee of the company, but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce."

In the case under consideration the Stevedoring Corporation occupied precisely the same position with respect to the defendant that Turner in the Bond case occupied to the railroad. If the independent contractor himself is, according to the Bond case, not an employee of the railroad, how can it be said that an employee of an independent contractor is an employee of the railroad? Since under the Bond case, a contract very similar in terms to Exhibit D. 2 in this case, was not a contract in violation of section 5, it cannot be said that the contract under consideration is in violation of section 5.

The business of stevedoring is an ancient and well-known business. The stevedore originally loaded and unloaded vessels. Under modern conditions the stevedore, whether an individual or a corporation, undertakes to load and unload merchandise under all conditions and either into and out of vessels, or into and from motor trucks, railroad cars, warehouses, or what not.

The stevedore in this case was responsible for procuring and providing at all times an ample supply of labor—no mean task under present day conditions. The railroad evidently considered that it would be economical to have its cars unloaded by stevedores, and that this expectation proved correct is proved by the evidence that before the contract D. 2 was made the railroad company employed on an average of 180 men to do its stevedoring, while the stevedoring corporation employs only about 130 to do the same work. (Mr. Cosgrove, p. 41, lines 1 to 15.)

It is therefore respectfully submitted that the contract, Exhibit D. 2, was one that is not made illegal by any law, and that since the independent contractors had the right to perform the contract it had the right to employ labor in that work, and that therefore it cannot be said in any aspect of the case to be in violation of section 5.

POINT III.

No negligence was proved on the part of defendant and a verdict should have been directed.

It is only where the injury results in whole or in part from negligence attributable to the carrier that the Federal act applies.

New York Central R. Co. v. Winfield, 244 U. S., p. 147; 61 L. Ed., 1045.

Drago testified that he and his fellow employee were working on the car when they put the wire through the wheels (p. 23).

"When we were hoisting this stuff up then I went further away. In the same car, inside the car" (p. 23, line 20).

“And while we were hoisting up the wheels—then the wire broke and then came down” (p. 23, lines 20 to 30).

Plaintiff testified that before these particular wheels were lifted they had already raised two drafts in the boat by means of the same sling.

“Q How do you know that it was the wire that broke? Did you see it at the time? A Yes; yes; even a companion of mine said watching it, ‘The wire is broken,’ and while we were trying to dodge it I was crushed” (p. 24, lines 25 to 32).

Plaintiff himself said not a word about the condition of the cable before it broke.

Mr. Cosgrove, called for the plaintiff on direct examination, describing the sling, said that “it was a wire rope (bottom p. 34), the diameter is three-quarters of an inch” (top p. 35).

In the endeavor to prove negligence, plaintiff’s counsel asked the following question:

“Q And if that wire rope was in good condition and the wire properly attached, it should lift them without breaking, shouldn’t it?”

The witness instantly: “A Oh, yes” (p. 35, lines 13 to 15).

Counsel for defendant said:

“I object to that as calling for a conclusion. Various things, I assume, will make the rope break.

The Court. Oh, I suppose if you took an axe, yes, you could sever it; or if you took any other object you could probably sever it. I understand the question couldn’t possibly go in that direction. I won’t strike it out. Take your objection.”

We submit that this answer to this question does not constitute legal evidence upon which the question of negligence should go to the jury, and that it was error for the Court not to strike out the answer. It is argumentative, it did not state facts upon which the Court and jury could weigh the credibility of the testimony, and it was a leading question, hypothetical in form. It did not state the facts upon which the conclusion of the witness was based, and it was nothing but a hasty, unconsidered guess. Defendant’s rights are protected by assignment of error number 12, page 6.

Mr. Cosgrove, on cross examination, testified that he was not present when the wire broke and did not see it (p. 42, lines 28 to 30). He said that he furnished new slings on June 15th, two days before the accident (bottom p. 42). He furnished one pair of new slings (p. 43, line 10). Mr. Cosgrove testified that if one of the wires should be kinked “it would break with a slight strain.” The witness testified that while he furnished two slings on the 15th of June, the two men were using only one.

“They had two to use; but they run one sling through the tires, these locomotive tires; they run one sling through and then run it into a sort of slip-knot so it will hold fast when the strain comes on it” (p. 43, lines 20 to 25).

It is the practice, the witness said, to use one. They could use two if they wished, because they were there (p. 43, line 30). The witness also testified:

"Q Do you know whether after the accident there were slings there that had not been used at all? A Oh, yes; there were a brand new pair of three-quarter wire slings on the same side of the crane" (p. 44, lines 5 to 11).

On re-direct examination by plaintiff's counsel the witness testified:

"Q Well, did you see the broken sling? A Yes.

Q What was the broken sling? A It was cut.

Q I know, but what was it? A It was five-eighths.

Q Same as you say you had furnished? A Yes.

Q Same size? A Yes, same slings I had furnished; but new slings" (p. 44, lines 33 to 40).

Continuing (p. 45):

"Q How long had it been in use, do you know? A Well, I should judge three or four days.

Q And when had you supplied the new slings? A Well, I supply new slings every time the boys ask me for them.

Q What I want to find is this: As I understand you, there were two new slings unused after the accident? A Yes, sir.

Q And one sling was broken, which was a used sling? A Yes.

Q So there were three there altogether? A No; there were more than that. They were using three slings in the car.

Q Oh, they were actually using three slings? How many men were working? A There were two men in the car.

Q They would use three slings, would they? A Yes.

Q How many slings were there altogether? A There was six slings right on that crane.

Q Hanging on the crane? A No, not hanging on; there were two hanging on the side, two new ones.

Q They had not been put in use yet. A Yes.

Q And four were in use? A Yes.

Q And out of those four three were being used by the men? A Three were being used.

Q And these slings were all of the same diameter? A No, the one on the side of the crane was three-quarter inch.

Q What were the ones they were using? A Five-eighths." (P. 45, lines 1 to 10.)

The witness, John Palino, who was working on the car with plaintiff at the time of the accident, testified that he and Drago put the wire through the wheels. In answer to the question how it happened, witness testified:

"After we put the wire through and then we placed the hook, and then he (evidently meaning Drago) says: 'Go ahead'; and then after he said: 'Go ahead' and when this—the wheels were about level—on the level with the car, and then the wire broke off in two pieces, and then my companion was struck with it.

Q How many wheels were held by the wire, do you know?

A Two."

Witness said that he had helped to hoist wheels like those before in the same way (p. 42). The men had been working about a quarter of an hour unloading a carload of wheels and had taken away two drafts (p. 48). Palino inserted the wire through the wheels and Drago went to the other side in the back and pulled the wire through (bottom, p. 48). Both hooked the loops on the ends of the wire over the hook on the crane, and both said "Go ahead" (top p. 49). The car tires that were being hoisted had very sharp edges (p. 49, line 18). Witness was asked:

"Q And when the crane lifted those up did the wheels slip in the sling? A The wire broke off in two parts, the wheels cut it.

Q The wheels cut it. Did you see the wire before it was used? A Yes, we did.

Q Did it look all right or not? A It looked all right; it looked good.

Q Was there anything to indicate to you that it would break or was in bad condition? A No, it was not in bad condition; did not look to be in bad condition" (p. 49, lines 20 to 30).

Again Palino testified on cross examination, page 50, as follows:

"Q How big around was this wire rope that was broke or was cut? A It could be about a finger and a half,

Q Let us see the size of your finger? A Of course, the wire didn't look bad; (in English) nice, good.

Q It looked good, look nice, did it? A It looked nice" (p. 50, lines 4-8).

On re-direct examination by Mr. Tumulty the witness said:

"Q When you raised the other car wheels before the car wheels that fell and struck Drago, what wire did you use?

The Interpreter. You mean on the same day?

Mr. Tumulty. On the same day.

A The same wire we used at other time."

Therefore on the question of negligence alone the Court should have granted defendant's motion for a non-suit. There was no negligence. Under the evidence the wire furnished was a proper wire as to size and strength. It had stood the test of two former drafts. The men using it saw no defects in it, "it looked good, it looked nice."

Since a proper appliance was furnished and no defect was observable in it, it is apparent that the break was caused either because plaintiff overloaded the wire, for he was the one who threaded it through the car wheels, or because it became kinked in the operation and broke, or because the wheels slipping together in an unexpected and unusual way came together in such a manner that the sharp edges cut the rope in half.

In defense a number of witnesses testified to inspecting the wire furnished before it was used and every witness who saw it supports Palino to the effect that the wire was a proper wire as to size and strength, was new in appearance and had no observable defects (Mr. McBride, p. 58). Mr. McBride said any defects would be observable

because the strands of the wire would be broke. There were no broken strands on any of the slings on crane No. 12 the day of the accident (p. 58, lines 30 to 40). This witness saw the sling just a few minutes before it broke (p. 59, lines 20 to 30), and he noticed nothing the matter with it.

Mr. Ahearn saw the sling just before it broke and it was so far as he knew in apparently good condition (p. 92, line 27). Mr. Ahearn was not more than six feet away from it and said: "There were not any defects in any part of that wire" (bottom p. 99). The steel tires which were being unloaded he said weighed about three hundred pounds (bottom p. 92), and that the edges of the tires were very sharp (top p. 93).

This testimony on defendant's part taken into consideration with the testimony produced on the part of plaintiff, establishes clearly that there was no negligence on the part of this defendant.

To hold the defendant liable for negligence in this case would be to make it an insurer of the safety of laborers on its premises.

POINT IV.

Plaintiff assumed the risk of such an accident.

Drago had been engaged in stevedoring work for the Central Railroad Company of New Jersey from 1910 to 1915, and by the Railroad Stevedoring Corporation from January 1, 1915, to June 18, 1917. All of his work was performed in and about the terminal of the Central Railroad Company of New Jersey at Communipaw, Jersey City. This is without doubt one of the largest and most improved railroad terminals in the country. Freight of all description in one operation can be unloaded from a freight car and deposited in the hold of ocean going steamers. Drago admitted that he was accustomed to handling "big stuff like pipe, &c." (p. 24, line 4), and undoubtedly he helped to stevedore all kinds of merchandise. He certainly knew the perils of this hazardous employment. He testified:

"Q Now, after the wheels were raised by the crane where were you standing? A I went further back to the car, because there was a chance to get away from it.

Q Did you always do that? A All the time, when there was big stuff like pipe, and so forth; then we would get off the car and get on the ground, but not at this time with this kind" (bottom p. 23 to line 10 on page 24).

The steel tires being loaded at the time of the accident were the kind that are used in locomotives, weighing three hundred pounds each, with sharp edges.

Plaintiff therefore assumed the risk of just such an accident as he suffered.

"Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of

mature years is taken to assume the risks of this sort, whether he is actually aware of them or not."

Seaboard Air Line Railway v. Horton, 233 U. S., p. 492; 58 L. Ed. 1062.

Philadelphia R. Co. v. Maryland (C. C. A., 3rd Cir.), (1917), 239 Fed. 1.

POINT V.

The trial court erred in charging that the burden was upon defendant to prove contributory negligence.

Under this point the section of the Federal Act that is pertinent is as follows:

"Sec. 3: That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The Trial Court charged that the defendant must satisfy the jury that the plaintiff was guilty of contributory negligence (pp. 127-128).

It is respectfully contended that under the section of the statute above quoted the Court should not have charged that the burden was upon defendant to prove contributory negligence. We submit that if it appears from the evidence that the plaintiff was guilty of contributory negligence the damages must be diminished by the jury in proportion to the amount of the negligence attributable to such employee, and that the burden of showing that negligence is not upon defendant. If there was contributory negligence, no matter whether proved by defendant or made apparent by the plaintiff, the damages must be reduced as the statute provides. We fear the jury received an erroneous conception of the requirements of the statute from the charge as made by the Trial Court. (Objection 18, p. 134, ground of appeal 8F, p. 5 of case.

POINT VI.

The trial court erred in charging the jury on master and servant principles.

The Trial Court charged the jury at length as to the duty of a master to provide reasonably safe, sound and suitable tools, implements and machinery with which to work (p. 120, line 30, to p. 122,

line 40), and left it to the jury to say whether defendant in this case had performed that duty.

As we have demonstrated in Point I plaintiff was not a servant of the defendant. Defendant was not the master of the plaintiff. Plaintiff's master was Railroad Stevedoring Company, a distinct and separate entity.

We submit that this charge on the principles defined by the Court was erroneous. (Objection 15, p. 133; 16 and 17, p. 134. Grounds of appeal 8c, d, e, p. 4.) Plaintiff an employee of Railroad Stevedoring Corporation being upon defendant's premises as mere licensee, the defendant owed him no higher duty than to refrain from acts wilfully injurious.

POINT VII.

The court erred in refusing the defendant's requests to charge.

Defendant's first request was that the Court charge that plaintiff was not an employee of the defendant at the time he received the injuries of which he complained.

Defendant's second request was that the Court charge that plaintiff at the time of the happening of the accident was employed by the Railroad Stevedoring Corporation, a corporation of New Jersey.

The third request was that the Court charge that plaintiff was not entitled to recover under the Federal Employers' Liability Act against the defendant.

The fourth request was that the Court charge that neither the employment of the plaintiff by the Stevedoring Corporation, in the course of whose employment plaintiff was injured, nor the contract between the railroad company and the stevedoring corporation, constituted a contract &c., the purpose and intent of which was to enable the railroad company to exempt itself from any liability created by the Federal Employers' Liability Act.

The fifth request was that the defendant had the right to make the contract D. 2 with the Stevedoring Corporation and employ the Stevedoring Corporation to perform stevedoring work for defendant, and that neither such contract nor the making thereof can be considered a contract, rule, regulation or device the purpose and intent of which was to enable the defendant to exempt itself from liability under the Federal Act.

The Court declined to charge each of these requests and allowed an exception to each (p. 129, lines 10 to 20.) (Grounds of Appeal 3, 4, 5, 6 and 7, pp. 2 and 3.)

It is submitted that each one of these requests was a proper request under the evidence, and that the refusal of the Court to charge them as made was error.

POINT VIII.

The Trial Court erred in submitting the case to the jury on the question whether the stevedoring contract was fraudulently entered into.

Fraud, as the Trial Court said, is never presumed; it must be proved by the party alleging it.

Sherron v. Humphreys, 14 N. J. L. 217.

What is evidence of fraud is a question of law.

Vanpelt v. Veghte, 14 N. J. L. 207.

There was no allegation made by plaintiff in the pleadings that the contract between the defendant and the Stevedoring Corporation was entered into fraudulently, and no issue upon that point was raised. In fact, plaintiff did not claim that the contract was fraudulently entered into; merely that the contract was made void under operation of section 5 of the Federal statute, above quoted.

Plaintiff's counsel even excepted to the charge of the Court wherein the Court left the fraud question to the jury. (Case, p. 139.) (Defendant's request, p. 2, ass'm't 6.)

There was no evidence, moreover, from which the jury might *lawfully* infer that the contract was fraudulently entered into.

The Court permitted the jury to *guess* that the contract between the railroad company and the stevedoring company was made for the purpose of evading the statute. There was not a scintilla of evidence upon which the finding was based or could be based. In the nature of things it is a mere suspicion of the jury, and fraud will never be founded upon mere suspicion.

Albro Co. v. Fountain, 162 N. Y. 498, at page 502.

In that case the Court of Appeals of New York said:

"While her testimony may create some suspicion, it is not necessarily in conflict."

In this case there is not even the basis of a fair ground of suspicion. The uncontradicted proof is that in the fall of 1914 Mr. Harry B. James conceived the idea of organizing a stevedoring corporation which would do a general stevedoring business. He presented his plans to the Central Railroad Company of New Jersey and convinced that company that he could do the railroad's stevedoring more cheaply and expeditiously through his company than it could do directly through its own employees. It may well be that in concluding to turn this business over to an independent contractor the railroad company intended to relieve itself of the burden of dealing with and being responsible for this class of employees. But that it had the right to do. Nor is it a suspicious circumstance that the Railroad Stevedoring Company, when it began business, took over the men then working for the Central Railroad Company of New Jersey. Employers of labor, of necessity, look for labor where it is to be found. It was the most natural thing in the world for the Railroad Stevedoring Corporation, knowing that one hundred and eighty men would be discharged by the Central Railroad Company of New Jersey, to

immediately take over these same more or less skilled men for its work. Nor would it be a suspicious circumstance had the railroad company requested this be done. Nor is any other fact or circumstance upon which the plaintiff relies suspicious, nor are all the facts upon which he relies, taken together, suspicious, and even if they all be sufficient to create a suspicion, the creation of this suspicion is not sufficient to predicate a finding of fraud.

See *Goldstein v. Weiss*, 172 N. Y. S. 131 (adv. sheets Nov. 11, 1918).

The Railroad Stevedoring Corporation does stevedoring work not only for the Central Railroad Company of New Jersey, but also for the Pennsylvania Railroad Company, the United States Steel Corporation, and many other firms and corporations which have need of stevedoring services. (Mr. McCarthy, p. 85 to p. 87.)

What evidence was there from which the jury could lawfully find that there was fraud? Who was intended to be defrauded? Of what thing were such person or persons to be defrauded?

The contract was entered into voluntarily between said railroad company and said Stevedoring Corporation, the object being on the part of the latter to make money in a lawful occupation, and on the part of the railroad company to secure an adequate supply of labor when needed and to have laboring work economically performed. The contract (Exhibit D. 2) and the amendment (Exhibit D. 5) show that the parties were dealing at arm's length, and that due to economic conditions the Stevedoring Corporation demanded and received from the railroad company an increased rate per ton for handling freight for the railroad.

We assume that it will be argued by plaintiff that the formation of the Stevedoring Corporation, and the contract between it and the railroad, took out of the scope of the Federal Employers' Liability Act all men employed by the Stevedoring Corporation who might handle freight in the course of its journey between Jersey City and points east thereof.

The Federal statute does not forbid such a contract to be made. No laborer is obliged to work for the Stevedoring Corporation. If one wishes employment where he may have the benefits of the Federal act, it is his duty to secure employment from the common carrier by railroad. As a matter of fact, when employed by a common carrier by railroad, he could only recover under the Federal act if he was injured through negligence. While an employee of the Stevedoring Corporation, if he suffers injury, he is entitled to compensation under the New Jersey act, although he is injured without negligence on the part of anyone. Therefore, one's chances of recovering fair compensation for injuries received while in the scope of his employment are much better while working for the Stevedoring Corporation than while working for a common carrier by railroad.

So long as there is no law prohibiting a carrier by railroad from having its stevedoring work performed by independent contractors, contracts such as Exhibit D. 2 are proper. Likewise, so long as independent contractors may perform work for railroad companies they may employ labor to do that work. And the fact that one of the

indirect results of the making of such a contract and the performance of such work is to take out of the scope of the Federal act all of the employees of the independent contractor is of no consequence. Congress itself did not have power to pass a Federal liability act covering all persons engaged in interstate commerce (*First Employers' Liability Cases*, 207 U. S. 463), and hence the courts should be very loath by construction to extend the act to include persons that an act of Congress itself could not protect.

POINT IX.

The judgment below should be reversed.

McDERMOTT & ENRIGHT,
Attorneys of Appellant.

JAMES D. CARPENTER, JR.,
Of Counsel.

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