NEW JERSEY COURT OF ERRORS AND APPEALS.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, *Appellant,* *vs* CHARLES J. NEWBAKER, *Respondent.*	On Appeal from Supreme Court.

(1.)

Statement of the Case.

This is an appeal from a judgment of the Supreme Court affirming a judgment of the Warren Common Pleas adjudging certain compensation to be paid to the respondent in a proceeding brought under the Workmen's Compensation Act of the State of New Jersey.

The question involved is whether the judgment of the Supreme Court is correct, or whether, for some one or more of the reasons urged before that Court, the judgment of the Warren Common Pleas should be reversed.

(2.)

Specification of the Grounds of Appeal.

The appellant urges the following grounds why the whole of the judgment entered in this cause should be reversed.

1. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas in this cause.

2. Because the New Jersey Supreme Court erroneously refused to reverse the judgment of the Warren County Court of Common Pleas in this cause.

3. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas judgment should have been entered denying the compensation claimed by the petitioner, and dismissing the petition.

4. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the determination and finding of fact by the Judge of the Court of Common Pleas of Warren County was not in accordance with the provisions of an act of the Legislature of New Jersey entitled "An Act prescribing the liability of an employer to make compensation for the injuries received by an employee in the course of employment establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the supplements and amendments thereto.

5. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the determination of fact by the Judge of the Court of Common Pleas of Warren County was not in accordance with the evidence.

6. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the evidence in the cause shows, that the petitioner was not injured at the time and in the manner he alleges, there is no evidence which shows that the petitioner was injured while in the employment of defendant or that the accident

arose out of and in the course of employment of said petitioner, but that he received his injury by other means entirely.

7. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the evidence in the cause shows that the defendant had no knowledge of the injury or the nature of the injury of petitioner or that any accident had happened by which petitioner was injured, and there is no evidence that the defendant employer ever had actual or any knowledge of the accident within ninety days after the injury, or until the petition in this cause was served.

8. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the petitioner's claim for compensation under the act of Legislature of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for the injuries received by an employee in the course of employment establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the supplement and amendment thereto, approved April 1, 1913, was barred forever, because he did not file a petition for adjudication of compensation within one year after the accident or injury alleged in his petition in accordance with the provision of the last paragraph of section 23 of the above stated act as amended, which amendment was approved April 1, 1913, Chapter 174 of the pamphlet laws 1913, at page 303.

9. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the evidence shows that the petitioner

was negligent in not giving notice of his condition to defendant, and in neglecting to submit to an operation which it appeared would cure him and that petitioner's disability was due to his failure to give said notice and submit to said operation and not to accident which happened to him.

10. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the Judge of the Court of Common Pleas in fixing compensation in the cause to which he held petitioner was entitled decided that a simple operation would be of benefit to the petitioner, but that he was not bound to go to a hospital to have an operation performed and that the court had not authority to order him to go to the hospital to have said operation performed, when it was the duty of the court to have made an order that petitioner should go to the hospital to have an operation performed, and that the basis of compensation and the amount of compensation as fixed by the court was illegal and not in accordance with the direction of the statute.

11. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the Judge of the Court of Common Pleas in fixing compensation in the cause to which he held petitioner was entitled decided that a simple operation would be of benefit to the petitioner, but that he was not bound to go to a hospital to have an operation performed, and that the court had not authority to order him to go to the hospital to have said operation performed, when it was the duty of the court to have made an order that petitioner should be entitled to compensation from the time, if he had submitted to said operation, he would have recovered and that the basis

of compensation and the amount of compensation as fixed by the court was illegal and not in accordance with the direction of the statute.

12. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the Court of Common Pleas of Warren County, and the Judge of the Court of Common Pleas of Warren County had no jurisdiction to entertain the petition in this matter, or to make any order, or enter judgment thereunder because the legal rights of the petitioner and defendant are determined by the Act of Congress of the United States entitled, "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, and the supplements and amendments thereto."

13. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas it appears by the evidence that at the time of the accident as alleged the defendant was engaging in commerce between and among the several states and territories of the United States and foreign nations and that the said petitioner was employed by it as such carrier in such commerce.

14. The respondent-appellant is deprived of its property without due process of law because the question of negligence or no negligence was not an issue at the hearing of the case; the petitioner-respondent did not allege the absence of negligence and no claim with respect thereto was made by the petitioner-respondent at the hearing. The respondent-appellant has therefore had no hearing on this point.

15. The respondent-appellant is deprived of its property without due process of law because the

question of negligence or no negligence was not an issue at the hearing of the case; the respondent-appellant did not allege negligence nor offer any proof with respect thereto at the hearing, there being no requirement therefor in the statute under which the petition herein was filed and determination and judgment entered, and said statute expressly providing that compensation shall be made without regard to the negligence of the employer. The respondent-appellant has therefore had no hearing on this point.

16. The respondent-appellant is deprived of its property without due process of law because there is no provision in the statute under which the petition was filed, and determination and judgment entered whereby the question of negligence or no negligence may be determined by the tribunal created by said statute.

17. The respondent-appellant is deprived of its property without due process of law because the jurisdiction of the tribunal created by the statute under which the petition herein was filed and determination and judgment entered to determine questions of fact is limited by the terms of said statute and there is nothing in said statute which permits said tribunal to determine the questions of fact as to the existence of negligence (see pages 100-105).

(3.)

Brief of the Argument.

The following brief has been prepared in part by Mr. George M. Shipman, on certain points involved in the case, and in part by the firm of Collins & Corbin on the particular point of the application of the Federal Employer's Liability Act of 1908 to the case *sub judice*.

Brief of George M. Shipman for the appellant, The New York, Susquehanna & Western Railroad Company.

The petition was filed in this cause for compensation by Charles J. Newbaker, an employe of the New York, Susquehanna and Western Railroad Company. In his petition he alleges that he was ruptured by an accident which occurred to him on the 11th day of March 1913, between the hours of four and five o'clock in the afternoon of that day; he was on a hand car of the company with several other employees of the company at that time, running toward Columbia from Delaware Junction going west in Warren County New Jersey, on the railroad track of the defendant's railroad; the foreman in charge of hand car seeing an approaching coal train coming towards them ordered the hand car to be taken from the track that the train might pass, and the Petitioner alleges that while he was assisting in removing the hand car, the handle of the car struck him in the groin and that he was ruptured by the blow.

It is quite significant that the Petitioner gives the name of the foreman in his testimony, a man named Gouger, and the names of the persons or of three of them who were, as he says, on the car with him and saw him injured (see page 40 of book, line 16). That every one of these men swear they have no knowledge of any such accident on that day, at that place and time, or that either of them knew the Petitioner was injured that day or was ever ruptured, or that any such accident happened to him in their presence.

I call attention to the testimony of Charles Kinney on page 63. He swears that Newbaker was not out on March 11th.

But Kitchen, on page 65, swears he never saw

hand car set off the track and Mr. Newbaker roll down on the bank.

Archibald Kitchen never saw any such accident.

Dr. Beck, the physician whom Mr. Newbaker swears was his physician to whom he went when he was first injured as he alleges, has no recollection of the first interview, or when this man was injured, and only swears he believes he was injured about March 11th, because he finds a charge in his book for a truss and the price of a truss on March 25th which he swears he furnished to Newbaker. See Dr. Beck's testimony on page 26, lines 30-40, page 27, lines 1-10. Dr. Ott, a physician living at Portland, Pa., swears he saw Newbaker in winter of 1913 about December perhaps, but that he had rupture, and that he furnished him with a truss and that when he examined him he saw no mark of any truss on him, so that evidently he had not been treated for any rupture before then.

I refer to testimony of Dr. Ott on page 36, on page 37 also.

The testimony of Dr. Albertson who examined him on the part of the defendant shows that he had a rupture (see evidence of Dr. Albertson on page 32). On page 33 he says he could not tell when the rupture was had, but that the man was ruptured was proved, but just when and under what circumstances is most uncertain.

By his petition petitioner fixes the day and place and the very hour of the day when he was injured, and he is bound to make his proof just as certain as his allegation, I insist, and this he fails to do. But for the fact that he was ruptured there would be no evidence to sustain his allegation except his own.

Mr. Shafer, the superintendent of defendant, swears on page 69, line 4, that if an employe is

injured the rules of company require him to make out a form as to his injury and that the petitioner never made out or produced any form such as is required by the company.

On page 42, lines 1-10, Newbaker admits he knew of a rule of the company requiring him to fill out a blank, but that he never asked foreman, or anybody else, for such a blank.

Gouger, the foreman, swears he never knew that petitioner was injured until he received the letters which are Exhibits P-1 and P-2, on page 90. (See testimony of Gouger on pages 53 and 54).

I refer to those two letters especially. Notice letter which petitioner wanted Gouger to sign, he fixes the date of his injury *March 11, 1912.*

Dr. Ott in his testimony on page 37, line 20, swears that he saw him at the time Newbaker said he did December 24th, 1913 (see line 40).

The Petitioner began work with the company in December, 1912 (see page 15, line 39). He did not quit work until February, 1915.

The first check for his work was given him November 30th, 1912. The last check February 9th, 1915, about one month before his Petition in this case was filed (see page 92, Exhibit 4). After the injury, as he alleges, he received work and wages about the same as before (see page 20, lines 23-40). Notice the checks he received from the Company after date of alleged accident (page 92, Exhibit 4). They were about the same size as before the accident (see page 46, lines 1-40).

He worked just as usual on the track, shoveled snow in March, 1914 (see page 46, line 20).

Newbaker swears he told Whitney, Supervisor, of his injury as soon as it happened. Can the Court believe that in view of the fact that New-

baker never made any attempt to report to company himself of his injury at the time it happened, and in view of the fact that he went to Gouger, the foreman, nearly two years after his injury with letters (Exhibits P-1 and P-2) asking him to sign the certificate fixing therein date of injury at March 11th, 1912, and writes that Whitney has no use for him.

I insist that the conduct of the Petitioner estops him from any recovery in this case, under the state of facts above given. Employer and employe accept the terms and provisions of Section 2 of the Workman's Compensation Act by implied agreement. The Act provides such agreement shall be a surrender by the parties thereto of their rights to any other form or method, or amount of compensation, than as provided in Section 2 of the Act, and of an acceptance of all the provisions of Section 2 of the Act, employer and employee adopt as part of their contract the terms of the whole of the Act. It is part of the contract as well as any other part of the contract as to the kind of work or place of work or wages, and the question presented to the Court in this case is not whether Petitioner can recover damages of defendant because defendant has failed to perform its contract, but the court is called on to compel defendant to perform its contract with Petitioner and to decide whether Petitioner is entitled to be paid compensation for an injury which he received in the course of his employment by accident, which deprives him of the power and ability to work and earn the same wages he would have received if he had not been injured.

When Petitioner began work for the defendant, there was no time fixed in the law within which he was compelled to file his Petition for compensation within which he was compelled to go to the court to ask his employer to fulfil his

contract. At the time he alleges he was injured March 11, 1913, there was no such limitation.

By an act of the Legislature of the State of New Jersey, entitled "An act to amend an act prescribing the liability of an employer to make compensation for injuries received by an employe in the court of employment establishing an Elective Schedule of compensation and regulating procedure for the determination of liability and compensation thereunder" Approved April fourth, One thousand nine hundred and eleven, approved April 1, 1913, which act by its terms took effect immediately.

Chap. 174, Pamphlet laws of 1913, page 302, it is provided, Section 8 of the act:

> "Paragraph 23 of this act is amended to read as follows:
>
> " 'In case of personal injuries or death *all claims* for compensation on account thereof shall be forever barred, unless within one year after the accident the parties shall have agreed upon the compensation payable under this act, or unless within one year after the accident one of the parties shall have filed a Petition for adjudication of compensation as provided herein.' "

So the contract existing at the time this amendatory act was passed, under the terms of the act was amended, then, and by this Statute, the terms of thic Act made a new contract between petitioner and defendant.

Petitioner had notice of this amendment. He was injured March 11, 1913, he alleges, the contract between him and his principal was amended April 1, 1913, within a month of time of injury. It was a reasonable amendment, and after he knew of it, he continued to work under the contract as amended for two years. He accepted wages from defendant, his employer, until February, 1915, and on March 15th, 1915, filed the

Petition in this case. I insist he was estopped from taking this proceeding.

Sun Dredging etc., Co. vs. Ottens, 55 Vroom, 740;
Stoutenburgh vs. Penek, 56 Vroom, 405;
Vineland vs. Fowler Waste Mfg. Co., 1 Gummere, 86 N. J. Law, 342.

The terms made use of in this amendment, as well as the professed object of the law under this Statute is retrospective certainly as far as the case in hand is concerned.

Certainly this Petitioner had no vested right under the contract as fixed by the law before the amendment, when he has accepted the contract as amended, and enjoyed its benefits for two years after its change.

This amendment to the original act by which the contract was changed, does not interfere with any vested right of Petitioner, by reason of the fact that he was injured before the amendment was passed. The Statute only fixes a time within which action must be taken for all claims for compensation for injury. It fixes a reasonable time, within one year from time of injury is a reasonable time for every person entitled to relief under the act to file a Petition.

The language of the Statute of amendment is so clear that it makes it plain that when the words *all claims* are used they refer to claims for compensation for injuries received before as well as after the act was passed.

In case of *Barnaby vs. Bradley and Currier Co.*, 31 Vroom, 60 Law, 158, Justice Depue says on page 160:

> "It is not denied that Legislature may pass Statute of Limitation which shall apply to existing contracts *if a reasonable time within which to bring suit is allowed.*"

Then the further language of Judge Depue in that same case, on page 161 of 31 Vroom at bottom of page in referring to the third section of act relating to Statutes:

> "The rule prescribed by this Statute will prevail as fundamental for construction of Statutes, *except where the Legislature has either in express language or by implication so strong as not to be resisted indicated the Legislative purpose to supersede this rule of statutory construction.*"

Certainly in the case before the court in which the Petitioner claims he was injured on March 11, 1913, and remained in the employment of the company for two years and enjoyed the benefit of his contract with the employer for two years, the law which provides that if he has suffered injury and seeks relief he must apply within one year is a reasonable one, and the language of the act is clear enough to show that the Legislature intended the limitation to apply to this case, and it is reasonable that it should.

I call special attention to the words of the Statute. *"In case of personal injuries," "all claims,"* shall be forever barred, unless within one year after the accident one of the parties shall have filed a Petition *for adjudication of compensation herein.*

Certainly that language refers to all persons, who had a reasonable time after accident, who accepted the terms of the act amending the contract, to file a Petition for adjudication.

This is not an ordinary action at law for breach of contract, or for damages on account of some trespass or injury. I call attention to the language of Justice Swayze in the case of *Newark Paving Co. vs. Klotz,* 1 Gummere, 690:

> "These considerations suffice to show that the right to compensation under Statute, and

the right to recover damages of a tort feasor are so different that the rule of law appealed to is unapplicable."

The same Justice in his opinion in the case of *Rounsaville v. Central Railroad Co.,* 94 Atlantic Reporter, 392, propounds the same thought.

I insist that the Statute of Limitations of actions does not apply in this case, that no employe engaged in labor under the contract provided by the terms of the act under which this Petition is filed has any vested right which was taken away by this amendment, fixing a time within which Petition for adjudication of compensation must be filed, unless the accident had happened to him more than one year before this amendatory act was passed. If we had a reasonable time after the amendment was passed within which to file his Petition within a year before the accident he complains of had happened and failed to take action under the Statute he was and is forever barred.

There was no Statute fixing the time within which a Petition must be filed before this amendment of 1913 was passed, so that there was no Statute repealed by this amendment of 1913, fixing a time within which Petitions for compensation must be filed. I insist the act of 1913 was binding upon every employe who had reasonable time after an accident happened to him, even if it happened to him before April 1, 1913, to file his Petition, and that he was bound to file his Petition within a year after the accident happened to him the moment that Statute took effect, which was April 1, 1913.

It might be unjust to say that a man injured more than a year before the act took effect should be governed by it, but certainly if a man has time after the accident happens to file his petition

within a year just as soon as the act became a law he was bound to do so.

This Statute of 1913, so far as this Petition in this case is prospective and not retrospective the language of the act is clear. "All claims." *In cases of personal injuries,* all claims for compensation on account thereof shall be forever barred unless within one year after the accident petition shall be filed. This claimant had a year within three weeks to take advantage of this law, certainly the language of the Statute applies to him.

The language of the Statute must control and if the intent of the language of the Legislature as gathered therefrom was clearly to make the new Statute applicable to existing causes of action, effect must be given accordingly unless such a construction would render the Statute unconstitutional.

Am. and Eng. Enc. of L., Vol. 19, page 176.

In this case the Statute does not expressly provide that it shall not affect existing causes of action, and the right of the Legislature to pass a statute fixing the limitation period is of course undoubted.

Am. and Eng. Enc. of L. Vol. 19, page 168, peal or alteration, power of state to alter.

> "Where no limitation existed when the cause of action accrued the new Statute will of course control, and will apply to such a cause of action, but the limitation will not begin to run in the absence of provision to the contrary, until the enactment of the Statute."

American and English Enc. of Law, Second Edition, Vol. 19, page 177, D.

I cite also:

Hyman vs. Baque, 83 Ill. 256;
Gridley vs. Barnes, 193 Ill., 211;
State vs. Clark, 7 Ind., 468;

Webster vs. American Bible Society, 50 Ohio St., 1;
De Cordova vs. Galveston, 4 Texas, 470;
Chotean vs. Harvey, 36 Fed., 541;
Greeley vs. Cascade County, 22 Mont. 580;
Van Campe vs. Chicago, 140 Ill., 361;
Schifferstein vs. Allison, 123 Ill., 662.

In the present case the man was injured as he alleges March 11, 1913. He had all of one year within which to file his Petition for compensation. Is not that a reasonable time within which he could have come into court to ask for compensation and a settlement of dispute. I insist it was.

In the case of *Terry vs. Anderson,* 95 U. S. Reports, 5 Otto, 628. The Court says:

> "The court has often decided that Statute of limitations affecting existing rights are not unconstitutional provided a reasonable time is given for the commencement of the action before the bar takes effect. It is difficult to see why if the Legislature may prescribe a limitation where none existed before it may not change one already established.
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> "The parties to a contract have no more vested interest in a particular limitation which has been fixed than they have in an unrestricted right to use. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced."

In all such cases the question is one of reasonableness we have therefore only to consider whether the time allowed in this statute is, under all the circumstances, reasonable, of that the legislature is primarily the judge and we cannot overrule the decision of that department of the government unless a palpable error has been committed.

Hawkins vs. Burnly, 5 Peters, 451;
Jackson vs. Lampshire, 3 Peters, 280;
Sohn vs. Waterson, 17 Wallace, 596;
Christmas vs. Russell, 5 Wallace, 290;
Sturgis vs. Crowningshield, 4 Wheaton, 122;
Wilson vs. Iseminger, Reports, 185 U. S. Supreme Court.

The Court says on page 63:

"The Court has often decided that Statute of Limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes effect."

In *Korn vs. Browne,* 64 Penna. St., 57, the judge says:

"The 7th section did not go into effect for three years, and gave ample opportunity to all owners of ground rents to make claims and demands for the same, so as to prevent the bar of the statute."

This prospective commencement makes the retrospective bar not only reasonable but strictly constitutional.

Biddle vs. Hooven, Penn. State Rep., 120, page 225.

The statute there referred to, the Court says, made the retrospective bar not only reasonable but constitutional.

In other words the act gave ample time to protect all existing rights.

Smith vs. Morrison, 22 Pickering, 430.

In the case of

Ross vs. Duval, 13 Peters, 64 U. S. Sup. Ct. Rep.

The Court says:

> "It is a sound principle that where the Statute of Limitations prescribes the time within which suit shall be brought or an act done and a part of the time has elapsed effect may be given to the act and the time yet to run being a reasonable part of the whole time will be considered the limitation in the mind of the legislature in such cases."

In this above case the words of the statute were "that of execution and other final process issued on judgments and decrees rendered"—not on judgments hereafter rendered. The law provides for executions not for judgment.

The language of the act governs.

The Court must have regard to all the words used by Congress in a statute and give effect to them as far as possible, and the introduction of a new word into a statute indicates an intent to cure a defect in and suppress an evil not covered by former law.

The intent of Congress is to be gathered from the words of the act according to their ordinary acceptance, and the act should be construed in the light of circumstances existing at time it was passed. Personal hardships cannot be considered nor can the Court hold the statute to meet its views of justice in a particular case.

Louisville & Nashville R. R. Co. vs. Mottley, 219 U. S. Reports, 467, see page 479.

See also

New York Central R. R. Co. vs. United States, 212 U. S. Reports, 505.

Where words were used to construe meaning—the word *shall* was used to mean happening of an event whether before or after act was passed.

It is well settled that a Statute shortening the period of limitation is within the constitutional power of the State, provided a reasonable time is allowed for bringing an action after the passage of the Statute and before the bar takes effect.

Turner vs. New York, 168 U. S. Reports, 90.

The legislature has the constitutional power to provide that existing causes of action shall be barred unless within a shorter period than that prescribed when they arose to enforce suits brought, if a reasonable time is given by the new law before the bar takes effect.

Koshkonong vs. Burton, 104 U. S. Reports, 668-675;
Saranac Lake & Timber Co. vs. Comptroller, 177 U. S. Reports, 318.

This supplement of April 1st, 1913, made a new contract between these parties. The petitioner had notice of the change, knew that if he had any claim for compensation he must make it within one year. He had been injured when this contract was changed. The law was printed far and wide. It was part of the law of the land. The petitioner knew of it, or was bound to know of it.

By the law if he was not satisfied all the petitioner need do was to give notice within sixty days after the change had been made that he would not be bound by the contract, and he could have brought this action under either Federal or State law, if he had any cause of action against the defendant for his injury.

Petitioner continued in the employment of defendant under the law as changed. He continued to take wages and thereby ratified the new contract.

He says defendant knew he was injured, if that is so defendant had a right to presume that the injury was of such a nature that petitioner was not suffering in any way from it, and was cured and well, and that he was satisfied with the wages he was recovering and that he did not demand any different money, that he was not in need of compensation and would not demand any.

Defendant had and has rights under the compensation act, as well as petitioner, and when he was paying the petitioner his daily wages for one year and two years after be says he was injured defendant had a right to presume that petitioner had no other claim against him except the ordinary wages which he was receiving.

Defendant had the right to give notice that it would not be satisfied with the contract as changed by this new Statute, if it so desired, and to discharge petitioner. But it did neither but accepted the contract as changed, and kept petitioner in employ.

Defendant to day has not broken the contract Petitioner has no cause of action against defendant. He seeks by this proceeding to make defendant pay compensation. He claims it is due him under the contract. By the Statute of New Jersey, he cannot recover for injury to his person against a railroad company for injury to his person unless he brings it within two years. It is too late for him to bring that action. Now he seeks to put into the contract something which is not there, something which the letter and spirit of the contract will not admit to be put into the contract.

I cite

Brethaner vs. Jacobson, 75 Atlantic Reporter, 560, especially 562;

Lapsley Admr. vs. Public Service Corporation, 46 Vroom; 75 N. J. Law, 1266.

The case of *Franchino vs. C. M. Grey Mfg. Co.*, 37 New Jersey Law Journal, 205, is cited.

But I insist that this case is not authority in favor of petitioner, but rather an authority against him.

In the opinion of the Court in that case the judge cites a number of familiar cases, and they are all cases where the party secured a right under an existing Statute, which Statute was afterwards repealed.

In case of the town of *Belvidere vs. The Warren Railroad Company,* 5 Vroom, 193. A Statute authorizing a tax was repealed before collection, after an assessment, the Court held the tax good and collectible, because when assessed there was a Statute. The right of the town to collect the tax could not be taken away by a repeal of the Statute under which the tax had been assessed.

In the case of the city of *Elizabeth vs. Hill,* 10 Vroom, 556, a man paid a tax assessment, regularly levied, which was afterwards declared void, the man brought suit and recovered judgment for amount of his assessment, when a law was passed that all actions to recover void assessment should be barred until a new assessment was made, the Court held the man's judgment good because it had been recovered before the new Statute had been passed.

In the case of *Williamson vs. New Jersey Southern R. R. Co.,* 2 Stewart, page 311, a case cited by Judge Roseberry. The judgment was recovered by the Lackawanna Coal and Iron Co. It was held to be valid and good as a lien against a chattel mortgage which had not been executed and recorded as the Statute required. A new Statute was passed repealing the statutory requirements which had not been complied with by the persons making, executing and recording the chattel mortgage, but the Court held the judgment good

against the chattel mortgage because it had been recovered before the repealing Statute was passed and in force.

These authorities do not sustain the conclusion of the judge for in each case there was a Statute which was repealed, and the party whose right was sustained had secured that right under the Statute while it existed.

Here this Statute of 1913, referred exactly and directly to the petitioner in this case for he had a claim for personal injury, pending when the law was passed and he had a whole year less three weeks within which to take advantage of the Statute to enforce his claim. "In cases of personal injuries, all claims" is the language of the Statute, certainly this language refers to existing claims which can be enforced.

Federal Employers' Liability Act.

The defendant in this case was a common carrier, an interstate commerce railroad and was engaged in interstate commerce, and the petitioner was employed by respondent while it was engaged in interstate commerce, and at the time he was injured, as he alleges, was engaged in the work which was necessary for the operation of an interstate railroad.

The evidence shows that the only remedy which petitioner has is under the Federal Employers' Liability Law.

It appears by testimony of Newbaker, the petitioner, he was at work on March 11th, the day he was hurt, with gang of men whom he named afterwards, repairing the track. On way home he was injured. He was at work repairing the track down below Columbia and as they were going home a coal train was coming from the east going west and to get out of the way of that train they took the hand car off of the

track and in doing so handle struck him and injured him (page 16 of book, line 22).

The train came from Edgewater near Jersey City and was going west into Pennsylvania (page 23, line 28 to line 10 on page 24).

William Gouger (page 51) swears the railroad runs form Stroudsburg, Pennsylvania, to Jersey City.

Mr. Shafer, the superintendent, swears (p. 67, ll. 22-40) the New York, Susquehanna & Western is a railroad extending from Jersey City New Jersey to Stroudsburg, Pa., where it connects with Wilkes-Barre and Eastern to Wilkes-Barre. intestate must have been employed was bound to prove to show that petitioner had his only remedy under the Federal Liability Act.

In the case of *North Carolina R. R. Co. vs. Zachary,* 232 U. S. Reports, 248.

The Court says, Justice Pitney, on page 256: In order to bring the case within the terms of the Federal act, printed in full in 223 U. S., page 6, defendant must have been at the time of the occurrence in question engaged as a common carrier in interstate commerce, and plaintiffs inttrstate must have been employed by said carrier in such commerce. If those facts appeared, the Federal act governed to the exclusion of Statutes of the State. Second Employers' Liability cases *Moudon v. New York, etc., Railroad Co.,* 223 U. S. 155; *St. Louis & San Francisco Railway v. Seal,* 229 U. S., 156-158.

The testimony of the superintendent, and of Mr. Gouger was that the defendant, The New York, Susquehanna and Western Railroad Company, is an interstate railroad, that its trains are principally interstate trains which run from the New York line in New Jersey to Stroudsburg, Pennsylvania and to Wilkesbarre, Pennsylvania, and that trains over this road run to Middletown, New

York, over the Midland Railroad. That the very train which this petitioner swears was coming on the day he was injured, and to get out of the way of which the hand car was removed from the track, was an interstate train.

The petitioner by his own testimony was engaged in the work of repairing and strengthening the track, so that interstate trains could run over it in safety. He was on his way home from that work when he was injured as he says, so I insist his only remedy for any injury he may have suffered is under Federal Employers' Liability Act.

I also refer to *Pederson v. Del. Lack. and Western R. R. Co.*, 229 U. S. Reports, 146.

Second Employers' Liability cases, 223 U. S. Reports 1 and 51.

Employe engaged in interstate commerce on his way to work.

Lamphere v. Oregon, etc., 196 Fed. Rep., 336.

Employe engaged in interstate commerce on his way home from work.

San Pedeo, etc., R. R. Co. v. Davide, 210 Fed. Rep., 870;
Cicalese v. L. V. R. R. Co., 75 N. J. Law 897;
Barlow v. L. V. R. R. Co., N. Y. Ct. of Appeals Reps., Feb., 1915.

That a section hand is engaged in interstate commerce.

Southern Railway v. Howerton, 101, North E., 121;
Colasurdo v. Central R. R. of N. J., 180, Fed. Rep., 832, affirmed 192, Fed. Rep., 832;
D. L. & W. R. R. Co. v. Wilkinson, 94 Atlantic Reporter.

COMPENSATION.

The Judge in his opinion finds it to be proved that the Petitioner could be made entirely well by an operation. An operation not dangerous nor even serious.

But he also finds that the Petitioner is not bound to submit to an operation but I insist that the testimony was such that it was the duty of the court to make order that the man submit to an operation before he made any order for the amount of compensation he should be paid or else limit the amount of compensation to the time when he would have recovered had he submitted to such an operation.

In the case of *John Vishney v. The Empire Steel & Iron Company,* the Judge of the Warren County Court made an order that Vishney should go to the hospital for treatment, fixing the time, and would make no order for compensation until he did go, so in this case, especially in view of the testimony in this case, that the Petitioner could be cured by a simple operation not even dangerous.

While under the case of *McNally v. Hudson & M. R. Co.,* 95 Atl., 122, it may be said that the Court coud not force him to have the operation performed yet I insist the court should have limited him to compensation for temporary disability for such period as he would reasonably be so temporarily disabled by reason of such operation, to permit an allowance of compensation for permanment injury under such circumstances, opens the way to fraud on the part of unscrupulous employes and circumvents the spirit of the act.

The Judge allowed compensation for permanent injury.

The testimony proves that the injury was not permanent.

I think the case of *Feldman v. Brauenstein,* 93

Atlantic 679 is an authority in favor of my insistment and that it was the duty of the court to make an order that the Petitioner submit to an operation, or in making the order for compensation limit the amount of the compensation to what he would have been entitled to had he submitted to such an operation.

Dr. Albertson swears that a man with rupture if it is treated properly can work just as well as he did before the rupture. It may be Petitioner was ruptured long before the time he fixes and when the company could find no more work for him makes the attempt to get compensation.

Certainly every circumstance which forwards his attempt in this case is suspicious and the weight of the testimony is against him.

The court will remember that the Superintendent swore that the rules of the company requires that a man when he is injured on company's work shall give a Release of damage for his injury to the company, before they can or will hire him again, and that no such Release had been given or thought of in this case.

The fact that the Petitioner waits for over two years to complain of his injury in this case, works for the company for nearly all the time after he is injured, works for the company until after his claim for compensation is barred by the Statute of limitation for a whole year before it is barred and for a whole year afterwards before he complains of his injury and before he makes any attempt to get compensation, I insist is conclusive against him, and the Petition should be dismissed.

The writ of certiorari was dismissed by the judgment of the Supreme court entered June 5th, 1916.

The notice of appeal was taken June 10th, 1916, see page 1 of the book.

The grounds of appeal will be found on page 100, of the book.

The opinion of the Supreme court will be found on page 97 of book.

The court in their per curriam opinion hold that the evidence justifies the finding of the Judge of the court of Common Pleas in finding that the Petitioner was injured at the time and manner alleged and proved by him and that he was injured while in the employment of the defendant and that the accident arose out of and in due course of the employment of Petitioner and that the defendant had timely notice of the injury.

By the first seven grounds of appeal in this cause we ask for a review of the facts. I have called the attention of the court to the facts of the case in my brief, and I ask the court to carefully examine the facts as presented by the state of the case for I insist if such an examination is made the court will be convinced that the Petitioner in this cause was not injured in the manner he alleges, but that he received his injury in some other way.

That the man had a rupture cannot be denied, but that he was hurt in the way he swears and attempts to prove I insist is not so, and a careful review of the evidence will convince this court that the judgment of the Judge of the court of Common Pleas was wrong and that the judgment of the Supreme Court should be reversed.

I refer to letter printed on page 90, Ex. P-1 and Ex. P-2.

These letters contradict Petitioners evidence. They show he was trying to make a case against this company by their opinion in this case.

The court have decided that,—

> "The provision of P. L. 1913, p. 302, that claims for personal injury shall be barred unless agreed upon or sought to be adjudged thereunder within one year does not apply to an accidental injury received before its pas-

sage. *Bermingham vs. Lehigh, etc. Co.*, 95 Atlantic 242, and that is this case."

Under the 8th ground of appeal I insist that the Statute passed in 1913, Pamphlet laws of 1913, page 311, bars recovery by Petitioner in this case.

The case cited by the court was decided June 14th, 1915.

The court in that case say,—

"The limitation of a year does not as we view it apply to cases like the present. The accident occurred before the act of 1913, containing the limitation was passed. That act will not normally be treated as retroactive, cases have been before us where the year had expired before the act was passed and if it applied to this case it should have applied to those but injustice of so construing the act was obvious."

In the case cited by the Supreme Court, in the above case the accident happened to the Petitioner for compensation more than one year before the act of limitation was passed.

The case of *Baur vs. Common Pleas of Essex*, 88 New Jersey Law 129, case was decided on October 14th, 1915, after the Bermingham case.

In the Baur case you will find the Petitioner was injured on the 24th day of November, 1911. He filed his Petition for compensation April, 25th, 1914.

This man was injured one year and five months before the act of limitation was passed. When he was injured under his contract with his employer there was no limit to the time within which he could file a Petition for compensation, so that of course a law which took effect a year and five months after his injury would not affect his right of recovery under his contract, for the contract was amended by the law which was passed so long after he was injured that it would affect his right

under the contract under which he was employed when he was injured.

Here this Petitioner was injured on March 11, 1913, the act of the Legislature fixing a limit within which a Petition for compensation must be presented to the court was passed April 1, 1913, within three weeks from the time the man was injured. This act which amended his contract was published, Petitioner in this case had notice of it, and Petitioner had all of a year after the act of 1913 was passed except 16 days within which to enforce his rights under this contract.

Normally the court says in the Bermingham case the act will not be treated as retroactive.

But this act is not retroactive as to this party, a law is prospective because if retroactive it deprives a man of his rights. This law does not deprive this Petitioner of a single right. He had notice of this law, and it was his duty to file his Petition within one year from the time he was injured. He had a reasonable time after he knew the law was passed to enforce his right, and he was bound to file his Petition within the terms of the law if he desired to recover for his injuries.

I call attention to the cases cited in my brief which hold that the Legislature may pass a Statute of limitation which shall apply to existing contracts of a reasonable time within which to bring a suit is allowed, and this is the very language of Justice Depue in the case of *Barnably vs. Bradley and Currier Company,* 31 Vroom, 60 Law, page 160.

This man is deprived of no right by this Statute, and therefore the act is not unconstitutional. It is not retroactive as to him.

In the Bauer case 88 New Jersey Law 130. Justice Kalisch cites the case of *Williamson vs. New Jersey Southern Ry.,* 29 New Jersey Equity, page

311. That case is in my brief. There the Lackawanna Iron & Coal Company had a judgment, execution and levy on certain grounds covered by a chattel mortgage which had not been executed as the law required. A Statute was passed repealing the Statutory requirements and attempting to make chattel mortgage good, of course that Statute could not affect the rights of the party who had the judgment, for the law was passed after the rights of the Plaintiff were vested. Here this Petitioner was not affected by this Statute, for all he had to do was to proceed to the enforcement of his rights. He had a reasonable time to do so, and therefore the Statute did not apply to him for it deprived him of no right whatever.

The Defendant in this case has rights under the act of 1911, as well as that of 1913, which this court is bound to regard and protect. This Petitioner did not file any Petition for two years after his injury. He was in employ of the company defendant all of that time, and defendant had the right to expect that Petitioner had no claim whatever, because he had failed to enforce the same under the law.

The language of this act which bars claims under the act after one year applies to the case before the court. The Petitioner will not be deprived of any right of compensation if the act is construed to apply to him, for the language of the act is that *all claims for compensation* on account of injuries under the act shall be forever barred unless within one year after such accident the parties shall have filed a Petition for adjudication of compensation.

This act applies to this Petitioner because he had a whole year after the act of limitation was passed to enforce his right. The act deprives him of no right of no privilege.

In the case of *Frelinghuysen vs. Morristown,* 48

Vroom, 77 New Jersey Law, page 496, Chancellor Pitney says,

> "ordinarily legislative bodies concern themselves for the regulation of affairs for the future, and not for the disturbance of *rights already acquired and acted upon.*"

The right of action was acquired by this Petitioner under the act of 1911, but the act of 1913 put upon him the duty of acting upon his right if he wanted to secure it, for the act under its provisions gave him a whole year within which to enforce his right, that was a reasonable time.

The defendant has its rights under this act. The corporation with whom Petitioner made his contract has the right under the terms of the act to conclude Petitioner has abandoned his claim for injury if he does not act upon his right within the reasonable time provided by the Statute.

This court has never passed upon this Statute. I ask for a careful consideration of the matter. I feel that a fair construction of this Statute entitles to Appellant to a reversal of the judgment of the Supreme Court.

Respectfully submitted,

GEORGE M. SHIPMAN,

Attorney of and of Counsel with Appellant.

SUPPLEMENTAL BRIEF OF COLLINS AND CORBIN UPON THE APPLICATION OF THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908 TO THE CASE SUB JUDICE.

The opinion of the Supreme Court treats very briefly with the question of the applicability of the Federal Act in these words:

> "We think the court below (the Common Pleas of Warren County) had jurisdiction to entertain this proceeding brought under our Workmen's Compensation Act. *Winfield vs. Erie R. Co.*, 96 Atl., 394" (p. 98, l. 12 et seq.).

Thus in effect the Supreme Court did not pass upon the question of whether the petitioner was engaged in interstate commerce, but contented itself in pointing out that whether he was or not, the Judge of the Common Pleas had jurisdiction. We therefore beg to refer to the decision of the Common Pleas Court in treating this question.

POINT I.

The Judge of the Court of Common Pleas erred as a matter of law in holding that "the petitioner was not engaged in Interstate Commerce at the time of the injury nor did the injury occur through the respondent engaged in Interstate Commerce."

The finding of the Judge of the Court of Common Pleas that "the petitioner was not engaged in interstate commerce at the time of the injury, nor did the injury occur through the respondent engaged in interstate commerce" (page 88, l. 5 et seq.) rests upon the facts "that at time the respondent was engaged in interstate com-

merce, also in intrastate commerce; that the hand-car which was taken from the track was used for local service upon the track of the respondent, wholly within the State of New Jersey, and in intrastate commerce only" (page 87, l. 40 et seq.).

The Court also found as a fact that "petitioner was ruptured on the lower part of the left side of the abdomen about the eleventh day of March, 1913, by accidentally being struck by the handle of respondent's hand car, while at work for respondent, on a section of its road lying between Hainesburg and Columbia, Warren County, N. J., in assisting to set off a hand car about five o'clock in the afternoon to allow the passage of a mixed train of cars of the respondent, on the respondent's railroad, running from Jersey City, N. J., to Stroudsburg, Pa., and there connecting with the Wilkesbarre and Pennsylvania Railroad. The respondent was at the time engaged in interstate commerce, also in intrastate commerce. The injury to petitioner arose out of and in the course of his employment by respondent at the close of a day's work as track repairer upon a section of the railroad between Hainesburg and Columbia, N. J., about the eleventh day of March, 1913" (page 78, l. 18 et seq.), and that "the hand car in question plied between Hainesburg and Columbia in Warren County, N. J., a distance of four or five miles over the tracks of the railroad of the respondent in carrying the track repairers of that section of the railroad to and from their work" (page 83, l. 32 et seq.). It is further respectfully submitted that there is not in the entire case a single scintilla of evidence tending to show that at the time of the alleged injury the defendant company was engaging in commerce both interstate and intrastate, for the testimony of every witness produced upon this point shows beyond all question that the train by which the hand car was alleged to have been struck was a coal train

running between Edgewater, N. J., and Pennsylvania (see testimony of Charles J. Newbaker, the petitioner, page 23, l. 36 et seq.); A. B. Schaeffer, (page 71, l. 36; C. D. Dutcher, page 72, l. 16 et seq.), and even though the train in question was engaging in a commerce of mixed character—and we submit under the evidence in this case it was not—still it would be held to be engaged in interstate traffic.

See

Pederson vs. D. L. & W. R. R. Co., 229 U. S., 146;
Michigan C. R. Co. vs. Vreeland, 227 U. S., 59;
Fernetto vs. Pere Marquette R. Co., 175 Mich., 653;
U. S. vs. Colorado & N. W. Ry. Co., 85 C. C. A., 27, 157 Fed., 342.

All section men and track laborers while working on or repairing any part of the track or switches used by a common carrier by railroad, indiscriminately, for both interstate and intrastate commerce are employed in interstate commerce within the meaning of the Federal Act.

Southern Ry. Co. vs. Howerton, 101 N. E., 121, 105 N. E., 1025;
Hardwick vs. Wabash R. Co., 168 S. W., 328;
San Pedro L. A. & S. L. R. Co. vs. Davide, 127 C. C. A., 454, 210 Fed., 870;
Jones vs. Chesapeake & W. Ry. Co., 149 Ky., 556;
Colasurdo vs. C. R. R. Co. of N. J., 180 Fed., 832, 192 Fed., 901;
Zikos vs. Oregon W. R. & N. Co., 179 Fed., 893;
Louisville & N. R. Co. vs. Kemp, 140 Ga., 57;

Truesdell vs. Chesapeake & W. Ry. Co.,
159 Ky., 718.

The Federal Statute not only includes employes actually engaged in interstate commerce but it also covers such employes on the railroad premises while going to and from their work, for in such cases they are only doing that which is essential to enable them to discharge their duties as employes engaged in interstate commerce. The case of *San Pedro, L. A. & S. L. R. Co. vs. Davide,* 210 Fed., 870, is almost identical with the case at bar. The U. S. Circuit Court of Appeals speaking by Gilbert, J. (page 871):

> "The principal question in this case is whether the defendant-in-error was engaged in interstate commerce. The work that he had been doing on the day on which he was injured was undoubtedly work done in interstate commerce. He had been engaged in ballasting the main track of a railroad which carried freight and passengers between different states. (*Pederson vs. Del. Lack. & West. R. R.,* 229 U. S., 146, 33 Sup. Ct., 648, 57 L. Ed., 1125.) And although at the time when he was injured he was returning to camp at the conclusion of his day's labor he was doing so at the direction of his employer. He got upon the hand car upon which he rode under the order of the section foreman, to take it to a certain designated place on the line of the road. He was not only engaged in returning from his place of work to the camp maintained by the company, but he was engaged in taking the hand car to a point where it was to be removed from the track so as to leave the road open to the passage of trains. He had not been discharged from his day's work. He was still acting under the orders of the section foreman. * * *
>
> "No reason is perceived why a section hand, engaged in propelling a hand car furnished by the railroad company, to convey him to his camp, as the concluding part of his daily service of ballasting a track used in

traffic between states, is not, while so doing, engaged in interstate commerce.

"We find no error. Judgment is affirmed."

This case, it is most respectfully submitted, is controlling upon the case at bar.

We also call attention to several recent cases in the U. S. Supreme Court as follows:

In *Seaboard Air Line v. Koennecki,* 239 U. S., 352-355, Justice Holmes, speaking for the U. S. Supreme Court, said:

"In this case, as deceased was engaged in distributing cars from an interstate train, and clearing the track for another interstate train, he was engaged in interstate commerce.

"The possibility that a local train might, before arrival at final destination, where the accident occurred, have dropped all interstate cars, and taken up only local cars, is too remote to warrant withdrawal of a case under the Employers' Liability Act from the jury."

In *Chicago, Rock Island Ry. vs. Wright,* 239 U. S., 548, it was said:

"As the injuries resulting in the intestate's death were sustained while the company was engaged, and while he was employed by it, in interstate commerce, the company's responsibility was governed by the Employers' Liability Act of Congress, c. 149, 35 Stat., 65; c. 143, 36 Stat., 291, and as that *act is exclusive and supersedes State laws upon the subject,* it was error to submit the case to the jury, as if the State act were controlling. *Wabash R. R. vs. Hayes,* 234 U. S., 86, 89, and cases cited."

In *Shanks vs. D. L. & W. R. R. Co.,* 239 U. S., 556-558, the Court said:

"Having in mind the nature and usual course of the business to which the act relates, and the evident purpose of Congress in adopting the act, we think it speaks of inter-

state commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co. vs. United States*, 196 U. S., 375, 398), and that the true test of employment in such commerce in the sense intended is, was the employe at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it."

To the same effect see *Chicago Burlington & Quincy R. R. Co. vs. Harrington*, 241 U. S., 177.

See also

Grow vs. Oregon Short Line R. Co., 138 Pac., 398;
Louisville & N. R. Co. vs. Kemp, 140 Ga., 657;
Sanders vs. C. & W. C. Ry. Co., 81 S. E., 283;
North Carolina Ry. Co. vs. Zachary, 232 U. S., 248;
St. Louis & S. W. Ry. Co. vs. Brothers, 165 S. W., 488;
Lamphere vs. Oregon R. & N. Co., 196 Fed., 336.

The last above cited case is particularly enlightening as the court therein reviews many of the cases; the court therein said (page 338):

> "The decedent when he was killed was not only on his way to work for his employer, but he wasproceeding under the direct and peremptory command of the railroad company to do a designated specific act in the service of the company, to wit, to move a train then engaged in interstate commerce. He was on the premises of the railroad company and in the discharge of his duty when he met his death and the train which struck him and caused his death was engaged in interstate commerce and belonged to the same railroad company."

Held deceased engaged in interstate commerce and Federal Employers' Liability Act applied.

It is therefore respectfully submitted that the finding of the Judge of the Court of Common Pleas was an error as a matter of law and that the finding should have been that at the time of the injury the defendant was a common carrier by railroad engaging in interstate commerce and the petitioner was injured while employed by it as such carrier in such commerce.

The only remaining question for consideration is whether, in a case to which the Federal statute applies, but where the accident happens *without negligence,* the Federal statute is exclusive of any recovery under a State Compensation Act.

POINT II.

The Federal Statute is exclusive of any proceedings under the State Compensation Law even though the accident happened without negligence.

This is the exact point that was considered by this Court in the case of *Winfield vs. Erie R. R. Co.,* 88 N. J. Law, 619. The decision in that case was adverse to our contention. We presume it will be regarded as binding in the present case, although we respectfully submit that it is directly the contrary to other well considered decisions on the same subject.

See

Smith vs. Industrial Accident Commission, 147 Pac., 600;
Staley vs. Illinois Central R. Co., 109 N. E., 342;
Jarvis v. Daggett, 151 Pac., 648;
Schuede vs. Zenith S. S. Co., 216 Fed., 566.

It should be stated in this connection that the judgment of this Court in the Winfield case is now under review by the United States Su-

preme Court, the argument thereon being had on March 1, 1916.

Up to the present time (November 11, 1916) no decision has been announced by the United States Supreme Court on this subject, and we therefore respectfully suggest that the decision in the present case be withheld until a decision is announced in the Winfield case, as of course the ruling of the United tSates Supreme Court on that question (the matter being one of the construction of a Federal statute) would be controlling.

GEORGE S. HOBART,
CLEMENT K. CORBIN,
Of Counsel with Appellant, on Applicability of Federal Employers' Liability Act of 1908.

Telephone 1697 Worth THE WEIBEZAHL PRINT 25 Elm St., N. Y.

INDEX.

TESTIMONY FOR PETITIONER.

TESTIMONY FOR RESPONDENT.

Notice of Appeal.

Filed June 16, 1916.

NEW JERSEY SUPREME COURT.

THE NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, *Plaintiff in Certiorari and Respondent,* *vs.* CHARLES J. NEWBAKER, *Defendant in Certiorari and Petitioner.*	*Notice of Appeal.*

To Hon. William H. Morrow, Attorney of Defendant and Petitioner:

TAKE NOTICE that the plaintiff in *certiorari* and respondent hereby appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals of the State of New Jersey, which judgment is as follows: This cause having been argued at the February last term of this court by George M. Shipman, of counsel with the plaintiff in *certiorari,* and William H. Morrow, of counsel with the defendant in *certiorari* and upon due consideration the court having found no error in the proceedings in the Warren Common Pleas set forth in the writ of *certiorari,* and being of the opinion that the judgment of the Court of Common Pleas of the County of Warren ought to be affirmed; it is on this 5th day of June, A. D. 1916, on motion of counsel for the defendant in *certiorari* ordered that said judgment be and the same is hereby affirmed with the cost of the defendant herein to be paid by the said plaintiff and that the

record and proceedings be remitted to the said Court of Common Pleas of the County of Warren.

GEORGE M. SHIPMAN,
Attorney of Appellant.

Rule entered June 5th, 1916.
On motion of

WILLIAM H. MORROW,
Attorney of Defendant.

Dated June 7th, 1916.

WARREN COUNTY, *ss.*

George M. Shipman, of full age, being duly sworn on his oath says, he is the attorney of the New York, Susquehanna & Western Railroad Company, defendant, respondent and appellant in the above cause. That he served a copy of the annexed notice of appeal on Hon. William H. Morrow, attorney of petitioner and respondent in the above stated cause, on June 10th, 1916, by leaving a copy of said notice at the place of residence of said William H. Morrow, he being absent from town, with a person, a member of his household above the age of fourteen years, and informing her of the contents of said notice.

GEORGE M. SHIPMAN.

Sworn and subscribed to before me
this 14th day of June, 1916.

NICHOLAS HARRIS,
Master in Chancery of New Jersey.

Writ of Certiorari.

Returnable July 10, 1915.

(SEAL) The State of New Jersey to our Court of Common Pleas of the County of Warren. GREETING:

We being willing for certain reasons to be certified of a certain judgment entered in the Court of Common Pleas of the County of Warren in a certain cause, in the matter of the petition of Charles J. Newbaker, petitioner against New York, Susquehanna and Western Railroad Company, on petition for compensation under the act of the Legislature of the State of New Jersey, entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, with the several supplements and amendments thereto, approved May, 1911, March 27th, 1913, and April 1, 1913, which judgment was entered June 12th, 1915, together with the opinion of the court filed upon said petition and the answer filed thereto, and the judgment entered thereon, and all papers touching and concerning the same, as is said, in order that the same may be determined before us, and not elsewhere, do command you, that you send under your hand and seal to the justices of the Supreme Court of Judicature to be held in the City of Trenton and State of New Jersey, on the tenth day of July, 1915, all and singular the said judgment with all things touching and concerning the same, together with this writ, that we may further cause to be done thereupon, what of right and according to law ought to be done.

Witness, William S. Gummere, Esquire, Chief Justice of our Supreme Court aforesaid, the twenty-sec-

ond day of June in the year nineteen hundred and fifteen.

WM. C. GEBHARDT,
Clerk.

GEO. M. SHIPMAN,
Attorney.

Endorsed:

"I allow this writ. Let it be sealed.

THOMAS W. TRENCHARD,
J. S. C."

Return.

New Jersey Supreme Court.

THE NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, *Prosecutor,* *vs.* CHARLES J. NEWBAKER, *Defendant.*	*On Petition for Compensation, Etc.*

On writ of *certiorari,* returnable July 10, 1915.

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

To the Honorable Joseph M. Roseberry, presiding Judge of the Court of Common Pleas in and for the County of Warren.

I, G. Howell Mutchler, Clerk of the said Court of Common Pleas in and for the County of Warren, do hereby certify that the following is a true copy of the judgment, record and proceedings in this case of *The New York, Susquehanna & Western Railroad Company, Prosecutor,* vs. *The Warren County Court of Common Pleas, and Charles J. Newbaker, Defendants,* lately pending in our said Court of Common Pleas in and for our said County of Warren, under my hand and the seal of our said court.

Witness, my hand and seal of our said court, at the Town of Belvidere, in said County of Warren, this twenty-eighth day of June, in the year of our Lord, one thousand nine hundred and fifteen.

G. HOWELL MUTCHLER,
Clerk.

(SEAL)

(U. S. I. R. Stamp. 10c.)

Return.

The answer of the Court of Common Pleas of the County of Warren, within named:

The Judgment, record and proceedings whereof mention is made with all the things touching and concerning the same I do certify to the Supreme Court of Judicature of the State of New Jersey in a certain schedule to this writ annexed as within I am commanded.

Dated June 29, 1915.

J. M. ROSEBERRY,

(SEAL) *Presiding Judge of the Court of Common Pleas of the County of Warren.*

SCHEDULE.

The following is the schedule above referred to:

Petition.

WARREN COUNTY COURT OF COMMON PLEAS.

CHARLES J. NEWBAKER,
Petitioner,
vs.
NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
Respondent.

Judgment Record.

Charles J. Newbaker, the petitioner in this cause, presented to this court the following petition the same being filed in the office of the clerk of this court on the ninth day of March, A. D., 1915:

"To His Honor, Joseph M. Roseberry, Judge of the Court of Common Pleas of Warren County:

The petition of Charles J. Newbaker, of the Township of Knowlton in the County of Warren and State of New Jersey, respectfully shows:

That your petitioner resides in the Village of Columbia in said Township of Knowlton; that your petitioner, while regularly employed by the New York, Susquehanna & Western Railroad Company, a corporation of the State of New Jersey engaged in railroad operations in said township, and having its principal office in Jersey City, in the State of New Jersey, and in the course of said employment, on the eleventh day of March, in the year nineteen hundred and thirteen, between the hours of four and five o'clock in the afternoon of said day was on a hand-car of said company with other employees and running toward the Village of Columbia from near Delaware Junction along the line of said company's railroad track, and the foreman in charge of the said

hand-car, seeing an approaching coal train behind the said hand-car, directed that said hand-car be taken off the track of the said railroad, and while so doing, petitioner having hold of the handle of the said hand-car, was struck by the car and thrown down the embankment along where the said hand-car was being removed from the said track, and he was thereby greatly injured, bruised and hurt and suffered a rupture therefrom, which immediately prevented petitioner from working, and for a greater part of the time has incapacitated him from work, and he has been unable since that day to do work that requires any considerable effort on his part, and is wholly incapacitated from doing the kind of work he had before been accustomed to do in his trade as a carpenter; that he has, since receiving the said injury, been subject to considerable expenditures in money, in the whole amounting to two hundred dollars ($200.00), or thereabouts, in medical and surgical treatment and the procuring of necessary trusses and instruments to be worn by him to prevent the said injuries increasing; that at the time of sustaining the said injuries he was receiving wages at the rate of about eleven dollars ($11.00) a week, and since that time he has because of the said injuries been unable to earn more than on an average of six dollars ($6.00) a week; that in respect to said employment, petitioner had accepted the provisions of section two of the act of the Legislature of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911; that the said injury was not self-inflicted or due to intoxication.

That actual knowledge by the said company of the occurrence of the injury was obtained through the employees of the said company, one of whom was William Gouger, who was foreman of the body of

men under whom petitioner worked on section 28 of the railroad track, of said company, and Thomas W. Whitney, supervisor of the division of the said railroad company, which division extended from Beaver Lake in the County of Sussex to the Delaware River, along the line of Warren County; and, also Lee Hersh, who was the clerk of the said supervisor, petitioner working under the direction of the said supervisor and of the said foreman; the said Whitney having actual supervision of the work in which petitioner was engaged at the time of sustaining said injuries on and along the track of the said railroad company between the points mentioned and the said Gouger having actual charge of the same operations on and along the track between Hainesburg Junction, and a place called Howeys along the main line of the said railroad track.

Petitioner shows that it was the duty of the said Gouger and of the said Whitney to convey to the said railroad company knowledge of the injury which petitioner had sustained as aforesaid, and, as petitioner is informed and believes to be true, such information was by the said Gouger and Whitney forthwith conveyed to the said railroad company.

That as to the matters in dispute between the said company and petitioner, said company has refused to treat with petitioner; and petitioner therefore submits a claim of himself for compensation to be made to him for the injuries by him sustained as aforesaid to the said Judge of the Court of Common Pleas of said county for adjudication pursuant to the act aforesaid.

Your petitioner prays that instead of payments being made periodically they be commuted to one or more lump payments as your honor may deem just.

CHARLES J. NEWBAKER,
Petitioner.

WM. H. MORROW,
Attorney.

Petition.

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

CHARLES J. NEWBAKER, being duly sworn according to law on his oath saith that he is the petitioner above named; that the matters and things in the foregoing petition set forth are true according to the best of his knowledge and belief.

CHARLES J. NEWBAKER,
Petitioner.

Sworn and subscribed this 9th day
of March, A. D. 1915, before me.

M. C. SWARTSWELLER,
Deputy Surrogate."

Order Fixing Time and Place for Hearing.

Filed March 13, 1915.

WARREN COUNTY COURT OF COMMON PLEAS.

CHARLES J. NEWBAKER, *Petitioner,* and NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, *Respondent.*	*On Petition for Compensation.*

The court thereupon made the following order:

"Application having been made to this court in the above stated matter, on behalf of the above stated petitioner, for an order fixing a day for the hearing of the matters in controversy in said matter, it is thereupon, on this 10th day of March, A. D., 1915, ordered, that the said cause be heard on Thursday, the eighth day of April next, at ten o'clock in the forenoon, at the court house in Belvidere in said County of Warren.

On motion of

WM. H. MORROW,
Attorney of Petitioner.

Let the above rule be entered in the minutes.

J. M. ROSEBERRY,
Judge."

The said order was filed in the office of the Clerk of this Court and entered in the minutes thereof on the thirteenth day of March, A. D. 1915.

A copy of said petition and said order was filed in said office on the eighteenth day of March, A. D. 1915, with the following endorsement thereon:

"Served the within Petition and Order March 16, 1915, on the defendant, New York, Susquehanna and Western Railroad Company, a corporation, by leaving true copies thereof with George W. Curran at No. 105 Pavonia avenue, Jersey City, N. J., agent of the said defendant company.

EUGENE F. KINKEAD,
Sheriff.

By FRANK HALLIGAN, S. D. S."

Sheriff's fees, $2.78.

The following order was filed in said clerk's office and entered in said minutes on the twenty-second day of March, A. D. 1915:

"Upon good cause shown it is ordered on this twenty-second day of March, nineteen hundred and fifteen, that the defendant have ten days' time from March 23, nineteen hundred and fifteen, within which to answer the petition filed and served in the above stated cause, on motion of George M. Shipman, attorney of the defendant.

J. M. ROSEBERRY,
Judge."

Answer.

The respondent answered as follows:

"The answer of the defendant, The New York, Susquehanna & Western Railroad Company to the petition of the said petitioner in the above stated cause.

1. The defendant admits that petitioner is resident of Columbia, Township of Knowlton, County of Warren, and that this defendant is a Railroad corporation, carrying on railroad operations in the said Township of Knowlton, County of Warren and State of New Jersey.

2. Defendant denies that the said petitioner in the course of his employment by said defendant, on the eleventh day of March, in the year nineteen hundred and thirteen, between the hours of four and five o'clock in the afternoon of said day was injured in the manner stated and set forth in his said petition, and this defendant denies that the said petitioner was ever injured while in the employment of the said defendant, and denies that the said petitioner was ever incapacitated from work or was ever subject to any expenditures in money in medical and surgical treatment or that he has been unable to earn wages because of any injury he ever received while in the employment of this defendant.

Defendant admits that while in the employment of defendant petitioner had accepted the provisions of section two of the act of the Legislature of New Jersey, entitled 'An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment and regulating precedure for the determination of liability and compensation thereunder,' approved April 4th, 1911, and the several supplements thereto, but defendant denies that the petitioner was ever or is now entitled to any compensation under the terms of said act.

3. Defendant denies that it ever had actual knowledge or any knowledge of the occurrence of the injury to petitioner stated in his petition or that actual knowledge was obtained in the manner stated in said petition, by information given by William Gouger or Thomas W. Whitney or Lee Marsh, or from any other person.

4. Defendant denies that petitioner has ever made claim of any kind of defendant for injuries received by him while employed by defendant's company or that he is entitled to receive compensation in any way whatsoever for any injuries received while in the employ of the said defendant's company, for he has received none.

5. Defendant says the petitioner was and is a painter and paper hanger by trade, and that he works and has worked for the defendant company at times when he was not engaged in the work of his trade, and that the defendant was injured in the manner stated in his petition if ever injured at all, which defendant denies long before, to wit, one year, or nearly so before the time stated in his petition, and not on the day and at the time of day mentioned in his petition or in the manner as mentioned, and while engaged in the employment of the defendant, but while working at his trade.

6. The defendant says that the railroad of this defendant extends from Jersey City in the State of New Jersey, to Wilksbarre in the State of Pennsylvania, and its trains operated on said railroad are mostly interstate trains, and that it is engaged in interstate commerce in the operation of trains engaged in the business of interstate commerce, and that this petitioner at the time stated in his petition as the time when he was injured was engaged in going from one job to another in the work of work upon the track of defendant's railroad helping keep the

same in proper repair for the operation of interstate trains, and if petitioner was engaged at all on the day named in his petition and injured at all it was while he was engaged in work or going to or from work done on said railroad in its operation carrying interstate commerce and that the Federal Liability act applies, and supersedes the New Jersey Employers' Liability act, stated and referred to in the said petition and this answer and that petitioner cannot recover any compensation under the act referred to in his petition the Employers' Liability Act of New Jersey, and defendant pleads this in bar of petitioner's recovery. And that this court have no jurisdiction to try the said matter.

7. Defendant denies that petitioner is entitled to any compensation under the act as stated in his petition, because he says that he alleges in his petition that the accident by which he was injured happened on the eleventh day of March, nineteen hundred and thirteen, and said petition was not filed in this court, until March tenth, nineteen hundred and fifteen, two years after the time of said alleged accident, and that by the terms of an act of the Legislature of New Jersey, entitled 'An act to amend an act' an act entitled 'An act prescribing the liability of an employer to make compensation for injuries received in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of the liability and compensation thereunder,' approved April fourth, one thousand nine hundred and eleven, which supplement was approved April first, 1913, it was provided, 'In case of personal injuries or death all claims for compensation on account thereof shall be forever barred, unless within one year after the accident the parties shall have agreed upon compensation payable under this act, or unless within one year after the accident one of the parties shall have filed petition for adjudica-

tion of compensation as provided herein,' and that in this case no agreement was made by the parties upon compensation payable under the said act, and no petition was filed by either of the parties in this case for adjudication of compensation as provided therein, and the petitioner having failed to agree with defendant within one year upon compensation payable under said act, and having failed to file a petition for adjudication of compensation within one year after the accident, is forever barred from any claim for compensation under said act, and defendant insists that by the terms of said act petitioner is forever barred from any recovery under his petition filed in this cause, and that he the said petitioner is forever barred from recovering any compensation whatever in this court in this cause, and defendant prays that it may be hence dismissed with costs, and defendant will ever pray, etc.

GEO. M. SHIPMAN,
Attorney of Defendant,
The New York, Susquehanna &
Western Railroad Co."

The said answer was filed in the said clerk's office on the first day of April, A. D. 1915.

Hearing was had in this cause on the eighth day of April, A. D. 1915.

Opening.

WARREN COUNTY COURT OF COMMON PLEAS

CHARLES J. NEWBAKER, *Petitioner,* and NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, *Respondent.*	*On Petition for Compensation.*

Before Hon. J. M. Roseberry, Judge Warren County Court of Common Pleas. Transcript of shorthand report of testimony taken in the above cause, on the 8th day of April, 1915.

HARRY RUNYON,
Stenographer,
Belvidere, N. J.

CHARLES J. NEWBAKER, sworn for petitioner.

Direct examination by Mr. Morrow.

Q Mr. Newbaker, where do you live?
A At Columbia, Warren County, New Jersey.
Q How long have you lived there?
A For some time.
Q How old are you?
A Thirty-five years old.
Q Where were you at work in the month of March, 1913?
A I was working for the New York, Susquehanna and Western Railroad Company.
Q How long had you worked for them?
A I think it was in the fall of 1912, in December, 1912, that I began working for them.

Q When did you begin to work for them after the first of January, 1913?

A That was in February, I think.

Q Where did you work?

A On the Columbia Section.

Q How long did you work for them on the Columbia Section?

A I worked for them up until the first part of March, 1913.

Q Did you have any injury?

A Yes, sir.

Q When?

A March 11th.

Q What year?

A In the year 1913.

Q What wages were you receiving?

A I was getting fifteen cents per hour.

Q How many hours per day did you work?

A Nine hours.

Q State what happened to you?

A We had been down below Columbia Junction making some repairs to the track and on our way back there was a coal train coming right east of the cut up there by Warrington, and Mr. Gouger says we'll set off the hand car; he sent one of the men out with the flag (you know that is the rule to send a man out with a flag)—

Q Well, never mind what the rule about that is?

A Well, we quit to set the hand car off on the right hand side going toward Warrington and in getting it off I was thrown down the bank.

Q What threw you?

A The hand car handles struck me and threw me.

Q What became of you?

A I got up and the pain took me right in here (indicating with his hand and finger pointing to his side) under my groin on the left side. Mr. Gouger says, "Charley are you hurt?" and I said "yes." Then

we came in and went to the tool house and I took my dinner pail and went over to the house.

Q What time was it when this happened?

A Between four and five o'clock when we came in.

Q When you went to the house what took place?

A I complained of pain and went over to Dr. Beck's office.

Q What did he do?

A He said what was the trouble and I described what had happened and how I felt and he said "Charley—

Mr. Shipman. I object to what the doctor said to Mr. Newbaker.

Q What did you describe to the doctor as to your pains, as to the location of them?

A Why, I described them as being right in the groin.

Q Did you ever have any such trouble as that before?

A Never before in my life.

Q What was the general condition of your health up to that time?

A I was always well.

Q What did you do then?

A The doctor ordered me a truss.

Q How soon after that did you get the truss?

A I think it was on the 15th of March.

Q What have you done with reference to wearing the truss since that time?

A I have worn it ever since, I don't dare take it off.

Q What does happen when you take it off?

A The rupture comes out.

Q How often did you have to go to Dr. Beck?

A I had to go every week or so to see him.

Q For how long after you were hurt?

A Well, for about two months after I was hurt.

Q How much did you suffer from this rupture?

A I suffered a whole lot.

Q How does it affect you with reference to your work on the track?

A I cannot work on the track.

Q Why not?

A Because I cannot lift.

Q What kind of work had you done for the company before the injury?

A I had been doing general section work, lifting ties, putting in new track, carrying rails, etc.

Q What kind of rails did you carry?

A Steel rails.

Q What had you done with steel rails about this time?

A I had lifted steel rails about this time.

Q Had you done any work with a shovel?

A Yes.

Q What kind of work?

A I had shovelled ashes.

Q What about carrying ties?

A I had carried ties.

Q What other kind of work had you done before that time?

A Well, I went on a train for a time, some time before that to learn to fire.

Q How long ago?

A I think that was in 1911.

Q Did you fire after that?

A No.

Q Now what has been you ability to work since the happening of this accident?

A I could not do heavy work, because I could not lift, but I could do light work like painting.

Q What painting did you do?

A I painted the signs for them, all the signs.

Q Did you do any work on the track after the accident?

A Yes, until April I walked the track and lighted the lamps and then Mr. Gouger—

Q Who was Mr. Gouger?
A He was foreman.
Q Under whose direction did you work?
A Mr. Gouger's, and he worked under Mr. Whitney.
Q Who was he?
A He was supervisor of Division No. 2.
Q What division was that?
A The division on which I worked.
Q What part of the division did you work on.
A I worked all over that division for Mr. Whitney and also he sent me down to Division No. 3 and I painted for him down there.
Q That was after the accident?
A Yes.
Q How about before the accident?
A I did general track work.
Q Where?
A On the Columbia Section.
Q Did you do any work on the track outside of New Jersey?
A No, sir.
Q You say Mr. Whitney was supervisor, was there anybody else in charge?
A Yes, Mr. Schaffer, he was superintendent.
Q Where was Mr. Gouger when you were hurt?
A He was right with us.
Q Did you see Mr. Whitney after this accident?
A I did not see him after this accident.
Q Did you tell Mr. Gouger how much you were hurt?
A Yes, sir. Oh, yes, I did see Mr. Whitney after the accident too, I had forgotten that.
Q Did you talk with him?
A Yes.
Q What did you say to him?
A I told him I was hurt taking off the hand car and he said Mr. Gouger had told him.

Q What other doctor have you seen besides Dr. Beck?

A Why Dr. Ott.

Q How often?

A Once.

Q How did you come to get him?

A I could not get Dr. Beck and Mr. Ott came over.

Q Did you have a talk with Mr. Schaffer about this?

A No, I wrote him a letter and had a reply.

Q Where is the letter?

A You have it.

Q Is this the letter (showing witness letter) you got from him?

A Yes, sir.

Mr. Morrow. I will offer the letter from Mr. Schaffer in evidence.

Admitted on part of petitioner, and marked Exhibit 1 and 2.

By the Court.

Q What work did you say you did after you were injured?

A They put me to painting after I was injured.

Q What wages did you receive?

A Seventeen cents per hour.

Q As compared with before you were hurt, how much were you able to earn after you were injured?

A That is pretty hard to tell exactly, but after I was hurt this work that I done did not amount to more than five or six dollars a week some weeks, and others it would be more, but I do not think it averaged over six or seven dollars a week.

Q Were you able to earn more than that?

A I do not think I was.

Q What wages did you receive for the work you did on the track before you were hurt?

A We got fifteen cents an hour on the track and worked nine hours a day.

Q How many days a week did you work?

A Six days a week.

Q What kind of work had you followed before you went to work for the company?

A I had worked at the carpenter trade.

Q What wages did you receive for that?

A I got $2.50 a day for carpenter work.

Q Can you do work of that nature now like you used to?

A No, sir, not like I used to.

Cross examination by Mr. Shipman.

Q When did you begin to work for the railroad company?

A I worked for them in 1912.

Q Where did you begin to work for them?

A With the section gang.

Q Where I asked you?

A Filling in the siding at Hainsburg Junction.

Q How much did you earn at that time?

A Fifteen cents an hour.

Q From the time you began to work up to this accident?

A Yes, sir.

Q Did you work every day?

A No, sir, not every day.

Q Well, six days a week?

A Yes, sir.

Q When did you begin to work on the track?

A It was in February, 1913.

Q Then after that you got pay for six days a week.

A Yes, sir.

Q What was your business before you quit to work on the track?

A Painting and carpenter work.

Q You quit that to go to work on the track?

A I did not have any work of that kind to do just at that time.

Q That was in 1912?

A Yes, sir.

Q Did you keep on with this work at all?

A I intended to go on with my trade when spring opened up.

Q Did you paint and paper anywhere at all?

A No.

Q Did you not get a fall off of a ladder in 1912?

A No, sir.

Q Did you not have a rupture in 1912?

A No, sir, I was sound as a dollar.

Q You never injured yourself before this March, 1913?

A No, sir.

Q You were perfectly sound, eh?

A Yes, sir.

Q Where were you the day before you were injured?

A Let me see the day before was a Monday, I just forget.

Q How any hours did you work?

A I do not know.

Q Did you work the night and the day before?

A I did not, I don't think so.

Q Did you go to work on Tuesday morning?

A Yes, sir.

Q How many hours did you work that day?

A I think nine hours.

Q Who kept the time?

A Mr. Gouger.

Q Suppose I should tell you that you did not work three hours that day?

A Well, that day was cloudy and rainy.

Q Did you not work three hours in the morning?

A Yes, sir.

Q What time did you come in from work that day?

A I think we worked nine hours that day.
Q What time in the morning did you go to work?
A Seven o'clock in the morning.
Q Quitting time was at half-past four o'clock?
A Yes, sir.
Q What time was it when you say you were injured?
A Between four and five o'clock in the afternoon.
Q You were going in from work?
A Yes, sir, we were.
Q What time had you gone down there?
A Around noon or right after dinner, I do not remember exactly.
Q Do you know whether the hand car was out that day or not?
A Yes, sir, it was.
Q You never had a rupture before that day you say?
A No, sir, I did not.
Q Sure you hadn't strained yourself and received one?
A No, I did not have any.
Q Which way was this train going?
A It was going west.
Q What kind of a train was it?
A It was a coal train.
Q At what point were you on the track when it passed?
A We was just east of Columbia Rock cut.
Q How far from the kiln?
A Just a little way from the dam.
Q Can you tell me the number of the engine?
A No, sir, I could not.
Q Where had this train come from?
A I suppose it had come from Edgewater.
Q Where is that?
A Out of Jersey City.

Q Do those trains run through in Pennsylvania?
A Yes, sir.
Q Did you come to work next day?
A I do not think I did the next day.
Q The next day after that?
Q I think so. I think Mr. Gouger came after me.
Q He came for you?
A Yes, sir. He said I could do light work, I could walk the track and light the lamps.
Q When did he tell you that?
A On this Thursday when I went out.
Q Did he tell you that he had told Mr. Whitney?
A Yes, sir.
Q Mr. Gouger told you then that you should do light work?
A Yes, sir.
Q Did he know that you had anything the matter with you?
A Why, I told him when I was injured.
Q Did you speak to Mr. Gouger afterwards about your injury?
A Yes, sir.
Q When?
A That was last week.
Q Why did you speak to him then?
A I wanted to find out something.
Q What did you say to him?
A I asked him if he knew when I was hurt.
Q What did he tell you?
A He said he could not tell.
Q Where did you find out what train this was that passed you at that time?
A Why, I was right there by the hand car.
Q Did you see anything of a freight train that day?
A Why, I do not know what every train carries.
Q Well, you said this was a coal train that passed you, did you not?

A Yes, sir.

Q Well, now, how can you tell then whether it was a coal train or a freight train that passed you?

A I do not know exactly.

Q Did you know what time the train went along there?

A No, sir.

Q Haven't you got one of the schedules of the trains and their times?

A No, sir.

Q Did you not get a schedule out of the station at Blairstown?

A No, sir.

Q You are sure it was between four and five o'clock in the afternoon?

A Yes, somewhere about that time.

Q You were never hurt before that time?

A No, sir.

Q You never got your rupture before that time?

A No, sir, not until this time.

Q Why did you give this paper to Mr. Gouger?

A Why, I made a mistake in that paper, that should be—

Q Never mind that, this is your paper (showing witness paper), is it not?

A Yes, sir, but there is a mistake there.

Q Did you ask Mr. Gouger to sign that paper?

A Yes, sir, he said if I would make out a paper and send to him, I would get my pay.

Q You gave that to Mr. Gouger?

A Yes, sir.

Q Isn't that the first that he knew that you were injured?

A No, sir, he knew it the same day I was hurt.

Q You say that Mr. Gouger told Mr. Whitney about it?

A Yes, sir.

Q Did you write that letter to Mr. Gouger?

A Yes, sir.

Q Mr. Whitney told you that Mr. Gouger never said a word to him about it, did he not?

A No, but Mr. Gouger said that Whitney was trying to get me in light work.

Q So Mr. Gouger never did make any reply to Whitney for you, did he?

A He told me that he had. He said Whitney and the clerk were both drunk and that—

Q After or before you gave him this paper?

A After I sent that paper to him.

Mr. Shipman. This letter is dated the 25th day of January, 1915, and I want to offer it in evidence later on.

Court adjourned until 1.30 P. M.

By consent Mr. Newbaker was allowed to stand aside and Dr. Beck was sworn for petitioner. Mr. Newbaker's testimony to be taken up later on.

DR. CHARLES E. BECK, sworn for petitioner.

Direct examination by Mr. Morrow.

Q Where do you practice, doctor?

A At Portland.

Q How long have you practiced?

A Since 1894.

Q Do you know Charles Newbaker?

A Yes, sir.

Q Did he visit you at any time for an injury?

A Yes, sir.

Q What did you do?

A I examined him and found him ruptured.

Q What did you then do?

A I got a truss for him.

Q What time was it when he came to you, at what time during the year?

A Well, that I do not exactly remember.

Q How soon did you get the truss for him?

A I ordered it right away?

Q Have you any recollection as to when that was?

A No, but I have a note of the time when I paid for the truss.

Q When did you pay for it?

A I paid for it on the 15th of March, 1913 (reading from note).

Q How often after that did you see Mr. Newbaker?

A Once or twice.

Q What was his condition each time as to this rupture?

A The main thing he complained of was the rupture.

Q Did he complain of anything else?

A Of some pain, yes.

Q Where?

A From this rupture and some pain in his head.

Q What is the general cause of a rupture?

A It is generally due to a strain or lifting or a wrench of some kind.

Q What is the effect of a rupture on the system?

A It prevents a person from doing heavy work unless he can support it.

Q Where are pains likely to manifest themselves as the effect of a rupture?

A Right at the rupture and through the bowels.

Q How about pains in the head from a rupture?

A Well, when the bowels are not in good working order they are likely to cause pains in the head.

Q What has been the progress of this trouble with Mr. Newbaker?

A Well, the rupture is there yet as I saw it on Monday or Tuesday of this week. When I saw it, it was out or down as they call it.

Q You mean Monday or Tuesday of this week?

A Yes, of this week.

Q What has been its condition all the time from the middle of March up to this time?

Q It would come out when he did any work, to the best of my knowledge.

Q Did you ever find it in that condition?

A Yes, sir.

Q Are the probabilities of a recovery from a rupture, that is a complete recovery, likely?

A They are doubtful.

Cross examination by Mr. Shipman.

Q When did you see this man for the first time?

A When?

Q Yes.

Q I haven't got any record of the dates except as I have already stated, judging from the time I purchased the truss.

Q So you do not know exactly when you saw him?

A Only as I judge from the purchase of the truss.

Q Did you get this truss for him?

A Yes, I think so.

Q Well, you cannot tell exactly whether you bought this one for him, can you?

A No, but I bought one for him.

Q And you are sure you saw him before that?

A Yes, I am sure I saw him before I bought the truss.

Q Are you sure you saw him before the 15th day of March?

A Yes, sir, I think so.

Q How long before did you see him?

A Three or four days.

Q Are you sure of that?

A Yes, sir.

Q Are you sure that the truss you bought on the 15 day of March was not for some one else, you cannot say positively, can you?

A Well, not exactly, but I think so, I could tell if I had my book here.

Q Where is your book?

A Home in my safe.

Q So you do not know when that date was exactly?

A No, but I think it was just a few days before the 15th of March, because I charged something against him a few days before.

Q Did he pay you when you examined him?

A No, sir.

Q You haven't got any charge of that there with you, have you?

A No, sir.

Q You do not know when he was ruptured, do you?

A I could not swear to any exact dates, no.

Q When you examined him what did you prescribe?

A I told him not to do any heavy work.

Q How did you know what kind of a truss to get?

A Why we usually get a truss that will hold the rupture back.

Q What kind of a truss did you get?

A I got an elastic truss.

Q An elastic truss, you say?

A Yes, that in my judgment, was the one thing I could do.

Q How did you know the size to get?

A When do you mean?

Q At the time he was there.

A He showed the rupture to me.

Q Did you measure him?

A Yes, sir, I did.

Q How much of a rupture was this?

A Well, a part of the lower bowel had come out and made a lump.

Q When do they make a lump?

A When they come out.

Q What is a truss for.

A It is supposed to hold the rupture back, but they do not all do it.

Q When they are in, it does not require much to hold them back, does it?

A That depends on the pressure.

Q Did he visit you afterwards?

A Yes, sir.

Q And the rupture was out?

A Yes, sir, several times.

Q Your truss did not hold it in then?

A I could not say about that whether it was the fault of the truss.

Q Does the truss not have to fit exactly?

A The idea is to make a pressure over the rupture sufficient to hold it back.

Q If a truss is properly fitted over a rupture it holds it back, does it not?

A Yes, if there is enough pressure.

Q Well, it is possible to get enough pressure, is it not?

A Yes, sir.

Q It is not much of an operation to cut down a rupture and sew it up again, is it?

A Yes, it is.

Q Very simple operation, is it not?

A No, sir, it is not a simple operation.

Q It does not occasion much pain and sickness, does it?

A Well, that depends. It is not a simple operation at all.

Q Well, they do perform this operation and sew them up, do they not?

A Yes, sometimes.

Q Very often, do they not?

A Yes, but it is not a simple operation, it is a major operation.

Re-direct examination by Mr. Morrow.

Q Where did you examine him?

A Right there where the rupture is.

Q Did you strip him?
A Yes, sir.
Q Did you discover the rupture then?
A Yes, sir.
Q You got the best truss for him that you could, did you?
A Yes, the one that in my judgment would answer the purpose.
Q How soon after you examined him did you get the truss?
A About two or three days.
Q When did you pay for the truss?
A On the 15th of March, 1913, I paid for the truss.
Q Do you remember getting a truss for any other person about this time?
A No, I do not think so.
Q Did this man ever come to you for any other trouble?
A Yes, he said he got this pain in the stomach and then it would go to his head.
Q Did he come any time before this rupture?
A I do not remember that he did before that time.
Q Did all of this trouble grow out of the rupture?
A It is possible.

Re-cross examination by Mr. Shipman.

Q You had doctored in this man's family before this time?
A Yes, sir.
Q He owed you a bill, did he not.

Mr. Morrow. I object to that question.

Q You doctored him before and he had not paid you, is that not so?
A I doctored him before, yes.

Mr. Morrow. I object to this questioning.

Q If a truss is properly fitted and the rupture is kept back there is no other trouble about it, is there?
A No, sir.

By the Court.

Q Suppose a man who is ruptured would take hold of a stone weighing about 100 pounds and have a truss on, how would that effect the system when he lifted?

A It probably would not as the trouble comes from the rupture crowding out.

Re-cross examination by Mr. Shipman.

Q If you put a truss on a man it will leave some mark on his body, will it not?

A It all depends on the truss.

Q Does it not leave a mark on a person?

A Not necessarily.

Q Does it not where the pad is?

A It makes a little indenture there, yes.

Q It does not make a mark then?

A Well, it makes a kind of callous there.

Re-direct examination by Mr. Morrow.

Q Did you notice any mark on this man when you examined him the other day?

A I did not look for it.

By consent Dr. Albertson was sworn for respondent at this time.

DR. WILLIAM C. ALBERTSON, sworn on the part of the respondent.

Direct examination by Mr. Shipman.

Q Doctor, you practice in Belvidere, do you not?

A I do.

Q Did you ever see this man, Newbaker?

A Yes, sir.

Q Did you examine him?

A Yes, sir.

Q When?

A On Monday or Tuesday; Tuesday, I think.

Q What did you find?

A I found a small rupture on his left side.
Q What kind of a thing is that?
A Well, it is a kind of—that allows the bowels to come out under the skin.
Q Did he have a truss on?
A Yes, sir.
Q Was it a serious injury?
A It is not a serious injury.
Q How is a rupture properly treated?
A Either by a truss or by an operation.
Q What do you mean by an operation?
A By an operation I mean a cutting down and—the skin and then sewing it together again.
Q How serious is that?
A It is under proper conditions and with proper treatment not a serious operation.
Q How does it leave the patient?
A Perfectly well.
Q How about the treatment with a truss?
A You fit a truss to the patient so as to hold in the rupture.
Q If that is done what is his condition?
A He is able to work as well as before if it is a proper fitting truss.
Q If the truss is properly fitted and holds the rupture back, the man can work as well as before?
A Yes, sir.
Q Well, what about this man?
A I see no reason why he should not.
Q Now about a mark on the body, will a truss leave a mark?
A I could see where a truss had been.
Q Could you tell when the rupture was had?
A No, sir.

Cross examination by Mr. Morrow.

Q A man's ability to lift as much after a rupture as before, depends upon the truss remaining in its

proper position at the time he does the lifting, does it not?

A Yes, sir.

Q And if by any means the truss gets out of its proper position the lifting would be diminished, would it not?

A Yes, sir.

Q Well does it ever get out of its place?

A It should not.

Q Suppose something occurred by which it did, then the man could not do as heavy work as before, could he?

A No, sir.

Q Do you mean to say that you could always put on a truss that would always stay in its place?

A If it is properly fitted it should.

Q And nothing can possibly happen by which it will get out of its place?

A I would not say that, no.

Q Suppose a truss does not fit properly?

A There may be trouble.

Q After you have fitted a truss to a person does he not have to avoid lifting heavy objects?

A I always told them to go right on with their work.

Q Did they ever come back?

A Yes, but that was because it did not fit.

Q Does that happen very often?

A No, not very often.

Q Do they wear the truss at night?

A No, not as a rule.

Q Then the putting on in the morning must be subject to the skill of the man who wears it?

A Yes.

Q If he does not have that he does not make a proper adjustment, does he?

A He may not.

Q Do you mean to say that in your opinion such an operation is not serious?

A I would not consider it serious.

Q Is not a rupture serious?

A Well, if it should get strangulated it may be.

Q What is that?

A Why, when it crowds out and swells up so it won't go back.

Q What produces that condition?

A By the rupture coming down.

Q By its not being properly supported?

A Yes.

Q If a truss is properly adjusted is that likely to happen?

A It is possible.

Q So that a patient in taking his truss off at night and putting it on again in the morning and adjusting it, runs that risk?

A Yes, I suppose so.

Q Then every man who wears one is subject to that risk, is he not? That is that the rupture will become strangulated?

A There is some risk in that, yes.

Q Strangulation of a rupture is serious, is it not?

A Yes, sir.

Re-direct examination by Mr. Shipman.

Q When did you see him last?

A This morning.

Q How was it then?

A It was all right, it was being held all right.

Q From his condition what about his working?

A As the truss was, I see no reason why he should not work.

Re-cross examination by Mr. Morrow.

Q It is as serious to reduce a small rupture as it is a large one, is it not?

A Yes, sir.

By the Court.

Q Where was this rupture?

A It is in the groin.

Re-cross examination by Mr. Morrow.

Q The condition this man was in was not a normal condition, was it?

A No, sir.

A You say he was in this condition this morning when you examined him, that is that he was ruptured?

A Yes.

By consent Dr. Howard H. Ott, was sworn for the respondent at this time.

DR. HOWARD H. OTT, sworn for the respondent.

Direct examination by Mr. Shipman.

Q You know this petitioner, Mr. Newbaker?

A Yes, sir.

Q Did you ever treat him?

A Yes, sir.

Q What for?

A I treated him for a rupture.

Q When?

A I do not know exactly.

Q How many years ago?

A Possibly two years ago.

Q Where did he come to?

A He came to my office.

Q What time of the year was it?

A It was sometime during the winter or fall.

Q What year was it?

A I think in the year 1913.

Q During the winter of 1913 then?

A Yes.

Q What was his condition?

A At that time I examined him and found a rupture there on his left side.

Q Could you tell whether it was a new one or not?
A I could not tell whether it was a new one or an old one.
Q Did he have a truss on?
A No.
Q Any mark of a truss on him?
A No.
Q What did you do?
A I told him to get a truss.
Q What did he come to you for?
A He complained of pain in the abdomen and if I remember rightly of some pain in the head.
Q What time of the day was it?
A I do not know, but I remember seeing him and this rupture was then there. I advised him to get a truss and I think I gave him an old one that I had around the office until he could get one of his own—
Q You say there was no mark of a truss on him then?
A Not as I remember.
Q This was in the fall of 1913?
A I do not know whether it was the fall or winter.
Q Did you see him more than once?
A It seems to me so.
Q Where?
A I think in my office.
Q In your office, eh?
A I think so, but I do not remember exactly.
Q How many time did you see him?
A Two or three times, I think.
Q How many time did you examine him?
A I remember the one time that I examined him.
Q That was the time about the truss you spoke of?
A Yes.
Q That was the winter of 1913?
A I think so.
Q Newbaker said that you saw him on the 24th of December, 1913?

A That may be right, I do not remember.
Q At that time you furnished him with a truss?
A Yes.
Q Was this a new truss?
A I think it had been used a few times.
Q You put it on him?
A Yes.
Q Did he come back after that?
A I cannot say, I think I saw him on the street, anyway I remember talking with him about the truss and rupture.

Cross examination by Mr. Morrow.

Q Are you the surgeon and physician for this railroad company?
A No, sir, not exactly. I do some work for it.
Q In cases of this kind?
A When they have accidents, I have assisted a number of times.
Q Where did you see Mr. Newbaker and this rupture?
A I was under the impression it was in the office, but it may have been at his house, I do not know which place I saw him, but I remember seeing him.
Q You found that he had a rupture?
A Yes, and I gave him a truss.
Q Are you sure that it was not at his house?
A I would not say that it was not.
Q Was his wife present?
A I cannot remember.
Q Did she not come over to the office after you?
A It seems to me that I do remember her coming over to the office at one time for me.
Q You do remember that you went with her over to the house?
A Yes, I think I did.
Q You went over to the house and examined Mr. Newbaker and found this rupture?

A As I said before I do not remember exactly in which place it was that I examined him and found the rupture whether it was in the office or at his house.

Q And did his wife when she came over after you not tell you what the matter was with him?

A I could not say as to that.

Q Did she not tell you that he was ruptured and that Dr. Beck was away and she then asked you to come over right away?

A I do not remember that she asked me to come over right away.

Q Well, you found the rupture when you examined him?

A Yes.

Q You reduced it?

A Yes, sir.

Q You say you did not see any signs of his having had a truss on before?

A No, sir.

Q You do not mean to say that he had not?

A I do not know whether he did or not.

Q You cannot say from anything that you observed that he never had a truss on that rupture before?

A Seems to me that I asked him and he said "No," but I do not remember positively.

Q Was his wife there then?

A I do not know now whether she was or not.

Q Now, in what other place and at what times did you examine him and find a rupture?

A I was under the impression that I did so in the office.

Q Well, you would not say that was the only time, would you?

A No, and I think I saw the rupture several times.

Q How many times did you reduce it?

A I know I reduced it one time.

Q You do not remember more than once, do you?

A I would not want to say whether I did so more than once, I am not sure.

Q Do you remember that you went to the house and reduced it?

A Yes.

Q Have you any recollection that you reduced it at any other place?

A No.

Mr. Newbaker now took the stand again and was further cross examined by Mr. Shipman.

Re-cross examination by Mr. Shipman.

Q Who was with you on the car that day?

A Mr. Gouger, myself, Charley Kinney, and a couple of the Kitchen boys, I do not remember which ones.

Q Was it 4.30 in the afternoon when the accident occurred?

A Somewhere around that time, between four and five o'clock, I do not remember.

Q You were working nine hours that day?

A Yes, sir.

Q You say that you worked on that day?

A Yes, sir.

Q How about the day before?

A I do not know.

Q Did you not work eighteen hours before, the day and night before?

A I do not know exactly, I cannot say.

Q You worked all day this day?

A Yes, sir.

Q You worked nine hours, from seven o'clock?

A I think so.

Q Well, did you work nine hours that day or did you not?

A Yes.

Q Quit at 4.30?

A Yes.

Q You usually had your car in the house at 4.30, did you not?

A Sometimes 4.30, sometimes later.

Q What kind of a train was it that passed by you there on that day, did you say?

A Well it was a coal train or a freight train, it might have been a freight train, I cannot say exactly as to that.

Q Did it have two engines?

A I think so, I do not know.

Q You say that Gouger told you that he would report the accident?

A Yes, sir, he did.

Q Did he ever give you a slip to report on?

A No.

Q Did Whitney ever give you a slip?

A No.

Q You have never passed one in to the company?

A No.

Q You never had any slip given to you by any one?

A No, sir, I did not.

Q By Gouger, Whitney, or by anybody else?

A No, sir.

Q But you knew there was such a slip?

A Yes, sir.

Q Didn't Gouger ever give you a slip?

A No, he did not.

Q What are you doing now?

A I am working for the Eastern Pennsylvania Power Company.

Q How much a month do you receive?

A $50.00 a month. I work twelve hours a day.

Q Where do you work?

A Columbia, New Jersey.

Q Did you ever ask for one of these forms (showing witness a paper)?

A No, sir, it was not my place.

Q You never asked Gouger for a form?

A No, sir.

Q You never asked Whitney for a form?

A No, sir.

Q Did you not know that this was one of the rules of the company?

A I was in under the impression that it was.

Q Then why did you not ask for one of them?

A It was the foreman's place to give it to me without asking for it.

Q You never asked for one, did you?

A No, sir.

Re-direct examination by Mr. Morrow.

Q Did you know of any rule or practice by which the man injured asked for a slip or form?

A No.

Q The foreman presented the slip to the man injured so far as you knew?

A Yes, sir.

Q Did you ever see any rule on the subject?

A No.

Q All that you knew about it was that the practice was for the foreman to give the man injured a slip?

A Yes.

Q You said that Mr. Whitney said something to you about this?

A Yes, sir, he said that Mr. Gouger had told him and that he would take the matter up with Mr. Schaffer and see that I had work which I could do.

Q Why were you taken off the track and put at light work?

A Because I got ruptured.

Q Was anything said about your doing other work?

A Yes, sir, and I worked seven months painting.

Q That work ended when?
A In December, 1914.
Q You said you were now working for the Eastern Pennsylvania Power Company?
A Yes.
Q How many hours a day do you work?
A Twelve hours per day.
Q How many days a month?
A That is according to the number of days in a month.
Q What time do you work?
A Night time.
Q How long have you worked there?
A Since April 1st.
Q What work do you do there?
A I am simply a watchman. Well, I start up the machinery when they run nights.
Q How does this work affect your rupture?
A It does not effect my rupture at all.
Q Have you tried to do heavy work?
A Yes, sir.
Q What was the result?
A My rupture comes down and gives me pain.
Q State whether the truss had to be refitted more than once by Dr. Beck?
A Yes, it did.
Q Why was that done?
A Because I could not do it and fix it right.
Q How often do you take it off?
A I never take it off.
Q Do you succeed always in keeping it in the right place?
A No, I do not.
Q What do you do then?
A I go to the doctor.
Q You are married?
A Yes, sir.
Q Did your wife see you this night? I mean when you received your rupture?

A Yes, sir.

Q How soon did she see the rupture itself?

A Two or three days after that.

Q Did you have the truss then?

A Yes, sir.

Q How soon after the rupture did you get the truss?

A Three or four days. I got the truss on the 15th of March, 1913.

Q Did you pay Dr. Beck for it?

A Yes, sir.

Q Where was Dr. Ott to see you?

A At the house.

Q When?

A December 24, 1913.

Q Did you have Dr. Beck put it on you?

A Yes, I had it on me that night.

Q What was the matter?

A I got a heavy cold and in coughing it come down on me and Dr. Oott came over and took my truss loose and put the rupture back and kept the truss off.

Q Was your wife there?

A Yes.

Q Did Dr. Ott ever fit a truss on you?

A Why that was one time when I broke mine and he loaned me one until I got my truss fixed.

Q When was that?

A On December 24th, 1913.

By the Court.

Q When did you see Mr. Whitney?

A Shortly after I was hurt.

Q How soon?

A I do not think a week, just a few days.

Q You told him how you were hurt?

A Yes, sir.

Re-direct examination by Mr. Morrow.

Q You told him how you were hurt?

A He said Mr. Gouger had told him that I claimed that I ruptured myself taking a hand car off on that day and he asked me if it was so and I said yes, and I got the rupture right here to show for it.

Q Was it after that that he agreed to put you on light work?

A Yes.

Re-cross examination by Mr. Shipman.

Q Whitney never sent any statement to the company so far as you know?

A Not so far as I know.

Q You never got any blank from the company about it?

A No, I never did.

Q You never gave any to the company?

A I said he never asked me for any. He said you speak to me and I speak to you and say nothing about it.

Q You never gave any release to the company about this?

A No, sir.

Q Where were you in the summer of 1914?

A I was around home.

Q What were you doing?

A I had nothing to do.

Q When did you do this painting on the road?

A The 5th of October, 1914.

Q Did you not paint before that on the road?

A I think I did do a little work for Mr. Whitney in the middle of April.

Q Whereabouts was this work done?

A In Blairstown depot.

Q Did you work any on the track in 1914?

A I worked, I think in January a little and in June and July.

Q Then you did work on the track?

A I flagged but done no work on the track.

Q This afternoon when you were hurt, you were gauging track, were you not?

A I helped do some of it.

Q So that you worked in July and did some work in August, 1914?

A I do not remember exactly.

Q You did do some work, did you not?

A Yes, I flagged.

A In April, May, June and July what did you do?

A I do not know whether I worked or not.

Q Did you work any in March?

A A few days, I think.

Q So you worked for a few days on the track in March, 1914?

A Yes, during the blizzard, shoveling snow.

Q Did you work any in February that year?

A I do not remember, perhaps I did.

Q What work did you do in February?

A I do not know.

Q Worked with the track gang, did you not?

A I do not think so.

Q Did you work any in January, 1914?

A I think I did a little.

Q Got in five hours a day, did you not?

A Yes.

Q In February you got full time for a few days.

A I don't know.

Q In April and May you did not do anything?

A I do not remember. I think I was around home.

Re-direct examination by Mr. Morrow.

Q When you were shoveling snow what effect did that have on your rupture?

A Well, not so much as we didn't have to work very hard.

Q You did not?
A No, sir.
Q Have you done any hard work since?
A No, sir.

Re-cross examination by Mr. Shipman.

Q You did carry bags of—since then did you not?
A No, I wheeled them.
Q You lifted them, did you not?
A Not until I got them in the car.

MRS. CHARLES NEWBAKER, sworn for the petitioner.

Direct examination by Mr. Morrow.

Q You are the wife of Charles Newbaker?
A Yes, sir.
Q How long have you been married?
A Thirteen years.
Q Where do you live?
A Columbia.
Q What has been the condition of your husband's health up to March, 1913?
A It was good.
Q Did he ever have any rupture or trouble of that nature?
A No, sir.
Q Nothing of that nature at all?
A No, sir.
Q I suppose you slept with him?
A Yes, sir.
Q Did he wear a truss?
A No, sir.
Q Do you remember the time he was ruptured?
A I do.
Q What was his condition?
A He complained of pain in his side.
Q You remember that night?
A Yes, sir.

Q When was it?
A I think March 11, 1913.
Q Where did he go?
A He went over to Dr. Beck.
Q How soon after that did the truss come?
A In a very few days.
Q Did you see it on him?
A Yes, sir.
Q How soon after it came?
A As soon as it come he put it on and has worn it ever since.
Q How about its getting out of place?
A It has gotten out of place once or twice that I know of?
Q What was the result?
A He complained of pain.
Q Did he ever go to Dr. Beck about the truss when it would get out of place?
A Yes, he went to him several times.
Q What did he work at the next spring?
A He went to painting on the road.
Q Do you remember Dr. Ott's coming to see him?
A Yes, I do.
Q How did he happen to come?
A I went for him.
Q How did you come to go instead of Mr. Newbaker himself?
A Because he could not walk.
Q Were you there when the doctor came?
A Yes, sir.
Q Where was your husband's truss when the doctor got there?
A He had it on.
Q Did they take it off?
A Yes, sir.
Q What was done with it?
A He laid it up.

Q Did the doctor tell him to lie still and leave it off?

A Yes, sir.

Q How soon did it get on again?

A He put it on after a time.

Q When did he go to Dr. Beck to adjust the truss?

A As soon as he was able to walk there.

Q What has been the effect of this rupture on your husband's health?

A He cannot do the work he used to.

Q How much has he worked since this injury?

A He has not worked very much.

Q When he is home what is he doing?

A Not much of anything.

Q Is he ever in the bed?

A Well when he feels like lying down, he does. He lies down quite often when he is around home.

Q Why does he do this?

A Because he does not feel well.

Q Does he complain of his rupture?

A He complains more or less all the time.

Q What is his appearance?

A He does not look as if he feels—

Mr. Shipman. I object to this sort of testimony.

Q How many children have you?

A Four.

Q Was Dr. Ott there on more than one occasion?

A I do not think he was.

Q Have you ever seen your husband trying to spade garden?

A He does not spade very much.

Q What effect does it have on his rupture when he does?

A It hurts him.

Mr. Shipman. I object to that, now, how does she know whether it hurts him or not?

Q How about his working before the accident?
A He always worked right along before that.
Q How old is he?
A Well, 34 or 35, I think.

Cross examination by Mr. Shipman.

Q You have seen him spade, haven't you?
A Yes, when it is necessary.
Q Well, he didn't spade much when he was working on the road either, did he?
A He did what he could.
Q When he works by the day, he isn't home very much, is he?
A Not during the day, no.
Q He didn't do any more work around home before he was hurt than he has since, did he?
A Well, he is less strong now.
Q You saw him dig in the ground and plant seeds last summer, did you not?
A No, sir, I planted them myself. He dug some, but not much.
Q He did dig in the ground a little then?
A Yes, what he could.
Q Nearly every day?
A No, not every day.
Q Whenever necessary?
A We did it together. He helped some.
Q So he did work the ground some then?
A We did it together.

EDWARD A. WILDRICK, sworn for the petitioner.

Direct examination by Mr. Morrow.

Q You were in the employ of the N. Y., S. & W. in March, 1913?
A Yes, sir.
Q What was your position there?
A I was foreman of the gang at Columbia in under Mr. Gouger.

Q You were assistant in under Mr. Gouger?
A Yes, sir.
Q What was Mr. Gouger?
A He was foreman.
Q He had charge of the work there?
A Yes.
Q Did you have a conversation with him about Mr. Newbaker's having been hurt?

Mr. Shipman. I object, this man was not there when this accident is supposed to have occurred—

Witness recalled by Mr. Morrow.

PETITIONER RESTS.

MR. WILLIAM GOUGER, sworn for the respondent.

Direct examination by Mr. Shipman.

Q What is your business?
A Section foreman.
Q Where?
A At Columbia, New Jersey. I am now at Beaver Lake.
Q On what railroad?
A The New York, Susquehanna and Western.
Q Where does that road run from?
A Why from Stroudsburg to Jersey City.
Q Do you know Charles Newbaker?
A Yes, sir.
Q How long have you known him?
A Why, I knew him when I was at Columbia.
Q He was at work for the company on the 11th day of March, 1913?
A He worked three hours.
Q How much the day before?
A Eighteen hours. He worked nine hours the day before and nine hours the night before watching the Columbia cut.

Q How many hours was a day's work?
A Nine hours.
Q What time did you begin work?
A At 6.30 o'clock in the morning.
Q What time did you quit?
A At four o'clock.
Q That was the case on the 11th of March, 1913?
A Yes, sir.
Q So he worked eighteen hours the day and night before?
A Yes, sir.
Q And on this day?
A Three hours.
Q Where did he work?
A Him and a couple of men worked above Columbia spiking in track.
Q Where above Columbia? West or east?
A West of Columbia.
Q That was in the morning or afternoon?
A In the morning.
Q He only worked three hours?
A Yes, sir.
Q He says that in the afternoon you were down at Delaware Junction with the car?
A The hand car was not out that day.
Q What was done that day?
A We unloaded ashes for a while and in the afternoon we took a switch point to Delaware Junction.
Q Was he at work in the afternoon between four and five o'clock with the hand car?
A No, sir.
Q And was it on your way back from there that an accident occurred to him?
A No, sir.
Q And did you meet a train?
A No, sir.
Q Do you remember any such occurrence as that at all?

A I think that was along in the summer.

Q At this time?

A No, sir.

Q He says there was a coal train went along there that afternoon?

A I do not know anything about a coal train.

Q What kind of a car did you have that day, if any?

A We had a truck, or push car.

Q What did you do?

A We went to Delaware Junction with this switch point.

Q He says that he went along with you, is that correct?

A No, sir.

Q Can you tell who was along that day?

A Yes, sir.

Q Who?

A Lee Hirsh was along, Charles Kinney, Bert Kitchen and Art Kitchen was along.

Q You and they pushed the car?

A Yes, sir.

Q What did you take down on the car?

A A switch point.

Q What did you bring back?

A Nothing, we came back with the car empty.

Q And did Mr. Newbaker receive an injury that afternoon, and did you ask him if he was hurt?

A No, sir.

Q Did you know that he was injured that afternoon?

A No, sir, I did not.

Q Did he tell you that he was injured that afternoon?

A I think it was on the 27th of March, if I remember, that I heard him say that his truss made him sore.

Q Did you hear about his being ruptured after that?

A Not until last December.

Q Did you get these letters from him (showing witness letters)?

A Yes, sir.

Q Did you ever say anything to Mr. Whitney about his being ruptured?

A Not until in December.

Q How did you come to speak to him about it?

A Mr. Newbaker asked me to fill out the papers for him?

Q What did you say?

A I said not unless Mr. Whitney said so.

Q Did you know that he was injured?

A No, sir.

Q Did you ever tell Mr. Newbaker that you would tell Mr. Whitney anything about it?

A No, sir.

Q What time did you get over there on this afternoon with the car?

A About four o'clock.

Q Where did you put the car?

A West of the Columbia tool house.

Q What did you put in there?

A Nothing.

Cross examination by Mr. Morrow.

Q Is there a record kept of the men working?

A Yes, sir.

Q Is there a record kept of the days the hand car is out on the track?

A No, sir.

Q Do you know Grover C. Lindaberry?

A Yes, sir.

Q Did you tell him that there was a record kept of the hand car, and it showed that the hand car was not out that day?

A No, sir.

Q Did you say the books were kept to show this hand car was not out?

A No, sir.

Q When did you first hear that Mr. Newbaker claimed to have ruptured himself? That he had done so in getting a hand car off the track?

A I think it was last December.

Q He told you?

A He did.

Q Do you remember a conversation with Mr. Wildrick shortly after this injury and he asked you why Newbaker was walking the track and you said because he had been ruptured setting the hand car off and you was ordered to give him light work?

A No, sir, I do not.

Q Have you seen these reports that mark the men's time, lately?

A I seen them only a week or so ago Sunday night.

Q Where did you see them?

A At Blairstown.

Q Who showed them to you?

A Mr. Knapp.

Q Who is he?

A He is the claim agent.

Q Where does he live?

A I do not know.

Q In Blairstown?

A No.

Q Did you get word to meet him there?

A Well, I got a message that he would be up at Beaver Lake on Monday morning, and he come to Blairstown on Sunday night and sent for me.

Q He had these records with him?

A Yes, sir.

Q For what purpose?

A I do not know.

Q Did you look at them?

A Yes.

Q Did you look at the one for March 11, 1913?
A Yes, sir.
Q Did you know then that Mr. Newbaker had commenced suit against the railroad company?
A Yes.
Q And that he claimed that he was injured on the 11th of March, 1913?
A Yes, sir.
Q Did you read the records that night?
A Yes.
Q What did you read them for?
A I read the ones that I had made out.
Q What did you do that for?
A I wanted to see them.
Q What did you read from?
A My time sheet.
Q You read that?
A Yes, sir.
Q What did you look at that for?
A To see if the time showed, so that you could look at it.
Q What did you look for, if you knew?
A I just happened to.
Q And did you remember March 11th?
A Yes, sir.
Q How many hours did Mr. Newbaker work on the 11th of February?
A I do not know.
Q How many hours on the 12th of February?
A I don't know.
Q On the 25th of February?
A I don't know.
Q How many hours on the first of March?
A I suppose he worked nine hours.
Q You do not know?
A No.
Q Do you know how many hours he worked on the 7th of March?

A No, sir.

Q Did anything especially happen on the 11th of March to make you remember that he only worked three hours on that day?

A No, sir.

Q Do you remember what time that day he worked three hours?

A Yes, sir, in the forenoon.

Q How do you remember that?

A I remember his coming out and complaining that he did not feel good.

Q How is it that you remember that?

A I do not exactly remember why it was.

Q So that the only thing that you remember he was only working three hours on that day by, is the fact that he complained to you that he was not feeling good?

A Yes, only that he was not feeling good and that he had worked eighteen hours the day and night before.

Q Is that on this time sheet (picking up time sheet)? Who made these marks (indicating marks on sheet to witness)?

A I did.

Q Do you remember how many hours any other man worked that week?

A No, I do not.

Q Have you a time-book?

A No, sir.

Q Did you ever have one?

A Yes, it got full.

Q Where is it?

A I had it home but could not find it.

Q The book was full, was it?

A Yes, sir.

Q Whose book was it?

A The railroad company's. The company gave it to me.

Q It was their property?

A Yes, it belonged to them.

Q It was last in your possession?

A Yes, sir.

Q How long ago was the last time you had it?

A I do not know.

Q From what did you make this report on this time sheet?

A We have a time book we make it from.

Q When do you put these records in?

A We send them in on the 13th.

Q Then this time sheet (showing witness time sheet) you made up on the 13th of March?

A Well, we give them the days and then if they do not work we send in and have them taken off.

Q Do you mean you send the report in made up before the work is done?

A Yes.

Q You made this up all at one time?

A Sometimes.

Q Do you remember when you made this up (indicating)?

A About the 13th.

Q All at one time?

A Yes, sir.

Q Did you ever show that time-book to Mr. Newbaker?

A I do not remember that I did. I had it last fall, I do not know where it got to.

Q Did you ever pay him?

A I never paid him.

Q Did you not show that time-book to Mr. Newbaker some time ago in Blairstown station. Do you not remember that?

A Yes, I think I did.

Q You had it then?

A Yes.

Q Did that time book not show that he made nine hours that day?

A No, sir.

By the Court.

Q What was the regular number of hours?

A Nine hours.

Q How long had that been so?

A It began in the fall.

Q What time in the fall?

A On the 4th of November or December.

Q Before that what had it been?

A Ten hours.

Q How long did nine hours continue?

A Until about the first of April.

Q Then it was about six months at nine hours and six months at ten hours?

A Well, it varies.

Q Practically so?

A Yes, sir.

Re-cross examination by Mr. Morrow.

Q Did Mr. Newbaker come to you and tell you about this accident and did you tell him to make this statement up and you would send it in?

A No, sir.

Re-direct examination by Mr. Shipman.

Q Mr. Newbaker says that you told him that you went to see Whitney and that he and his clerk, Mr. Hirsh, were both drunk, did you say that?

A No, sir.

Q Was that true?

A No, sir.

Q Was Hirsh working with you that day?

A Yes.

Q On the push car or truck?

A Yes.

LEO HERSH, sworn for the respondent.

Direct examination by Mr. Shipman.

Q Where do you live?
A Blairstown.
Q What is your business?
A Supervisor's clerk.
Q Who is supervisor?
A Mr. Cope.
Q Who was on the 11th day of March, 1913?
A Thomas W. Whitney.
Q Do you know what work was done that day?
A On the 11th day of March?
Q Yes, sir.
A Yes.
Q Were you at Columbia?
A Yes, sir.
Q You remember Mr. Gouger working that day?
A Yes, sir.
Q Do you remember about Mr. Newbaker that day, whether he worked?
A Yes, sir.
Q Did he work that day?
A He worked three hours in the forenoon.
Q What work was done in the afternoon? Was you on the car with Gouger?
A Yes, and we went down to Delaware Junction.
Q Did you have the hand car out?
A No, sir.
Q Who else was along that afternoon?
A The rest of the section gang.
Q What time did you quit work that day?
A About four or four-thirty.
Q How many hours were they working then?
A Nine.
Q Was Newbaker in that gang?
A He worked in the gang, yes.
Q Was he in the gang that afternoon?
A No, sir.

Q Was the hand car out that afternoon?
A No, sir.
Q He says that Gouger told him that you and Whitney were drunk one afternon when he came to see Whitney about the accident, is that true?
A No, sir.

Cross examination by Mr. Morrow.

Q What was your work at that time?
A I was the supervisor's clerk. I helped out sometimes with the work on the track.
Q You say that you were working on the track on the afternoon of March 11, 1913, and that Mr. Newbaker was not working that afternoon; that he only worked three hours that day and that was in the forenoon?
A Yes, sir.
Q How do you remember all that?
A Our records show it.
Q Who makes these records up (indicating to witness the records referred to)?
A The section foreman makes them up in duplicate.
Q And you looked at that one before you came here to testify?
A Sometimes I look them over.
Q Why?
A In case a man is short of time or something of that sort.
Q Do you remember anything about looking this one for the 11th of March, 1913, up?
A Yes, I looked at it this morning.
Q When last before had you seen it?
A A week or so last Sunday.
Q You did see it then?
A Yes, sir.
Q Where?
A At Blairstown, in the office.

Q How did you happen to be there?

A Why Mr. Knapp came there and came up to the house after me.

Q What for?

A He wanted to see me.

Q What for?

A Why about Mr. Newbaker.

Q What did he want to know of you about him?

A Why because I worked on the track that day when Newbaker claimed to have been injured.

Q How do you remember that particular morning and day?

A Why, I remember that I came on train 9:61 and the engineer left me off at Columbia. That morning we unloaded ashes and then in the afternoon we went out with the push car down to Delaware Junction.

Q How do you remember just the number of hours Mr. Newbaker worked on this day?

A By these records.

Q Did you make this up (showing witness paper)?

A No, Mr. Gouger did.

Q You say this because you look at the paper and because the paper states such a thing then you swear to it, is that not a fact?

A Well, those records are supposed to be correct.

Q What time did Mr. Newbaker begin to work on that day?

A I do not know.

Q How many hours did Mr. Wildrick work on the 11th of March?

A I do not know. I think he worked seven.

Q You do not remember these things as a fact but simply as you remember it from these records?

A I count up the hours.

Q Do you remember checking up this one?

A I check them all.

Q Do you remember checking this one?
A Yes, sir.
Q Mr. Hersh, you have been convicted of falsifying the accounts of Rider, Carter and Hill a few years ago, weren't you?
Mr. Shipman. I object to that question.
Q Weren't you?
A Yes, sir.

CHARLES KINNEY, sworn for the respondent.

Direct examination by Mr. Shipman.

Q Do you work for the New York, Susquehanna and Western Railroad Company?
A Yes, sir.
Q Were you working for them two years ago?
A Yes, sir.
Q On the 11th of March two years ago?
A Yes, sir, so far as I know.
Q What were you doing on that day?
A I remember unloading ashes.
Q You remember Mr. Newbaker?
A Yes, sir.
Q Did he work in the afternoon of that day?
A I do not think so.
Q Did you go out with the car that afternoon, if so what kind of a car?
A With the push car.
Q Was Lea Hersh on the push car with you?
A Yes.
Q Where did you go with the car?
A Down to Delaware Junction.
Q What did you do with the car? How did you get it down there?
A We pushed it.
Q What time did you get back?
A I think it was about 4.30 o'clock.
Q Was Newbaker in that crowd?

A I do not remember seeing him.

Q Did you see him at all that day?

A Yes, sir.

Q How do you know it was the 11th of March?

A I do not know whether it was the 11th of March, but I know he was there only three hours.

Q How do you know that he worked three hours that day?

A Well, I guess I know when a man comes out and when he don't.

Q You know that day was the 11th of March when he did not come out?

A No, I would not swear to that.

Q Do you remember the day you took the hand car off the track?

A I never seen anything of that.

Q Do you remember when he quit walking the track and went to painting?

A I never seen him walk the track.

Q You seen him painting?

A That has been some time ago.

Q Do you remember the 13th of March, 1913?

A Well, that has been some time ago.

Q Do you remember?

A No, sir.

Q Don't you remember that in March, 1913, he quit working on the track?

A Not exactly; no, sir.

Q Well, when was it that he quit working on the track, was it in March, or April or May or February, 1913?

A It was in March, I think.

Q Have you worked there ever since that time?

A Yes, all but one day.

Q Since March, 1913?

A Yes.

Q Can you tell how many hours he made any day since March, 1913?

A I do not keep their records.

Q Can you tell how many days he made in February?

A No, sir.

Q Can you remember what he did any day in February or March, 1913, except on this 11th day of March, can you remember anything on any other day that he did?

A No, sir.

No Cross Examination.

BERT KITCHEN, sworn for the respondent.

Direct examination by Mr. Shipman.

Q You work for the New York, Susquehanna and Western Railroad Company?

A Yes, sir.

Q Working for them now?

A Yes, sir.

Q Were you working for them in March, 1913?

A Yes, sir.

Q Where?

A In the section gang at Columbia.

Q Do you remember seeing the hand car set off the track and Mr. Newbaker's rolling down the bank?

A I never saw anything like that in my life; no, sir.

Q You never saw the hand car taken off the track in that month or at any other time when Mr. Newbaker rolled down the bank.

A No, sir.

Cross examination by Mr. Morrow.

Q Did you ever see a car taken off the track?

A I guess I have.

Q. Quite a number of times to get out of the way of a passing train, haven't you?

A I couldn't say as to that, as to how many times.

Q You would not say that you did not?

A No, sir.

Q In putting a hand car off the track sometimes it will give a jerk and throw a man, will it not?

A I do not think that could happen without a man's seeing it.

Q Do you remember what you did every day in March, 1913?

A No.

Q Have you any recollection of any day in the month of March, 1913, as to what you did?

A No, sir.

Q What time did you commence work?

A I commenced work about 6.30.

Q Do you remember what hours in the day each man worked and how long they worked?

A No, I do not.

Re-direct examination by Mr. Shipman.

Q Do you remember about being in the gang that pushed that car down to Delaware Junction in March?

A No, sir.

Re-cross examination by Mr. Morrow.

Q You do not remember about pushing a push car down toward Delaware Junction?

A No, sir.

Q You do not remember that you ever saw a car throw this man (pointing to Newbaker) down?

A No, sir.

ARCHIBALD KITCHEN, sworn for the respondent.

Direct examination by Mr. Shipman.

Q You work for the New York, Susquehanna and Western Railroad Company?

A No.

Q Did you work for them in 1913?

A Yes.

Q Do you remember being in the section gang when the hand car was taken off and this man, Newbaker, was thrown down the bank?

A Not to my knowledge.

Cross examination by Mr. Morrow.

Q Did you ever see a hand car put off the track?

A Yes, sir.

Q Do you remember whether any was put off the track in March, 1913?

A No, sir, I do not remember.

A. B. SCHAEFFER, sworn for the respondent.

Direct examination by Mr. Shipman.

Q What relation have you with the New York, Susquehanna and Western Railroad Company?

A I am superintendent.

Q Where does that road run?

A It runs from Jersey City, N. J., to Stroudsburg, Pa.

Q Does it run into Pennsylvania?

A Yes.

Q There it connects with what?

A With the Wilkes-Barre and Pennsylvania.

Q What traffic runs over that road?

A Passenger, freight and coal.

Q Can you tell me what trains were running east or west in the month of March, 1913?

A I can tell by looking at the records.

Mr. Morrow. Are they kept by you?

A No, sir, they are not.

Continuation by Mr. Shipman.

Q You have supervision over them?

A I do.

Q You know they are correct?

A They should be.

Q Can you tell me about the trains going west on the Susquehanna in the morning?

A I can by referring to the train sheet.

Q From your knowledge?

A No, but I can tell what trains should be going west.

Q Well, what kind of trains run west in the morning?

A Coal trains.

Q What time in the afternoon does the passenger train go?

A It leaves Columbia about one o'clock P. M., going west, and the way-freight anywhere between three and five o'clock, the register will show the exact time the trains go by there.

Q Now, in reference to this matter of an accident, what is the rule of the company in regard to that?

Mr. Morrow. I object to that.

Q What is the rule?

Mr. Morrow. I object.

Q Did you receive notice of this accident?

A No, sir.

Q Did you ever receive notice from any employee in regard to it?

A No, sir, the first I knew of it was in January.

Q That was your first knowledge?

A Yes, sir.

Q This letter that has been produced here was your letter in reply to that?

A Yes, sir.

Q Where did you write that from?

A From my home, I was sick at home at the time.

Q Did you have any blanks in reference to accidents?

A Yes, sir, if an employee was injured he was supposed to make out one of those forms as to his injury?

Q Were any forms ever produced to your company?

A No, sir.

Q Where is Thomas W. Whitney now?

A He is not working for the company.

Cross examination by Mr. Morrow.

Q Do you know where Mr. Whitney is?

A No, sir.

Q Have you heard?

A No.

Q When did he go out of the employ of the company?

A On the first of April.

Q What was he doing?

A He was supervisor.

Q Where did he live?

A At Blairstown.

Q He lived there until he went away?

A That was his head-quarters.

Q You do not mean to say that you know anything about the legal status of this railroad company in Pennsylvania, do you? You simply mean that they run over a track in that state?

A I mean that they operate in Pennsylvania.

Q Whose road they run over you do not know?

A Not to testify to, no.

Q Is it the road of the New York, Susquehanna and Western when they cross the river?

A I understand so.

Q Mr. Whitney was your supervisor?

A Yes, sir.

Q If he knew that an accident has occurred, it would be his duty to report it to you, would it not?

A Yes.

Q If he was apprized of an accident happening, you would expect him to report it to you, would you not?

A Well, not exactly.

Q Why not, was that not a part of his duty?

A The way that is done is in this manner; the man that is injured makes out a slip as well as the foreman, these are then given to the supervisor and are sent by him to the superintendent.

Q It was the supervisor's duty to make out the report and give it to Mr. Whitney?

A It was the foreman's duty to make it out and give it to him, then it passes through the supervisor to the superintendent.

Q What is the supervisor's duty in reference to it?

A He is supposed to look it over and send it on.

Q You furnish the forms and blanks for that purpose?

A We furnish him with them and the agents at all stations as well are supplied with them.

Q And it is his duty to get them from the agent in case he does not have any?

A Yes, sir.

Q They are not furnished to the men who work on the track are they?

A No, sir.

Q When were you first apprized of the beginning of this proceeding?

A When I received his letter.

Q When were you first apprized of the beginning of this suit?

A Last night about eleven o'clock.

Q The papers had been served at your office before that time, had they not?

A Yes, but I had been away—was sick for a time. They had been served at the office in Jersey City at 109 Pla— avenue and then they were sent on to me.

Q Who were they served on there?

A On my chief clerk.

Q What is your chief clerk's name.

A It depends on the day they were served. I think it was G. W. Garn on that day.

Q He was your chief clerk?

A Yes, sir.

Q After these papers had been served on him, in the course of events what would he do?

A He would forward them to our legal department and then later on notify me.

Q Let's see then (looking at petition in case) in the ordinary routine of business that would have been about the 17th of March?

A Yes, sir.

Q At that time Mr. Whitney still resided in Blairstown?

A Yes, I think so.

Re-direct examination by Mr. Shipman.

Q What do you know about these time sheets?

A What I know is this, they are made out by the foreman and forwarded to the office two or three days before the 15th and 30th of each month. If there is any change to be made on those dates they notify us by wire to make the change, then the pay-roll is made up from these sheets. I personally see myself that they are correct.

Q This is the letter that you received from Mr. Newbaker (showing witness letter)?

A Yes, I believe so.

Q The trains that run over the New York, Susquehanna and Western Railroad, are they interstate trains?

A Yes, sir.

By the Court.

Q This mixed train that went between four and five o'clock, did that operate wholly in the State of New Jersey?

A No, sir, that operates between Beaver Lake and Stroudsburg.

G. D. DUTCHER, sworn for the respondent.

Direct examination by Mr. Shipman.

Q You kept these sheets (showing witness train sheets)?

A Yes, sir.

Q Where are they made?

A At Jersey City.

Q At what place?

A At 109 Pla— avenue.

Q At whose office?

A At the office of the superintendent of the New York, Susquehanna and Western Railroad Company.

Q What is your business?

A Train despatcher for the N. Y., S. & W. Railroad Company.

Q You know where the trains are running on your road?

A Yes, sir.

Q Tell me the train on the 11th of March, 1913, going west, what time in the afternoon it went?

A At 4.53 o'clock P. M.

Q Going which way?

A West.

Q What kind of a train was that?

A A freight train.

Q Where did it come from?

A Beaver Lake.

Q How many locomotives did it have?

A Only one.

Q Was there any train west on that afternoon between 4.00 and 4.53 o'clock?

A None only that freight train.

Q That was the only one?

A Yes, sir.

Cross examination by Mr. Morrow.

Q What time did that train pass the Columbia station?

A They got to Columbia at 4.53 and left 4.57.

Q What time did it leave Hainesburg?

A 4.41 P. M.

Q Got to Columbia at 4.53?

A Yes, sir.

Q It goes from Hainesburg west over the tracks of the New York, Susquehanna and Western Railroad Company? Or does it run over some other road?

A There is a junction down there near the tool house.

Q I know there is a junction there, do trains ever stop there?

A Yes, sometimes.

Q What for?

A There are trains that go to Delaware that stop there.

Q Do not trains stop there to get out of the way sometimes?

A Yes, if they have a meet there.

RESPONDENT RESTS.

EDWARD A. WILDRICK, recalled in rebuttal, on the part of the petitioner.

Direct examination by Mr. Morrow.

Q Did you have a conversation with Mr. William Gouger two years ago in March when you saw Mr. Newbaker walking track?

A Yes, sir.

Q Did you ask Mr. Gouger why he was walking track?

A Yes, sir.

Q Did he then say it was because he had been ruptured setting a hand car off the track and he was ordered to give him light work?

A Yes, sir.

Q Did you have a conversation after that with Mr. Whitney?

A Yes, sir.

Q What did he tell you?

A He said to me that Mr. Newbaker claimed to have been ruptured and that they was trying to give him light work.

Q Did he say that Newbaker claimed to have been injured? That he claimed he had been ruptured?

A Yes.

Q That was while you were in the employ of the company?

A Yes, sir.

Cross examination by Mr. Shipman.

Q Whitney told you that Newbaker claimed that he was ruptured?

A Yes.

Q Are you in the employ of the company now?

A No, sir.

Q When did you leave their employ?

A Last November.

Q Where did you go?

A I stayed at Columbia until the first of March.

Q How did it happen that you asked Whitney about it?

A It came through a conversation.

Q How did Gouger come to tell you?

A I saw Mr. Newbaker walking track and asked about it.

Q That was all Whitney said to you about it?

A So far as I remember.

Q Did Whitney tell you how he was ruptured?
A He said he was ruptured by taking a car off the track.
Q Did he say when?
A No, sir, he did not.
Q When was this time?
A Some time in 1913.
Q When did Gouger talk with you?
A It must have been some time in March, 1913.
Q Were you in the employ of the company when Whitney talked with you?
A Yes, sir.
Q What was you doing?
A I was working on the carpenter gang.

GROVER C. LINDABERRY, sworn in rebuttal, on the part of the petitioner.

Direct examination by Mr. Morrow.
Q Where do you live?
A Columbia, New Jersey.
Q You know Mr. William Gouger?
A Yes, sir.
Q Did you have a conversation with him about this case of Newbaker, the petitioner, in this case?
A Yes, sir.
Q Did you ask him what was going on about Newbaker?
A Yes, sir.
Q Did he say that Newbaker claimed that he had told him that the hand car was out that day, that the books showed it, and did he say to you that the books they kept did show that the hand car was not out that day?
A Yes, sir.

Cross examination by Mr. Shipman.
Q You say that Mr. Gouger said the hand car was not out that day, on the day this man was hurt?
A Yes, sir.

CHARLES NEWBAKER, the petitioner, recalled in rebuttal.

Direct examination by Mr. Morrow.

Q Did you see Mr. Gouger at the station at Blairstown some time ago?

A Yes, sir.

Q When was it?

A I think it was in December or January.

Q Did you see the time-book he kept?

A Yes, sir.

Q He showed it to you?

A Yes, sir.

Q Did he have a record for March 11, 1913, of the number of hours you worked?

A Yes, sir.

Cross examination by Mr. Shipman.

Q Where did you see it, this book?

A At the Blairstown station.

Q You say you saw Gouger's book?

A Yes, sir.

Q Where did you see it?

A At the Blairstown station.

Q Are you sure about that?

A Yes, sir.

Q Did you ever see these time-sheets, you have, haven't you (handing witness papers)?

A No, I never saw these.

Q How did you come to see this book of Gouger's?

A He showed it to me.

Q How many hours did you make the day before?

A That was nine hours the same.

Q Did it show the day before that?

A I did not work on the Sunday before that.

Q How many hours on the 10th, did you work?

A Nine hours.

Q You didn't work eighteen hours the day and night before then?

A No; not at that time.
Q You never did?
A Yes, I have, but not at that time.

Re-direct examination by Mr. Morrow.

Q How did you come to see it, the book?
A I asked him about it the day before and he said he would bring it down the next day.
Q Was that before you had seen a lawyer?
A Yes, sometime before.

PETITIONER RESTS.

BOTH SIDES REST.

Time-sheets and a number of checks offered in evidence, by respondent.

Opinion of the Court.

Filed May 24, 1915.

WARREN COUNTY COURT OF COMMON PLEAS.

CHARLES J. NEWBAKER, *Petitioner,* *and* NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, *Respondent.*	*On Petition for Compensation.*

"Petitioner was ruptured on the lower part of the left side of the abdomen about the eleventh day of March, 1913, by accidentally being struck by the handle of respondent's hand car, while at work for respondent, on a section of its road lying between Hainesburg and Columbia, Warren County, N. J., in assisting to set off a hand car about five o'clock in the afternoon to allow the passage of a mixed train of cars of the respondent, on the respondent's railroad, running from Jersey City, N. J., to Stroudsburg, Pa., and there connecting with the Wilkesbarre and Pennsylvania Railroad. The respondent was at the time engaged in interstate commerce, also in intrastate commerce. The injury to petitioner arose out of and in the course of his employment by respondent at the close of a day's work as track repairer upon a section of the railroad between Hainesburg and Columbia, N. J., about the eleventh day of March, 1913, and the petition was filed March thirteenth, 1915, about two years after the injury occurred.

The first defense raised by the respondent is that the petitioner should have filed his petition within

one year after the accident, according to the amendment to the Workingmen's Compensation Law of 1913, page 314, paragraph 23, as amended.

There is no limitation in the Act of 1911 in which to bring suit. Does this amendment of 1913 to that act have a retrospective application, or is it prospective only?

The Supreme Court of the United States in the *United States* vs. *Heth,* 3 Cranch, p. 413, held that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied and such is the settled doctrine of this court,' citing a number of cases.

The Court of Errors and Appeals of this State in *Williamson* vs. *N. J. Southern R. R. Co.,* 2 Stew., p. 311, after quoting the above rule of construction of a statute, says, 'This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of the parties or will affect their antecedent rights, services or remuneration, which is so obviously improper that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature, *United States* vs. *Heth,* 3 Cranch, pp. 399-413. This rule of construction has been repeatedly enunciated and enforced by the courts of this state,' and it held that the third section of the act relating to statutes is only declaratory of the law as judicially pronounced in *Hunt* vs. *Gulick,* 4 Hal., 204. The same court in *Boylan* vs. *Kelly,* 9 Stew., p. 334, cited with approval the same rule. It said, in the case of the *Citizens Gas Light Co.* vs. *Alden,* 15 Vroom, p. 654, that 'all legislation is framed or presumed so to be, in view of this conspicuous canon of construction governing in courts where the duty of interpretation is imposed.'

Opinion.

In *Allen* vs. *Township of Bernards,* 28 Vroom, p. 306, the same court again said 'Under a well settled rule of statutory construction such a purpose is not implied in language which has full force if applied to the future only.' And in *Williams* vs. *Bayonne,* 26 Vroom, p. 63, it must 'admit of no doubt that a retrospective operation was intended.'

In *Barnaby* vs. *Bradley & Currier Co.,* 31 Vroom, p. 162, the same court said 'To give to the Act of 1895 the effect of limiting the time for which the statutory lien of the prior act should continue without the claim being filed, would deprive the plaintiff of a right with respect to its debt which it had when its contract was made and the work was done * * *if applied in this suit the Act of 1895 would affect and impair and even destroy a right of the plaintiff which accrued to it under the proceeding act within the meaning of the third section of the act relative to statutes.'

The law of 1911, p. 136, says 'every contract of hiring * * * shall be presumed to have been made with reference to the provisions of Section II of this act.' There is no limitation under the law of 1911 within which compensation shall be made. The limitation of one year was made by the amendment of 1913, after the injury to petitioner had occurred and after the right to compensation without limitation had accrued under the Act of 1911, unless a limitation applied under the general statute of limitations.

The decision by the Supreme Court in *Bretthaner, Adm'r,* vs. *Jacobson,* 50 Vroom, p. 223, holds on page 225 near bottom that 'it is entirely settled that until the period fixed by such a statute has arrived the statute is a mere regulation of the limitation, and, like other such regulations, subject to legislative control. But this provision of the death act is not an ordinary statute of limitation.' The court held that the death

occurred under the twelve months' limitation. The action could not be extended for two years under a later amendment to the death act. This case was decided on March 2, 1910. On the 12th day of April, 1910, the Legislature passed a law which was an amendment to the act of 1874, which incorporated the words 'or limitation,' so that it reads, 'but every such act done, or right or limitation vested or accrued.' The word 'limitation' was not in the act of 1874, and did not become a part of that act until the amending of April 12, 1910.

The injury having occurred to the petitioner before the amendment of 1913 was passed, the right or limitation became vested or accrued under the Employers Liability Act of 1911. The right and liability of petitioner and respondent became fixed and is subject to the provisions of the Act of 1911.

The amendment of 1913, so far as its period of limitation is concerned, is fully satisfied, if applied prospectively, and the law requires such construction under the decisions in the cases cited.

The Common Pleas Court of Essex County held that causes of action under Section II of the Act of 1911, which accrued prior to the enactment of the amendment of April 1st, 1913, are not affected by the one year limitation. *Frandhino* vs. *C. M. Grey,* 37 N. J. L., 203.

DID THE INJURY HAPPEN TO THE PETITIONER WHILE THE RESPONDENT WAS ENGAGED IN INTERSTATE OR INTRASTATE COMMERCE, AND WOULD THE FEDERAL EMPLOYERS' LIABILITY LAW, UNDER THE CIRCUMSTANCES OF THIS CASE APPLY?

The evidence does not show any negligence on the part of the respondent. The Federal Employers' Liability Law is grounded upon some negligence of the interstate common carrier by railroad. In the case of the *Illinois Central Railroad Company* vs. *Behrens,*

Administrator (Decided April 27, 1914), 233; U. S., 473, the Supreme Court of the United States said: 'Passing from the question of power to that of its exercise, we find the controlling provision in the Act of April 22, 1908, reads as follows,' 'Section 1. That every common carrier by railroad while engaged in commerce between any of the several states * * * 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 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.'

From this recital of the act it appears that the Federal Employers' Liability Law applies to an interstate railroad carrier only where the injury to the employee is the result of negligence, as stated, on the part of the interstate carrier. The testimony in this case does not show any negligence on the part of the respondent under the statute, and therefore, the Federal Employers' Liability Law cannot apply to this case.

The court in the case cited said further: 'Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. The act was so construed in *Pedersen* vs. *Delaware, Lackawanna & Western Railroad Company*, 229 U. S., 146. It was there said (p. 150): 'There can be no doubt that a right of recovery thereunder arises only where

the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce.' Again (p. 152): 'The true test always is: Is the work in question a part of interstate commerce in which the carrier is engaged.'

Turning to the last named case (*Pedersen* vs. *D., L. & W. R. R. Co.,* 229; U. S., p. 146), we find the court divided upon the application of the law. On page 155, Justice Lamar, Justices Holmes and Lunten concurring, said, in a dissenting opinion that, 'the plaintiff was carrying bolts to be used in repairing a bridge. That was not interstate commerce, and in my opinion the court below properly held that his rights were to be determined by the laws of the State of New Jersey and not by the Act of Congress.' This was said on the ground that 'Congress itself limits the operation of the statute to persons while employed in interstate commerce, the statute does not extend to its incidents and is confined to transportation.' The majority opinion of the court held that (p. 152) 'it was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of a larger one.' The plaintiff was injured by an intrastate passenger train.

Whatever may be the views expressed above this court has no dissenting view on the use of a hand car, which is in its nature of strictly local use in intrastate commerce. It plied between Hainesburg and Columbia in Warren County, N. J., a distance of four or five miles over the tracks of the railroad of the respondent in carrying the track repairers of that section of the railroad to and from their work. It was not necessary to the repair of the roadway, however useful and convenient it might be, but its use was strictly of a local nature and intrastate. The Federal Employers' Liability Act cannot interfere with this

view of the case. Its exclusive nature is not applicable here as I deemed it to be in the case of *Rounsaville* vs. *Central R. R. Co. of N. J.*, 37 N. J. L. J., 295.

COMPENSATION.

I am satisfied that an operation for hernia, from the testimony in the case, is not a dangerous or even serious operation to remove petitioner's disability, and would leave the patient perfectly well. That was the opinion of one of the physicians sworn in the case and is uncontradicted by the other two physicians also sworn, although Dr. Beck said his recovery was doubtful, but this was spoken of his continuing present condition, but not in case of an operation.

In the case of *Houglin* vs. *Swift & Co.*, Vol. 37 N. J. L. J., 81, it was uncontradicted that an operation would entirely relieve the petitioner from any effect of the injury. In the present case the hernia was a small one in the lower part of the left abdomen, which could be remedied by a properly fitting truss, or entirely cured by an operation safe and easy of performance. The testimony is that the truss worn would become frequently displaced causing inconvenience, suffering and a danger of strangulation.

Under the English Workmens' Compensation Act, 1906, Sec. 1, where a workman suffered an incapacity by reason of an accident, and it appeared that a reasonable and safe surgical operation would relieve or remove his incapacity, and that he refused to consent to the same; it was held that his continued inability to work at his trade was due to his refusal of remedial treatment, and not the result of the original accident. *Warmicken* vs. *R. Moreland & Son, Limited*, 1 K. B. (1909), 184. But the Workmen's Compensation Act of New Jersey is otherwise, because, it is held in *Feldman* vs. *Braunstein* (decided March 29, 1915), 93 Atl. Rep., 679, 'Whether the petitioner would submit to an operation rested on his will alone, and he had

nothing to gain pecuniarily by taking the risk that necessarily attends all operations. * * * It is for the court, under the statute, to determine the compensation, and the court can act only on the facts before it, and not upon the uncertain possibilities of the future."

As it rests upon the petitioner's will alone whether he will have an operation the court can act only upon the facts before it. Consequently I must hold that the hernia is of a permanent nature.

"The expression 'disability' in the Workmen's Compensation Act refers to the loss of a member or of a function rather than to a loss of earning power." *De Zeng Standard Co.* vs. *Pressey,* 92 Atl. Rep., 278.

The act provides that in all other causes of the class specified in Clause 'C,' or "where the usefulness of a member or any physical function is permanently impaired, the compensation shall bear such relation to the amount stated in the above schedule as the disabilities bear to these produced by the injuries named in the schedule." *Rakie* vs. *D., L. & W. R. R. Co.,* 88 Atl. Rep., 953. *Barbour Flax Spinning Co.* vs. *Hagerty,* 56 Vroom, 407.

The abdomen in this case is a physical function permanently impaired by hernia, but the relative amount to be determined by Schedule 'C' is very difficult.

The petitioner says, that before the accident, his average daily work was nine hours at fifteen cents an hour making daily wages of $1.35, and weekly wages of $8.10. After the accident, causing his injury, his earning capacity was about seventy-five cents a day. His earning capacity or disability, therefore, was reduced by the injury to five-ninths of its former ability, or, in other words, the disability was four-ninths of his former ability for work in the same line of work.

The pay checks beginning November, 1912, given by respondent to petitioner up to March 11, 1913,

show petitioner's earning capacity to be as stated above, and that the loss in his earning capacity is less than the minimum rate of five dollars a week.

Under the Act of 1911, the compensation to petitioner must be made under Sec. II, Par. 11, Clause B. for disability, total and permanent, the compensation shall be paid during the period of such disability, not, however beyond four hundred weeks. Under Clause C, is for disability, partial but permanent. The difference between Clause 'B' and 'C' is that one is total, the other partial. So that some calculation must have been made from the total disability to the several degrees of partial disability. Therefore, if total permanent disability cannot exceed four hundred weeks then petitioner lost four-ninths of four hundred weeks which equals 177 7/9 weeks, in other words, if his permanent daily disability is four-ninths of his daily average ability, then for four hundred weeks it must be four-ninths of four hundred weeks. This is the only reasonable, rational bases of calculation without guessing that occurs to me at the present time.

The accident to the petitioner arose out of and in the course of his employment by the respondent, of which the respondent had notice within a week or two after the accident.

I will order conpensation to be paid by respondent to petitioner at the minimum rate of five dollars a week for one hundred seventy-seven and seven-ninths weeks for partial permanent disability with costs to petitioner."

The said opinion was filed in the said clerk's office on the twenty-fourth day of May, A. D. 1915.

Rule for Judgment.

Filed June 12, 1915.

WARREN COUNTY COURT OF COMMON PLEAS.

CHARLES J. NEWBAKER,
Petitioner,
and
NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
Respondent.

Rule for Judgment.

"This matter coming on to be heard in the presence of William H. Morrow, attorney for the petitioner, and George M. Shipman, attorney for the respondent, and it appearing to the court that the petitioner, Charles J. Newbaker, on March 11, 1913, while in the employ of the respondent, New, York, Susquehanna and Western Railroad Company, sustained an injury by which he was ruptured in the lower part of the left side of his abdomen; the said injury did not result in whole or in part from the negligence of any of the officers, agents or employees of respondent, or by reason of any defect or insufficiency due to its negligence in the cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment of the respondent, the said injury occurring by accident only, in throwing off by the employees of the respondent, of whom petitioner was one, a hand car from the track of the respondent, which car accidentally struck the petitioner and caused the injury mentioned; that the said injury to the petitioner arose out of and in the course of his employment by respondent at the close of a day's work as track repairer on a section of respondent's roadbed track between Hainesburg, New Jersey, and Columbia, New Jersey; that at the time the respond-

ent was engaged in interstate commerce, also in intrastate commerce; that the hand car which was taken from the track was used for local use on the track of the respondent, wholly within the State of New Jersey, and in intrastate commerce only, and the petitioner was not, engaged in interstate commerce at the time of the injury, nor did the injury occur through the respondent engaged in interstate commerce.

And it further appearing to me that the injury so sustained is of a permanent nature and that thereby the usefulness of the physical functions of the petitioner is permanently impaired, and that the petitioner is entitled to compensation therefore according to the provisions of the act of the Legislature entitled 'An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an electrive schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder,' approved April 11, 1911.

And it further appearing that the petitioner at the time of the sustaining by him of the injury before mentioned was earning average weekly wages of $8.10, and that after the accident causing said injury his earning capacity was not more than seventy-five cents a day, and that thereby his earning capacity or disability was reduced to five-ninths of its former ability, and that the loss in petitioner's earning capacity is less than the minimum rate of $5.00 a week.

And it further appearing that under the facts of this case, as proved to the satisfaction of the said judge, the petitioner is entitled to compensation at the rate of $5.00 a week for 177 7/9 weeks, from the 25th day of March, 1911, for partial permanent disability; the said respondent to pay forthwith to the petitioner at and after the rate of $5.00 a week from the said twenty-fifth day of March, 1911, to this day, and from this time on for the residue of the period

above mentioned at the same rate of $5.00 per week, and that the respondent do pay to the petitioner his costs of this proceeding.

It is further ordered that out of the money above directed first to be paid to the petitioner there be paid to William H. Morrow, attorney for the petitioner, the sum of one hundred and fifty dollars.

Dated June 12th, 1915.

J. M. ROSEBERRY,
Judge."

Judgment.

Whereupon it is adjudged that the petitioner herein, Charles J. Newbaker, recover of the respondent herein, New York, Susquehanna and Western Railroad Company, compensation at the rate of five dollars ($5.00) per week for one hundred seventy-seven and seven-ninths (177 7/9) weeks, for the twenty-fifth day of March, 1911, for partial permanent disability; the said respondent to pay forthwith to the petitioner at and after the rate of five dollars ($5.00), a week from the said twenty-fifth day of March, nineteen hundred and eleven, to this day and from this time on for the residue of the period above mentioned at the same rate of five dollars ($5.00) per week, and that the respondent do pay to the petitioner his costs of this proceeding, which are taxed at the sum of forty dollars and forty-nine cents ($40.49).

It is further ordered that out of the money above directed first to be paid to the petitioner there be paid to William H. Morrow, attorney for the petitioner, the sum of one hundred and fifty ($150.00) dollars.

Judgment entered and signed,
June 12, 1915.

J. M. ROSEBERRY,
Judge.

Exhibits.

EXHIBIT P. 1.

Columbia, N. J., 1-25-15

Mr. Wm. Gouger

Dear Sir

I thought that I would write to you as I have not heard from you in regards to telling T. N. W. about me getting hurt. He told me that you had said that you didnt know anything about it now what I would like for you to do is to sign your name to letter that I am sending you so I can send it to A. B. Shafer. or you can write one like the one that I am sending to you—as I have taken the matter up with Mr. A. B. Shafer if you will sign your name to the letter why I will send it to A. B. S and he will give me a job you neednt be afraid because I wont get you into any trouble. if I have a letter from you why I will get a job please do that much for me as Whitney hasnt got any use for me any more I had a letter from A. B. S. and he said he would find me work now you sign you name on the note that I am sending you or write one like it and send it to me by return mail and I will send it in. Please ans by return mail and oblige

CHAS. J. NEWBAKER.

EXHIBIT P. 2.

Blairstown, N. J., Jan. 25-1915

To whom it may concern

Gentlemen

This is to certify that Chas. J. Newbaker received his rupture while working under my employ when I was Section Foreman on Columbia Section on March 11, 1912. The accident happened in taking off hand car.

Yours Respct & Oblige

FOREMAN

Exhibits.

EXHIBIT P. 3.

Admitted by Agreement.

ERIE RAILROAD COMPANY

V

New York, April 5, 1915.

Mr. H. W. Andrus,
Claim Agent.

Dear Sir:—

As requested in your letter of even date, we attach hereto N. Y. S & W. R. R. paychecks B-333 of July, $8.50, and A-1306 of August 1914, $9.45, in favor of Chas. Newbaker, which we would ask that you kindly have returned to our files as soon as they have served your purpose. Kindly acknowledge receipt.

Yours truly,

F. A. CLARK,
General Auditor.

Exhibits.

EXHIBIT P. 4.

Admitted by Agreement.

S/LH

ERIE RAILROAD COMPANY

New York, April 3, 1915.

Mr. H. W. Andrus,
Claim Agent.

Dear Sir:—

As per your request of the 2nd. inst., we are attaching hereto paychecks in connection with suit Chas. Newbaker *vs.* N. Y. S. & W. R. R. Co. who was employed on Section 28, Columbia, N. J. beginning November 1912, as enumerated below.

No.	A—1092	November	30, 1912	$6.00
"	B—1428	December	14, 1912	16.20
"	A—1510	December	31, 1912	16.35
"	B—1511	January	14, 1913	16.95
"	A— 189	February	28, 1913	4.05
"	B— 722	March	14, 1913	15.75
"	A— 197	March	31, 1913	15.90
"	B— 710	April	14, 1913	18.75
"	A— 781	April	30, 1913	13.80
"	B—1393	May	14, 1913	19.80
"	A— 237	May	31, 1913	19.50
"	B— 803	June	14, 1913	23.40
"	A— 382	June	30, 1913	21.60
"	B— 691	July	14, 1913	23.40
"	A— 729	July	31, 1913	21.60
"	B—1304	August	14, 1913	19.80
"	A— 405	August	30, 1913	21.60
"	B—1536	September	13, 1913	19.80
"	A—1234	September	30, 1913	24.48
"	B—1102	October	14, 1913	24.48
"	A— 315	October	31, 1913	24.48
"	B— 936	November	14, 1913	28.56
"	B— 245	December	13, 1913	18.00
"	A— 713	December	31, 1913	19.50
"	B— 282	January	14, 1914	6.75
"	A— 700	January	31, 1914	10.05
"	B— 172	February	14, 1914	10.50
"	A— 238	February	28, 1914	9.75
"	B— 345	March	14, 1914	2.85
"	A—1505	March	31, 1914	19.10
"	A— 483	October	31, 1914	20.40
"	B— 424	November	14, 1914	23.04
"	A— 342	November	30, 1914	12.96
"	B— 299	December	14, 1914	1.35
"	B— 193	January	9, 1915	17.55
"	B— 314	February	9, 1915	5.67

Also Voucher No. 22 covering wages of January 1913 shown on Line 11 $5.25.

Reasons.

Filed July 19, 1915.

NEW JERSEY SUPREME COURT.

CHARLES J. NEWBAKER, *Petitioner-Defendant,* *vs.* THE NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, *Respondent-Prosecutor.*	*On Certiorari.* *Reasons.*

The prosecutor presents the following reasons for the reversal of the judgment of the Court of Common Pleas of Warren County, entered in the above stated cause.

1. Because judgment should have been entered in favor of the respondent and denying any compensation in the above cause.

2. The determination and finding of fact by the Judge of the Court of Common Pleas of Warren County was not in accordance with the provisions of an act of the Legislature of New Jersey entitled "An Act prescribing the liability of an employer to make compensation for the injuries received by an employee in the course of employment establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder, approved April 4th, 1911, and the supplements and amendments thereto.

3. The determination of fact by the Judge of the Court of Common Pleas of Warren County was not in accordance with the evidence.

Reasons.

4. Because the evidence in the cause shows, that the petitioner was not injured at the time and in the manner he alleges, there is no evidence which shows that the petitioner was injured while in the employment of defendant or that the accident arose out of and in the course of the employment of said petitioner, but that he received his injury by other means entirely.

5. Because the evidence in the cause shows that the defendant had no knowledge of the injury or the nature of the injury of petitioner or that any accident had happened by which petitioner was injured, and there is no evidence that the defendant employer ever had actual or any knowledge of the accident within ninety days after the injury, or until the petition in this cause was served.

6. The evidence shows that the petitioner was negligent in not giving notice of his condition to defendants, and in neglecting to submit to an operation which it appeared would cure him and that petitioner's disability was due to his failure to give said notice and submit to said operation and not to accident which happened to him.

7. The petitioner's claim for compensation under the act of the Legislature of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for the injuries received by an employee in the course of employment establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the supplement and amendment thereto, approved April 1, 1913, was barred forever, because he did not file a petition for adjudication of compensation within one year after the accident or injury alleged in his petition in accordance with the provision of the last para-

graph of section 23 of the above stated act as amended, which amendment was approved April 1, 1913, Chapter 174 of the pamphlet laws 1913, at page 303.

8. The Court of Comon Pleas of Warren County, and the Judge of the Court of Common Pleas of Warren County had no jurisdiction to entertain the petition in this matter, or to make any order, or enter judgment thereunder because the legal rights of the petitioner and defendant are determined by the act of Congress of the United States entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, and the supplements and amendments thereto."

9. Because it appears by the evidence that at the time of the accident as alleged the defendant was engaged in commerce between and among the several states and territories of the United States and foreign nations and that the said petitioner was employed by it as such carrier in such commerce.

10. Because the Judge of the Court of Common Pleas in fixing compensation in the cause to which he held petitioner was entitled decided that a simple operation would be of benefit to the petitioner, but that he was not bound to go to a hospital to have an operation performed, and that the court had not authority to order him to go to the hospital to have said operation performed, when it was the duty of the court to have made an order that petitioner should go to the hospital to have an operation performed, and that the basis of compensation and the amount of compensation as fixed by the court was illegal and not in accordance with the direction of the statute.

Reasons.

Endorsement:

NEW JERSEY SUPREME COURT.

CHARLES J. NEWBAKER,
Petitioner-Defendant,

vs.

THE NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
Prosecutor-Respondent.

ON CERTIORARI.

REASONS FOR REVERSAL.

GEO. M. SHIPMAN,
Attorney.
Belvidere, N. J.

Filed July 19, 1915.

WM. C. GEBHARDT,
Clerk.

Opinion.

Filed April 19, 1916.

NEW JERSEY SUPREME COURT.

February Term, 1916.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY,
Respondent and Plaintiff in Certiorari,

vs.

CHARLES J. NEWBAKER,
Petitioner and Defendant in Certiorari.

Argued February 15, 1916; decided April 19, 1916.
On *certiorari,* etc.

Before Justices Garrison, Trenchard and Black.

For the plaintiff in *certiorari,* George M. Shipman, Collins & Corbin, Clement K. Corbin, Carl M. Herbert.

For the defendant in *certiorari,* William H. Morrow.

Per curiam:

We think that none of the reasons are sufficient to disturb the judgment in favor of the petitioner in the court below.

Upon considering the evidence we cannot say that the trial judge erred in his determination respecting the time when and the manner in which the petitioner was injured. The evidence also justifies the finding that the petitioner was injured while in the employment of the defendant below and the finding that the accident arose out of and in the course of the employ-

ment of the petitioner. The evidence likewise justifies the conclusion that the defendant company had timely notice of the injury.

The provision of P. L. 1913 (p. 302) that claims for personal injury shall be barred, unless agreed upon or sought to be adjudged thereunder within one year, does not apply to an accidental injury received before its passage (*Birmingham* vs. *Lehigh, &c., Co.*, 95 Atl., 242), and that is this case.

We think the court below (the Common Pleas of Warren County) had jurisdiction to entertain this proceeding brought under our Workmen's Compensation Act. *Winfield* vs. *Erie R. Co.*, 96 Atl., 394.

The judgment below will be affirmed, with costs.

Rule for Judgment.

NEW JERSEY SUPREME COURT.

THE NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, *Plaintiff in Certiorari and Respondent,* *vs.* CHARLES J. NEWBAKER, *Defendant in Certionari and Petitioner.*	*On Certiorari to Warren Pleas.* *Rule for Judgment.*

This cause having been argued at the February last term of this court, by George M. Shipman, of counsel with the plaintiff in *certiorari,* and William H. Morrow, of counsel with the defendant in *certiorari,* and upon due consideration the court having found no error in the proceedings in the Warren Common Pleas, set forth in the writ of *certiorari,* and being of the opinion that the judgment of the Court of Common Pleas of the County of Warren ought to be affirmed, it is, on this 5th day of June, A. D. 1916, on motion of counsel for the defendant in *certiorari,* ordered that said judgment be and the same is hereby affirmed, with the costs of the defendant herein to be paid by the said plaintiff and that the record and proceedings be remitted to the said Court of Common Pleas of the County of Warren.

Rule entered June 5th, 1916.
On motion of

WM. H. MORROW,
Attorney of Defendant.

Grounds of Appeal.

Filed July 8, 1916.

New Jersey Court of Errors and Appeals

CHARLES J. NEWBAKER, *Petitioner-Respondent,* *vs.* THE NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, *Respondent-Appellant.*	*On Appeal from Supreme Court.*

To William H. Morrow, Attorney for Petitioner-Respondent:

Sir:

TAKE NOTICE, that the following are the grounds of appeal from the whole of the judgment entered in this cause, which the appellant hereby assigns and upon which it will rely:

1. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas in this cause.

2. Because the New Jersey Supreme Court erroneously refused to reverse the judgment of the Warren County Court of Common Pleas in this cause.

3. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas judgment should have been entered denying the compensation claim by the petitioner, and dismissing the petition.

4. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the

Warren County Court of Common Pleas, whereas the determination and finding of fact by the Judge of the Court of Common Pleas of Warren County was not in accordance with the provisions of an Act of the Legislature of New Jersey entitled "An Act prescribing the liability of an employer to make compensation for the injuries received by an employee in the course of employment establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the supplements and amendments thereto.

5. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the determination of fact by the Judge of the Court of Common Pleas of Warren County was not in accordance with the evidence.

6. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the evidence in the cause shows that the petitioner was not injured at the time and in the manner he alleges, there is no evidence which shows that the petitioner was injured while in the employment of defendant or that the accident arose out of and in the course of the employment of said petitioner, but that he received his injury by other means entirely.

7. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the evidence in the cause shows that the defendant had no knowledge of the injury or the nature of the injury of petitioner or that any accident had happened by which petitioner was injured, and there is no evidence that the defendant employer ever had actual or any knowledge of the accident within ninety days

after the injury, or until the petition in this cause was served.

8. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the petitioner's claim for compensation under the act of the Legislature of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for the injuries received by an employee in the course of employment establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the supplement and amendment thereto, approved April 1, 1913, was barred forever, because he did not file a petition for adjudication of compensation within one year after the accident or injury alleged in his petition in accordance with the provision of the last paragraph of section 23 of the above stated act as amended, which amendment was approved April 1, 1913, Chapter 174 of the pamphlet laws, 1913, at page 303.

9. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the evidence shows that the petitioner was negligent in not giving notice of his condition to defendant, and in neglecting to submit to an operation which it appeared would cure him and that petitioner's disability was due to his failure to give said notice and submit to said operation and not to accident which happened to him.

10. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, where as the Judge of the Court of Common Pleas in fixing compensation in the cause to which he held petitioner was entitled decided that a simple operation would

be of benefit to the petitioner, but that he was bound not to go to a hospital to have an operation performed, and that the court had no authority to order him to go to the hospital to have said operation performed, when it was the duty of the court to have made an order that petitioner should go to the hospital to have an operation performed, and that the basis of compensation and the amount of compensation as fixed by the court was illegal and not in accordance with the direction of the statute.

11. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the Judge of the Court of Common Pleas in fixing compensation in the cause to which he held petitioner was entitled decided that a simple operation would be of benefit to the petitioner, but that he was not bound to go to a hospital to have an operation performed, and that the court had no authority to order him to go to the hospital to have said operation performed, when it was the duty of the court to have made an order that petitioner should be entitled to compensation from the time, if he had submitted to said operation, he would have recovered and that the basis of compensation and the amount of compensation as fixed by the court was illegal and not in accordance with the direction of the statute.

12. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, whereas the Court of Common Pleas of Warren County, and the Judge of the Court of Common Pleas of Warren County had no jurisdiction to entertain the petition in this matter, or to make any order, or enter judgment thereunder because the legal rights of the petitioner and defendant are determined by the Act of Congress of the United States entitled, "An Act relating to the

liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, and the supplements and amendments thereto.

13. Because the New Jersey Supreme Court erroneously sustained and affirmed the judgment of the Warren County Court of Common Pleas, where as it appears by the evidence that at the time of the accident as alleged the defendant was engaging in commerce between and among the several states and territories of the United States and foreign nations and that the said petitioner was employed by it as such carrier in such commerce.

14. The respondent-appellant is deprived of its property without due process of law because the question of negligence or no negligence was not an issue at the hearing of the case; the petitioner-respondent did not allege the absence of negligence and no claim with respect thereto was made by the petitioner-respondent at the hearing. The respondent-appellant has therefore had no hearing on this point.

15. The respondent-appellant is deprived of its property without due process of law because the question of negligence or no negligence was not an issue at the hearing of the case; the respondent-appellant did not allege negligence nor offer any proof with respect thereto at the hearing, there being no requirement therefor in the statute under which the petition herein was filed and determination and judgment entered, and said statute expressly providing that compensation shall be made without regard to the negligence of the employer. The respondent-appellant has therefore had no hearing on this point.

16. The respondent-appellant is deprived of its property without due process of law because there is no provision in the statute under which the petition was filed, and determination and judgment entered whereby the question of negligence or no negligence

may be determined by the tribunal created by said statute.

17. The respondent-appellant is deprived of its property without due process of law because the jurisdiction of the tribunal created by the statute under which the petition herein was filed and determination and judgment entered to determine questions of fact is limited by the terms of said statute and there is nothing in said statute which permits said tribunal to determine the question of fact as to the existence of negligence.

Respectfully yours,

GEORGE M. SHIPMAN,

Attorney for Respondent-Appellant.

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New Jersey ~~Supreme~~ Court. of Errorsxand Appeals.

Charles J. Newbaker,
Petitioner,
vs. respondent,
New York, Susquehanna and
Western Railroad Company
Respondent.
appellant

On Certiorari to Warren Common Pleas. and appeal from t judgment of Sup. Co

Brief of Wm. H. Morrow, for petitioner.

Petitioner was employed as track-hand on the railroad track of respondent on the 11th day of March, 1913, when he sustained injury mentioned in his petition.

It was an accident. See his account, page 16, lines 20-40. A train was approaching and the men working on the track with a handcar set it off and in so doing the car in some way struck petitioner and knocked him off the track and down the embankment, and the result was a rupture from which he still suffers, and for which the judge of the common pleas made the allowance complained of.

There is not a particle of evidence showing that the accident was the result of negligence on the part of any one.

I shall answer the reasons assigned for reversing the judgment just as they are presented in the causes for reversal, pages 93, etc.

(1). The 1st and 2nd reasons are general only.

I do not think there is any error on the face of the proceeding, and these reasons are not specific and the plaintiff in certiorari can get no relief under either of them.

See **Paterson v. Freeholders, 27 Vr. 459.**

(2). The 3d and 4th reason may be considered together.

Petitioner testified to his sustaining the injury as set forth in the petition. If the judge believed his testimony that was sufficient to entitle the judgment to stand, even though his fellow workmen contradicted him. They all denied not only that petitioner was injured on the day named, but also that to their knowledge he had ever sustained an injury or that such an accident happened.

Gouger, who was foreman of the section, says he never heard of the accident until December, 1914.

But Edward A. Wildrick testified that while he was in the employ of the company, in March, 1913, seeing Newbaker walking the track, asked Gouger why Newbaker was walking the track, and Gouger replied that Newbaker had been ruptured in setting a hand car off the track, and that he, Gouger, had been ordered to give him light work. **Page 74.**

Gouger testified that on the day named Newbaker worked but three hours, and time-sheets were produced to sustain this testimony.

But Gouger admitted that he had in his possession the original time-book, "the book of original entries," and

not merely a sheet that can be made to order most any time,—and that he had shown this book to petitioner a short time before the hearing in the common pleas. But the book, although proved to be in the possession of the respondent's foreman, was not produced, while Newbaker testified to having seen it in Gouger's hands a short time before and that the timebook showed that Newbaker had worked nine hours on March 11th, 1913.

On the cross-ex. of Mr. Wildrick respondent's counsel developed that Mr. Whitney, who was supervisor of the division of the road, had told Wildrick in 1913 that Petitioner had been ruptured by taking a car off the track.

See p. p. 74, 75.

There were probably three of four men who testified that Newbaker did not work on the afternoon of March 11, 1913, but it was most remarkable that these men, not a very intelligent lot, could remember, after more than two years, with nothing in the meantime to call their attention to the particular day or to the affair, could say that on the particular day, the 11th March, petitioner worked but three hours, and then in the forenoon. Not one of them could state any reason for this remarkable stretch of memory, and not one could tell the hours made by petitioner or by any other of the men on any other day, but only that petitioner made but three hours that afternoon.

They were a sorry looking lot and no wonder the judge disregarded their testimony.

I refer to this testimony to show that the judge had before him contradictory evidence out of which to determine the facts, and that he was abundantly justified in his conclusions.

And this court will not review his findings, provided, he has some substantial testimony upon which he found-

ed his judgment. This is the provision of the Statute, and the determination of the Court of Errors and Appeals, in **Hulley vs. Moosbrugger, 95 Atl. p.** 1008; see, also, the cases in the same opinion, on same page. Notably, **Bryant v. Fissell,** 86 Law, 701.

(3). As to reasons 5 and 6.

Petitioner testified that Gouger, track foreman, was with him at the time of the accident; Gouger at once knew all about it. Petitioner further testified that just a few days after the accident, within a week after, he had a conversation with Whitney, supervisor of the railroad, and he then told Whitney how he had been hurt, and that Whitney said to him,—Gouger had told him that I had been hurt, or claimed to have been ruptured in taking a hand-car off on that day, and then Whitney asked him if it was so, and thereupon petitioner said yes, and he had the rupture right there to show for it. **See pages 44, 45.**

There is considerable evidence on this subject, but the foregoing shows that the supervisor of the company had almost immediate notice and knowledge of this injury.

It seems that there was a sort of habit of some superior servants of the company to hand out slips to injured employees on which they might write down the circumstances of the accident or whatever it was, and these slips would be forwarded to the home office in Jersey City.

See testimony of Mr. A. B. Schaeffer, Supt. of the road, **Page 70.**

But petitioner says that no slip was ever presented to him to be filled out.

Now, Schaeffer says that if an accident happened to

the knowledge of the supervisor, Whitney, it would be his duty to report it to the superintendent.

I submit that this brings actual knowledge of the injury directly home to the company. It was at once communicated to the supervisor whose duty it was to send his knowledge on to the superintendent.

Gouger, the foreman, promised to report the accident: **page 41,** and doubtless he did report to Whitney, his immediate superior, for we find Whitney talking within a week about it, and, moreover, it is indisputable that because of this injury petitioner was at once set at light work, walking the track, painting signs, **etc.**

See **page 42,** as to his knowledge of the rule and that light work was at once given him **because he was ruptured.** The Judge of the Common Pleas had before him evidence upon which he founded his determination that the respondent had actual knowledge of this accident within a week after its happening.

That such knowledge obtained with respondent is proved by the fact that, instead of petitioner doing the hard work of lifting ties and heavy iron rails onto the roadbed, the supervisor, Whitney, kept him at work, walking track, painting and doing other light work until some time in December, 1913, **see pages 42, 3.** And on page 42 Newbaker says that Whitney said to him that Gouger had told him of the injury and that Whitney would take the matter up with the Supt., Mr. Schaeffer, and would see that Newbaker had light work to do.

I presume this light work could not be assigned to petitioner without orders from the superintendent, and the fact that he was assigned to light work seems to prove that Schaeffer had been told petitioner had been injured and was suffering from a rupture. It is sufficient that the employer has knowledge of the injury. If there be no actual knowledge, then there must be notice.

What is sufficient notice is shown in **Pappagello v. Hyde,** 83 Atl. 953, N. J. L. "If the notice fairly apprises "the employer of the time, place, and cause of injury, it "is sufficient."

Gouger had knowledge, Whitney had knowledge and, doubtless Schaeffer had knowledge as well.

(4). As to reason 7, numerous decisions of this court have held that the time limit of one year as fixed in the act of March 15th, 1913, does not apply in cases where the injury was sustained before the 15th March. That there is no time limit fixed by the act of 1911, and that the amenatory provision of 1913 is prospective legislation.

Birmingham—95 Atl. Pe. 242.

Bauer v. Court of Common Pleas, 95 Atl. 242.

The cases upon which these latter cases are founded were cited by me on the argument before the common pleas and they are commented on by the judge of that court in his opinion filed in this case.

(5). The eighth and ninth reasons are based upon a misconception of the U. S. Statute.

Liability under the Federal Act is founded upon **negligence** on the part of the employer or of his agents having been the cause of the accident. Or, that it was due to defects and insufficiencies in the cars, engines, appliances, etc. And, as stated in the opening of this brief, this injury was the result of an accident, pure and simple. No one contributed to its happening. It is one of the events that is not anticipated, but is likely to happen, even where the greatest care and caution are used. It is very much like slips and falls and tumbles and stumbles.

There was not presented in the evidence the least inti-

mation of negligence on the part of any one, either employer or servant. This was the finding of the trial judge. He says, "the testimony in this case does not show any "negligence on the part of the respondent under the stat- "ute, and therefore The Federal Liability act does not apply."

It is hardly worth while to await the outcome of the case pending in the Supreme Court of the U. S., if there be a case pending and involving this question, because that Court has already passed upon the question in the case of ~~Ill. Cent. R. R. Co. v. Behrens~~ Pitney, 233 U. S. ~~473~~, in an opinion by Justice ~~Vandeventer~~, which simply emphasizes, section 1 of the act. He says,—"This clause has two branches:—the one covering the negligence of any of the officers, agents or employees of the carrier, * * * * * * * and the other relating to defects and insufficiencies, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, etc. To hold otherwise, is to take from the act the words "due to negligence." The plain effect of these words is to condition the liability upon negligence. And this is in accord with what is said in two cases in our Supreme Court,—**Rounsavel v. Central R. R.**, 94 Atl., 392, where Mr. Justice Swayze says "The Federal Employers' Liability Act * * * is applicable only in tort for negligence. And **Williver v. D., L. & W. R. R. Co.**, 94 Atl. 596, in which Ch. Justice Gummere says the action could not be maintained under the Federal Employers' Liability Act because "the proofs fail to disclose negligence on the part of the company, its agents or employees, which produced the death of plaintiff's decedent."

Seaboard Air line Co. v. Horton, at p. 501,2

The Winfield case, cited in brief for the appellant, is conclusive in this court

New Jersey
Court of Errors and Appeals

NEWBAKER

VS.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO.

I beg to submit the following additional matters in answer to the strenuous argument of counsel on the other side as to the effect of the Statute of 1913, requiring every petition for relief under the Workingman's Compensation Act to be filed within one year from the sustaining injuries, for which relief is sought.

I do not know, however, that I can add anything to the carefully reasoned out opinion of Judge Martin in Franchino v. The Grey Mfg. Co., Vol. 37, N. J. L. J., page 205, or the opinion of Mr. Justice Kalisch in Bauer v. Court of Common Pleas, 88 Vr. p. 128.

I do not, upon reading the many cases cited in the Marchino case and in the Bauer case, find anything in them sustaining the argument put forth by counsel of the appellant.

In the City of Elizabeth, 10 Vr. p. 556, case, Mr. Justice Depue, who afterwards wrote the opinion for this court in the N. J. Southern R. R. case, 2 Stew. 311, said, speaking for the Supreme Court: "The effort of the courts is always to give statutes a prospective effect only, unless the language is so clear and imperative as not to admit doubt." And then, quoting from the opinion of Rolfe, Baron, "The principal is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant is to apply retroactively."

And, on page 559 of the reported case, the opinion quotes from the statue to be construed as relating to "such assessments *as shall be* set aside; clearly expressing the legislative intent that such assessment only should be embraced as should be vacated, altered or reduced after the act took effect."

Now this act of 1913 says that all claims for injuries *shall be* forever barred; does not this mean all claims, speaking from the date of the enactment of the statute, *shall be* barred, &c.?

Then, Williamson v. The N. J. S. R. R. Co., 2 Stew., 311, the same learned judge, speaking for the court of last resort, said: "Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the Legislature cannot otherwise be satisfied."

In Barnaby v. Bradley & Currier Co., 31 Vr., 160, at p. 161, speaking again for this court, the same judge said, referring to the Act of March 27, 1874, (Gen. Stat., p. 3149,)—"This statutory provision preserves intact from future legislation rights vested or accrued under existing legislation, except 'where the course of practice or procedure

for the enforcement of such right or prosecution of such suit shall be changed.'" And then he proceeds to say the exception refers to practice or procedure in the conduct of the suit, and not to practice or procedure which directly affects the right which the statute was designed to protect. And, further, that this rule prescribed as the fundamental rule for the construction of statutes will prevail, except where the Legislature has, either in express language or by implication so strong as not to be resisted, indicated the legislative purpose to supercede this rule of statutory construction.

I do not see how this cited case differs from the one in hand. It was a Mechanics' Lien case; the right, at the time of doing the work or furnishing the materials was to file a lien within one year; a subsequent statute limited the right to file liens to the period of four months after doing the work.

And this court held that the claimant still had the full period of one year for filing the claim.

City of Elizabeth v. Hill and Williamson v, v. N. J. Southern R. R. Co were cited with approval by this court in Boylan v. Kelley, 9 Stewart p 334. And the language of Judge Patterson in U. S. v. Heth, 3 Cranch, quoted by Justice Depue was again quoted with approval And in the Boylan v. Kelley case it was said by Mr. Justice Knapp, speaking for his court, that it was in the cases cited by him, distinctly held that the act in question did not necessarily require a retrospective construction, and therefore should not receive it.

Then, further, considering the legislation referred to, it was declared that the act had been considered in both its aspects, and the construction given was designed to be authoritative, and its construction must here be considered settled, not only on principle, but authority.

In Lydecker v. Babcock, 26 Vr. 394, Mr. Justice Dixon said,–It is well settled that laws will be construed as prospective only, unless an opposite intention on the part of the legislature appears clearly by the terms or by necessary implication.

Citing many cases.

A Statue does not alter or affect the quality or legal relations of past acts and concluded transactions, unless there be found in it such clear and indubitable expression of the legislative design to do so as precludes any other reasonable interpretation of the words used. Citing Citizens' Gaslight Co., v. Alden, I5 Vr. 648

I have taken the time, while in the State library, to read every case cited by Judge Shipman, and I find nothing in them that militates against the position by me taken; indeed, it cannot be so, for the principle invoked is sustained by this court, and to now adopt a different rule is simply asking this court to reverse every opinion and judgment by it given on the subject for the past 40 years.

When the statute of 1913 uses the language—"In case of personal injuries," does it not refer to personal injuries that may be sustained afterwards? After the date when the statute goes into effect?

Every adjudged case sustains the views here presented; to give such statutes a prospective effect; therefore, when this statute speaks of personal injuries sustained, it must mean injuries that may be hereafter sustained.

To leave the interpretation of the statute simply doubtful is to compel a construction that gives the statute a prospective view only; so that if there be doubt merely, the doubt must be resolved against appellant.

Much is made of the fact that Newbaker was in the employ of the company for a full year and

more after he had sustained the injury; but he was kept at light work, such as he could do; but when the year had expired and this company thought there was no longer liability under the act of 1913, he was di charged.

With respect to the question as to whether respondent had a contract with appella nt, as to whlch is made in the brief by Judge Shipman, I do not think it is of very much moment just what was the technical relation. The statute defines their respective rights and obligations—no difference by what name the relation is called.

I see no occasion to discuss in this court the question so elaborately argued by the supplemental brief of Messrs. Corbin & Collins, inasmuch as the construction of the Federal Act has been considered by this court in the Winfield case.

In Louisville & Nashville R. R. Co. v. Motley, 219 U. S. 467, Mr. Justice Harlan said: "The court must have regard to all the words used by Congress in a statute and give effect to them as far as possible."

In the opinion of Justice Vandeventer, in the "Second Employers' Liability cases," 223 U. S., p. 1, at p. 49, the Supreme Court of the U. S., speaking of the statute, says it contains a departure from the common law, said: "The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such injury as was done at common law, when the injured person was not an employe."

It will be observed that the learned justice makes the "negligence" the basis of the new action by employees against employers, and gives to the Federal courts exclusive jurisdiction.

In all those cases, argued together, the late Solicitor General, Mr. Bowers, made a forceful and unanswerable argument in favor of the exclusive jurisdiction of the Federal courts; but every line of the argument was predicated upon the fact that the injury complained of was the result of "negligence"; and he insisted that it was negligence alone that gave jurisdiction to the Federal courts.

In Pederson's case, cited in brief of the appellant, the opinion of the learned justice declared—"If the other conditions be present, the statute gives a right of recovery for injury * * * * resulting from the negligence of any of the employees of the company. At page 29 of the reported case the opinion says that if a constitutional difficulty be found about extending the inter-state employer's responsibility to an inter-state employee for negligence for an inter-state employee, the statute should then be construed as limited to the case of an inter-state employee's negligence. But the statute covers all cases resulting from negligence of an employee, no difference in what service he is engaged.

The cases cited from the Federal Reporters and decided in the various Circuit Courts of Appeals, are to the same effect.

C. R. R. Co. of N. J. v. Colasurdo, 192 Fed., 901, plaintiff was injured by being struck by an unlighted train, running ten miles an hour in charge of one man, and the company was held liable for the "negligence" of the servant in charge of the train.

In San Pedro's case, 210 Fed. 870, the plaintiff was on a handcar followed by other cars proceeding rapidly, when the man in charge of the first car materially slackened its speed and rear cars ran into it and plaintiff was thereby injured.

The jury, under proper instructions from the court, found that fellow servants were negligent as alleged in the complaint, and that the negligence consisted in not warning the man in the next car of the slackening of speed.

The appellate court held that the negligence gave to the Federal courts jurisdiction in the cause.

In Lamphere v. Oregon Co., 196 Fed. 336, the death of the intestate was caused by the negligence of a fellow servant, while both were engaged in interstate commerce.

In Tinkas v. Oregon Co., 179 Fed. 897, it is declared in the opinion that the plaintiff was injured through the negligence of a fellow-servant.

In truth, all the cases cited in Judge Shipman's brief are predicated upon the negligence of a fellow-employee of the defendant company, and it does not seem to make any difference in the mind of the U. S. Courts whether the injured party was on a train or track or going to or from his work, or what he was doing, only so that he was about his master's business and was employed by a master in some way engaged, but not wholly so in interstate commerce. But in every case so far I have been able to read them, and especially every case decided by the U. S. Supreme Court, emphasis is laid upon the fact of the injury complained of having been occasioned by negligence.

And that is just what the Supreme Court from whose judgment this appeal is taken meant when it said "The Court below had jurisdiction to entertain this proceeding, &c." And in so doing it cited the Winfield case, the turning point in which, in the opinion of Chief Justice Gummere, was whether the injury was due to negligence on the part of a fellow-servant, and finding no negligence, the U. S. Court had no jurisdiction and the State court

had. It is quite obvious that the Supreme Court meant to simply follow the Winfield case and that without regard to the question of inter-state commerce.

The case cited in my original brief, correctly stated on the margin, is decisive of the question involved, and there is no use of waiting for another decision by the U. S. Supreme Court.

WM. H. MORROW,
Attorney of Respondent.