

New Jersey Court of Errors and Appeals

WEST JERSEY TRUST COMPANY, ADMINISTRATOR, AMOS B. CAL- LAWAY, DECEASED,	} <i>Appellee.</i>	On Appeal.
<i>vs.</i> PHILADELPHIA & READING RAILWAY COMPANY,		
	<i>Appellant.</i>	

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BRIEF FOR APPELLANT.

The proceeding in this instance was brought by petition under the Workmen's Compensation Act, P. L. 1911, Page 134, and the supplement thereto, P. L. 1911, page 763. Claim is made for compensation by the West Jersey Trust Company, administrator of the estate of Amos B. Callaway, for the death of Amos B. Callaway who was injured while 20 in the employ of the appellant as brakeman on a train from Port Reading Junction, New Jersey, to Philadelphia, Pennsylvania, (State of Case, page 93, line 26-33, page 96, line 4-19), on the thirteenth day of November, nineteen hundred and eleven, and who died in St. Francis Hospital, Trenton, New Jersey, shortly subsequent to the said injury as a result thereof.

FACTS.

- Amos B. Callaway was appointed to the position of brakeman on the Philadelphia and Reading Railway Company, June twenty-first, nineteen hundred and ten. The certificate of his appointment is introduced in evidence and is found in the printed case. About the time of entering in the said employment, and in anticipation thereof, upon June
- 10 Callaway made application for membership in the Philadelphia and Reading Relief Association. The application for membership stated, "This application shall take effect on the seventeenth day of June, nineteen hundred and ten, if on that date I shall be on duty in the service of the said company; otherwise, from the date of my going on duty in said service, and am not at the time suffering from injury or disease." A copy of the application for
- 20 membership in the Philadelphia and Reading Relief Association is attached to the testimony as an exhibit.

- Subsequent to such appointment as a brakeman in the employ of the Philadelphia and Reading Railway Company, Amos B. Callaway entered upon the discharge of his duties. At the time of the contract of hiring, Amos B. Callaway was a resident of the State of Pennsylvania. The contract was made in Pennsylvania. When he died, he was still a resident of Pennsylvania. He made application for
- 30 membership in the Philadelphia and Reading Relief Association and entered into the contract mentioned in said application in the City of Philadelphia and State of Pennsylvania.

Subsequent to the employment, to wit, upon July fourth, nineteen hundred and eleven, an Act of the Legislature of New Jersey, entitled, "An Act prescribing the liability of an employer to make com-

pensation for injuries received by an employe 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, went into effect.

After said act had gone into effect, upon November thirteenth, nineteen hundred and eleven, Amos B. Callaway met the injury resulting in his death at Skillman, New Jersey, while in the employ of the Philadelphia and Reading Railway Company, under the following circumstances:

He was acting as a brakeman on a train running from Third and Berks Streets, Philadelphia, Pennsylvania, to Port Reading Junction, New Jersey, thus being engaged in interstate commerce. The injury resulting in his death occurred on the return trip of the train from Port Reading Junction to Philadelphia. (State of Case, page 93, lines 26-33, page 96, line 4-19.)

The train upon which he was employed as a brakeman was spotting a car at Skillman, New Jersey. There was a considerable grade up which the train was pulling. The car was spotted on the grade and the jar of the engine pushed the car out of position and it became a necessity to re-spot the same. The engine was provided with straight air and automatic air brakes. The straight air brakes applied to the engine only permit the other cars to bump against each other until they come to a position of full stop. The automatic air stops all cars immediately where they are. It is customary to use straight air applied to the engine only under the circumstances of spotting a car, such as those in question. The cars are provided with levers upon the sides thereof to open the knuckles. There were levers upon the train which could be used, and would be used by a prudent brakeman in the dis-

charge of his duties. When the train had been stopped and was at a standstill, it was difficult to open the knuckles. In order to recouple the cars, Callaway signalled for the engine to back. The signal was obeyed. Instead of opening the knuckles by means of the levers, he jumped in between the cars to open them, and was caught in the slack of the cars and very greatly injured, so that death resulted, in St. Francis Hospital, in the City of Trenton, New Jersey, subsequent thereto.

In the application which Amos B. Callaway had made to the Philadelphia and Reading Relief Association, he named his wife, Ella Callaway, to be the beneficiary thereof. She was at the time, and still is, a resident of the State of Pennsylvania.

The application for membership signed by Amos B. Callaway which was accepted by the Philadelphia and Reading Relief Association stated "I hereby agree that the acceptance of benefits from the said Relief Fund, or from said Association, for injury or death, shall operate as a release of all claims for damages against said company, my employer, and against any such associated companies by which I may hereafter be employed, arising from such injury or death, which could be made by or through me, and that I, or my legal representatives, will execute, or, where necessary, procure to be executed, such further instrument as shall be necessary formally to evidence such acquittance."

Subsequent to the death of the said Amos B. Callaway, a check, (annexed to the testimony as an Exhibit) was presented on or about February twenty-seventh, nineteen hundred and twelve, to Ella Callaway, widow and beneficiary, drawn by the Philadelphia and Reading Relief Association in the sum of Six hundred dollars. Said check was endorsed by her and payment made. The certificate authorizing such payment of Six hundred dol-

lars is also annexed to the testimony and marked as an Exhibit.

On February twenty-sixth, just previous to the receipt of the check, and as one of the conditions upon which the same was given, the said Ella Callaway executed a release (a copy of which is annexed to the testimony and marked as an Exhibit), being the prescribed release on account of death benefit of the Philadelphia and Reading Relief Association, and in the same stated, "I, the undersigned, do hereby acknowledge that payment of the aforesaid amounts from the said Philadelphia and Reading Relief Association, which I have this day received, is in full satisfaction and discharge of all claims and demands on account of or arising from the death of said deceased, which I now have, or can, or may hereafter have, whether against the said Philadelphia and Reading Relief Association, the said Philadelphia and Reading Railway Company, or against any other corporation having amongst its employees members of said Association."

Subsequent to the acceptance of said benefits and the execution of said release, the West Jersey Trust Company, as administrator of the estate of Amos B. Callaway, commenced the present proceeding to obtain compensation under the New Jersey statute for the defendant Amos B. Callaway by reason of his death, alleging that by reason of the failure to serve notices given in the ninth paragraph of section two of the Workmen's Compensation Act, the said act became operative and the administrator was entitled to recover under the same notwithstanding the payment and release of the widow and beneficiary under the contract made between Amos B. Callaway and the Philadelphia and Reading Relief Association, making such release likewise to the Philadelphia and Reading Railway

Company in accordance with said agreement, by reason of the Contributions of the Philadelphia and Reading Railway Company to the said Relief Fund.

QUESTIONS.

10 *First: As the decedent received injuries from which he died in the employ of the Philadelphia and Reading Railway Company on a train engaged in interstate traffic, and while operating under a contract of hire made in Pennsylvania, prior to the enactment of the Workmen's Compensation Act of New Jersey, should not the petition have been under the Federal Employers' Liability Act, rather than under the present proceedings.*

20 *Second: Whether the circumstances under which Amos B. Callaway met his death are such as to bar the right of recovery under the Workmen's Compensation Act of New Jersey, or more especially under the Federal Act, by reason of his conduct being such as to exhibit not only negligence, but a practical self-infliction of the death which he suffered, while negligence on the part of the company is suggested only in the proof.*

30 *Third: Whether the Court has jurisdiction under the Workmen's Compensation Act in the case of a contract of hire made in the State of Pennsylvania when the injury only occurred in New Jersey, and whether the assumption of such jurisdiction is not contrary to the provisions of the Constitution of the United States relative to its provisions concerning the impairment of contract.*

Fourth: Whether the application for membership in the Relief Association, the election to accept benefits thereunder by the beneficiary, and the actual payment and execution of a release, said contract being made prior to the going into effect of the Workmen's Compensation Act, and said acceptance

of benefits being received subsequent to the going into effect of said act, constitute a release of the Philadelphia and Reading Railway Company, and a complete or partial defense to the proceeding instituted in the present case.

The Mercer County Court of Common Pleas dismissed the petition upon the determination of the third of the questions involved. Subsequent to the decision of the New Jersey Supreme Court in *American Radiator Co. vs. Roggee*, 92 Atl. 85, the case was certiorated, bringing the entire case and all questions involved before the New Jersey Supreme Court, which reversed the Mercer County Court of Common Pleas for the reasons given in the opinion of PARKER, J., annexed to the State of Case. An order of reversal was entered. This appeal is from such order. 10

I.

CASE SHOULD HAVE BEEN UNDER FEDERAL ACT AS NO CONTRACT OF HIRE IN NEW JERSEY. 20

Taking up the first of the questions suggested therein, the testimony shows that the petitioner's intestate Amos B. Callaway was employed by the Philadelphia and Reading Railway Company in the City of Philadelphia; that he was paid in the City of Philadelphia, and that as a result of an application made by him he was appointed as a brakeman on the "Bound Brook Local," in which employment he met his death, as in the facts stated. The "Bound Brook Local" freight on which Amos B. Callaway was employed ran from Philadelphia, Third and Berks Streets, in the State of Pennsylvania, to Port Reading Junction, in the State of 30

New Jersey, and return. The traffic in which he was engaged was therefore interstate traffic.

- 10 In *Parker v. Atlantic City R. Co.*, 93 *Atlantic*, 574, Court of Errors and Appeals, the plaintiff was a brakeman employed by the defendant company admittedly operating a road engaged in interstate commerce when he was injured while coupling an engine tender to a car. Owing to the fact that the couplers would not work, he inserted his arm between the tender and the car next back of it to make an adjustment, when his arm was crushed, necessitating amputation. Suit was begun under the Act of Congress of April 22, 1908. *C. 149, 35 Stat., L. 65, Fed. Stat. Anno. Supp. 1909, p. 584, (U. S. Comp. St. 1913, ss. 8657-8655)*, commonly called the Federal Employers' Liability Act, in which it is enacted by supplement, April 5, 1910, *C. 143, 36 Stat. 291, Fed. Stat. Anno. Supp. 1912 p. 335 (U. S. Comp. St. 1913, ss. 8657-8665)*, that the jurisdiction
- 20 of the Courts of the United States under the act shall be concurrent with that of the Courts of the several states.

- In the case, *supra*, WALKER, C., uses the following language, "*In Seaboard Air Line Ry. Co. v. Horton*, 233 *U. S.* 492, 34 *Sup. Ct.* 635, 58 *L. Ed.* 1062, Mr. Justice Pitney, speaking for the United States Supreme Court, said at page 501 of 233, *U. S.*, at page 638 of 34 *Sup. Ct.* (58 *L. Ed.* 1062): 'It is settled that since Congress, by the act of 1908, took
- 30 possession of the field of the employers' liability to employes in interstate transportation by rail, all such (state) laws upon the subject are superseded.' "

In *Hopkins v. Port Reading Railroad Company*, 38 *N. J. L. J.* 19, the Court said and the testimony showed that "at the time the deceased was killed, he and the crew with which he worked were engaged in transferring coal cars of the Philadelphia and

Reading Railroad Company preparatory to the making up of a train to be taken to Philadelphia; and reviewing the case upon the petitioner's stand—that is, that the respondent was a New Jersey corporation, and independent of the Philadelphia and Reading Railroad Company,—yet it seems to me that the deceased was engaged in interstate traffic. If the company which employed him was engaged in aiding and assisting the Philadelphia and Reading Company in its work at Port Reading, then it is clear that the Port Reading Company 10 was employed by a company that was doing an interstate business, and as the deceased was one of the instrumentalities by which the Port Reading Company was enabled to performed its work, he was necessarily engaged in the same kind of business as his employer. As I view the case, it makes no difference whether he was employed by the Philadelphia and Reading Company or the Port Reading Company. The cars and tracks upon which he was employed were engaged in interstate com- 20 merce, and not in a traffic carried on wholly within the State of New Jersey. *Colasurdo v. C. R. R. Co. of N. J.*, 180 *Fed. Rep.* 832; *North Carolina R. R. Co. v. Zachary*, 232 *U. S.* 248, *Norfolk & Western R. R. Co. v. Pennsylvania*, 136 *U. S.* 114; *Behrens v. Illinois Central R. Co.*, 192 *Fed. Rep.* 581.

In *Hall v. Louisville & N. R. Co.*, 157 *Fed.* 464, the Court says at page 466, “If the employee bringing the suit, was in the employment of a common carrier engaged entirely in intrastate com- 30 merce the right of action must necessarily be created entirely under the State Statute, and if the employee was in the employment of a common carrier engaged in interstate commerce, the right of action is created under the Federal Statute.”

The same view is reached in *Whitecraft v. Pennsylvania Railroad Company*, 36 *N. J. L. J.*, 182, in

which BOYLE, J., dismissed the petition in the case of a person engaged in interstate commerce upon the grounds that in such event he was without authority to apply the state law invoked by the petitioner.

10 In the case at bar therefore, as the train upon which the appellee's intestate was employed was engaged in interstate commerce, the Federal Employers' Liability Act superseded the State Workmen's Compensation Act. The case at bar under the cases cited herein and in *Parker v. Atlantic City Railroad Company*, supra, should have been brought under the Federal Employers' Liability Act before a court and jury rather than under the Workmen's Compensation Act of New Jersey, in which the courts sits without a jury. The appellant therefore urges that the petition should have been dismissed upon the ground that the action should have been brought under the Federal Employers' Liability Act.

20 The Supreme Court says that under this practice of the case at bar, the case of *Rounsaville vs. Central R. R. Co.*, 94 Atl. 392, is controlling. It is true that such case decided that the Federal Employers' Liability was a separate matter from the New Jersey Workmen's Compensation Act, but the case at bar is distinguishable. In *Rounsaville vs. Central R. R. Co.*, supra, the contract of employment was made in New Jersey though the accident happened without the state. In the case at bar the contract of hire was made in Pennsylvania though the accident happened in New Jersey. In *Sexton vs. Newark District Telegraph Company*, 84 Atl. 451, it is decided that the right of proceeding under the Workmen's Compensation Act is a right arising *ex contractu*. As there was no New Jersey contract in this case and as such contract as there was antedated the enactment of the Workmen's Compensation Act, the New Jersey Court we submit was bound to have

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distinguished this case and to have decided that it should have been brought under the Federal Act. Neither a New Jersey Legislature nor a New Jersey Court can under the Constitution alter the meaning of a Pennsylvania contract.

The Supreme Court in its opinion seems to have supposed that there were two employments of hiring of Callaway, one before and one after the enactment of the Workmen's Compensation Act. The employment was single and continuous. There was only one contract of hiring. That was before the Act. There was after that merely designation of work under the contract. 10

In the case at bar the testimony tends to suggest a negligence on the part of the appellant in applying "straight" instead of "automatic" air and the case would therefore come under the provision of *Winfield vs. Erie R. Co.*, 96 *Atl.* 394., ousting the Workmen's Compensation Act of application and the Common Pleas of jurisdiction thereunder. 20

We submit that the Supreme Court should have decided that the Mercer Common Pleas had no jurisdiction under this head.

II.

NEGLIGENCE.

Taking up the second of the questions suggested in the preceding paragraphs, we find that the Employers' Liability Act comprises certain provisions respecting employment arising under Section I thereof, and employments arising under Section II thereof. 30

Section I provides that the employee may recover provided he was not himself "wilfully negligent" at the time of receiving the injury. The act defines "wilful negligence" as follows: "For the purposes

of this act, wilful negligence shall consist of (1) deliberate act or deliberate failure to act, or (2) such conduct as evidences reckless indifference to safety, or (3) intoxication, operating as the proximate cause of injury."

10 Section I of the Employers' Liability Act is apparently designed to apply to cases arising under the employe's common law right with modifications where the employe or the employer have either one or the other served the notices making inoperative Section II of the Employers' Liability Act.

Section II of said act providing for the imputed contract between employer and employe makes the employe's recovery impossible, "when the injury or death is intentionally self-inflicted, or when intoxication is the natural or proximate cause of injury, and the burden of such proof of fact shall be upon the employer."

20 In *Bertha Houghton, administratrix, v. W. G. Root Construction Co.*, 35 N. J. L. J., 332, GNICHTEL, J., uses the following language, "It is also contended that the respondent was wilfully negligent in approaching the dangling wire with his wet clothes; that his conduct evinced reckless indifference to danger.

30 "The words 'wilful negligence' occur in Section 1 and are defined in Section III, but as I read the law, they apply only to suits brought under Section I. The only defenses to suits under Section II are that the injury or death was self-inflicted, or that intoxication was the natural and proximate cause of the injury. It is questioned whether a person can be charged with "wilful negligence" if he is engaged in work which is strictly in the course of and arises out of the employment."

In the case under consideration, if the case is properly under the Workmen's Compensation Act at all, it would be under Section II thereof, as there

was no proof that either party served upon the other the notices required to be served by paragraph 9 of Section II of said Act.

The Supreme Court considered this portion of the case disposed of in *Taylor vs. Seabrook*, 94 Atl. 399. This case would seem binding upon the Supreme Court so far as it applies to the case at bar. We conceive the facts however, to disclose a condition of negligence practically tantamount to intended self-infliction. It is an aggravated case and for this reason only we insist on this portion of the argument. 10

Nevertheless, the facts in the present instance disclose that Amos B. Callaway had been in the employ of the Railroad Company for a considerable time and was familiar with the work. They also disclose that there were appliances for coupling and uncoupling the cars upon the side thereof which were provided for the safety of employes, and that any railroad man would understand that in spotting, such as is involved in this case, either straight or automatic air, one or the other, may be applied. The facts also disclose that there was an incline easily observable. When straight air is applied the cars jostle one another. Callaway gave the signal for the engine to move, with an entire knowledge of all the surrounding circumstances, and, acting so far contrary to what prudence would indicate as to be tantamount to the self-infliction of the injury, he leaped into the aperture to unfasten the knuckle in a way which was entirely unnecessary, and by the slack of the cars, which he ought to have anticipated, he met his death. This is true whether or not there was negligence on the part of the appellant. 20 30

There is no doubt that if this case arose under Section I of the Employers' Liability Act, there would be a "wilful negligence" consisting of a "deliberate act" and likewise "such conduct as evidences reckless indifference to safety." *It is not claimed that Amos B. Callaway was intoxicated, as*

there is no evidence of that, but it would appear clear that every reasonable interpretation of the act for which he was responsible under the testimony, indicates an indifference to safety which is so great as to be practically a self-inflicted injury resulting in death.

10 The testimony of the railroad men that he took a "railroader's chance" tends to show that it is commonly understood that if a person acts in this fashion, he acts with great recklessness, without any regard for his safety, and at his own risk. His act is of such a character that it practically results in a self-inflicted death.

20 There appears to have arisen under the Workmen's Compensation Act no set of circumstances in any reasonable degree similar to those which arise in the present case. It is therefore impossible to cite any rulings of the Court in a case similar to the present one which defines an accident arising out of and in the course of the employment.

Justice Trenchard in *Bryant v. Fissel*, 86 *Atlantic*, 458, decided in the Supreme Court of New Jersey, on March 24th, 1913, in giving the opinion of the Court, uses the following language, "For an accident to arise out of and in the course of the employment it must result from a risk reasonably incidental to the employment. As was said by BUCKLEY, L. J., in *Fitzgerald v. Clarke & Son*, (1908) 2 *K. B.*, 796, 77 *L. J. K. B.* 1018, "The words 'out of' 30 point, I think, to the origin and cause of the accident, the words 'in the course of' to the time, place and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involve, I think, the idea

that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment. We conclude, therefore, that an accident arises 'in the course of employment' if it occurs while the employe is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time."

In the present case, it is doubtful whether going 10
between the cars of the train at a time when a car was being spotted and when straight air might be applied, and when it was perfectly and actually contemplated that the work should be done in another and much safer manner, was risk arising "out of the employment." It would seem almost to be a certainty that there was likely to result a self-destruction from such actions, and that certainty must necessarily be clear to the mind of any reasonable man. 20

It may be argued that the Courts have gone very wide in the interpretation of injuries which arise "out of and in the course of the employment," as for instance, the case of *Zabriske v. Erie Railroad Company*, 88 *Atlantic* 824, where Justice Minturn delivered an opinion where the defendant's employe was permitted to recover on the theory that the accident arose "out of and in the course of the employment," when he was absent from his work and was killed when he had so absented himself for 30
matters which were personal to himself. The theory upon which this latter case is based would seem to be that it is the duty of the employer to furnish to the employe the reasonable appliances to render his work possible, and if the employer supplied such appliances at such a distance that it became necessary for the employe to go across railroad tracks and be struck by an automobile in so crossing, the

employee nevertheless was acting "in the course of his employment." This case has been so frequently cited and followed that amplification at this time seems unnecessary. In the present case appliances were at hand. The neglect to use them resulted in the death.

The present case, if it is properly under the Workmen's Compensation Act at all, arises under Section II of said act, the constitutionality of which
 10 was upheld by TRENCHARD, J., in *Sexton v. Newark District Telegraph Co.*, decided in the Supreme Court, February 25th, 1913, and reported in 86 Atlantic, 451.

It is urged upon the part of the appellant that the case at bar is one which should have been brought under the Federal Employers' Liability Act, and that by reason of failure to bring the case in either a United States or State Court under that act, the petition should have been upon the facts in
 20 this case dismissed. The United States Compiled Statutes, section 8657-8658, render common carriers liable for negligence causing injuries to employees. Section 8659 contains provision that the contributory negligence of the employee shall not be a bar to recovery, but shall go in diminution of the damages in proportion thereto.

In the case at bar while negligence is suggested upon the part of the Philadelphia and Reading Railway Company, the injury happened mainly by reason of the negligence of Amos B. Callaway now deceased, therefore the question of the degree of negligence is not one which need necessarily be discussed under the theory that the case should have been brought under the Federal Employers' Liability Act. At least it need not be discussed at length
 30 here.

III.

LEX LOCI CONTRACTUS.

The contract of hiring of the plaintiff's intestate was made at the office in Pennsylvania, as appears from the certificate of employment in evidence. The accident occurred in New Jersey, as appears from the testimony. The testimony shows that on June 16, 1910, Callaway was appointed a brakeman on the New York Division of the Philadelphia and Reading Railway Company and his name was placed on the "Extra" list. Upon that list he had irregular work. Subsequently, upon May 26, 1911, he was given the position of brakeman upon the Bound Brook route.

It is contended by the appellee that this constitutes two contracts, the first when he was appointed to a position in the Philadelphia and Reading Railway Company, and the second when he was appointed as a brakeman upon May 26, 1911. The Appellant insists that there was but one contract which antedated the Workmen's Compensation Act. What occurred after that was merely with respect to assignment of work. He was never out of the employ of the appellant from the time of the contract until he died—nor did he ever have employment as anything other than a brakeman. The argument that there were two contracts will not bear the test of an examination of the testimony. The employment was June 10, 1910. Assuming, however, two contracts were made, they were both made in the State of Pennsylvania; of that there is no doubt whatever, and both of them were made previous to the going into effect of the Workmen's Compensation Act of New Jersey. The appellee contends that the employment as a brakeman commencing upon May 6, 1911, was after the approval of the Workmen's Compensation Act of 1911, and the supple-

ments of the same year. This is true, but the act did not go into effect by its terms until July 4, 1911. *The contract of employment was therefore made previous to the going into effect of the Workmen's Compensation Act.* The first case to arise under that act was *Sexton v. Newark District Telegraph Company*, 86 *Atlantic Reporter*, 451, The accident in that case happened upon the day of July 4, 1911, at about five P. M.

- 10 It is contended upon the part of the appellee that a contract under the Workmen's Compensation Act in New Jersey is imputed by reason of any employment actually had in New Jersey, even if the contract is made out of the state and before the existence of the act. It is contended that no matter where the actual agreement of hiring by reason of which the person becomes an employe is made, if work is done in New Jersey and the injury occurs in
- 20 New Jersey, immediately upon the happening of the injury there is invoked a New Jersey contract of employment making operative the Workmen's Compensation Act. Such argument has now received the sanction of the Court in *American Radiator Company v. Roggee*, 92 *Atl.* 85. *We submit that the right which the employe has to be an employe at all is derived from the contract or agreement by which he is hired.. And that such contract of hire must be viewed from the laws of the state where made (in this case Pennsylvania) and with*
- 30 *respect to the date of making (is this case before the New Jersey Workmen's Compensation Act.) We submit that it is not competent for a New Jersey Legislature under the constitution of the United States to pass an act which alters the obligation of contract and especially of the contract of another state. We consider the testimony to show one contract of hiring to be a brakeman only on June 16, 1910 before the Workmen's Compensation Act was*

enacted even, much less put in effect. We feel that the powers of a court in this respect are as restricted as those of a legislature for the same reasons.

If in the case we assume that there were two contracts of employment, *which we think is not so*, the latter contract of employment even made in Pennsylvania before the going into effect of the Workmen's Compensation Act, is the contract by virtue of which Callaway became an employe of the Philadelphia and Reading Railway Company. There was no contract at any time made in New Jersey. He entered New Jersey as an employe of the Philadelphia and Reading Railway Company solely by virtue of the contract of hiring made in Pennsylvania. He was under instructions by reason of that hiring; he was paid his wages by reason of that hiring; it was in all respects the agreement under which he acted. 10

*To say that a new obligation imputing a contract under the New Jersey law, occurred as speedily as an accident in the course of the employment happened in New Jersey, appears an extension of the law of contract, and to render it like the law of tort. The law governing a contract has always been the place of the contract. The law governing a tort is the place of the tort. We cannot say that the mere happening of an accident in New Jersey would raise a contract which would not be raised in the actual hiring of the employe. To say so would be to establish a right akin to that arising *ex delicto* rather than to that arising strictly *ex contractu*.* 20 30

Sexton v. Newark District Telegraph Company, supra, decides that the obligation under the Employers' Liability Act is one which arises *ex contractu*.

Deeny v. Wright & Cobb Lighterage Co., 36 N. J. L. J., 121, emphasizes the position that it is the contract of hiring which prevails and not the *situs* of

the accident, by reason of the fact that when the contract of hiring was made in New Jersey and the accident occurred in New York recovery was permitted, by reason that the Workmen's Compensation Act imputed the liability into the New Jersey contract of hiring.

10 Judge Martin in *Deeny v. Wright and Cobb Light-
erage Co.*, 36 N. J. L. J., 121, uses the following language: "It would seem that the reasonable construction of the statute is that it writes into the contract
of employment certain additional terms. The cause
of action of petitioner is *ex contractu*. The *lex loci
contractus* governs the construction of the contract
and determines the legal obligation arising from it.
9 Cyc. 664. That the cause of action is *ex contractu*,
see *Sexton v. Newark District Telegraph Company*,
34 N. J. L. Journal, 368, and 35 N. J. L. Journal, 8;
Perlsburg v. Muller, 35 N. J. L. Journal, 202.

20 These two cases apparently establish firmly
that the right is one which arises by contract
and by contract made within the State of New
Jersey. If a contract is made within the State
of New Jersey, it makes no difference where
the accident may happen. The Workmen's Com-
pensation Act reads the liability for compensa-
tion into the New Jersey contract of employ-
ment, and recovery may be had. If the contract
is not made in New Jersey the vital principle under
these two cases is missing. The Workmen's Com-
30 pensation Act cannot be read into any contract of
hiring, and neither can the *situs* of the accident in
New Jersey raise a presumption of a contract. *The
necessary element for recovery under the Work-
men's Compensation Act in New Jersey is not that
the accident happened in New Jersey, but that the
contract was made in New Jersey.*

"The English cases cited in Bradbury's Book are not precedents, because a claim under the English act is "*ex delicto*."

"The objects of our act are to protect the citizens and inhabitants of New Jersey. It is based upon the proposition that the inherent risks of the employment should, in justice, be placed upon the shoulders of the employer, who can protect himself by an addition to the price of his product, and so cause the burden ultimately to fall upon the consumer; that indemnity to an insured employe should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances or tools; that under our former system the loss fell immediately upon the employe, who is almost invariably unable to bear it, and therefore ultimately upon the community which is taxed for the support of the indigent, and that our former system was uncertain, unscientific, and wasteful, and fostered a spirit of antagonism between the employer and the employe which it is to the interest of the State to remove." *Deeny v. Wright and Cobb, supra*. 10 20

In the case from which the above is quoted, the petitioner being injured in New York State, under a contract made in New Jersey, was permitted to recover upon the theory that the contract was a New Jersey contract and that the Workmen's Compensation Act was designed for citizens of New Jersey.

It is unreasonable to suppose that a new contract of hiring is made by the employe under the laws of New Jersey as soon as he comes within the confines of New Jersey. No proof was offered of the making of a contract in New Jersey at all. Is he not operating under the Pennsylvania contract, and if that is so and "the objects of our act are to protect the citizens and inhabitants of New Jersey," what standing under the Workmen's Compensation Act 30

has the present case? We believe that it has none.

The Supreme Court of Errors of Connecticut, in *Kennerston vs. Thames Towboat Co.*, 94 Atl. 372, is to the effect that it is the place of the contract of hiring, not the place of the accident which rules under a Workmen's Compensation Act.

In the present case, there is no contract made in New Jersey, and under the circumstances the New Jersey Workmen's Compensation Act is not applicable. To assume the decision sought to be assumed by the appellee would bring about this anomalous state of circumstances. Assuming as there is a Workmen's Compensation Act in Pennsylvania similar to that existing in New Jersey, and assuming *Deeny v. Wright and Cobb Lighterage Co.* to have been adopted as a Pennsylvania decision, there would be under those circumstances recovery for the Pennsylvania contract, though the accident happened in New Jersey, and there would also be according to the appellee's contention, recovery under a New Jersey contract for exactly the same accident by reason of the law having raised a contract of employment in New Jersey by very reason of the accident. This contention appears absurd.

The law of New York is contrary to *National Radiator Co. v. Roggee*, *supra*. The New York Supreme Court, Appellate Division, in *Pensabene v. F. & J. Anditoreo*, 240 N. Y. Supp. 266, construing our statute, held that the reading of Subdivision 9, Section 11, made it plain that the statute applied only when the contract of hiring was made in New Jersey. This has been subsequently followed in New York.

The contention of the appellant is, that this case has no standing under the testimony under the Workmen's Compensation Act of New Jersey, and that even if the injury occurred in New Jersey, inasmuch as the contract of hiring was not in New Jersey, the statutes of New Jersey cannot read into

that contract of hiring anything other than existed there when it was made under the laws of the other jurisdiction.

*We believe this contention to be borne out by the Constitution of the United States. "No state shall * pass any * law impairing the obligation of contracts."*

Such is the prohibition of the Constitution of the United States depriving states of a certain power.

In the case at bar, a contract was made in Pennsylvania. Subsequent thereto, the Workmen's Compensation Act was passed. To say that the Workmen's Compensation Act which related to New Jersey contracts likewise extended to Pennsylvania contracts made prior to its enactment is to give it force of an act impairing the obligation of contracts which a court is not warranted in doing. This prohibition extends to all contracts wherever made. Western Nat. Bank. vs. Reckless 96 F. 70. To same effect as to Courts, see King vs. Dedham Bank, 15 Mass. 447; State vs. Miller, 50 Mo. 129; Neill vs. Gater, 152, Mo. 585. The decision of the court cannot give such effect to a law. A court is bound to interpret the law so that neither the state or National Constitution is vitiated, if such is possible, which, of course, it is in this case.

Under these circumstances Section II of the Workmen's Compensation Act would not stand, and if there is any right of a recovery at all in the appellee, it would be by common law, in which it would be barred by the "wilful negligence" of its intestate in all probability as the case stands.

IV.

EFFECT OF RELEASE.

To take up the fourth question, namely that of the effect of Callaway's agreement in joining the

Philadelphia and Reading Relief Association, and the release given by his widow and beneficiary upon the present right to recover.

If it be considered that the case arises under the Federal Employers' Liability Act the effect of the release is provided in U. S. Comp. St. Sec. 8661, to be that there shall be exemption only by reason of set-off of sums contributed or paid to any insurance, relief benefits, or indemnity that may have been paid
 10 to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

The Supreme Court dismissed this portion of the case at bar without citation of case authority for such dismissal. It stated 'the release is made by the widow quo widow and of course cannot bind the personal representatives of the deceased, who sued in right of the Statute.' *The right in this case to demand and receive a release in full from the personal representative was contracted for in Pennsylvania before the New Jersey Workmen's Compensation Act was ever considered.*
 20

*When the Supreme Court gave its decision then it failed to observe two things, (1) The Constitution, as we have discussed it before, prohibits a state alone impairing the obligation of contract. To so interpret the Workmen's Compensation Act would be to give it such prohibited construction. And (2) the payment made should be a ground at least
 30 for relief pro tanto, so far as the widow as a dependent is concerned.*

If it can be conceived to be properly brought under the Workmen's Compensation Act, the facts show that the Philadelphia and Reading Relief Association is a separate and independent corporation; that its members are persons employed or about to be employed by the Philadelphia and Reading Railway Company and certain other companies, and that

membership in the said Relief Association is entirely voluntary. It is not required of any employe of the Philadelphia and Reading Railway Company. If they join such Relief Association, they submit themselves to its rules and regulations, making contributions and receiving the rights and benefits arising therefrom. Membership in the Relief Association is not in any respect a part of the contract of hiring or employment by the Philadelphia and Reading Railway Company. 10

There was submitted in evidence, and there appears in the state of the case, a copy of the application for membership in said Relief Association of Amos B. Callaway. The agreement provides that there shall be deducted from his wages a certain amount to be paid to the Relief Association as his contribution to the benefit fund. The Philadelphia and Reading Railway Company likewise under the agreement pays a certain proportion to the fund. It makes no difference what that proportion may be, as the law does not examine into the amount of the "quid pro quo," leaving that to the judgment of the parties themselves. 20

The application for membership in the Relief Association contains the following clauses:

"And in consideration of the contribution to be made to the Relief Fund of the said Association by The Philadelphia and Reading Railroad Company, and its successors, and of the agreement of the several Associated Companies in respect to any deficit in the Relief Fund for benefits to their respective employes, I hereby agree that the acceptance of benefits from the said Relief Fund, or from said Association, for injury or death, shall operate as a release of all claims for damages against said Company, my employer, and against any of said Associated Companies by which I may 30

hereafter be employed, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute, or, where necessary, procure to be executed, such further instrument as may be necessary formally to evidence such acquittance.

10 "I also agree, That this application, when approved by the Superintendent of said Association, shall make me a member of said Association on and from the date upon which by the provisions of the Regulations of said Association and the terms of this application, it takes effect, and shall constitute a contract between myself and the said Company, my employer, and such of the Associated Companies by which I may be hereafter employed, and that

20 the terms of this application, and the Regulations of said Association shall during my membership, be a part of the conditions of my employment by said Companies, or any of them, and that the same shall not be avoided by any change in the character of my service, or locality where rendered, while in such employment, nor by any change in the amounts applicable from my wages, to the Relief Fund, which I may hereafter consent to, and that the

30 agreement that the above named amounts shall be appropriated from my wages, shall apply also to any other amounts arising from charges made as aforesaid, and shall constitute an appropriation and assignment in advance, to the said Company or Companies, my employers, in trust, for the purposes of said Association, of such portion of my wages, which assignment shall have precedence over any other assignment by me of my wages or

of any claim upon them, on account of liabilities incurred by me."

"I DO HEREBY FURTHER ACKNOWLEDGE, CONSENT AND AGREE, That any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in this application, or my resignation from the service of said Company, my employer or from any of the Associated Companies, or my being relieved from employment and pay therein at the pleasure of the said Companies, or any of them, or their proper officers, shall, except as otherwise provided in the Regulations, forfeit my membership in the said Association, and all benefits, rights and equities arising therefrom, excepting that my leaving the service shall not (in the absence of any of the other foregoing causes of forfeiture) deprive me of any benefits to the payment of which I shall have previously become entitled to by reason of accident or sickness occurring while in the service, nor of the right to continue my membership in respect of death benefit only, as provided in said Regulations."

The acceptance of this application by the Relief Association and Callaway's subsequent admission to membership constitute the agreement with the Relief Association, together with the by-laws of said Association therein referred to and annexed to the state of the case. It makes no difference whether said application has been signed by the Relief Association or the Railway Company or not, the fact that the Railway Company did make contributions in accordance with the agreement, and that the agreement was accepted and payment made thereunder, in accordance with its terms, has been fully established and the contract proved.

It is to be strictly considered that this contract is in no sense a "contract of hiring." It is an entirely separate and voluntary contract made with a separate organization not the employer. It does not therefore come within the purview of the Workmen's Compensation Act of New Jersey, which provides: "Every contract of hiring, verbal, written or implied from circumstances, now in operation or made or implied prior to the time limited for the act to which this act is a supplement to take effect, shall, after this act takes effect, be presumed to continue subject to the provisions of section two of the act to which this act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract that the provisions of section two of the act to which this act is a supplement are not intended to apply," P. L. 1911, page 763.

The application for membership in the Relief Association and the contract connected with and related thereto is likewise a contract made in Pennsylvania and to be interpreted in accordance with the Pennsylvania law. It can in no respect be regarded as a contract of hiring, and even if it were so regarded, it would be a part of a contract of hiring made in Pennsylvania, and not made in New Jersey, and therefore not subject to interpretation under the laws of New Jersey or modified by the Workmen's Compensation Act of New Jersey.

In order to assert, as the plaintiff does assert, that the contract with the Philadelphia and Reading Relief Association was modified by the statutes of New Jersey, it would be necessary to assert that a contract is not governed by the *lex loci contractus*, which is, of course, in the absence of an agreement, in the contract itself that it should be determined according to the laws of another jurisdiction a generally well established rule.

Under these circumstances, it is not reasonable to assume as contended by the appellee, that because of a failure to serve notices provided by Section II of the Workmen's Compensation Act, in connection with the contract of hiring, made in the State of Pennsylvania, that said contract of hiring must be made with respect to the provisions of Section II of the New Jersey Workmen's Compensation Act. Such contention would cause the operation of the statutory contract in the Workmen's Compensation Act of New Jersey to be extra-territorial in cases 10 where an accident occurred within the jurisdiction of New Jersey. It is perfectly proper that in case of such an accident, the common law remedy for the injury should exist, but that there should be a new contract raised up for him of a different character and containing different terms from that made for him by the law of the place of the contract of hiring, is we submit erroneous.

Under these circumstances the appellant's contention is, (1) the Workmen's Compensation Act 20 does not apply at all to the contract of hiring in the present case; and (2) though it should be adjudged so to apply by reason of the accident having occurred in New Jersey, it cannot apply to a contract made with an independent corporation, which is not a contract of hiring and not made within the State of New Jersey, e. g., the contract with the Relief Association and its attendant circumstances.

To quote from *Elliott on Railroads, Vol. 3, Second Edition, page 907*, "Many railroad companies have 30 recently established voluntary relief departments for the accumulation and management of a relief fund out of which definite amounts are to be paid to the employees who voluntarily become members and contribute thereto in case of accident or sickness, or to their relatives or other designated beneficiaries in case of their death."

In *Beck v. Pennsylvania R. Co.*, 63 N. J. L., 232 (N. J. Supreme Court, 1899) MAGIE, C. J., says at page 239, "A contract by which an employe permits such an employer to create a fund in part out of his wages, supplemented by a contribution by the employer when necessary, out of which relief for sick and injured employes is provided, and by which the employer undertakes to manage the fund and furnish the agreed on relief is, in my judgment, within
 10 the implied powers of the employer, if a corporation. On the part of the employer such a scheme may be deemed likely to increase the efficiency of the force it employs, and on the part of the employe it may tend to relieve from anxiety as to support if injured by any of the many dangers to which he is daily and hourly exposed." It is also held in the same case that it is not against public policy nor lacking in mutuality of consideration, nor is it an insurance contract. How much less so when the relief
 20 is from contract with a separate corporation or association.

In *Elliott on Railroads*, Vol. 3, Edition II, page 909, we find the following language:: "It is a general rule that an employer cannot contract in advance that he will not be liable for his own negligence. *Miller v. Chicago, &c., R. Co.*, 65 Fed. 305. Doubtless this rule would, in most jurisdictions, prevent the enforcement of a railroad company of an unconditional contract by a member of the Relief Association to release the company, or not to sue if he
 30 should be injured therein by the negligence of the company. If the terms of the contract were such that the mere membership in the Association and the right to receive benefits would of itself release the company from all liability, or if the contract rules and regulations of the Relief Association were such as to compel him to accept the benefits and re-

lease and discharge the company, they would be void as against public policy.

This seems to be conceded in all the cases upon the subject, but a contract giving the employe the option to do so, or providing that if he does do so after injury, the railroad company shall be released, is a very different thing."

The same work, *i. e.*, *Elliott on Railroads, Vol. 3, Second Edition, page 910*, contains the following language: "There is no rule of public policy which 10 forbids or discourages settlement by compromise in good faith, of a claim for damages after an injury has been inflicted. Such a contract as that to which we referred in the conclusion of the last section, does not compel the employe to accept the benefit of the Relief Fund nor to release the company unless he desires to do so. The contract, or transaction, is, in reality, not concluded until after the injury, and the company is not released until the fund is accepted. This completes the transaction, and the 20 contract or release is no more against the public policy than any other release or settlement by way of compromise after the injury is inflicted.

The same work, *i. e.*, *Elliott on Railroads, Vol. 3, second edition, page 911*, says: "By becoming a member of the Relief Department, the employe receives benefits if he chooses to accept them and releases the company not only where he is injured by the negligence of the company, but also where the company is guilty of no negligence, and indeed, for mere sickness, with causing which the company has 30 nothing to do. * * * It cannot be said therefore, that there is no consideration in the agreement for the employe, nor can it be said that there is no mutuality in the contract.

The same work, *i. e.*, *Elliott on Railroads, Vol. 3, Second Edition, page 912*, says: "It is well settled by the almost unruffled current of authority, that the

voluntary acceptance of benefits from relief associations, after an injury has been inflicted, under an agreement made upon becoming a member of the Association, that such acceptance shall operate as a release of the Railroad Company, or the acceptance of such benefits and the execution of a release in consequence thereof, does operate to release the company in cases cited."

- 10 *In the present case, it is provided that the acceptance of benefits from the Relief Association operates as a release of the Railway Company. By the contract which Callaway made with the Philadelphia and Reading Relief Association, a separate organization, and by an entirely voluntary agreement for a sufficient consideration moving also from the Philadelphia and Reading Railway Company, and made before the Workmen's Compensation Act was created, he agreed that the acceptance of benefits by his wife and beneficiary should operate as a release*
- 20 *of the Railroad Company, and should authorize and require his executors or administrators to give a full and complete release for any liability arising from his death.*

In this case the following facts are to be noted:

- (1) During the continuance of the contract made with the Relief Association, Callaway was likely to receive (a) sick benefits, and (b) death benefits, to his estate, wherever he was killed and under whatever circumstances.
- 30 (2) It was possible for him or for a beneficiary named by him to elect after injury whether they would accept the benefits under the contract or whether they would accept their remedies at law.
- (3) If they accepted their contract rights, they then waived any other possibility of recovery.
- (4) The contract was made with people who understood the effect of it, who were not ignorant, and who were presumed to have a knowledge of the

law; the benefits were paid under it; the release given in accordance therewith, with knowledge, that it was a release, and under such circumstances the present right of action would be barred.

This is especially so as

(5) The case arises under a contract made in the State of Pennsylvania, and which would not be affected in anywise by the statute of New Jersey.

While it is true that the voucher signed by Mrs. Callaway and the release make no mention of the children of Callaway, and that upon the fact of the instruments, except by reason of the language used to authorize the executor or administrator to execute a contract, no one would be affected thereby but the signer, the face of the voucher and release are not alone to be considered. 10

In the present case, the contract was such that upon receipt of claims by the widow and beneficiary the railroad company, for due consideration, was released. The release annexed to the state of the case contains such language. 20

It is contended by the appellee that the acceptance of benefits from the relief association and an agreement that the railroad company shall be released will at least not more than prevent the recovery of damages for the benefit of the particular persons who accepts such relief and executes such release to the railroad company after the death.

It is contended that the acceptance by the widow of benefits from the Relief Fund and the release by her of claims against the company, will not necessarily prevent her or someone else from maintaining an action as administratrix against the company for the benefit of the children. There is surface authority for this contention in *Chicago R. Co. v. Wymore*, 58 N. W. 1120, "But we conceive that the contract in that case as well as the contract in the case of *Chicago R. Co. v. Healy*, 111 N. W. 598, were 30

founded upon different facts and language than the present instance shows. There is likewise law to the contrary.

The syllabus prepared by the Court in *Chicago R. Co. v. Healy, supra*, contains the following language: "under a contract of membership in the relief department of the Chicago, Burlington and Quincy Railroad Company, which provided that the receipt of benefits by the beneficiary should bar all
10 actions of damages arising from the death of a member, the beneficiary, after receiving the benefits provided for in the certificate of membership, cannot maintain an action to recover damages for herself caused by such death; but the receipt of such benefit will not bar her action as administratrix of the estate of the deceased for the benefit of her minor children."

The contract in that case must have differed in certain respects from the contract in the case at
20 hand, which provided for the release of the estate by the acceptance of benefits by the beneficiary and did so release the company, being likewise with an independent corporation.

It is contended by the appellee that the contract of Callaway with the Relief Association and the proceedings under it are against public policy and fraudulent. We do not conceive that there is any merit whatever in such contention. We also conceive that under the particular contract made by
30 Callaway with the Relief Association the rights of the minor children are likewise barred. Nevertheless, if that be not so, the only sum which could be obtained by the administrator in this specific action would be such sum as would be allowed for the minor children, exclusive of the sum which would, under the Workmen's Compensation Act, be allowed for the widow, as under the 1911 act only.

It is especially called to the attention of the Court that the accident did not arise at a time when the amendments to the Workmen's Compensation Act, found in P. L. 1913, page 312, were in effect, but prior thereto. The language of this latter act is as follows: "No agreement, composition, or release of damages made before the happening of any accident, except the agreement defined in section two of this act, shall be valid or shall bar a claim for damages for the injury resulting therefrom, and any such agreement, other than that defined in section two herein, is declared to be against the public policy of the State. The receipt of benefits from any association, society or fund to which the employe shall have been a contributor shall not bar the recovery of damages by action at law or the recovery of compensation under section two thereof." 10

The very fact that the present amendment to the act was enacted would indicate that it was the contemplation of the Legislature that therefore receipt of benefits from associations, societies or funds to which the employe may have been a contributor, were a bar to the recovery of damages by action at law by the recovery of compensation under Section II of said act. It was with a view of changing the law that this latter section was passed by the Legislature. 20

The case which we are considering arises before such change was made.

It cannot be validly contended either that the statute of 1909 can have any bearing upon the present contention, or throw any light upon the public policy or the general public sentiment relative to this question, for the law of 1909 found in *P. L. 1909, page 114*, is not the law under which the plaintiff in this instance is proceeding, and is therefore not pertinent to the present case. 30

It does not seem therefore necessary to discuss the operation of either of these last mentioned acts, and while it may well be conceded that a provision such as that contained in the Federal Employers' Liability Act, 223, U. S. I. should be upheld as constitutional, as has been done in *Davis Smith Co. v. Clausen*, 117 *Pacific*, 1101, and in *Borgnis v. Falk Co.*, 133, *N. W.* 209, we consider such discussion beside the issue in this branch of our discussion.

10 CONSTITUTIONALITY OF RELEASE.

We have already said that the New Jersey Workmen's Compensation Act has been decided to be constitutional. That is not the question which arises in the present instance. The constitution of the United States provides that the States shall not pass laws violating the obligation of contract. In the present instance the contract is one made in Pennsylvania. The obligation of such contract could not, under the constitution, be violated by any act of the
20 Legislature of New Jersey, and it is contended in the present instance that any attempt to nullify the contract which has been made under the laws of Pennsylvania and with the Pennsylvania Relief Association by virtue of the ultimate acceptance and ratification of the contract by which the release hereto appended was given, would be contrary to the constitutional provisions.

Amos B. Callaway was paid by the month. His contract of hiring was indefinite. It is contended by
30 the plaintiff that, "There being an appointment to the employment for an indefinite term, an agreement to leave the employment at the pleasure of the employer, payment of wages by the month, and no agreement by the employe to serve for a definite term, the employment should be at will only or at most for monthly terms. The employment for each

day, if an employment at will, or the employment for each month, if for monthly terms, constitute a new contract."

This contention would appear to be unsound. The contract was entered into at the moment of hiring. It continued until the time of death. The fact that for convenience monthly payments only were made, does not of itself constitute a new contract. There is no proof of such new contract or that any contract was made in New Jersey.

In *Beach v. Mullin*, 34 N. J. L., 343, it was held, 10
 "The reservation of wages payable monthly or weekly will not control the contract so as to disrupt its entirety * * * but if payment of monthly or weekly wages is the only circumstance from which the duration of the contract is to be inferred, it will be taken to be a hiring for a month or a week."

In the present instance, there are other circumstances, from which it may be inferred that there was not a new contract entered into at the beginning of each month. As a matter of fact, it was continued 20
 upon the same terms and conditions without any new agreement, and by virtue of the original contract of hiring from the time of the making of the contract until the death of the plaintiff's intestate. There is nothing to show any making of a new contract once each month. The only mention of "month" at all is that according to the time Callaway worked he received pay at the end of a month. It is not possible that by reason of such payment the plaintiff can avoid the constitutional question which 30
 is absolutely material in this instance, to wit, whether a statute of New Jersey can avoid the obligation of a previously existing contract made under the laws of Pennsylvania, the benefits of which were accepted subsequent to the passage of the statute of New Jersey.

SUMMARY.

Under the facts of the case, the actions of the appellee's intestate were such as to bar his estate under the common law from recovery on the ground that he was "wilfully negligent" if the action had been brought under the common law. His actions were such that his death resulted from that which was tantamount to "self-infliction," if the case properly arises under the Workmen's Compensation Act of New Jersey. It is contended that the Federal Employers' Liability Act or the common law in an action for damages and not the Workmen's Compensation Act, should have been the procedure under which damages should have been sought to be obtained by the administrator of the deceased person who was engaged in interstate commerce especially when the contract of hiring was in the State of Pennsylvania previous to the passage of the Workmen's Compensation Act of New Jersey, even though the accident which occurred during the course of the employment was in New Jersey subsequent thereto.

It is contended likewise that it would be unconstitutional to hold that the Workmen's Compensation Act of New Jersey avoided the obligation in the previously existing contract of hiring made under the laws of the State of Pennsylvania. It is likewise contended that the contract by which Callaway joined the Relief Association and under which his widow elected to receive the benefits thereof, could not be affected by the New Jersey Workmen's Compensation Act, and was in full force and virtue. By reason thereof and by the language which it contains, it certainly bars all recovery of the administrator for the benefit of Callaway's widow, and its language would likewise totally bar any recovery by the administrator at all.

Under these circumstances it is contended that the petition should have been dismissed and the Supreme Court should have upheld such dismissal.

Respectfully submitted,

EDWARD L. KATZENBACH,
Attorney and of Counsel for Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WEST JERSEY TRUST COMPANY,
ADMINISTRATOR OF AMOS B.
CALLOWAY, deceased,

Respondent,

vs.

PHILADELPHIA & READING RAIL-
WAY COMPANY,

Appellant.

ON APPEAL.

BRIEF FOR RESPON-
DENT.

THE FACTS.

This is an action under the second section of the Employers' Liability Act, P. L. 1911, p. 134, and supplement, P. L., p. 763. The accident happened on November 13, 1911, and is therefore to be governed by the statute as it existed prior to that date. No notice was given to take the employment out of the second section, and to place it within the first section.

The petition is made by the administrator of the decedent, for the benefit of the persons entitled by the Act.

It was proven that the act of the decedent preceding the injury and which placed him in a position where he could

be, and was, injured, was an act such as is customarily performed by railroad employes of his class; that while his act was not necessary, it assured a more successful result from the employe's efforts in his employer's business than would be obtained from some other course of action, and that his action was duplicated every day on railroads, by employes of his class. (Case, pp. 45, 51, 52 and 71.)

The accident itself was described by several witnesses, and in substance it was this: That decedent went between two cars of this train in order to open a "knuckle" and to make a coupling more sure, and in coming back between the cars he was caught and killed. (Case, pp. 34, 35, 41, 42, 45, 49, 67, 68.)

The decedent left surviving him a widow, Rose Ella Calloway, and two children, Randolph T., born September 24, 1900, and Edna D., born January 10, 1906, who were all dependent on him at the time of his death. (Case, pp. 53, 54, 55.) His average wage was stipulated to be \$18.13 per week.

The defendant claimed that it was under no liability by reason of an agreement made by Calloway in joining an association known as the Philadelphia and Reading Relief Association. This agreement is Exhibit R1, and is found in the State of the Case on p. 98, *et seq.* This application or agreement, whichever it may be called, is not signed by the Relief Association or the Railway Company, and contains no agreement on the part of the Railway Company to contribute anything to the Relief Association, or if it does contribute, to contribute any definite sum or percentage. It was proven that Calloway paid, in the manner agreed upon, his contributions to the bene-

fit fund, and that the Railroad Company contributed to that fund five per cent. of the amount contributed by the employes who were members, and that this five per cent. was the total, not only of the Railway Company, but of the Associated Companies referred to in this agreement. (Case, pp. 62, 63, 97.) Of the \$600 from the benefit fund paid to Mrs. Calloway, therefore, the company's proportion was only \$30.00.

The defendant also set up as a bar to its liability a release (Exhibit R4) and a receipt or voucher (Exhibit R3) and the payment of the sum of \$600 from the Relief Association (Exhibit R2). These are found in full on pp. 106 to 111 of the State of the Case.

Mrs. Calloway testified that when she went to get the money from the association, she was told she could not get it without signing the papers offered in evidence; that she did sign these papers and was told she would receive a check for the money, which she later did receive; and that nothing was said at the time the papers were signed regarding any rights under the Employers' Liability Law. (Case, pp. 80, 81.)

The admission in evidence of Exhibits R1, R2, R3 and R4, was objected to, but they were admitted, subject to argument at the close of the case. (Case, pp. 59, 61.)

The Court below found as a fact that the contract of employment was made in the State of Pennsylvania, and that for that reason recovery was denied. No findings of fact upon any other of the features of the case were made.

Calloway was appointed a brakeman on or about June 16, 1910, on the New York Division of the Railway Company and his name was then put on what was known as

the extra list. Those whose names were on this list were called on for special or irregular work, and paid for such time as they actually served. (Case, pp. 87, 93.) Thereafter, in May of 1911, Calloway applied for appointment as brakeman on the Bound Brook Division and received his appointment as such. (Case, pp. 89, 90, 91 and 93.) This position required his services in New Jersey and Pennsylvania, and while performing the duties of brakeman in New Jersey, Calloway was killed. (Case, p. 93.)

Decedent was paid by the month (Case, pp. 82, 94), and his employment was at the will of the Railway Company. (Case, p. 94.) The application for membership in the Relief Association also referred to Calloway's "being relieved from employment and pay therein at the pleasure of the said companies, or any of them, or their proper officers."

NOTE.

The trial Judge made no findings of fact on the question of dependents, whether death was due to accident arising out of and in the course of the employment, and so forth, deciding the case upon the sole ground that the contract of employment was made out of the State. There were other points of law to be determined by the Supreme Court, however, before it could be known that this action in dismissing the petition was not justified. These relate to the effect to be given a certain contract made by the decedent and certain papers executed by the widow. The Supreme Court decided all these points in favor of the petitioner below, and we ask that the order of the Supreme Court be in all things affirmed. These

legal questions we discuss in their order, and ask the Court for a favorable determination of the legal questions involved in this appeal, and that the record be then remitted to the Common Pleas for further proceedings. This case is in somewhat the same situation as *Long vs. Bergen Common Pleas*, 86 A. R., 529, Judge Gnichtel having gone out of office.

The present case, so far as it relates to the effect of the agreement and release, is one of first impression so far as we can find, and is of vast importance to the employes of all railroads in New Jersey.

1. Effect, if any, of the Federal Employers' Liability Act.

THE QUESTION OF WHETHER THE DECEASED WAS ENGAGED IN INTERSTATE COMMERCE AT THE TIME OF HIS DEATH, SO AS TO BAR THE RIGHT OF RECOVERY IN THIS ACTION, WAS NOT RAISED IN THE COMMON PLEAS, EITHER IN THE PLEADINGS OR ARGUMENT, AND NO EVIDENCE WAS INTRODUCED ON THIS ISSUE. THE QUESTION WAS RAISED FOR THE FIRST TIME IN THE SUPREME COURT AFTER THE TIME WITHIN WHICH AN ACTION UNDER THE FEDERAL STATUTE COULD BE BROUGHT HAD EXPIRED. UNDER THESE CIRCUMSTANCES WE THINK THE DEFENDANT IS PRECLUDED FROM PUTTING IN THIS DEFENSE.

But even if this defence had been put in, we think the petitioner would nevertheless have been entitled to recover.

In *Rounsaville vs. Central Railway Company*, 94 Atl. Rep. 392, (now in this Court on appeal, opinion not having been filed) the Supreme Court, per Justice Swayze, showed that the Federal act and the act of our own State covered different subject matters, the Federal act covering liability for torts and the State act liability ex contractu. The ruling of that case, therefore, was that an employment in interstate commerce did not prevent a recovery under our statute.

Counsel attempt to distinguish the Rounsaville case from this because of the fact that there the contract of employment was made in the State, while the accident happened out of the State; while here the accident happened in the State, while the employee was hired out of the State. But we submit that these differences in point of fact have no bearing on this particular question. We think this question must be determined solely upon the nature of the statutes alleged to conflict, unaffected by the fortuitous facts of specific cases.

The Supreme Court came to the same conclusion in the case of *Hammill vs. Pennsylvania R. R. Co.*, 94 Atl. Rep., 313.

In *Winfield vs. Erie R. Co.*, 96 Atl. Rep., 394, this Court decided that where the Federal act gave no remedy it was not exclusive of recovery under the State act. The Chief Justice said "that in order to oust the Court of Common Pleas of jurisdiction in a proceeding brought under our Workmen's Compensation Act, it must affirmatively appear either in the pleadings or the proofs that a right of action is given to the widow or personal representatives of the deceased employee by the Federal statute; in other words, that his death resulted in whole or in

part from negligence chargeable to the defendant company; for such negligence will not be presumed."

No reference was made in the pleadings to the Federal act at all, and so far from admitting its negligence, the defendant below alleged in its answer (Case, p. 14) that the accident "was due SOLELY AND SIMPLY to the reckless indifference, wilful negligence and deliberate act or failure to act on the part of the said" decedent. The appellant in the light of this Court's decision in the Winfield case says in its brief that the testimony "tends to suggest a negligence on the part of the appellant." But such an assertion, made in that manner, at a time when a right under the Federal act is barred, does not meet the language of the Chief Justice where he says that a right of action for negligence must "affirmatively appear." The appellant does not even now admit its negligence, but at the most suggests that there may be a doubt as to the truth of its pleadings, and, by inference, that there might be a jury question as to the negligence in an action under the Federal act.

The New York Courts have had this question before them. The present statute of that State provides for a compulsory insurance fund, with an option to the employer in certain cases to act as a self insurer.

In *Winfield vs. New York Central & Hudson River R. Co.*, 110 N. E. Rep., 614, the Court of Appeals of New York State, per Justice Seabury held that the Federal act was not exclusive of the State act. The Court called attention to the fact that the Federal statute allowed recovery for injuries which were the result of the defendant's negligence and that the State statute allowed compensation regardless of fault.

The Court said as to the action of Congress in enacting the Federal employer's liability act, that:

"It intended to occupy and exclusively pre-empt the field in which the liability of certain employers engaged in interstate commerce to their employes is prescribed when the latter are injured as the result of negligence. It did not intend to enter upon the field of compensation for industrial accidents which were not the result of negligence, but left that field open for occupancy by the State until such time as it should assume to legislate upon this subject."

The recovery sought in this action is on contract. Can the appellant be heard to say that it is not bound by its contract, because it might have had some other rights if it had not made the contract?

2. Negligence of Decedent.

There is no contention that the decedent was intoxicated, nor that the injury was in any respect caused by intoxication. The act of decedent which placed him in the position where he was injured was an act such as is customarily performed by railroad employes of his class and contributed to the successful performance of his work.

Taylor vs. Seabrook, 94 Atl. Rep., 399, covers this point.

It is urged by appellant that the nature of the accident was such that it should be said that the accident did not arise out of or in the course of his employment. To state the appellant's view of the case in this language: "You were not employed to perform negligent acts, and there-

fore an accident resulting from your negligence does not arise out of or in the course of your employment," is to demonstrate its fallacy.

Bryant vs. Fissell, 86 A. R., 458, is dispositive of this branch of the case.

3. *Lex Loci Contractus*.

We think this feature of the present case is entirely disposed of by the case of *American Radiator Company vs. Rogge*, 92 A. R., 85, affirmed by this Court, 93 A. R., 1083.

The facts regarding the contract of employment with Calloway have been already set out.

The point is made that his employment was not under the act. But in May of 1911 he was appointed brakeman on the Bound Brook division of the railroad and while so acting he met with the accident which caused his death. As this date was subsequent to the enactment of our statute, the employment was subject to the act, on the authority of *Sexton vs. Newark District Telegraph Co.*, 86 A. R., 451.

In addition to this circumstance, there was an appointment for an indefinite term, an agreement to leave the employment at the pleasure of the employer, payment of wages by the month, and no agreement by the employee to serve for a definite term, so that the employment would be at will only or at most for monthly terms. The employment for each day, if an employment at will, or the employment for each month, if for monthly terms, constituted a new contract. As several months elapsed after the supplement was adopted before the accident, the con-

tract was made subject to the act. If Calloway had been injured after the passage of the act, and before the expiration of the month of his employment, the constitutional question might be material. That is not this case. As the contract in existence at the time of the accident was made after the passage of the act, the act cannot be said to impair its obligation.

In *Beach vs. Mullin*, 34 N. J. L., 343, it was held,

"The reservation of wages, payable monthly or weekly, will not control the contract so as to destroy its entirety, when the parties have expressly agreed for a specified term, as a year. But if the payment of monthly or weekly wages is the only circumstance from which the duration of the contract is to be inferred, it will be taken to be a hiring for a month or a week."

American Radiator Co. vs. Rogge, supra.

Counsel's argument is based upon a misapprehension of the opinion in the case of *American Radiator Company vs. Rogge, supra*. The liability does not depend upon the New York contract, and when the Court refers to the fact that his action is *ex contractu*, the contract meant is the contract implied by the statute.

Counsel says that because this contract of employment was made in Pennsylvania, our statute violates its obligation within the meaning of the constitutional provisions upon that subject. But attention is not called to any authority applying a different rule of constitutional construction to a foreign contract than is applied to a domestic contract. We submit that no such authority can be found, and that, from the constitutional point of view,

the decisions of our courts, which have approved this act, in the light of the various constitutional objections which have been made, are equally applicable to this case.

Sexton vs. Newark District Telegraph Company, 86 A. R., 451.

Hoey vs. Superior Laundry Co., 88 A. R., 823.

Huyett vs. Penna. R. R. Co., 92 A. R., 58.

Troth vs. Millville Bottle Works, 91 A. R., 1031.

4. The Effect of Calloway's Agreement in Joining the Relief Association.

A. *The contract presumed by the Act, and the contract in the application for membership, were both in effect at the time of the accident, the latter, however, being in some respects changed by the statutory contract.*

The supplement to the General Act (P. L. 1911, p. 763), provides:

"Every contract of hiring, verbal, written or implied from circumstances, now in operation or made or implied prior to the time limited for the Act to which this Act is a supplement, to take effect, shall, after this Act takes effect, be presumed to continue subject to the provisions of section two of the Act to which this Act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract that the provisions of section two of the Act to which this Act is supplement are not intended to apply."

The notice here provided for was never given, so that the Railway Company must be considered to have con-

tracted with decedent that the Act should apply. If the company had desired to contract that the Relief Association agreement with the decedent should be effective without change, they should have given the notice provided by the Act to put decedent within the first section. The effect of the making of the second contract, that presumed by the supplement, was to change the provisions of the former agreement, in so far as they related to limitation of liability and terms of employment, and to substitute the statutory provisions. It cannot be considered that the second contract was exclusive, as no action was taken by the company or association to terminate the first contract, although there was an easy method provided for terminating it, as above, and the company deducted, and the association received several contributions from decedent after the Act became effective. The Railway Company, therefore, can only be considered to have desired and intended that both contracts should remain effective, so far as might be. This was the view adopted by Justice Parker in the Court below. The benefit derived by the Railway Company from the agreement with the Relief Association, after the adoption of the Workmen's Compensation Act, was that it applied to accidents occurring in Pennsylvania, where Calloway performed a portion of his contract of employment. It is to be assumed that they did not endeavor to abrogate this early agreement, because of this apparent benefit.

In the Supreme Court, Justice Parker said that the contract or quasi contract arising under the statute "must be taken to have superseded pre-existing arrangements between the parties, and among them the release

in advance of all claim for 'damages' in view of the membership in the relief association."

In the case of *Newark Paving Co. vs. Klotz*, 91 A. R., 91, and *Interstate Telephone & Telegraph Company vs. Public Service Electric Co.*, 90 A. R., 1062, the Supreme Court considered the compensation provided by the Act to be so much a part of the employment contract as to constitute a portion of the wages of the service. The defendant is therefore in the position of saying that they will not pay wages actually earned under the contract which they chose to make with decedent. This position cannot be sustained.

The agreement, if there were any, by the Railway Company to contribute a specific sum was no part of consideration for the agreement contained in the application for membership, as the Railway Company's agreement was not with Calloway, but with the Relief Association. Calloway would have been entitled to the same sum from the Relief Association even though the Railway Company had made no contribution whatever.

This beneficial society agreement is somewhat analogous to one of insurance, the insurance premium being paid largely by Calloway, both benefiting by its provisions in the State of Pennsylvania, and Calloway benefiting by its provisions in New Jersey. *Barbour Flax Spinning Company vs. Hagerty*, 89 A. R., 919, was a case involving a pure insurance, and is of no assistance here. The Railway Company has received its *quid pro quo* by the protection from liability in the State of Pennsylvania.

Counsel for appellant bases his argument upon the theory that our statute changes the Pennsylvania con-

tract, and violates its obligation, overlooking the rule which is now well settled, that our statute creates a new contract. Can he be heard to say that the parties to this agreement, or persons benefiting by its provisions, cannot make a new contract? In the light of our decisions, that is the effect of this agreement and we think it is totally without force.

B. The agreement does not relate to the cause of action represented by the present suit.

In addition to the reasons above set forth, why the agreement does not refer to this cause of action, we contend that a proper construction of the agreement would secure the same result.

The agreement provides that the acceptances of benefits thereunder shall operate as a release of all CLAIMS FOR DAMAGES against said company, arising from injury or death, which could be made by or through Calloway. The suit is based not upon any claim for damages which could have been made by or through him, but is a claim which arose upon his death, and vested directly in his wife and children by the statutory contract. This was the view adopted by Justice Parker in the court below. This action is therefore not within the description of the contract.

The agreement also says "acceptance of benefits," without specifying by whom accepted. The agreement by Calloway as to the effect of the acceptance of benefits cannot bind third persons, not taking or claiming in privity with him. While the wife and child of Calloway claim by reason of his injury or death, yet there is

no privity between them in this right of action, this being a contractual right in them directly. They do not claim in privity with him.

The only effect of the acceptance of benefits is to be determined by the matter passing between the Railway Company, or association, and the third person, in this case the release.

Cases arising under the Act commonly called Lord Campbell's Act, or the Death Act, should be distinguished from this case, as they are all founded upon a statutory tort, while this case is founded upon a statutory contract.

5. THE EFFECT OF THE RELEASE AND RECEIPT OR VOUCHER SIGNED BY MRS. CALLOWAY, AND THE ACCEPTANCE OF BENEFITS BY HER, UPON THE RIGHTS OF THE ADMINISTRATOR AND THE CHILDREN OF DECEDENT.

The voucher does not refer to claims of an administrator or children, and the release specifies simply claims and demands of the party signing, who was the widow. Upon the face of these instruments, no one would be affected but the signer. As Justice Parker said in the court below, "The release is made by the widow qua widow, and of course cannot bind the personal representatives of the deceased, who sued in right of the statute."

The construction of the respective rights of the administrator, and persons entitled, other than the beneficiary, would be more liberal under this Act than

under Lord Campbell's Act, as this is an action in its nature contractual, while an action under the latter would be in tort. But there are many cases holding that the release by a beneficiary cannot bar the claims of others entitled under Lord Campbell's Act. We cite:

Pittsburgh, C. C. & St. L. Rwy. Co. vs. Hosea, 53 N. E. 419 (Ind.)

C. B. & Q. R. R. vs. Healey, (Neb.) 111 N. W. 598.

B. & O. R. R. Co. vs. Hottman, 25 Ohio Cir. Ct. R. 410.

Oyster vs. C. B. & Q. Rwy. Co., 91 N. W. 699 (Neb.)

McKeering vs. P. R. R. Co., 46 A. R. 715 (N. J.)

In this last case, a release by the beneficiary was pleaded in bar, and on demurrer overruled. It was held that no action on the part of the beneficiary could bar the other next of kin.

In *Beck vs. Penna. R. R. Co.*, 43 A. R. 908, a benefit association agreement, similar to the one here, was attacked by an employee who had received benefit thereunder, and then brought suit, upon the grounds that it was opposed to public policy, lacked consideration, was void for want of mutuality, and was ultra vires the corporation. The agreement was sustained, and we cite it, because the following language in this case is open to criticism: "I think it plainly apparent, that the employee, or his representative, is not debarred from this contract from maintaining such an action, but there is an option afforded thereby either to seek redress by ac-

tion, or to accept the funds stipulated for from the fund." The reference to "representatives" is obiter and should not be considered controlling. That the Court understood the real nature of the case is apparent in the next paragraph, where it is said "Benefits are payable to sick members, to members injured, and to beneficiaries of such as are killed."

6. THE EFFECT OF THE RELEASE AND RECEIPT OR VOUCHER, AND THE ACCEPTANCE OF BENEFITS BY MRS. CALLOWAY, UPON HER RIGHTS.

A. The receipt of the \$600 and a voucher cannot bar Mrs. Calloway.

This feature is disposed of in 2, A and B, above.

B. Upon the true construction of the release, it cannot act as a bar.

At the time of the execution of the release, the widow, as above set forth, was the beneficiary under two contracts. Unless an intent appears to bar both, the release has not the effect contended for by the defendant. There is no magic in a release. When we look at the release we find that it recites particularly the rights in the association's fund, and that the sum of \$600 is payable to the widow "upon the condition of the execution of this release as provided in said application." Then follow the words of general release from all claims, or demands on account of or arising from the death of said decedent against the Relief Association

and the Railway Company. The reference to the application, however, does not broaden the particular recital. There was no condition in the application requiring the execution of a release by the beneficiary, and the release, therefore, cannot be considered to have incorporated in it any part of the application, nor to have ratified any part of the application which had been changed by the statutory contract. The widow was entitled to the \$600 under this Relief Association contract as it then stood. The release should be construed in the light of the circumstances surrounding its execution. It would have been a very easy matter to have referred to the Employers' Liability Act in the release, or to have called the attention of Mrs. Calloway to the fact that the contention of the Railway Company was that the release barred her rights under the Act. She had the right to assume that she had rights under two contracts, and that by reason of the fact that only one contract right was recited, the other was not included in the general words following. The fact that the consideration related only to the one right, is also very material. In the Supreme Court Justice Parker said on this point:

"The subsequent release of the widow, which by its recitals is expressly founded upon the agreement contained in the membership application, and which includes the Relief Association as a party released, must be held as a matter of construction to be limited in its application to the rights and liabilities of the parties as they would have existed if the compensation act had not been passed. This construction is fortified by considering that the act of 1911, by paragraph 12 (P. L., p. 139) provides for

awards based on the existence of children as well as the widow, and for distribution to them in case of intestacy, according to the intestate law of this State. The release is made by the widow qua widow, and of course cannot bind the personal representative of the deceased, who sued in right of the statute."

A Court of Errors and Appeals case, dealing with the rule of construction here applicable, is *Van Slyke vs. Van Slyke*, 78 A. R., 179. This is a well-considered opinion and under the rule there applied, that the general intent as gathered from the whole release governs, this release would not affect the releasor's right to maintain this action.

See also *Jacowitz vs. D. L. & W. R. Co.*, 92 A. R., 946.

We also contend that a release such as this one, when pleaded in an action of this nature, should be strictly construed against this defendant, from the nature of the right, and the policy of this State applicable thereto.

C. There was no consideration for this release, and the defendant asks this Court to assist in the perpetration of a legal fraud.

We have already shown that the contractual rights of Mrs. Calloway under the act were in existence concurrently with her rights in the Relief Association. Upon the death of her husband, she could have maintained an action for the \$600 against the Relief Association. The association could not have defended by saying that the beneficiary should release her rights under some other contract, before she received the

benefits due by it. There is no such condition in the application, which constitutes the contract, and certainly no such condition could be implied. It should be borne in mind that although the release runs to both the Relief Association and the Railway Company, the Relief Association alone had the funds and the Relief Association alone would have been a proper party to such a suit. Now, the fact is that the Relief Association only paid Mrs. Calloway that which she could have recovered in a suit against it. The payment of this sum of money by the Relief Association, therefore, could only be consideration for the release of its obligation under the only contract to which it was a party. This is not a case of insufficient consideration or failure of consideration, but an entire lack of consideration for the release of any rights of the widow under the Act. The release, therefore, must fall, if applied to rights under the Workmen's Compensation Act. If applied to rights under that Act it is a legal fraud. The authorities are numerous, holding that a release without any consideration is ineffective in law, and need not be cited extensively. In *Silverthorne vs. Troxall*, 12 A. R., p. 619, it is said, "In cases of gross inadequacy of consideration, fraud is always presumed, much more when there is none. It is a legal fraud," and many cases are there cited.

Courts of law have concurrent jurisdiction with Courts of Equity, in cases of fraud; or, in other words, a plaintiff cannot recover at law, in any case, where upon the same evidence of actual or constructive fraud a Court of Equity would decree against him.

Tomlin vs. Cox, 19 N. J. L., 82.

Obert vs. Hamel, 18 N. J. L., 81.

As the lack of consideration appears on the face of the release, it is not necessary to invoke the exceptions to the rule excluding parol proof, which applies where the suit is between strangers to the contract, or between a party and a stranger, or between parties not privy to the contract, stated in *Shreve vs. Crosby*, 72 N. J. L., at p. 502; *First National Bank vs. Dunn*, 55 N. J. L., 404.

Newark Paving Co. vs. Klotz, 91 A. R., 91, illustrates the principle here involved. The plaintiff there, an employee of the defendant, while acting in the course and scope of his employment, was injured by the negligence of a third party. He sued the third party and recovered, giving a release of his claim against him. The plaintiff then sued his employer, under the Employers' Liability Act, and recovered. The only difference between the *Perlsburg* case and this one is that in the former case the right against the third party was in tort, here it was contract, against the association.

See also upon this point *Bryant vs. Fissell*, 86 A. R., at p. 46.

Twails vs. Penna. R. R. Co., 75 A. R., 1010, should be distinguished from the present case. There the plaintiff had executed, in consideration of the acceptance of benefits, a release similar in form to the one here. He subsequently filed a bill in the Court of Chancery to restrain the Railroad Company from putting in defense to an action in tort, the release previously given, and tendered a return of the consideration paid. The prayer of the bill was denied and the release sustained. The distinction is that there the right of action released was identical with the one sued upon. Here they are entirely separate and distinct.

D. The release is against public policy and void.

The Legislature never intended that a beneficiary under the statute should be barred of recovery thereunder, unless the payments provided by the Act, or some lump sum fairly in settlement thereof, was paid. Section 21 of the 1911 Act illustrates this, by its provision that no agreement for commutation of payments shall be valid unless approved by the Court.

The Court must take judicial notice of the public policy of this State, demonstrated by the passage of the Act. If this release contravenes that policy, it cannot be given effect. It is not necessary for us to go into the question of the existence of this public policy here, but the underlying reasons therefor are set forth in *State vs. Clausen*, 65 Wash., 156; 117 Pac., 1101; 37 L. R. A. (N. S.), 466, and *Borgnis vs. Falk*, 147 Wis., 327, 133 N. W., 209; 37 L. R. A. (N. S.), 489, at p. 498.

Would not the purpose of the Act be defeated by allowing as a defense, a release not reciting the Act or the rights arising under it, having for its consideration a sum due under a separate and distinct contract, running to the person owing that sum, and also to a third person, who had contributed five per cent. of that sum, or in the figures of this case, who had contributed but thirty dollars of the six hundred dollars paid? We maintain that it would. The effect of the defendant's contention would be to absolve it from a liability, under the statute, of several thousand dollars by the payment of a paltry thirty dollars.

The Act of 1911 says that commutation may be ordered "provided the same be in the interest of justice.

Unless so approved, no compensation payments shall be commuted," p. 143. To allow the defendant to escape liability under the circumstances of this case would be to allow by another name what would be substantially a commutation. See also on this point, *Newark Paving Company vs. Klotz*, 91 A. R., 91.

The amendment of the Act of 1911, found in P. L. 1913, p. 312, reads:

"No agreement, composition, or release of damages made before the happening of any accident, except the agreement defined in section two of this Act, shall be valid or shall bar a claim for damages for the injury resulting therefrom, and any such agreement, other than that defined in section two herein, is declared to be against the public policy of the State. The receipt of benefits from any association, society or fund to which the employee shall have been a contributor shall not bar the recovery of damages by action at law or the recovery of compensation under section two hereof."

This is entitled to great weight by the Court, in considering the defense here interposed. The Legislature did not by this Act create a public policy; that it cannot do. Neither did it imply that public policy did not therefore exist. Quite the contrary. By this Act it has declared that the theretofore existing public policy of this State was thus and so, and this policy must be considered to have existed from the time of the passage of the original Act, nothing intervening between that time and the present to create any change in conditions.

On this point see *Interstate Telephone & Telegraph Co. vs. Public Service Electric Co.*, 90 A. R., 1062.

The first Employers' Liability Act also shows a continuous public policy where it provides (P. L. 1909, p. 114):

"An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employe for personal injuries, for which compensation may be recovered under this Act, or to any relief society or benefit fund, may prove in mitigation of damages recoverable by an employe under this Act such proportion of the pecuniary benefit, which has been received by such employe from such fund or society on account of such contribution of employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto."

Under this Act, the constitutionality of which was upheld in *Quigley vs. Lehigh Valley R. R. Co.*, 79 A. R., 458, the company could have relied upon the Relief Association membership to mitigate damages in a common law action, to the extent of thirty dollars. As a substitute for this right the 1911 Act gave the employer the power to except himself from the operation of the second section and to put himself within the first section, where the release would be as effective as before the passage of the Act.

That this is not a local rule of policy is apparent from the laws of other jurisdictions.

Section fifteen of the English Workmen's Compensation Act of 1906 provides that any contract existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of that Act, be

deemed to continue after the time at which the workman's contract of service would determine if notice of determination thereof were given at the commencement of that Act.

Section three of the same Act provides that where a scheme of compensation, etc., is not less favorable than the Act, and that where the scheme provides for contribution by the workmen, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under the Act, and where the majority of the workmen are in favor of the scheme, the employer may contract with his workmen that the provisions of the scheme shall apply, but with that exception the Act shall apply notwithstanding any contract made after the commencement of that Act and provided that the workmen do not have to join the scheme, and may withdraw at any time.

The Federal Act declares void any contract, rule, regulation or device, the purpose or intent of which is to enable a carrier to exempt himself from the liability which the Act creates, and this has been upheld as constitutional in the Second Employers' Liability Cases, 223 U. S., 1.

The Washington Act has a similar provision, upheld in *State, ex rel., Davis-Smith Co. vs. Clausen*, 37 L. R. A., 466, 117 Pacific, 1101.

Also in Wisconsin, approved in *Borgnis vs. Falk Co.*, 37 L. R. A. N. S., 489, 133 N. W., 209.

In *B. & O. R. R. Co. vs. Garwinski*, 197 Fed. 31 (C. C. A. Third Circ.), an employee was allowed to recover damages under the Federal Act, although he had contracted that in event of his injury he would execute a release upon acceptance of benefits from a relief association and in fact did execute such a release.

7. Constitutionality of the Supreme Court's Construction of the Release.

Under the heading "Constitutionality of Release" counsel for appellant discusses the nature of the employment of Calloway as affecting the release. The matters mentioned by him here have been disposed of in the argument upon the foregoing points.

We respectfully submit that the judgment of the Supreme Court should be affirmed.

OTT & CARR,
Counsel for Respondent.

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NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

WEST JERSEY TRUST COM- PANY, ADMINISTRATOR AMOS B. CALLOWAY, DE- CEASED, <i>Relator,</i> <i>vs.</i>	}	Notice of Appeal.
PHILADELPHIA AND READING RAILWAY COMPANY, <i>Respondent.</i>		

10

TO OTT AND CARR, Esquires, Attorneys for Relator:

Take Notice that the respondent appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause in the New Jersey Supreme Court on the following grounds:

1. Because the New Jersey Supreme Court ordered a reversal of the judgment of the Court of Common Pleas of Mercer County and directed a new trial of the issue. 20

2. Because the New Jersey Supreme Court held that the prosecutor was entitled to recover for the death of Amos B. Calloway under the provisions of the New Jersey Workmen's Compensation Act, Chapter 95 of the Laws of New Jersey for 1911 and the acts amendatory thereof and supplementary thereto.

3. Because the New Jersey Supreme Court held that the administrator of an employe of a common carrier by railroad engaged in inter-state commerce could recover against such carrier under the New Jersey Workmen's Compensation Act, above referred to, for injuries resulting in death sustained by such employe while engaged in inter-state commerce. 30

4. Because the New Jersey Supreme Court held that where a contract of employment is made in Pennsylvania the administrator of an employe can recover under the New Jersey Workmen's Compensation Act above referred to for death resulting from an accident which occurred within the State

of New Jersey, even when the Pennsylvania contract of employment was entered into before the going into effect of the New Jersey Workmen's Compensation Act before mentioned.

5. Because the New Jersey Supreme Court held that the act of Congress entitled, "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April 22, 1908, and the acts amendatory thereof, is not the exclusive manner of determining liability in this case.

6. Because the New Jersey Supreme Court held that the contract with the Philadelphia and Reading Relief Association made in Pennsylvania and the payments made pursuant thereto and in accordance therewith and the release given the Philadelphia and Reading Railway Company by contract in accordance therewith did not operate as a bar to recovery under the New Jersey Workmen's Compensation Act above referred to even though said contract was made in Pennsylvania before the enactment of the said New Jersey Workmen's Compensation Act.

7. Because the New Jersey Supreme Court held that contracts made in Pennsylvania had read into them the provision of the New Jersey Compensation Act above mentioned by the mere happening of an accident in New Jersey, thus giving to acts of the New Jersey Legislature a power of modification of already existing Pennsylvania contracts contrary to the Constitution of the United States which prohibits the passage of a law by any State impairing the obligation of contracts.

Yours respectfully,

EDWARD L. KATZENBACH,

Filed, January 8, 1916.

Attorney of Defendant.

(Endorsed)

Due and legal service of a copy of the within notice is hereby acknowledged this 5th day of January, A. D. 1916.

OTT & CARR,

Att'ys of Relator.

WRIT OF CERTIORARI.

NEW JERSEY, ss.

(Seal The State of New Jersey to our Judge
 of of our Court of Common Pleas in and for
 Court) the county of Mercer.

GREETING:

We, being willing for certain reasons to be certified of a certain judgment made and rendered upon 10
 a petition filed by West Jersey Trust Company, administrator of Amos B. Calloway, deceased, against Philadelphia and Reading Railway Company, do hereby command you that you send, under your seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the sixteenth day of April, next, as well the judgment aforesaid as the petition of the said West Jersey Trust Company, administrator of Amos B. Calloway, deceased, and all orders, answers, proceedings, and finding filed, made or given before 20
 our said Court of Common Pleas in and for the County of Mercer, with all things touching and concerning the same, as fully and entirely as they remain before you, a Judge of said court, by whatsoever names the parties may be called therein, together with this, our writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

WITNESS, WILLIAM S. GUMMERE, Esq., Chief Justice of our Supreme Court, at Trenton, this twenty-seventh day of March, 1915.

WM. C. GEBHARDT, 30
Clerk.

OTT & CARR,
Attorneys.

[Endorsed]

This writ is allowed. Let it be sealed.

Thomas W. Trenchard,
Justice of Supreme Court.

ORDER EXTENDING RETURN DAY.**NEW JERSEY SUPREME COURT.**

10	WEST JERSEY TRUST COM- PANY, Administrator of the Estate of Amos B. Calloway, <i>Petitioner,</i>	} On Certiorari. ORDER EXTENDING RETURN DAY.
	vs.	
	PHILADELPHIA & READING RAILWAY COMPANY, <i>Respondent.</i>	

20 It appearing to the Court that the writ of certiorari allowed in this case on March twenty-seventh, nineteen hundred and fifteen, was returnable at a day too early for the proper return to be made there-to, on motion of Ott & Carr, attorneys for the prosecutor,

It is ordered on this twenty-first day of April,

nineteen hundred and fifteen, that the return day of the said writ be extended to the thirtieth day of April, nineteen hundred and fifteen.

THOMAS W. TRENCHARD,
J. S. C.

Consent is hereby given to the entry of the above order.

EDWARD L. KATZENBACH,
Attorney for Respondent.

RETURN.

10

*To the Honorable the Justices of the Supreme Court
of Judicature of New Jersey:*

In obedience to the command of this writ directed to the Judge of the Court of Common Pleas of the County of Mercer, I hereby certify and send under the seal of the said Common Pleas Court to the Honorable Justices of the Supreme Court of Judicature of New Jersey the judgment, petition and answer in a certain action, plaint or proceeding filed by the West Jersey Trust Company, administrator of Amos B. Calloway, deceased, against the Philadelphia and Reading Railway Company, and all orders, answers, proceedings and findings filed, made or given, with all things touching and concerning the same as fully and entirely as before said the Common Pleas Court of Mercer County they remain, as is commanded.

In Testimony Whereof, I, Erwin E. Marshall, Judge of the Common Pleas Court of Mercer County,

have hereunto set my hand as Judge of said Common Pleas Court and caused the seal of said Common Pleas Court to be affixed and attested by the clerk of said Common Pleas Court this ninth day of April, nineteen hundred and fifteen.

ERWIN E. MARSHALL,
Judge of Common Pleas Court.

Attest:

10 GEO. R. ROBBINS,
Clerk.
(Court Seal.)

NOTICE OF HEARING.

MERCER COUNTY COURT OF COMMON
PLEAS.

20 WEST JERSEY TRUST COM-
PANY, Administrator of
Amos B. Calloway, de-
ceased,

Petitioner,

vs.

PHILADELPHIA & READING
RAILWAY COMPANY,
Respondent.

NOTICE OF HEARING.

30 *To the Philadelphia and Reading Railway Company:*
Please to take notice that West Jersey Trust Com-
pany, administrator of the estate of Amos B. Callo-

way, who was injured on the thirteenth day of November, nineteen hundred and eleven, while in your employ, and who thereupon died by reason of such injuries, has filed a petition addressed to the Honorable Frederick W. Gnichtel, Judge of the above-stated court, for compensation under an act 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 elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved the fourth day of April, nineteen hundred and eleven, and the Judge of said court has fixed the eleventh day of April, nineteen hundred and thirteen, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, at the Court House in the City of Trenton, as the time and place for hearing on the same. Please take notice therefore that at the time and place aforesaid we shall move the hearing of said matter. That annexed hereto and served herewith is a true copy of the petition and order in the above matter.

10

20

OTT & CARR,
Attorneys for Petitioner.

PETITION FOR COMPENSATION.**MERCER COUNTY COURT OF COMMON
PLEAS.**

	WEST JERSEY TRUST COM- PANY, Administrator of Amos B. Calloway, de- ceased,	}	PETITION FOR COM- PENSATION.
	<i>Petitioner,</i>		
	vs.		
10	PHILADELPHIA & READING RAILWAY COMPANY,	}	
	<i>Respondent.</i>		

*To the Honorable Frederick W. Gnichtel, Judge of
the Court of Common Pleas of the County of
Mercer:*

The petition of the West Jersey Trust Company,
a corporation of the State of New Jersey, respect-
fully shows:

20 1. That it was heretofore appointed administrator
of the estate of Amos B. Calloway, by the Surrogate
of the County of Camden.

2. That said Amos B. Calloway, on the thirteenth
day of November, nineteen hundred and eleven, was
employed by the Philadelphia and Reading Railway
Company in this State, as a brakeman on a freight
train.

3. That while engaged in the said employment he was injured by being caught between two cars of a freight train, at or near Skillman, in the County of Somerset, this State, by reason of which injuries he died in about five hours, at St. Francis Hospital, in the City of Trenton, this State.

4. That at the time of the said injury and death of Amos B. Calloway he was earning from seventy-five to eighty dollars per month.

5. That at the time of the said injury and death, 10
said Amos B. Calloway was thirty-four years of age and in good health.

6. That at the time of the said injury and death, said Amos B. Calloway was married to one Rose Ella Calloway, and had two children living, one Randolph T. Calloway, who was twelve years of age on the twenty-fourth day of September, nineteen hundred and twelve, and one Edna D. Calloway, who was seven years of age on the tenth day of January, nineteen hundred and thirteen, and the said Rose Ella 20
Calloway, Randolph T. Calloway and Edna D. Calloway, are still living.

7. That the said Philadelphia and Reading Railway Company has not paid this petitioner, nor the said Rose Ella Calloway, Randolph T. Calloway or Edna D. Calloway any proportion of the wages of decedent as required by the laws of this State.

8. That the said injury was not caused by or through the wilful negligence of said decedent.

9. That the said Philadelphia and Reading Rail- 30

way Company has full knowledge of the injury and death aforesaid and has had such knowledge from the said thirteenth day of November, nineteen hundred and thirteen.

Your petitioner therefore prays for relief under the provisions of the Act 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 elective
 10 schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved the fourth day of April, nineteen hundred and eleven, and that the compensation allowed by said Act may be computed to a lump sum by this Honorable Court, according to the statute aforesaid.

WEST JERSEY TRUST CO.,
 C. H. LAIRD, JR., *Sec'y,*
Petitioner.

20 STATE OF NEW JERSEY, }
 COUNTY OF CAMDEN, } *ss.*

Charles H. Laird, Jr., being duly sworn according to law, on his oath deposes and says that he is the secretary and treasurer of West Jersey Trust Company, the administrator of the estate of Amos B. Calloway, the petitioner in the foregoing petition named, and that the matters and things therein contained are true to the best of his knowledge and belief.

30 CHARLES H. LAIRD, JR.

Sworn to and subscribed before me, a Notary Public of N. J., this 14th day of March, 1913.

CLEMENT R. LIPPINCOTT,
Notary Public.

ORDER FOR HEARING.

MERCER COUNTY COURT OF COMMON
PLEAS.

WEST JERSEY TRUST COM- PANY, Administrator of Amos B. Calloway, de- ceased, <i>Petitioner,</i>	}	ON PETITION FOR COMPENSATION. ORDER FOR HEARING.	10
vs.			
PHILADELPHIA & READING RAILWAY COMPANY, <i>Respondent.</i>	}		

Upon reading and filing the petition of West Jersey Trust Company, administrator, etc., herein, this fifteenth day of March, nineteen hundred and thirteen,

It Is Ordered that the eleventh day of April nineteen hundred and thirteen, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard thereon, at the Court House in the City of Trenton, be and the same is hereby fixed as the time and place for the hearing upon the said petition. 20

F. W. GNICHTEL,
J.

[Endorsed]

I hereby deputize and appoint George B. Hulit, of Pennington, N. J., a special deputy to serve the within writ.

Witness my hand and seal this 18th day of March, A. D. 1913.

Walter Madden,
Sheriff of Mercer County.
Harry V. Holden,
Under Sheriff.

10

Served within petition, order and notice for hearing, March 18th, A. D. 1913, upon the Philadelphia and Reading Railway Company, respondent, by giving and delivering a true copy thereof to Henry E. Harvey, the registered ticket agent of said company, at its Warren Street Station, Trenton, N. J., personally; said service being made at said Warren Street Station.

20

Walter Madden, Sheriff,
by George B. Hulit,
Spec. Dep.

Filed Mch. 22, 1913,
Geo. R. Robbins, Clerk.

ANSWER.

MERCER COUNTY COURT OF COMMON
PLEAS.

WEST JERSEY TRUST COM- PANY, Administrator of Amos B. Calloway, de- ceased, <i>Petitioner,</i>	}	ON PETITION, &c.	10
vs.		ANSWER.	
PHILADELPHIA & READING RAILWAY COMPANY, <i>Respondent.</i>	}		

The answer of the Philadelphia and Reading Rail-
way Company, a Pennsylvania corporation, shows:

1. It admits the first paragraph of the petition in the above entitled action.
2. It admits the second paragraph of the petition 20
in the above entitled action, averring that said Cal-
loway entered the service of respondent on, or previ-
ously to, the 23rd day of June, 1910.
3. It leaves the petitioner to its proof as to the
third paragraph of the petition in the above entitled
action.
4. It leaves the petitioner to show the exact wages
received by the said Amos B. Calloway at the time
of his death.

5. It leaves the petitioner to show the age and condition of health of the said Amos B. Calloway at the time of his death.

6. It has no knowledge of the matters contained in the sixth paragraph of the petition in the above entitled action, excepting as to the identity of said decedent's widow.

7. It admits the seventh paragraph of the petition in the above entitled action.

10 8. It denies the eighth paragraph of the petition in the above entitled action.

9. Respondent admits that it had knowledge of the occurrence of the accident to said Calloway within a few days thereafter.

20 10. For answer, it says that the said Amos B. Calloway at the time of suffering the injury mentioned in said petition was himself wilfully negligent in that he deliberately acted or deliberately failed to act in a manner which was prudent under the circumstances, and exhibited such conduct as evidenced reckless indifference to his personal safety, and asserts that the accident was due to no defect in any of the cars of this respondent or any of the appliances of this respondent or to any of the methods used in connection with the work of this respondent, but was due solely and simply to the reckless indifference, wilful negligence and deliberate act or failure to act on the part of the said Amos B. Calloway in his lifetime, viz: while cars were standing upon
30 a curve and the engine was perfectly still, he carelessly went in on the long side of the curve, back

of one car and in front of another, to shut the knuckle on one car and open the knuckle on the other, and after doing so started to go out on the short side of the curve, whereupon, owing to his negligence in doing so, he met with the accident which it is claimed resulted in his death, and therefore under the terms of the Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe 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, the petitioner, as administrator of Amos B. Calloway, is not entitled to receive compensation. 10

11. For a further answer to the petition in the above entitled action, the respondent avers that at or about the 23rd day of June, 1910, the said Amos B. Calloway executed an application for membership in the Philadelphia and Reading Relief Association, wherein he agreed, *inter alia*, as follows: 20

"And in consideration of the contribution to be made to the relief fund of the said association by the Philadelphia and Reading Railroad Company, and its successors, and of the agreement of the several associated companies in respect of any deficit in the relief fund for benefits to their respective employes, I hereby agree that the acceptance of benefits from the said relief fund, or from said association, for injury or death, shall operate as a release of all claims for damages against said company, my employer, and against any of said associated companies by which I may hereafter be 30

employed, arising from such injury or death which could be made by or through me, and that I or my legal representatives will execute or, where necessary, procure to be executed such further instrument as may be necessary formally to evidence such acquittance."

10 And respondent further avers that, in accordance with the provisions of the contract so entered into between said Amos B. Calloway and Philadelphia and Reading Relief Association, the said association has duly paid to the widow of said decedent, who was his designated beneficiary, the full amount of the benefit due under the said contract upon the death of said Amos B. Calloway, and the widow of said decedent, thereupon on the 26th day of February, 1912, executed a release to the respondent for all claims for damages resulting from the death of said Calloway. A copy of said release is hereto attached, being marked "Exhibit A."

20 Respondent is advised and believes and therefore avers that, under the provisions of the above recited application of said Calloway for membership in the said Philadelphia and Reading Relief Association, the payment by it and acceptance by the designated beneficiary of the said benefit upon the death of said Calloway and the above recited release by the widow of said Calloway operate to bar the present proceeding and entitle respondent to demand and receive from the legal representative of said Amos B. Calloway, to wit, The West Jersey Trust Company, administrator, petitioner herein, a full release of all
30 claims for damages by reason of the death of said Calloway, including a release from all claims for compensation under the above entitled Act of the

Legislature of the State of New Jersey, approved
April 4, 1911.

PHILADELPHIA AND READING RAILWAY COMPANY.

By GEORGE ZIEGLER, (Seal)

Secretary.

FRANK S. KATZENBACH, JR.,

Attorney.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.

10

George Ziegler, being duly sworn according to law, on his oath deposes and says, that he is secretary of the Philadelphia and Reading Railway Company, the corporation which executed the foregoing answer, and the respondent in the action in which the same was filed, that he is familiar with the matters and things therein contained and that the same are true as he verily believes.

GEORGE ZIEGLER.

20

Sworn to and subscribed before me, a Notary Public in and for the County of Philadelphia and State of Pennsylvania, this 24th day of March, A. D. 1913, at Philadelphia.

C. K. KLINK,

Notary Public.

(Seal)

My commission expires April 18, 1916.

30

EXHIBIT A.

(Copy)

PHILADELPHIA AND READING RELIEF
ASSOCIATION.

Release on Account of Death Benefit.

Whereas, Amos B. Callaway, deceased, lately in the service of the Philadelphia & Reading Railway Company, was a member of the Philadelphia and Reading Relief Association, under Application No. 133221, and the Death Benefit payable from said Relief Association on account of such membership, amounting to Five Hundred Dollars, (\$500.00) with an additional sum payable from the Surplus Fund of said Association, of One Hundred Dollars (\$100.00), together with unpaid Disablement Benefit amounting to (\$), are upon the condition of the execution of this release, as provided in said application payable to Ella Callaway, widow;

Now, Therefore, I, the undersigned, do hereby acknowledge that the payment of the aforesaid amounts from the said Philadelphia and Reading Relief Association, which I have this day received, is in full satisfaction and discharge of all claims or demands on account of or arising from the death of said deceased, which I now have, or can or may hereafter have, whether against the said Philadelphia and Reading Relief Association, the said Philadelphia & Reading Railway Company, or against any other corporation having amongst its employees members of the said Association.

Witness, my hand and seal, this 26th day of Febru-

ary, A. D. 1912. (This date and date of Receipt on Voucher must be same.)

(Signed) Ella Callaway (Seal).

In the Presence of:

(Signed) Howard F. Jones

(Signed) F. Wm. Fink

Approved:

(Signed) W. Hoffman,

Superintendent of the

Relief Association.

10

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } s.s.

On the 26th day of February, A. D. 1912, before me the subscriber, a Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared the within named Ella Callaway, personally known to me to be the same person who signed the foregoing release, and acknowledged and declared that she signed, sealed and delivered the same as her free and voluntary act and deed, for the purposes therein mentioned, the full contents of the said release having been first made known unto her by me. 20

Witness my hand and official seal the day and year aforesaid.

(Signed) F. Wm. Fink,

(Impression seal) My commission expires,
Notary Public.

My commission expires 191.. January 16, 1915.

30

[Endorsed]

Filed Mch. 25th, 1913
Geo. R. Robbins,
Clerk.

ORDER FOR HEARING.

Upon reading and filing the petition of West Jersey Trust Company, administrator, etc., herein, this fifteenth day of March, nineteen hundred and thirteen,

10 It Is Ordered that the eleventh day of April, nineteen hundred and thirteen, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard thereon, at the Court House in the City of Trenton, be and the same is hereby fixed as the time and place for the hearing upon the said petition.

F. W. GNICHTEL,
J.

[Endorsed]

ORDER.

This being the day fixed for hearing upon the petition of West Jersey Trust Company in this matter and, counsel consenting thereto,

It Is on this ninth day of April, nineteen hundred and thirteen, Ordered that the hearing provided by the rule on the said petition be continued to the twenty-fifth day of April next, at ten o'clock in the forenoon, at the Court House, in the City of Trenton.

F. W. GNICHTEL,
J.

On motion of

OTT & CARR,
Attorneys for Petitioner.

10

I consent to the entry of the above order.

FRANK S. KATZENBACH, JR.,
Attorney for Respondent.

[Endorsed]

Filed this 25th day of April, 1913.

Geo. R. Robbins,
Clerk.

20

ORDER.

This being the day fixed for hearing upon the petition of West Jersey Trust Company in this matter and, counsel consenting thereto,

Order.

It Is on this twenty-fifth day of April, nineteen hundred and thirteen, Ordered that the hearing provided by the rule on the said petition be continued to the ninth day of May next, at ten o'clock in the forenoon, at the Court House, in the City of Trenton.

F. W. GNICHTEL,
J.

On motion of

10

OTT & CARR,
Attorneys for Petitioner.

I consent to the entry of the above order.

FRANK S. KATZENBACH, JR.,
Attorney for Respondent.

[Endorsed]

Filed this 25th day of April, 1913.

Geo. R. Robbins,
Clerk.

20

ORDER.

It Is, on this fourteenth day of November, nineteen hundred and thirteen, Ordered that the hearing upon the petition and answer herein be fixed for the twenty-first day of November, nineteen hundred and thirteen, at ten o'clock in the forenoon, or as soon thereafter as the same can be brought on, at the
30 Court House, in the City of Trenton.

F. W. GNICHTEL,
J.

We consent to the entering of the above order.

OTT & CARR,
Attorneys for Petitioner.

I consent to the entering of the above order.

FRANK S. KATZENBACH, JR.,
EDWARD L. KATZENBACH,
Attorneys for Respondent.

[Endorsed]

10

Filed Nov. 18, 1913.

Geo. R. Robbins,
Clerk.

And on Friday, November 21, 1913, and Wednesday, January 21, 1914, at sessions of the said Mercer Common Pleas Court, the evidence of the petitioner and respondent was submitted and after the argument of counsel, decision was reserved. 20

And afterwards on the day of March, A. D. 1914, at a session of the said Mercer Common Pleas Court, the Court rendered its decision ordering and adjudging that the said petition be dismissed.

30

OPINION AND DETERMINATION OF FACTS.

**MERCER COUNTY COURT OF COMMON
PLEAS.**

10	WEST JERSEY TRUST COM- PANY, Administrator of Amos B. Calloway, de- ceased, <i>Petitioner,</i>	} ON PETITION OPINION AND DETER- MINATION OF FACTS.
	vs. PHILADELPHIA & READING RAILWAY COMPANY, <i>Respondent.</i>	

Mr. Carr, of Ott & Carr, and Mr. Edward D. Har-
rington (of the Philadelphia bar, for the peti-
tioner,
Messrs. Frank S. and Edward L. Katzenbach for
respondent.

20 GNICHTEL, J.:

The testimony in this case, and the admissions of
counsel show, and I find the facts to be, that Amos
B. Calloway was a brakeman employed by the Phila-
delphia & Reading Railroad Company; that the con-
tract of hiring was made in Philadelphia on June 21,
1910, and no notice was given that the provisions of
Section II were not to apply; and that on November
3d, 1911, Calloway met with an accident which arose
out of and in the course of his employment, and

caused his death; that the respondent received due notice of the accident, and that the wages received by Calloway averaged \$18.13 per week.

The respondent disclaims any liability in this suit, and urges among other reasons,

First: That the contract of hiring in this case was made at the respondent's office in Philadelphia, and is governed by the laws of Pennsylvania; that the legal obligation arising therefrom must be determined by the laws of that State, and not by the laws of New Jersey. 10

Second: That by the acceptance of the benefits from the Philadelphia & Reading Relief Association, and the execution of a release by the widow in full satisfaction of all demands, the respondent is released from all further claims arising from said death.

The contract of hiring was executed in Pennsylvania, and at the time the accident happened, Amos B. Calloway and his wife lived in Philadelphia. The accident occurred on November 13, 1911, at Skillman, New Jersey, where Calloway was at work as a brakeman on a freight train which ran from Third and Berk Streets, Philadelphia, Pennsylvania, to Port Reading, New Jersey. 20

The right of this petitioner to recover must rest on an agreement by the parties, expressed or implied, to accept the provisions of Section II of the Workmen's Compensation Act.

The contract of hiring was made on June 21, 1910, and by its terms Calloway was employed as a brakeman. He was an extra hand until May 26, 1911, when he was given the position he held at the time of the accident. 30

It is contended that the petitioner has no standing under our Act because the contract was not made in this State. That the petitioner has a right of action in tort is not denied, but the present claim under the Workmen's Compensation Act is founded on contract. The Act provides that when the employer and employe shall, by agreement, either expressed or implied, accept the provisions of Section II, compensation for injuries or death of such employe shall be made, &c. This acceptance of the compensation feature needs no affirmative action, as the law provides that all contracts made subsequent to July 4, 1911, are presumed to have been made with reference to the provisions of Section II of the Act, and contracts made prior shall be presumed to continue subject to said section unless the parties give written notice that the section is not to apply. This presumption, or rule of evidence, which obviates the necessity of proving the contract, applies to all contracts made in New Jersey. Does it apply also to contracts made in other States? Has our Act a wider scope than the limits of the State? There is nothing in the words of the Act to give it extra territorial jurisdiction. A careful reading of the Act shows clearly that it was the intention of the Legislature to protect the citizens of this State, and not to go beyond the jurisdiction of our Courts; and that the presumption arising was not intended to relate to contracts made in Pennsylvania by citizens of that State. As far as appears, these parties when they made the contract, were ignorant of the very existence of the law, and while it is well settled that every one is presumed to know the law, there is no presumption that a person knows the provisions of a statute of another State or country. All matters bearing upon the contract, its interpretation and

validity, must be determined by the laws of Pennsylvania, and this is not altered by the fact that the employe, in the course of his employment, and as an incident of it, came into this State.

Nor is there any evidence of any affirmative act by the parties accepting the elective compensation provision of our law. On the contrary, the testimony shows that when the contract was made, the parties entered into an additional agreement covering the subject of compensation or relief in case of death or injury, by the terms of which the Philadelphia & Reading Railway Company deducted from Calloway's wages, a sum to be paid to the benefit fund of the Philadelphia & Reading Relief Association. And it was agreed that (in consideration of the contribution to be made to the fund by the Philadelphia & Reading Railway Company), the acceptance of benefits by Calloway or his legal representatives, for injury or death, should operate as a release of all claims for damages against the railway company arising from such injury or death, which could be made by or through him.

The contract was made in 1910, and was not altered or changed upon the passage of the Workmen's Compensation Act. The parties continued to act under both contracts, and contributed to the fund, and after the death of Calloway, his widow accepted the benefits and executed a formal release to the railway company. While the validity of the release is questioned by counsel, it is important here, to show the purpose of the parties to the contract of hiring, and negatives the existence of any agreement looking to the acceptance of the elective feature of our Act.

In *Deeny vs. Wright & Cobb Lighterage Co.*, 36 N. J. L. J. 121, where the contract was made in New

Jersey, and the accident occurred in New York, it was held that it is the contract of hiring which prevails, and not the situs of the accident.

The question here involved has not been before our Courts, but was raised in the New York courts in a suit brought under our Compensation Act. The administrator of Antonio Pensabene, brought an action against F. & J. Auditoreo. Pensabene was employed under a contract made in New York, and while doing work in this State, received injuries
 10 which resulted in his death. The case was heard by the Supreme Court, Appellate Division, Second Department, and it was held, all five Judges concurring, that it is plain from a reading of Subdivision 9, Section II, of our Act, that its provisions apply, by force of the statute, only where the contract of hiring was made in the State of New Jersey. 240 N. Y. Supp. 266.

My conclusion is that our Act does not cover the contract involved here, and it is therefore unnecessary
 20 to pass on the other questions involved.

The petition will be dismissed.

[Endorsed]

Filed March, 1914.

Geo. R. Robbins,
 Clerk.

STIPULATION.

WEST JERSEY TRUST COM- PANY, Administrator of Amos B. Calloway, de- ceased, <i>Prosecutor,</i>	}	ON CERTIORARI.	
VS.		STIPULATION.	10
PHILADELPHIA & READING RAILWAY COMPANY, <i>Respondent.</i>	}		

It is hereby stipulated and agreed by and between
Ott & Carr, attorneys for prosecutor, and Edward
L. Katzenbach, attorney for respondent:

1. That the determination filed by Frederick W.
Gnichtel, Judge of the Mercer County Court of Com-
mon Pleas, shall for all purposes, both in this suit,
on the hearing on the writ of certiorari in this mat-
ter, and in any other matter or proceeding be con-
sidered as an order of the Mercer County Court of
Common Pleas entered on the petition filed in that
court in this case, dismissing such petition for the
reasons stated, and that the respondent will not at
any time raise the objection that no order disposing
of said petition in the Mercer County Court of Com-
mon Pleas was entered therein.

2. That the testimony given in the Mercer County Court of Common Pleas on the hearings on the petition and answer in this cause is to be considered as a part of the return to the writ of certiorari herein and as the facts found by the said Court or the Judge thereof, in reaching a determination of the matters raised by the said petition and answer.

OTT & CARR,

Attorneys for Prosecutor.

EDWARD L. KATZENBACH,

Attorney for Respondent.

TESTIMONY.

MERCER COUNTY COURT OF COMMON
PLEAS.

WEST JERSEY TRUST COM- PANY, Admr., Amos B. Calloway, deceased, <i>Petitioner,</i>	}	ON PETITION FOR COMPENSATION.	10
vs.			
PHILADELPHIA & READING RAILWAY COMPANY, <i>Respondent.</i>	}	TESTIMONY.	

Transcript of testimony taken in the above en-
titled cause before Hon. Frederick W. Gnichtel, on
Friday, November 21st, 1913, at eleven o'clock in the
forenoon.

APPEARANCES:

MESSRS. OTT and CARR and AVERY D. HARRINGTON, (of 20
the Philadelphia Bar), for the petitioner.
MESSRS. FRANK S. KATZENBACH, JR., and EDWARD L.
KATZENBACH, for the Respondent.

EDGAR L. WEST, a witness being duly sworn on behalf of the petitioner, testified as follows:

Direct examination:

By Mr. Carr:

Q. Doctor, you were, on the thirteenth of November, 1911, at the St. Francis Hospital at Trenton, were you not?

A. I was.

10 Q. Do you know whether Amos B. Calloway was admitted to that institution on that day?

A. He was.

Q. Did you examine him?

A. I did.

Q. Do you know whether or not Mr. Calloway died?

A. He did die that day.

Q. That day?

A. Yes.

20 No cross-examination.

The Court: What did he die of?

A. Fractured pelvis, ruptured bladder and internal hemorrhage.

The Court: Could you say from the indications what was the cause of the fracture, and so forth?

30 A. No.

The Court: Was there any outward sign?

A. He was bruised about the pelvis.

The Court: What kind of bruises?

A. I don't recall very definitely.

The Court: Black and blue?

A. Black and blue.

EMERSON CHISHOLM, a witness being duly sworn
on behalf of the petitioner, testified as follows:

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Direct examination.

By Mr. Carr:

Q. Do you know Amos B. Calloway?

A. Yes, sir.

Q. On the thirteenth of November, 1911, what was
your occupation?

A. Brakeman.

Q. Where?

A. On the P. & R. Railroad, on local freight.

20

Q. Was Amos B. Calloway a member of that train
crew?

A. Yes, sir.

Q. Did you see the accident which caused the
death of Mr. Calloway?

A. Yes, sir.

Q. Will you please tell, in your own words, as
well as you can, what the cause of that accident
was?

A. Well, we had spotted the car on the siding— 30

Q. What do you mean by that?

A. We placed a car on Vansant's siding at Skillman, and we wanted to part the cars, pull away from the car we had spotted, and we had too much slack, we couldn't lift the lever.

Q. Explain what you mean by "slack."

A. The thing was too tight, we couldn't lift the lever to separate it, —

The Court: You hadn't enough slack?

A. We hadn't enough slack.

The Court: Go on.

- 10 A. (Continuing the answer.) — and to get that slack, we had to have a movement to release, and as we did that we knocked the car out of place, out of its place. He pulled the lever and right away the car was away from its place.

Q. That was the car that was to be spotted?

A. The car was knocked out of place where we wanted to spot it.

- 20 Q. What lever was lifted?

A. On the car spotted. The car in front was out of its place and we had to couple it again to place it in its place, and in the meantime he had closed the one knuckle, and ran across and opened a lever and another knuckle, and there was a full lock; and in coming back the surge of the train was what caught him.

O. As he was coming back he was caught by the surge of the train?

- 30 A. Caught between the cars.

Q. Was this train on a level grade?

A. It was approximately level where the car was, some grade, but not so very much of a grade.

Q. There was some grade, about how much, would you say?

A. Well, very small.

Q. Would it be a noticeable grade?

A. Yes, it is a noticeable grade.

Q. And on which end of the grade, the lower or higher end, was the car?

A. The car was at the lower end.

Q. Then the engine was higher?

A. At the high end.

10

Q. And when the train stopped — —

A. The cars would come together and drift back.

Q. Down the grade?

A. Down the grade.

Q. When Calloway was coming back through the cars, do you remember what happened to Calloway coming back through the cars?

A. He was caught between the couplers.

Q. Then what happened?

A. He fell out between them, he was done for then.

20

Q. What did you do with him?

A. We got him as quick as we could and put him on a stretcher, carried him to the station, and there they sent him to the hospital in Trenton. I was on the car and I came down as quick as I could, and I grabbed him in my arms.

Q. When the engine went up the grade and stopped, was any brake applied?

A. Only, I might say, straight air, on the engine, was applied to stop the train.

Q. What do you mean by "straight air"?

A. There is straight air and automatic air.

Q. What is the distinction?

30

A. Straight air works on the engine, and automatic works on the engine and train.

Q. What would have been the situation of these cars if the automatic air had been applied?

A. All would have stopped.

Q. And then what?

A. They would all have stopped.

Q. Would there have been any surge if the automatic air had been applied?

A. Somewhat, when it is applied and released.

Q. When the air is released that leaves the surge?

10 A. Yes.

Q. Did this engine have both automatic air and straight air on it, do you know?

A. I think it had. I wasn't on the engine, that wasn't my place. I wouldn't say.

Q. Do you know whether or not the straight air was applied?

A. I couldn't say.

Mr. Katzenbach: I don't think this is the witness from whom those facts could be obtained.

20 By the Court:

Q. As I understand it, they pulled these cars apart for the purpose of re-coupling them and placing the cars in proper place?

A. Yes.

Q. And as they drove the cars back, they got in between them to couple them?

A. The cars came back—with the stoppage of the train they came back.

Q. The car you were going to leave came back?

A. No, that stayed there, but the car coupled on the engine came back.

30 Q. And he was caught between the couplings?

A. Yes.

Q. What part of the body was he caught on?

A. About the hips.

Q. And when he was sent to the hospital, he was still alive?

A. Yes, sir, he talked and everything.

By Mr. Carr:

Q. The couplings on these other cars—was there a handle on both sides of the car to operate the couplings?

A. I don't think there was. Lots of cars don't have them that way. 10

Q. Do you know as to that car?

A. I didn't take particular notice, but I hardly think it had. I wouldn't say positively because I didn't take time to look at it.

Cross-examination.

By Mr. Katzenbach:

Q. You were one of the brakemen on the train which was the cause of Mr. Calloway's death, is that what I understand? 20

A. Yes, sir.

Q. Now, you testified that you had spotted a car on Vansant's siding?

A. Yes, sir.

Q. Had the brake been applied to that spotted car?

A. Yes, sir.

Q. So that car remained stationary?

A. Yes, sir.

Q. And, as I understand you, there was a grade there? 30

A. Yes, sir.

Q. And the engine, with the other cars, was up-grade?

A. Yes, sir.

Q. Now, what was Mr. Calloway's duty, if anything, at that particular moment?

A. Well, his duty was to knuckle the cars, to uncouple or couple them, as it may be.

Q. Let me ask you this, were the cars coupled or uncoupled?

10 A. They were uncoupled when he got hurt.

Q. Were they uncoupled before he was hurt?

A. No, sir, they were coupled to this car.

Q. They were coupled to the car?

A. Yes, sir.

Q. And then what happened?

A. They uncoupled them.

Q. Who uncoupled them?

A. He made the cut, he uncoupled them himself.

20 Q. What is the process of uncoupling the cars?

A. To lift the lever—there is a lever there on the cars for that purpose, to cut them.

Q. Which side of the train was he on?

A. On the right side.

Q. And there was a lever on that side, was there not?

A. Yes, sir.

Q. So that he might have pulled the lever without going between the cars?

30 A. Yes, sir.

Q. And while the car was on the grade?

A. Yes, sir.

Q. Instead of pulling that lever, he went between the cars, is that what I understand?

A. After the car had been spotted, he went between them. He pulled this lever first, after he got this slack, and knocked the car out of its place.

Q. Which car was knocked out of place?

A. The car we spotted.

Q. That car was knocked out of place?

A. Yes.

Q. But I thought you said that car had the brake applied?

A. I know, but the motion of that train did move the car back.

Q. With the brake on?

A. Yes, with the hand-brake on it. When you 10
place the car you have to place it at the other end,
then nothing would knock them out.

Q. Before he went in between those cars, that car
had been knocked out of the place to which it had
been spotted, is that what I understand?

A. Yes, sir.

Q. By the action of the engine?

A. Yes, sir.

Q. Then, after that, after the car had been 20
knocked out of spot, what did the train do?

A. The train had parted them after it was knocked
out.

Q. The uncoupling was done at the moment of the
knocking of the spotted car out?

A. Yes.

Q. So that the cars were uncoupled?

A. Yes, sir.

Q. Now then, had the engine moved after the car
had been spotted?

A. It moved backward and went forward. You 30
see at first there was such a strain on the lever he
couldn't pull it. Then he would have to back the
train back in order to pull that lever, and then go
ahead.

Q. Did you see him at the time that happened?

A. I was on the top of the car.

Q. You were looking down?

A. I was looking down.

Q. You mean on top of the car that was spotted?

A. Yes, sir.

Q. And you had applied the brake?

A. Yes, sir, I applied the hand-brake.

Q. So the spotted car was stationary?

A. Yes, sir.

Q. And he met the injury between the spotted car and the car next to it toward the engine?

A. Yes, sir.

10 Q. You say the engine pulled it up, why did it pull it up—had he given a signal?

A. Yes.

Q. What was that for?

A. After he got the slack he went ahead so that he could open the knuckle. That left a space after he had knocked this car, you understand?

Q. Yes.

A. Then he closed this one knuckle and went on, and that left a space between the spotted car and the engine, and he closed the knuckle and went over to open the other, and on the way back that was where he was caught.

The Court: What do you mean by “knuckle”?

20 A. That was what closed the car.

The Court: And while he did that they came together?

A. Yes.

Q. Don't both knuckles operate levers?

A. Yes, sir.

Q. After he turned the lever, wouldn't he be able

to close those knuckles without crossing between the cars?

A. One lever works one knuckle on this car, then there was another lever on the next car operating that knuckle.

Q. Now, there is only one knuckle between each set of cars?

A. A knuckle on each end of the car, two knuckles to a car.

Q. Only one knuckle on the end of the car, which 10
was next to the spotted car?

A. Yes, sir.

Q. As I understand you, that knuckle was turned by a lever which was on the side of the car where Calloway stood?

A. Yes, sir.

Q. Now, did he turn that lever?

A. He pulled the lever to cut them.

Q. Doesn't the lever close them also?

A. No, sir. You close them by hand, by pushing 20
them shut.

Q. Don't they close by the automatic machinery which is on the side of the car?

A. No, sir, that just opens them.

Q. You mean to say there is no method of closing the knuckle by machinery or by attachments on the car?

A. No, sir.

Q. The closing of the knuckle must always be done by hand, or brake?

A. Or by the train hitting it.

Q. In this particular instance, which did he want 30
to do, open or close the knuckle?

A. He closed one and opened the other because one was a surer knuckle to couple than the other. Both were standard knuckles, but one would couple more sure than the other.

Q. There is a knuckle on one end of one car and another on the other end of the other car? There was only one knuckle here, was there not?

A. Two, one on each end of the car.

Q. Those knuckles fitted together?

A. They come together like that (indicating) in order to make a hook.

Q. From the side of the car was there not a lever?

A. Yes.

10 Q. Which would open those knuckles?

A. Yes.

Q. And the knuckles were supposed to close by hitting together?

A. Yes, sir.

Q. You say he had opened the knuckle?

A. Yes, sir.

Q. What was he then doing between the cars?

A. He went across to pull the lever on the car next to the engine to open that knuckle and shut the one
20 that he had first originally pulled the lever on.

Q. Where did he go to open the knuckle?

A. He would have to cross between the cars.

Q. Did he have to operate between the cars?

A. He would have to run across in order to lift the lever, because that lever was on the opposite side of the car.

Q. Wasn't there a lever on both sides of the car?

A. No, sir. It wasn't working on that side.

Q. The engine had stopped while the cars were on
30 a grade, and the cars were coming back together?

A. Yes, sir.

Q. He went between them?

A. He went through.

Q. While the cars were coming together?

A. As soon as they separated, he ran through them. The cars were coming back when he was coming back.

Q. He ran through after the engine had stopped?

A. After the cars had separated. The engine practically had stopped, and he opened that lever and was coming back and the surge of the cars caught him.

Q. The cars were on a grade?

A. Yes, sir.

Q. And the cars did come together and hit each other?

A. They came together and rebounded again.

Q. That was a perfectly apparent fact that they did come together? 10

A. Yes, sir.

Q. And he ran through there?

A. Yes, sir.

Q. For the purpose of fixing a knuckle with his hands?

A. Yes, sir.

Q. When there was a lever on the side of the train?

A. Yes, sir.

Q. When he should have known, where he might easily have understood that the cars would drift back and hit the train attached to the engine, and fall back on the grade and hit the car that was spotted, is that correct? 20

A. Yes, sir, he certainly would think that. He had no business there because the lever was in operating order there also. He would have no business to go there.

Q. Then it was unnecessary for him to go through?

A. No, sir, it was not necessary.

Q. But knowing that the cars might drift back, he did run through? 30

A. He didn't think about them drifting, because he thought that knuckle was shut. The cars would naturally drift backward and forward.

Q. He didn't really have any necessity to go through?

A. No, sir.

By the Court:

Q. I thought he had to close them by hand?

A. He could close them by hand and open the other. He didn't have to do it, but one is surer than the other.

10 Q. Was it in this case?

A. Yes.

Q. What was he trying to do?

A. He wanted to make a coupling in the surest way.

Q. And he was sober?

A. Yes, sir.

Re-direct examination.

By Mr. Carr:

20 Q. On the other side of this train, the side opposite from that on which Calloway was standing, was there anything there?

A. There was a building there.

Q. A building?

A. Yes.

Q. And was it at that building where the car was to be spotted?

A. Yes.

Q. And the car was to be spotted at the door of the building?

30 A. Yes, at the door of the building.

By the Court:

Q. How was this work usually done by the brakeman, the way he did it or differently?

A. Generally that way. You see, one knuckle is more sure than the other knuckle.

Q. That is the way they usually do it?

A. Yes, especially on a train like this, where you hurry up.

Q. Why did you hurry up?

A. On a local freight you have to hurry in order to make time. 10

Q. And they usually get between and take a chance?

A. It doesn't require it because the levers were put there for that purpose, to operate the knuckle.

By Mr. Carr:

Q. But the lever for the knuckle, which you say was more sure, was on the opposite side of the car?

A. Yes, sir, there was a lever on each end.

20

WILLIAM CUSICK, a witness being duly sworn on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Cusick, did you know Amos B. Calloway?

A. Yes, sir.

Q. On November 13th, 1911, what was your occupation?

A. Brakeman.

Q. On what railroad?

A. On the P. & R., Philadelphia & Reading.

Q. Was Amos B. Calloway on that train crew with you?

A. Yes, sir.

Q. Did you see the accident on that day?

A. Yes, sir.

Q. In which Mr. Calloway lost his life?

10 A. Yes, sir.

Q. Will you please tell what you saw with regard to that accident, what happened?

A. We backed in to place the car at Vansant's siding, and him and I was there, so we got the slack to uncouple the car. After it was spotted, it came back too much and knocked the car out, and in the meantime the lost motion pulled away, and just as it pulled away he went through to pull it, and the lost motion caught him on the way back.

20 Q. What do you mean by "lost motion"?

A. Slack between the couplers.

Q. And then what happened after he was caught between the cars, what happened?

A. He laid down on the bank, and we picked him up and carried him on a stretcher into the station.

Q. Is that the last you saw of him?

A. That is the last I saw of him.

Cross-examination.

30 By Mr. Katzenbach:

Q. Where were you, Mr. Cusick, at the time this accident happened?

A. Right alongside of him.

Q. On which side of the track?

A. On the righthand side.

Q. Now, you say that a car had been spotted at Vansant's crossing?

A. Yes, sir.

Q. Was that car stationary?

A. It was to be left there to be loaded.

Q. Had the brake been applied to that car?

A. Yes, the man on top put the brake on.

Q. That man was Mr. Chisholm?

A. Yes, sir.

Q. After the brake had been applied by Mr. Chisholm, what was the next thing that was done? 10

A. To get the slack to cut the car.

Q. The cars were coupled together?

A. Yes, sir.

Q. What was done to get that slack?

A. Why, it was brought back to pull them back.

Q. Brought what back?

A. Brought the engine back to get the slack on the train.

Q. Did somebody signal the engine? 20

A. To get the cut?

Q. Who signalled to the engine, if you know?

A. I couldn't say whether it was him or whether it was me. He had his hand on the lever. I suppose it was him who gave the signal.

Q. But you don't know who gave the signal?

A. No, I do not.

Q. But the engine moved back?

A. Moved back to get the slack, and then went ahead. The lost motion caught him.

Q. These cars were coupled together?

A. Yes, sir.

Q. And you wanted to get them uncoupled, is that it? 30

A. Yes, sir.

Q. Mr. Calloway was at the lever which he proposed to move to uncouple them?

A. Yes, sir.

Q. And a signal was given by some one to have them come back?

A. Yes, sir.

Q. Was the car at that time on the grade?

A. Yes, sir.

10 Q. And which way on the grade was the engine facing?

A. West.

Q. Was the engine down-grade or up?

A. Up-grade.

Q. After the signal had been given, what did the engineer do?

A. He moved it back and then moved it ahead a little bit.

Q. He backed first?

20 A. Yes, sir, to get the cut.

Q. Was the cut made at that time?

A. Yes, sir, we knocked them out.

Q. So the cars were uncoupled?

A. Yes, sir.

Q. And what happened next?

A. Then he went ahead and he ran across to open the knuckle on the other side, at that time, just as soon as he opened the knuckle, he went right back and the lost motion caught him right here (indicating).

30 Q. After the cars had been uncoupled, did they desire to couple them again?

A. Well, yes, sir, they wanted to cut them out.

Q. You mean after the car—

A. —was knocked out of spot, the position in which it was.

Q. And they wanted the car again to pull it up?

- A. Yes, sir.
- Q. And the signal was given to back?
- A. To get them coupled.
- Q. And what had to be done then, after the signal had been given to back?
- A. He went ahead.
- Q. Wasn't anything done with respect to the coupling?
- A. When he came back, he pulled the coupling, he pulled the lever.
- Q. What did you then do?
- A. They lifted the car back out of its position and 10
he had to open the other to couple it up, and he went
across to pull it up, and he was caught.
- Q. How many knuckles are there to a car?
- A. One at each end of the car.
- Q. And the one on one end of the car must join the
other on the other end of the car?
- A. Yes, sir.
- Q. You must have the two meet?
- A. Yes, sir.
- Q. And it is only necessary in order to couple
them, to have one of those knuckles open? 20
- A. Yes, sir.
- Q. As I understood you a moment ago, one of
those knuckles was open?
- A. Yes, sir.
- Q. Why was it necessary to open the other?
- A. Well, sometimes one of them won't meet, and
we try two of them.
- Q. You mean open both of them?
- A. Yes, sir.
- Q. Will that couple the car? 30
- A. Yes, sir.
- Q. If both are open?
- A. Yes, sir.

Q. How are these knuckles matched?

A. The knuckle has a pin right down through it.

Q. Is there a lever on the side?

A. Yes, sir.

Q. Of the car?

A. Yes, sir.

Q. Which the brakeman is supposed to pull to open or close the knuckle?

A. Yes, sir.

Q. Was there this lever on the side of this car?

10 A. There was a lever on the other side. I couldn't feel certain whether it came all the way through.

Q. Don't levers come all the way through?

A. Some of them.

Q. You don't know, as a matter of fact, whether this did or not?

A. No, sir.

Q. Have you ever seen any of the Philadelphia & Reading cars without the lever running all the way through?

20

A. No, none of them.

Mr. Carr: Well, he hasn't testified that it was a Philadelphia & Reading car. A freight train may be made up of cars of other roads.

Q. Was this car a car of the Philadelphia & Reading Railroad?

A. That, I couldn't say what car it was, I don't know what initial it was.

30 Q. As I understand, Mr. Calloway had one of the knuckles open?

A. Yes, sir.

Q. It was not, therefore, necessary for him to go through and open the other?

A. No, sir.

Q. It was not a part really of the work he was required to do as a brakeman, was it?

A. No, sir.

Q. And now, I understand you to say that the slack of the car was what he was caught in?

A. Yes, sir.

Q. After he had run through?

A. Run through and came back.

Q. And was trying to get back?

A. Yes, sir.

10

Q. Now, cars on grades customarily rebound in that fashion, do they not?

A. Yes, sir.

Q. Is that something which a brakeman will take into consideration in going between the cars?

A. He knows it, and it is his own risk.

Mr. Carr: I object to that as immaterial.

The Court: That is immaterial.

20

Re-direct examination.

By Mr. Carr:

Q. Mr. Cusick, you say it wasn't necessary for him to go through in order to get some lever to operate the other coupling?

A. No, sir.

Q. Would it be natural for him to do that to make a more sure coupling?

Mr. Katzenbach: I object.

30

A. That is his own risk, if he wants to.

Q. I mean, is that done?

A. It is done every day.

Q. What did you say?

A. It is done every day.

Q. Were you late?

A. We were late.

Q. You were not late?

A. We were late.

Q. Do you know whether one coupling, operated by a lever on the left-hand side, was more sure than
10 the one operated on the other side?

A. I couldn't say.

By the Court:

Q. Do you ever do that?

A. Every day.

Q. Who is in charge of the train?

A. The conductor is.

Q. Has anybody ever forbid you to do that?

A. No, that is your own risk.

Q. Suppose the brakeman didn't do that, what
20 would be the result?

A. Nothing.

Q. I mean with respect to facilitating the delivery of the cars.

A. You have to pull this lever.

Q. Why do they do it?

A. I don't know why they do it; it is customary for all railroad men to do it.

Q. Does it save time?

A. Yes, sir.

Q. Suppose, on a local freight, where it was frequently behind time, what would be the result?
30

A. No result.

Q. No result at all?

A. No.

Q. Would you deliver the cars and get through on time?

A. If they were coupled—

Q. I understood you, in the first part of your testimony, to say that this was done because it makes a surer and quicker coupling?

A. Yes, sir, and it saves time.

Q. Is it necessary to save time on a local freight?

A. You have to hurry.

10

Q. If you don't hurry, what is the result?

A. You will be late.

ROSELLA CALLOWAY, a witness being duly sworn on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. Carr.

Q. Where do you live, Mrs. Calloway?

A. I live at 2436 East Indiana Avenue.

20

Q. Where?

A. In Frankfort.

Q. In November, what was the name of your husband?

A. Amos B. Calloway.

Q. When were you married?

A. In 1899.

Q. How many children had you living on November 13th, 1911?

A. Two.

Q. What were their names?

30

A. Randolph T. and Edna D. Calloway.

Q. How old was Randolph?

A. He was thirteen years old on the twenty-fourth of September. He was born in 1900.

Q. How old is Edna?

A. She is seven years, born the tenth of January, 1906.

Q. You were asked how old Randolph was?

A. Yes.

Q. And you are asked now how old Edna is. How old is Edna now?

A. Seven years, on the tenth of January last.

10 Q. You mean that on the tenth of January last—

A. On the tenth of January last, she was seven years old.

Q. She will be eight years old.

By the Court:

Q. You have never been divorced from Mr. Calloway?

A. No, sir.

20 Q. At the time of his death were you or were you not dependent on him?

A. Certainly.

Q. And were or were not the two children dependent upon him?

A. Certainly.

By Mr. Carr:

Q. Randolph was born, if this is correct, September 24th, 1900?

A. Yes, sir.

30 Q. And the other one was born when?

A. January 10th, 1906.

Q. What was the condition of the health of Mr. Calloway at the time of his death?

A. He wasn't in very good health.

Mr. Katzenbach: I object to that on the ground that it is immaterial. The law makes no difference between a perfectly healthy man and one who is not.

The Court: I sustain the objection.

Cross-examination.

By Mr. Katzenbach:

10

Q. You had no other means of support, as I understand it, than the wages which Mr. Calloway received?

A. No, sir.

Q. And the children had no means of support than that?

A. No, sir.

Q. At the time of Mr. Calloway's death, where did you live?

A. I lived at 3035 Tulip Street.

20

Q. In Philadelphia?

A. Yes.

Q. And Mr. Calloway was supporting the home at that time?

A. Yes, sir.

Mr. Katzenbach: That is all.

The Court: It is admitted by counsel that Amos B. Calloway received an average of \$18.13 per week as wages during the last preceding six months prior to his death. 30

PETITIONER RESTS.

WILLIAM LANDIS, a witness being duly sworn on behalf of the respondent, testified as follows:

Direct examination.

By Mr. Katzenbach:

Q. What is your full name?

A. William Landis.

Q. Where do you live?

A. Philadelphia, 3416 North Sixteenth Street.

Q. And what is your position or occupation?

10 A. I am chief clerk in the Philadelphia & Reading Relief Association.

Q. Is the Philadelphia & Reading Relief Association a Pennsylvania corporation?

A. It is not a corporation.

Q. It is a voluntary association?

A. A voluntary association.

Q. What persons, if any, comprise the membership of that organization?

A. Employees of the Philadelphia & Reading Railroad and its affiliated lines.

20 Q. As chief clerk of the relief association, do you have custody of the papers and records of that association?

A. Yes, sir.

Q. Did you know Amos B. Calloway in his lifetime?

A. No, sir.

Q. Did you know that Amos B. Calloway was an employee of the Philadelphia & Reading Railroad?

30 A. Only from the records of the relief association.

Q. Did you know that Amos B. Calloway was a member of the relief association, of which you are the chief clerk?

A. We had a man by the name of Amos B. Calloway, according to the record.

Q. And have you the records, or any of the records of the relief association relative to the membership of Amos B. Calloway?

A. I have.

Q. Will you produce those records?

(Witness produces records.)

Q. I show you a paper which you have produced purporting to be the application for membership in the Philadelphia & Reading Relief Association of Amos B. Calloway. Is that the original record of the application in this association for Amos B. Calloway? 10

A. It is.

Q. Do you know, of your own knowledge, whether the dues of Amos B. Calloway in that relief association, were paid?

A. According to the record, yes. 20

Q. Do you know from your records whether Amos B. Calloway died on or about November 13th, 1911?

A. From the record, yes.

Q. Do you know, of your own knowledge, whether any benefits were paid to the widow of Amos B. Calloway by reason of his membership in the Philadelphia & Reading Relief Association?

A. By the record, yes.

Q. Have you the records or proof of such payment?

A. I have. 30

Q. Will you produce them?

(Witness produces record.)

Q. I show a paper purporting to be a voucher or receipt, purporting to be signed by Ella Calloway, acknowledging herself to having received \$600.00, alleging herself to be the widow of Amos B. Calloway, a brakeman in the employ of the Philadelphia & Reading Railroad Company, who died at Trenton, New Jersey, the thirteenth of November, 1911, and ask you whether that is the record of the receipt which you have for the payment made to
10 Ella Calloway?

A. It is the receipt.

Q. I show you a check of the Philadelphia & Reading Relief Association, purporting to be signed by H. E. Peasley, treasurer, payable to the order of Ella Calloway, widow and beneficiary, in the sum of \$600.00, dated February 27th, 1912, and ask you if you know, as a matter of fact, of your own knowledge, whether that is a record of the check paid to
20 Ella Calloway?

A. It is the check.

Q. That is the check which you have among your records?

A. Among our records.

Mr. Katzenbach: You admit she got that sum of money?

Mr. Carr: Yes.

Mr. Katzenbach: I offer in evidence the application for membership in the Philadelphia & Reading Relief Association made by Amos B. Calloway, and
30 produced from the records of the Philadelphia & Reading Relief Association.

(Above application received in evidence and marked Exhibit "R1.")

Q. Do you know, as a matter of fact, Mr. Landis, whether this check was forwarded to Ella Calloway by registered mail?

A. By the record, yes.

(It is admitted by the counsel for the petitioner, that the widow, Ella Calloway, whose name was given here as Rosella Calloway, received the voucher which was offered as evidence, and marked Exhibit "R2.")

10

Mr. Carr: I would like to object on the ground that they are incompetent and immaterial.

The Court: I will admit all of these papers, subject to the objection, and hear the objection argued later on.

Mr. Katzenbach: I offer in evidence a check of the Philadelphia & Reading Relief Association, dated February 27th, 1912, drawn on Drexel & Company, bankers, to the order of Ella Calloway, beneficiary, in the sum of \$600.00, and endorsed by Ella Calloway, widow and beneficiary, and stamped as paid.

20

(Check above referred to received in evidence and marked Exhibit "R2.")

Mr. Katzenbach: I offer in evidence a receipt signed by Ella Calloway for the sum of \$600.00 from the Philadelphia & Reading Relief Association, bearing date February 27th, 1912, and referring to the check before offered in evidence.

(Receipt above referred to received in evidence and marked Exhibit "R3.")

30

Q. Have you, among your records, any other papers connected with the membership in the Association for the payment of these benefits by Amos B. Calloway?

A. I have.

10 Q. You have produced a release on account of the death of Amos B. Calloway, of the Philadelphia & Reading Relief Association, purporting to release and discharge the Philadelphia & Reading Relief Association, and the Philadelphia & Reading Railroad Company, bearing date the twenty-sixth day of February, 1912, having as the consideration, \$500.00, and an additional sum of \$100.00, and signed by Ella Calloway. Is this the release received by the Philadelphia & Reading Relief Association from Ella Calloway by reason of the payments of the check which you have before mentioned? This is the record of your release?

A. Yes, sir.

20 Mr. Katzenbach: I offer in evidence the release on account of death benefit, Philadelphia & Reading Relief Association, certificate No. 133211, for death benefits received on account of the death of Amos B. Calloway.

(Release above referred to received in evidence and marked Exhibit "R4.")

30 Q. Have you, in your possession, a copy of the rules and regulations of the Philadelphia & Reading Relief Association?

A. I have.

Q. Will you produce that copy?

(Witness produces copy of rules and regulations.)

Q. Is the book which you have just produced, to your knowledge, a true copy of the regulations governing the Philadelphia & Reading Relief Association?

A. It is.

Q. And governing such association at the time of the membership of Amos B. Calloway?

A. Yes.

Q. And at the time of the death of Amos B. Calloway?

A. Yes.

10

Mr. Katzenbach: I offer in evidence the regulations of the Philadelphia & Reading Relief Association.

(Regulations above referred to received in evidence and marked Exhibit "R5.")

The Court: Now, you may make your objection. You don't object to the genuineness of any of these papers, but object to them as incompetent and immaterial?

Mr. Carr: Yes.

20

The Court: I will overrule the objection and admit the papers, and you may argue the matter at the close of the case.

Q. Mr. Landis, in your position as chief clerk of the Philadelphia & Reading Relief Association, do you know from what source that association receives its funds?

A. I do.

Q. Do you know, of your own knowledge, that

those funds are paid to the relief association, and used for the payments of these benefits, by the Philadelphia & Reading Railroad Company?

Mr. Carr: I object to it as leading.

Mr. Katzenbach: I will withdraw the question.

Q. From what source are the funds for this association received?

A. From contributions of the individual members and also by the Philadelphia & Reading Railroad
10 Company.

Q. The Philadelphia & Reading Railroad Company then make contributions to this fund?

A. It does.

Q. Is that a regular contribution?

A. It is regular, based on figures, of course. It is a monthly contribution, as I understand, regularly. It is a regular amount, it is a regular contribution.

Q. Based on calculations?

A. Yes.

20 Q. What is the nature of them?

A. They contribute five per cent. of the amount contributed by the members who are in their employ.

Q. Do you know whether or not employees of the Philadelphia & Reading Railroad Company are required, as part of their employment, to join this association?

A. No.

30 Q. You mean you don't know?

A. It is voluntary.

Q. That is, the joining of the association is voluntary with the employees of the Philadelphia & Reading Railroad Company?

A. Yes, sir.

Cross-examination.

By Mr. Carr:

Q. What employees of the railroad company are there who are not members of this association?

A. I can't tell just what, there are some.

Q. Do you know what proportion?

A. No, I couldn't tell you.

Q. When the wages are paid to the different people working for the railroad company is there a deduction made by the paymaster? 10

A. The deduction is made on the payroll.

Q. Then the payments for the relief association, received from the individual members, are through the hands of the Philadelphia & Reading Railroad Company?

A. Yes.

Q. How long was Mr. Calloway a member of this association?

A. I think about seventeen months.

Q. And he made payments during that time? 20

A. During that time.

Q. Do you know how much he paid?

A. I think about \$25.00, I don't know the exact figures.

Q. That was his contribution as a member?

A. As a member during that time.

Q. Was he in the employ of the railroad company for some six years?

A. I don't know.

Q. When did his membership in the relief association commence? 30

A. About June, I think, it was 1910.

Q. Look at the application and state what date he entered the association.

A. He is given here as a new employee, examined on the seventeenth—

Q. Just state the date.

A. June 17th, 1910.

Q. And the sum of \$600.00, which was paid to Mrs. Calloway was paid from the general funds of the relief association, which general fund was composed of the \$25.00 paid by Mr. Calloway, and the money of others, and five per cent. by the railroad?

10 Did any other railroads contribute other than the Philadelphia & Reading?

A. There are affiliated lines, the Atlantic City Railroad, for instance.

Q. Do the affiliated lines contribute?

A. Yes, the affiliated lines contribute.

Q. Is the money received from the different railroad companies kept in a separate fund, a separate class?

A. No.

20 Q. It all goes in as a common fund?

A. It all goes in the one fund, the common fund.

Re-direct examination.

By Mr. Katzenbach:

Q. Is there or is there not any deduction for the Philadelphia & Reading Relief Association made from the wages of the employees of the Philadelphia & Reading Railroad Company, who are not members of the association?

30

A. No.

Re-cross examination.

By Mr. Carr:

Q. Does the five per cent. payment from the Philadelphia & Reading include the Atlantic City Railroad?

A. The five per cent. paid by the Philadelphia & Reading Railroad is five per cent. of the contribution paid by all the members—employees.

Q. Yes, but does the Philadelphia & Reading Railroad Company pay that five per cent., or does the Atlantic City Railroad pay it?

10

A. The Reading Railroad pays it.

Q. If there is any contribution made by the Atlantic City Railroad Company to that fund on account of the injuries received which occur on that railroad, it is paid by the Philadelphia & Reading, is that right?

A. My opinion is—I would like to say there, my opinion is that the Reading Railroad pays the five per cent. of the contributions made, and whether they are reimbursed, I don't know.

20

The Court: You don't know?

The Witness: I think they are, but I don't know. All the contributions are made by the Philadelphia & Reading, and if they are reimbursed by the Atlantic City Railroad, I don't know, but I think they are.

30

JOHN F. OTTO, a witness being duly sworn on behalf of the respondent, testified as follows:

Direct examination.

By Mr. Katzenbach:

Q. Where do you live, Mr. Otto?

A. Bound Brook.

Q. What is your occupation?

A. Conductor.

Q. With what railroad?

10 A. Philadelphia & Reading.

Q. How long have you been with that company?

A. I have been with this company about eight years.

Q. Did you know Amos B. Calloway?

A. Yes, sir.

Q. Did you know him on November 13th, 1911?

A. Yes, sir.

Q. At that time what was his occupation, to your knowledge?

20 A. Brakeman.

Q. Do you know on what train he was brakeman?

A. Yes, sir.

Q. What train was it?

A. Philadelphia & Reading local freight.

Q. Was that the same train on which you were the conductor?

A. Yes, sir.

Q. Do you remember the accident which happened, resulting in the death of Amos B. Calloway, on November 13th, 1911?

30 A. Yes, sir.

Q. Were you present at the time?

A. Yes, sir.

Q. Will you, in your own words, recount the nature of the accident and where, and when and how it happened?

A. Well, about seven-forty-five in the morning, we arrived at Skillman. We had a car to put at Vansant's siding at the green house. There was a car waiting at this green house, loaded, and we were to pull it out and set an empty behind it, and when the move was made, backing in after the engine had stopped, these cars were all stretched, and to cut this car off, it was necessary to take the slack, and in bringing the engine back to take the slack, the last car was shoved out. The cut was made and the engineer was given the signal to go ahead, which made an opening there of probably five feet between the cars, and this man went in there to open the knuckle, and after the engine stopped, after pulling away, naturally the cars all run together, and at the same time rebounded, and when he tried to get out, this rebound caught him. 10 20

Q. Was the train upon a grade at that time?

A. There is a little grade, but I wouldn't think the grade would amount to anything, or at least not very much.

Q. Now, was it necessary for Mr. Calloway to go between the cars to open the coupling?

A. No, one coupling opened would be sufficient.

Q. Was there a device upon the side of the cars, a lever?

A. Yes, sir. 30

Q. By means of which the coupling could be opened?

A. There is a lever on the side of a car, but that lever don't necessarily open the knuckle. Sometimes it is necessary for a man to reach in to pull

the knuckle open or cut the lever, and then open the knuckle.

Q. In this particular instance, did you see whether the knuckle was or was not open?

A. No, I didn't see that.

Q. Did you see Mr. Calloway going in?

A. I saw him start in.

Q. And did you see him come out?

A. I saw him fall; that is the only thing that I
10 saw.

Q. You don't know, as a matter of fact, what the condition, with reference to coupling or uncoupling the cars, was at that time?

A. Not exactly.

Q. Where were you?

A. At the switches.

Q. And where are they with reference to this?

A. They are back on the track a matter of one hundred fifty or two hundred feet, back on the siding.

20 Q. Were you easily able to see Mr. Calloway and what he was doing, from your position?

A. Yes, except when he went between the cars.

Q. And you couldn't see when he went between the cars?

A. No.

Q. Now, on this train, who was the engineer?

A. Frank Sellers.

30 Q. Who was the fireman?

A. James Hannon.

Q. Were they in charge of the engine at that time?

A. They were both on the engine, yes.

Q. What kind of brakes were on that train?

A. Most engines are equipped with what we call automatic and straight air.

Q. Have you any personal knowledge as to which air was applied at the time of the accident?

A. No.

Q. You have no means of telling, have you?

A. I have not, no.

Q. And, as I understand you then, one car had been already spotted?

A. Yes, sir.

Q. And the rest of the train had been unknuckled or uncoupled?

A. No, one car was spotted, and in order to get that car away from the others, it was necessary to take the slack, and in taking the slack this car 10 spotted was shoved out of position. It was necessary to move it away in order to make a coupling, because all couplings are made by impact, coming together.

Q. Was or was not the engine stationary, if you know, at the time of the accident?

A. At the time of the accident, yes.

Q. You mean it was stationary?

A. It was.

Q. What, so far as you could observe, was the cause of the impact between the cars? 20

A. I don't understand your question.

Q. What, so far as you could observe, was the cause of the impact of the cars?

A. Well, the cars pulled away were all stretched, and as soon as the engine stopped, the cars run together, and then after the cars run together, they would rebound.

Q. Is it not the duty of a brakeman to uncouple the cars by means of the lever provided on the side of the cars? 30

A. Yes, sir.

Q. Is it part of his duty to go between the cars for the purpose of coupling the cars?

A. Not necessarily his duty.

Q. When you say, "Not necessarily his duty," is it his duty at all?

A. No.

Cross-examination.

By Mr. Carr:

Q. Mr. Otto, regarding the air that was on this train, as I recall, you said most engines on the Philadelphia & Reading were equipped with straight and automatic air, is that correct?

10 A. Yes.

Q. Was this particular engine equipped with them?

A. Both.

Q. You don't know which was applied?

A. No.

Q. The straight air, as I understand it, is the air which is related to the engine?

A. Yes.

20 Q. And the automatic is on the train and cars attached?

A. Yes.

Q. If the automatic air had been applied to the train, would the cars have rebounded?

A. I don't think I could answer that.

Q. The effect of that air brake is to hold the car?

A. It should hold it.

Q. It works on the wheels, backwards and forwards?

A. Yes.

30 Q. If the brake was used, it would prevent it from going down the grade, is that correct?

A. Yes.

Q. And if the car went down the grade or re-

bounded, it would indicate that the automatic air had not been used, wouldn't it?

A. Yes.

Q. You said that it was not necessary for Mr. Calloway to go through the two cars in order to make this coupling? Is it or is it not a custom or habit among the railroad employees, brakemen, for instance, to go through cars in order to open the coupling on both ends, in order to make a sure coupling? 10

A. It is a railroad chance, done every day.

Q. It is done every day?

A. Every day.

Q. Then if that was not done, the alternative would be to run the risk of the car not coupling properly?

A. That would be it.

Q. And then it would have to be done over again?

A. Yes.

Re-direct examination.

20

By Mr. Katzenbach:

Q. It would be merely a risk of the car not coupling properly, would it not?

A. That is all, just a risk.

Q. Sometimes they couple properly, and sometimes they don't?

A. Yes.

Q. Sometimes the knuckle is not perfect in workmanship? 30

A. There are many different makes; whether it would have met or not, I couldn't say.

FRANK R. SELLERS, a witness being duly sworn on behalf of the respondent, testified as follows:

Direct examination.

By Mr. Katzenbach:

Q. Where do you live, Mr. Sellers?

A. Bound Brook.

Q. What is your occupation?

A. Engineer.

Q. And an engineer in the employ of the Philadelphia & Reading Railroad?

A. Yes, sir.

Q. And you were, on November 13th, 1911?

A. Yes, sir.

Q. And at that time were you the engineer on the train of which Mr. Otto was the conductor?

A. Yes, sir.

Q. And upon which Mr. Amos B. Calloway was brakeman?

A. Yes, sir.

Q. Do you remember the accident that happened to Mr. Calloway, resulting in his death?

A. Yes, sir.

Q. Where and when and how, in your own language, did that accident occur, and what did you see of it?

A. Well, I seen the fireman was to handle the engine at that time. I gave the engine in his charge when we came into Skillman. After we backed into Vansant's siding, I got on the tank, and stood alongside the tank, when he pulled away from the train, and he said, "Is that it there?" A short time before he got his signal to back back again, and when

he pulled away from the train, I seen Mr. Calloway go in before the rebound of the slack of the train had settled, and I seen Mr. Calloway falling down.

Q. About how far were you from the scene of the accident?

A. About four car lengths.

Q. And was Mr. Calloway engaged at that time in coupling the cars?

A. That is more than I can tell you, whether he was coupling them or not.

10

Q. You don't know just what he was doing?

A. I seen him go in. I don't know what he went in for.

Cross-examination.

By Mr. Carr:

Q. Mr. Sellers, did you say the fireman was running the engine?

A. Yes, handling the engine when we were making that fast.

Q. Were you running the engine?

A. Not at that time.

20

Q. Do you know what air was applied?

A. The automatic in stopping the train, the automatic was used, and when he pulled away from the car, the straight air was used.

Q. When you pulled away just before the cars were backed again, you used the straight air?

A. He used the straight air when he stopped the train, after he pulled away from the car.

Q. And just after he pulled away, Mr. Calloway went through?

30

A. Yes, sir.

Q. And at that time the air used was the straight air?

A. Yes, sir.

Q. If the automatic air had been used, it would have held the cars?

A. It would, yes, sir.

Q. You didn't see the accident yourself?

A. No, sir, I wasn't back there.

Re-direct examination.

By Mr. Katzenbach:

10 Q. Is it customary, as the cars are spotted and in coupling and uncoupling them, to use straight or automatic air?

A. If you only have a short train, it is customary to use straight air; pulling out on the main track, you have a reserve charged with automatic, in case of making a stop. If you use automatic air spotting the car, in moving on the main track, you will not have full breaking power pressure.

The Court: Was this train about to move out on the main track?
20

A. After that car was spotted, we were going to move on the main track.

The Court: Don't it depend somewhat on the grade as to which air you use?

A. Not necessarily. Your engine will hold your train still.

The Court: It didn't hold this train.

30 A. Oh, yes, it did.

The Court: It didn't hold the car?

A. It doesn't hold the car, no, sir.

The Court: The automatic would have?

A. The straight air held it after the slack went out.

The Court: The automatic would have held it before the slack went out?

A. Yes, sir, it would.

JAMES E. HANNON, a witness being duly sworn on 10
behalf of the respondent, testified as follows:

Direct examination.

By Mr. Katzenbach:

Q. Where do you live, Mr. Hannon?

A. 511 North Hermitage Avenue, Trenton.

Q. What is your occupation?

A. Fireman.

Q. With what railroad are you employed?

A. Philadelphia & Reading.

Q. How long have you been employed there? 20

A. I am in the fifth year.

Q. Were you employed there November 13th,
1911?

A. Yes, sir.

Q. On what train were you on that day?

A. On the Bound Brook local freight, Philadelphia
& Reading.

Q. Who was the conductor on that?

A. John Otto.

Q. And was that the train on which Mr. Calloway was brakeman?

A. Yes, sir.

Q. Do you remember an accident which occurred to Mr. Calloway on that day?

A. Yes, sir.

Q. Where were you at the time of the accident?

A. On the engine.

10 Q. Did you see the accident?

A. Yes, sir.

Q. What did you see?

A. Why, after we had spotted the car at Vansant's siding and given Amos Calloway his slack to make the cut, he knocked the car out of position and it pulled, and it pulled away from the car, and when we pulled away from the car, he dove in between the cars, and the last I seen was his hat falling, and I
20 seen the brakeman, Chisholm, throw up his hand and signal to stand still, and we all got off the engine and went back and helped to pick him up.

Q. Was the engine in motion at the time of the accident?

A. No, sir.

Q. Standing still?

A. Yes.

Q. And about how long before the accident had it been stopped?

30 A. Why, it was just stopped when he went between them.

Q. Just long enough for him to run in between?

A. Yes.

Q. Had you struck the car which you were trying to spot, so as to knock it out of position?

A. No.

Q. Just before the accident?

A. When he took the slack of the car, that is what knocked it out. They pulled away and set the knuckle to come back and make another coupling, push it in position.

Q. Did you, or did you not see Mr. Calloway move the lever to adjust the knuckles?

A. No.

Q. After the car had stopped, all you saw was that he ran in between?

A. That is all. I saw him go in.

10

Q. Mr. Sellers has testified that you were, at the time, in charge of the engine.

A. Yes.

Q. Or at least, running the engine?

A. Yes.

Q. What kind of air brakes was that engine equipped with?

A. Both automatic and straight air.

Q. And which was used at this time?

A. When we backed in to spot the car we used the automatic brake, and when we pulled away to adjust the knuckle of the car, we used the straight air; and he went in before the cars had gotten back into position.

20

Q. Were the cars situated on grade?

A. A slight grade.

Q. Would the grade be sufficient to cause the cars to run back of their own motion?

A. Well, even on level ground there is a little rebound to the cars, that is always looked for after they come up with the engine. They will drop back without a grade.

30

Cross-examination.

By Mr. Carr:

Q. Mr. Hannon, you saw Mr. Calloway go in between these cars?

A. Yes, sir.

Q. Did you apply the automatic brake when you saw him go in between?

A. No. He didn't wait until the cars had come to a standstill before he went in.

Q. I asked you if you applied the automatic
10 brake?

A. No, I applied the straight air brake.

Q. Now, when the engine stopped, Mr. Calloway immediately —

A. Went in.

Q. Went in. You saw him go in?

A. Yes.

Q. You were in the engine?

A. Yes.

Q. The brakes were manipulated from the engine?
20

A. What?

Q. The brakes were manipulated from the engine?

A. Yes.

Q. And you didn't apply the automatic air?

A. No.

Q. Would there have been any rebound of the train if you had applied the automatic air?

A. In a case of that kind we don't apply it.

Q. Would there have been any rebound of the car
30 if you had applied the automatic air?

A. No.

Q. You say that, as I understand you, in order to release this car that had been spotted, so that it could be respotted, it was necessary to let it slack out so that the pin could be loosened?

A. Yes.

Q. In performing that operation, you used the automatic air?

A. In backing in we use the automatic air when spotting.

Q. Did you ever say anything to Calloway which would indicate that you were not going to use automatic air the second time?

A. No.

Re-direct examination.

10

By Mr. Katzenbach:

Q. Would the fact that you were not expecting to use automatic air the second time be generally known to railroad men?

A. Yes.

Re-cross examination.

By Mr. Carr:

Q. How would you know what would be generally known by railroad men?

A. By signal.

20

Q. You don't know what Calloway did, do you?

A. I didn't know what he was going to do.

Q. You had no means of knowing what he was going to do?

Mr. Katzenbach: I object.

(Objection sustained.)

RESPONDENT RESTS.

30

REBUTTAL.

ROSELLA CALLOWAY, recalled, on behalf of the petitioner.

Direct examination.

By Mr. Carr:

Q. Do you desire to correct, at this time, the statement of your residence that you made this morning?

A. Yes.

Q. What was your residence?

10 A. 3152 Tulip Street.

Q. That is, at the time of the accident?

A. Yes.

Q. Did you go to the Philadelphia & Reading Railroad Company to obtain the money due on the benefit certificate?

A. Yes, I went to the Spring Garden Street Station.

Q. What were you told there in regard to getting the money?

20 A. They said I couldn't get the money until I signed a paper, a release paper.

Mr. Katzenbach: I object. I don't think that makes any particular difference, because I admit it is a fact that she couldn't get the money without signing a release, but, at the same time, if she is going to testify as to what was told her at that particular time, I do object, unless she says who told her.

30 Q. Do you know who it was that told you that?

A. No, sir, I do not. They wouldn't give me the money.

Q. Was it some one in the office there?

A. Yes.

Q. Was it the man who gave you the check?

A. He didn't give me any check, he sent it to me.

Q. Did he ask you to sign the release?

A. Oh, yes, he said I would have to sign the release before I could receive the money. 10

Q. The release says, "Mr. Charles and Mr. Fink." Do you know those gentlemen?

A. No, I do not. I wouldn't know them if I were to see them.

Q. What did you do when they told you that?

A. They fixed a paper and I signed it.

Q. And did you subsequently get the \$600.00?

A. \$600.00.

Q. Was anything said to you by any one there at the time of the execution of the release, or at the time of the signing of any other paper, about waiving your rights under the Employers' Liability Act? 20

A. No, sir, not one word.

Q. I show you a paper marked at the top, "Philadelphia & Reading Railroad Company, New York Division, office of superintendent," and ask you what this is?

A. That is a certificate of him working for the railroad.

Q. Where did you find it?

A. We found it in his box. 30

Mr. Katzenbach: It isn't denied that Mr. Calloway worked for the railroad.

Mr. Carr: I would like to have that go in to show the nature of the service and the date of it.

(Above certificate received in evidence and marked Exhibit "P1.")

Q. How often was Mr. Calloway paid?

A. Every month.

By the Court:

Q. Do you know how often he was paid by the railroad?

A. Every month.

Q. How do you know?

10 A. He brought home his pay, that is how I know.

(It was agreed that briefs would be submitted.)

BOTH SIDES REST.

FURTHER TESTIMONY.

Transcript of testimony taken in the above entitled matter before Hon. Frederick W. Gnichtel, Judge of the Mercer County Court of Common Pleas. Richard A. Porter, stenographer.

OTT & CARR, for the petitioner.

EDWARD L. KATZENBACH, for the respondent.

Mr. Katzenbach: It is admitted that the application for membership in the Philadelphia & Reading Relief Department and the contract connected therewith was made and entered into in the State of Pennsylvania. 10

Mr. Carr: I will stipulate that the application for membership was made out in Philadelphia and accepted at Philadelphia and that the release was executed in Philadelphia.

The Court: Now, you stipulate that the application for membership in the Relief Association was made in Philadelphia, accepted in Philadelphia and the benefits paid thereunder were paid in Philadelphia. 20

FRANK E. SLACK, being duly sworn, testified as follows:

Direct examination.

By Mr. Katzenbach:

Q. Mr. Slack, where do you live?

A. 5110 Greene Street, Philadelphia.

Q. What is your present position?

A. Assistant trainmaster.

Q. In the employ of what railroad company?

10 A. Philadelphia & Reading Railway Company.

Q. Where is your office?

A. Third and Birks Street, Philadelphia.

Q. How long have you been assistant trainmaster of the Philadelphia and Reading Railway Company?

A. About ten or eleven years.

Q. Did you know Amos B. Calloway?

A. I did.

Q. Did Amos B. Calloway come in contact with you in the course of his duties?

A. At all times.

20 Q. Will you explain what the nature of your duties are?

A. I employ men for the freight train service. I exercise general supervision over them and the movements of freight trains.

Q. About when did you first meet Amos B. Calloway? And under what circumstances?

A. I cannot say from memory the exact date. He came to my office and asked for employment.

30 Q. At Third and Birks Streets?

A. Yes.

Q. At Third and Birks Streets in Philadelphia?

A. Yes, sir.

Q. At the time he made application for employment to you, at Third and Birks Streets in Philadelphia, did he make a formal written application?

A. No, sir.

Q. Did he at any time, before he was employed, make a formal written application?

A. At the time of his employment, not before that time.

Q. At the time that he first approached you with respect to employment, what did you do or say to him? 10

A. In his particular case, of course, I cannot remember. The general procedure is to ask the man as to his character, his previous experience, if any, where he has been employed, how long, his cause for leaving that employment, age, make-up in general, and if he passes those questions satisfactorily, he is given a blank form and then fills out an application for employment.

Q. Did you ask Mr. Calloway these questions? 20

A. Yes, sir.

Q. Did you give him a blank form to fill out, making application for employment?

A. I did.

Q. Did he fill out that blank form?

A. He did.

Q. Did he return that blank form to you?

A. He did.

Q. Have you that blank form in your possession? 30

A. I have.

Q. Will you produce it?

(Witness produces blank form as requested by counsel.)

Q. This is the form which Mr. Calloway brought back to you?

A. Yes, sir.

Q. At Third and Birks Streets, Philadelphia?

A. Yes, sir.

Q. This is signed by Amos B. Calloway?

A. Signed by him and witnessed by me, although my own signature is on the opposite side.

Q. This application is dated at Birks Street. Does that refer to Birks Street, Philadelphia?

10 A. Yes, sir. That is a term on the railroad. We refer to Third and Birks Street as Birks Street.

Q. That means your Birks Street Philadelphia office?

A. Yes, sir.

Q. This application is dated at that place?

A. Yes, sir.

Q. It was presented to you at that office?

A. Yes, sir.

20 Q. This application gives the address of Amos B. Calloway as 3187 Memphis Street. Do you know where that is?

A. Yes, sir.

Q. Where is that?

A. That is not a great distance from Third and Birks Street, in the Kensington District in Philadelphia, Pennsylvania.

Q. Was Amos B. Calloway at that time a resident of the State of Pennsylvania?

A. Yes, sir, according to the papers.

30 By Mr. Carr: There is no dispute as to that.

By Mr. Katzenbach: Is it admitted that he was always a resident of Pennsylvania up to the time of his death?

By Mr. Carr: I don't know about that. He was a resident when he made the application and when he died.

Q. Do you know where the residence of Amos B. Calloway was from the time he made the application to the Railway Company up to the time he died?

A. To the best of my belief and knowledge, it was in Philadelphia all the time. We require men on the extra list to live within the calling district at Philadelphia. All the time he was an extra man, up 10 to the time when he first secured a regular position, he must have lived within call. After that he may have changed his residence, although I believe he lived there up to the time of his death.

By Mr. Katzenbach: It is admitted that he was at the time of his death a resident of Philadelphia.

Q. After Mr. Calloway had delivered to you this application, what did you do with it?

A. I witnessed the signature and read over the paper carefully, then had him sign an application 20 for admission to the Relief Association and sent him to the superintendent's office, room 313, Reading Terminal, Philadelphia, for approval of the papers.

Q. When you say the "superintendent's office," do you mean the office of Charles A. Beach?

A. Yes, sir.

Q. The superintendent of the New York Division of the Philadelphia and Reading Railway?

A. Yes, sir.

Q. Where did you say his office was? 30

A. Room 313, Reading Terminal, Philadelphia.

Q. When Mr. Calloway had been to Mr. Beach's office, did he return to you with any paper from that office?

A. After he had passed his medical examination, and his papers had been approved at the office, he was returned to me with a certificate of employment, to show that his papers had been approved and that he might be put to work.

By the Court: In other words his papers were approved. Say that again.

A. His papers had been approved. He had passed his physical examination for admission to the Relief Association and with the certificate of appointment
10 in regular form saying that the man had been appointed that day as brakeman.

The Court: Have you that form here?

Mr. Katzenbach: Yes.

Q. Mr. Slack, I show you a paper marked "Exhibit P1," purporting to be the certificate of employment of Amos B. Calloway, signed by Charles
20 H. Beach and ask you if that is the paper with which Mr. Calloway returned to you.

A. Yes, sir.

Mr. Katzenbach: I offer in evidence the application which was made by Amos B. Calloway, dated June 16, 1910.

(The offer was accepted and marked "P1" for identification.)

Q. Subsequent to Mr. Calloway's return to you with the certificate of employment from Mr. Beach,
30 what, if anything, did you have to do with his em-

ployment by the Philadelphia & Reading Railway Company?

A. Why, I sent him out as a learner on different trains, to learn the different branches of the division and to learn the character of the work; to return with endorsed papers from the conductors of those trains, giving their opinion of his capability and etc. After he passed through that and we considered him capable, we marked him up on the list as what is called an extra man—to be called for service at such 10 times as he may be needed—and I followed out that course in his case.

Q. When Mr. Calloway was employed, as I understand it, you have testified he was employed, what was the term of the employment, if any, if you know?

A. Until he died or resigned or was dismissed, as I understand, to the age of seventy years, the retiring age under the pension laws. It depended upon good behavior.

Q. There was no term of years or other period fixed? 20

A. No, sir.

Q. Now, did Mr. Calloway, while in the employ of the Philadelphia & Reading Railway Company, make application to you for assignment to work upon the Bound Brook route?

A. Yes, sir.

Q. Did he make such written application?

A. Yes, sir.

Q. Have you in your possession such written application? 30

A. I have.

Q. Will you produce it?

(Witness produces document as requested by counsel.)

Q. Is this the signature of Amos B. Calloway?

A. Yes, sir.

Q. Is this the application to which you refer?

A. That is the application.

Mr. Katzenbach: I offer this application in evidence.

(The offer of counsel was accepted and marked for identification.)

10 Q. Did you, before you received that application, post a notice for applications as a brakeman upon the Bound Brook local?

A. Yes, sir.

Q. Have you got a copy of that notice?

A. Yes, sir.

Q. Will you produce it?

(Witness produces notice as requested by counsel.)

Q. Where was this notice issued?

20 A. At my office, Third and Birks Street, in Philadelphia.

Q. And where was the application which you have produced, delivered to you?

A. At my office in Philadelphia.

Q. As a result of this notice and this application, was Amos B. Calloway appointed by you as a brakeman on the Bound Brook local?

A. He was.

Q. Where was that appointment made?

A. At my office in Philadelphia.

30 Q. At Third and Birks Streets?

A. Yes, sir.

Mr. Katzenbach: The notice produced, reads as follows:

“Notice

May 23, 1911.

V. C. 867.

All Concerned:

Vacancy for Brakeman on Bound Brook Local Freight. Applications for this position will be received up to noon May 28th, 1911.

Roster number must show on application.

(Signed) F. E. Slack, 10
Assistant Train Master.

Amos B. Calloway” (this is written in pencil).

“F. E. Slack

Assistant Trainmaster.

Dear Sir:

I hereby make application for the position as brakeman on the Bound Brook Local as advertised in your V. C. No. 867.

My number on roster is 181.

(Signed) Amos B. Calloway. 20

Assistant Train Master

New York Division

Third and Birks Streets.

7 A. M., May 27.

Philadelphia.

Philadelphia & Reading Railway Company.”

Q. Was that advertisement posted around the Reading yards or delivered to employes of the Reading Railway Company?

A. It was posted on the bulletin board. 30

Q. Referring to the notice. There appears in handwriting, the name of Amos B. Calloway. Do you know who wrote that?

A. I did.

Q. Why?

A. I endorse the advertisement, as we term it, with the name of the successful man.

Q. And Mr. Calloway was the successful man in this instance?

A. Yes, sir.

Q. As a result of this advertisement and this application, I understand that you designated Amos B. Calloway to act as brakeman on the Bound Brook local freight.

A. Yes, sir.

Q. Was that the employment which he had at the time he met his death?

A. Yes, sir.

Q. He was never employed in any other way then from the time that you appointed him to that position to the time that he died?

A. No, sir.

Q. Was any other contract of hire made with him subsequent to that time?

A. No, sir.

Q. And he was appointed, as I understand, to the place after having made application at some place in Philadelphia?

A. Yes, sir.

Q. And the office of Mr. Beach, superintendent of the New York Division is in the Reading Terminal, Philadelphia, isn't it?

30 A. Yes, sir.

Q. And the certificate of appointment brought to you by Calloway came from that office, that Philadelphia office, of Mr. Beach, didn't it?

A. Yes, sir.

Cross-examination.

By Mr. Carr :

Q. Mr. Slack, when Calloway was first appointed, he was put on what you call the extra list?

A. Yes, sir.

Q. Is that a list of names from which men are called when extra work is needed to be done?

A. Yes, sir.

Q. And they respond when called. And if not their names are removed from the list? 10

A. Yes, sir.

Q. They are paid for such work as they do in response to call?

A. Yes, sir.

Q. When was his name removed from that extra list and placed on any other list?

A. At the time of his appointment to the first regular job.

Q. Which was the Bound Brook local freight?

A. Yes, sir. 20

Q. And the Bound Brook local freight, he acted as brakeman on that?

A. Yes, sir.

Q. Where was that employment to be performed?

A. The work?

Q. The work to be done by him as brakeman on the Bound Brook local freight.

A. The train ran between Philadelphia, Third and Birks Streets and Port Reading Junction, New Jersey.

Q. When he met his death, at or near Skillman, he was engaged in performing the duties of his position as brakeman in the State of New Jersey, was he not? 30

A. Yes, sir, naturally. That is correct.

By the Court: The train ran from Third and Birks Street, Philadelphia, to Port Reading, New Jersey?

A. Yes, sir, and return.

Q. How did he receive his pay during the time of his employment?

A. By check.

Q. How often?

A. Once a month.

10 Q. Where?

A. Philadelphia.

Q. At Third and Birks Street?

A. He could get it at Third and Birks and at the railroad superintendent's office on other days.

Q. He was paid according to the number of hours he worked, is that correct?

A. Yes, sir.

20 Q. You say there was no limit to the term of employment and that he could serve until he died or until he reached a certain age, or until dismissed. Was there anything in the contract of employment that would prevent the railroad company from dismissing him without cause? Was there anything in the contract which would prevent that?

A. No, sir.

Q. Then if he were not dismissed, it would be due to the fact that the railroad company did not desire to dismiss him?

A. Yes, sir.

30 Q. When he first went on the extra list, where did he perform his services?

A. On the New York Division. As to specifying just what trains, I can not say from memory.

Q. Do you know whether he worked on trains in New Jersey or Pennsylvania, or in both?

A. Being an extra man, and from the character of our service, I should say that he worked on interstate trains—that is, trains running from one State to the other.

Q. Now, when he was on the extra list, you say you suppose he worked on interstate trains. You mean trains running between points in New Jersey and Pennsylvania?

A. I say, I believe he had struck some of those trains at sometime during his extra service, although I have no proof at hand of that. 10

Q. What force has the certificate of appointment that is signed by Mr. Charles A. Beach?

A. That is the employee's evidence that he was employed as a brakeman on that day. It may be of value to him at the age of seventy in proving when he was appointed, when he applied for his pension.

Q. He was appointed to the position of brakeman. Did that mean a brakeman on any specific road or line, or did that mean his name would be added to the list of brakemen and would be subsequently assigned to work, in your judgment? 20

A. He was appointed as a brakeman on the New York Division.

Q. When you transferred him to the Bound Brook Division, did he receive any certificate?

A. That was not a transfer.

Q. Is the Bound Brook line part of the New York Division?

A. Yes, sir. 30

Re-direct examination.

By Mr. Katzenbach:

Q. You have testified that Mr. Calloway was in-

jured upon a train which ran from Third and Birks Street to Bound Brook?

A. Yes, sir.

By the Court: Third and Birks Street, Philadelphia, to Port Reading Junction, New Jersey, you mean?

A. Yes, sir.

Q. Do you know whether Mr. Calloway was killed on the outward or return journey?

10 A. The return trip.

By the Court: That train ran every day?

A. That train ran east one day and west the next. There were two crews alternating.

Re-cross examination.

By Mr. Carr:

Q. One crew at Third and Birks and the other at Port Reading?

A. Both Philadelphia crews.

TESTIMONY CLOSED.

20

It is stipulated that Amos B. Calloway received pay from his employment by the Philadelphia and Reading Railway Company in the City of Philadelphia, Pennsylvania.)

(It is admitted that the Philadelphia and Reading

Railway Company contributed to the Philadelphia and Reading Relief Fund, five per centum of the amount contributed by the members of the association to the expenses of administering the fund.)

(It is further stipulated that the Philadelphia and Reading Railway Company admitted the contribution mentioned to be made by it in the by-laws of the Philadelphia and Reading Relief Association.)

(It is likewise stipulated that the Philadelphia & Reading Railway Company contributed ten per centum of the amount contributed by the employees, until the total fund of the Relief Association had reached the sum of one million dollars, and which was in March, 1893, and after that date, the Philadelphia & Reading Railway Company has paid five per centum of the amount contributed by members, together with the expenses of operation of the association.) 10

BOTH SIDES REST.

20

EXHIBIT P1

Form 400

The
Reading.

Philadelphia & Reading Railway Company,
New York Division.

Office of Superintendent.

June 21st, 1910.

This certifies that Amos B. Calloway, having successfully passed the necessary examinations is ap- 30

pointed to the position of brakeman dating from June 21st, 1910.

Charles A. Beach,
Superintendent.

EXHIBIT R1.

PHILADELPHIA AND READING RELIEF ASSOCIATION.
Application for Membership in the Philadelphia and
Reading Relief Association.

10

[26893]

To the Superintendent of the Philadelphia and
Reading Relief Association:—

I, AMOS B. CALLOWAY, of Philadelphia, in the
County of Philadelphia and State of Pennsylvania,
employed or about to be employed, in the service of
the Philadelphia & Reading Railway Company, do
hereby by reason of such employment, apply for
membership in the Philadelphia and Reading Relief
Association, and consent and agree to be bound by
20 the Regulations of said Association, as contained
in the book of said Regulations, approved by the
Advisory Committee, which I have read or have had
read to me, and by any other regulations of the said
Association, which may be hereafter adopted.

I ALSO AGREE, That the said Company, my em-
ployer, or any other Company whose employes may
become members of the said Association, and which
may hereafter employ me, shall by its or their prop-
er agents, and in the manner provided in said Regu-
30 lations, apply as a voluntary contribution from any
wages earned by me under such employment, or
from benefits that may hereafter become payable to
me, at the rate of One dollar and fifty cents (\$1.50)

per month, for the purpose of securing the benefits provided for in the Regulations for a member of the said Association of the second class, *a* and additional death benefit equal to the death benefit of the first class. a Unless I shall otherwise designate in the prescribed form with the approval of the Superintendent of the Relief Association, death benefit shall be payable to *b* my wife Ella Calloway, of 3187 Memphis St., Phila., Pa. _____

And if any person now or hereafter designated by me to receive the death benefit shall not be living at the time of my death, or shall be incapacitated for executing the requisite receipt and release, or if there shall be no such person, the death benefit shall be payable as provided in the Regulations of the Association for such event. Any funeral or other expenses incident to my death which shall have been paid by the Superintendent of the Relief Association, in accordance with the Regulations, shall be held to be in part payment of the said death benefit, and the amount so paid shall be deducted from the total amount of said death benefit before payment to the person or persons entitled to receive the same. And in consideration of the contribution to be made

a. If no additional death benefit is taken in this application draw lines through the words "and additional death benefit" and all following, to and including the word "class" in the next line.

b. If no beneficiary is specially designated, draw lines through the blank space. The witness is not to note these erasures, but must particularly describe, over his signature, as "made before execution," all other erasures, alterations or interlineations.

to the Relief Fund of the said Association by The Philadelphia and Reading Railroad Company, and its successors, and of the agreement of the several Associated Companies in respect of any deficit in the Relief Fund for benefits to their respective employes, I hereby agree that the acceptance of benefits from the said Relief Fund, or from said Association, for injury or death, shall operate as a release of all claims for damages against said Company, my employer, and against any of said Associated Companies by which I may hereafter be employed, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute, or, where necessary, procure to be executed, such further instrument as may be necessary formally to evidence such acquittance.

I ALSO AGREE, That this application, when approved by the Superintendent of said Association, shall make me a member of said Association on and from the date upon which, by the provisions of the Regulations of said Association and the terms of this application, it takes effect, and shall constitute a contract between myself and the said Company, my employer, and such of the Associated Companies by which I may be hereafter employed, and that the terms of this application, and the Regulations of said Association shall during my membership, be a part of the conditions of my employment by said Companies, or any of them, and that the same shall not be avoided by any change in the character of my service, or locality where rendered, while in such employment, nor by any change in the amounts applicable from my wages, to the Relief Fund, which I may hereafter consent to, and that the agreement that the above named amounts shall be appropriated from my wages, shall apply also to any other

amounts arising from changes made as aforesaid, and shall constitute an appropriation and assignment in advance, to the said company or Companies, my employers, in trust, for the purposes of said Association, of such portion of my wages, which assignment shall have precedence over any other assignment by me of my wages, or of any claim upon them, on account of liabilities incurred by me.

I ALSO AGREE, For myself, and those claiming through me, to be especially bound by the Regulation providing for final and conclusive settlement of all disputes by reference to the Superintendent of said Association, and an appeal from his decision to the Advisory Committee. 10

I CERTIFY, *That I am correct and temperate in my habits; that, so far as I am aware, I have no injury or disease, constitutional or otherwise, which will tend to shorten my life, and am now in good health and able to earn a livelihood.*

I DO HEREBY FURTHER ACKNOWLEDGE, CONSENT AND AGREE, *That any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in this application, or my resignation from the service of said Company, my employer, or from any of the Associated Companies, or my being relieved from employment and pay therein at the pleasure of the said Companies, or any of them, or their proper officers, shall except as otherwise provided in the Regulations, forfeit my membership in the said Association, and all benefits, rights and equities arising therefrom, excepting that my leaving the service shall not (in the absence of any of the other foregoing causes of forfeiture) deprive me of any benefits to the payment of which I shall have previously become entitled by reason of accident or sickness occurring while in the* 20 30

service, nor of the right to continue my membership in respect of death benefits only, as provided in said Regulations.

This application shall take effect on the seventeenth day of June, A. D. 1910, if, on that date, I shall be on duty in the service of the said Company, otherwise, upon the date of my going on duty in such service, and am not at the time suffering from injury or disease.

10 IN WITNESS WHEREOF, I have signed these presents at Philadelphia, in the County of Philadelphia, State of Pennsylvania, this seventeenth day of June, A. D. 1910.

The following made before execution:—

Amos B. Calloway

Witness: G. S. Hodson.

The foregoing application is approved at the office of the Superintendent of the Philadelphia and Reading Relief Association, at Philadelphia, Pa.

W. Hoffman,

20

Superintendent of the Philadelphia and Reading Relief Association.

133221

B/7/27/10

.Statements Made to the Medical Examiner by Applicant for Membership, in Connection With Annexed Application.

-
- 30 1. What is your full name? Amos B. Calloway
 2. When and where were you born? 11th day of October 1877 Age in years 33 Place Harrington, Del.
 3. Have you ever been a member, or examined for membership, in the Philadelphia and Reading Relief Association? No

4. How long have you been in service of the Company continuously? new employe
5. Are you married? yes
6. What is the name and age of your wife (husband)? Ella Age 32
7. a. What are the names and ages of your children now living? (If married, give married names) Randolph 10, Edna 4
- b. What were the names and ages of your children now deceased? —

10

8. What are the names and ages of your parents now living? (If either parent is not living, give age at and cause of death.)
Father Benj F. 61 Mother Deborah 59
9. What are the names and ages of your brothers and sisters now living? (To be answered only when applicant has no wife or children living.)
Brothers —
Sisters —

20

10. Have you had sunstroke? No
11. Have you had fits? No
12. Have you been vaccinated? Yes
13. Have you had small-pox? No
14. Have you had a stricture or any urinary trouble? No
 - (a. Have you hernia, or have you ever been ruptured? No
15. (b. If so, do you wear a suitable truss? V
- (c. Do you agree to wear one while a member of this Association? V
16. Have you haemorrhoids or varicose veins? No
17. Have you had rheumatism? No
18. Have you any disease or physical infirmity? No

30

I CERTIFY, That the above statements were made by me to the Medical Examiner in answer to the above questions asked by him, and that said statements are true to the best of my knowledge and belief.

10

Applicant. AMOS B. CALLOWAY.

W. S. McDOWELL, M. D.

Medical Examiner.

20. Name of applicant 20. Amos B. Calloway
21. Sex 22. Intelligence 21. Male 22. Normal.
23. General development. 24. Height 25. Weight
23. Normal 24. 5 ft. 11½ in. 25. 140 lbs.
20 26. Chest measure. 27. Abdominal measure, erect
26. 36 in. (full inspiration) 32 in. (full expira-
tion) 27. 30 inches.
28. Color of hair 29. Complexion 30. Eyes 28.
Brown 29. Ruddy 30. Gray
31. Special senses 31. Normal.
32. Head and face 33. Abdomen and groins Nor-
mal 32. 33. Normal
34. Spine and Joints 35. General surface 34. Nor-
mal 35. Normal
(a. Number and character of pulse beats.
30 (36a. 76 Normal
36. Heart: (b. Where apex beats 36b. Normal
(c. Auscultation 36c. Normal.
(d. Blood-vessels 36d. Normal.
(a. Number and character of respira-
(tions. 37a. 187 Normal

37. Lungs: (b. Percussion 37b. Normal
(c. Auscultation. 37c. Normal.
38. Kidneys and Bladder 38. Normal
39. Cachexiae, Diathesis, Temperate, &c. 39. None
Temperate
40. Opinion of applicant's statement after physical
examination 40. Correct
41. Opinion as to applicant's change of longevity
41. Good
42. Remarks: 42. ——— 10
43. Recommendation (favorable or unfavorable)
after examination of sight and hearing, when
required. 43. Favorable
44. If applicant is rejected, for what cause. 44. ———

I CERTIFY, That I have carefully examined the
applicant named herein, and that the above is a cor-
rect description of his physical condition, and I do
hereby recommend the ———approval of his applica-
tion.

Place and date of examination—Medical Examin- 20
er's Office, Phila, Pa., 6/17/1910.

W. S. McDOWELL, M. D.
Medical Examiner, District No. 1.

The above certificate examined and approved as
of the date last above written.

CASPER MORRIS, M. D.
Chief Medical Examiner.

(Endorsed on back)

Philadelphia and Reading 30
Relief Association.
Application for Membership.
Number 133221
(Philadelphia & Reading)
Office of Superintendent
Jun. 25 1910
Relief Association)

EXHIBIT R2.

Philadelphia and Reading Relief Association,
No. 8928. Philadelphia, Feb. 27, 1912.

DREXEL & CO. BANKERS.

Pay to the order of Ella Calloway, widow &
beneficiary,

Six hundred dollars.

\$600.00

J. H. LANSLEY,
Treasurer.

10

Endorsed:

Ella Calloway,
widow beneficiary.

EXHIBIT R3.

Form 32—R. A.—1

PHILADELPHIA AND READING RELIEF ASSOCIATION.

To Ella Calloway, widow and beneficiary, Dr.

Voucher No. 6779

20 Check No. 8928

Date Paid Feb. 27, 1912.

C. V. No. 148

Harrington, Delaware.
Address, 3152 Tulip St., Phila., Pa.

Feb. 26th, For amount of Death Ben-
1912 fit, Five Hundred Dol-
lars,

\$500.00

For amount of Additional
Death Benefit,—Dollars,

30

Countersigned:
Theodore Voorhees,
Chairman, Advisory Committee.

For amount payable from Surplus Fund, One hun- dred Dollars,	100.00	
		600.00
Less Funeral and other ex- penses paid to		

Payable to Ella Calloway, widow and beneficiary of Amos B. Cal- loway, deceased, recently em- ployed as Brakeman in the ser- vice of Philadelphia & Reading Railway Company, who died at Trenton, N. J., on the 13th day of November, 1911, from injuries ac- cidentally received, being at the time a member of the Philadel- phia and Reading Relief Associ- ation in the second class under application No. 133221 with no additional Death Benefit of the First Class.		10
		20

For amount of Disablement Bene- fit, 191 to 191 inclusive, days,	
Total	\$600.00

In red ink:

(Paid and)	
(Feb. 27, 1912)	
(Charged)	30

I CERTIFY, That the above is a true and correct
account as per papers on file in the office of the Sup-
rintendent of the said Relief Association, in the

City of Philadelphia, Pennsylvania, and as such is hereby approved and authorized for payment.

(Death Certificates, \$600.00

Charge (

(Disablement Certificates —

W. Hoffman,

Superintendent of the Relief,
Association.

10

RECEIVED February 26th, 1912, of the Treasurer of the Philadelphia and Reading Relief Association Six hundred Dollars, in full of the above account.

(The undersigned having under even date herewith executed as provided in the said application of said deceased and in the regulations of the said Relief Association.)

Ella Callaway

Witness:

20

Howard F. Jones,
F. Wm. Fink.

30

READ) The above receipt must be dated and signed THIS) by the person in whose favor the check is drawn, duly witnessed by some one knowing the signer to be the proper person, and the receipt must NOT be cut off from the body of the Voucher. A person unable to sign will make his mark. The signature must conform to the name as written in the check and this voucher. Send this voucher, together with the release, signed and witnessed, to Superintendent of Relief Association, 227 S. 4th St., Phila.

(Endorsed on back):

Philadelphia and Reading
Relief Association.

Death Benefit Voucher
 No. 6779
 Name Amos B. Calloway
 Location New York Div.
 Philadelphia & Reading
 Railway.
 \$600.00

EXHIBIT R4.

Form 31—R. A.—1

10

PHILADELPHIA AND READING RELIEF ASSOCIATION.

Release on Account of Death Benefit.

Whereas, *Amos B. Callaway* deceased, lately in the service of the *Philadelphia & Reading Railway* Company, was a member of the Philadelphia and Reading Relief Association, under Application No. 133221, and the Death Benefit payable from said Relief Association on account of such membership, amounting to *Five Hundred Dollars (\$500.00)*, with an additional sum payable from the Surplus Fund of said Association, of *One Hundred Dollars (\$100.00)*, together with unpaid Disablement Benefit amounting to _____, are upon the condition of the execution of this release, as provided in said application payable to *Ella Callaway, widow* _____

20

30

Now, Therefore, I the undersigned do hereby ac-

knowledge that the payment of the aforesaid amounts from the said Philadelphia and Reading Relief Association, which *I* have this day received, is in full satisfaction and discharge of all claims or demands on account of or arising from the death of said deceased, which *I* now have or can or may hereafter have, whether against the said Philadelphia and Reading Relief Association, the said *Philadelphia & Reading Railway Company*, or against any
 10 other corporation having amongst its employes members of the said Association.

Witness, *my* hand—and seal—, this 26 day of *February* A. D. 1912.

(This date and date of Receipt on Voucher must be the same.)

(Signed) *Ella Callaway* (Seal)

In the Presence of:

(Signed) *Howard F. Jones*

(") *F. Wm. Fink*

20 Approved:

(Signed) *W. Hoffman,*

Superintendent of the Relief Association.

(Over)

County of Philadelphia } ss.
State of Pennsylvania }

On the 26th day of *February* A. D. 1912 before me the subscriber, *A notary Public for the Commonwealth of Pennsylvania residing in the City of Philadelphia* personally appeared the within named *Ella*
 30 *Callaway* _____

personally known to me to be the same person who signed the foregoing release, and acknowledged and

declared that *she* signed, sealed and delivered the same as *her* free and voluntary act and deed, for the purposes therein mentioned, the full contents of the said release having been first made known unto *her* by me.

Witness my hand and official seal the day and year aforesaid.

(Impression seal)
(Signed) *F. Wm. Fink*
My Commission expires, 10
Notary Public
My Commission Expires 191
January 16, 1915

(Endorsed):

Philadelphia & Reading
Relief Association.

Release on Account of Death Benefit

Certificate Number.

20

133221

Name, *Amos B. Callaway*
Company, *Philadelphia & Reading Railway*

(All words in Italics are hand written or stamped.
All Roman type is printed form.)

REGULATIONS GOVERNING THE PHILADELPHIA AND READING RELIEF ASSOCIATION.

General.

- 10 1. The "Philadelphia and Reading Relief Association" is an association composed of employes of The Philadelphia and Reading Railroad Company, or its successors, and of its or their affiliated, controlled and leased lines, which companies and the companies operating said lines are hereinafter designated as the "Associated Companies," in the executive charge of a superintendent, whose directions in carrying out its regulations are to be complied with subject to the control of an "advisory committee."

20 The superintendent of the association shall be appointed by the first vice-president of The Philadelphia and Reading Railroad Company, or its successors, or by such other officer as may from time to time be designated by said railroad company, or its successors.

- 30 2. The object of this association is the establishment and management of a fund to be known as the "relief fund," for the payment of definite amounts to members of the association, when, under the regulations thereof, they shall be entitled thereto, by reason of disablement from accident, sickness or other cause, and, in the event of their death, to their relatives, or other beneficiaries specified in their applications for membership or thereafter designated in accordance with the said regulations.

3. The relief fund, from which the proposed bene-

fits are to be paid, will be formed by contributions from employes of the several associated companies, who shall have become members of the association; appropriations, when necessary, to make up deficits for benefits to their own employes respectively, by the respective companies whose employes may be members of the association; income or profit derived from investments of the moneys of the relief fund; and such other contributions, gifts or legacies as may be made to the association for the use of said fund.

10

4. The Philadelphia and Reading Railroad Company, or its successors, and the other companies whose employes shall become members of this association, will assume, proportionately, all the expense of clerk hire, office room, and all charges for stationery, etc., required in the conduct or management of the organization, except as is provided in Regulation No. 8, and will facilitate in every way, without any charge therefor, the investment and handling of the relief fund, from time to time, for the benefit of the association, as well as contribute to the said fund to the extent of ten per cent. of the amount, from time to time, contributed by the employes, members of the association, until the total sum contributed by said companies, and the said employes, members, shall amount to one million dollars.

20

In the event of a deficit in the relief fund prior to the total contribution of said ten per cent., The Philadelphia and Reading Railroad Company, or its successors, will guarantee the covering of said deficit to the full amount of the said proposed contribution; and when the total sum contributed by said companies, and the said employes, members of the association, shall have amounted to one million dollars,

30

said railroad company, and its successors, will make further contributions to said relief fund to the amount of five per cent. of all sums thereafter contributed by employes, members of the association.

The several companies whose employes may become members of the association will make up any deficit in the relief fund for benefits to their own employes respectively who are members of the association.

10

Membership.

13. The members of the association shall be those who, being or having been employes of one or more of the associated companies, and having been admitted to membership in the association, shall, under the regulations thereof, be contributors to the relief fund or have the right of participating in its benefits.

Applications.

20 20. Membership in the association and participation in the benefits of the relief fund thereof must be based upon an application by the proposed member, in the form prescribed in Regulation No. 21, approved by the superintendent of the relief association, and upon a certificate of membership issued by him to the applicant.

Benefits.

30 36. Members will be entitled, upon the conditions prescribed in the regulations, and commencing with membership, to the following benefits:

First.—Payments while disabled by accident in the service of any one of the associated companies for each day during a period of not longer than fifty-two (52) weeks, at the rate of fifty (50) cents per day for a member of the first class, and of greater amounts for members of the other classes, in proportion to their contributions. After the expiration of the period of 52 weeks, for disability due to accident while in the service of any one of the associated companies, one-half of the rate to which any member shall have been entitled during such period, so long as such disability shall continue, or until he shall be offered some employment in the service suitable to his capacity at the time. 10

Second.—Payments while disabled by sickness or by injury other than accident in such service, for each day after the first seven (7) days of such disability, and for a period not longer than fifty-two (52) weeks, at the rate of forty (40) cents per day for a member of the first class and of greater amounts for the other classes, in proportion to their contributions; provided, that if such disablement from sickness shall continue for a period of at least four (4) weeks, the benefits shall date from and include the first day of disablement, and further provided, that if a member shall have returned to duty after disability from sickness and shall again be disabled by sickness within less than (2) weeks from his return to duty, such disablement shall be counted with the prior one in computing the fifty-two (52) weeks for which payments may be made, and the deduction of seven (7) days shall not be made therefrom. Any member, who prior to such disablement by sickness or injury other than accident in such service, shall have contributed in one or more of the 20 30

foregoing classes for a total period of fifteen consecutive years, shall, after the expiration of the said period of fifty-two weeks, receive one-half of the rate of the sick benefit to which he shall have been entitled during such period, so long as such disability shall continue, or until he shall be offered some employment in the service suitable to his capacity at the time.

- 10 A member, who, after receiving for fifty-two (52) weeks, or longer, the payments herein provided for shall, by contributing for the death benefit, retain the title to payments in the event of death occurring while continuing disabled and unable to engage in any occupation. His contributions in such case shall be for each death benefit of the first class to which his class entitles him, at the rate for additional death benefit applicable to the age at which he entered the class in which he last contributed, and for his additional death benefit at the rate he last contributed for the same. If such member shall be able to return to
- 20 duty, and shall so return, he shall resume full contribution, and shall be entitled to payments for disability from accident occurring thereafter in such service, and to payments for disability from sickness occurring after he shall have been continuously engaged in the performance of duty with full contribution for a period of three months.

- 30 Third.—A payment, upon the conditions prescribed in the regulations, on the death of a member from accident or other cause, occurring during time for which he shall have contributed, or while receiving disablement benefits, or during a month in which he shall have recovered from disability, or two hundred and fifty (250) dollars for a member of the first class, and of greater amounts for the other classes, in proportion to their contributions.

Fourth.—On the death of a member from accident or other cause, occurring during time for which he shall have contributed, or while receiving disablement benefits, or during a month in which he shall have recovered from disability, an additional payment from the surplus fund, upon the conditions prescribed in the regulations as to other payments, of one hundred (100) dollars.

37. The following table exhibits the amounts of the contributions and benefits of the several classes: 10

	1st Class	2d Class	3d Class	4th Class	5th Class
Highest monthly pay.....	\$35.00	\$55.00	\$75.00	\$95.00	Over \$95.00
Contribution per month:					
Class:	75	1.50	2.25	3.00	3.75
Additional death benefit, equal to death benefit of					
Class:—					
Not over 45 years of age.....	30	60	90	1.20	1.50
Over 45 years and not over 60 years of age.....	45	90	1.35	1.80	2.25
Over 60 years of age.....	60	1.20	1.80	2.40	3.00
Disablement benefits per day, in- cluding Sundays and holi- days:—					
Accident:—					
For fifty-two weeks.....	50	1.00	1.50	2.00	2.50
After fifty-two weeks.....	25	50	75	1.00	1.25

Sickness:—

After first seven days and not longer than fifty-two weeks...	40	80	1.20	1.60	2.00
After fifty-two weeks.....	20	40	60	80	1.00
Death benefits:					
For class.....	250.00	500.00	750.00	1000.00	1250.00
Additional payment from the surplus fund.....	100.00	100.00	100.00	100.00	100.00
Additional death benefits that may be taken.....	250.00	500.00	750.00	1000.00	1250.00

39. Payments of benefits on account of disablement by accident shall only be made upon the disablement being shown to have resulted solely from accidents occurring to members in the performance of duty in the service, to which duty they were assigned or which they were directed to perform by proper authority, or in voluntarily protecting the property or interests of any of the associated companies, or from accidents occurring to members at points upon the property of any of said companies which they are under the necessity of passing when going to or from work, and when so passing, and which result from causes of a nature peculiar to such points, and which do not result from their voluntarily or unnecessarily exposing themselves to danger. There must be a clear and well-established history of the cause and circumstances of injury accidentally inflicted and sufficient to produce the alleged injury, with exterior or other positive evidence of such injury, and satisfactory evidence that it renders the person unable to perform his duty in the service. When such injury of a member of the association shall have assumed a permanent character, and he is by reason thereof unable to resume his former occupation, benefits thereafter shall be paid him at half the rate which he had theretofore received on account of such injury until such time as he shall be offered some employment in the service suitable to his capacity at the time.

20 30 Disablement from accident occurring otherwise than aforesaid shall be classed as sickness.

Questions as to the permanent character of disability and the continued payment of benefits on account of the same, shall be determined by the advisory committee.

Miscellaneous.

51. Death benefits will be paid by vouchers which will be cashed by the treasurer of the association.

52. Should a member or his legal representative, or any other person authorized by law, bring suit against The Philadelphia and Reading Railroad Company, or against any other corporation which may at the time have its employes among the contributors to the association, for damages on account of injury or death of such member, payment of benefits from the relief fund on account of the same shall not be made until such suit is discontinued. If prosecuted to judgment or compromised, any payment of judgment or amount in compromise shall preclude any claim upon the association for such injury or death. 10

REASONS FOR REVERSAL.

NEW JERSEY SUPREME COURT.

WEST JERSEY TRUST COM-
PANY, Administrator of
Amos B. Calloway, de-
ceased,
Prosecutor,
vs.
10 PHILADELPHIA & READING
RAILWAY COMPANY,
Respondent.

REASONS FOR RE-
VERSAL.

The said prosecutor, by Ott & Carr, its attorneys,
comes and prays that the order and determination
made on the day of March, nineteen
hundred and fifteen, in the Mercer County Court of
Common Pleas, by Frederick W. Gnichtel, Judge of
said court, upon a petition filed by the prosecutor
against the respondent which dismissed the petition
filed by this prosecutor may be set aside, reversed
and for nothing holden for the following reasons:

1. Amos B. Calloway while engaged in the respondent's employ in the State of New Jersey, was injured, as a result of which he died at the City of Trenton in this State.

2. Amos B. Calloway received an average of \$18.13 per week for the last preceding six months prior to his injury and death.

3. Amos B. Calloway at the time of his death was married to Rose Ella Calloway and had two children living, one Randolph T. Calloway, who was twelve years of age on the twenty-fourth day of September, nineteen hundred and twelve, and one Edna D. Calloway, who was seven years of age on the tenth day of January, nineteen hundred and thirteen, the said Rose Ella Calloway, Randolph T. Calloway, and Edna D. Calloway being still living and all of them dependent upon Amos B. Calloway for support at the time of his injury and death. 10

4. The said injury was not caused by or through the wilful negligence of Amos B. Calloway.

5. The said injury was not caused by or through the reckless indifference, wilful negligence, and deliberate act or failure to act of the said Amos B. Calloway in his lifetime.

6. The application of Amos B. Calloway (Exhibit R1) for membership in the Philadelphia and Reading Relief Association was improperly admitted in evidence. 20

7. The check dated February twenty-seventh, nineteen hundred and twelve (Exhibit R 2) of the Philadelphia and Reading Relief Association to the order of Ella Calloway was improperly admitted in evidence.

8. The voucher dated February twenty-sixth, nineteen hundred and twelve (Exhibit R3) given by Ella Calloway to the Philadelphia and Reading Relief Association was improperly admitted in evidence. 30

9. The release of Ella Calloway dated February twenty-sixth, nineteen hundred and twelve (Exhibit R4) was improperly admitted in evidence.

10. The acceptance of benefits by Ella Calloway from the Philadelphia and Reading Relief Association is no bar to recovery by this prosecutor for Rose Ella Calloway, widow, and for Randolph T. Calloway and Edna D. Calloway, children.

10 11. The execution of the release dated February twenty-sixth, nineteen hundred and twelve, by Ella Calloway to the Philadelphia and Reading Relief Association is no bar to recovery by this prosecutor for Rose Ella Calloway, widow, and Randolph T. Calloway and Edna D. Calloway, children.

12. The application for membership in the Philadelphia and Reading Relief Association is no bar to recovery by this prosecutor for Rose Ella Calloway, widow, and Randolph T. Calloway and Edna D. Calloway, children.

20 13. There was no contract made out of the State of New Jersey for the employment of Amos B. Calloway by the respondent.

14. The right of the prosecutor to recover is not barred by any contract of employment between Amos B. Calloway and respondent made out of the State of New Jersey.

30 15. The order and determination of the Mercer County Court of Common Pleas or the Judge thereof is contrary to law.

OTT & CARR,
Attorneys for Prosecutor.

NEW JERSEY SUPREME COURT.

WEST JERSEY TRUST COM- PANY, Administrator of Amos B. Calloway, de- ceased, <i>Relator,</i>	}	On Certiorari. Rule of Reversal and Remittur.
vs. PHILADELPHIA & READING RAILWAY COMPANY, <i>Respondent.</i>		

10

The Court having inspected the transcript and proceedings of the Judge of the Court of Common Pleas of the County of Mercer, returned with the certiorari in this cause, the reasons for reversing the judgment below, and heard the argument of counsel therein, and having duly considered the same, do order that the judgment of the said Court of Common Pleas of the County of Mercer aforesaid, be reversed, set aside, made void, and for nothing holden, and that the said prosecutor under certiorari be restored in all things wherein it hath lost by reason of the said judgment, and that the record in said cause be remitted to the said Court of Common Pleas of the County of Mercer, for a trial *de novo*, costs to abide the event of the suit. 20

Dated.

Entered Dec. 10, 1915.

On motion of OTT & CARR,
Attorneys for Prosecutor. 30

Let this rule be entered.

C. W. PARKER,
J. S. C. for the Court.

NEW JERSEY SUPREME COURT.

June Term, 1915.

10	WEST JERSEY TRUST COM- PANY, Admr. &c. of Amos B. Calloway, de- ceased, <i>Prosecutor,</i>	}	On Certiorari. Opinion.
	vs.		
	PHILADELPHIA & READING RAILWAY COMPANY, <i>Defendant.</i>	}	

Submitted July 1, 1915, decided November 3, 1915.
 On Certiorari to finding of Court of Common Pleas
 in Workmen's Compensation case.

Before Justices PARKER, MINTURN and KALISCH.

For the prosecutor, S. CONRAD OTT.

For the defendant, EDWARD L. KATZENBACH.

20 The opinion of the Court was delivered by PARKER,
J.

Deceased was killed while in the employment of
 defendant, by an accident arising out of and in the
 course of his employment. The trial court found
 for the defendant on points of law. There is no
 substantial dispute as to the facts. Deceased was
 a brakeman, and was first employed by defendant in
 Philadelphia as an "extra" June 21, 1910, and as a
 30 "regular" May 26, 1911. Our compensation act

went into force July 4, 1911. Deceased was killed on November 13, 1911, while at work in New Jersey on a train engaged in interstate commerce. He left a widow and two young children.

We think that all the grounds urged against a recovery of compensation have been decided adversely to respondent, except perhaps the last.

1. That as deceased was engaged in interstate commerce, the federal act is exclusive. It is decided otherwise in *Rounsaville v. Central R. R. Co.*, 94 10
Atl. 392.

2. That deceased was wilfully negligent. But wilful negligence is not a defence under Section 11, of the Act. See *Taylor v. Seabrook*, 94 *Atl.* 399.

3. That the act is inapplicable on account of the rule of *lex loci contractus*. *Aliter* is *American Radiator Co. v. Roggee's Administrator*, 86 *N. J. L.* 436, *affirmed*, 93 *Atl.* 1083.

4. That the claim is barred by a release by decedent in his lifetime contained in his application 20
for admission into the railroad relief association, and a further release by his widow on receipt of the death benefit from said association.

The first seems to refer to damages only. The compensation act, as has more than once been pointed out, created a right of recovery contractual in its nature, and irrespective of negligence or other common law liability on the part of the employer. *American Radiator Co. v. Roggee, supra.*, *Jacowitz v. D. L. & W. R. R. Co.*, 92 *Atl.* 946. 30

But apart from this, the statute of 1911, which was on the statute book at the time of the second employment, (See *Sexton v. Newark District Telegraph Co.*, 84 *N. J. L.* 85, 96, *et seq.*, *affirmed* 86 *N. J. L.* 701), created an irrebuttable presumption in the absence of an express contract or notice as therein provided, of the assent of the parties to

anew contract or quasi contract, whereby in case of injury or death there should be compensation according to the statutory scheme. *American Radiator Co. v. Roggee, supra.* This must be taken to have superseded pre-existing arrangements between the parties, and among them the release in advance of all claim for "damages" in view of the membership in the relief association. The subsequent release of the widow, which by its recitals is expressly founded upon the agreement contained in the membership application, and which includes the relief association as a party released, must be held as a matter of construction to be limited in its application to the rights and liabilities of the parties as they would have existed if the compensation act had not been passed. This construction is fortified by considering that the act of 1911, by paragraph 12 (P. L. p. 139) provides for awards based on the existence of children as well as the widow, and for distribution to them in case of intestacy, according to the intestate law of this State. The release is made by the widow quo widow, and of course cannot bind the personal representative of the deceased, who sued in right of the statute.

These views result in a reversal of the judgment. The judge who tried the case having gone out of office, the matter must be re-tried, unless the parties agree to submit it on the evidence already taken. *Lang v. Common Pleas*, 86 Atl. 529. The costs will abide the event of the suit.

On Certiorari.
Opinion.
Filed, November 3, 1915.

WM. C. GEBHARDT,
Clerk.



