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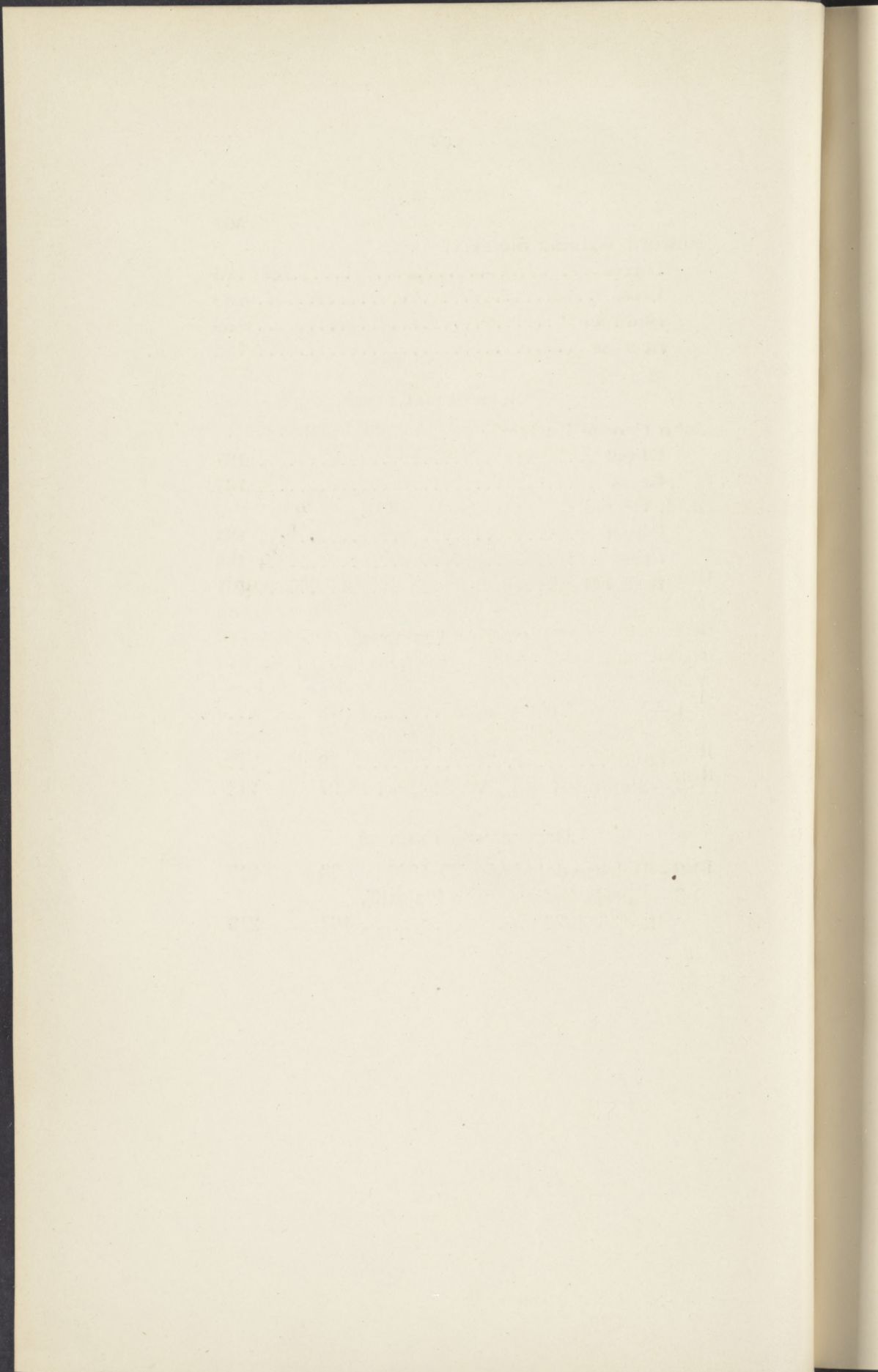
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Summons.

(Filed October 7, 1926.)

THE STATE OF NEW JERSEY TO PENNSYLVANIA RAIL- 10
ROAD COMPANY (Body Corporate):

You are summoned to answer the
annexed complaint of HOWARD W.
STEINERT in an action-at-law in the
(L. S.) Hudson County Circuit Court: And
take notice that unless you file your
answer to said complaint with the
Clerk of the Circuit Court, at Jersey City, within
20 days after service upon you of this writ and 20
the annexed complaint, the plaintiff may proceed
in the suit and judgment may be entered against
you.

WITNESS, Honorable Henry E. Ackerson, Jr.,
judge of our said Circuit Court, at Jersey City,
this 22nd day of September, 1926.

JOHN J. MCGOVERN,
Clerk.

JOHN WINANS, 30
Attorney.

Complaint.

(Filed October 7, 1926.)

HUDSON COUNTY CIRCUIT COURT.

10

HOWARD W. STEINERT,
Plaintiff,

v.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

} Action at Law.

Plaintiff, who resides at Washington, D. C., says that:

20

1. At all times herein mentioned defendant was and is a foreign corporation organized and existing under the laws of Pennsylvania.

30

2. At all said times, defendant was engaged in business within the State of New Jersey as a foreign railroad corporation; and prior to the occurrence of the accident and injuries herein complained of, it had filed in the office of the Secretary of State, at Trenton, one or more such reports, certificates, statements and other writings as were necessary to entitle and qualify it to operate a railroad within this State, agreeably to the act of the Legislature and the laws and practice of this state relating to foreign railroad corporations; whereby it designated and appointed an agent within this state upon whom process against it might be served.

40

3. At all said times defendant maintained and had and now has a place of business and registered address within this state, located at Exchange Place, Jersey City, in the County of Hudson.

Complaint.

4. At all said times defendants maintained, controlled and operated a line or lines of steam surface railroad, which extended in, through and across portions of the State of New Jersey, certain other states and the District of Columbia, together with the tracks, rails, switches, signalling devices and other railroad property and equipment used in connection therewith. 10

5. At all said times defendant maintained, controlled and operated a certain railroad freight yard or place adapted for use and used for the classification, drilling and otherwise operating with and in relation to freight cars and for the making up and breaking up of trains, known as Jersey Yard, situate at or near the City of Washington, in the District of Columbia. 20

6. At and immediately prior to the time of the accident and injuries hereafter complained of, defendant had in its possession and under its control and used and hauled upon its said railroad and in its said Jersey Yard and over and upon the tracks, rails and switches thereof certain freight cars and other cars, one or more locomotive engines and certain trains, strings or drafts of cars, including the particular train, string or draft of cars and engine hereinafter more particularly mentioned. 30

7. At all said times, and particularly at the time of the occurrence of said accident and injuries, defendant was engaged in business as a common carrier by railroad within the District of Columbia, and as a common carrier in interstate commerce by railroad between the District of Columbia and certain other states and foreign places. 40

Complaint.

8. At all said times defendant used and employed its said railroad, railroad freight yard and the tracks, rails, switches and railroad property and equipment therein and used in connection therewith, and said locomotive engines, cars and trains, strings or drafts of cars in its said business as a common carrier in interstate commerce by railroad.

9. On and prior to April 17, 1926, plaintiff was in the employ of defendant as a brakeman, member of a train or switching crew and railroad employe; and, as such, within the scope of such employment and in the performance of the duties thereof, was working for defendant in its said business as a common carrier in interstate commerce by railroad at said Jersey Yard.

10. At the time and place last aforesaid, defendant's said railroad and railroad yard and the tracks thereof and therein upon and in relation to which plaintiff was then working as such railroad employe, were and had theretofore been used in the interstate commerce business of the defendant.

11. At the time and place last aforesaid, defendant had in its possession and used and hauled over and upon its said railroad, in its said Jersey Yard and upon and across the tracks, rails and switches thereof, one or more freight cars or other cars which were not provided with proper power brakes capable of being operated effectively by the engineer in charge of an engine attached to the train, string or draft comprising said car or cars, not provided with efficient hand brakes and not capable of being coupled by impact or of being uncoupled without the necessity of a man going between the ends of cars.

Complaint.

12. At the time and place last aforesaid plaintiff, in the course of his said employment and in performance of the duties thereof, was engaged in drilling, switching, classifying and otherwise working in and upon certain of the railroad freight cars then and there being used and hauled by defendant, and in coupling, uncoupling, adjusting the coupler knuckles and otherwise working in and upon one or more of said cars; and in so doing, and for the purposes of and in the performance of his said duties, he was then and there obliged to and did go between the ends of 2 of said cars or between the ends of 1 of said cars and of the engine or the tank thereof then and there being used with, in relation to or in close proximity to said car or cars.

10

20

13. At the time and place last aforesaid, wholly by reason of the negligence and the wilful, wanton and wrongful acts of defendant, by and through one or more of its officers, agents, vice-principals, servants and employes, and by reason of the defects and insufficiencies, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works and equipment, and without any negligence or fault on the part of plaintiff, said engine or the tank thereof and one or more of said cars, all then being in the possession and control and being operated and used by defendant, were caused, wholly without signal or warning and with great force and violence, to run upon and against and collide with each other and to strike, collide with and run upon and against plaintiff, inflicting upon him serious, painful and permanent injuries, which are hereinafter more particularly specified.

30

14. The injuries sustained by plaintiff at the

40

Complaint.

time and place last aforesaid, comprised and comprise the crushing of his right hand and arm, the fracture of certain bones, joints and other bony portions of his right hand and arm, laceration of the muscular, fleshy and other tissues in and about
10 the site of said fracture, necessitating the amputation of his said hand and portions of said arm; bruises, contusions and lacerations upon his body and limbs, severe traumatic shock and derangement of his nerves and nervous system; which injuries are and will be permanent.

15. By reason of said accident and injuries, plaintiff was, at the time and place last aforesaid, and has ever since continued to be, sick, sore,
20 lame, maimed, disfigured and physically impaired, he has been obliged to lay up in bed and indoors, to refrain from work and lose the earnings and profits thereof; to endure severe pain and suffering, both physical and mental; to submit to one or more dangerous and painful surgical operations and other treatments; to expend moneys and incur debts for surgical, medical, hospital and nursing care and attendance and for medicines and supplies; and he will always hereafter be
30 crippled, maimed, lame, sick, disfigured and physically disabled; he will be unable to engage in his usual work and occupation, his earning capacity will be seriously impaired or destroyed and he will lose all or a large part of the usual earnings of his work and employment; he will be subjected to severe pain, both physical and mental and will be put to heavy expense for treatments and attempted cures of his said ailments and for the amelioration thereof; by all of which means he has sustained
40 damage in the sum of \$50,000.

16. At and prior to the occurrence of said ac-

Complaint.

cident and injuries, defendant, by and through one
 or more of its officers, agents, vice-principals, ser-
 vants and employees, was guilty of negligence, in
 that it failed to provide a safe place for its em-
 ployees, including plaintiff, to work in, and failed
 to provide safe or reasonably safe ways, works, 10
 plant machinery, means and devices in common use
 and well-known to it, for the performance of said
 work; but, on the contrary, caused and required
 plaintiff to go into, remain in and perform the
 work of his said employment in an unsafe and
 dangerous place, and with, in relation to and in
 dangerous proximity to unsafe and dangerous
 ways, works, plant, machinery, means and devices;
 in that it failed to make, observe and enforce 20
 rules and regulations for the safety of its said
 railroad, railroad yard, the tracks, rails and
 switches thereof, the engines, tanks, cars and other
 railroad property and equipment used therein and
 in connection therewith, for the safe performance
 of the work therein or thereupon upon which
 plaintiff was then engaged and for the safety of
 its employees then and there working, including
 plaintiff; in that it failed to provide proper super-
 intendance or any superintendance or person ca- 30
 pable of and actually engaged in giving proper in-
 struction for the performance of said work and for
 the safety of the men employed thereon, including
 plaintiff, but caused such work to be performed
 by an insufficient number of men and without any
 actual or competent superintendent thereof; in
 that it failed to inform plaintiff of the dangers
 aforesaid, then and there attending, and caused
 and required him to engage in said work and to
 go into and work in said unsafe and dangerous 40
 place and with said unsafe and dangerous mech-

Complaint.

10 anisms, means and devices, without being warned
of such dangers; in that it failed for a long time
theretofore to inspect and repair said cars, loco-
motive engines, tanks and other railroad property
and equipment, and each of them; in that it had
20 in its possession, and used and hauled over a rail-
road and railroad tracks used in interstate com-
merce, such engines, tanks and cars not properly
provided or equipped, as required by the Federal
Safety Appliance Act, in the respects aforesaid,
in that no signal or warning was given of the re-
moval or intended removal of said engine, tank
and cars of the impending collision thereof; in that
said engine, tank and one or more of said cars
were caused suddenly, without warning and in an
20 unusual, violent and sudden manner, to jolt, jerk,
crash together and violently to collide with each
other at a time when plaintiff was exposed to dan-
ger as aforesaid; and in that its said railroad prop-
erty and equipment were so recklessly and care-
lessly managed and operated as to cause the said
collision, accident and injuries.

17. Less than 24 calendar months have elapsed
since the occurrence of said accident, the infliction
30 of said injuries and the accrual of the cause of ac-
tion herein set forth.

Plaintiff demands, as damages, \$50,000.

JOHN WINANS,
Attorney of Plaintiff,
102 North Avenue,
Plainfield, N. J.
50 Church Street,
New York.

40 I hereby Deputize Edward Walsh to serve the

Rule Denying Motion.

within Writ. Witness my hand and seal this 25th day of September, 1926.

JOHN M. HANNAN, Sheriff,
By JOHN M. HANNAN, Sheriff.

Served within Summons and Complaint Sept. 28/26 on the Defendant Pennsylvania Railroad Company (A Corporation) by delivering a True copy thereof to C. W. Glenn, Agent of the said Defendant Company. 10

JOHN M. HANNAN, Sheriff,
By EDWARD WALSH, S. D. S.

Filed Clerk's Office,
October 7, 1926,
Hudson County, N. J. 20

JOHN J. MCGOVERN,
Clerk.

Rule Denying Motion.

(Filed January 21, 1927.)

HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT, <i>Plaintiff,</i> <i>v.</i> PENNSYLVANIA RAILROAD COMPANY, <i>Defendant.</i>	} Action at Law.
--	------------------

30

Defendant having moved, upon notice, for a rule striking out the complaint of the plaintiff on file in this action, and same coming on to be heard 40

Rule Denying Motion.

10 pursuant to such notice before this court at the Court House in Jersey City: Now, after hearing John A. Hartpence, esquire, of counsel with defendant, in support of said motion, and John Winans, esquire, of counsel with plaintiff, in opposition thereto, and due consideration having been had: Now, on motion of John Winans, attorney of the plaintiff, it is ORDERED that defendant's said motion be and the same hereby is in all respects denied, with costs of motion to the plaintiff; and it is further

ORDERED that defendant have 10 days from and after the making and entry of this rule, in which to file its answer to said complaint.

20

HENRY E. ACKERSON, JR.,
Circuit Court Judge.

Rule dated and actually entered this 21st day of January, 1927.

Filed Clerk's Office,
Jan. 21, 1927,
Hudson County, N. J.

30

JOHN J. MCGOVERN,
Clerk.

40

Answer.

(Filed January 29, 1927.)

HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT, <i>Plaintiff,</i> <i>v.</i> PENNSYLVANIA RAILROAD COMPANY, <i>Defendant.</i>	10 Action at Law.
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Defendant, The Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, having a place of business at 26 Exchange Place, Jersey City, New Jersey, says that: 20

FIRST DEFENSE.

1. Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, of the complaint are admitted.

2. Paragraphs 11, 12, 13, 14, 15, 16 and 17, of the complaint are denied.

SECOND DEFENSE.

The alleged injuries to plaintiff complained of resulted from a risk of his employment assumed by him, and the existence, nature and danger of which were patent and obvious and known to and appreciated or realized by him, or ought reasonably to have been. 30

THIRD DEFENSE.

Plaintiff's own negligence contributed proximately to alleged injuries to plaintiff complained of, who went upon the tracks of the railroad and 40

Answer.

10 between the cars referred to voluntarily and without being required or directed to do so and without notifying or apprising defendant, its agents and servants thereof, and in failing to keep a careful watch out for moving cars, and to exercise reasonable care for his own safety while engaged in and about his work.

FOURTH DEFENSE.

20 The alleged injuries to plaintiff complained of resulted from the sole fault and negligence of plaintiff, who went upon the tracks of the railroad and between the cars referred to voluntarily and without being required or directed to do so and without notifying or apprising defendant, its agents and servants thereof, and in failing to keep a careful watch out for moving cars and to exercise reasonable care for his own safety, while engaged in and about his work.

FIFTH DEFENSE.

30 The alleged injuries to plaintiff complained of resulted solely from a patent and obvious risk voluntarily assumed by him, the existence, nature and danger of which were known to and appreciated or realized by him, or ought reasonably to have been.

SIXTH DEFENSE.

40 Subsequent to the occurrence of the alleged injuries to plaintiff complained of and prior to the commencement of this suit, plaintiff for a valuable consideration paid to him by defendant, released and discharged defendant from any and all liability and obligation to plaintiff for, because or on account of said alleged injuries. A copy of the

Objection in Point of Law.

release thereupon executed by plaintiff and delivered to defendant is annexed hereto and made a part hereof, marked "Schedule A." Said release and discharge constitute a bar to plaintiff's alleged right of recovery against defendant in this action.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

10

Objection in Point of Law.

At, upon or after the trial of this action defendant will object in point of law that said Hudson County Circuit Court, in the State of New Jersey, is without jurisdiction to hear and determine said action, and that it should dismiss the same, on the grounds that the alleged cause of action arose outside the State of New Jersey, that both plaintiff and defendant are non-residents of the State of New Jersey, that defendant is a common carrier by railroad engaged in interstate commerce and amenable to service of process in the District of Columbia, in the United States of America, where plaintiff resides and where said alleged cause of action arose, and that to permit the prosecution of said action in said Court in said State imposes an unwarranted substantial burden upon and interference with interstate commerce and the performance of defendant's business, duties and obligations in such commerce, under the Constitution and laws of the United States.

20

30

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

40

Schedule "A."

10 KNOW ALL MEN BY THESE PRESENTS, that I,
Howard William Steinert, residing at or near the
City of Washington and District of Columbia, in
consideration of the sum of One Thousand Eight
Hundred Dollars (\$1,800.00) lawful money to me
20 paid by The Pennsylvania Railroad Company at
the time of the sealing and delivery hereof, the
receipt whereof is hereby acknowledged, have re-
leased, and by these presents do release unto the
said The Pennsylvania Railroad Company all
claims and demands which I, have or can or may
have against the said The Pennsylvania Railroad
Company for or by reason of personal injuries sus-
tained by me, and loss of and damage to wearing
30 apparel and other personal property, due to being
caught between couplers, while performing the
duties of a yard brakeman, for the said The Penn-
sylvania Railroad Company, at or near the City of
Washington and District of Columbia on or about
the seventeenth day of April, 1926; including here-
in any and all loss or damage whatsoever sustained
by me, in consequence or by reason thereof, and
also all claims for compensation.

30 And the said The Pennsylvania Railroad Com-
pany in paying the said sum of money does so in
compromise of said claim and demand above re-
leased, not admitting any liability on account of
the same.

Reply.

Witness my hand and seal the 29th day of May
one thousand nine hundred and twenty-six.

HOWARD WILLIAM STEINERT L. S.

Sealed and delivered in the
presence of us:

10

J. C. KORTER
R. J. GOSNELL

Filed Clerk's Office,
Jan. 29, 1927,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

20

Reply.

(Filed March 1, 1927.)

HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT,
Plaintiff,

v.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Action at Law.

30

Plaintiff, for his reply, says that he

FIRST SEPARATE AVOIDANCE OF SECOND, THIRD,
FOURTH, FIFTH AND SIXTH SEPARATE DEFENSE:

1. Denies every allegation contained in the Sec-
ond, Third, Fourth, Fifth and Sixth separate de-
fenses and each of them, except that he admits
that he went upon the track between the cars in-
tended to be coupled together.

40

Reply.

FIRST SEPARATE AVOIDANCE OF SIXTH SEPARATE DEFENSE:

- 10 1. Alleges that the pretended release or agreement set forth in the Sixth Separate Defense of the answer, a copy of which is thereto annexed, was not and is not the act and deed of plaintiff and that the alleged execution and delivery thereof were induced wholly by accident and mutual mistake of facts.

SECOND SEPARATE AVOIDANCE OF SIXTH SEPARATE DEFENSE:

- 20 1. Alleges that the pretended release or agreement set forth in the Sixth Separate Defense of the answer, a copy of which is annexed hereto, was induced by misrepresentations and false statements of fact, made by defendant, by and through its servants, representatives and claim adjusters, they then and there being the agents of the defendant, in manner following:

- 30 2. Alleges that defendant, at and prior to the alleged execution and delivery of said pretended release or agreement, by and through its agents aforesaid, stated and represented to plaintiff that at the time of the occurrence of the accident and infliction of the injuries set forth in the complaint, plaintiff was not engaged or employed in or about any business of the defendant as a common carrier in interstate commerce by railroad, or in any acts in furtherance of such interstate commerce; and that plaintiff, at the time and place thereof, was engaged in the performance of work relating wholly to intrastate commerce.

- 40 3. Alleges that defendant, at and prior to the alleged execution and delivery of said pretended

Reply.

release or agreement, by and through its agents
 aforesaid, stated and represented to plaintiff that
 the time of the occurrence of the accident and in-
 infliction of the injuries set forth in the complaint,
 defendant was not, in relation to the occurrence
 of said accident and the infliction of said injuries, 10
 engaged in the performance of any act or acts in
 connection with its business of common carrier
 in interstate commerce by railroad or in further-
 ance thereof, but that, in relation to said accident
 and injuries, it was engaged in the pursuit and
 furtherance of commerce which was purely intra-
 state.

4. Alleges that defendant, at and prior to the
 alleged execution and delivery of said pretended 20
 release or agreement, by and through its agents
 aforesaid, stated and represented to plaintiff that
 at the time of the occurrence of the accident and
 infliction of the injuries set forth in the complaint,
 defendant did not have in its possession nor use
 nor haul upon its said railroad, any cars not
 equipped with power brakes, efficient power brakes
 or efficient hand brakes, or which would not or
 did not couple by impact, or uncouple, without the
 necessity of men going between the ends of the 30
 cars, and that the cars in relation to which plain-
 tiff sustained the injuries complained of, were in
 all respects properly equipped with all so-called
 "safety appliances" required by the act of Con-
 gress known as the Safety Appliance Law.

5. Alleges that at the times aforesaid defend-
 ant misstated and concealed from plaintiff the true
 purport and effect of said pretended release and
 agreement, and stated to him that it was a mere 40
 receipt for money.

Reply.

6. Alleges that such statements and representations, so as aforesaid made by defendant, were at all said times wholly false and that defendant at all said times knew them to be false.

10 7. Alleges that said statements and representations and each of them were made by defendant for the purpose and with the intent on its part of inducing plaintiff to believe the same, to convince him of the truth thereof and with the intent and for the purpose that he should rely thereon, in relation to the proposed execution and delivery of said pretended release or agreement.

20 8. Alleges that plaintiff at all said times relied upon said statements and representations of the defendant and believed them to be true; that plaintiff had the right so to rely, and that his subsequent alleged execution and delivery of said pretended release or agreement was made by reason of such reliance and belief, and not otherwise.

THIRD SEPARATE AVOIDANCE OF SIXTH SEPARATE DEFENSES

30 1. Alleges that said alleged release or agreement was made wholly without consideration and for an inadequate consideration.

2. Alleges that the pretended consideration for said alleged release or agreement failed in whole, and in part.

40 3. Denies that said alleged release or agreement and said alleged consideration therefor, or either of them, operated as a release or discharge of plaintiff's cause of action, as set forth in the complaint herein; and denies that plaintiff is barred or precluded thereby.

JOHN WINANS,
Attorney of Plaintiff.

Order to Amend Answer.

It is hereby consented that the within reply be filed as of time, but without prejudice to rejoin or take other action thereto.

February 24, 1927.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys of Defendant.

10

Filed Clerk's Office,
Mar. 1, 1927,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

Order to Amend Answer.

20

(Filed March 18, 1929.)

HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT,
Plaintiff,

v.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant.

Action at Law.

30

Application having been made to me upon the trial of the above-stated cause for leave to amend the Answer heretofore filed by defendant:

It is ORDERED that said Answer be and hereby is amended by adding to the copy of the Release annexed to said Answer and forming a part thereof, marked Schedule A, above the signature "Howard

40

Rule for Judgment.

William Steinert," the words, "I have read and fully understand this release."

Dated March 13th, 1929.

FRANK L. CLEARY,
Circuit Court Judge.

10

Entered March 19th, 1929.

On Motion of

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

Filed Clerk's Office,
March 18, 1929,
Hudson County, N. J.

20

JOHN J. MCGOVERN,
Clerk.

Rule for Judgment.

(Filed March 15, 1929.)

HUDSON COUNTY CIRCUIT COURT.

30

HOWARD W. STEINERT,
Plaintiff,

v.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Action at Law.
Rule for Judgment.

40

This cause having been regularly at issue and on the list for trial at the December, 1928, term of this court; and having been reached in its regular order for trial before Mr. Circuit Court Judge Frank L. Cleary on the 13th day of March, 1929;

Rule for Judgment.

and plaintiff thereupon attending by his counsel, John Winans, Esq., and defendant attending by its counsel, John Hartpence, Esq., and a jury having been empanelled, found satisfactory and sworn to try the issues between the parties; and the respective parties having presented their proofs and the jury having returned into court on the 14th day of March, 1929, and rendered a general verdict in favor of the plaintiff and against the defendant and assessed plaintiff's damages at the sum of Twenty-five thousand dollars (\$25,000); Now on motion of John Winans, attorney for plaintiff, it is ordered that the plaintiff, Howard W. Steinert, do recover of the defendant, Pennsylvania Railroad Company, his damages aforesaid in the sum of Twenty-five thousand dollars (\$25,000), together with his costs to be taxed; that judgment be entered accordingly and that plaintiff have execution therefor.

10

20

On Motion of
JOHN WINANS,
Attorney of Plaintiff.

Rule dated and actually entered in the minutes
this 15th day of March, 1929.

30

Filed Clerk's Office,
Mar. 15, 1929,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

40

Judgment.

(Entered March 15, 1929.)

HUDSON COUNTY CIRCUIT COURT.

10

HOWARD W. STEINERT,
Plaintiff,

v.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Judgment entered March
15, 1929.

Damages \$25,000.00

Costs 66.02

Total \$25,066.02

JOHN WINANS,
Attorney.

20

Judgment On Verdict in the above entitled cause was entered in this Court on the 15th day of March in the year of our Lord One Thousand Nine Hundred and Twenty-nine in favor of the Plaintiff Howard W. Steinert and against the Defendant Pennsylvania Railroad Company in a plea of Action at Law for the sum of Twenty-five Thousand Dollars damages and Sixty-six Dollars and Two cents, cost of suit.

Judgment entered and signed this 15th day of March, 1929.

30

FRANK L. CLEARY,
Judge.

40

Rule to Show Cause.

(Filed March 18, 1929.)

HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT,

*Plaintiff,**v.*THE PENNSYLVANIA RAILROAD
COMPANY,*Defendant.*

Action at Law.

10

Application for this rule having been made to me, the Judge before whom the above-stated cause was tried, within six days after the rendering of the verdict therein:

20

It is ORDERED that the above-named plaintiff show cause before this Court, at the Hudson County Court House, in the City of Jersey City, New Jersey, on Friday, the 12 day of April, A. D. 1929, at 1:30 P. M., or as soon thereafter as the Court may hear the same, why the verdict rendered in his favor on March 14th, 1929, should not be set aside, and a new trial granted, on the grounds that said verdict is excessive, contrary to the charge of the Court, and the result of the bias, prejudice and passion of the jury, reserving to the defendant all exceptions and objections noted; meantime, and

30

40

Stipulation.

until the further order of the Court, execution is stayed.

Dated March 19th, 1929.

FRANK L. CLEARY,
Circuit Court Judge.

10

On Motion of
WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

Filed Clerk's Office,
Mar. 18, 1929,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

20

Stipulation.

(Filed April 17, 1929.)

HUDSON COUNTY CIRCUIT COURT.

30

HOWARD W. STEINERT,
Plaintiff,

v.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant.

} Action at Law.

It appearing that Judge Cleary will not sit for motions on April 12th, 1929,—

40 It is hereby stipulated that the rule to show cause why the verdict in above-stated case should not be set aside and a new trial granted, dated March 19th, 1929, returnable April 12th, 1929, be

Continuance.

continued to April 26th, 1929, at the same hour and place and with like effect as in said rule specified.

Dated April 10th, 1929.

JOHN WINANS,

Attorney for Plaintiff. 10

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

Continuance.

(Filed April 17, 1929.)

HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT,
Plaintiff,

v.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Action at Law.

20

Upon good cause shown,—

IT IS ORDERED that the rule to show cause why the verdict rendered in above-stated case should not be set aside and a new trial granted, dated March 19th, 1929, returnable April 12th, 1929, be and the same hereby is continued to April 26th, 1929, at

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40

Continuance.

the same hour and place and with like effect in all respects as in said rule specified.

Dated April 12, 1929.

FRANK L. CLEARY,
Judge.

10

On Motion of
WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

Filed Clerk's Office,
April 17, 1929,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

20

Continuance.

(Filed April 29, 1929.)

HUDSON COUNTY CIRCUIT COURT.

30

HOWARD W. STEINERT,
Plaintiff,

v.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant.

Action at Law.
Rule to Show
Cause.

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Rule to show cause in the above-stated cause, dated March 19, 1929, returnable April 12, 1929, and on April 12, 1929, the said rule having, by order, been continued to April 26, 1929, the same is hereby further continued to May 17th, 1929, at

Memorandum.

the hour of 11 A. M., with like effect as in said rule specified.

Dated April 26, 1929.

FRANK L. CLEARY,
Circuit Court Judge.

10

Filed Clerk's Office,
April 29, 1929,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

Memorandum.

(Filed July 1, 1929.)

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HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT,
Plaintiff,

v.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant.

On Rule to Show
Cause.

30

CLEARY, J.

This is the return of a rule to show cause why a judgment of Twenty-five Thousand (\$25,000.00) Dollars in favor of the plaintiff should not be set aside because the amount is excessive.

The defendant obtained the rule to show cause and alleges as its only point that the verdict is excessive. All other exceptions taken by the defendant at the trial are reserved in the said rule.

40

Memorandum.

10 The plaintiff was in the employ of the defendant company as a brakeman in the company's yards at Washington, D. C. He was thirty-nine (39) years of age at the time of the accident and was earning according to his testimony the sum of seventy-five (\$75.00) dollars every two weeks. This figure is disputed by the defendant company and the proof of the records in the company's office produced in behalf of the defendant was to the effect, that the time-keeper's records for the year prior to the accident showed that the plaintiff was making an average of Twenty-seven dollars and seventy-two cents (\$27.72) per week.

20 It was also testified by the plaintiff himself that since returning to work he has been receiving from eighteen to twenty (\$18.00 to \$20.00) dollars per week.

From all of this evidence and viewing it most favorably to the plaintiff by accepting his own figures, it would show that he is now making within Seventeen (\$17.50) dollars and fifty cents per week of what he was earning prior to the accident.

30 Under such circumstances I think the verdict of Twenty-five Thousand (\$25,000.00) dollars is clearly excessive and if the plaintiff will accept the sum of Fifteen Thousand (\$15,000.00) dollars, the verdict will be allowed to stand, otherwise the rule to show cause will be made absolute.

FRANK L. CLEARY,
Judge.

Filed Clerk's Office,
July 1, 1929,
Hudson County, N. J.

40 JOHN J. MCGOVERN,
Clerk.

Rule to Show Cause.

(Served January 20, 1930.)

HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT, <i>Plaintiff,</i> <i>v.</i> PENNSYLVANIA RAILROAD COMPANY, <i>Defendant.</i>	10 Action at Law.
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Plaintiff having applied to the undersigned, one of the judges of this court, upon affidavits, for relief touching the matters hereinafter mentioned: Now on motion of John Winans, attorney of plaintiff, it is, on this 15th day of January, 1930, ordered that the defendant or its attorneys show cause before me, at the Hudson County Court House at Jersey City, on Friday, the 24th day of January, 1930, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the rule to show cause, granted herein upon application of the defendant within six days after rendition of verdict herein and dated the 19th day of March, 1929, should not be argued or reargued; why a certain decision thereon heretofore made by the undersigned, Circuit Court Judge as aforesaid, should not be recalled, vacated and annulled; why defendant's said rule to show cause should not be discharged; and why plaintiff should not have such other and different relief in the premises as shall be just; further

Ordered that entry of a rule upon said decision

40

Notice.

is hereby stayed until the hearing and determination upon this rule to show cause; and it is further

10 Ordered that a copy of this rule to show cause and of the affidavits upon which it is granted be served on the attorneys for the defendant within 5 days after the making of this rule to show cause; which service shall be sufficient notice hereof.

FRANK L. CLEARY,
Circuit Court Judge.

Notice.

(Filed August 22, 1930.)

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HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT,
Plaintiff,

v.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant.

} Action at Law.

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To JOHN WINANS, Esq.,
Attorney of Plaintiff.

SIR:

40 PLEASE TAKE NOTICE, that on Friday, January 24th, 1930, at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, we will move before Honorable Frank L. Cleary, Judge of the above stated Court or such Judge thereof as shall sit for motions, at the Hudson County Court

Notice.

House in the City of Jersey City, New Jersey, for an order directing the above named plaintiff to elect within such time as the Court may designate whether to accept the verdict in the above stated cause as reduced by the Court from Twenty-five Thousand (\$25,000) Dollars to Fifteen Thousand (\$15,000) Dollars or that upon failure to so elect within the time so designated the defendant's rule to show cause why said verdict should not be set aside and a new trial granted be made absolute. Upon said motion, we will rely upon the record and proceedings in the cause. 10

Yours, &c.,

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant. 20

Dated January 21, 1930.

(Endorsed):

Copy received Jany. 21, 1930.

JOHN WINANS,
Atty. for Plff.

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Rule for Continuance.

(Filed February 6, 1930.)

HUDSON COUNTY CIRCUIT COURT.

10

HOWARD W. STEINERT,
Plaintiff,

v.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

} Action at Law.

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It being represented to the court that the plaintiff's attorney will be actually engaged upon a trial before Mr. Circuit Court Judge Daly, at the Union Circuit, on February 7, 1930, the day to which the rule to show cause granted in this cause has been continued by stipulation, and to which defendant's cross motion has been likewise continued; it is thereupon, on this 6th day of February, 1930, on motion of John Winans, attorney of plaintiff, ordered that said rule to show cause and cross motion be and the same hereby are further continued to the 28th day of February, 1930, at the same hour and place.

30

FRANK L. CLEARY,
Circuit Court Judge.

Filed Clerk's Office,
Feb. 6th, 1930,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

40

Stipulation.

(Filed March 17, 1930.)

HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT, <i>Plaintiff,</i> <i>v.</i> PENNSYLVANIA RAILROAD COMPANY, <i>Defendant.</i>	}	At Law.	10
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IT IS HEREBY stipulated and consented that plaintiff's rule to show cause for a reargument of defendant's rule to show cause, and defendant's motion to require plaintiff to elect, both of which have been continued to the 14th day of March, 1930, are hereby further continued until and made returnable on the 21st day of March, 1930, provided Mr. Circuit Court Judge Cleary shall sit for motions on that day; otherwise on his next motion day thereafter, and to be at the same hour and place as previously specified.

Dated, March 13, 1930.

JOHN WINANS,
 Attorney of Plaintiff. 30

WALL, HAIGHT, CAREY & HARTPENCE,
 Attorneys of Defendant.

Filed Clerk's Office,
 March 17, 1930,
 Hudson County, N. J.

JOHN J. MCGOVERN,
 Clerk.

40

Rule to Elect, &c.

(Filed May 8, 1930.)

HUDSON COUNTY CIRCUIT COURT.

10

HOWARD W. STEINERT,

*Plaintiff,**v.*PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Action at Law.

Rule.

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A rule to show cause, dated March 19, 1929, having been granted in this cause, on application by defendant made within six days after the rendering of the verdict herein, requiring plaintiff to show cause on April 12, 1929, why the verdict rendered in his favor on March 14, 1929, should not be set aside and a new trial granted on the grounds that said verdict is excessive, contrary to the charge of the court and the result of bias, prejudice and passion of the jury, with reservations as noted therein, and the same having been duly continued from time to time and thereafter coming on to be heard at Jersey City; and defendant having thereupon, in open court, waived all of the grounds expressed therein, except that of excessiveness of the verdict; and the court having thereafter made and filed a memorandum decision to the effect that if the plaintiff should elect to reduce said verdict to \$15,000, said rule to show cause should be discharged, but otherwise made absolute; and a rule to show cause, dated January 15, 1930, having thereafter been made upon application of the plaintiff, requiring defendant to show

Rule to Elect, etc.

cause on January 24, 1930, why said prior rule to show cause should not be argued or reargued, why said memorandum decision should not be recalled, vacated and annulled, why defendant's said rule to show cause should not be discharged and why plaintiff should not have such other and different relief in the premises as should be just; and the rule to show cause latterly mentioned having been duly continued from time to time and coming on to be heard before the court at Jersey City on March 24, 1930, in the presence of John Winans, Esq., of counsel with plaintiff, and John A. Hartpence, of counsel with defendant; and the court having thereupon granted such argument or reargument of defendant's rule to show cause, and the same having been duly reargued by the respective counsel, and the court having upon due consideration, decided the same in manner and form as hereinafter set forth: Now, on motion of John Winans, attorney of plaintiff, it is on this 8th day of May, 1930,

ORDERED that reargument of defendant's said rule to show cause is hereby allowed and confirmed;

ORDERED that said memorandum decision upon defendant's rule to show cause is hereby reconsidered, recalled and annulled;

ORDERED that, upon condition that the plaintiff shall, within 20 days after the making and entry of this rule, make and file in the office of the clerk of this court, a stipulation or consent in writing, signed by plaintiff and his attorney herein, or either of them, which shall in due form of law stipulate and agree that the verdict for \$25,000 heretofore rendered in this cause in favor of the

Rule to Elect, etc.

plaintiff and against the defendant may be reduced to the sum of \$20,000, that then and in that event defendant's said rule to show cause be discharged; and it is further

10 ORDERED that in the event that plaintiff or his attorney herein shall fail to file such written stipulation and consent within the time hereinbefore limited for the purpose, then defendant's said rule to show cause shall be made absolute, said verdict be set aside and a new trial had of the issues in this cause.

FRANK L. CLEARY,
Circuit Court Judge.

On motion of
20 JOHN WINANS,
Attorney of Plaintiff.

Rule dated and actually entered this 8th day of May, 1930.

Filed Clerk's Office,
May 8, 1930,
Hudson County, N. J.

30 GUSTAV BACH,
Clerk.

Stipulation and Consent.

(Filed May 15, 1930.)

HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT,
Plaintiff,

v.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant.

Action at Law.

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Whereas, by a rule dated and entered in this cause on May 8, 1930, it was, among other things, ordered and directed that upon condition that the plaintiff should, within 20 days after the making and entry thereof, make and file in the office of the Clerk of this court a stipulation and consent in writing, signed by plaintiff and his attorney herein, or either of them, in due form of law stipulating and agreeing that the verdict for Twenty-five thousand dollars (\$25,000) heretofore rendered in this cause in favor of the plaintiff and against the defendant be reduced to Twenty thousand dollars (\$20,000), then and in that event the certain rule to show cause granted upon defendant's application within 6 days after the verdict herein and dated March 14, 1929, should be discharged; but, in the event that plaintiff or his attorney should fail to make and file such written stipulation and consent within the time aforesaid, that defendant's said rule to show cause should be made absolute, the verdict set aside and venire *de novo* issued; and

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Whereas, plaintiff has elected to accept such reduction of verdict, in accordance with the condition expressed in said rule:

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Stipulation and Consent.

Now, therefore, the undersigned, Howard W. Steinert, the plaintiff above named, and John Winans, attorney upon the record for the plaintiff herein, do hereby stipulate and consent that the verdict, rendered in this cause on or about March 14, 1929, be and the same hereby is reduced to Twenty thousand dollars (\$20,000), as of the date of the rendering thereof, as aforesaid, and that there may be credited upon the judgment entered thereon in favor of the plaintiff and against the defendant a reduction and partial satisfaction on account thereof to the amount and extent of said indicated reduction, leaving due and unpaid thereon the amount of said verdict, as so reduced, being the sum of Twenty thousand dollars (\$20,000), damages, costs as taxed thereon and included therein, and interest on said damages and costs from the date of said judgment.

IN WITNESS WHEREOF, I, Howard W. Steinert, plaintiff as aforesaid, and I, John Winans, attorney upon the record for the said Howard W. Steinert, have hereunto respectively set our hands on this ninth day of May, 1930.

Signed and delivered (by
Howard W. Steinert) in Howard W. Steinert
the presence of Plaintiff

Joseph A. Sieler

Signed and delivered (by
John Winans) in the John Winans
presence of Attorney of Plaintiff

Edna M. Cahill

Filed Clerk's Office,
May 15, 1930,
Hudson County, N. J.

GUSTAV BACH,
Clerk.

Notice of Appeal.

(Filed May 23, 1930.)

HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT,

*Plaintiff,**v.*THE PENNSYLVANIA RAILROAD
COMPANY,*Defendant.*

Action at Law.

10

To: JOHN WINANS, Esquire,
Attorney of Plaintiff.

SIR:

20

PLEASE TAKE NOTICE that the Defendant hereby appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment of the Hudson County Circuit Court entered in the above-stated cause.

Dated May 19th, 1930.

Yours, &c.,

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys of Appellant.

30

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

HARRY EGGLESTON, of full age, being duly sworn, on his oath, says:

That on May 19th, 1930, at about the hour of 12:30 P. M., Daylight Saving Time, he served a true copy of the within Notice of Appeal on John

40

Recognizance on Appeal.

Winans, Attorney for Plaintiff, personally, at his office No. 50 Church Street, New York City, N. Y., and that at said time and place said John Winans, in deponent's presence, signed the endorsement which appears hereon.

10

HARRY N. EGGLESTON.

Sworn to and subscribed before me, }
 this 22 day of A. D. 1930. }

(Seal) GROVER J. CAREY,
 Notary Public
 of New Jersey.

20

A Copy of within paper was delivered to me on this 19th day of May, 1930, but not accepted because not served in due time.

JOHN WINANS,
 Attorney of Plaintiff.

Filed Clerk's Office,
 May 23, 1930,
 Hudson County, N. J.

Recognizance on Appeal.

30

(Filed May 23, 1930.)

WHEREAS, HOWARD W. STEINERT, lately recovered in the Hudson County Circuit Court in the State of New Jersey against The Pennsylvania Railroad Company judgment for Twenty Thousand Dollars (\$20,000) damages, besides costs of suit; and

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WHEREAS, The Pennsylvania Railroad Company has taken an appeal from said judgment to the Court of Errors and Appeals of the State of New Jersey;

Recognizance on Appeal.

THESE ARE THEREFORE to authorize Albert C. Wall, William H. Carey, or John A. Hartpence, of Jersey City, New Jersey, to enter into and execute in our behalf, as Attorney in Fact, recognizance on appeal in the sum of Forty Thousand Five Hundred Dollars (\$40,500), conditioned only that said The Pennsylvania Railroad Company shall prosecute said appeal with effect, and also pay and satisfy, if said judgment be affirmed, all damages and costs in the said judgment and upon appeal, and all costs and damages to be awarded for delay of execution, as fully and completely as we ourselves might do, and for so doing this shall be their and each of their sufficient warrant. 10

IN WITNESS WHEREOF, said The Pennsylvania Railroad Company has caused these presents to be signed by its Vice-President, attested by its assistant Secretary, and its corporate seal to be hereto affixed this 22nd day of May, A. D., 1930. 20

THE PENNSYLVANIA RAILROAD COMPANY

By C. S. KRICK,
Vice-President.

Attest: (Seal)

E. H. BROWN, 30
Assistant Secretary.

Recognizance on Appeal.

HUDSON COUNTY CIRCUIT COURT.

10

HOWARD W. STEINERT,
Plaintiff,

v.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant.

Action at Law.

Recognizance
on Appeal.

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

20

30

BE IT REMEMBERED that on this 23rd day of May A. D., 1930, personally appeared before me, George W. Flaacke, one of the Supreme Court Commissioners of the State of New Jersey, at Jersey City, in the County of Hudson, in said State of New Jersey, The Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, by John A. Hartpence, its Attorney in Fact, on its behalf as principal, and Fidelity & Deposit Company of Maryland, a corporation of the State of Maryland, by Richard T. Purcell, its Attorney in Fact, on its behalf as surety, who jointly and severally did acknowledge said corporations, respectively, to be indebted to Howard W. Steinert, of Washington, D. C., in the sum of Forty Thousand Five Hundred Dollars (\$40,500), lawful money of the United States to be made of their respective goods and chattels, lands and tenements and real estate, if default be made in the following conditions:

40

WHEREAS, said The Pennsylvania Railroad Company is about to prosecute an appeal from said Hudson County Circuit Court to the New Jersey Court of Errors and Appeals, to review a judgment

Recognizance on Appeal.

entered in said Hudson County Circuit Court on or about May 15, 1930, in favor of said Howard W. Steinert and against said The Pennsylvania Railroad Company, for Twenty Thousand Dollars (\$20,000) damages, besides costs of suit, as by the record thereof will appear.

10

Now, THEREFORE, the condition of this obligation is such that if the said The Pennsylvania Railroad Company shall prosecute its said appeal with effect and answer all damages and costs in the former judgment and all costs and damages to be awarded for delay of execution, if it shall fail to make its plea good and said judgment shall be affirmed, then this recognizance to be void, otherwise to remain in full force and effect.

20

THE PENNSYLVANIA RAILROAD COMPANY

By JOHN A. HARTPENCE,
Its Attorney in Fact.

FIDELITY & DEPOSIT COMPANY OF MARYLAND

By RICHARD J. PURCELL,
Its Attorney in Fact.
(Seal)

Taken and Acknowledged this }
23rd day of May, A. D., 1930. }

30

GEORGE W. FLAACKE,
Supreme Court Commissioner.

The within recognizance is hereby approved as to form and sufficiency.

May 23, 1930.

GEORGE W. FLAACKE,
Supreme Court Commissioner
of New Jersey.

Filed Clerk's Office,
May 23, 1930,
Hudson County, N. J.

40

Grounds of Appeal.

(Filed June 13, 1930.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

10

HOWARD W. STEINERT,
Plaintiff-Respondent,

v.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant-Appellant.

Action at Law.

On Appeal from
Hudson County
Circuit Court.

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The appellant states the following grounds of
appeal:

1. The said Hudson County Circuit Court
denied defendant's motions to dismiss the cause.

2. The said Hudson County Circuit Court
denied defendant's motion to direct a verdict in
favor of defendant and against plaintiff.

The following questions were admitted:
To the plaintiff—

30

3. "Q. Can a pin always be lifted easily when
it is in order?"

4. "Q. When Mr. Waller spoke to you about
compensation did he tell you whether compensa-
tion was paid in one payment or by installments?"

5. "Q. Did you know at the time you were
working in the yard, when you were hired, you
were working in Interstate Commerce?"

40

The Court charged the jury as follows:

6. "It is a rule of law, that a release under seal
of a claim for personal injuries, is a bar to an

Grounds of Appeal.

action for such injuries, unless obtained by fraud or deceit; that is, unless there was fraud in the execution of the release." * * *

"So a release must stand, unless it was procured, the execution of that release, was procured through fraud and deceit, on the part of the person to whom the release was given, or his or its agent in that behalf." * * * 10

"So that this question of release is of importance in this cause, because unless you find that it was obtained by fraud and deceit, practiced upon the plaintiff in this case, the law says that the release must stand." * * *

"There must be fraud in the execution of the release to sustain the allegation of fraud. It has been said by our higher Courts, that a fraudulent misrepresentation of the contents of the release, or the person giving the release, is induced to execute it, is a fraud in the execution of the release, even though the misrepresentation is as to the status of the consideration contained in the release. Now, fraudulent misrepresentation may be made by act or deed, as well as by word, and the test of fraud is that the defendant made some representation, either by word or by act, either directly or through authorized agents, meaning that he should act upon it, and that such representation was false, and defendant knew it to be false, and that plaintiff, believing such representation to be true, acted upon it, and was injured, or prevented from asserting some right which he otherwise would have had." * * * 20 30

"It is for you to say, gentlemen, whether or not the execution of this release was obtained by fraud and deceit." * * *

"But if * * * you find that the plaintiff has 40

Grounds of Appeal.

clearly and distinctly proven that the execution of this release was obtained by fraud and deceit, then you will disregard the release and proceed with the other phases of this case."

10 7. "A servant assumes the usual and obvious risks of his employment, and those which he could not discover with ordinary care, but not the negligence of his employer." * * *

20 "But risks of another sort, not necessarily incident to the occupation; may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work, and suitable and safe appliances for the work. These the employe is not treated as assuming, unless he becomes aware of the defect or disrepair, or of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them.

30 "When the employee does know of the defects and appreciates the risk that is attributable to them, then if he continues in the employment without objection and without obtaining from the employer or his representatives an assurance that the defect will be remedied, the employe assumes the risk, even though it arises out of the master's breach of duty."

40 8. "If you find that the defendant was liable at all, you will return a verdict in favor of the plaintiff, and against the defendant, in such sum as in your judgment as would fairly compensate the plaintiff for the injuries which he has suffered as the direct and proximate result of the accident himself."

9. "In determining the degree of credibility of

Grounds of Appeal.

a witness, the jury may take into consideration the fact of his being in the employ of a party to the suit, and if he is in such employ, may regard him as an interested witness."

10. "A witness whose own act is found to have contributed proximately to the occurrence of an accident may be regarded as an interested witness." 10

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant-Appellant.

(Indorsed)

Copy received this 12th day of June,
1930, but not accepted because not in
time and no appeal pending. 20

JOHN WINANS,
Atty.

30

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Affidavit of Service.

(Filed June 25, 1930.)

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

10

HOWARD W. STEINERT,
*Plaintiff-Respondent,**v.*THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant-Appellant.

Action at Law.

On Appeal from
Hudson County
Circuit Court.

20

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

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JAMES RABBITT, of full age, being duly sworn according to law, on his oath says that on June 12, 1930, he served a true copy of the Grounds of Appeal in above-stated cause personally on John Winans, Attorney for Plaintiff, at his office No. 50 Church Street, New York City, N. Y., who at that time in my presence indorsed on the original the words "Copy received this 12th day of June, 1930, but not accepted because not in time & no appeal pending, John Winans, Atty."

JAMES RABBITT.

Sworn to and subscribed before me
at Jersey City, N. J., this 19th day
of June, A. D., 1930.

GROVER J. CAREY,
Notary Public
of New Jersey.

40

Case.

HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT

v.

PENNSYLVANIA RAILROAD CO.

10

Before—Hon. FRANK L. CLEARY, J., and a Jury.

Jersey City, N. J.,
March 13, 1929.

APPEARANCES:

JOHN WINANS, Esq., for the Plaintiff.

WALL, HAIGHT, CAREY & HARTPENCE, Esqs.,
for the Defendant, by JOHN H. HART-
PENCE, Esq.

20

A Jury was duly empanelled; being found satisfactory, they were sworn.

Counsel opened to the Jury.

Mr. Hartpence: I move to dismiss, on the ground that the Court has no jurisdiction, because neither the plaintiff nor the defendant reside in this State, and the cause of action arose out of the State, and this constitutes an unwarranted burden upon Interstate Commerce; and for that reason the case should be dismissed.

30

The Court: The motion is denied, with an exception.

Mr. Hartpence: Exception.

40

Howard William Steinert, direct.

HOWARD WILLIAM STEINERT, sworn for the plaintiff:

Direct examination by Mr. Winans:

- 10 Q. You are the plaintiff in this case? A. Yes, sir.
Q. Did you have an accident? A. Yes, sir.
Q. When did that happen? A. April 17th, 1926.
Q. Where? A. Jersey Yards, Washington, District of Columbia.
Q. That is a yard of what, the Pennsylvania Railroad? A. Pennsylvania Railroad.
Q. How old are you? A. 39 years old.
Q. On the 17th of April, 1926, were you employed, engaged in any kind of work? A. Yes, sir.
20 Q. By whom were you employed? A. Pennsylvania Railroad.
Q. Is that the defendant in this case? A. Yes, sir.
Q. In what capacity were you employed? A. As brakeman.
Q. Were you a brakeman on road service or yard service? A. Yard service.
Q. That means what kind of work? A. Consists of shifting cars.
Q. At that time, what was your condition of health, before this accident happened? A. Good.
30 Q. How about your arms and hands? A. Good.
Q. Right and left hand alike or unlike? A. Both alike.
Q. Normal in all respects? A. Yes, sir.
Q. Strong? A. Yes, sir.
Q. What time did you go to work on the 17th of April, 1926? A. 12 o'clock.
Q. That was midnight? A. Yes, sir.
Q. That was the beginning of the 17th of April, was it? A. Yes, sir.
40 Q. Where did you go to work? A. Jersey Yards.

Howard William Steinert, direct.

Q. What is the Jersey Yard? A. Freight yard.

Q. Is that a yard where freight trains are broken up and made up with cars classified? A. Yes, sir.

Q. Move them around from one track to another? A. Yes, sir.

Q. Are engines used for that purpose? A. Yes, 10
sir.

Q. What kind of engines were used? A. Yard engines.

Q. Was a yard engine being used in the work you were engaged on at that time? A. Yes, sir.

Q. What provision is there on that yard engine, or was there at that time, for carrying members of the switch crew from place to place; any place to stand? A. Yes, sir; rear steps and front steps.

Q. These steps run across, cross-wise on the engine front and back? A. Yes, sir. 20

Q. Did you ever observe while you were in the employ of the Railroad Company and working in that yard, how members of the switch crew did go from place to place in the yard when switching cars on that road? A. Yes, sir.

Mr. Hartpence: That is objected to as immaterial.

The Court: Objection sustained. 30

Q. For what purpose was the step on the front end of the engine always used? A. For riding on.

Q. Were you working alone, or were you a member of a gang or crew? A. Working with a crew.

Q. And that crew consisted of how many men? A. Three men.

Q. Was there a conductor in charge? A. Yes, sir.

Q. What is his name? A. Benjamin Kerr. 40

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Q. Then you were also a member, were you? A. Yes, sir.

Q. Who was the third man? A. A man by the name of Redding.

10 Q. What position did he occupy with the switching crew? A. He was brakeman; he was known as a brakeman.

Q. You were what? A. Front brakeman.

Q. He was the rear brakeman? A. Mr. Redding, yes, sir.

Q. That is the same thing as a flagman? A. Yes, sir.

Q. When you first went to work in the yard that night, what part of the yard were you working in? A. I first went to work and I worked with another crew.

20 Q. How long did you continue to work there? A. About an hour and a half.

Q. That would bring it up to half past one? A. Yes, sir.

Q. At half past one were you sent over to another place? A. I was sent over to Mr. Kerr's place.

Q. By whom were you sent? A. The yard master.

30 Q. What yard master? A. Of the Jersey Yard.

Q. What Railroad Company? A. Pennsylvania.

Q. Where did you find Conductor Kerr when you were sent to join him? A. He was standing around the yard.

Q. What part of the yard? A. In the yard, in the vicinity where all the men stand.

Q. Did you go over and tell him you had been sent over to him? A. Yes, sir.

Q. What did he say? A. He told me to go over to No. 1 High line and get some cars off him.

40 Q. Who was in charge of the switching crew

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that you were working in from half past one o'clock; who was the boss of the gang? A. Mr. Kerr, the conductor.

Q. Did Mr. Kerr give orders to the members of your switching crew that night? A. Yes, sir.

Q. What did the men to whom he gave the orders do? A. Replied to the orders. 10

Q. Was any engine used in connection with the work you were doing, consisting of the conductor, Kerr, the rear flagman and yourself the front flagman; was there an engine being used? A. Yes, sir.

Q. And that is the switching engine you speak of? A. Yes, sir.

Q. Who was engaged in driving or operating that engine? A. The fireman.

Q. What is the fireman's name? A. Mr. Jarvis. 20

Q. Whose orders was the fireman Jarvis under while you were working there that night, Conductor Kerr?

Mr. Hartpence: I object to that unless he states he knows. It is incompetent.

Mr. Winans: I withdraw it.

Q. Do you know under whose orders Fireman Jarvis was working while he was working around in the switching gang under Conductor Kerr? A. Under the conductor's orders. 30

Q. What Conductor? A. Conductor Kerr.

Q. Where was the engineer? A. I didn't see him.

Q. Did you see him afterwards? A. Yes, sir.

Q. Was he on the engine at any time from the time you went to work there at half past one o'clock that morning until you left the place? A. No, sir.

Q. When he did go away where did he come 40

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from? A. Out of the yard master's office; I mean the car inspector's office.

Q. During the time you were working in connection with that switching engine, who at all times drove and operated the engine? A. The fireman.
10

Q. Was the fireman alone in the cab? A. Yes, sir.

Q. You say the conductor, Kerr, told you to go over to High line No. 1 and get some cars? A. Yes, sir.

Q. Did he tell you where the cars were to be taken? A. Yes, to bring them in the yard.

Q. When was this done, after the conductor gave those orders? A. The fireman went back over to No. 1 High line and got these cars.
20

Q. Did you go back with him? A. Yes, sir.

Q. Riding how? A. On the front step of the engine.

Q. Anybody else there with you? A. No, sir.

Q. Well, when you came to the cars on High line No. 1, did you go up with your pilot end or the tank end to these cars? A. The pilot end.

Q. How many of these cars did you pick up? A. Four or five.
30

Q. Was there any cut made? A. Yes, sir.

Q. Where was the cut made? A. About the fourth or fifth car.

Q. From your engine? A. Yes, sir.

Q. That is from the pilot of your engine? A. Yes, sir.

Q. Who made that cut? A. The flagman.

Q. What did your engine do with reference to these four or five cars that were cut off? A. I got a signal from the flagman to back up, and I gave the signal to the fireman to back and he went on back.
40

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Q. When you say "backed up" you mean to say the pilot side of your engine approached these cars that were cut off? A. Yes, sir.

Q. Coming in contact with them? A. Yes, sir.

Q. Was there any coupling made? A. Yes, sir.

Q. Who made that coupling? A. I did.

10

Q. After the coupling was made, what was next done; was any signal given? A. A signal from the flagman.

Q. Did you receive that signal? A. Yes, sir.

Q. Did you relay it? A. Yes, sir.

Q. To whom? A. The fireman.

Q. What was that signal? A. Back up.

Q. Did the engine then back up? A. Yes, sir.

Q. How about the cars that you were just coupling? A. We brought them with us.

20

Q. Did you push them ahead of you, or did they follow the engine? A. They followed the engine.

Q. Then your engine was, the pilot was following the cars? A. Yes, sir.

Q. How long did your engine continue to back? A. Three or four hundred feet.

Q. Was that far enough to clear the switch point? A. Yes, we had to clear the switch.

Q. What switch point? A. The switch point that led into the yard.

30

Q. Was that switch thrown after you passed over it and cleared it? A. Yes, sir.

Q. Who threw it? A. The switch tender.

Q. That is a man not connected with your crew at all? A. No, sir.

Q. Where was the rear brakeman, or flagman? A. He was right on the ends of these cars.

Q. That is the farthest of the cars from your engine that you had been drawing behind you? A. Yes, sir.

40

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Q. You were standing there, and the switch has been thrown leading into the yard, running into the yard; is that what you call the ladder track?
A. Yes, sir.

10 Q. Was there any signal given? A. Got a signal to go ahead.

Q. Who gave that signal? A. The flagman.

Q. Who received that signal? A. I did.

Q. What did you do with it? A. Gave it to the fireman.

Q. Where were you standing at that time? A. The front step of the engine.

Q. Which side of the engine? A. Engineer's side.

Q. Who was occupying the engineer's seat at the time? A. The fireman.

20 Q. That is, the engineer's seat is always the right hand side of the engine, looking ahead? A. Yes, sir.

Q. What was that signal, to do what? A. To go ahead.

Q. That would mean to push the cars? A. Yes, sir.

Q. Did the engine come ahead? A. Yes, sir.

Q. Did the cars move? A. Yes, sir.

30 Q. Did they pass over that switch that had just been thrown? A. Yes, sir.

Q. In passing over that switch, were these cars and the engine pushing them deflected toward the right or toward the left? A. Went towards the right.

Q. Did they pass on to the ladder track? A. Yes, sir.

Q. About how far did they run along that track? A. Some distance, three or four hundred yards.

40 Q. Where did that bring them to? A. About No. 9 or 10 track.

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Q. When you got to that point, was any signal given or anything done? A. The conductor got on the front end of the engine at that time, while we were coming down on the ladder track and he gave them the signal to stop.

Q. You say the conductor came and got on the engine? A. Yes, sir. 10

Q. Where did he stand on the engine? A. On the outside of the engine.

Q. You mean hanging on? A. No.

Q. Where was he? A. He stood on the front step.

Q. That is the same step you were on? A. Yes, sir.

Q. The same side you were on? A. Yes, sir.

Q. Which one was at the outside and which one was on the end next the coupling? A. The conductor stood on the outside of the engine and I stood in by the coupling. 20

Q. Which way were you both facing? A. Forwards.

Q. That would be back towards the front; faces looking towards the cars ahead? A. Yes, sir.

Q. When the conductor came and got on the step and stood in the position you speak of, was he in line with the engineer's window of the cab? A. Yes, sir. 30

Q. Did you say he gave a signal? A. Yes, sir.

Q. What signal did you give? A. Stop.

Q. What happened then? A. I pulled the pin on the engine.

Q. Was it part of your duty to pull that pin on the engine? A. Yes, sir.

Q. What effect has the pulling of the pin on the engine, what effect has it on the operation? A. It opens the knuckle so that the cars roll away. 40

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Q. Does the opening of the knuckle indicate a coupling or uncoupling operation? A. Uncoupling.

Q. Then when you pulled the pin, you uncoupled? A. Yes sir.

10 Q. The same effect as though you took away a coupling, let us say, on the side? A. Yes, sir.

Q. Did you do that? A. Yes, sir.

Q. Where was the rear end brakeman? A. He was on top of the car, making them slide.

Q. What do you mean? A. Putting the brakes on so that they were rolling out of the yard.

Q. You are referring to the hand brakes, the brakes that have wheels, on top of the car, to turn around? A. Yes, sir.

20 Q. There was no air on at the time? A. Yes, sir.

Q. What happened when you lifted the pin on the engine coupling and the rear end brakeman set the hand brakes on these four or five cars? A. Well, the cars rolled away from the engine; after it stopped about three or four feet.

Q. And then what, kept on going or came to a stop? A. Stopped.

Q. What did the engine do? A. Stop.

30 Q. So that when both stopped, what was the interval or space between them? A. Between three and four feet.

Q. Did the flagman still stay on the cars that had rolled three or four feet away? A. Yes, sir.

Q. What did the conductor do? A. The conductor left me then; said "Go over and get the rest of these cars from No. 1 High line."

Q. When you moved the four or five cars on No. 1 High line, you left other cars there? A. Yes, sir.

40 Q. Were those the cars you were told to go back and get? A. Yes, sir.

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Q. At that time, did it become your duty, as the man riding on the front end of the engine, to do anything with reference to the cars that you had just pushed down and left there on the track? A. Yes, I was always told, well, I was to always open the knuckle of the last car so that the next car that came in would couple up to it. 10

Q. It is possible to couple other cars on without the knuckle being open? A. No, sir.

Q. How long had you worked for the Railroad Company? A. Four years.

Q. Had you been all of that time in the yard service doing switching or drilling operations, or had you also worked on the road? A. No, sir; worked on the road and yard both.

Q. How much of your time during those four years had you been working on switching service in the yard? A. I would say half of the time. 20

Q. What have you observed as to what men always did when cars were left on a siding?

Mr. Hartpence: That is objected to as immaterial and irrelevant.

Mr. Winans: I withdraw it.

Q. Was it your duty at that time to do anything with reference to the coupling? A. I was supposed to open that knuckle. 30

Q. Were you supposed, or was it your duty? A. Yes, sir.

Q. Was it anybody else's duty to do it? A. The members of the crew.

Q. When your conductor left you, off which side of the engine did he step? A. Off the right side of the engine.

Q. When he reached the ground at the front right corner of the engine—that is where he would 40

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step down, isn't it—in which direction did he walk? A. Walked in a left hand side direction at a 45 degree angle, to the yard master's office.

10 Q. You mean he diverged away from the side of your track; was he going around the front away from the engine, or back towards the tank? A. Going towards the tank.

Q. At an angle of 45 degrees? A. Yes, sir.

Q. Was there any particular place he was going over there? A. To the yard master's office.

Q. Did you hear him say anything, give any order when he left where he had ridden with you on the front step? A. He gave orders to go back to No. 1 High line and get the rest of these cars.

20 Q. Who did he give those orders to? A. I presume myself and the fireman, both.

Q. Did you hear any response from the fireman when the conductor gave that order? A. No, sir.

Q. Did the fireman do anything? A. I heard the window shut.

Q. What window? A. The cab window.

Q. The engineer's side or the fireman's side? A. The engineer's side.

30 Q. Who was in the engineer's side of the engine at that time? A. The fireman.

Q. Was anybody else there? A. No, sir.

Q. Well, now, what happened after that? A. Well, after the conductor left the front part of the engine, I stood on the front step with my arms resting on the hand rail of the locomotive, my lamp set on the bulk head.

40 Q. Did you do anything with reference to the coupling you had lifted the pin of on the engine? A. Just made a yank to the knuckle on the box car, and it would not come open. So I waited a few minutes and I seen I could not get no response to

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the signal I gave the fireman, and I stood there; finally the flagman came up from the rear end of these cars, after making them slide and he said to me "What is the matter." I said "I don't know."

Q. Wait a minute; the cars that you refer to as being made to slide, were the cars you just pushed in, were they? A. Sure. 10

Q. They were to the front of your engine? A. Yes, sir.

Q. Which side of those cars did he walk back along? A. Right-hand side.

Q. That would be on the engineer's side, as your engine stood? A. Yes, sir.

Q. Did he do anything with reference to giving any signal? A. No, sir, not then. He did when he got up to me. He asked me what was the matter and I said, "I don't know what is the trouble with him." I didn't hear him give signals that night. 20

Q. Well, then, what did he do? A. Went over to the tank on the side of the cab of the locomotive.

Q. Which side? A. The engineer's side.

Q. Is that the seat in which the fireman was? A. Yes; he told him to go over there, "What is the matter? Let's get done with this thing." 30

Q. Did he tell him where to go? A. No, he didn't say where to go. He said, "Come on, let's go over and get the rest of these cars."

Q. You knew where that was, High line No. 1? A. Yes, sir.

Q. Well, did the engine move then? A. No, sir.

Q. What did you next do? A. I waited a couple of minutes; it seemed he didn't move.

Q. How long was that in all you waited from the time you got there with these four or five cars, pushed a little ahead and stopped, the conductor 40

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walked off, calling out what was to be done, then you waited, the brakeman came back; did he go away then? A. Yes, sir, he went in the yard.

10 Q. How long did you stand there yourself, the whole time from the time the engine came to a rest until something happened? A. Eight or ten minutes.

Q. At the end of the interval of eight or ten minutes, what if anything did you do? A. I went back and started to open that knuckle of the car.

Q. Was that the same knuckle you had attempted to open before? A. Yes, sir.

20 Q. Why hadn't you succeeded in opening it the time before? A. I gave the man a signal to move, to go backward. After I seen he didn't respond to it, I said, "Sure, I won't stay here. I will go over and open that knuckle." I was going over to the yard master's office.

Q. You said you had previously tried to open the knuckle? A. Yes, sir.

Q. Did it come open? A. No, something the matter with the pin, a bent pin in it.

Q. After that what did you do? A. I put my hand in.

30 Q. Did you expect to get the pin out? A. Yes, sir.

Q. Did you expect to get the knuckle open? A. Yes, sir.

Q. In what position was your hand? A. Inside the knuckle, pushing the pin back.

Q. Which hand was that? A. My right hand.

Q. At that time, did anything happen? A. Yes, the engine came on ahead, made a jump and caught my hand in the knuckle.

40 Q. When the engine came ahead and made a jump, did it or did it not come in contact with the

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group of these four or five cars that had been just brought on the track here? A. Yes, sir.

Q. What part of the engine? A. Front part.

Q. What part of the car did the knuckle of the engine come in contact with? A. The knuckle of the engine.

10

Q. Is that the identical knuckle in which you had inserted your hand to lift the pin? A. Yes, sir.

Q. What was the result of these two knuckles coming together? Did they couple or uncouple? A. They closed.

Q. That means the engine and the cars became coupled? A. Yes, sir.

Q. What happened then; you say the engine came forward. Did it stop, or continue to move? A. After he hit the cars, he reversed his engine and started back. He didn't know he had me in there until I hollered and Mr. Kerr came out of the yard master's office. I told him he had my hand in there and he went up and stopped him.

20

Q. How far did the engine proceed back with your hand in between the knuckles? A. About six feet.

Q. Did you have gloves on at the time? A. Yes, sir.

Q. Did you have a glove on the hand that was caught? A. Yes, sir.

30

Q. Did the engine, after moving six feet or thereabouts, come to a stop? A. Yes, sir.

Q. What happened then? A. As soon as he stopped, I tried to pull the pin out of the engine.

Q. With which hand? A. With the left hand.

Q. Did you succeed in doing it? A. No, he had a strain on the cars.

Q. You mean that the engine was pulling back on the draw heads, and that the strain on the pins

40

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prevented them from being lifted, do you? A. Yes, sir.

Q. Which one did you try to lift with your left hand? A. The one on the engine.

10 Q. You say you could not do that? A. No, sir; I gave him a signal to go ahead.

Q. With your left hand? A. Yes, sir.

Q. Did he come ahead then? A. Yes, I told him to go as easy as he could.

Q. How far did he go ahead? A. Just far enough.

Q. A matter of inches? A. No more than half an inch or an inch.

20 Q. Was it enough to relieve the strain on the draw bars? A. Enough to relieve the strain on the locomotive.

Q. Did you then succeed in lifting the pin? A. Yes, sir.

Q. Did anybody come to your assistance? A. The conductor was standing there, close by.

Q. Who did lift the pin, as a matter of fact? A. I did.

Q. When the pin was lifted, what next happened? A. Gave a signal to back up.

30 Q. Who gave that signal? A. I did.

Q. With your left hand? A. Yes, sir.

Q. Did the engine then back up? A. Yes, sir.

Q. What happened then? A. I pulled my hand out.

Q. Did you notice the condition the hand was in? A. Yes, sir.

Q. Did it hurt you? A. Not then.

Q. How did it feel? A. Numb.

40 Q. Did you afterwards go to the hospital? A. Yes, sir.

Q. While you were engaged the second time in

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trying to lift the pin in the knuckle of the car—I refer now to the second time, when you succeeded in lifting the pin, the time when you were caught, when that engine came ahead at that moment, did you hear any signal from the engine? A. No, sir.

Q. Or any bell sounded? A. No, sir.

10

Q. Any whistle sounded? A. No.

Q. Is there any rule relating to the operation of engines in the freight yards? A. Yes, sir.

Q. When an engine has been standing at rest and one or more are working around it, what is always done with reference to signal before that engine is suddenly put in motion?

Mr. Hartpence: I object to that.

Mr. Winans: Just the rule, if there is one.

20

Q. Is there a rule? A. The rule is to blow a whistle or ring the bell.

Mr. Hartpence: If there is a rule, I think he should state what form it is in, whether written or otherwise, and it should be produced if there is any such rule.

Q. Was this rule indicated to you by anybody in charge of the Pennsylvania Railroad freight yards?

30

Mr. Hartpence: I object to this question, and move to strike out the previous answer.

The Court: That may be stricken out. Just leave in the answer "Yes," there is a rule.

Q. What is that rule? A. It is to ring the bell.

Mr. Hartpence: I have to object again. He is asking what the rule is. I am asking, where is the rule?

40

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Mr. Winans: Counsel can cross examine if he wants to find that out.

Mr. Hartpence: Is there any such rule?

Mr. Winans: It is not in visible form, as far as I know. I am asking what the rule is, if he is told to do something.

Mr. Hartpence: Now, I draw a distinction between instructions, and written rules.

Q. Have you ever seen the rule in writing? A. Yes, sir.

Q. What is that rule?

Mr. Hartpence: I object to that as incompetent; not the best evidence.

Q. Have you a copy of your book of Rules? A. No, sir.

Q. Is it in that book of rules? A. Yes, sir.

Mr. Winans: I call upon counsel to produce the book of Rules of the Pennsylvania Railroad Company.

Mr. Hartpence: I don't have them. I don't carry them.

Q. Was any instruction ever given in your presence to railroad men working in the yard with reference to the giving of signals upon an engine being moved? A. Only from the conductor.

Q. You mean the conductor told you? A. The conductor, if he wanted to make a rule anywhere he knew where to go; he would tell us.

Q. Have you observed the practice, or did you, during the four years that you worked in the Jersey Yard, observe the practice as to what was done with reference to signals when an engine which had been standing at rest, with one or more men working around it, was about to move? A. Yes, sir.

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Q. What was always done?

Mr. Hartpence: I object to that as immaterial and irrelevant, for several reasons, if your Honor please. What might have always happened under other circumstances would not necessarily govern these circumstances. The witness has not testified that this was an engine at rest or standing, or at a switch, but it was engaged in an operation.

10

Mr. Winans: He says the engine was at rest ten minutes and suddenly starts ahead without giving any signal at all.

The Court: That is all right, if he can testify to what was done in such circumstances, without attempting to designate whether it was an engine at rest in its technical sense or whether the engine was engaged in coupling under the circumstances found here. What was always done?

20

Q. What was always done? A. Always ring a bell or blow a whistle before he made a move of the engine, that is, after the engine was standing still.

Q. You testified that you had a good right hand before this accident? A. Yes, sir.

30

Q. Was your right hand as it exists now? A. No, sir.

Q. When you first saw that right hand after this accident happened—I believe it was some time later, when you were in the hospital? A. Yes, sir.

Q. Was the glove removed? A. Yes, sir.

Q. Who took off the glove? A. The

Q. What did you observe as to what happened to your hand or the condition of your hand upon

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the removal of the glove? A. The thumb came off and it was all mashed up.

Q. Did the thumb come off with the glove? A. Yes, sir.

10 Q. How about the rest of your hand, what was its condition? A. That was all mashed up, blood and stuff all over.

Q. Did the doctors do anything in relation to the hand while you remained in the hospital? A. Oh, yes; operated.

Q. Had a number of operations, did you? A. Yes, sir.

Q. How long did you remain in the hospital the first time? A. About three or four months.

20 Q. Were any portions of the hand operated on that were mashed and mutilated? A. Yes, the thumb was cut away and the small finger.

Q. The thumb and which finger? A. The small finger.

Q. The little finger? A. Yes, sir.

Q. That left three fingers on your hand when you left the hospital after how long? A. Three or four months.

30 Q. Afterwards, what condition was that middle finger in? A. Well, from there, back to here—

Q. Wait a minute; when you say from there, you are indicating the point of the junction between the fingers that remained on your hand, are you? A. No, that is the hand back to here.

Q. You are indicating now a distance of about one and a half inches, running lengthwise on the back of your hand, are you? A. Yes, sir.

Q. What was the condition? A. There was a bone sticking out of there.

40 Q. What bone was that? A. Supposed to be a bone out of the center finger.

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Q. To which finger did that bone extend? A. To the middle finger.

Q. You haven't your middle finger on? A. No, sir.

Q. What was the condition there, where you say the bone protruded out? A. Pus formed underneath and it smelled. 10

Q. Agreeable or disagreeable? A. Disagreeable.

Q. It would smell? A. In warm weather, it was very disagreeable.

Q. Did you have an open sore? A. Yes, sir.

Q. With the bone through it? A. Yes, sir.

Q. Where did you go then; did you go for further treatment? A. I went to the doctor.

Q. What doctor? A. Dr. Manken. 20

Q. What did Dr. Manken do with reference to the second finger, opposite the bone that was protruding through the back of your hand? A. He kept bathing and wrapped it up and then I would go on home.

Q. And then what did he do? A. I would stay until it started to smell right bad again and then I would go back.

Q. Each time it got smelling too bad, you would go back to the doctor? A. Yes, sir.

Q. How long did that keep up? A. I guess it was two months. 30

Q. Did you eventually, as the result of any advice you received from the doctor, have anything further done with that hand? A. Yes, I asked him what he was going to do about it.

Mr. Hartpence: I object to the conversation.

Q. The question is, did you afterwards, as the result of any advice given to you by your doctor, 40

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have anything further done to your right hand?

A. No, sir.

Q. You didn't? Then you still have the three fingers on? A. He took them off later on.

10 Q. I am asking you whether as a result of his advice, you had something done to your hand?

A. Yes, sure.

Q. What did he do? A. Took that bone and middle finger out.

Q. You say "bone"; you mean the bone running down in the middle of your hand, and also the middle finger? A. Yes, sir.

20 Q. What was done with reference to these two fingers that remained, the fore finger and ring finger? A. He drew them together and sewed them up.

Q. And that is the condition in which you now find your hand? A. Yes, sir.

Q. Are you able to use that hand? A. No, sir.

Q. Were you, at the time this accident happened and before it, a right-handed or left-handed man? A. Right-handed man.

Q. Which hand did you use for writing? A. Right hand.

30 Q. In preference to the left, for general purposes, did you? A. Yes, sir.

Q. Have you been able to use your right hand for writing or work since that time? A. No, sir.

Q. Did you return to work after this accident at some time? A. No, sir.

Q. Never went back to the Railroad Company? A. No, sir.

Q. Or any Railroad Company? A. No, sir.

Q. Why not?

40

Mr. Hartpence: That is objected to.

The Witness: I had a suit against—

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Mr. Hartpence: I move to strike that out.

Mr. Winans: I will consent to that. I also withdraw the question.

Q. Why did you not return to the Pennsylvania Railroad Company?

10

Mr. Hartpence: I object to that as immaterial and irrelevant.

Mr. Winans: I withdraw it.

Q. After this accident, have you at any time been able to do railroad work? A. No.

Q. How long did you remain out of work following this accident? A. Sixteen months.

Q. During that time, did you do any work of any kind from which you could earn any money? A. No, sir.

20

Q. At the end of sixteen months, did you procure some other employment? A. Yes, sir.

Q. Was that light or heavy work? A. Light work.

Q. At the time your accident happened, what was your rate of pay from the Railroad Company? A. About \$75 or \$85 every two weeks.

Q. You mean twice a month, or every two weeks? A. Every fifteenth and thirtieth.

Q. Your wages were \$75 or \$85 twice a month, is that right? A. Yes, sir.

30

Q. Now, what have you been earning since you again went back to work, sixteen months after your accident? A. \$18 to 20 a week.

Q. What kind of work do you do? A. Checking dairy supplies.

Q. A milk establishment, you mean? A. Yes, sir.

Q. In doing that work, do you use your right hand or left hand? A. Left hand.

40

Dr. Harry J. Perlberg, direct.

DR. HARRY J. PERLBERG, sworn for the plaintiff:

Direct examination by Mr. Winans:

10 Q. You are a regularly licensed and practicing physician and surgeon, licensed to practice in the State of New Jersey? A. I am.

Q. You have practiced as such for how many years? A. Eighteen years.

Q. Doctor, are you a graduate of any medical institution? A. Long Island College Hospital, 1911.

Q. Have you had hospital experience? A. Yes, sir.

Q. In cases of traumatic injuries? A. Yes, sir.

20 Q. By that you mean injuries resulting from violence, do you not, doctor? A. Yes, sir.

Q. Are you also a roentgenologist? A. I am doing roentgenology exclusively, my work has been for ten years.

Q. And that is the taking of X-ray pictures is it not, doctor? A. Yes, sir.

Q. You not only take these pictures, but can you read them and demonstrate what appears upon them? A. Yes, sir.

30 Q. Are you able to diagnose conditions, abnormal conditions of the human body, especially where the bony structure is invoved, by the use of your roentgenology? A. Yes, sir.

Q. Did you, at my request, about two days ago, make a physical examination of the hand of Mr. Howard W. Steinert, the plaintiff in this case? A. I did.

Q. Did you take X-ray pictures at the same time? A. Yes, sir.

40 Q. Will you state, please, what condition you found with reference to his hands? A. I exam-

Dr. Harry J. Perlberg, direct.

ined the right hand and wrist and took the left for comparison. It shows, in the right hand, that there is an amputation of all the bones of the thumb and of the middle finger and of the three phalanges of the little finger. The phalanges are the three last bones, in the terminal portion of the little finger. There is also a posterior dislocation of the approximal bones of the index and the ring fingers, which are the only two remaining, and a forward displacement of some of the bones of the wrist, all of which I can demonstrate on the X-ray pictures which I took.

10

Q. Did you take the pictures yourself? A. I took them myself.

Q. Will you please demonstrate by reference to these, what the normal hand would consist of and what this abnormal right hand consists of?

20

Mr. Hartpence: I object to that as immaterial and incompetent.

The Court: I think undoubtedly this will show the conditions of this hand that are not possible to see by a view of the hand from the outside?

The Witness: Yes, your Honor.

Mr. Hartpence: I don't object to his saying what is there, but this demonstration. I don't think the Jury is entitled to a demonstration by the roentgenologist as regards the condition of the man's hand.

30

The Court: You just testified as to what you found, the conditions that existed there?

The Witness: I have just described the conditions.

The Court: All right. Then show on the X-ray where that is?

40

Dr. Harry J. Perlberg, direct.

The Witness: This is a view of the left hand, showing—

Mr. Hartpence: That is what I object to. Why should we have a demonstration of his left hand?

10 The Court: (After argument) I think he ought to testify to the condition he found there, where it is different from the normal. I will limit the doctor to that.

20 The Witness: This is an X-ray film of the right hand of Mr. H. W. Steinert, taken on March 11th, 1929 by myself. It shows an absence of all the bones of the thumb. That is on this side. An absence of all the bones, that is, it shows an absence of all the bones of the middle finger, which occupied this space here. The index finger is intact, and this is the ring finger, which is intact. This is all that remains of the little finger. The three phalanges, as I stated before, one, two, three, have been removed. These are the bones of the wrist,—there are eight bones in the wrist—have been all distorted. There is also a posterior dislocation of the approximal—by approximal, I mean in this
30 narrow shoulder of the meta carpal bones which are a formation on the palm part of the hand, as you will note here. This is under a considerable backward dislocation, causing a marked protrusion, which is noted on the man's hand. The other bone is also displaced somewhat backward. Normally, they should be in one continuous line, which could be shown on the other film, which I cannot produce. These bones are all out of
40 line. These are the bones in the wrist, of

Dr. Harry J. Perlberg, direct.

which there are eight and this will also cause a marked protrusion on the palm side of the hand, so that he has a lump, a lump forward in the palm. The bones are completely distorted, and there has been absorption of the lime salts in the bones, as compared with the normal. 10

Mr. Winans: Mr. Steinert, will you come up here please.

Q. Doctor, will you be good enough to indicate on this man's hand which of the fingers now remain? A. The thumb is off, as I have said. This is the index finger. The middle finger is out. This is the ring finger, and this is all that remains of the little finger. The posterior dislocation I spoke about is just this. There should be a straight line, as you see in the normal hand, and that has been displaced backward and is causing that protrusion. Due to the injury to the hand, the bones of the wrist, of which there are eight, have all been distorted and are out of normal place, causing protrusion forward of this bone, as you see here, and which is demonstrated on the X-ray film I showed, at this point. This is the bone that has protruded forward. 20 30

Q. Is this man's condition progressive or regenerative? A. I would regard it as progressive.

Q. By that you mean that it will, in reasonable certainty, get worse rather than better? A. I believe he will eventually lose all the remains of the hand.

Q. You adduce that from what facts? A. From the physical examination of his hand.

Q. And this absorption of the calcareous or lime salts in the bone, is that a factor in the eventual 40

Dr. Harry J. Perlberg, direct.

disappearance of bone? A. Not entirely. That would be evidence, due to the disuse of the hand.

Q. Doctor, has this man any percentage of the function remaining to him of that right hand? A. None.

10 Q. You mean there is 100 per cent. disability?
A. Yes, sir.

Q. Is that condition permanent, or will it ever clear up? A. It can't clear up.

20 Q. Doctor, assuming that Howard W. Steinert on or about the 17th day of April, 1926 sustained an accident in the course of which his right hand, the one you examined, encased in a glove while inserted in the knuckles of the coupling device of an engine and car, was crushed by metallic knuckles being forced together, so that his hand was held in the grip of those two knuckles, that he was dragged along, was caused to move while the train moved a distance of about six feet; that then by means of signals, the strain of the engine pin coupling was relieved, that a coupling was removed coupling these knuckles and his hand then removed from that position, that his hand at that time felt numb, rather than painful; that later on, when removed to the hospital, the glove was
30 removed by a physician, the thumb coming away with the glove, and the rest of the hand being mashed and distorted; can you state, and will you state, whether the injuries received under such circumstances would be a competent, producing cause of the condition that you found in his hand when you examined it, first about two days ago, and when you examined it again in the Court room just now? A. I would be justified in stating that
40 the injuries sustained at that time would be the cause of the condition as it exists today.

Dr. Harry J. Perlberg, cross.

Q. Is there any doubt about that? A. No doubt in my mind.

Q. In answering that, you are assuming the hypothesis that I stated concerning the nature of the injury, and so forth, are you not? A. Yes, sir.

Q. Do you see evidence in his hand of the middle finger and the bone reaching from the middle finger back towards the wrist having been extravasated, having been removed or cut out? A. I assume that it was cut out because it is not there, and there is nothing remaining to show it had been there. 10

Q. Did you find on the top of his right hand, a scar coincident with the absent bone opposite where his middle finger was? A. Yes, sir.

Q. Is that a laceration or surgical cut; are you able to tell from the appearance? A. Well, the evidence of the incision and the scar would make me feel that it was made surgically. 20

Cross examination by Mr. Hartpence:

Q. That is what you term, I think, in your surgical nomenclature, a post-operative scar? A. Yes, sir.

Q. That indicates some surgical operation was performed there? A. Yes, sir. 30

Q. Just what was done you of course cannot say? A. Not with definite certainty, no.

Q. I take it that you are in the same position, are you not, when you say that the various circumstances recited by Mr. Winans in his hypothetical question could have been the competent producing cause of the condition in which you eventually found Mr. Steinert's right hand, that is, that that could be the cause of such a condition as you 40

Howard William Steinert, direct.

found? A. Taking the facts as stated, that is my deduction, as a result of those facts.

Q. But whether it is the actual result of those facts, you have no way of knowing? A. I have no personal knowledge of course.

10 Q. You think there is no percentage of function at all left in the right hand? A. No, sir.

Q. It cannot be used for any purpose at all? A. I think it is in his way, what is left. I think he would be better off without what is left.

Q. To lose the hand at the wrist? A. At the wrist, yes, sir.

Mr. Winans: I offer the X-ray of the right hand.

20 (Accepted and marked as Plaintiff's Exhibit P-1 of this date.)

HOWARD W. STEINERT, recalled:

Direct examination by Mr. Winans (resumed):

30 Q. Mr. Steinert, what is the condition of your right hand now with reference to numbness or sensibility, or pain or absence from pain? A. At just odd times, it aches; when it gets real cold, and especially warm weather. I get pains here, this kind of is coming out of the skin. I can't put any pressure on that, it aches me too bad.

Q. Is that sensitive to slight pressure or does it require heavy pressure? A. Slight pressure, not even a glove.

40 Q. You can't wear a glove over it? A. No, bed covers either. I have to keep my arm outside of the cover unless I lay my hand sideways, so that nothing touches the bone.

Q. What effect does the fact of having clothing

Howard William Steinert, cross.

rest on the bone of the hand have? A. A pain, ache.

Q. Is that a big ache or pain or a little pain?

A. It is very annoying; it is not a very big pain there.

Q. Is it enough to keep you awake? A. If I lay 10
on it, I have to wake up.

Q. Is there any other sensitive place in the hand?

A. The bottom; I can't rest that hand on the table properly, on account of the weight from the wrist, when I put it down on the table.

Q. What is the result when you raise your hand, so that the protruding bone where the joint of the thumb used to be, what does it cause when it comes in contact or rest on something? A. It 20
aches me.

Mr. Winans: I want to offer the left-hand X-ray plate.

Mr. Hartpence: I object.

The Court: Sustained.

Mr. Winans: I will have it marked for identification.

(Accepted and marked as P-2 for Identification of this date.)

Cross examination by Mr. Hartpence: 30

Q. You were the head brakeman, as I understand, of the crew that night? A. Yes, sir.

Q. What does that mean, head brakeman? A. The man that takes charge of the engine around the yard, back and forth, where the conductor gave orders to take it.

Q. When the conductor is not there, you, acting under his orders, were in charge of the engine and crew, were you not? A. Yes, sir. 40

Howard William Steinert, cross.

Q. So that when Mr. Kerr, the conductor, left, went over to the yard master's office, after having directed you to go over to the other line to pick up the cars, you were really in charge of the movement then, weren't you, yourself? A. I was not
10 in charge. I was not running the engine. I am only in charge of giving the signal, not to run the engine.

Q. You were in charge of the crew, weren't you, when Mr. Kerr left? A. No, I am never in charge of it. The conductor is in charge of the crew. I am only as brakeman of the crew.

Q. I guess you misunderstand my question. I asked you, if the conductor left and went away, and you remained in the crew, whether you, as
20 head brakeman, then were in charge of the crew. I understood you to say that you were? A. Well, if he gives me orders before he leaves where to go, then I give the signal to move in either direction. I presume by that, you mean that I am in charge.

Q. That is what I mean. A. Yes, sir.

Q. If you don't want the engine to move, there isn't any other member of the crew that could move it, move it under those circumstances? A.
30 Oh, yes, sure.

Q. Could the rear brakeman overrule you and give a signal to the fireman to go ahead, if you had given a signal that he should not? A. I don't think a man would do a thing like that.

Q. Could he? A. I don't know whether he would or not. That is something I can't say. I am not in that man's mind.

40 The Court: It isn't whether he would; could he?

Howard William Steinert, cross.

The Witness: He possibly could, yes, sure.

Q. That is, having been left in charge of the crew by the conductor, as head brakeman, you gave a signal to the man in the engine to go back, and your rear brakeman gave a signal to go forward, your rear brakeman could overrule your signal to the engine man and he would obey him and not obey you?

10

Mr. Winans: I think that is calling for a conclusion and highly argumentative.

The Court: What the witness should tell is whether he had any authority to give a signal that would be binding on another member of the crew.

20

Mr. Winans: That is not the question asked.

Mr. Hartpence: I withdraw it.

Q. After Mr. Kerr left and went over to the yard master's office, Mr. Steinert, as I understand it, you had been instructed to make the movement, to go over and get the other cars? A. Yes, sir.

Q. You say the rear brakeman's name was Redding? A. Yes, sir.

30

Q. Did the rear brakeman, Mr. Redding, have the power or authority to overrule a signal which you gave to the man on the engine to go one way, so that he could compel him to go the other; or were you the one that had the authority and the power? A. I don't think that he had any more power than I had. We were both brakemen. He had no more power to move the engine than I did, unless he got instructions.

Q. You had the instructions that night? A. Yes, sir.

40

Howard William Steinert, cross.

Q. You were in charge of that movement? A. At the time, yes, sir.

Q. About what time was it that that took place?

A. I would say around 2 o'clock A. M.

10 Q. And whatever signals that you men did give to the man in the engine were given how? A. By a lamp.

Q. Each had a lighted lamp? A. Yes, sir.

Q. You have ways of giving the signal one way or another, which mean going forward or stop?

A. Yes, sir.

Q. And as I recall your testimony, the pilot of the engine was pointed toward the freight cars to which it had been coupled? A. Yes, sir.

20 Q. And in order to go over to this High line to get the other cars that Mr. Kerr instructed you to get, your engine, after uncoupling from the ones you had just brought over, would have to move backward? A. Yes, sir.

Q. And the man in the cab would get what kind of signal from you, or your fellow brakeman to go back; what would be the nature of it? A. Half circle backward motion.

30 Q. By throwing the lantern around, backward motion? A. Yes, sir.

Q. What would be the signal you would give him to go forward? A. Straight up and down.

Q. That would mean go forward? A. Yes, sir.

Q. What would be the signal for the stopping of the engine? A. Straight across, right in front of your body.

Q. Holding the lantern by the handle this way (indicating)? A. Yes, hanging it down lengthways, right across the body, right across the knees.

40 Q. As I recall your testimony, Mr. Kerr, the conductor and you, the head brakeman, Mr. Redding

Howard William Steinert, cross.

the rear brakemen, were all on the right-hand side of the engine, that is, the engineer's side of the engine as the engine and cars stood still there, after they had come to a stop, and Mr. Redding got off the cars, walked along the right-hand side of the cars, back to where you were? A. He was not on the front steps with me. He was on top of the cars. 10

Q. After he got off the top of the cars, got down to the ground, he walked over to the front on the right-hand side? A. Yes, sir.

Q. You were on the step toward the right-hand side? A. Yes, sir.

Q. And Mr. Kerr was also on the right-hand side, wasn't he? A. Yes, sir.

Q. And he got off the step on the right-hand side? A. Yes, sir. 20

Q. And walked over at this angle you speak of, about 45 degrees, towards the yard master's office on the right-hand side? A. Well, he got off on the right-hand side. I didn't say the conductor went on the right-hand side to the yard master's office. I say he walked at a 45 degree angle to the yard master's office.

Q. Was that still on the right-hand side of the engine? A. Yes, sir. 30

Q. You said the fireman was on the wheel, running the engine? A. Yes, sir.

Q. On the engineer's side of the engine? A. Yes, sir.

Q. So all this took place, you have told us, all this really took place on the same side of the engine, that is, on the engine man's side, the side of the fireman? A. Yes, sir.

Q. What did Mr. Kerr say when he got down off the engine and walked over to the yard master's 40

Howard William Steinert, cross.

office? A. He told me to go back over to the High line and get the rest of these cars.

Q. Was that in a loud voice or an ordinary voice, or low voice, or how? A. Well, ordinary.

10 Q. Were there any other engines drilling cars around right near where you were at that time?

A. At that time I hadn't noticed any; I didn't hear any.

Q. And when he said that to you, the engine and the cars there that you were on were at a standstill? A. Yes, sir.

Q. So that there was no noise going on around that would make him talk above an ordinary tone of voice? A. No, sir.

20 Q. What kind of night was it, stormy or clear? A. Clear night.

Q. Cold or not? A. Damp; cold damp. It wasn't very warm.

Q. The latter part of April? A. 17th of April, yes, sir.

Q. I have forgotten whether you said the cab windows were closed or open? A. I heard that cab window closed after I gave him the signal to back up.

30 Q. Now, what kind of signal did you give him? A. Back, forward motion signal.

Q. Standing on the right-hand side of the locomotive, on the step? A. I was on the ground when I gave him the signal.

Q. You were on the ground when you gave that signal to him, standing out on the ground; at that time, had Mr. Kerr got out of sight? A. I never could say that exactly. It wasn't very far, only fifteen to 20 feet. I suppose he did.

40 Q. That is to the yard master's office? A. Yes, sir.

Howard William Steinert, cross.

Q. When you gave that signal to back up, about how far away from the engine were you? A. The distance from the cab to the front of the engine?

Q. Now, how far out from the side of the engine, how far away from the side of the engine? A. Just about—I moved away far enough to grab the hand rail and go with him. 10

Q. You expected to step on that step and go with him? A. And go with him, yes, sir.

Q. What about Mr. Redding, had he gotten up there? A. I didn't see Mr. Redding. He must have been over No. 1 High line, cutting across. I didn't see him at all.

Q. You didn't see him at all? A. No, sir; I was the only one there.

Q. When you gave that signal to back up, the engine didn't move, did it? A. No, sir. 20

Q. Well, I understood you to say that after you gave that signal to back up, Redding came along? A. He did.

Q. You don't know where he came from? A. He came from the hind end of these cars we just put in there.

Q. Do you know whether he was expecting also to ride around on the step of the engine? A. I don't know whether he was going to ride with me or not. 30

Q. You don't know about that? A. No, sir.

Q. If he had not ridden with you on the engine, how would he have gotten to the High line? A. He could go across, straight, across three tracks and gotten to the High line.

Q. You could have done the same thing? A. Absolutely.

Q. Your fireman knew where to go? A. Yes, sir. 40

Q. Because, as I understood you on your direct

Howard William Steinert, cross.

examination, Mr. Kerr had given these instructions in a way the fireman could hear as well as you? A. Yes, or had the rear brakeman tell him, when he came up with his lantern and said why didn't he move, go over and get the rest of these cars on the High line.

10

Q. That was after you had given your signal to back? A. Yes, sir.

Q. Had Redding walked up to where you were? A. Yes, sir.

Q. Walked up to the cab and asked "Why don't you move your engine back and go up to the High line"? A. Yes, sir.

Q. Were you standing on the ground? A. I was on the front step of the engine then.

20

Q. When Redding said that? A. Yes, I was, with my arms resting on the hand rail. My lamp setting on the bulk head.

(Recess to 2 P. M.)

(After Recess 2 p. m.)

HOWARD W. STEINERT, resumed the stand:

30

Cross examination by Mr. Hartpence (continued):

Q. Then as I understand, Mr. Steinert, after you had given the signal to go back and the engine had not moved, then Redding came along and gave the signal, went up and told the fireman to go back and he did not move; you did something else after that, didn't you? A. No, sir; I waited a few minutes.

40

Q. Then what did you do? A. After I seen he had not responded to the last bang on the cab, by the flagman, or Mr. Redding, I went back and proceeded to open that knuckle.

Howard William Steinert, cross.

Q. You got on the engine to do that? A. No, sir; stepped off the engine.

Q. As I understand, you were standing on the ground when you gave the signal to the fireman to go back? A. Yes, sir.

Q. When Redding came along, where were you? 10
A. Standing on the front steps of the locomotive.

Q. You had already stepped on the engine? A. Yes, sir.

Q. How far away did you say the knuckle was from the front part of the engine, as they stood there? A. Three or four feet.

Q. How did you come to go in there and proceed to open that knuckle, after you had given the signal to go back? A. After I had seen the man had not made any attempt to move, I just said to myself, "Well, I am not going to stand here all alone; I will go open that knuckle and go inside the yard master's office where the rest of them are, somewhere around the grounds." I stepped off and tried to open the knuckle. I had difficulty in raising the pin. After I got the knuckle open, it would not drop down as it should, in its proper position, and when the next car came it would close up that knuckle. Well, I was proceeding with the pin, the engine come and coupled it to me. 20 30

Q. Am I right in my recollection that when you first went to High line to get these cars, you made a coupling between the engine and the car? A. Yes, sir.

Q. Well, you didn't have any difficulty in making that coupling then? A. No, the knuckle on the cars was closed and the one on the engine was open.

Q. Who uncoupled the car from the engine when you got it back on No. 9 track, was it? A. Someone from 9 or 10. 40

Howard William Steinert, cross.

Q. Who uncoupled it? A. I did by pulling the pin on the engine knuckle.

Q. Could you use, on the freight car, that lever on the outside? A. Yes, sir.

10 Q. Could you use that in coupling or uncoupling the engine? A. Not in the way I was facing. It was on my wrong side. I could not reach over to the knuckles to do it, so I had to pull the pin on the locomotive, which left the knuckle on the car closed and the one on the locomotive open and the cars separated.

20 Q. After the cars separated from the locomotive and this space of several feet intervened, and as you stood on the front of the locomotive step there looking toward the car, on which side of you was the lever that would operate it? A. On the box car or on the end—

Q. On the end? A. That was the left-hand side.

Q. You were on the right-hand side of the engine? A. Yes, sir.

30 Q. There was nothing to prevent you from going around through the opening between the box car, there was nothing to prevent you going through? A. Yes, the knuckles together, I could not go between them.

Q. What two? A. The one on the box car and the one on the engine.

Q. I thought you said they were two or three feet apart? A. You mean after they were apart?

40 Q. I don't want to confuse you. I just want to get that clear. After the engine and the cars had been uncoupled and you said there was several feet intervened between them, and you gave your signal to go back and the fireman did not pay any attention to it, you got tired waiting and you made up your mind to do something else? A. Yes, sir.

Howard William Steinert, cross.

Q. Couldn't you have walked across over to where the lever was and raised that lever? A. Yes, sir.

Q. And that is what the lever is there for? A. Yes, sir.

Q. It is there for the purpose of making it unnecessary for you or any other brakeman to go in between the cars, isn't it? A. Yes, sir. 10

Mr. Winans: I object to asking the witness what it is there for. I think that is a conclusion on his part.

Mr. Hartpence: I will put it in this form.

Q. Do you or do you not know whether the lever is put there on the outside for the very purpose of making it unnecessary for the brakeman to go in between the cars, in order to couple them up and uncouple them? 20

Mr. Winans: I object to that as assuming facts not proved and not true. There is no evidence that the cutting lever will open that knuckle at all. It simply works on the pin.

The Court (after argument): If that is so, the witness will know that as well as counsel. The question is whether or not that is the purpose of it being there, whether he knows. I will let him answer the question, that one. 30

Q. (Previous question read as follows: "Do you or do you not know whether the lever is put there on the outside for the very purpose of making it unnecessary for the brakeman to go in between the cars, in order to couple them up and uncouple them?") Or to lift the pin or open it up? A. Well, if you want to hear, the answer to this is this: if 40

Howard William Steinert, cross.

the lever had been on the right-hand side of the car, where it should have been, there is no occasion for a man to walk between the cars to get on the left-hand side of the car to pull the pin; so I didn't walk between the cars. I stood on the same side
10 and raised the pin with the hand myself, the same as I pulled the pin on the locomotive. I knew it was dangerous to walk between them cars. I stood on my right side, which I could perform the duties as well, by lifting that pin with the hand from the knuckle, as I could with the lever, because the lever was on the opposite side. It would take me to proceed to walk from there, which is dangerous, which I didn't do—I stayed on my proper side.

Q. Now, if you will answer my question whether
20 or not you knew an opening lever is put there for the purpose of operating the knuckle, raising the pin, opening the knuckle and coupling and uncoupling, so that one who is doing that does not have to go between the cars; you know what it is put there for? A. Yes, sir.

Q. Now, as I understand you, you were standing on the step from the engine, on the right-hand side?
A. Yes, sir.

Q. When you made up your mind you were going to open the knuckle? A. Yes, sir.
30

Q. You stepped down off the step on to the ground on the right-hand side? A. Yes, sir.

Q. And then you went in, or reached in and tried to lift the pin with your hand? A. Yes, sir.

Q. What was to prevent you, when you were standing on the step on the right-hand side of the engine, from just stepping over to the left-hand side of the engine, stepping off to where the lever was, without going through the cars at all? A.
40 They were too far apart. I could not reach the

Howard William Steinert, cross.

lever there, to put me in a safe position to keep the knuckle from hitting me, or anything else, to reach the hand of the lever.

Q. Here is what I am trying to get at. This step you were standing on, that did not run all the way across the engine? A. No, it had the knuckle in between them, two separate sides on it. 10

Q. Couldn't you step from one side to another? A. Not unless I straddled the knuckle.

Q. You could have done that? A. Suppose he had moved, he would have cut me in half.

Q. Was there any danger of his moving? A. How could I know what the man was going to do?

Q. I understood you to say that it was dangerous to walk in between the engine and the cars? A. Certainly I did. That is the reason I didn't walk between them. I stood on my proper side to open that knuckle. 20

Q. Why was it dangerous? A. Suppose he moved as I done that. If he took his right signal and didn't move, I would still have two hands.

Q. You realized there was danger in going in there? A. I was already in there. I didn't go between them. I stood on the side I should, which was safety to me, in regards to them coupling up, they would not hurt my body in any way unless my hands were caught in there. 30

Q. There was just as much danger to your hand in putting it in the knuckle as there would be to your body if your body had been in there? A. Absolutely sure.

Q. And yet you did that? A. Well, I had to put my hands there to open it.

Q. Why did you have to open it? A. That was my duty. 40

Howard William Steinert, cross.

Q. After you had given the signal to back up and expected to go over to the High line? A. The man had not responded to the call in ten minutes. I thought he never was going to move.

Q. In ten minutes? A. Yes, sir.

10 Q. You had been instructed by Mr. Kerr to go over to the High line? A. Yes, sure I was.

Q. You had not been instructed by Mr. Kerr to open the knuckle? A. I didn't need any instructions. That is the regulation for the brakeman, not only the front one, but the rear one, or the middle one. That is the last car in should be opened in order to couple it up.

20 Q. You didn't intend to do that when you gave your signal? A. No.

Q. You had not intended to open the knuckle when you gave your signal to go back? A. No, sir; I looked for the rear brakeman to do that.

30 Q. It was after you gave your signal to go back, at that time following the instructions of your conductor, and because he didn't go back that you made up your mind to go in and fix it up? A. After ten minutes had expired and he had not moved, yes, sir. Then I thought the man was never going to move.

Q. Let me ask you this: after ten minutes had gone by and the fireman didn't move his engine to go back, did you go to the cab to see why he didn't move it? A. No.

Q. You had given him the signal to go back, hadn't you? A. Yes, sir.

40 Q. After ten minutes had expired and he did not move, why didn't you go back and see why he didn't move? A. For the simple reason, he is an employee, same as me. If I am supposed to be on the job, why shouldn't he? Why should I take a

Howard William Steinert, cross.

special purpose going up to the cab and beg him to go back? That was that man's duty to go back. He got the signal. That was sufficient in order for him to move. He didn't move. Mostly any man would have done the same thing I had done after ten minutes had expired, go up and open that knuckle, or leave the engine and cars stand there or leave the knuckle closed. When Mr. Redding had passed me, I knew he was not going to do it, so I done it myself, and he pulls the throttle and bangs into me, and then this whole trouble got me. 10

Q. Did you see him pull the throttle? A. He could not move the engine unless he did.

Q. Couldn't the engine have drifted down? A. I would not say whether it could or not. 20

Q. It was on a slight incline there, wasn't it? A. I can't say that either.

Q. How far away from the engine was the yard master's office? A. I would say 25 feet.

Q. And during that ten minutes Mr. Kerr did not come back to see why the engine wasn't moving, did he? A. No, sir. Nobody was there when I got caught at all, but myself. I was the only man there. If I didn't holler, he would have pulled me over. He knew he made a wrong move and reversed his engine and backed with me, not knowing I was in there; if it had not been Mr. Kerr hollered at him, he probably would have dragged my limbs off my body. 30

Q. He didn't know you were in there? A. I don't think he did. If he did, I don't think the man would set there and smash me up.

Q. Let me ask you along this line, Mr. Steinert. Ten minutes having elapsed after you had given the order, the signal, to go back, the fireman not 40

Howard William Steinert, cross.

moving the engine, and the order having been by Mr. Kerr to go over to the High line and get cars, which the fireman heard as well as you, you went in there to open that knuckle and put your hand in there, did you tell the fireman you were going to do it? A. No, sir.

Q. So he didn't know you were engaged in opening that knuckle, and that your hand was in there? A. No, sir; he didn't know it. If he did, I said he would not have coupled up to me. He had no business moving the engine without giving a signal.

Q. Now, what was the first thing that brought to your attention the fact that the engine was moving towards you, when it caught your hand in the knuckle. What first caused you to realize that the engine was coming forward, or had come forward?

A. It came too quick on me to realize anything. I tried to yank my hand, I did get part of it out. If he had got me right, he would have caught on up to here (indicating). As it was, he got me below the wrist. I started to pull out, but it closed too quick on me.

Q. When the brakes are released, there is an escape of air? A. Yes, sir.

Q. That makes a hissing sound? A. Yes, sir.

Q. Didn't you hear the air? A. No, sir.

Q. That always precedes the movement of the engine when it is at a standstill? A. He could have had the air released before that.

Q. You didn't hear the air released? A. No, sir. In other words, to tell you the truth, I didn't pay any attention to that part of it.

Q. What I was going to say, you have spoken about their ringing a bell and blowing a whistle before they move an engine which is at a standstill. A man who works around engines and in

Howard William Steinert, cross.

the yards and in the movement of trains also knows of the hissing sound when the air is released, that that is an indication that the train is about to move, doesn't he? A. Not always. They could be testing the air lines on the engine, or the air brake on the engine. The engine does not move—it makes a hissing noise. 10

Mr. Winans: I believe it is in evidence that the air was not on, the brakes only being used.

Mr. Hartpence: The air is in the locomotive.

Q. There is a brake, air, to the wheels of the locomotive? A. Yes, sir.

Q. In addition to the accelerator that runs back in the train? A. Yes, sir. 20

Q. When you gave your signal to go back, if you had heard the air hissing out, that would be an indication to you that the locomotive was about to move? A. As I said, I paid no attention to that. I never heard; I can't say I did and I can't say I didn't.

Q. After the accident, Mr. Steinert, while you were in the hospital there, you made a statement, didn't you of how the accident took place, to the representative of your claim master? A. Yes, sir. 30

Q. Do you remember who that was? A. Mr. Waller.

Q. Mr. Waller? A. Yes, sir.

Q. He is from the claim department? A. That is the only man that got a statement from me.

Q. Didn't someone from your train master go to see you? A. No, sir; oh, yes, that is right, a young fellow came to see me.

Q. Do you remember his name? A. No, sir; never seen the gentleman before. 40

Howard William Steinert, cross.

Q. That was before Mr. Waller went to see you?
A. I believe it was.

Q. Now, do you remember whether you signed the statement you made or whether you didn't?
A. I don't think I did.

10 Q. Now, just look at this paper I show you and tell whether or not the signature down there, H. W. Steinert, is your signature or not? A. This is how the accident happened? I don't know whether I did or not, but that looks like my handwriting.

Mr. Hartpence: I will have it marked for identification.

(Marked D-1 for Identification of this date.)

20 Q. Let me refresh your recollection just a little bit about that. I will ask you whether you remember saying to that gentlemen:—

“Just as I was opening the knuckle, but before I had a chance to move my hand, I heard the air release and the engine came forward and coupled to the cars, catching my hand”?

30 A. As I say, I might have said that. I don't know whether I did hear it or didn't hear it. If it is in that statement, at that time I was in a condition I would probably tell anything. I was in a condition of pain, Dr. Manken—

Q. This is dated April 26th; that was about ten days after the accident? A. I was in bad shape at that time.

Mr. Winans: Nine days.

40 The Witness: Anything I say I won't deny.

Howard William Steinert, cross.

Mr. Winans: If counsel is going to use that, I propose he put it in evidence.

Mr. Hartpence: I don't propose to at this time.

Mr. Winans: Then I will take the liberty of offering it, if that is the case.

10

(D-1 for Identification now marked in evidence as Plaintiff's Exhibit P-3.)

Q. I will ask you if you recall stating to that gentleman:—

"Conductor Kerr then gave a back-up signal, but Fireman failed to take it at once, and waited about two minutes. About that time the flagman had come back from the rear end of the cars we had just pushed in, and he too gave a back-up signal. About a minute and a half expired, and as the engine had not moved, Conductor Kerr told me to come over on No. 1 track over the hill, and he started to get off the engine step to the ground"

20

Do you remember saying that? A. He told me in the first place to go over to No. 1. I don't know how that got in there.

30

Q. You thought it was longer than a minute and a half? A. Yes, sure; the man walked the length of five cars after putting the brakes on and then had not moved, and then after he gave the signal he didn't move at all. Ten minutes, giving the Railroad Company the benefit of the doubt.

Q. You got a little out of patience then, with the situation? A. Absolutely; any man would. When you stand out there and stand around freezing yourself to death for the simple reason some man isn't working on the job.

40

Howard William Steinert, cross.

Q. This was on the 17th April, I understand you to say it was a clear night, not cold? A. Damp. It was in April.

10 Q. You were in charge of the crew then. Would you just let your fireman get away with that and not obey orders when you gave them to him, go off and do something else, because you got out of patience about it, or would you go back and make him do it? A. I can't make no man do nothing.

Q. I just want to ask you one or two questions about another paper, Mr. Steinert. I show you this other paper, and call your attention to the signature here, H. W. Steinert; that is your signature isn't it? A. Never wrote that one.

20 Mr. Winans: May that be marked for identification?

Mr. Hartpence: I will have it marked.

(Marked D-2 for Identification of this date.)

Mr. Winans: May that be impounded with the Clerk.

Mr. Hartpence: Why should it be necessary.

30 Mr. Winans: Because I want to have an expert examine it.

Mr. Hartpence: We haven't marked it in evidence. He says he didn't sign it.

Mr. Winans: Then I withdraw my request until it is offered.

Q. You were paid \$1,800 by the Railroad Co. in settlement of this case? A. I was paid \$1,800, yes, sir.

40 Q. In settlement of your claim for the injuries you sustained? A. I didn't figure it was a settlement.

Howard William Steinert, cross.

Q. You didn't what? A. I had no intention that was a full settlement.

Q. What was it ever paid to you for? A. I thought that was just part, like salary, some parts of my salary, figuring the length of time I would be out of work.

10

Q. Who told you anything like that? A. Nobody told me anything. That's just what I was figuring on.

Q. Who actually paid it to you, Mr. Steinert? A. Pennsylvania Railroad Co.

Q. Where? A. Calvert Station, Baltimore.

Q. By whom? A. One of the clerks in the office.

Q. Claim Master's office? A. No, sir; Claim Agent's office.

Q. Mr. Waller's office? A. Yes, sir.

20

Q. How did you come to go there to get it; how did you know it was there? A. I was told to go get it.

Q. By whom? A. Mr. Waller.

Q. He was the claim agent? A. Yes, sir.

Q. What else did he say to you about it when he told you to go there and get it? A. We had a little talk over the matter. I told him I would like to see the superintendent.

Q. Where were you when you had this little talk? A. Washington.

30

Mr. Winans: Has the witness offered the whole conversation? Have you told the whole conversation?

The Witness: No, I haven't finished the conversation. Do you want me to proceed with it?

Q. Where did that conversation take place with Mr. Waller? A. Union Station, Washington, D. C.

40

Howard William Steinert, cross.

Q. Didn't he have a conversation with you while you were still in the hospital? A. Yes, sir.

Q. About paying you the \$1,800? A. I don't think he said anything about \$1,800 at that time. We were just talking about the money that he would try to get for me, or something of that description.

Q. Didn't you tell him that you wanted to talk to your wife about it before you decided to accept it? A. I wanted to tell my wife about it?

Q. Didn't you tell him you wanted to talk to your wife about it before you accepted it, the last day you were in the hospital? A. The last day I was in the hospital?

Q. I mean the first time you were there and the last day at that time, just before you went home, didn't you then tell Mr. Waller you wanted to talk to your wife about it before you accepted it? A. No, sir.

Q. And when you went to his office to get the check, you say some clerk in the office paid it to you? A. Yes, there was two of them in the office at the time.

Q. Did you not sign a paper at that time? A. I did, sir, yes, sir.

Q. What was the paper that you signed? A. A blank piece of paper about the size or a little larger than a calling card.

Q. That is all you signed? A. Yes, sir.

Q. Didn't you at that time, when you accepted the check of \$1,800 in Mr. Waller's office, sign this paper which I again show you, which was marked D-2 for Identification, "Howard W. Steinert"? A. No, sir.

Q. Didn't you write on there, "I have read— A. I wrote that on that little piece of paper.

Howard William Steinert, cross.

Q. "I have read and fully understand this release"; didn't you write that on there? A. No, sir; I never seen one of them things.

Q. You did write "I have read and fully understand" on this paper, on the little card? A. On that piece of paper.

10

Q. And then you signed that? A. I signed that piece of paper; not that.

Q. Was the piece of paper you did sign white paper? A. Yes, sir, plain white paper. I picked it up and looked on both sides.

Q. There was nothing on either side of it? A. No, sir.

Q. You just signed a blank paper? A. Yes, sir.

Q. How did you come to write on it, "I have read—" A. The man told me to put that on there.

20

Q. Who told you? A. The clerk in the office that was giving me the check.

Q. Told you to write that on it? A. Yes; first asked me, "Could I write with my left hand." I said, "I will try." He said, "Put your name on this," and he handed me that piece of paper. Before I started to write my name, he said to me, "Put on there—" what you have got on top there, "I fully understand this," whatever it is.

30

Q. And that is the way you came to do it? A. Yes; he handed me the check and I went out of the office. I was only in about three minutes from the time I went in.

Q. You cashed that check and got the money on it? A. Yes, sir.

Q. Do you know Mr. Dicus, one of the brakemen in the yard? A. No, sir.

Q. After you were hurt, were you taken to the hospital? A. Yes, sir.

40

Q. How? A. In the engineer's automobile.

Howard William Steinert, redirect.

Q. Who else was there in the automobile? A. Some new brakeman I had never seen but maybe once or twice. I don't know the gentleman's name.

Q. There was a brakeman in the car with you?

A. Yes, he was sitting in back with me.

10 Q. You talked to him a little bit on the way to the hospital? A. Not that I recollect.

Q. You don't recollect? A. I might have talked about something. I don't recollect what I talked about.

Q. Don't you remember telling him that the accident which you just sustained to your hand was your own fault? A. No, sir.

20 Q. You didn't say that? A. No; no man would stick his hand in a coupler to have it smashed off intentionally.

Q. Now, my question didn't say that you said you did it intentionally. I say, didn't you tell that brakeman that the accident to your hand was caused by your own fault? A. No, sir.

Redirect examination by Mr. Winans:

30 Q. Mr. Steinert, what is the cutting lever? A. That is a lever that goes across the front part of a box car, where the knuckle is and then there is another lever that projects out and connects up to the pin.

Q. You mean it is a rod that runs crosswise of the car? A. Yes, sir.

Q. Right alongside the end sill of the car? A. Yes, sir.

Q. Is that a sort of ball crank, a crank in shape? A. Yes, sir.

40 Q. And has a handle on the outer end, out on the side of the car? A. Yes, sir.

Q. And these are of two devices, one rocks up and down and the other rotates? A. Yes, sir.

Howard William Steinert, redirect.

Q. Do you remember which kind this was on the car you were hurt on? A. I believe it was straight up and down and frogged out over the knuckle.

Q. That is one that is pivoting at the same point between the knuckle and the outside of the car and works in a receptacle, up and down motion?

10

A. Yes, it works in some kind of thing, holds the rod, you know.

Q. Is it one of the kind that turns around? A. No, one that you lift.

Q. Then at the knuckle that rod extends above the sill of the car, doesn't it? A. Yes, sir.

Q. At that point there is a little chain that attaches to the top of the coupling pin? A. Yes, sir.

20

Q. When you move a lever, the effect is to lift that pin, isn't it? A. Absolutely.

Q. Does it have any other effect besides lifting the pin? A. It will open the knuckle to a certain extent, though you have to push it over all the rest by your hand, unless you give a good yank.

Q. Does that cutting lever in any way fasten on to the knuckle itself? A. Yes, sir.

Q. Does it fasten to the knuckle or to the pin? A. To the pin.

30

Q. Does it fasten to the knuckle then, leaving the pin out? A. No, sir; just to the pin.

Q. Now, you have testified that you had a conversation with some member or members of the claim department of the Pennsylvania Railroad previous to the time when they gave you that check for \$1,800. Have you told everything that was said between you and this representative of the claim department. A. No, sir.

Q. Was there anything said about interstate

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Bernard V. Kerr, direct.

commerce? A. I don't know nothing about interstate commerce.

Q. I say did the claim representative say anything to you about interstate commerce? A. He was talking on that subject.

10 Q. What did he say? A. He said, in the yard—

Mr. Winans: I think I am anticipating; I withdraw the question.

Plaintiff rests.

BERNARD V. KERR, sworn for the defendant:

Direct examination by Mr. Hartpence:

20 Q. Where do you reside, Mr. Kerr? A. 1463 Monroe N. W., Washington, D. C.

Q. What is your occupation? A. Conductor, Washington yards.

Q. Where do you work? A. Pennsylvania Railroad.

Q. What part of the road? A. Jersey yards.

Q. Where is that? A. All around Washington yards.

30 Q. How long have you worked there, Mr. Kerr? A. Since 1913, March 28th.

Q. What has been your work, what kind of work have you done? A. Well, I started as brakeman and worked up for conductor.

Q. Freight? A. Yes, sir.

Q. Always in the yard, or sometimes out on the road? A. When I was extra I was on the road, road and yard both; when I was conductor, in the yard generally.

40 Q. Where have you spent most of your time, on the road or in the yard? A. Most of the time, the yard.

Bernard V. Kerr, direct.

Q. You know Mr. Steinert, the plaintiff in this case? A. Yes, sir.

Q. How long have you known him? A. I know him three or four years he was working around.

Q. Do you remember when he was hurt? A. Yes, sir.

10

Q. What was his job then? A. Freight brakeman.

Q. He was in your crew that night, wasn't he? A. Yes, sir.

Q. You were the conductor? A. Yes, sir.

Q. Did you see him get hurt? A. No, sir, I didn't see him, but we put one car in No. 9 and coupled to another car there.

Q. That was before he was hurt? A. Before he was hurt. That was his first four or five cars we pulled over the hill; we shifted these cars. We had one more car backed in No. 9. After shoving the rest, I made a coupling in there to another car and I says to him, I says, "Let the engine back one over the hill, we will get some more cars and pull them over and shove them."

20

Q. When you said that, where were you standing; where was he standing with relation to the engine itself and the cars that had been coupled up? A. We were both standing in on the engine on the side of the step, were standing on the step in front of the engine.

30

Q. Had the cars been coupled to the engine? A. I told him to go down one over—

Q. When you were talking to him, had the cars you had taken in on No. 9, had they been coupled or uncoupled from your engine? A. Not at that time. I told him, I says, "Now, bring the engine down over the hill and get the rest of the cars." Then I can't say whether he pulled the pin or I

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Bernard V. Kerr, direct.

10 pulled the pin. I said, "Let the engine go down over the hill and get the rest of these cars." I walked away. I was going to walk across. As a rule we do that, being the engine has to go up, probably a couple of hundred yards and get around to go up around that switch box. The switchman had a hand switch up there, which they have now. I told him to go down and get these cars and I started to walk away to go across. I heard him holler and I wondered what was the reason, I didn't know if he was singing. Lots of times a fellow will be singing.

Q. What did you do? A. I shut off right away.

Q. Where? A. Shut the engine man off, whoever was running the engine.

20 Q. What did you do to shut him off? A. Sure I shut him off.

Q. What did you do? A. Shut him off with my lamp.

30 Q. What did you do, give a signal? A. Yes, and went back there. I found him hanging in the coupling. I went to the fireman, the fireman was running the engine. I went to him, "Now, we got a man's hand caught between these two knuckles, so slack." He can't get his hand out unless he gets a little slack, because it had trapped it in there. I says, "Give me a little slack." As I got a little slack, then I pulled the pin myself and got him out. I asked him, "Do you feel bad, do you want to sit down?" He says, "I can walk all right." I said, "You had better sit down." I said to the other man, "You had better hold on to him, and I will run and notify the yard man to get an ambulance," and in the meantime, my engine man was right there. I said to him, "You get your car; 40 you had better run him up there right quick; by

Bernard V. Kerr, direct.

the time the ambulance gets down there you can be up there with him."

Q. Who did go with him up to the hospital? A. A young fellow by the name of Dicus; he hadn't been around there very long.

Q. What was his job? A. He was what we call top man; we had four men on the crew at the time.

Q. Was he a brakeman? A. Yes, brakeman.

Q. You say you pulled the pin to release Mr. Steinert? A. Yes, had to pull the pin to release his hand.

Q. How long a time elapsed in your judgment, or so far as you are able to tell, between the time that you uncoupled the cars from the engine, either you or Steinert, whoever did it? A. Well, I don't quite—

Q. How long a time elapsed between the time you uncoupled these cars you had taken in No. 9 or 10 and the time you heard Steinert holler and you went back to the cars? A. Well, approximately I will say two or three minutes, because, you see, I had told him what to do after we had cut, pulled the pin, I told him what to do. Then of course I turned around and started away. It might have taken a couple of minutes.

Q. Let me ask you one more question; after you told him what to do, you turned around to go across the yard? A. Yes, sir.

Q. How long a time elapsed between that, when you turned to go, and the time you heard him holler and came back? A. Could not be a minute, because I could not be very far. I only made about five or six steps before I heard him holler. I didn't know whether he was hollering something or singing. Lots of times you get fellows on

Bernard V. Kerr, cross.

the road singing, but I didn't take any chance; I went back to see what was wrong. I found his hand caught in the knuckle, see.

Cross examination by Mr. Winans:

10 Q. Who pulled the pin when the cars ahead of your engine were cut off? A. I could not say whether I pulled the pin at that time or Mr. Steinert.

Q. Immediately after that, did you give word that the engine was to back off and get something?

A. Yes, to go to No. 1 over the hill and shove the rest of these cars over there.

20 Q. Was there any order given within your knowledge for the engine to go ahead? A. Not to my knowledge.

Q. And there was nobody there that was entitled to give an order while you were there, was there?

A. No, sir.

Q. Did you go to the yard master's office then?

A. No, sir, I didn't get that far.

30 Q. You were walking towards the yard master's office? A. I was walking towards the yard master's office, but I was going to cut the cars on No. 1. As a rule we shoved them cars back off the air there. While the engine is going around, you cut over, cut the air off and follow the five cars while the engine gets there.

Q. Going over to High line No. 1, you were required to go on the other side of the track this engine was on? A. Well, after the engine went back, I went after the cars, for I wasn't crossing over while he passed me.

40 Q. You stepped off, as I understand it, on the right or engineer's side of this engine, went over to the yard master's office which is on that side?

A. Yes, I walked over.

Bernard V. Kerr, cross.

Q. In order to wait until the engine backed out in order that you could go across the tracks to High line No. 1? A. Yes, sir.

Q. How near the yard master's office did you get? A. I didn't get over four or five feet from the engine before I heard the hollering.

10

Q. Did you see the engine go ahead? A. No, I didn't see the engine go ahead. I heard the air released, I thought the engine was going back. I gave him the back-up signal.

Q. You knew that the engine ought to go ahead?

Mr. Hartpence: I object to that.

Q. You knew that the engine should go back in response to your signal, didn't you? A. Yes, sir.

Q. Did you feel any surprise when you saw the engine go ahead?

20

Mr. Hartpence: I object to that as immaterial and irrelevant.

The Court: Sustained.

Mr. Hartpence: He said he didn't see it go ahead.

Q. Did you see it? A. No, sir; I had my back to it. I was walking away from it at the time.

Q. Did you see the flagman, the rear brakeman of your crew about that time? A. Yes, sir; the rear man, he came up and I told him to hold on to Mr. Steinert, to keep him from falling. I was afraid he was going to faint. I could see the hand was mashed pretty bad.

30

Q. How did you give your signal to the fireman in the engine cab to back up? A. I gave him the signal to back up like that, on the right side (indicating).

Q. Did you call out, "Go over to High line No.

40

Bernard V. Kerr, cross.

1"?" A. I don't remember. Sometimes I do, after I tell the brakeman, I holler up to the engine man just where I am going. You don't have to do that around the yards; the only talk, I tell my engine crew when we are working around the yard is
10 where we are going out of the yard or back to track 2.

Q. You sometimes trust the man in knowing what is the next move? A. They pretty well know after working around in my regular crew.

Q. In this case, you are not sure whether you actually did give that order at that time, or whether you simply assumed knowledge on the part of your crew that they were going to go up to High No. 1 and bring out cars? A. The only mem-
20 ber of the crew I told was Mr. Steinert; that is as far as I can remember.

Q. You don't know whether or not you did call to the fireman? A. No, sir.

Q. Do you know whether the fireman closed the window? A. No, sir; I could not say that.

Q. You say afterwards, in response to a signal, the fireman just pulled up a little to relieve the strain on the draw bars; is that right? A. After he got his hand in there, I went up to tell him to
30 give me the least little slack, that is what we call it, so as to go ahead, pull the pin and get his hand out of the knuckle.

Q. That is to the fireman? A. Yes, sir.

Q. What is his name? A. Jarvis.

Q. Was he the only man in the cab? A. I could not tell you that.

Q. Was he the only man running the engine? A. Yes, sir.

40 Q. Did you see any other man there you knew during the whole time of the operation? A. No,

Bernard V. Kerr, cross.

I never bothered going up on the engine. Whenever I get up on the engine, in the cab when we are going out of the yard into another yard, something like that. As long as the engine is handled properly and safe for me, I never bother. If I got a good fireman on the engine, if I think he is capable of handling the engine all right, I let him handle it. 10

Q. When the cut was made detaching the four or five cars that were ahead of the engine, the pin of which knuckle was lifted? A. Of the engine.

Q. That is what you and Steinert were riding on? A. But as a rule, when the engine goes away from the car, the rear man, he is down, of course, making his coupling, he comes up as a rule; he is the man that is supposed to open these knuckles, not the front man. 20

Q. After he comes up and goes away, whom does the duty devolve upon? A. Sometimes they go and sometimes somebody else will open them; sometimes they are not opened at all. If you cut another car, back in the track, against it, if that knuckle is open, lots of times the coupling would make away, it would not make it.

Q. You say in the first place it was the duty of the rear man to open that, was it? A. Not particularly, as a rule I do. 30

Q. Was it part of Steinert's duty to see that was opened? A. Well, I don't know, the man that is close to the engine—I say, when the car and the engine was that close together, I don't think he should have put his hand in there.

Mr. Winans: I ask that that be stricken out as not responsive, the last answer is certainly a conclusion on the part of the witness. 40

The Court: Yes; strike it out.

Bernard V. Kerr, redirect.

Q. Was it any part of Mr. Steinert's duty, as a member of your switching crew to open that knuckle? A. He could have opened it or he could have left it closed.

10 Q. It was part of the duty of the switching crew to see it was left open? A. Yes, sir.

Q. If somebody else didn't do it, it was his duty to do it? A. Not necessarily; sometimes, they don't open them at all, leave them till—

Q. Isn't that somebody's duty, to open it? A. Not necessarily.

20 Q. Mr. Steinert has testified when cars are led in on the track, that the last car, the nearest car should be left with the knuckle open before the switching crew quit they should open it, leave it in an open condition? A. That is up to the men; if they want to do it. If they don't want to do it, there is plenty don't do it.

Q. If they do want to do it, it is all right? A. Yes, sir.

Q. You do it all right? A. Yes, I open them myself at times.

Q. Have you ever been criticized for doing it? A. No.

30 *Redirect examination by Mr. Hartpence:*

Q. When the fireman who was running the engine, gave you a little slack so that you could help Mr. Steinert, I understood you to say you lifted the pin? A. I lifted the pin at that time. I went on to the engine man and I told him, "Now, give me a very little bit of slack. You got a man's hand caught." I didn't have time to explain who it was. I didn't have time to explain all that.

40 Q. Which pin was it? A. On the engine. As a rule that is the easiest one to pull because we got

Bernard V. Kerr, redirect.

it oiled; the couplings on the cars, they are very hard sometimes to open.

Q. When you released Mr. Steinert's hand from the knuckle, you lifted the pin on the locomotive?

A. Yes, sir.

Q. On the locomotive knuckle? A. Yes, sir.

10

Q. Not the front car knuckle? A. No, sir.

Q. You say that the rear brakeman, Redding, came up to where you were? A. He was right up there by the time I got him out. I told him to hold on to him while I go around and get the yard master, to notify the yard master to get the ambulance.

Q. Was he over where Steinert was? A. Yes, sir.

Q. Had Redding already got there when you came back? A. Yes, he was there.

20

Q. How much space was there between the locomotive knuckle and the freight car knuckle after you had uncoupled the draft when it first went in and then started away? A. There is a little grade there. I imagine the cars after—because there is only two cars there together, there was a little opening between these two cars. We backed one in and coupled up the one. There was a little grade; I imagine they run away, they pull away anyway six inches apart.

30

Q. What is your best recollection of how much space there was? A. Just about six inches.

Q. No more than that? A. Could not have been no more than that, because that is about on the level near where they make that cut, they would not drop away that much.

Q. When you told Mr. Steinert to go back to No. 1 and get the other cars, then you turned and walked towards the yard master's office. At that time the space between the locomotive knuckle

40

Bernard V. Kerr, recross.

and the freight car knuckle was not much more than six inches? A. Just about six inches.

Recross examination by Mr. Winans:

10 Q. And you base your reason for saying it must have been about six inches on the fact that there was a little grade there, is that the idea? A. Yes, the cars drifted away just about six inches.

Q. Do you remember seeing that six inches or do you mean that usually in that grade that they do drift about six inches? A. No, I had taken a look myself, the cars was about six inches, that is the two knuckles, the knuckle of the car and the knuckle of the engine.

20 Q. You looked at that time and figured the distance apart? A. Yes, sir; just about six inches apart.

Q. Why is it that the pins of the cars are harder to lift than the pins of the engine; isn't it that they get harder knocks? A. Oh, no, the pins on the engine, if they work a little hard, gets some oil and works them up and down. They work easy for you. Take the pin on the car; that hardly ever gets any oil.

30 Q. Isn't a bent pin harder to lift than a straight pin? A. Oh, yes, sir.

Q. Will oil even make that easier? A. I don't know if oil would make it easier. It might help a little bit. You know, we have pins—maybe I don't get you right, we have pins all shapes, you know. Do you mean one that has been bent, caught behind the knuckle and bent?

Q. Through receiving a blow? A. I don't think oil would help that very little.

40 *Redirect examination by Mr. Hartpence:*

Q. The cutting lever on a freight car, you know

Bernard V. Kerr, redirect.

what the cutting lever is; how does that work?

A. Well, they work different ways. We have different classes. Some shove down to raise the pin, and some you pull up to raise the pin.

Q. Whichever way they move, up or down, that has the effect of raising the pin? A. Yes, sir. 10

Q. What effect does it have on the knuckle? A. Not much; sometimes the knuckle is easy to open, if you work it a little hard the knuckle will fly open. Then again, if it done, you have to pull the knuckle open with your hand.

Q. What is the object and purpose? Are you familiar with the appliances which do this cutting of knuckles on freight cars? A. Yes, sir.

Q. What is the object and purpose of having that lever there, Mr. Kerr, do you know? A. That is to cut the cars, keep a man from walking in between them, keep him from walking down on the track, that he could not go between them. 20

Q. That is one of the things you workmen insist should be provided for you on the cars?

Mr. Winans: I don't know if this man was a member of any committee that agitated for the safety appliances; I think that is away before his time. I object to it as immaterial. 30

The Court: Upon that ground, sustained, its immateriality.

Q. As a workman on the railroad, handling freight cars, coupling and uncoupling freight cars as you have done for quite a number of years, have you learned why it is and how it came to be that the cutting lever was provided on freight cars?

Mr. Winans: I don't think it has anything to do with this case. 40

Bernard V. Kerr, redirect.

The Court: Let me ask you this: what else is necessary to be done in coupling and uncoupling of the car other than lifting the lever or pin you speak of?

10

The Witness: That is the only way you can get them apart, raise this pin, either from the engine or car. If the cars are coupled, you have to raise this pin.

The Court: Is that all that is necessary for coupling or uncoupling?

The Witness: Well, you have to move your knuckle.

The Court: How do you open your knuckle?

20

The Witness: You pull out the pin with your hand, and shove down on your pin with the lever.

The Court: Does that lever have anything to do with the opening of the knuckles?

The Witness: Sometimes it does if the knuckle works easy, you shove down this pin and the knuckle will fly open.

The Court: Do you have an appliance on cars that will open the knuckle?

30

The Witness: They tell me they have. I haven't seen them yet, never handled them.

Mr. Winans. They have on passenger coaches.

Q. Ordinarily that pin is raised; for instance, what is the operation in which the knuckle is opened, if you are cutting off a car from a locomotive? A. Well you raise one pin. Of course the knuckle on the other car will pull it over. That is all you have to do if you are cutting off a car.

40

Q. That is the object of stopping the train; when you lift the pin, you stop the rest of the train and

Bernard V. Kerr, recross.

the open knuckle cuts off the other car? A. Yes, sir.

Q. How about when you couple, and the knuckle is open and another car is backed in against the open knuckle; what happens then? A. They both couple.

10

What causes that coupling? A. Well, they both open when they come together; they come in like that (indicating), you know, and when they hit, there is a little piece underneath comes down on the bottom of the pin that shoves them right together, like that, and they clamp.

Q. And then what happens then? A. The pin drops down.

Q. And that is what causes that coupling? A. That is to hold them after it couples.

20

Recross examination by Mr. Winans:

Q. Mr. Kerr, is the cutting lever used exclusively for cutting, or is it also used for coupling. In other words, if you are going to couple cars, can you couple them with the cutting lever? A. No, you have got to have your knuckle up to couple the car.

Q. The cutting lever has nothing to do with coupling the cars together? A. Yes, sir.

30

Q. It simply, as its name infers, is a cutting lever? A. Cutting lever, raises the pin and opens the knuckle. If you walk down, well you knock them, you shove the lever down, that raises the pin, you take the other end and pull the knuckle up, or if the knuckle works easy, it flies open.

Q. Sometimes it jars it open? A. Yes, sir.

Q. More often it does not? A. Yes, sir; right.

Q. More often you have to reach and loosen the coupling on the next car? A. Yes, sir.

40

Frank B. Redding, direct.

FRANK B. REDDING, called for the defendant:

Direct examination by Mr. Hartpence:

Q. Where do you live? A. 1517 Gales Street, North East, Washington, D. C.

10 Q. What is your work? A. Brakeman for Mr. Kerr around the Jersey yards.

Q. How long have you been in that line of work? A. Eleven years.

Q. Where do you work? A. Most of the time in the yards; sometimes on the road.

Q. Always for the Pennsylvania Railroad? A. Yes, sir.

Q. Do you know Mr. Steinert? A. Yes, sir.

20 Q. Were you working with him on the night that he was injured? A. Yes, sir.

Q. Did you see him get hurt? A. No, sir, not exactly.

Q. What did you see about it? A. After I coupled up one car that was pushed in there, I came up there, they were standing about that far apart.

Q. "That far apart" doesn't mean anything; how far would you say? A. About six inches; six to eight inches.

30 Q. Which cars were standing six to eight inches apart? A. The car from the engine.

Q. Did you uncouple them? A. No, sir; didn't touch them.

Q. Well, had you ridden on the cars when they came from No. 1 High line? A. I rode on the car next to the engine and coupled it up.

Q. You coupled it up? A. Yes, sir.

Q. To the engine? A. No, sir, to the car that was standing in there.

40 Q. Then what did you do? A. I walked up

Frank B. Redding, direct.

towards the engine. They were standing about that far apart, about six or eight inches.

Q. What did you see, what took place then? A. I saw the car and the engine about that far apart. I heard the conductor tell him to go down to One over the hill next.

10

Q. You heard what? A. The conductor tell him to go down to One over the hill. We started waving at him. By that time the engine started, I don't know whether it was going back or front. I heard Steinert holler, that time, sometime the engine started, the air release —

Q. Where were you then? A. I came back with the conductor to see what the trouble was.

Q. Where were you when you heard him holler? A. I was about, say eight feet away from this car and the engine.

20

Q. What were you doing? A. Going down over the hill to get the rest of them.

Q. You were going to cut across the yard too? A. Yes, sir.

Q. Let me get this a little more connected. You heard Mr. Kerr tell Steinert something? A. Yes, sir.

Q. What did he say? A. "Go down over the hill next, we will get the rest of them."

30

Q. Then what did Mr. Kerr do after he told Steinert that? A. Him and I started over that way.

Q. You went out together? A. Yes, sir; not exactly together.

Mr. Winans: Who does "him" refer to?

The Witness: Mr. Kerr, the conductor.

Q. What was the next thing that you heard? A. The next thing I heard was Steinert holler.

40

Q. Then what did you do? A. We went right

Frank B. Redding, direct.

back. Steinert said "I got my hand caught." The conductor walked up to the fireman and said "Give him a little slack. We got a man's hand caught", and he gave him enough to release the engine and the guy got his hand out. He told me to hold him
10 up, while he went to get some water. We pulled the glove off and tied the hand up.

Q. You tied the hand up? A. Yes, pulled the glove off; later we found that a man took him to the hospital.

Q. That's all you know about it. A. Yes, sir.

Q. Let me ask you this question: this car that you had ridden on came down off what track?

A. We brought it down off 1 over the hill.

Q. How many cars did you bring? A. Something
20 like five or six; just made a short pull.

Q. Which car of the five or six did you ride on?

A. I had been catching them all as they came up in the yard. Then I got on the rear end and made a coupling to one car standing there.

Q. What track were they on? A. No. 9.

Q. How far is that away from the hill? A. Well, it is about seven tracks come across there.

Q. Seven tracks? A. Somewheres, yes, sir.

Q. Now, when Mr. Kerr told Mr. Steinert to go
30 back on the hill for the other cars, you and Mr. Kerr turned and walked away; how long a time elapsed between the time Mr. Kerr told Mr. Steinert to go over to get the other cars and you turned and the time you heard Mr. Steinert holler? A. It seemed to me just about a minute.

Q. How far had you actually walked? A. About six or seven yards.

Q. That is all? A. Yes, sir. As to him opening
40 the knuckle, that was my job, opening knuckles on cars standing in tracks.

Frank B. Redding, direct.

Q. Did you help Mr. Kerr get Mr. Steinert's hand out of the knuckle? A. I was right there.

Q. What was done; how was it done? A. All he said "You hold him up". Steinert said "I believe I can walk". Kerr said "You hold him up while I go get him a drink". That is what he first hollered for, to get a drink. I held him up. 10

Q. Before he got his hand out of the knuckle; how was it gotten out, who took it out, what was done to get the hand out of the knuckle? A. Why, the conductor pulled the pin, the engine jarred back. He brought his hand out like this (indicating). That is the way it came out.

Q. What pin did the conductor pull? A. On the engine.

Q. Did Mr. Steinert lift the pin out himself with his other hand? A. No, he didn't; he wasn't able to. He caught hold of his other hand with this one. 20

Mr. Hartpence: I move that the witness's statement that he "was not able to" be stricken out.

Mr. Winans: I think that is a description of the condition at the time.

Mr. Hartpence: Obviously it refers to a later date, because the reference to the man holding the other hand—he could not have held it while engaged in the coupling. 30

Q. Did you give any signal to the fireman in the cab? A. No, sir.

Q. Did you say anything to Mr. Steinert about the man on the engine not moving his engine backwards in response to your signal? A. No, sir.

Q. Did you go up to the cab where the fireman was running the engine and bang on the cab? A. 40

Frank B. Redding, cross.

The conductor and I we waited alongside there, when he started. I don't remember whether I banged on there or not. It don't seem to me I did.

Q. Did you have any conversation at all with Mr. Steinert? A. Yes, sir.

10 Q. About the fireman not starting his engine back after the signal was given? A. It seems to me I asked why he didn't move, and he said "I don't know". I asked why the fireman didn't move and he said "I don't know".

Q. When did you ask him that? A. Just before he got hurt.

Q. Was that before or after Mr. Kerr had told Mr. Steinert to go around and get the other cars? A. That was after.

20 Q. Did you see Mr. Steinert give any signal to the man in the engine? A. I did see him give a signal to back up just before I got there. When I got there, he was still sitting there. I said "What is the matter; can't he move? He said "I don't know".

Q. Was Mr. Kerr there at the time? A. Yes, walking on from there.

30 Q. And it was after that Mr. Kerr said to Steinert to go around—

Mr. Winans: I think there is considerable leading going on there. The witness is intelligent and I think he can tell his story without leading.

Cross examination by Mr. Winans:

Q. When you say that you saw Steinert give a signal, what kind of signal did he give? A. He gave a back-up signal with his lantern.

40 Q. Was that while you were in the neighborhood of the engineer's cab of the engine? A. No, sir;

Frank B. Redding, cross.

that was just before I got there, I see him give the back-up signal.

Q. You did have a conversation with Mr. Steinert about the fireman backing up? A. I asked him what is the matter, "Can't he move?"

Q. Afterwards, in the hospital, you had a conversation with Steinert too, about the same subject? A. We didn't talk much about it. 10

Q. You talked something? A. I don't remember saying much; I gave him cigars and asked how did he feel.

Q. When you were at the hospital about two weeks after the accident, didn't you say to Mr. Steinert that the fireman ought to get burnt for going ahead there instead of going back? 20

Mr. Hartpence: I object to that as immaterial, incompetent and irrelevant. Even though he did say it it does not in any way bind the defendant in this case.

Q. Sure you didn't say that? A. No, sir; positively.

Q. Where was the conductor when you banged on the cab to attract the attention of the fireman? A. Within about three or four feet of me, both going the same way. 30

Q. Near enough to hear? A. Yes, sir.

Q. Which side of the engine were you on? A. When this accident happened, on the right hand side.

Q. You walked back from several car lengths ahead along the right side? A. One car length.

Q. You didn't start to walk back until the whole string had come to a stop, did you? A. That is right. 40

Q. And when you got there, was Mr. Kerr just

Frank B. Redding, cross.

walking away? A. I was there in time to hear him say "Go down over the hill".

Q. When he walked away, he walked over towards the yard master's office? A. Yes, sir.

10 Q. Still on the right side of the track? A. Right side of the engine.

Q. The way the engine was facing? A. Yes, sir.

Q. That is the same side you were on? A. Yes, sir.

Q. You say it was your intention to walk over to High line No. 1? A. Yes, sir.

Q. Why didn't you walk over there? A. We didn't get very far before we heard him holler.

Q. You were walking away from High line? A. No, sir; going that way.

20 Q. Just what way were you walking? A. Going north, towards over the hill.

Q. Were you following the conductor? A. Yes, sir.

Q. Well, he was going off on the right hand side of the engine, wasn't he? A. Yes, sir.

Q. High line No. 1 was on the left side of the engine? A. Yes, sir.

30 Q. So you were going, and the conductor was going, away from High line No. 1, weren't you? A. No, sir.

Q. Well, how were you going? A. Well, you see, the way the engine was headed; it was headed with the back right toward the way we were going.

Q. It has been testified that the string of cars picked up on High line No. 1 had cleared the switch point, the switch thrown and they started to go on the ladder leading to No. 9, and started to turn towards the right; is that true? A. Yes, sir.

40 Q. Then when they came in on No. 9 or 10, they turned again towards the left, didn't they, to come

Frank B. Redding, cross.

down that way? A. No, sir; the cab headed straight on back.

Q. Doesn't that put High line No. 1 on the left hand side of the engine as it stood there when this man was hurt? A. How was that?

Q. Isn't High line track No. 1 on the left side of where the engine stood there, just after he was hurt? Is that right? A. I would say due back of it, not on the other side. 10

Q. A little off to the back? A. To the back, yes, sir.

Q. And on the left side? A. Yes, sir.

Q. Why were you walking off to the right side, if you were going to High line No. 1? A. Well, we would have to climb over the engine if we went any other way. By going right straight back, the right side of the engine, that put us right over there. 20

Q. Or were you going to the Yard master's office to get any orders? A. No, sir. I was going right over the hill.

Q. Isn't it a fact that you did go to the yard master's office? A. No.

Q. How near is the yard master's office? A. Right alongside of the engine when I heard him holler. 30

Q. How far is the greatest distance that you were away from the engine from the time you arrived back at the point where Steinert was just before he was hurt; from then up to the time that he was hurt, what is the furthest distance you were away from the engine? A. Forty feet.

Q. Was that off on the left side? A. On the right side.

Q. I mean that was off on the right side? A. Yes, sir.

Q. Did you see any signal given by anybody for 40

Frank B. Redding, cross.

the engine to come ahead at any time while you were there? A. Yes, sir.

Q. Who gave that signal? A. Steinert.

Q. Gave a signal for the engine to come ahead.

A. Jarred him ahead to cut them cars loose.

10 Q. You mean after he was hurt? A. Before he was hurt. They spread about that much, six or eight inches.

Q. When was that, when was that signal given?

A. It was when them cars separated about six or eight inches, about that far.

Q. And then what? A. And he reached over to the pin on the knuckle. I didn't see him when he opened that knuckle. I know he was over there though.

20 Q. Did you see anybody give a signal for that engine to come ahead? A. Yes, sir.

Q. Who? A. Steinert.

Q. When did he give the signal for it to go ahead? A. Just before he cut him loose, at the same time he got the slack and cut them cars loose.

Q. You mean before running the cars in there and before they were cut loose? A. No, sir; they were standing.

30 Q. They were cut loose at the time they came to a standstill? A. No, sir.

Q. When were they cut loose? A. After they were cut loose they rolled about that far away from the engine.

Q. They didn't roll until they were cut loose? A. No, sir.

Q. After they rolled that far apart, was any signal given to the engine to come ahead? A. No, sir.

40 Q. When you say a signal was given to the engine to come ahead, you mean when the cutting was done and you were up at the other end of the

Frank B. Redding, cross.

car or cars? A. Yes, forty feet away, that is when he cut loose.

Q. You say that to open up the knuckle at the rear end of the car at the place where Steinert was hurt, that was your job? A. Yes, sir.

Q. And if you didn't do it, it was the job of any other member of the crew, wasn't it, to see that it was done? A. That is my job to couple the cars up. 10

Q. Now, if you didn't do it, whose job is it? A. Anybody that comes along.

Q. Any member of the crew? A. Anybody that wants to volunteer.

Q. You didn't do it, did you? A. I did do it, yes, sir; I coupled those cars up.

Q. I say you didn't open the knuckle, did you? A. No, sir; I would have opened it. 20

The Court: You say this car rolled about six inches?

The Witness: Yes, sir.

The Court: Were the cars at a standstill before you cut them, before you pulled this pin?

The Witness: You see when the engine stops and the slack runs out of the car, then you have them go ahead a bit to take the slack, then they roll about that far apart. 30

The Court: Do you connect them while in motion or do you wait until they stop?

The Witness: You are supposed to stop, to cut them; if you don't get enough slack you got a job.

The Court: You are supposed to stop and then cut them?

The Witness: Yes, sir.

The Court: Stop what, the engine? 40

The Witness: Yes, sir.

Frank B. Redding, cross.

10 Q. Isn't it a fact that the practical operation of cutting off one or more cars at the head end of a string that is being moved, is accomplished first by the engine pushing up to compress the draw bars, then the cutting lever is used to make the cut, then a signal is given to the engineer to go ahead, to give a kick, and as soon as he gives that kick, he puts on his brakes and slows down and that allows the cars to run ahead; isn't that the practical way of doing that cutting operation; isn't that right? A. Not exactly. When you give the kick, sometimes they roll; if they are going fast enough, you don't stop.

20 Q. The engine is stopped and then the slack—
A. Yes, sir.

Q. And that requires a signal from the man that is in charge of the operation? A. Yes, sir.

Q. And that is usually the head man? A. Generally the conductor.

Q. And the head brakeman if the conductor is not there? A. No, sir.

Q. Who then? A. The conductor lays the switching out until the switching crew is taken off—

30 Q. If the cutting operation is to be performed and the engineer is there, and the head brakeman standing at the point of the cut, isn't it his business to give a signal to the engineer to go ahead and give the kick, and then slack away to allow the cars to run ahead? A. You are talking about the engineer; the fireman was on the engine.

40 Q. Where the conductor is not there, the head brakeman is at the point where the cut is being made, isn't it his duty to give the signal to the engineer or to the engine, to give the kick, and then let the slack out, and then the cars go ahead? A. Yes, sir.

Frank B. Redding, cross.

Q. At the time that was done, you were not at that point. You were on another car some distance away? A. When I came away up there, he was on the fore part, and he had just cut the slack and cut off.

Q. Were you on the forward end one or more cars away from the engine? A. Just one car. 10

Q. What, when this movement was made, and the cars were brought down there? A. No, I rode on the back end of one car in there and coupled it up.

Q. You rode in one nearest the engine? A. No, one furthest away.

Q. That is where you were when that car was brought down? A. No, sir; I rode on the end of the car in there. 20

Q. Then you were a car length away from the engine at least? A. I was.

Q. When it was brought down? A. Yes, sir.

Q. You don't know what happened between the conductor and the head brakeman down in between that car and the front pilot of the engine? A. Yes, sir.

Q. You do know? A. I know he told him to cut loose and go down over the hill next. 30

Q. That was Mr. Kerr? A. Yes, sir.

Q. As to who lifted the pin, you don't know? A. Yes, sir.

Q. Who did it? A. I know Steinert cut them off when they run that far apart.

Q. How do you know he did? A. Because I was close by and seen him.

Q. The engine was actually separated from the rear end of the car that you rode down wasn't it?

A. You mean from the head end. 40

Q. Whichever end you call the pilot of the en-

Frank B. Redding, cross.

gine was separated from the end of the car that was nearest to the engine? A. Yes, sir.

Q. There was clear space wide enough for a man to walk across and back? A. No, sir; I would not have liked to have gone through it.

10 Q. There was space there? A. I would not think of going through.

Q. Isn't it a fact that the distance that you testified to, is the best of your recollection of how they stood just at the time, and the matter was impressed on your mind at the time the man had his hand smashed in there; isn't that the time you saw them they were so close together? A. No, I saw they were coupled; then I saw them separated away.

20 Q. They pulled away about that distance? A. About that far (indicating).

Q. That is when his hand was taken out? A. Got a little too much space; maybe about 18 inches.

Q. No, I have about 12 inches there. Be that as it may, whatever the distance is. You say that was after Steinert's hand had been taken out of the coupling, wasn't it? A. At about that distance.

30 Q. You hadn't any occasion to look and see how far away they were before his hand got caught in the coupling, did you? A. Yes, sir.

Q. Why did you care what distance they were apart?

Mr. Hartpence: I object to that; I don't think that is material.

Mr. Winans: I withdraw the question.

40 Q. Did you measure the distance between the front of the engine and the rear of that car before Steinert caught his hand in there? A. I was the furthest distance away, I was forty feet, as long as a box car is generally.

John George Korter, direct.

Q. A distance of 40 feet? A. If I am not mistaken, it was 36 when they were shoved in there.

Q. What I am asking you now is whether before Steinert's hand was caught in that coupling, you measured the distance apart of the engine and the car that was next to the engine? A. No, sir, I didn't measure it. 10

Q. You didn't have occasion to measure it? A. No, sir; I didn't measure it. I noticed over there how far it was. I noticed they were separated, because he got the slack just before I got there.

Q. You say there was a distance for a man to walk in between? A. No, sir, I didn't say that.

Q. Did you try? A. I would not try to. I would not put my hand in there, let alone walk through there. 20

Mr. Winans: I move that that be stricken out as not responsive to any question.

The Court: That may be stricken out.

JOHN GEORGE KORTER, sworn for the defendant:

Direct examination by Mr. Hartpence:

Q. Where do you live, Mr. Korter? A. 124 North Milton Avenue, Baltimore. 30

Q. How long have you lived there? A. About twelve years.

Q. What is your business? A. I am employed by the Pennsylvania Railroad in the Claim department, Baltimore.

Q. How long have you been so employed? A. About 6½ years.

Q. Do you know Mr. Steinert, the plaintiff in this case? A. I do know him, yes, sir. 40

John George Korter, direct.

Q. In what circumstances have you been in contact with him? A. Why, Mr. Steinert came to the office for the purpose of getting a check.

10 Mr. Winans: I move that the purpose be stricken out.

Q. What office do you refer to? A. Our office, Calvert and Center Street, Baltimore.

Q. Whose office is that? A. That is Mr. C. C. Waller, the claim agent.

Q. You are employed under Mr. Waller? A. Mr. Waller's office.

Q. Did you have any conversation with Mr. Steinert at that time? A. I did, yes, sir.

20 Q. Who else was present? A. Mr. Steinert, myself and Mr. R. J. Gosnell.

Q. Do you recall when that was, by the way? A. Why, I don't; it was some time the latter part of May, I think.

Q. What transaction took place between you and Mr. Steinert at that time? A. I didn't know Mr. Steinert at the time.

30 Q. Please answer my question. What transaction took place between Mr. Steinert and you at that time? A. I gave Mr. Steinert that paper.

Q. Which paper; this paper I show you, Exhibit D-2 for Identification? A. That is the paper, yes, sir.

Q. You gave him that paper? A. Yes, sir.

Q. What did he do with it? A. I told him to read it.

Q. What did he do when you told him that? A. He did read it.

40 Q. What else took place? A. I asked him if he understood it.

Q. What did he say to that? A. He said he did.

John George Korter, direct.

Q. Then what did you do? A. Then I told him to write this sentence on here.

Q. Which sentence is that? A. Do you want me to read it?

Q. You say this sentence; we can't tell what that is? A. "I have read and fully understand this release." 10

Q. Did you actually read that sentence on that paper? A. Yes, sir.

Q. Just as it is here on this paper? A. Yes, sir.

Q. He wrote that himself? A. He did; with his left hand.

Q. What did he do after that? A. Then he signed his name, Howard W. Steinert.

Q. You saw him sign it? A. I did, yes, sir.

Q. Then what did he do, or what did you do after that? A. Then I gave him the check. 20

Q. Do you remember what the check was? A. It was for the amount of the release, \$1,800.

Q. What else took place, if anything, between you? A. After Mr. Steinert had signed the release, he said that that amount did not pay him, and the Railroad Company—he used a cuss—if you want me to use it.

Q. Whatever he said? A. He said that amount didn't pay him and the Railroad Company had better a damn sight give him a job. I told him I knew nothing whatever about a job. 30

Q. Well, then what did he do; where did he go after that? A. He left the office. I don't know where he went. Before, I didn't know Mr. Steinert when he came to the office and I asked him for some identification. He had his right hand bandaged; he produced his annual pass, with his name on it. 40

John George Korter, cross.

Q. Do you recognize him here, as this gentleman here today? A. That is him, yes, sir.

Q. You were acting under whose instructions?

A. Under the instructions—well, I don't know if I worked under anyone's instructions.

10 Q. How did you know what he wanted? A. I knew we had this paper in there, Mr. Waller had told me, and the check was there.

The Court: Did you have anything to do with the negotiations leading up to the agreement with this man?

The Witness: No, sir, I didn't.

Cross examination by Mr. Winans:

20 Q. Mr. Steinert told you that \$1,800 didn't pay him, did he? A. After he signed the release, yes, sir.

Q. You remember that distinctly? A. I do, yes, sir, because it impressed me.

Q. Did you question Mr. Steinert's ability to write with his left hand when he came into your office that day? A. I asked him if he could write with his left hand; he said he could and he signed.

30 Q. Did he say he could, or did he say "I can try"? A. I think he said "I can."

Q. Did you ask him to try, to see if he could? A. I didn't.

Q. Did you give him a blank piece of paper and ask him to write his name on it? A. No, sir, I didn't.

Q. Or ask him to write anything on it? A. I didn't.

40 Q. You didn't discuss with him what the payment of \$1,800 was for, did you? A. Well, he knew—or—did I?

Robert J. Gosnell, direct.

Mr. Winans: I ask that that be stricken out as not responsive, and a conclusion.

The Court: Yes; strike it out, and answer the question.

Q. (Question read as follows: "you didn't discuss with him what the payment of \$1,800 was for, did you?") A. He came in and asked for his check. I immediately tendered him this release, which he read. 10

Q. Have you told all that was said between you?
A. Yes, sir.

ROBERT J. GOSNELL, sworn for the defendant:

Direct examination by Mr. Hartpence: 20

Q. Where do you live, Mr. Gosnell? A. 56 West Biddel Street, Baltimore.

Q. How long have you lived there? A. I have lived there about five years.

Q. Where do you work? A. Pennsylvania Railroad Company, Mr. Waller's office, Claim Agent.

Q. How long have you worked there? A. About three years.

Q. Were you present on this occasion just referred to by Mr. Korter when Mr. Steinert came in? 30
A. Yes, sir.

Q. What was your position? A. I am a clerk in the office.

Q. I show you this paper D-2 for identification and ask you if your signature appears on there?
A. Yes, that is my signature.

Q. Where is it, on the bottom on the left, R. J. Gosnell? A. Yes, sir.

Q. I call your attention to the signature off to the right, Howard W. Steinert; did you see Mr. Steinert sign that? A. Yes, I did. 40

Robert J. Gosnell, direct.

Q. Actually saw him sign that? A. Yes, sir, I did.

Q. What about the language just above it; "I have read and fully understand this release"? A. That was requested of him by Mr. Korter and Mr. Steinert wrote that in there, which he did with his left hand.

Q. How did he sign his name? A. With the left hand.

Q. How was the right hand when he came in? A. It was bandaged when he came into the office.

Q. Did you say anything to Mr. Steinert yourself about the transaction? A. No, sir, I didn't say anything to him.

Q. Did you hear Mr. Korter say anything to him? A. No.

Q. Did you hear any discussion between them? A. No, sir; Mr. Korter asked him for identification as to who he was. He said he was Mr. Steinert and when he came in he showed his pass.

Q. I understood you to say there was no discussion? A. Mr. Korter showed him the release, asked him to read it, told him to read it. He read it over and said he understood it. Mr. Korter asked him to write the words on there "I have read—

Mr. Winans: I ask that the witness's statement "he understood it" be struck out.

Mr. Hartpence: I consent that that part be stricken out.

Q. You say he read it; what did you see him do; just describe what you saw him do; did he read it out loud? A. No, sir; he read it to himself, he just picked up the release, read it; he was told to read it by Mr. Korter.

Q. When you say he read it, what did he do?

Robert J. Gosnell, cross.

Hold it in front of him or back of him, or in front of his eyes? A. He held it in front of him.

Q. Did he look at it? A. Yes, sir.

Q. And then said nothing? A. He said, "That is all right".

Q. He didn't read it out loud? A. No, sir, he didn't. 10

Q. He did say "It is all right"? A. Yes, sir; he was requested to write there he had read and fully understood the release.

Q. Did you see him do that? A. Yes, sir, I did.

Q. What did Mr. Korter do about handing him any other document or paper? A. Mr. Korter gave him the check which was in the office for \$1800.

Q. You saw him give him the check? A. Yes, sir. 20

Q. Did Mr. Steinert say or do anything further at the time? A. Well, Mr. Steinert made the remark that the Railroad, as Mr. Korter said, it had better a damn sight give him a job.

Q. Then where did Mr. Steinert go after that? A. He left the office. I don't know where he went.

Cross examination by Mr. Winans:

Q. Did you hear Korter say to him, "Here is a check for your compensation"? A. No, sir, I didn't. 30

Q. Did you hear him explain what it was at all? A. No, sir, he didn't.

Q. You have told all the conversation that you recollect, have you? A. Yes, sir.

Q. Did you hear Mr. Steinert say that this did not pay him? A. This did not pay him, Mr. Steinert made the remark that this—

Q. I asked whether you heard Mr. Steinert tell Mr. Korter that, referring to the check, that this did 40

William C. Jarvis, direct.

not pay him; did you or did you not? A. He made that remark along with that remark in the same sentence.

Q. You say he made a remark; did you hear him say that? A. He did with the same sentence.

10 Q. That is all I asked you; I asked if he made that remark; you say "Yes", don't you? A. Mr. Steinert made a remark.

Q. I asked you if he made that remark, is your answer yes or no? A. He made that remark.

Redirect examination by Mr. Hartpence:

Q. What else did he say? A. He made the remark that didn't compensate him unless the Company better a damn sight give him a job.

20 Q. Was that before or after he had signed the release? A. That was after he signed the release.

WILLIAM C. JARVIS, sworn for the defendant:

Direct examination by Mr. Hartpence:

Q. Where do you live? A. 1019 Gerard N. E., Washington, D. C.

Q. How long have you lived there? A. 22 years.

30 Q. Where do you work? A. Pennsylvania Railroad.

Q. How long have you worked for the Pennsylvania Railroad? A. 12 years.

Q. Whereabouts? A. Washington, D. C.

Q. In the Jersey Yards? A. All around.

Q. Mostly all the work was out on the road? A. Just about the same, six years of each I guess.

Q. What position have you occupied? A. Fireman.

40 Q. Do you remember the accident to Mr. Steinert? A. Yes, sir.

Q. Did you actually see him hurt? A. No, sir.

William C. Jarvis, direct.

Q. What were you doing at the time? A. I was running the engine.

Q. How long had you been running the engine?
A. Just about an hour and a half.

Q. That night? A. Yes, sir.

Q. How long had you been doing that sort of thing, running an engine? A. Off and on, I guess for four or five years. 10

Q. Prior to the time of the accident? A. Yes, sir.

Q. Had Mr. Steinert been working with your crew that night for that hour and a half? A. No, sir.

Q. When did you first see him? A. I guess he was working half an hour before I seen him.

Q. What sort of work had you been doing? A. We had been shifting cars.

Q. Steinert had been engaged in that? A. Yes, sir. 20

Q. You were running the engine? A. Yes, sir.

Q. Who was your conductor? A. Mr. Kerr.

Q. What called your attention to the fact that Mr. Steinert had been hurt? A. Mr. Kerr came up there and told me, he said the brakeman caught his hand.

Q. That is the first you knew about it? A. Yes, sir.

Q. What was the movement you had made just prior to that time? A. Going ahead. 30

Q. When you were standing there and Mr. Kerr told you that Mr. Steinert was hurt? A. Going ahead, shoving the cars.

Q. Where had you taken these cars from? A. From 1 High line.

Q. You had taken them in on what tracks? A. I guess No. 9. We were going in the yard, that's all I can say.

Q. How many cars had you taken in? A. Taken one then, that is the time he was hurt. We got about six or seven off No. 1. We had shifted some. 40

William C. Jarvis, direct.

Q. Had you taken them all on the one track or one or two at a time? A. We had shifted some, but this one we were shoving in by itself.

Q. The last one you took in prior to the time Mr. Steinert was hurt, was there just one car? A. One car.

10

Q. You got that from No. 1 High? A. Yes, sir.

Q. Now, had your engine come to a standstill after you took a car in? A. Yes, sir.

Q. How long had you been at a standstill would you say? A. I would not say over a minute anyway.

Q. Had you gotten any signal after you took the car in? A. No, sir.

Q. Did you make a movement at all? A. No, sir.

20

Q. Do you know how the car was cut off from your locomotive after you got in there? A. I don't know.

Q. You only moved on signal, is that right? A. Yes, sir.

Q. And those signals came from whom? A. From the brakeman, front brakeman.

Q. Who was the front brakeman? A. Mr. Steinert.

Q. Had you gotten a signal from him? A. Go ahead.

30

Q. A back up signal? A. No, sir.

Q. You had not? A. If I did, I didn't see it.

Q. What kind of signal did you say? A. Go ahead signal.

Q. What was that for? A. Just push ahead a little so as to get enough slack to cut off.

Q. When had you gotten that signal; how long before Mr. Kerr told you Mr. Steinert had been hurt? A. Wasn't over a minute.

Q. Did you see Mr. Steinert after he gave you that go ahead signal? A. No, sir.

40

Q. Well, in any go ahead signal there, which

William C. Jarvis, direct.

way was the pilot of your engine pointing? A. It was pointing towards the cars.

Q. And so the go ahead signal would have sent your engine in towards the cars? A. Yes, sir.

Q. You say you got that from Mr. Steinert? A. Yes, sir. 10

Q. Do you recall what happened after you got that signal to go ahead? A. Went ahead just to let the cars ride on in, that is the last engine move.

Q. How did you come to a standstill; on whose signal? A. Nobody; just moving slow, just let them drift in and hit the other car.

Q. That stops of itself? A. Yes, just moved that slow.

Q. You got no other signal after that from any member of your crew? A. No, sir. 20

Q. Until Mr. Kerr came? A. He said a man was hurt; he didn't say who.

Q. Can you say whether or not your engine moved? A. I could not say whether it moved or not.

Q. What is your best recollection of it? A. I don't think it did.

Mr. Winans: I think that is speculative. I move to strike that out, because the witness has already said he doesn't know whether it went ahead or not. 30

Mr. Hartpence: I consent that the answer be stricken out.

Q. What is your best recollection of whether the train did move? A. I don't think the engine moved.

Q. Is that your best recollection of whether it did or did not? A. Yes, sir. 40

Q. After Mr. Kerr told you that Mr. Steinert had

William C. Jarvis, cross.

been hurt, did you get any signals then to move or signal to go ahead? A. He just told me to jar ahead steady.

Q. Jar ahead steady? Did you do that? A. Yes, sir.

10 Q. Then what happened? A. Mr. Kerr gave me a back up signal.

Q. Did you do that? A. I did.

Q. Then what kind of signal did he give? A. Gave me a shut-off signal.

Q. What is that? A. Stop.

Q. I am not familiar with the railroad terms and I have to ask you what they mean. Then what took place after that? A. I got off the engine and went around the front.

20 Q. What did you see when you got there? A. I seen Mr. Kerr bring Mr. Steinert in from between the engine and the first car.

Q. Had the engine and the car been uncoupled when you got up there? A. Not as I know of. The car and engine was never uncoupled as I know of.

30 Q. Well, I mean after you got up to where Mr. Steinert was and saw he had been hurt; was the locomotive coupled up to the car ahead of it at that time? A. No, sir, not when Mr. Kerr got Mr. Steinert out.

Q. Was Mr. Steinert already out when you got up there? A. Yes, sir; just coming out between the engine and the first car.

Q. His hand was not still in the knuckle? A. No, sir.

Q. Is there anything else you know of the accident that I didn't ask you about? A. No, sir.

Cross examination by Mr. Winans:

40 Q. You are not an engineer, are you? A. No, sir.

William C. Jarvis, cross.

Q. Was there an engineer attached to that engine that night? A. There was.

Q. Part of the crew? A. He was.

Q. He wasn't there at the time? A. Yes, sir.

Q. Where? A. On the engine.

Q. Who was driving the engine? A. I was.

10

Q. Where was the engineer? A. On the fireman's side.

Q. As you brought these cars down on to track 9, did you say it was? A. I said I didn't know.

Q. Well, whichever track it was, 9 or 10, or some yard track, did you get a signal to stop? A. No, sir.

Q. What did you receive in the way of signal before you did stop? A. The only thing I got was a jar ahead signal.

20

Q. That is while you were still running? A. Yes, sir.

Q. What does a jar ahead signal mean? A. Go ahead, just jar ahead.

Q. That means give a kick? A. No, sir.

Q. What kind of signal did you get when giving a kick ahead? A. Call it jerk up signal.

Q. You get a jerk up signal? A. Yes, sir.

Q. What is the difference between a jar and jerk up signal? A. The jar ahead, just want you to move slow.

30

Q. In giving that signal, indicate a jar ahead signal? A. Just about like that; just enough to move.

Q. What is a jerk up? A. One pitch, like that.

Q. In other words, one is a little more violent, otherwise they are the same signal? A. No, it is not the same, nowhere near the same.

Q. Where you indicated a jar ahead, you moved your wrist up and down a slight distance, and when you came to show the jerk up signal, you

40

William C. Jarvis, cross.

moved it up and down a greater distance? A. No, like that. That is the jar ahead, and that is the jerk up. (Indicating.)

10 Q. You think that one is not simply an exaggeration of the other? A. I didn't think so; nothing like it.

Q. Now, when you received this different signal, jar ahead and to stop, or back up and then stop. Was that after the accident had happened? A. The only signal I got from Mr. Steinert was the jar ahead; he was pushing one car in to couple to another one.

Q. That was before you stopped? A. Yes, sir.

20 Q. You did not receive any other signal until after the accident happened, did you? A. No.

Q. Were you awake all the time? A. Yes, sir.

Q. Didn't the engineer come from the yard master's shed after the accident was all over? A. No, sir.

Q. Did you say you were awake during all this time? A. I was.

Q. You sat looking out the front of the cab? A. No, sir, right on the side window.

30 Q. Sticking your head out of the side window? A. No, sir.

Q. Did you close any of the windows? A. No, sir.

Q. At any time? A. No.

Q. Did you hear the conductor give the signal to back up and come out to High line No. 1 and get some other cars? A. I did not.

Q. Did you hear the rear end man, Redding, knock on your cab side? A. I did not.

40 Q. Did you hear him ask you if you were going up back to High line No. 1? A. I did not.

Q. Did you get a back up signal from Mr. Stein-

Cloyd W. Gardener, direct.

ert shortly before the accident happened? A. No, sir.

Q. Within six or eight minutes before? A. No, sir.

Q. You didn't see any of these signals? A. No, sir. 10

Q. You didn't see the signals, whoever gave them, did you? A. Yes, sir.

Q. You say the conductor didn't give you that signal? A. I do.

Q. You say Mr. Redding didn't give you that signal? A. I do.

Q. And that Mr. Steinert didn't give you the signal that he says? A. The only signal Mr. Steinert gave was the jar ahead signal.

Q. Then nothing until after the accident? A. No, sir. 20

CLOYD W. GARDNER, sworn for the defendant:

Direct examination by Mr. Hartpence:

Q. You were the engineer, were you, Mr. Gardener? A. Yes, sir.

Q. Where do you live? A. 124 C Street N. E., Washington, D. C. 30

Q. How long have you lived there? A. About 24 years.

Q. How long have you worked for the Railroad? A. 23 years.

Q. How long have you been an engine man? A. 12 years.

Q. You were the fireman that night? A. Well, I was taking the place; we had changed off, the fireman and me probably thirty minutes before this accident. 40

Cloyd W. Gardener, direct.

Q. Is that anything out of the ordinary? A. That is usual, that is done when he is a reliable man.

Q. What do you know about the accident? A. I didn't know anything until after they coupled up, and they coupled us very lightly that I hardly
10 knew it, sitting on the left side. I heard my fireman get into a discussion with somebody on the outside, on the ground, and I heard him say, "How about it; what do you want about it." I heard a voice over there, a little out of the ordinary, in distress like, and the fireman had a talk; he went away from the engine, behind the fireman, you know and I heard somebody say "Little bit ahead, just a little." I didn't know at that time what had
20 happened, only he said to the fireman "Just a little bit." He jarred ahead very nicely, just a few inches, stopped, and by that time Mr. Steinert had come out holding his hand. That was my first knowledge that something had happened. I jumped off the engine, got down. We had taken his glove off and seen his hand in bad shape.

Q. Did you have any conversation with Mr. Steinert? A. No, not right there at that particular time. After going to the hospital I questioned him, you know.
30

Q. Did you take him to the hospital? A. Yes, I did.

Q. In your car? A. Yes, sir.

Q. What did Mr. Steinert say, if anything, to you? A. Why, the way he was sitting in the back, he said to Mr. Dicus, another brakeman, they were discussing how it happened and probably I had said something about it, anyway, I heard him say "It was my own damn fault; nobody but me. I had
40 no business putting my hand in there." Mr. Steinert said those exact words.

Cloyd W. Gardener, cross.

Cross examination by Mr. Winans:

Q. You say the signal that was given the fireman was that someone called him and told him to go just a little ahead? A. Yes, sir.

Q. Then it was not given by the movement of the hand? A. I could not tell you; I was on the fireman's side.

10

Q. The only signal you know of was by voice? A. I heard the conversation. That is what made me become interested, because I heard this man in the argument with the fireman.

Q. Well, the fireman was driving and you were firing? A. I usually perform the service.

Q. Well, the fireman was driving the engine and you were firing? A. I was.

20

Q. Were you firing while sitting there waiting? A. No, I was sitting on the side box. We change; I probably fire six months out of the year, for a year now.

Q. When did you go over there? A. Probably 30 minutes, immediately after turning over my engine to the fireman, probably thirty or thirty-five minutes previous to that time. I had dropped off to get a little coffee; I usually had my lunch but I dropped off to get a cup of coffee and caught my man on coming in the yard back again.

30

Q. When you came from the foreman's shanty you say you heard him tell the conductor— A. After that, when the accident had already happened, I presume, when I heard this argument.

Q. You didn't know it had happened? A. I didn't know, no.

Q. When you came back, you came on the right side of the engine? A. No, I came around, I imagine, after I stopped at the shanty, I stepped on the right side.

40

Clarence C. Waller, direct.

Q. After you finished the sandwiches and coffee, and came back to the engine, you came on the right side? A. I wasn't there over just a minute or two. I was on the engine practically just a few minutes.

10 Q. And, I say, that is when you heard the signal to go ahead just a little? A. After we had been in the yard,—

(Recess to 10 A. M. March 14, 1929.)

Jersey City, N. J., March 14, 1929, 10 A. M., trial of the case resumed, pursuant to adjournment.

20 CLARENCE C. WALLER, sworn for the defendant.

Direct examination by Mr. Hartpence:

Q. Mr. Waller, where do you live? A. Baltimore.

Q. How long have you lived there? A. About nine years.

Q. For whom do you work? A. The Pennsylvania Railroad.

30 Q. How long have you worked for the railroad? A. Twenty years.

Q. What is your position? A. Claim agent.

Q. How long have you been claim agent? A. About twenty years.

Q. Where were you located in 1926? A. Baltimore.

Q. Are you familiar with this case of Mr. Steinert against the Pennsylvania Railroad Company? A. Yes, sir.

40 Q. Did you have any discussions with Mr. Steinert about the situation after he was injured? A. Yes, sir.

Clarence C. Waller, direct.

Q. Do you recall about when it was you saw him? A. The first time I saw him, about a week after he was injured.

Q. Where was he? A. At the hospital in Washington.

Q. Did you see him after that in the hospital? 10
A. Yes, I saw him two or three times at the hospital after that.

Q. I show you this Exhibit D-2 for identification and ask you if you have seen that before? A. Yes, sir.

Q. When and where did you see that paper before? A. On the 28th of May, 1926.

Q. Under what circumstances? A. The voucher and this piece of paper.

Q. When you say voucher, what do you mean? 20
A. Eighteen hundred dollars, a check payable to Mr. Steinert, and this paper was sent to me from Philadelphia, the voucher to be delivered to Mr. Steinert. Before delivery, however, I was to obtain this release.

Q. Did you see Mr. Steinert about the release?

Q. Where did you see him? A. At the hospital, in Washington.

Q. What did you say to him and what did you say to him about the release? A. I offered this release to him to be signed. He said, "Before I sign that, Mr. Waller, I would like to talk to my wife." 30

Q. Did he read the release at the time? A. Apparently he did.

Q. When you say apparently— A. He looked at it.

Q. How long did he look at it? A. Long enough to read it.

Q. Well, what did you do with it then? A. I took it back to my office in Baltimore. 40

Clarence C. Waller, direct.

Q. Did you say anything to Mr. Steinert at that time about an adjustment of the claim that he had made because of his injury? A. No, the agreement for the adjustment had been made prior to that.

10 Mr. Winans: I object to the witness characterizing anything as an agreement, he may state what was said but not characterize it.

The Court: Yes, I think that is so.

Mr. Hartpence: I will consent that the answer, except the opening word, which I think was "No," be stricken out.

Q. Had you previously said anything to Mr. Steinert about that? A. I had.

20 Q. When and where, under what circumstances? A. On the 20th of May, in the hospital at Washington.

Q. What had you said and done with him at the time? A. I had agreed the railroad company should pay him eighteen hundred dollars.

Q. What did he say about that? A. He said he would accept it.

Q. Accept it how, for what purpose? A. In settlement of his injuries, or for his injuries.

30 Q. Now, were you present at your office at the time Mr. Steinert did call for the check? A. No, sir, I was not.

Q. When you say you left it at your office did you leave it with any one in particular with any instructions?

Mr. Winans: I object to anything that he said.

The Court: The answer may be yes.

40 The Witness: Yes, sir.

Clarence C. Waller, cross.

Q. With whom did you leave that? A. Mr. Korter.

Q. Did you leave anything else? A. Only verbal instructions.

Q. What do you mean? A. The voucher and the release were attached; they were both left with Mr. Korter. 10

Cross examination by Mr. Winans:

Q. How long have you been claim agent of the Pennsylvania Railroad? A. About twenty years.

Q. And prior to that were you in the railroad employ also? A. Yes, sir.

Q. In what capacity? A. I started as an office boy.

Q. In the claim department? A. No, I worked up to various clerkships, to claim-master of a small railroad, and finally claim agent of the Pennsylvania Railroad. 20

Q. How many years in all does your employment with this railroad consist of? A. This railroad, about twenty years.

Q. You have been claim agent all that time? A. Yes, sir.

Q. What are the duties of the claim agent of the Pennsylvania Railroad? A. The duties of claim agent of the Pennsylvania Railroad are to make investigations and settlements. 30

Q. And in making your settlements does the claim agent act in a judicial capacity or as a partisan of the railroad company?

Mr. Hartpence: Objected to as irrelevant and incompetent.

The Court: Sustained.

Q. Does your success in holding your position 40

Clarence C. Waller, cross.

and securing promotion depend upon the favorable nature of the settlement you make with respect to the railroad company's interest?

10 Mr. Hartpence: Objected to on the same ground.

Mr. Winans: To show interest and bias, your Honor.

Mr. Hartpence: There has nothing been testified here that would call for the bias of this witness at all. It is not proper cross examination.

The Court: I will sustain the objection as not proper cross examination.

20 Q. How many talks in all did you have with Steinert? A. Four or five.

Q. You knew the nature of his injuries, did you? A. Yes, sir.

Q. Did you tell him that the sum of eighteen hundred dollars was a fair valuation for the loss of a railroad brakeman's right hand?

30 Mr. Hartpence: That is objected to as immaterial and irrelevant, what he might have told him in any such regard, incompetent, as not binding upon the railroad company.

Mr. Winans: Misrepresentation and inadequacy are set out in the reply.

Mr. Hartpence: That would not be misrepresentation at all.

The Court: I will sustain the objection. Misrepresentation, of course, is advanced, but I don't think this is.

40 Mr. Winans: Exception.

Q. Did you tell Mr. Steinert on any of the occa-

Clarence C. Waller, cross.

sions prior to the 29th of May, 1926, when you say you saw him and talked to him, that he was not engaged in interstate commerce at the time the accident happened?

Mr. Hartpence: Objected to on the same ground, irrelevant, immaterial and incompetent. Even though he said so it would be only an expression of opinion on the part of this gentleman. 10

The Court: (After argument.) I will sustain the objection and allow an exception. At least at this stage of the case. Of course if the plaintiff himself gets on the stand and testifies that representations were made to him upon which he relied, inducing him, and so forth, that may be different. 20

Mr. Winans: Exception.

Mr. Winans: Does your Honor rule now, that the plaintiff may, without laying any foundation, testify to the misrepresentations that were made to him?

The Court: He may testify to what the facts were at the time when this release was signed.

Mr. Winans: Or prior to the release. 30

The Court: The facts which induced him to the making of the release, if there were such facts other than the ones testified to by this man. He said he read it over and agreed to it. If there is any difference to those facts which he can testify to, which he claims he induced him to make this release.

Mr. Winans: Does your Honor rule that I can offer that evidence in rebuttal by the plaintiff without laying a foundation, and by 40

Clarence C. Waller, cross.

calling testimony to the attention of the witness.

10 The Court: I rule that any of the facts and circumstances which this man has described, pertaining to the signing of this release, where they are different from what he has testified to, the plaintiff can testify to what the conditions were as to what his version might have been at the time of and leading up to the time of the signing of this release.

Mr. Winans: Including the conversation with this claim agent, Waller. Does counsel make any objection to that?

20 Mr. Hartpence: I make no objection to that. I object to the line of examination as not proper cross examination.

Q. Did you, in the course of the several conversations with the plaintiff that you have testified to, leading up to the alleged making of a payment to him of eighteen hundred dollars, and the alleged execution of a release, state to him as an inducing cause of the execution of the alleged release, that the plaintiff Steinert was not at the time of the
30 accident engaged in work of interstate commerce, or in furtherance thereof? A. I did not.

Q. Did you in any of those conversations which led up to the payment to Mr. Steinert of eighteen hundred dollars, and the alleged execution of a purported release, state to him that his only rights were under the Workmen's Compensation Law?
A. I did not, sir.

Q. Did you in the course of any of these conversations leading up to the payment of eighteen
40 hundred dollars and the alleged execution of a purporting release, state to him that the payment

Clarence C. Waller, cross.

that he was entitled to would be made to him upon a weekly or other periodical basis, in installments representing a certain proportion of his wages? A. I did not. To the contrary, I told him he was not entitled to compensation under the compensation law, or any other compensation law.

10

Q. Did you tell the plaintiff in the course of any of the conversations you have testified to prior to and leading up to the payment to him of eighteen hundred dollars, and the alleged execution of a purporting release, that a man who worked in a freight yard was not engaged in interstate commerce, but that a man who worked on the road run was engaged in interstate commerce? A. I did not, sir.

Q. Did you tell him either one of these things? A. No, sir.

20

Q. Have you related all the conversation that occurred between you and the plaintiff Steinert on the occasions you have testified to? A. I don't think I have.

Q. What else took place between you? A. Mr. Steinert asked me before he agreed to accept eighteen hundred dollars in settlement of his claim—

30

Mr. Winans: Right here I move that the expression "before he agreed," may be stricken out as a conclusion.

The Court: Just tell us what the conversation was without designating it before or after.

The Witness: Asked me if the settlement of his claim had anything to do, would prevent him from obtaining a position with the company when he was able to go back to work.

40

Clarence C. Waller, cross.

Q. Did you reply to that? A. I did.

Q. What did you tell him? A. I told him the claim department had absolutely nothing to do with employment, and he would have to confer with his trainmaster.

10 Q. Did you in the course of any of the conversations that you have testified to leading up to the payment to the plaintiff of eighteen hundred dollars, and the alleged execution of a purporting release, hear him state to you that he would not make any settlement or adjustment of his claim until he had discussed the matter with superintendent Smith? A. He did not.

Q. Who is Superintendent Smith? A. He is superintendent of the Baltimore division.

20 Q. With office in Baltimore? A. Yes, sir.

Q. Is he your superior officer? A. No, sir, he is not.

Q. Connected with another department? A. Entirely another department.

Q. Did you meet Mr. Steinert about five weeks after this accident happened in Union Station, Washington? A. I do not recall it, sir.

30 Q. Did you on an occasion about five weeks after the occurrence of the accident, which was on the 17th of August, 1926, the date referred to being prior to the 29th day of May, 1926, at the request of the plaintiff, Mr. Steinert, and while he was present, call up Mr. Smith's office in Baltimore on the telephone in relation to making an appointment for Mr. Steinert? A. I did not, sir.

Q. You never called up Mr. Smith's office in Mr. Steinert's presence? A. I did not.

40 Q. Have you now stated all of the conversations that you had with Mr. Steinert? A. All that I recall, sir.

Thomas H. Watkins, direct.

THOMAS H. WATKINS, sworn for the defendant.

Direct examination by Mr. Hartpence:

Q. Where do you reside, Mr. Watkins? A. Baltimore.

10

Q. What is your business? A. Yard trainmaster.

Q. What railroad? A. Baltimore division, Pennsylvania Railroad.

Q. And how long have you worked for the railroad? A. I entered the service in 1890.

Q. Working continuously ever since? A. Yes, sir.

Q. You know Mr. Steinert, do you, the plaintiff in this case? A. Yes, sir.

20

Q. As trainmaster of that division, what, if any, supervision did you have over the men employed in the Jersey yards? A. I had general supervision over the train men.

Q. And Mr. Steinert came under your supervision? A. Yes, sir.

Q. You recall the fact that he was injured, do you not? A. Yes, sir.

Q. In April, 1926? A. I do.

30

Q. Did you have any conversation with him after that with regard to his injury and his position? A. He was injured in Washington and I never saw him until he was out of the hospital. Of course he was seen by others in my department. He came in to see me in May, 1926, relative to a position.

Q. What was said between you and him at that time? A. And I advised him that when he was able to return to duty and obtained a release from

40

Thomas H. Watkins, direct.

the doctor, to report back to me and that I would try to place him, take care of him.

Q. When you say a release from the doctor what do you mean? A. That is when the doctor would give him a return-to-duty card saying that he was able to work.

Q. What did Mr. Steinert say or do? A. Well, he practically said nothing to me after that. He walked out. He seemed to be in bad humor about it.

Q. Did he come back again to see you? A. I never saw him from that day until today.

Q. Do you know what his wages, his average weekly wages were, when he was working there? A. His average wages, as we checked it up—

Mr. Winans: I object to something that was checked up. There is a record. Produce the record.

Mr. Hartpence: May the witness be permitted to answer the question?

The Court: Yes. The question is, "Do you know?"

Mr. Winans: May his previous answer then be stricken out?

The Court: Strike it out.

Q. Do you know what they were, yes or no? A. Yes, I think I can answer that.

Mr. Winans: May I cross examine the witness as to his knowledge. Did you ever see payment of wages made to Mr. Steinert?

Mr. Hartpence: Objected to as immaterial and irrelevant.

The Court: Answer that question.

The Witness: I did not. I did not see the checks.

Thomas H. Watkins, cross.

Cross examination by Mr. Winans:

Q. Have you acquired whatever knowledge or belief you have as to Mr. Steinert's earnings from some papers you have read? A. No.

Q. Or some chart or payroll? A. Payroll.

Q. That is the only knowledge you have on the subject. A. Yes, sir.

10

Mr. Winans: I submit the witness' testimony is not competent. If there is a payroll it should be produced.

The Court: The objection is that it is secondary evidence, and that the payroll as a primary evidence should be produced?

Mr. Winans: Yes, sir.

The Court: Do you press your question?

20

Mr. Hartpence: Yes.

The Court: What is your position?

The Witness: Yard trainmaster.

The Court: What access do you have to the payrolls?

The Witness: I can look them over.

The Court: Have you any duty to take care of them?

The Witness: No.

The Court: Or any duty to look them over?

30

The Witness: Yes, sir.

The Court: As far as this particular man?

The Witness: I have a duty to look over who, and do look over the time cards of the men to see what they earned.

The Court: All of the men?

The Witness: Yes, of all the men.

The Court: Of this man?

The Witness: All the men of my depart-

40

Thomas H. Watkins, cross.

ment. I did not get the time personally. I looked at the time cards very frequently to see what their earnings were as they go along, to hold their wages at a certain amount.

10 The Court: He is in your department and under your supervision?

 The Witness: Yes, sir.

Q. Did you look at that paper you described as a payroll for the purpose of coming here to testify what was in it? A. No, I did not look at it. The information was worked up.

Q. By whom? A. By the timekeeper.

Q. He supplied you with some figures? A. Yes, 20 sir.

Q. Did he do that at the request of the claim department? A. He did that at the request of the claim department, at the request of the superintendent, through the claim department, I will put it that way.

Mr. Winans: It seems to me that the objection is a proper one; that this witness is simply here because another department requested him, or loaded him up with such figures to come here to testify, such figures to furnish the testimony. 30

The Court: You did not get these figures from the payroll?

The Witness: I hadn't the slightest idea I was going to be asked any questions about it.

The Court: You just got the figures somebody gave you?

The Witness: I have the figures that we actually checked as wages from one year to another. 40

The Court: You actually checked them?

Thomas H. Watkins, cross.

The Witness: No, the timekeeper checked them. I have a copy of the memorandum.

Mr. Winans: I make the further objection that the question now asks for an average, and that an average does not appear in any record, and that the only testimony that this witness can possibly give would be as to facts which mean definite figures from which the court might arrive at an average. 10

The Court: That may be so; an average might be as you say without giving the jury a right to know upon what facts the average was based; it might be based on two months' average of a hundred dollars a month, and he might not have made over ten.

Mr. Winans: The average is not proper testimony. 20

Mr. Hartpence: The reason I asked the question in that form was by reason of the direct testimony of the plaintiff himself, when he was asked what his earnings were prior to the time he was injured. That's all there was to it. That was a general question. He said seventy-five to eighty-five dollars a month. He only gave an average. 30

The Court: Do you know how many weeks these figures represented that you had?

The Witness: One year.

The Court: How many weeks was that for?

A. Fifty-two weeks.

The Court: So that the figures that were presented to you showed the weekly pay- 40

Thomas H. Watkins, redirect.

ments for every week for a year prior to the accident?

The Witness: Yes, that would show the weekly or the two monthly periods. We pay twice a month.

10 The Court: I will allow the question with an exception.

Redirect examination by Mr. Hartpence:

(Question read as follows:) Q. Do you know what his wages, his average weekly wages were, when he was working there? A. Twenty-seven dollars and seventy-two cents a week was his average.

20 Mr. Hartpence: Cross examine.

Recross examination by Mr. Winans:

Q. Was this amount on the regular list, or extra? A. Regular list.

Q. What was the rate of his pay by the hour, or by the day? A. His rate was fifty-seven—we have had an increase in wages in the last year and a half, I don't know whether that rate was later, when the last increase took place. The rate now, I think, would be \$6.06 a day.

30 Q. A day of how many hours? A. That is the same position as the present time?

Q. A day of how many hours? A. Eight hours. I would like to state that I am not positive that is right. I can get it for you in a minute, and I would be positive. I don't want to misrepresent anything for a penny. I have really forgotten his rate. It is \$6.06, I think.

40 Q. Is that since the recent raise? A. I think that is correct. I am not positive, as I did not get the rate.

Thomas H. Watkins, recross.

Q. Isn't it a fact that he made \$6.48 a day? A. You may be correct. It is six something; I have forgotten.

Q. You haven't forgotten the \$27.72 you came to testify to? A. I have not forgotten, because I had that checked up.

10

Q. Did he work six or seven days per week? A. He worked six or seven, as we desired.

Q. Which did he work? A. He worked six some weeks, seven some weeks. They alternated on Sundays, and they did not work every Sunday. We work them occasionally.

Q. Did he, during these fifty-two weeks that you are assuming to tell his earnings, do any work every week day and every alternate Sunday? A. I would say no.

20

Q. Isn't it a fact that he was on the extra list, and was not called out for duty all the time? A. He might have been on the extra list during part of this time.

Q. Do you know whether he was or not? A. I could not answer that question right now.

Q. Do you realize you are here attempting to state the earnings of this man and the basis of those earnings? A. I only gave you the earnings as they were checked from the payroll. I didn't check them and don't know any more about it than I have told you.

30

Q. Did he work in every one of these fifty-two weeks you have testified about? A. I could not answer that question.

Q. But the amount of his earnings from week to week varied? A. I can only answer that in this way: they would not vary materially if he worked continuously. I did not check the amount of time lost.

40

Thomas H. Watkins, recross.

Q. If he worked continuously, the only variation would be based on whether it happened to be a week in which he worked on a Sunday, and a week in which he did not work on a Sunday? A. That is correct.

10 Q. In other words it will be seven days pay in one week and six days pay in another, whatever the rate was, and you don't know what the rate was? A. I have admitted that I do not. It is six dollars and something, but the actual rate I have forgotten, the one that was in effect at the time.

Q. Do you know whether he was sick during any part of these fifty-two weeks that you are assuming to testify about? A. I do not; I did not prepare myself and look. I didn't know even I was coming
20 here until last night.

Q. I understand all that you did was to take fifty-two figures that you obtained from some office, or from somebody else, and come here today and give them? A. No, I asked for the rate, asked for the average.

Q. You trusted getting the average through somebody else? A. Through the timekeeper.

Q. So that all you know, some person in the railroad employ told you to come here and say that the average earnings of this man were \$27.72 a week? A. No one told me to come, and to say anything.
30

Q. Somebody told you that that was a fact, didn't they? A. Yes, sir.

Q. Was that some one connected with the railroad? A. He was a railroad man, yes, sir.

Q. That's really all that you know about it? A. That's all that I know about the earnings.

Q. If the man was out of work twenty-six of these fifty-two weeks you wouldn't know about it
40

Thomas H. Watkins, recross.

personally? A. Well, this happened in 1926. I said I would have forgotten it. I would not make any attempt to say out of the thousand men that I would remember which man would be off that week or for a ten-day period.

Q. If this average was given on a slip of paper by some one else, why didn't you want to look at the payroll? A. Why I have not looked at the payroll? 10

Q. Why didn't you look at the payroll if the man gave you a piece of paper with \$27.72 written on it? A. Well, I have not checked the payroll personally for this amount. I have tried to make this clear.

Mr. Winans: I think the incompetency of this testimony must be overwhelmingly evident at this time. I move that the testimony of this witness as to his impression or belief as to what the amount of earnings were be stricken out. 20

Mr. Hartpence: I will consent, your Honor.

Mr. Winans: I will also ask your Honor to direct the jury as a matter of law to disregard what this witness has said on this subject. 30

The Court: It having been stricken out the jury will of course disregard any testimony as to that.

Mr. Hartpence: Now I will ask to have the trial continued long enough to bring the payrolls from Washington. I now offer in evidence the release, if your Honor please.

Mr. Winans: I object, if your Honor please, because I think there is a material variance. That alleged release is pleaded in the answer, and I notice that something 40

Thomas H. Watkins, recross.

which might be regarded as highly important has been placed on the original, which apparently was not there when the copy was made and attached to the answer.

10

Mr. Hartpence: I presume that is an omission of a clerk, and I ask leave to amend the copy of the release and add these words:

Mr. Winans: I don't think, your Honor, that that should be granted unless we have proof that these words were there at the time.

Mr. Hartpence: The evidence already states that they were already written there.

20

The Court: The motion to amend if counsel thinks that is desirable and requires it, should be amended, that motion will be granted.

Mr. Winans: I don't think it should be allowed to be made a physical thing in the answer. I want to use the answer in its present condition.

The Court: Just let it appear in the record.

30

Mr. Winans: I haven't any objection to doing that. I don't want the answer on file interfered with in any way.

The Court: That is all right.

Mr. Hartpence: The words to be added are as follows:

"I have read and fully understand this release."

40

Howard William Steinert, direct.

HOWARD WILLIAM STEINERT, recalled by the defendant.

Direct examination by Mr. Hartpence:

Q. I show you, Mr. Steinert, what purports to be a check of the Pennsylvania Railroad Company for eighteen hundred dollars, drawn to your order, Howard William Steinert, and ask you if that is the check that you got in payment at the time they paid you the eighteen hundred dollars, and if that is your endorsement on the check (handing witness). A. Yes, sir.

10

Mr. Hartpence: I want to offer that in evidence.

Mr. Winans: Were the words "All claim for compensation" in that check when you received it?

20

The Witness: I can't say whether it was or not.

Mr. Winans: You don't know?

The Witness: No.

Mr. Winans: I want to object to this on the ground that a release is pleaded, a check, if they assume to have it affect the release, must be pleaded and proved. While I concede they proved it, it has not been pleaded. Therefore, I don't think it should be admitted as an amendment to an enlargement of their defense of a general release.

30

Mr. Hartpence: I am perfectly willing to have it so limited. I merely offered the check for the purpose of showing that it is the check he received, and that his signature is endorsed thereon.

Mr. Winans: We concede that.

(Accepted and marked as Defendant's Exhibit D-3 of this date.)

40

Mr. Hartpence: Defendants rest.

Howard William Steinert, direct.

REBUTTAL.

HOWARD W. STEINERT, called in rebuttal.

Direct examination by Mr. Winans:

10 Q. While you were at the place of the accident
and the engine was standing there, from the time
the engine arrived at that place, and up until the
time of the accident, did the fireman Jarvis, hold
his head on the right-hand window of the cab? A.
I didn't see him, no, sir.

Q. Did he or did he not? A. No, sir.

Q. Did you look back there? A. Yes, sir.

Q. In connection with giving signals, did you
look that way? A. Yes, sir.

20 Q. What was the name of your engineer? A.
Gardiner.

Q. And did Gardiner, Engineer Gardiner, come
from the shanty over the right side of the engine
before or after your accident happened? A. After
the accident happened.

Q. Had you, up to that time, seen Engineer
Gardiner that night? A. No, sir.

30 Q. When you went to the car ahead to lift the
pin was there any other person there to lift it? A.
No, sir.

Q. Was the conductor, Kerr, there at the time?
A. He was standing off to the side a little.

Q. Was the flagman, Redding, passing at the
time? A. Yes, sir.

Q. Can a pin always be lifted easily when it is
in order?

Mr. Hartpence: I object to that as calling
for a conclusion.

40 The Court: Overruled.

Mr. Hartpence: Exception.

Howard William Steinert, direct.

Q. What is the answer? A. Yes, sir.

Q. Is the cutting lever used in coupling cars or uncoupling cars? A. Uncoupling cars.

Q. Is it used in the act of coupling cars at all? A. No, sir.

Q. From the position where Flagman Redding was just before your accident happened on the cars ahead of your engine, could he have left on the left hand side and gone directly across to high-line number one? A. Yes, sir. 10

Q. Without going over toward the yardmaster's office at all? A. Yes, sir.

Mr. Hartpence: I move to strike that out as immaterial. What difference would it make whether he could or could not. That is only a collateral point. 20

The Court: Leave it in, if there was testimony to the contrary by the other side.

Q. Could Conductor Kerr have crossed over directly to the left side instead of going over to the yardmaster's office? A. Yes, sir.

Q. On which side of the engine as it stood there at the time of your accident, or an instant before, was highline number one track? A. Left hand side. 30

Q. That is the opposite side from the side on which all of you men were? A. Yes, sir.

Q. Do you remember Flagman Redding when he came back asking you why the fireman had not backed up yet? A. Yes, sir.

Q. What did you tell him? A. I told him I didn't know.

Q. Who gave the "jar ahead" signal as it was referred to by Mr. Redding? 40

Mr. Hartpence: I object unless the specific

Howard William Steinert, direct.

"jar ahead" signal was referred to.

10 Mr. Winans: There was only one because the witness distinguished from the "shake-up" signal, which he said was a big movement, and a "jar ahead" signal, which was a little movement.

Q. How many "jar ahead" signals were given?

Mr. Hartpence: I object to that as absolutely not rebuttal.

Q. How many "jar ahead" signals were there?

A. Just one.

Q. Who gave that? A. I did.

Q. Did you give it before or after the accident?

20 A. After the accident.

Q. When you were in the automobile going away from the place of the accident, did you say anything about this being your fault? A. Why, I think I said, "I guess it is my own fault, being on the job, and all the rest of them lying down on it." I said, "If I ever go back to work again I won't do anything unless the others are going to help out."

30 Q. Now, you testified that you signed a statement at the hospital when a young man came there and talked to you? You recall that, do you? A. Yes, sir.

Q. Was that in handwriting or in typewriting? A. It was in handwriting.

Q. Did you sign any sheet of paper with any typewriting on it? A. No, sir.

Q. And you were shown a piece of paper with typewriting on it, with your name written on the extreme bottom, and you stated that was your signature, did you? A. Yes, sir.

40 Q. Now, tell us what happened at the time when

Howard William Steinert, direct.

you signed the handwritten paper, and your name on the other paper here that you saw in court?

Mr. Hartpence: Objected to as not rebuttal.

Mr. Winans: I ask then that I be permitted to open my case and put this testimony in? 10

The Court: I think that may be done.

Q. Will you answer? A. Well, after I was in the hospital about a week or ten days that gentleman from Baltimore came over to see me.

The Court: Just talk up loudly and clearly enough so that the last juror can hear you, and counsel on both sides can hear you, and so that I can hear what you say. 20

The Witness: After I was in the hospital about eight or ten days, a gentleman came from Baltimore and told me he would like to know how the accident happened. Well, I told him. We go in the sunparlor in the hospital and talk it over. So him and I went in there, he sat alongside of me on this side of me, and I sat on the other chair. He was writing at the table and I gave him word for word as best that I can, all about the accident, how the accident happened, and he said, "Is that all?" I says, "Yes," he says, "Sign your name", and I signed it. After he said, "I want to have this in typewriting, and he said perhaps you wouldn't mind signing a blank piece of paper, so I said "Sure", and I signed the bottom of a blank piece of paper. So he thanked me, and went on out, and I haven't seen the man since. 30 40

Howard William Steinert, direct.

Q. Was the paper that you signed written out with pencil or pen and ink? A. Pencil or pen and ink. I never paid much attention.

Q. You signed that? A. Yes, sir.

10 Q. The other one that you signed, was there anything on it? A. No, sir, a blank piece of paper.

Q. Did the man who asked you to sign that indicate the place on the paper where he wanted you to put your signature? A. Yes, he told me on the bottom.

Q. Did you write on the extreme bottom? A. Yes, sir.

Q. How many times did you sign your name on that occasion? A. Twice.

20 Q. Did he read over to you, or did you read the matter which he had written out in your presence? A. No, sir. I just told him.

Q. Did you have some conversations with claim agent Waller who was on the stand here this morning? A. Yes, sir.

Q. Now, these conversations occurred, some at the hospital, and at least one of them at another place, is that right? A. Yes, sir.

30 Q. When did Mr. Waller call on you at the hospital first? A. About a week or ten days after I was hurt.

Q. Did you have a conversation with him then? A. Yes, sir.

Q. When did he call upon you again? A. About eight or ten days later.

Q. Where was that? A. In the hospital.

Q. When did you see him the next time? A. I saw him the next time in Union Station, Washington.

40 Q. When? A. About two weeks prior to that.

Q. Did you see him any other times besides those? A. Not to my recollection.

Howard William Steinert, direct.

Q. On these occasions did you have a conversation with him about your injuries? A. Yes, sir.

Q. Did you show him the right hand? A. Yes, sir.

Q. Was it bandaged at the time? A. Yes, sir.

Q. Did Mr. Waller on the occasion of these three talks you had with him about your injuries say anything about settling? A. He started telling me something about— 10

Q. State yes or no? A. Yes, sir.

Q. What did he say to you about settling? A. He told me that he thought I didn't have any claim against the railroad, I was not working under the Interstate Act.

Q. Did he tell you what Interstate Commerce consists of? A. First I told him I didn't understand anything about Interstate Commerce, and then he started to tell me that if a man was working on interstate, he would have to be out on road service going from state to state, and being that I worked in the yard—and he also asked whether I lived in the District of Columbia that night and I told him no. He told me I would be entitled to compensation. 20

Q. Did he tell you that if you were working in a yard you were not entitled to a claim against the railroad company, except for compensation? A. Yes, sir. 30

Q. And that you were not engaged in interstate commerce? A. Yes, sir.

Q. Did you tell Mr. Waller that you would or would not settle with the company for your injuries at the time? A. Yes, sir.

Q. What did you tell him? A. I told him I would not settle anything until I had seen Mr. Smith, the superintendent. 40

Howard William Steinert, direct.

Q. You knew who Superintendent Smith was, did you? A. Yes, sir.

Q. Did Mr. Waller speak about Superintendent Smith. A. Yes, sir.

10 Q. Where were you with Mr. Waller when the name of Superintendent Smith was mentioned? A. In Washington terminal, Washington, D. C.

Q. What part of Washington terminal station? A. In Mr. Warren's office.

Q. That is what is known as Union Station, Washington? A. Yes, sir.

20 Q. What, if anything, did Mr. Waller do, while you were there, with reference to your desire to see Superintendent Smith? A. Well, he started talking about the Compensation Act again, and Interstate Commerce Laws, and I told him that I wanted to see Mr. Smith first; I asked him if he would make an appointment for me to see Mr. Smith. He said, "Why, certainly," and he took the 'phone that was setting right on the desk, and called Mr. Smith. Mr. Smith must have told him to come over, because he told me to see Mr. Smith on Saturday morning at ten o'clock.

30 Q. What day was this that Mr. Waller called up on the telephone for you? A. On Friday afternoon.

Q. And when was the Saturday morning at ten o'clock you refer to? A. The next morning.

Q. Did he tell you where to see Mr. Superintendent Smith on the following morning at ten o'clock? A. Yes, sir.

Q. Where? A. Baltimore.

Q. Did Mr. Waller tell you anything about how a man would be paid on the compensation plan?

40 Mr. Hartpence: Objected to as immaterial and irrelevant.

Mr. Winans: I withdraw it.

Howard William Steinert, direct.

Q. When Mr. Waller spoke to you about compensation did he tell you whether compensation was paid in one payment or by installments?

Mr. Hartpence: I object to that as incompetent, irrelevant and immaterial.

10

The Court: Overruled.

Mr. Hartpence: I pray an exception.

A. Mr. Waller told me that he could probably get me eighteen hundred dollars, he said; and the rest of it would be paid by the week. He didn't say how many weeks, or how long I was to get it, or anything else. He told me he could possibly get me eighteen hundred dollars right now.

Q. Did you tell him what you wanted that eighteen hundred dollars for? A. Yes, sir.

20

Q. What was that for? A. For my family.

Q. This was some weeks after the accident? A. Yes, sir.

Q. Had the defendant paid you any money at all during the time that intervened and the time you had these talks with Mr. Waller? A. Not a penny.

Q. Did you know at the time you were working in the yard, when you were hired, you were working in Interstate Commerce? A. No, sir.

30

Mr. Hartpence: I object as being incompetent, irrelevant and immaterial; and not proper rebuttal.

The Court: I will permit it and allow you an exception.

Mr. Hartpence: Exception.

Q. (Question read as follows:) "Q. Did you know at the time you were working in the yard, when you were hired, whether or not you were working in interstate commerce?" A. No, sir.

40

Howard William Steinert, direct.

Q. Did you know at the time Mr. Waller made the statement to you that you were not engaged in interstate commerce, know whether or not these statements were true? A. No, sir, knew nothing about interstate commerce.

10 Q. Did you believe the statement that Mr. Waller made to you? A. Yes, I thought that he was telling me the truth.

Q. Did you rely on the statement he made to you? A. Sure.

Q. Did you at the time of the accident, or at the times of these conversations with Mr. Waller that have been testified to, know whether or not that a man working in a freight yard is not engaged in interstate commerce? A. No, sir, I had no idea.

20 Q. Did you know that a man must be working on a road run in order to be in interstate commerce? A. No, sir, not until I was told.

Q. Did you know that a man working in a freight yard must take compensation in installment payments? A. No, sir.

Q. Did you believe all these things when Mr. Waller told you? A. Believe him, yes, sir.

Q. When did you first learn you were engaged in interstate commerce? A. Through my lawyer.

30 Q. Was that long after you ceased dealing with Mr. Waller? A. Yes, sir.

Q. After you brought your suit? A. Yes, sir.

Q. Did you tell Mr. Waller whether or not you knew anything about interstate commerce? A. I told him, yes, I didn't know anything about interstate commerce.

Q. You knew you had your hand off, though, didn't you? A. Yes, sir.

40 Q. Did you after Mr. Waller told you he had made an appointment for you to meet Superin-

Howard William Steinert, direct.

tendent Smith on the following Saturday morning at ten o'clock, make an effort to see Superintendent Smith? A. Yes, sir.

Q. Did you go to his office in Baltimore? A. Yes, sir.

Q. Did you succeed in seeing him? A. No, sir. 10

Q. Were you, as a result of your going to Superintendent Smith's office in Baltimore, to see him, referred by anybody there to any other place, yes or no? A. Yes, sir.

Q. What place were you referred to? A. Calvert Station.

Q. Where is Calvert Station located? A. Baltimore.

Q. Did you go to Calvert Station? A. Yes, sir.

Q. On the same day or another day? A. The same morning. 20

Q. When you got there whom did you see? A. I met the gentleman who was on the stand yesterday, Mr. Korter, and Mr. Gosnell.

Q. You saw these gentlemen on the occasion that they both testified to? A. Yes, sir.

Q. You heard them testify to having you sign the release? A. Yes, sir.

Q. Will you tell us what was said and what was done when you reached that office that day and the eighteen hundred dollar check was given to you? 30

A. When I went in the office I seen these two gentlemen sitting there at the desk, and I said, "Good morning", or something like that. They said, "What is your name"? I told them. "Oh, yes! you are here for the check", and he started to give me the check, and I wanted to know how I can endorse the check, what good was the check if I could not endorse it.

Q. Did they tell you any reason why they 40

Howard William Steinert, direct.

thought you could not endorse the check? A. They said, "Your right hand is off, we don't know whether you can write with your left hand".

10 Q. Did you make any response to that? A. I said, "Sure, I can try to write." So Mr. Korter gave me a piece of paper about the size of a playing card, or probably a little longer than a playing card, about like a calling card, it was the same width, and he told me to sign my name on that. I looked at it, after I started to write he said, "Put this at the top". It went something like this—I can't repeat the exact words, I understood this is something about a release, and I wrote it as requested to write, as he told me to.

20 Q. Whatever words you wrote, were they dictated to you, or did you compose the words yourself? A. No, he dictated them to me.

Q. Did you write just what he told you? A. Yes, sir.

Q. On what? A. On this piece of paper.

30 Q. Now at the time you wrote your name and the other words dictated to you by Mr. Korter on this piece of paper, was there any writing, printing or typewriting, or other marks on that paper? A. No. I picked it up specially, and looked at it to see if there was nothing on it.

Q. Did you sign any release? A. No, sir.

Q. Did you sign any release there at the time? A. No, sir.

Q. Did any one of these men, Korter or Gosnell tell you that they had a release for you to sign, or asked you to sign a release. A. No, sir.

40 Q. One of these men, or possibly both of them said something about the payment not being for your hand; just what did you say there? A. Well, Gosnell or Korter handed me the check. I went on

Howard William Steinert, direct.

out, and as I was going out I said, "This doesn't pay me at all for my hand. I want to see Mr. Waller afterwards to make some kind of an arrangement after I see Mr. Smith", and I went on out.

Q. Well, did you make that statement to Mr. Korter or Mr. Gosnell, or both of them? A. Both 10
men were in the office.

Q. Did you ever say to them that you were accepting the check in payment for the loss of your hand?

Mr. Hartpence: Objected to as immaterial and irrelevant.

Mr. Winans: I withdraw it.

Q. Now, during the year before you sustained this accident, while you were working for the railroad company, were you on the regular list of brakemen, or were you an extra man? A. I was 20
on the extra list.

Q. What does that mean? What is the practical difference from being a regular employee and being on the extra list? A. Well, a regular employee has to work every day; a man working on the extra list has to wait until he gets called for work.

Q. How does a man get off the extra list and on to the regular list? A. By seniority right. I had 30
many years to go before I could hold a regular position.

Q. During that year what was your regular rate of pay, per day, or per hour? A. Six dollars and forty-eight cents a day.

Q. Of how many hours? A. An eight-hour day.

Q. And about how many days a week? A. I was 40
called out five days of every seven.

Howard William Steinert, cross.

Cross examination by Mr. Harpence:

10 Q. Your average employment was five days a week at \$6.48 a day? A. Well, on an average of that, five days a week, sometimes I made big months, and sometimes I did not. It would depend on how the railroad situation was, whether they had plenty of work or not. A man worked on the extra list he had to take what came. He had to take the good with the bad.

Q. Well, let me see. I understood you to say yesterday that you did sign H. W. Steinert, you signed that? A. Yes, sir.

20 Q. You say when you signed that on this exhibit P-3, which was first marked D-1 for identification—you knew there was nothing at all on that paper when you signed it? A. No, that man had no typewriting when he came to me.

Q. Just a blank piece of paper? A. Absolutely. He wrote what I told him. That is what was on that paper, on another piece of paper, and then he asked me to sign this piece of paper. He said he wanted to typewrite it; which I did, that is the first time I seen it.

30 Q. Where does this, what appears in typewriting, differ from what you told him, and from what he wrote down in handwriting, where does it differ at all? A. I can't say that it differs, outside of one is in typewriting and one not.

Q. Well, will you say it differs at all? A. Yes, sir.

Q. In what respect? A. In typewriting.

Q. Does the contents of this paper in typewriting differ at all from the contents of the paper that he wrote?

40

Mr. Winans: I object to this, if your

Howard William Steinert, cross.

Honor please. I now call upon the plaintiff to produce the paper writing spoken about and signed by the witness. In the absence of that, or of notice to produce, it appears to me it is all secondary evidence. We are not questioning that paper. We put this in evidence because it shows substantially the same statement as taken down by the man that sat alongside of him a few days after the accident. 10

Mr. Hartpence: Have we any such paper?

Mr. Waller: I have never seen such a paper.

Mr. Winans: I object to that unless Mr. Waller testifies on the stand, so as to be able to identify that statement. 20

Mr. Hartpence: We are unable to produce any such statement, because there is no such statement.

Mr. Winans: I ask that the statement of Mr. Waller be not given a factitious position in this case unless he takes the stand and says that he is qualified to testify as to that, and does so.

Q. I show you this check on which you endorsed your name? A. I had to get the money. 30

Q. Was the printing above your name and the typewriting on the face of it also on there when you signed it, or was that blank when you endorsed your name on the back of it,—was it a piece of blank piece of paper? A. I can't say.

Mr. Winans: I ask that the cross examination in this regard be limited to the same scope that was given to the paper when I withdrew my objection. In other words, it 40

Howard William Steinert, cross.

be not relied upon by the defendant. The release is conceded, he is simply showing the *res gestae*, as I understand.

10 Mr. Hartpence: I agree with that unequivocally. I only want the signature that is written, to ascertain from Mr. Steinert whether or not when he endorsed it that was on there.

Mr. Winans: I will concede it was in the same shape as it is now.

Q. Yet you say this Exhibit D-2, which purports to be a release signed by you, that you never signed it? A. Not on that piece of paper.

20 Q. Do you say that it is not your signature on Exhibit D-2, Howard W. Steinert? A. That's my name, but I didn't write it on that piece of paper.

Q. These words, "I have read and fully understand this release," I understood you to say yesterday, that is in your handwriting, isn't it?

Mr. Winans: He didn't say anything of the kind.

30 A. No, I didn't say that. I said I wrote something like that on a piece of paper about the size of a plain card, or probably a little longer.

Q. Will you say now that this writing on this D-2, "I have read and fully understand this release, Howard W. Steinert," whether that is in your handwriting or whether it is not? A. It is not in my handwriting on that piece of paper.

40 Q. Will you say whether or not you did write these words, "I have read and fully understand this release, Howard W. Steinert," on this Exhibit D-2, did you write that or not? A. Not on that piece of paper.

Howard William Steinert, cross.

Q. Will you say that this is not your signature?

A. Not on this piece of paper. It is my signature, but not on this paper.

The Court: Don't you get confused between your name and your signature. Is it your signature and not your name? 10

The Witness: No, it is not my signature.

Q. At the time you were injured, Mr. Steinert, where did you live? A. Washington, D. C.

Q. Do you still live there? A. Yes, sir.

Q. I understood you to say on your present examination by Mr. Winans, that you had not seen the engineer Gardiner at the scene of the accident until after you were injured? A. Yes, sir.

Q. Is that correct? A. That is right. 20

Q. And that is when he came from the direction— A. Of the yard inspector's office.

Q. Had you seen him at all on the engine during the time you worked there that morning? A. No, sir.

Q. Who did run the engine all the time you worked on it with the crew? A. Fireman Jarvis.

Q. You had been working on it that morning how long? A. About half an hour.

Q. Before you were injured? A. Yes, sir. 30

Q. How many trips back and forth had you made? A. Just one.

Q. You don't know what became of the little blank piece of paper a little larger than a playing card after? A. I went out of the office with the check, and that was the end I seen of Calvert Station to the present day.

Q. How did you know that this check of eighteen hundred dollars was going to be there for you? A. 40

Howard William Steinert, cross.

Mr. Waller told me on Friday evening when he made the appointment to see Mr. Smith.

Q. Told you what? A. If I wanted that money to go down to Calvert Station and get it.

10 Q. I gather from what you said in answer to your counsel's question with regard to this statement that you say Mr. Waller said, that you believed what Mr. Waller told you about it; that is correct, isn't it? A. I believed what he was telling me.

Q. You felt— A. The claim agent, he ought to know.

Q. You felt that he was a man whose word was worthy of being taken? A. He told me himself that he would treat me the same as though he was
20 my own son.

Q. You felt what he said was worthy of being accepted by you? A. Sure.

Q. You did get relief benefit at the time you were injured?

Mr. Winans: I object to that as irrelevant and immaterial. Payment is not pleaded, and it could not be pleaded.

30 Mr. Hartpence: He made the statement he had not received a dollar.

Mr. Winans: From the railroad company.

Mr. Hartpence: You distinguish between the railroad and the relief fund?

Mr. Winans: Yes, I do.

The Court: Objection sustained; go ahead.

40 Q. What was this compensation act that was referred to which you say Mr. Waller told you about? A. Mr. Waller told me, as I said before, that if I had been working on the road service I would have come under the compensation law,

Howard William Steinert, cross.

and not working on the road service work, working in the yard that way, he told me that I was entitled to compensation, that I had to take compensation.

Q. What did you understand compensation to be? A. Well, he explained it to me—

10

Q. What did you understand compensation to be? A. What Mr. Waller told me.

Q. Didn't you know that there was no such thing as the Workmen's Compensation Act in the District of Columbia? A. I told you before I knew nothing about compensation or interstate either. They were too high for me as a brakeman.

Q. What was it that you thought you were entitled to in the railroad company because you were hurt? A. As compensation, as Mr. Waller told me, getting something for part payment for my injuries, and I was entitled to my wages. That is the way he explained it to me.

20

Q. How long had you worked there in the Jersey yards before you were hurt? A. Oh, that night, half an hour.

Q. How long had you worked there before that time? A. In the Jersey yards, on that night?

Q. Not that night, altogether? A. I put about three years in Washington.

30

Q. Do you belong to the Railroad Brotherhood? A. No, sir.

Q. Do you belong to any railroad union? A. No, sir, I could not afford it, not as an extra man. I was not sure of my wages. I am mighty sorry I didn't.

Q. You can read and write, can you not? A. Yes, sir, the best that I can with my hand, nothing like in comparison with the right, it is awful unhandy, I get very shaky at times, because of my left hand

40

Howard William Steinert, redirect-recross.

and with stomach trouble. I am not any good to the family. I got a family of four children and a wife and myself, and it means digging. It is hard to dig with one hand, when a man with two hands can't get work.

10 Q. But if the English language is put before you in writing you can read it, can you? A. Yes, sir.

Q. Did you ever go back to Mr. Waller's office or to the railroad company to get any further payment after you got the eighteen hundred dollars?

A. Did I ever go to Mr. Waller's office?

Q. For any further payment? A. No, sir.

Q. Did you ever go to any railroad department at all for any further payment after you received the injury? A. I did not think it was necessary. I
20 thought if I was to get it, it would be sent to me, and I never went.

Redirect examination by Mr. Winans:

Q. Showing you this defendant's exhibit D-3, as to your ability to read, can you read the words, "All claims for compensation." A. I can just about make it out.

Q. You can read it, can you? A. Yes, sir.

30 *Recross examination by Mr. Hartpence:*

Q. Now, I will ask you if you cannot read the rest of it, Mr. Steinert:

"For personal injuries received by me, and loss of, and damage to wearing apparel, and other personal property, due to being caught between couplers while performing the duties of yard brakeman for the said the Pennsylvania Railroad Company at or near said Washington, District of
40 Columbia, on or about the 17th day of April, 1926, including herein any and all loss or damage what-

J. G. Korter, direct.

ever sustained by me in consequence or by reason thereof, and also all claims for compensation." You can read all that on there, can't you? A. Yes, sir.

Mr. Winans: Plaintiff rests.

10

J. G. KORTER, called in surrebuttal.

Direct examination by Mr. Hartpence:

Q. Mr. Korter, did you at the time that Mr. Steinert called at your office and you gave him this check for eighteen hundred dollars, and you obtained the release D-2, did you at that time ask him to sign his name on a blank card, a little larger than a playing card, blank on both sides?

20

Mr. Winans: Not a card, a piece of paper.

Q. With nothing on it and ask him to sign his name, and did you dictate to him: "I have read this", or whatever else was on the card, according to his statement? A. I asked him to sign nothing else but that release. I did tell him, however, to write on there those words.

Q. To do what? A. "I have read and fully understand this release."

30

Q. Write it where? A. Just above his signature.

Q. On the release? A. Yes, sir.

Q. Did you see him write it there? A. Yes, I saw him write it.

Cross examination by Mr. Winans:

Q. Was that written there at the same time that you were there? A. It was written there first, and he signed his name under it.

Q. How do you account for the fact that in the

40

J. G. Korter, cross.

defendant's answer in this case you have set up this proposed release, and they did not put in any of those words in their copy at all?

10 Mr. Hartpence: I object to that as incompetent. This witness wouldn't know anything at all about that.

Mr. Winans: Well, let him say he does not.

Mr. Hartpence: That does not make it competent.

Q. Were those words on it at the time you saw Steinert sign it? A. Positively.

20 Q. Did you hold any paper over any part of what you call a release when you say he put his name there? A. I held nothing at all over it. Mr. Steinert took the paper, looked at it as if he were reading it, took time enough for any one. Then I asked him if he understood it. He said he did, and I told him to write those words and sign his name.

Q. The whole thing was before him? A. The whole thing was before him.

Q. You had the release already prepared? A. The release was prepared. The release came down with the check.

30 Q. One copy or two copies to be signed? A. One copy.

Q. And the words you say were written by him, "I have read this release", and the rest of it written on there before you say he put his name on it? A. He wrote, "I have read and fully understand this release", and then signed his name.

40 Q. Was there ever a time when that paper that you call a release had the Steinert signature on it that the words "I have read", and so forth, were not on it? A. Ask me that question again.

(Question repeated.)

R. J. Gosnell, direct.

A. Well, I guess he signed that paper—

Q. Answer that question yes or no, please? A. No.

Q. I show you schedule A annexed to the defendant's answer in this case, and I ask you whether there was ever a time when the words, "Witness my hand and seal, the 19th day of May, 1928, Howard William Steinert", without the other words being on it, "I have read and fully understand", and so forth? A. Possibly the date was not on there. Of course the date was filled in after he signed it. 10

Q. That was filled in after he signed it? A. Yes, sir, the same day that he signed it.

Q. Why did he sign it, if he did sign it, as you say, before everything was put in a paper that was undated? A. I suppose because I could not put the date on the release before he signed it. 20

Q. You could not? A. Of course not. I could not put the 29th day on the release, and have him come in the next day for the release and sign it.

Q. Isn't it your custom before a person signs to put everything on? A. The date has nothing to do with the obtaining of the release.

Q. Isn't the date part of it? A. The date is part of the release, but the date has nothing to do with the obtaining of it. 30

Q. If it were dated before the accident it might have something to do with it? A. If it were dated before the accident? I can't get that.

Mr. Winans: That's all.

R. J. GOSNELL, recalled in surrebuttal.

Direct examination by Mr. Hartpence:

Q. Mr. Gosnell, at the time this check for eighteen hundred dollars, D-3, was delivered to Mr. 40

R. J. Gosnell, cross.

Steinert, and the release, D-2, was obtained, were you present there at the time that Mr. Steinert was there with Mr. Korter? A. Yes, sir.

10 Q. Did you hear Mr. Korter ask Mr. Steinert, or was there any such transaction took place as the signing of a blank piece of paper a little larger than a playing card with Steinert's name, and some words to the effect, "I have read and fully understand this paper"? A. No, sir.

Q. Was any such thing ever done? A. No, sir.

Q. But you did see Mr. Steinert sign some paper there? A. Yes, sir.

Q. What paper was that? A. He signed the release.

Q. This paper D-2? A. Yes, sir.

20 Q. That was the time he signed his name there, "Howard William Steinert"? A. Yes, sir.

Q. And what about the words? A. Mr. Steinert put those in before he signed his name.

Q. You saw him do it? A. Yes, sir.

Cross examination by Mr. Winans:

Q. You were right there all the time, were you? A. Yes, sir.

30 Q. How far were you away from Mr. Korter? A. We were standing right alongside Mr. Steinert.

Q. Did you drop your other work and come over and look? A. Yes, sir, we did.

Q. As soon as the man came over you walked right over to Mr. Korter's desk, did you, and stood there, while the whole thing was done? A. Yes, sir.

40 Q. Was that as the result of any previous instructions to have some other man around, as many men around as possible when you dealt with one injured man? A. That release must be executed with two witnesses.

R. J. Gosnell, redirect.

Q. That is the instruction of the company? A. That is right.

Q. What was said with reference to Steinert's inability to write with his left hand? A. Why, I don't know that anything was said about his inability to write with the left hand. When he was asked if he could write with it he said that he could. 10

Q. Was he told that he could not use the check unless he endorsed it? A. Not that I recall.

Q. Do you mean to say that it was not said or that you don't remember what happened there that day? A. Why, the check must be endorsed to use it. I don't know that anything was said about it.

Q. Then I understand your answer to be that you don't know whether he was told that he would have to endorse the check before he could use it. You don't know whether that was told him or not? A. No, I don't think it was. 20

Q. Are there any other parts of the transaction there that you do not have a distinct recollection of? A. No, sir.

Q. You are sure of this? A. Yes, sir.

Q. But you are not sure whether his ability to endorse a check came up? A. I am not sure whether it was asked of him or not. 30

Q. You did hear something that was said about whether he could write with his left hand? A. I am sure he was asked.

Redirect examination by Mr. Hartpence:

Q. Mr. Gosnell, on this release D-2, that is your signature on there?

Mr. Winans: I object to that. That was testified on the defendant's main case. 40

BOTH SIDES REST.

Motion for Direction of Verdict.

10 Mr. Hartpence: I move for a direction of
verdict in favor of the defendant on the
ground that the evidence is undisputed
which shows that the proximate cause of the
injury complained of was Mr. Steinert's, the
plaintiff's, own voluntary act in placing him-
self in a position of danger, without being
either instructed or directed to do so, and
without notifying or informing the man in
charge of the engine he was in that posi-
tion; and that therefore at the time he re-
ceived his injury he was not engaged in the
performance of any duty that he was ex-
pected or required to perform, in the move-
ment which he had been instructed to make,
20 and that the proximate cause therefore was
his own fault.

On the further ground that the release it-
self is a complete bar to the action.

The Court: The motion will be denied,
and an exception allowed as to each ground.

Mr. Hartpence: Exceptions. Thank you.

30 Mr. Winans: I move that the defendant
be required to elect, in the event that the
plaintiff recovers a verdict upon the merits
of his cause of action set forth in the plead-
ings, whether the acknowledged payment of
eighteen hundred dollars is to be treated as
a payment on account by the defendant, and
so deducted from what the verdict would
otherwise be in diminution of the plaintiff's
actual damages; or whether the defendant
prefers to reserve that and have it credited
upon the plaintiff's judgment in the event of
a verdict.

40 Mr. Hartpence: The defendant does not
care to elect either way. It doesn't think it

Howard W. Steinert, direct.

is under any duty to do so. We have the pleadings, we have pleaded the release, and we stand on that.

(Argued.)

(Recess to 1:45 P. M.)

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AFTER RECESS, 1:45 P. M.

Mr. Winans: If your Honor please, with the consent of my adversary, I will reopen my case and recall Mr. Steinert for one question.

HOWARD W. STEINERT, recalled.

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Direct examination by Mr. Winans:

Q. Did you, during the noon recess make a statement to me for the first time about the condition of your hand on May 29, 1926? A. Yes, sir.

Q. In what condition was your right hand at the time? A. I had it in a sling and also in splints about three inches projecting out from my hand, it was all wrapped up.

Q. Were you able to hold anything in that hand? A. No, sir.

30

Q. When you signed your name and wrote some other words, did Mr. Korter hold the paper on which you did the writing? A. Mr. Korter did.

Mr. Hartpence: No cross examination. All I could do would be to recall Mr. Korter to refute it.

Mr. Winans: I will stipulate that if Mr. Korter were present he would deny it.

40

Counsel summed up to the jury.

The Court's Charge.

The Court then charged the jury as follows:

The Court: Gentlemen of the jury:

10 This plaintiff sues the Pennsylvania Railroad Company alleging in his written complaint, in essence, that on the 17th day of April, 1926, he and the railroad company were jointly engaged in interstate commerce, that is in carrying on the transportation of goods and merchandise between the different states of the Union.

20 The fact that they were both engaged in interstate commerce is admitted by the defendant in this suit, and therefore you need spend no time in determining that. That is an admitted fact and the importance of that fact in this case rests upon the idea that if they were both engaged in interstate commerce, this plaintiff has the right to bring his action under what is known as The Federal Employers' Liability Act, an Act enacted by the Congress of the United States. That act implies a remedy under certain circumstances, and it becomes important for us to look at certain parts of this act which the plaintiff claims to be pertinent in this case.

30 Now, there appears to be some question by the defendant that at the time the actual thing which the plaintiff was actually doing, was something outside of the scope of his employment, something that he was either not told to do or authorized to do. In order to bring it under this act, it must be either proven or admitted by the parties that the parties were engaged in interstate commerce, and for that purpose it is admitted by the defendant, as I understand, so as to bring this case, admittedly bring it, under the Federal act.

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The Court's Charge.

Mr. Hartpence: We do not dispute that. The only distinction we draw, we do not admit in our pleadings that he was acting within the scope of his permitted duty at the moment.

The Court: So, the importance, as I said before, of this admission, is to prevent the necessity of me going into detail with you, reading the sections of the act in all detail, and also the necessity of the plaintiff proving certain details and characteristics of this defendant's work which would make it necessary if those facts were not admitted.

10

There are only certain parts of the act that are necessary, it being admitted for the purpose of this suit, that the action is properly brought under this Federal statute, and one section which I have in mind is as follows:

20

The act provides:

"That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the States and territories, or between the District of Columbia and any of the States or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents, and if none, then to the next of kin dependent upon such employee for such injury or death, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency

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The Court's Charge.

due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment."

And the act further provides:

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"That in all actions hereafter brought against any such common carrier by railroad, under or by virtue of the provisions of this act to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, however, that no such employee who may be injured or killed, shall be held to have been guilty of contributory negligence in any case where the violation of any such common carrier of any statute enacted for the safety of such employees contributed to the injury or death of such employee."

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30

You will observe from what I have read of this act, that the basis of the act is negligence, the negligence that the plaintiff claims this defendant is guilty of, and that is charged in his written complaint, as follows:

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"At the time and place last aforesaid, wholly by reason of the negligence and the wilful, wanton and wrongful act of the defendant, by and through one or more of its officers, agents, vice-principals, servants, employees, and by reason of the defect and insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks,

The Court's Charge.

roadbed, works and equipment, and without any negligence or fault on the part of the plaintiff, said engine, or the tank thereof, and one or more of said cars, all then in the possession and control, and being operated and used by the defendant, were caused, wholly without signal or warning, and with great force and violence, to run upon and against and collide with each other, and to strike, collide with and run over and against plaintiff, inflicting upon him serious, painful and permanent injuries, which are hereinafter more particularly certified.” 10

And so I say to you, gentlemen of the jury, that in this case, if the plaintiff recovers, he must recover because he shall have made out by the greater weight of the evidence one or more of the particulars of negligence charged by him in his written complaint against the defendant, and that this one or more particulars of negligence were the proximate cause of that accident. 20

In other words, the plaintiff in this case must prove that the accident was brought about through the negligence of this defendant, and that that negligence was the proximate cause of the accident. 30

Now proximate cause means the moving cause, the main cause, the one which set the others in motion, and without which the accident itself would not have happened. Because if there was no negligence on the part of the defendant of course there can be no recovery.

And so the plaintiff is limited to one or more of the proofs of what he sets forth as negligence, and he must prove to your satisfaction that one or 40

The Court's Charge.

more of the causes which he alleges as negligence were actually committed by this defendant, and that as a result of that, and as a proximate result of the negligence, this accident occurred. If he makes those out, and unless the defendant makes out some defense of which I will speak to you later, the plaintiff is entitled to a verdict and to have you assess his damages.

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If he does not make that out, manifestly he ought not to have a verdict, and the verdict should be, under such circumstances, for the defendant.

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That, you will observe, is practically all that is necessary to be said upon the question of the negligence of the defendant. And that must be shown by the plaintiff by the greater weight of the evidence, and by the greater weight we mean just what the words imply, not necessarily by the greater number of witnesses, but by the greater weight of the evidence, that the defendant was guilty of one or more of the particulars of negligence charged against it by the plaintiff, and that the plaintiff has further shown that that negligence was the proximate cause of the plaintiff's injury.

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If those things are made out by the greater weight of the evidence, as I have said, the plaintiff is entitled to have a verdict, and to have you assess the damages, unless the defendant shall have made out a defence.

Now, that brings us to consider logically and chronologically, what defences are interposed.

Of course, one defence is that no negligence has been shown. Logically that means just this, that the plaintiff has not made out his case. That is one defence.

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But that defence is not one of the defences concerning which I wish to particularly speak about,

The Court's Charge.

because it follows, that if the plaintiff has not made out his case and made out that the defendant was negligent, then there is no case to defend against and the defendant is entitled to your verdict. In other words, the first thing which the defendant says here is that this railroad company was not negligent at all. If you find that to be so, that ends the case and your verdict in that case must be for the defendant.

10

Then the defendant goes on and states, by setting up a number of defences—and I am going to take them up with you, perhaps not in exactly the order in which they are figured, but nevertheless in the order which I consider them to be of importance.

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Now, the first one urged is that this plaintiff has signed a release which is sealed, and for consideration, and the defendant says that is an absolute bar to recover in this case because that closed the case and any action brought afterwards was improperly brought.

Now, I am going to speak to you of this release first, because, gentlemen, it will depend upon what you find concerning this release, whether it will be necessary for you to continue and to examine the other elements in this case or not. It is a rule of law, that a release under seal of a claim for personal injuries, is a bar to an action for such injuries, unless obtained by fraud or deceit; that is, unless there was fraud in the execution of the release.

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Now, there is a very good reason for that, gentlemen of the jury, because the stability of business, the exercise of human conduct in the business world, requires a certain degree of stability, and that persons who once having settled a difference

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The Court's Charge.

for a consideration and given a release, should not be allowed to go back on that release because of what is the consideration of the release.

10 So a release must stand, unless it was procured, the execution of that release, was procured through fraud and deceit, on the part of the person to whom the release was given, or his or its agents in that behalf.

So that this question of release is of importance in this case, because unless you find that it was obtained by fraud and deceit, practised upon the plaintiff in this case, the law says that the release must stand, and if it must stand you have no other duty than to return a verdict in favor of the defendant and against the plaintiff.

20 Where, however, a release under seal is relied upon as a defence, fraud in the consideration of th release is not available as a defence at law. There must be fraud in the execution of the release to sustain the allegation of fraud. It has been said by our higher courts, that a fraudulent misrepresentation of the contents of the release, whereby the release, or the person giving the release, is induced to execute it, is a fraud in the execution of the release, even though the misrepresentation is as to the status of the consideration contained in the release. Now, fraudulent misrepresentation may be made by act or deed, as well as by word, and the test of fraud is that the defendant made some representation, either by word or by act, either directly or through authorized agents, meaning that he should act upon it, and that such representation was false, and defendant knew it to be false, and that plaintiff, believing such representation to be true, acted upon it, and was injured or prevented from asserting some right which he otherwise would have had.

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The Court's Charge.

The plaintiff asserts that the execution of this particular release in this case, was obtained by fraud, and this must be clearly and distinctly proved by the plaintiff. As was stated by the Court of Errors and Appeals:

“A charge of fraud must be clearly and distinctly proved by the party who asserts it.”

10

And the party in this case is the plaintiff. The presumption is in favor of innocence, and fraud is not to be assumed on doubtful evidence.

You will remember what the evidence was upon the subject of the release and its execution and procurement, and it is for you to say, gentlemen, whether or not the execution of this release was obtained by fraud and deceit. If you find that the execution of this release was not obtained by fraud and deceit, then it must stand, and it is a bar to any recovery in this suit, and it will not be necessary for you to proceed further, but you will, in that event, bring in a verdict in favor of the defendant and against the plaintiff, of “No cause of action.”

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But if, on the other hand, you find that the plaintiff has clearly and distinctly proven that the execution of this release was obtained by fraud and deceit, then you will disregard the release and proceed with the other phases of this case.

30

Now, so much for that defence which has been interposed.

The second defence which has been urged, is the defence of contributory negligence. Now you will remember I read to you a few moments ago from the statute, that in this kind of action, under the Federal Employers' Liability Act, contributory

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The Court's Charge.

negligence does not bar the plaintiff's right of action, but is to be taken into consideration unless it is the sole cause, so far as the evidence shows, of the accident itself. It is to be taken into consideration by the jury, and so much must be deducted from the entire damage suffered by the plaintiff as the proportion of the joint negligence of himself and the defendant.

Now, some of you have served upon some other cases during the week, where we were trying negligence cases here, or in some other court. You have heard the court charge in numerous cases that if you should find contributory negligence to exist, that that is an absolute bar to recovery. That is not so in this case because under the Federal Act it is offered as a defence only in diminution of the damages, and not as a sole bar to recovery. And so, in this case, if you find there was contributory negligence, that is to be used in diminution of the damages.

Suppose we make up just a little bookkeeping problem for illustration. Suppose the entire amount of damage, and I use the figures only to illustrate, not to indicate what they should be, or that I have an opinion that the plaintiff is entitled to one thousand dollars, or nothing, or ten thousand dollars, or any amount. I just use the figures to illustrate what I say to you. Suppose the entire damage were one thousand dollars, and suppose that the evidence showed that the plaintiff by his negligence had contributed one-half to the production of the result of which he complains, and that the other half was due to the negligence of the defendant. If the plaintiff is guilty of one-half negligence, you must diminish the entire damage of one thousand dollars and, as I say, I am only giving

The Court's Charge.

you these figures to illustrate, you would diminish that by five hundred dollars, and your verdict would be for the plaintiff for the sum of five hundred dollars. If the plaintiff contributed a quarter and the defendant three-quarters, then you would diminish the damages two hundred and fifty dollars from the one thousand dollar verdict and you would render a verdict of seven hundred and fifty dollars. That illustrates to you the manner in which that rule applies, and that is all there is to that phase of the case.

10

The defendant is entitled to have the advantage of that. If the defendant has shown the plaintiff was guilty of contributory negligence, he is entitled to have you subtract that amount of negligence from the entire amount of negligence in the case, and reflect that amount, subtract it from your verdict in the manner I have indicated.

20

That brings us to the inquiry as to what contributory negligence is. The law says that the duty of this plaintiff in the employment in which he was engaged, was to use reasonable care for his own safety, and by reasonable care is meant such care as a reasonably prudent and cautious man would use under the circumstances. Now, if this plaintiff did not use reasonable care for his own safety, then you say whether or not his neglect to use that care contributed to the accident. If it did, then you say how much that contributed. If the entire amount, it was the sole cause of it, why, of course, no recovery could be had. If a quarter, one-third, one-half, three-quarters, or whatever you find he did contribute, if the defendant is liable at all, you subtract that proportion of it which the plaintiff's negligence bears to the joint negligence, and that would be your verdict, if you find for the plaintiff.

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The Court's Charge.

Now, the next defence interposed, is what is known as the defence of assumption of risk, and upon that subject the law has laid down these rules:

10 "A servant assumes the usual and obvious risks of his employment, and those which he could discover with ordinary care, but not the negligence of his employer."

An employee assumes the risk, not only from facts known to him, but also such danger attending his work as he might discover by the exercise of ordinary care for his own safety.

20 The doctrine of assumption of obvious risk by a servant applies as well to those which arise or become known to the servant during the service as to those in contemplation at the time of his original hiring.

And the Supreme Court of the United States has laid down the rule in very clear language, and I am just merely going to repeat it:

30 "Some employments are necessarily fraught with danger to the workman, danger that must be and is confronted in the line of his duty. Such dangers as are normally, necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages, and a workman of mature years is taken to assume risks of this sort whether he is actually aware of them or not; but risks of another sort, not necessarily incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work, and suitable and safe appliances for the work. These the employee is

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The Court's Charge.

not treated as assuming, unless he becomes aware of the defects or disrepair, or of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them.

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"When the employee does know of the defects and appreciates the risk that is attributable to them, then if he continues in the employment without objection and without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty."

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So much for that, gentlemen of the jury.

The burden rests upon the defendant to make that out, because that is an affirmative defence, that the danger and risk of injury from it were assumed by this plaintiff, why manifestly he would not have a right of action here, and the verdict would be for the defendant. If that is not met by this greater weight of the evidence, why manifestly the assumption of risk in this case is not made out, and there could be no defeat of the right of the plaintiff to recover, if he has made his case out in accordance with the rules which I gave you with respect to proving negligence, and the fact that the negligence of the defendant was the proximate cause of the accident, in the earlier part of this charge.

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Now, gentlemen of the jury, that practically covers the law relating to the liability, to the responsibilities of the respective parties governing this case.

I am not going to attempt to comment on the facts. You have listened attentively, and I am

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The Court's Charge.

10 sure that you are more familiar with the facts of the case than I am, and anyhow I take it that it is not the province of the court to comment on the facts. Under the law the court is permitted indeed to comment, but after all is said and done it would be my duty to say to you to disregard my version of the facts if I were to attempt to do so, and have to charge you to take the facts and determine them that that is your province, the province of the jury. And so you will take these facts and make the application of the law as I have tried to give it to you. You will necessarily take up first the question of whether or not this defendant was negligent, because this case is predicated entirely and absolutely upon that. All such cases, all accident cases,—in such cases the mere happening of the accident itself does not mean anything. In order to recover it must necessarily be predicated upon the fact that the negligence not only happened, but that it caused the accident, that the accident was caused by the negligence of the defendant, and that that negligence was the proximate or moving cause of the accident. That the plaintiff has got to satisfy you of by a preponderance of the evidence. That is what I said a moment ago, by the greater weight of the evidence. If he has done that, he has made out a prima facie case, and the defendant must meet that case by establishing a defence.

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If the defendant has established one or more of the defences which he has interposed here, or, if he has made a case in all except that one connected with contributory negligence, and as I say, that defence, if established by this defendant in this action, could only go to diminish the damages, and is not an absolute defence or bar to recovery. But,

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The Court's Charge.

the defence of the question of no negligence on the part of the defendant, the question of the assumption of risk, are absolute defences if proven, and if the defendant has made them out by a preponderance of the evidence, one or all of them, your verdict in that case should be for the defendant.

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Now, if you find that the plaintiff is entitled to recover, and that after all, if the essential part, which you must determine first, because in all of these cases you see, you must take them up practically in two sets: first the question of liability, because if no liability, that ends your case and your verdict is for the defendant. If liability, then you go one more step and you come to the question of the measure of damages.

20

If there is liability here, if this defendant is liable, then the plaintiff is entitled to recover what the law calls damages. He is entitled to be compensated in so far as money can be said to compensate him for such losses as he has been put to as a natural and proximate result of the accident. He would be entitled to be compensated for any pain and suffering which he has already suffered both mental and physical, because of this accident. He would be entitled to be compensated for any pain and suffering which he will probably suffer in the future as a proximate result of the accident, if you find from the evidence he will suffer in the future. He would be entitled to be compensated for any loss he was put to, money loss, as a result of the accident, such wages as he lost apparently during the time he was out of work, waiting for this hand to heal; such losses as were proven he would be put to because of a diminution of earning capacity because of this injury; such sum as will compensate him for the losses he was put to because of

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The Court's Charge.

that condition as to earnings. He would be entitled to be compensated in such sum as you think would compensate him for his permanent injury.

10 It has been said here that there has been no medical expenses proven, hence you cannot allow for that.

And so you will take up these features of the case, and determine, if you should come to that point, how much in your judgment would be fair compensation to this plaintiff for the injuries that he has received.

20 If you come to that question, if you find that the defendant was liable at all, you will return a verdict in favor of the plaintiff, and against the defendant, in such sum as in your judgment would fairly compensate the plaintiff for the injuries which he has sustained and the losses which he has suffered as the direct and proximate result of the accident himself.

That is practically all there is to the case. I don't think there is anything else I can say which will be helpful to you. You will take the law as I have given it to you and apply that to the facts as you find them.

30 Mr. Winans: Will your Honor charge about this credit of eighteen hundred dollars?

The Court: No, I refuse to charge that. I don't think it is proper that the jury should take that into account. The jury will return such verdict based on the right of the plaintiff to recover, in such sum, if he has any right to recover at all.

Mr. Hartpence: Will your Honor charge the jury as to the lump sum of the verdict, the capitalization and so forth?

40 The Court: I have no hesitation in charging that. If you find a verdict, predicated upon what in your judgment what would be the loss that this

The Court's Charge.

man shall be put to in the future, that you cannot find in a lump sum now, you will say that that sum placed out at interest, would bring this man some amount that he would get, or was getting before the accident, because, you see, if you were doing that, if he had it for fifty years and left that sum alone, if he would have gotten the return on that during all that time, and would still have the principal. What you would have to find would be a sum which would represent a sum which would be the present value. In rendering your verdict you will take into consideration the fact that you are discounting, as a matter of fact, all the probabilities and the possibilities that might arise on a man's earning capacity. It might be diminished by some other natural cause, by death, or by some other accident. If you were to arrive at any sum, any amount which you consider to be the man's losses, because of his earning capacity spread over a number of years, it would be such a sum as would represent the present value. 10

That is the measure of damages. That is what you want, I think, Mr. Hartpence. 20

Mr. Hartpence: I guess so, your Honor.

Mr. Winans: May I ask your Honor to charge a plaintiff's request. 30

The Court: Number 1.—This request has been withdrawn.

Number 2.—In determining the degree of credibility of a witness, the jury may take into consideration the fact of his being in the employ of a party to the suit, and if he is in such employ, may regard him as an interested witness.

I so charge you. 40

The Court's Charge.

Number 3.—I refuse to charge except as I have already charged. I think I have covered that.

10 Number 4.—A witness whose own act is found to have contributed proximately to the occurrence of an accident may be regarded as an interested witness.

I so charge you.

The other requests I refuse to charge other than I have already charged in the main part of the charge.

Mr. Winans: I think your Honor has covered them fully.

(The jury retired.)

20 Mr. Hartpence: I pray an exception to that portion of your Honor's charge where you charged that it was for the jury to say if the release was obtained by fraud and deceit, and if they find that the plaintiff has clearly proved that it was so obtained, then they could disregard it and proceed to consider the other features of the case, and such other remarks as your Honor made, leaving it to the jury to determine whether or not the release could be so voided.

30 Secondly.—Where your Honor charged with regard to assumption of risk, that the servant assumed the obvious risks of the employment enumerated, not the negligence of his employer.

Third.—Where the court charged the jury plaintiff's requests numbers 2 and 4.

40 Fourth.—Where your Honor charged the jury that if the evidence introduced by the defendant of no negligence, release, the assumption of risk, where established by the greater weight of the evi-

The Court's Charge.

dence, then a defence existed which would prevent recovery by the plaintiff; that that burden of proof is thrown on the plaintiff.

Finally.—Where your Honor charged the jury that they should find such verdict as in their judgment should compensate the plaintiff for the injuries received and the losses suffered.

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The Court: You may have exceptions. Get the jury back.

(The jury returned to the court room.)

The Court: Gentlemen of the jury: My attention has been called to the fact that during some part of my charge, in enumerating the defences which the defendant has interposed, that I said to you among other things that if the defendant had proven any one of the defences, such as negligence on his part, or the release, or the assumption of risk, by the greater weight of the evidence, then the defendant is entitled to your verdict. In other words, that I included in that what would appear to be a statement that it was upon the defendant to prove by the greater weight of the evidence that it was not negligence. That is not the law. The burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence that the defendant was negligent, and if I neglected that in the defences enumerated as being necessary to be proven by the defendant, if I included in that the defendant's negligence, I want you to disregard that, because the defendant does not have to prove himself free from negligence by the preponderance of the evidence or otherwise.

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The burden is upon the plaintiff to satisfy you by a preponderance of the evidence that the defendant is negligent.

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Plaintiff's Requests to Charge.

Mr. Winans: Will your Honor state the defences where the burden lies upon the defendant?

The Court: The other defences interposed, the release, assumption of risk, contributory negligence as diminution.

10 You may now retire, gentlemen.

(The jury again retire.)

PLAINTIFF'S REQUESTS TO CHARGE.

1. Withdrawn.

2. In determining the degree of credibility of a witness, the jury may take into consideration the
20 fact of his being in the employ of a party to the suit, and if he is in such employ, may regard him as an interested witness.

3. Witnesses are to be weighed, not merely counted.

4. A witness whose own act is found to have contributed proximately to the occurrence of an accident, may be regarded as an interested witness.

5. Defendant is responsible for negligent acts of
30 its servants in the performance or neglect of the duties of their employment which form a proximate cause of plaintiff's injuries, notwithstanding the fact that they were fellow-servants of plaintiff.

6. To make a purporting release effectual to bar the cause of action of a party, there must have been a meeting of the minds of the parties,—that is, they must have understood and agreed upon the
40 same thing.

Plaintiff's Requests to Charge.

7. If the jury find that misrepresentation by one party to the other of a material fact induced the execution of a paper or the doing of an act which would be to his disadvantage, if given effect, the party found guilty of the misrepresentation may not profit thereby, upon condition that the other party believed the misrepresentation, relied upon it and had the right to rely upon it. 10

8. A statement, if false and if relied on, that plaintiff was not working in interstate commerce, that men working in a freight yard are therefore not engaged in interstate commerce, or that solely because they were working in a freight yard their rights in case of injury are measured solely by any workmen's compensation law is in a case like this, a misrepresentation of a material fact. 20

9. A release, in the absence of facts constituting an estoppel, cannot operate to defeat a cause of action unless it was intended by both parties as a release.

10. In determining whether the minds of the parties met in the alleged execution of a purporting release, the jury may take into consideration the question of adequacy or inadequacy of the alleged consideration. 30

Exhibit P-3.

Washington, D. C., April 26, 1926.

Statement of Brakeman H. W. Steinert.

10 I was Head Brakeman on Yard Engine 5171,
April 17th with Conductor Kerr. About 2.30 A.M.
while pushing three cars in No. 9 track Jersey
Yard, I was riding on the front step of engine 5171.
Conductor Kerr gave a shut off signal to Fireman
who was running the engine at the time, and as
he did, I pulled the coupler pin on engine in order
to release the cars. When the engine stopped the
cars had rolled about a foot from engine before
stopping. Conductor Kerr then gave a back-up
signal, but Fireman failed to take it at once, and
20 waited about two minutes. About that time the
Flagman had came back from the rear end of the
cars we had just pushed in, and he too gave a
back-up signal. About a minute and a half ex-
pired, and as the engine had not moved, Conductor
Kerr told me to come over on No. 1 track over the
hill, and he started to get off the engine step to
the ground. I put my right foot on the ground
and reached back to open the knuckle on the car
we had just pushed in the track, so that the next
30 car coming in would couple to it. Just as I was
opening the knuckle, but before I had a chance to
move my hand, I heard the air release and the
engine came forward and coupled to the cars,
catching my hand. As soon as the engine had
coupled, the Fireman reversed it and engine start-
ed back. I then yelled to the Conductor to stop him
as my hand was caught, and Conductor and Flag-
man ran up and stopped the engine. When engine
had stopped, it was again necessary for it to come
40 ahead in order to release my hand.

My right hand is badly crushed from this ac-
cident.

H. W. STEINERT.

Exhibit D-2.

KNOW ALL MEN BY THESE PRESENTS, that I, Howard William Steinert, residing at or near the City of Washington and District of Columbia, in consideration of the sum of One Thousand Eight Hundred Dollars (\$1800.00), lawful money to me paid by The Pennsylvania Railroad Company at the time of the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have released, and by these presents do release unto the said The Pennsylvania Railroad Company all claims and demands which I, have or can or may have against the said The Pennsylvania Railroad Company for or by reason of personal injuries sustained by me, and loss of and damage to wearing apparel and other personal property, due to being caught between couplers, while performing the duties of a yard brakeman, for the said The Pennsylvania Railroad Company, at or near the City of Washington and District of Columbia, on or about the seventeenth day of April, 1926; including herein any and all loss or damage whatsoever sustained by me, in consequence or by reason thereof, and also all claims for compensation.

And the said The Pennsylvania Railroad Company in paying the said sum of money does so in compromise of said claim and demand above released, not admitting any liability on account of the same.

WITNESS my hand and seal the 29th day of May one thousand nine hundred and twenty-six.

I have read and fully understand this release.

HOWARD WILLIAM STEINERT [SEAL]

Sealed and delivered in the
presence of us:

J. C. KORTER.

R. J. GOSNELL.

*Exhibits.***Exhibit D-3.**

"G"

THE PENNSYLVANIA RAILROAD COMPANY

Philadelphia, Pa. May 26 1926 Number 42272

10 May 21, 1926—For personal injuries sustained by
me, and loss of and damage to wearing apparel
and other personal property, due to being caught
between couplers while performing the duties of
a yard brakeman, for the said The Pennsylvania
Railroad Company, at or near the City of Wash-
ington and District of Columbia, on or about the
17th day of Apr. 1926; including herein any and
all loss or damage whatsoever sustained by me, in
consequence or by reason thereof, and also all
20 claims for compensation.

Memo No. 3549C

Send Voucher to

Approved for Payment

Legal Department.

W M KENNEDY

[R.T.]

for Comptroller

Pay to the Order of Howard William Steinert
One Thousand Eight Hundred *** Dollars \$1,800.00

THE PENNSYLVANIA RAILROAD COMPANY

30

W. H. BROWN

for Treasurer

Payable by the

FRANKLIN NATIONAL BANK, PHILADELPHIA 3-44

Through the Clearing House

Proper Indorsement on the Back Hereof
Will be Conclusive Evidence of the Pay-
ment of the Above Stated Accounts.

40

Exhibits.

(Indorsements on back of above check):

Indorse Here

This check is indorsed as a receipt in full for
the amount thereof, and in full satisfaction and
release of the claims and demands set forth in
the account on the face of this check.

10

HOWARD WILLIAM STEINERT

Payee

Pay to the Order of
Any Bank or Banker

Prior Endorsements Guaranteed

15

JUN 1 1926

62

EAST WASHINGTON SAVINGS BANK

Washington, D. C.

20

CHARLES A. MCCARTHY

Secretary & Treasurer

Pay to the Order of
Any Bank or Banker

All Prior Endorsements Guaranteed

THE NATIONAL CAPITAL BANK

15-5 Washington, D. C. 15-5

H. C. STEWART, Cashier.

Received Payment Through

The Clearing House

30

JUN-3 1926

PHILADELPHIA GIRARD NATIONAL BANK

PHILADELPHIA NATIONAL BANK

GIRARD NATIONAL BANK

3-1

C659326

40

New Jersey Court of Errors and Appeals

HOWARD W. STEINERT,
Plaintiff-Respondent,

vs.

10

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellant.

*On Defendant's Appeal From Circuit Court.
On Plaintiff's Motion to Dismiss Appeal.*

BRIEF OF PLAINTIFF-RESPONDENT.

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Statement.

The chronology of proceedings upon and after verdict is as follows:

1929

March 14—Verdict of \$25,000 for plaintiff.

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“ 15—Rule for judgment in plaintiff's favor entered in court below (Case, pp. 20, 21).

“ 15—Judgment final on verdict in plaintiff's favor for \$25,000, damages, and \$66.02, costs, entered in court below (p. 22).

“ 18—Defendant-appellant took rule to show cause (within 6 days after verdict) why the verdict should not be set aside and a new trial granted,—

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"on the grounds that said verdict is excessive, contrary to the charge of the Court, and the result of bias, prejudice and passion of the jury, reserving to the defendant all exceptions and objections noted" (pp. 23, 24).

- 10 July 1—Argument of defendant's rule having been waived, a memorandum decision (afterwards, upon reconsideration, recalled and annulled) was made and filed by the learned trial judge (pp. 27, 28). (No rule was entered; hence, under S. C. Rule 214, the decision became "of no effect" and both parties waived benefit. Necessity for entering a rule to obtain benefit of the decision, appears by *Exner vs. Nevin Bus Lines*, 8 N. J. Misc., 65.)
- 20

1930

- Jan'y 15—Plaintiff took rule to show cause, why defendant's rule to show cause should not be argued or reargued, the memorandum decision recalled and annulled, and defendant's rule to show cause discharged.
- 30 May 8—Arguments upon both rules having been had, a rule was entered on plaintiff's motion, vacating the memorandum decision and directing that defendant's rule to show cause be discharged, provided plaintiff stipulated for a reduction of verdict to \$20,000; otherwise that defendant's rule be made absolute (pp. 34-36).
- 40 " 15—Stipulation by plaintiff to accept reduction to \$20,000 filed in clerk's office (pp. 37, 38).

1930

- May 19—(1 year, 2 months, 4 days after entry of final judgment) defendant delivered to plaintiff's attorney a purporting notice of appeal (p. 39), service of which was declined because "not served in due time" (p. 40).
- " 20—May, 1930, term of this court opened. 10
- Oct'r 15—Plaintiff served notice of motion to dismiss appeal, returnable at opening of October, 1930, term, viz.:
- Please take notice that on the third Tuesday of October (October 21st), 1930, at the opening of court on that day, or as soon thereafter as counsel can be heard, at the Court Room thereof, in the State House at Trenton, I will move this court, upon the certain affidavit made by John Winans, a copy of which is herewith served upon you, and upon defendant-appellant's proposed State of the Case, entitled as above, to dismiss the purporting appeal of the defendant, upon the grounds (1) that the same was not taken with in due time, (2) that no appeal is pending and (3) that said purporting appeal is without merit. 20 30

Facts.

Appellant's statement of facts (Appt.'s br., pp. 1, 2, 6, 7) is incomplete, misleading and in some respects inaccurate.

Contentions are no part of the facts in the case. 40
There is no evidence to justify the qualification

“without being required by defendant to do so” (Appt.’s br., foot of p. 1). Plaintiff testified that he “was supposed to open that knuckle” (Case, p. 59), and that it was his duty to open the knuckle on the nearest car (pp. 59-91).

10 Conductor Kerr testified that it was the duty of the switching crew, of which plaintiff was one (pp. 51, 52, 105, 118), to see that the knuckle was left open (p. 112); that as a rule the rear brakeman, on the ground making couplings, goes up and opens the knuckle, although it is “not particularly” his duty in the first place to do so (p. 111); that it “is up to the men, if they want to do it” (p. 112); that if they do, it is all right (*ib.*); that the witness had opened them and had never been criticized for doing so (*ib.*); and that
20 sometimes the knuckle jars open when the cutting lever is depressed, more often it does not, and more often it is necessary to reach in to loosen the coupling on the next car (p. 117).

Rear brakeman Redding said that it was his duty to open the knuckle (pp. 120, 127); that he went away without having done so (p. 127) and that it then became the duty of “anybody that comes along,” “anybody that wants to volunteer” to open it (*ib.*).

30 Plaintiff was engaged, with the conductor and rear brakeman, in shifting cars from High Line No. 1 track (pp. 52, 58, 109, 119, 120), which lay to the left and rear (pp. 55, 56, 108, 125) of the engine, as it stood on track 9 (pp. 56, 87, 105, 120), just before the accident. This involved a reciprocating, forward-and-back, movement of the engine (pp. 54, 82, 85), as cars were successively brought in and coupled to cars previously
40 shifted. One or more cars had just been brought in, detached from the engine and coupled to the

string on track 9 (pp. 87, 105, 120). The engine stood, its front or pilot end pointing toward the car just uncoupled, at a distance therefrom variously estimated at 6 or 8 inches (pp. 113, 118, 126) or 3 or 4 feet (p. 58), but insufficient for a man to walk through (p. 130). The disparity is negligible, for a distance of "3 or 4 feet" (p. 58) between bumpers or end sills closely approximates "6 or 8 inches" (pp. 113, 118, 126) between the projecting couplers. 10

Defendant's statement that "*plaintiff voluntarily assumed to place himself in a position of danger*" (Appt.'s br., bottom of p. 1) is not justified by any evidence in the case. The indicated movement of the engine was to back away on track 9 (pp. 82, 87, 105, 120) and the oblique or "ladder" track (p. 56), a distance of 300 or 400 yards (p. 56, bottom), to the switch which united the latter with the High Line (pp. 55, 56); then to come forward a distance of 300 or 400 feet (p. 55) to the cars still remaining on High Line No. 1 track (pp. 58, 105, 124),—the reverse of the operation of bringing in the preceding car, as described in plaintiff's testimony (pp. 54-57). The switching and engine crews knew of this intended movement (p. 110); nevertheless Conductor Kerr signalled the fireman, who was running the engine (pp. 53, 83, 110, 128, 139, 145), to back up (pp. 109, 119), and gave oral instructions to go back to the High Line for the additional cars (pp. 58, 60, 84, 110, 119, 124). Plaintiff, standing at the head end of the engine (pp. 60, 83, 84, 86, 122, 129), gave the usual "back-up" signal with his lantern (pp. 60, 61, 82, 84, 122) and Rear Brakeman Redding, when he returned from coupling the standing cars, asked plaintiff why the engine had not backed in response to his signal 20 30 40

- (pp. 61, 122, 123), which the rear end man had observed (pp. 122, 123), and then banged on the side of the engine (pp. 61, 86, 123) and urged the fireman to back over to High Line for the other cars (pp. 61, 86). The brakeman, after first denying recollection of these acts (pp. 121, 122), admitted his conversation about the failure of the engine to move (p. 122) and his banging on the cab (*ib.*), at a time when the conductor was within 3 or 4 feet of him (*ib.*); but fireman Jarvis denied that he received any "back-up" signal after the car was taken in on track 9 (pp. 140, 144, 145) and professed complete ignorance of any forward movement of the engine at the time of the accident (p. 140) or that the engine and car had been uncoupled at all (p. 142).
- 20 The expressions "*without in any way apprising the operator of the engine of his intention to do so, or informing him of the dangerous position in which he placed himself*" (Appt.'s br., pp. 1, 2), "*nor to inform the engine-man of his intention to reach into the narrow space between the engine and the car to adjust the coupler*" (*ib.*, p. 2) and "*the engine-man did not know that he had placed his hand and arm in between the engine and the car*" (*ib.*) contain an innuendo wholly at variance with the facts in the case, if we except the testimony of Fireman Jarvis alone, who in effect denied that the accident resulted from any forward movement of his engine (Case, p. 140). The orders and signals given by the conductor, rear brakeman and plaintiff, and testified to by all of them (pp. 58, 60, 61, 82, 84, 86, 109, 110, 119, 122-124), were to *back* the engine, and the fireman's disregard of this duty and his recklessness in permitting the engine to come *ahead* (pp. 62, 93, 109, 119, 120) against cars where men were known to
- 30
- 40

be at work coupling cars (pp. 59, 105, 110, 118, 129, 139, 144) was what created the "*dangerous position*" (*supra*), and formed the proximate cause of the accident.

Proof that the coupler on the near end of the car just brought in was defective, that the pin was bent and could be lifted only with difficulty by direct application of a man's hand (pp. 62, 87) 10 was not controverted in any way, but tacitly admitted by defendant's witness Conductor Kerr (pp. 112-114, 116); and it is not disputed that the ensuing coupling could not be made until the knuckle had been opened, which could only be accomplished by raising the pin (pp. 62, 87, 114, 115, 116, 117);—indicating *per se* a violation of the federal Safety Appliance Act, the applicable portions of which are as follows: 20

FEDERAL SAFETY APPLIANCE ACT.

An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

* * * * *

30 Sec. 2. On and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled, or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars (Act of Mar. 2, 1893, ch. 196, sec. 2, 27 U. S. Stat., 531). 40

This makes applicable also section 4 and the proviso of section 3 of the federal Employers' Liability Act, viz.:

FEDERAL EMPLOYERS' LIABILITY ACT.

10 An Act relating to the liability of common carriers by railroad to their employes in certain cases.

* * * * *

20 Sec. 3. * * * *Provided*, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

30 Sec. 4. In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe (Act of April 22, 1908, ch. 149, secs. 3 and 4, 35 U. S. Stat., 66).

40 The question of the non-applicability of defendant's defenses of assumption of risk and contributory negligence as diminution are considered under Point V and Point IX, subdivision (2), paragraph (d)—*infra*.

Plaintiff, in his reply, admitted that "*he went upon the track between the cars intended to be coupled together*" (Appt.'s br., bottom p. 2; Case, 15); but it appears that the other car to be brought up and coupled to the one having the bent pin, was still at least 1,200 feet away (pp. 54-57), with the engine standing between them, and that the impact which resulted in the injury came from the engine and not from "the cars intended to be coupled together." Moreover, the presence of the injured employe upon a track is an incident of most coupling accidents, but this does not disparage his right of recovery, under the federal acts quoted above (*vide* Point V—*infra*).

10

It is not a *fact*, but was an issue in the case, whether "*a release was given*" (Appt.'s br., bottom, p. 2) and plaintiff not only pleaded (Case, pp. 15, 16, et seq.), but testified that he never executed (*vide* Point VIII—*infra*) the pretended release (Deft.'s exh. 2, at p. 215).

20

I.

The purporting appeal was not taken in due time, and should be dismissed.

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The successive steps in the case, since verdict, are sufficiently set forth in the "Statement," at page 1, *et seq.* of this brief.

The right to appeal is not inherent and depends wholly upon the constitution and statutes of the state. No court has inherent authority to entertain an appeal.

The Practice Act (1912), Schedule A, sec. 77, provides as follows:

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"Sec. 77. Appeals shall be taken by notice, which shall be served on the adverse party and filed *within the time limited for bringing writs of error*, and at least thirty days before the appeal is argued.

10 "The notice shall be entitled in the court from which, and shall state the court to which, the appeal is taken, and shall be filed with the clerk of the former court who shall forthwith transmit to the appellate court a transcript of everything required to be removed under section 26 of the Practice Act (1912, sec. 286), together with a certified copy of the notice of appeal" (P. L., 1912, p. 398, rule 77, as modified by S. C. R., 1913, rule 137). (*Italics ours.*)

20 An Act respecting writs of error (2 N. J. C. S., 2208, sec. 2) provides as follows:

30 "2. *Limitations; disabilities.*—No writ of error shall be brought or allowed on any judgment that shall have been or hereafter may be entered or obtained, unless the same shall be brought and allowed within six months after the judgment rendered in actions affecting the possession of or title to lands, or *within one year* in other cases; provided, where the person entitled to such writ of error be an infant, or insane, he or she shall have one year to bring such writ of error, after such disability shall be removed" (Rev., 1877, p. 373, as amended P. L., 1907, p. 453, and P. L., 1909, p. 149). (*Italics ours.*)

40 In *Prantl vs. Junk*, 93 N. J. L., 387, it was held, in the unanimous opinion of the Court of Errors and Appeals, by Walker, C., as follows:

"Appeals were substituted for writs of error by the Practice Act of 1912. In Rule 77 annexed to that act it is provided that appeals shall be taken by notice, which shall be served on the adverse party and filed within the time limited for bringing writs of error, which at the time of passage of that act was one year in the class of cases in which that at bar is one (2 N. J. C. S., 2208, sec. 2). Rule 137 of the Supreme Court, in its first paragraph, is a literal transcription of Rule 77 annexed to the Practice Act of 1912. The remaining portion of Rule 137 concerns matters of practice and procedure not involved in this motion."

10

It was held, in *Williams vs. White*, 98 N. J. L., 140, in the unanimous opinion of the Court of Errors and Appeals, per Walker, C., as follows:

20

"*Prantl vs. Junk*, 93 N. J. Law, 387, is relied upon by counsel for appellant as authority for the delay and inaction of the appellant in this matter, he claiming that he has one year from the date of entry of the judgment—that is, until April 5, 1923,—in which to proceed. That case is clearly distinguishable from the one before us. In *Prantl vs. Junk* the defendant one month after the entry of judgment against him served a notice of appeal upon the plaintiff, namely, on June 14, 1916, and on March 6, 1917, the plaintiff moved to dismiss the appeal because inter alia the defendant had not filed the notice, which was the fact; and we held that, as the statute gave one year in which a defeated litigant might appeal with-

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out providing that he should file his notice of appeal in any prescribed time within that period, the appellant might delay perfecting the appeal so far as filing the notice would perfect it, until the last day on which an appeal would lie.

- 10 “Formerly appeals were taken by writs of error which invoked the action of the court out of which the writ issued. These writs were returnable on specified dates, and were required to be perfected and prosecuted within prescribed limits as to time after their return. Appeals are now substituted for writs of error, and they are taken by notice ‘which shall be served on the adverse party and filed within the time limited for bringing writs of error,’ which is one year (*Prantl vs. Junk, supra*, 93 N. J. Law, at p. 388). It will be noticed that an appeal has to be served and filed. It is the filing of the appeal which invokes the jurisdiction of the appellate court.”
- 20

- In the *per curiam* opinion of the Supreme Court, quoted by the Court of Errors and Appeals and unanimously affirmed in *Morley vs. McDonald*, 98 N. J. L., 275, it is stated:
- 30

“Nor is there anything in the argument that by entering judgment July 12, 1921, the prosecutor lost his right to appeal, because his right began when the final judgment was entered.”

- In *Plahn vs. Givernaud*, 85 N. J. Eq., 143, it was held by the Court of Errors and Appeals, reversing an order of the Court of Chancery which
- 40

attempted to extend the period within which an appeal might be taken, that *immunity from appeal*, after lapse of the period limited therefor, is a vested right which cannot be destroyed by act of the legislature or by order of the Chancellor, under assumed legislative sanction, and it was further held, in the unanimous opinion, per Gummere, C. J., as follows:

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"The decree having established the property right, and that right having become vested by the expiration of the time within which an appeal might have been taken, it could not thereafter be impaired by legislative enactment. * * * We are not to be understood as denying the power of the legislature to extend the time to appeal before that right has expired by limitation. What we do determine is that a statute like that which we have been discussing is unconstitutional, so far as it operates to revive a right of appeal after its expiration under the then existing law, and property rights have thereby become vested."

20

In *Smith vs. Walton*, 96 N. J. Eq., 421, it was held by Chancellor Walker:

30

"Counsel for defendant in their brief concede the right of the Chancellor in the exercise of discretion to permit of an extension of time in which the complainant may appeal, but they object to the granting of the extension in this case upon factual grounds. While it may be that the leave requested should not be extended because of the facts adverted to in the brief, nevertheless, I am of opinion

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that leave should be withheld because of the existence of defendant's vested rights, as an act of the Legislature which would permit the Chancellor to extend the time after it has expired is, to that extent at least, unconstitutional."

10 See also

State Council, &c., vs. National Council, &c., 79 N. J. Eq., 193.

20 It seems, therefore, that the time limited for an appeal from a judgment at law, not involving the title or possession of land, is immovably fixed at one year; nevertheless, the defendant has contended that its prolonged and unsuccessful efforts to set aside plaintiff's verdict, and so annul the judgment have operated to extend its time for appeal. There appears no sanction, by statute or decided case, for any such contention.

30 In *State, ex rel. Bauman vs. District Court, &c., of Hoboken*, 49 N. J. L., 537, it appeared that after entry of judgment in a district court, the defendant filed a motion for a new trial, which was overruled by the court, and that thereafter, more than 10 days after entry of the judgment, but in less than 10 days after overruling the motion, he served a notice of appeal; and it was "*held*, that such appeal was not seasonably taken, under the (then) statute of New Jersey, which required an appellant from a district court to give notice of his appeal within 10 days after judgment."

40 In some later cases involving appeals from district courts, it has been held that the pendency of a rule to show cause for a new trial operated to enlarge the time for appealing; but it is so held

only because of section 213f of "An Act concerning district courts (Revision of 1898)," (2 N. J. C. S., 2017, sec. 213f), which provides as follows:

"213f. Rule to show cause why new trial should not be granted as waiver of appeal.—The granting, by a judge of a district court, of a rule to show cause why a new trial should not be granted shall, unless expressly stipulated in the rule to show cause, be a waiver of any grounds for appeal existing in favor of the party obtaining such rule; and, so far as concerns the time within which an appeal may be taken, judgment shall not be considered as entered until such rule to show cause has been disposed of, if the court shall so order" (P. L., 1910, p. 497, sec. 3).

Such a provision, in case of appeals taken from district court judgments, has merit because of the short period limited for appealing by section 213a of the District Court Act,—originally 10 days, but now enlarged to 20 days after entry of judgment.

No similar provision is contained in the Practice Act, or in any statute or rule regulating practice in the higher courts.

That no implication exists under the Practice Act, or the rules thereunder, which enlarges the time to appeal, because of the pendency of a rule to show cause, is evident from the inclusion in the District Court Act of a provision to that effect, which negatives the idea of a necessary implication. Moreover, even in the District Court Act, the enlargement contended for exists only when so ordered by the court and there seems to be reason for this elasticity in the fact that the time

for appeal in those courts is only 20 days (P. L., 1915, p. 549, ch. 305, sec. 1).

10 Under the Practice Act, the limit for an appeal is one year. In the instant case, an appeal could have been taken at any time between March 15, 1929, and March 15, 1930, and the pendency of the rule to show cause did not prevent appealing upon any question or questions sufficiently reserved by the rule. Defendant's right was not postponed until final disposition of the rule; if an appeal had been noticed, within time and before final disposition of the rule, that appeal could have been abandoned if the rule had been made absolute, or its prosecution continued upon discharge of the rule; or defendant might have shown some alacrity in prose entering its rule.

20 Defendant, having enjoyed this *right to appeal* during the full statutory period of one year, cannot now successfully maintain an appeal, not from the determination on the rule, but from the final judgment entered in March, 1929, and enforceable by plaintiff at all times since that date, except during the pendency of defendant's several *ex parte* stays.

In Harris on Pleadings and Practice in New Jersey, page 637, sec. 674, it is stated:

30 "The appellant must serve a notice of appeal upon the adverse party and file a copy of such notice with the clerk of the court from which the appeal is taken, within one year after the entry of judgment. In the case of actions affecting the possession of, or the title to lands, the appeal must be brought within six months after entry of judgment.

40 The notice must be entitled in the court from which the appeal is taken and must state the

court to which the appeal is taken. The appellate court acquires jurisdiction over the cause after the service of the notice of appeal and the filing of such notice with the clerk. If the notice of appeal has been served within a year after final judgment, but yet such notice has not been filed until after the expiration of a year after the entry of judgment, the right to appeal is lost. On the other hand, within the year limit, the appellant may file the notice of appeal at any time after serving the notice of appeal on his adversary. Once the two necessary requirements for perfecting the appeal have been met, the appellant must proceed in accordance with the rules of the appellate court, or else his appeal may be dismissed." 10 20

Plaintiff was entirely within his rights in entering judgment on March 15, 1929, which was during the 4-day interval which defendant permitted to elapse, after verdict and before applying for its rule.

Appellant suggests that the judgment was prematurely, and therefore improvidently, entered and cites a comment *obiter dictum* by Mr. Justice Parker in *Morgan vs. Bowman*, 103 N. J. L., 542, at page 545, which relates to the impermanence of a verdict, upon which no judgment had been entered. To apply this to a final judgment, properly entered is contrary to Supreme Court Rule 116, which reads as follows: 30

"116. In actions in the Supreme Court, the *postea* may be filed immediately after *relieta* given or verdict obtained and judgment shall be entered forthwith. But the trial judge of 40

the court, or any justice thereof, may stay execution pending an application for a new trial."

10 Even if the judgment were premature and were appealable for that reason, the time to appeal would have commenced at the time of the wrong-
 20 ful entry of judgment and the appeal would have involved the alleged improvidence in entering same prematurely. Quite likely, application would have been made to the court below to correct the indicated abuse of its procedure, and the appeal would have taken up for review the determination of the trial court in that regard. The right to appeal would have expired at the end of one year, even if the judgment were inherently
 30 bad. The rules make no distinction between appeals from bad judgments and those from good judgments; the improvidence in entering would have been a ground for appealing the judgment, which, like other grounds, could only be determined upon the appeal, and not at all when the appeal is not taken within time.

The practice relative to entering judgments nisi, preliminary to final judgment, is not generally followed in circuit courts, and in all courts
 40 is permissive only.

"What is called a judgment nisi is nothing more than a rule to show cause why judgment should not be rendered."

Young vs. McPherson, 3 N. J. L., 895, at page 897.

Supreme Court Rule 128 provides:

40 "128. If a rule to show cause why the verdict of a jury or finding of a justice should

not be set aside and new trial granted shall be discharged, the party entitled to the judgment shall be allowed to enter judgment final *nunc pro tunc* as of the time when judgment nisi was taken, and the execution thereon shall be endorsed to the effect that interest thereon shall be reckoned as from the date of the judgment nisi, but the date of the actual entry of the rule for final judgment shall be expressed therein." 10

No statute, rule or practice requires entry of judgment nisi; it is purely optional and affords an expeditious means of preserving a plaintiff's recovery and dating the accrual of interest thereon, pending subsequent taxation of costs and determination of a rule or motion for a new trial or in arrest of judgment. It is not the practice to enter such preliminary judgments in the Hudson County Circuit Court; the custom being to enter a rule for judgment, upon which the clerk taxes costs and enters final judgment. It is upon this entry of judgment that the time limited for appeal begins to run. 20

In *McNamara vs. New York, L. E. and W. R. Co.*, 56 N. J. L., 56, on application by plaintiff for entry of his judgment *nunc pro tunc*, in order to forestall the rights of creditors under a receivership, while the application was denied, because of the intervening rights of third parties, the court nevertheless held, by Depue, J., as follows: 30

"The plaintiff would have had his judgment in the regular course of practice before the receiver was appointed, if there had been no delay incident to the granting and the hearing of the rule to show cause. The ver- 40

dict here recovered has been sustained. Judgment entered at this time as of a prior day cannot, under the statutes referred to, have relation as a lien upon the defendant's property prior to the date of actual entry; and, if execution be issued thereon, the command of the writ will be to levy upon the lands, tenements, and hereditaments whereof the defendant was seized at the time of the actual entry of the judgment. The defendant's property is in the hands of the receiver, and under the control of the federal court. We think that if the plaintiff will derive any benefit in the administration of the affairs of the company by having his judgment *nunc pro tunc*, he is entitled to that advantage. Collection of interest from the date of judgment nisi by an endorsement on the execution would, in this case, be impracticable. An execution, if issued, would be of no avail against the defendant's property."

The same case held, further, that the holder of a verdict could as a matter of right enter judgment nisi, but not that he was obliged to do so.

It is evident that during the period of one year following entry of the judgment, defendant enjoyed, but failed to exercise, the limited right to appeal reserved to it by the rule; that its time to appeal expired on March 15, 1930; that subsequent service of a purporting notice of appeal did not operate to extend that time and defendant is now in default; and that plaintiff has acquired a vested right in his recovery, which cannot be impaired retroactively by the expedient of enlarging defendant's expired right of appeal.

II.

Defendant is not entitled to any enlargement of its time to appeal.

It is respectfully submitted, on the authority of cases cited under Point I (*supra*), that no power exists to annul or impair plaintiff's vested right to his recovery. 10

If power to extend the time to appeal was vested in any court, during the year following entry of judgment, it terminated with the expiration of that period, and defendant's rights at the same time, by its own laches.

III.

20

The Hudson County Circuit had complete original jurisdiction over this action.

Appellant "relies upon" (Appt.'s br., Point III, at p. 8), but does not argue, its Ground of Appeal No. 1, which reads as follows:

1. The said Hudson County Circuit Court denied defendant's motions to dismiss the cause (Case, p. 44). 30

There were two motions to dismiss; one of which resulted in the Rule Denying Motion (pp. 9, 10).

The other motion, made at the opening of the trial, was as follows:

"Mr. Hartpence: I move to dismiss, on the ground that the Court has no jurisdiction, because neither the plaintiff nor the 40

defendant reside in this State, and the cause of action arose out of the State, and this constitutes an unwarranted burden upon Interstate Commerce; and for that reason the case should be dismissed" (p. 49).

- 10 The attack is upon the jurisdiction of the trial Court over the subject-matter of the action, rather than over the person of defendant, which was acquired by due service upon it within the state and by its general appearance in the action.

The jurisdiction of state courts in like cases has been sustained by high state and federal authority.

- 20 *Metcufskie vs. Phila. & Read. Ry. Co.*,
97 N. J. L., 100.

Hoffman vs. State of Missouri ex rel. Foraker, 274 U. S., 21; 71 Law. Ed., 905.

In the *Hoffman* case, just cited, it was held, per Brandeis, J., as follows:

- 30 "A state may authorize its courts to take jurisdiction of a proceeding under the federal Employers' Liability Act against one of its corporations operating a railroad within its limits, to recover damages for the death of a non-resident caused by injuries occurring in the state of his domicile, where the corporation has offices and an agent for the transaction of business within the territorial limits of the court, notwithstanding the railroad company could have been sued in the state court where the accident occurred,
- 40 and interstate commerce may be incidentally

burdened by the necessary taking of material witnesses away from their work and subjecting defendant to unnecessary expense."

IV.

The scope of the proposed appeal is restricted by defendant's rule to show cause and its adjudication in the court below. 10

On March 18, 1929, on defendant's application, the learned trial judge granted a rule to show cause "why the verdict * * * should not be set aside, and a new trial granted, *on the grounds that said verdict is excessive, contrary to the charge of the court, and the result of the bias, prejudice and passion of the jury, reserving to the defendant all exceptions and objections noted*" (pp. 23, 24). 20

Final determination of this rule to show cause resulted in the making of a rule, dated May 8, 1930 (pp. 34-36), which, with plaintiff's stipulation and consent (pp. 37, 38), filed within the time limited by the rule, operated to reduce plaintiff's recovery to \$20,000.

This amounted to *res judicata* upon the subjects embraced in the rule, to wit: (1) that the verdict was excessive, (2) contrary to the charge of the court, and (3) the result of bias, prejudice and passion—notwithstanding the attempt to reserve "to the defendant all exceptions and objections noted" (p. 23, bott.). 30

Goekel vs. Erie R. Co., 100 N. J. L., 279.
Margolies vs. Goldberg, 101 N. J. L., 75.

(1) The matter of excessiveness is not before this court.

(2) The verdict cannot now be assailed as contrary to the charge, since that question was adjudged under the rule to show cause. It follows that plaintiff's testimony as to the defective safety
 10 appliance (pp. 62, 87), uncontradicted and, at least tacitly, corroborated by Conductor Kerr (pp. 112-114, 116), not only helps sustain the verdict, but, under sections 3 and 4 of the federal Employers' Liability Act (*supra*), eliminates the defenses of contributory negligence and assumption of risk.

Nor is the verdict subject to attack because the trial court, though charging generally as to fraud
 20 in its execution, did not explicitly mention plaintiff's denials, by pleading and proof, that he ever signed the disputed release. The charge was clear and complete on the question of the representations made by defendant's claim agent, their falsity, and plaintiff's belief in and reliance upon them. Since all of the evidence on both subjects,—defective safety appliance and non-execution of the release,—was before the jurors, it is unimportant whether it was expressly submitted
 30 to them, or whether they considered it; for the verdict is not now, if ever, open to any imputation of being contrary to or unsupported by the charge of the court.

Defendant, having taken a rule to show cause upon the reason, *inter alia*, that the verdict was "contrary to the charge of the court," cannot be permitted, on appeal, to contend that there was error in the charge; since that proposition is *res*
 40 *judicata* under the rule.

Lewis vs. Schlichting (*infra*).

(3) The other reason expressed in defendant's rule, "that said verdict is * * * the result of the bias, prejudice and passion of the jury," is equivalent to a proposition that the verdict was not supported by any evidence; but this also became *res judicata* upon the determination of the rule.

The fact that the rule purported to reserve to defendant "all exceptions and objections noted" does not detract from the conclusiveness of the former adjudication. 10

Goekel vs. Erie R. Co. (supra).

Margolies vs. Goldberg (supra).

Where one of the grounds urged and passed on in rule to show cause for a new trial was that the verdict was against the weight of evidence, it cannot be urged on appeal from the judgment that there was no evidence to support the jury's finding. 20

Lewis vs. Schlichting, 6 N. J. Misc., 340.

See also *Klein vs. Shryer* (not yet off. rep.), 150 Atl., 321.

V.

Defendant's undisputed violation of the federal Safety Appliance Act was negligence per se. 30

Plaintiff testified, without contradiction, that the coupling pin on the near end of the car standing at the place of the accident was bent so that it could not readily be lifted from the knuckle (p. 62); plaintiff, whose duty it was, in common with others of the switching crew, to open this knuckle (*supra*), had attempted to do so, while standing on the adjacent engine step (pp. 60, 62), but was 40

unable to prepare the knuckle for the next intended coupling because of the bent pin (*ib.*); he therefore reached in to lift the pin and open the knuckle (pp. 62, 87), when the engine, without warning and contrary to orders, came forward, engaged the coupling and crushed his hand. It was testified and is not disputed, that a coupling cannot be made without opening the knuckle, that the knuckle cannot be opened without raising the pin, that the cutting lever (another safety appliance) is used only to lift the pin, sometimes releasing the knuckle and sometimes not, and that a bent pin is difficult to raise (pp. 114-116).

Section 2 of the federal Safety Appliance Act (*supra*) requires that the coupler shall be ready to couple by impact, without the necessity of a man going between the ends of the cars. In *Erie R. Co. vs. Russell*, 106 C. C. A., 160; 183 Fed., 722, it appeared that a switchman stepped to the end of the car to repair a defective coupler and that, while he was doing so, three other cars standing about 5 or 6 feet from him, without any apparent cause, silently moved and caught and crushed him; and it was held that the question whether the defective coupler was a proximate cause of the injury, was properly submitted to the jury.

It has been held that if the condition of a coupler is such that the knuckle cannot be opened by the use of the pin lifter and that either of them must be opened with the use of the hand, the coupler is defective within the meaning of the statute, because it will not couple automatically by impact; *a fortiori* if the knuckle itself fails to open because of a damaged pin.

Burho vs. Minneapolis & St. L. R. Co.,
121 Minn., 326; 141 N. W., 300.

Hurley vs. Illinois Cent. R. Co., 133
Minn., 101; 157 N. W., 1005.

In 2 Roberts' Federal Liabilities of Carriers,
sec. 821 (pp. 1358, *et seq.*), it is stated that

"The construction of railroad cars is such
that frequently a coupling between an inop- 10
erative coupler and an operative one, can be
automatically effected by impact without the
necessity of a man going between the end of
the cars, if the lever on the opposite side of
the adjacent car is used; but the statute does
not contemplate that railroad employes
should be required to go around, over or
under cars in order to operate the coupler
from the other side on the adjacent car. The
statute requires each car to be equipped so 20
that it can be coupled automatically without
the necessity of a man stepping between the
ends of the cars. The mere fact that the
coupler on the adjacent car can be so manipu-
lated that it can be coupled therewith with-
out a man going between the ends of the cars,
if the employe goes on the other side, is no
defense."

Chicago, B. & Q. R. Co. vs. United States, 30
127 C. C. A., 438; 211 Fed., 12.

Nichols vs. Chesapeake & O. R. Co., 115
C. C. A., 601; 195 Fed., 913.

Norfolk & W. R. Co. vs. Hazelrigg, 107
C. C. A., 66; 184 Fed., 828.

Donegan vs. Baltimore & N. Y. R. Co.,
91 C. C. A., 555; 165 Fed., 869.

For reasons stated in Point IV (*supra*), the
mere failure of the court expressly to charge the 40
provisions of the Safety Appliance Act cannot
deprive the verdict of the sanction of that act.

VI.

Defendant's negligence was the sole proximate cause of plaintiff's injuries.

Defendant was guilty of negligence in four respects,—

10

(1) Using and hauling, on a track used in interstate commerce, a car equipped with a coupler which would not couple by impact, without the necessity of a man going between the ends of the cars;

(2) Moving the engine forward in disregard of orders to "back up";

20

(3) Moving engine forward in absence of signal from plaintiff or the conductor, authorizing such movement; and

(4) Failure to give warning, by bell, whistle or otherwise, before an engine "at rest" was put in sudden motion.

(1)

30

The violation of the federal Safety Appliance Act was negligence *per se*, regardless of whether or not defendant had been afforded opportunity to inspect and repair or had received prior notice of the defect.

Texas & Pac. R. Co. vs. Rigsby, 241 U. S., 33; 60 Law. Ed., 874.

Minneapolis & St. L. R. Co. vs. Gottschall, 244 U. S., 66; 61 Law. Ed., 995.

40

St. Louis, Iron Mt. & So. Ry. Co. vs. Taylor, 210 U. S., 281; 52 Law. Ed., 1061.

Chicago, M. & St. P. Ry. Co. vs. Voelker, 65 C. C. A., 226; 129 Fed., 522.

Both parties were engaged at the time in defendant's business as a common carrier in interstate commerce by railroad (complaint, pars. 7, 8, 9 and 10, at pp. 3, 4; answer, par. 1 of First Defense, at p. 11; charge, at p. 194). 10

The coupler, of which the knuckle, pin and cutting lever are necessary parts, is one of the safety appliances required by the Act of Congress, quoted above. The knuckle swings on a pivot and when opened permits coupling, or uncoupling to be done (pp. 116, 117). In common practice, as testified by Conductor Kerr, when the pin is lifted to uncouple, the knuckle is opened by the pull of the knuckle on the adjacent car (p. 116), but when lifted in preparation for coupling, sometimes the knuckle will "jar" or "fly" open (pp. 103, 116, 117), more often it will not (pp. 103, 117), and more often a man has to reach in to loosen the coupling (*ib.*), i. e., open the knuckle. There was no appliance to open the knuckles on freight cars (p. 116). The cutting lever, also a safety appliance, is attached to and operates only on the pin (pp. 103, 115, 117), but it is used only to uncouple cars (pp. 103, 111, 114-117, 129). The knuckles must be opened before the cars will couple (pp. 59, 62, 116). The impact of the cars in coupling forces the knuckles closed (p. 117), when the pin drops into place and holds them coupled (*ib.*) until the pin is raised again (pp. 57, 58, 103, 116). 20 30 40

10 It was plaintiff's duty to open the knuckle so that the next coupling could be made (p. 4, "Facts"—*supra*). He reached from his position on the step of the engine, but was unable to budge the pin on the adjacent car (pp. 60, 62); Conductor Kerr had already left (pp. 58-60, 106, 108, 124); the rear brakeman, Redding, came back, inquired the cause of the delay (pp. 61, 122, 123), tried to get the fireman to start backward (pp. 61, 86, 123) and then left leaving the knuckle on the nearest car open (pp. 62, 86, 87, 92, 127). After some further delay plaintiff again undertook to open the refractory coupling. The pin was bent (pp. 62, 87) and difficult to raise (pp. 62, 87, 113, 114). It is probable that the defective pin would not have responded any more

20 readily to the cutting lever than it did to plaintiff's hand, but the lever was on the opposite side of the car and track (pp. 90, 91), plaintiff would have been subjected to unnecessary danger if he had crossed between the couplings to make a probably ineffectual effort to open the knuckle by its aid (pp. 103, 116, 117) and he was under no duty to do so.

- 30 *Chicago, B. & Q. R. Co. vs. United States*
(*supra*).
Nichols vs. Chesapeake & O. R. Co.
(*supra*).
Norfolk & W. R. Co. vs. Hazelrigg
(*supra*).
Donegan vs. Balto. & O. R. Co. (*supra*).

40 A bent pin is harder to lift and oiling it would help very little (p. 114). This was the immediate and sole cause of plaintiff's being obliged to reach in to adjust the coupling (pp. 59, 62, 87, 117, bottom).

(2)

The engine moved forward in disregard of repeated orders to go backward. The fireman was in charge of the engine; plaintiff testified that the engineer was absent from his post during the whole time he worked there that night (pp. 53, 54, 60) and that he came from the car inspector's office (p. 54); but that was after the accident (p. 106, bott.). Conductor Kerr said that Fireman Jarvis was the only man running the engine (p. 110) and that he did not see any other man that he knew there during the whole operation (pp. 110, 111). Redding corrected counsel when reference was made to the engineer, by saying "You are talking about the engineer; the fireman was on the engine" (p. 128). Both the fireman and engineer claimed that the latter was on the engine and both professed ignorance of the accident until after it had occurred (pp. 139, 147). 10 20

Signals to back the engine had been given to Fireman Jarvis by all three of the train crew, Conductor Kerr and Brakemen Redding and Steinert ("Facts," pp. 5, 6—*supra*), but Jarvis denied that he observed any of these signals (pp. 141, 145) and that his best recollection was that his engine did not go forward at all after the cars were detached before the accident (p. 141). 30

(3)

The engine moved forward without any signal to do so. Fireman Jarvis said that his engine was moving "*on signal only*" (p. 140) and that the signals came from the front brakeman, Steinert (*ib.*); that he received a signal to go ahead 40

just before the cars were detached (p. 141) and received no other signal from any member of the crew (pp. 141, 145). His professed ignorance of the subsequent forward movement of his engine has been mentioned above (end of subdivision [2] of Point VI).

10 The conductor was the only person entitled to give orders while he was present (pp. 80, 108) and he said that no order was given with his knowledge for the engine to go ahead (p. 108) and that it should have backed in response to his signal (p. 109).

20 Upon his leaving, the duty devolved upon plaintiff, as head brakeman (pp. 54, 80, 82, 105, 122, 128, bott., 140); but no signal to go ahead was given by anyone (pp. 82, 84, 122, 126, bott., 141, 145).

(4)

30 *No previous warning of the forward movement of the engine was given*, in accordance with defendant's rule and the practice in the yard. The engine had been at rest for several minutes; plaintiff said 8 or 10 minutes (p. 62) and Conductor Kerr approximated it at 2 or 3 minutes (p. 107), but the time was sufficient for Redding to couple his cars, walk back to the engine, converse with Steinert, go to the engine cab, bang on its side, endeavor to gain the attention of the fireman and then walk a considerable distance on his way to High Line No. 1, *via* the yardmaster's office (*vide* "Facts;" pp. 5, 6 [*supra*]).

40 The rule required the engine, before starting after a period of rest, when men were working around it, "to blow a whistle or ring a bell" (p. 65); and the invariable practice in the yard was

to give such a signal "before he made a move of the engine, that is, after the engine was standing still" (p. 67); yet plaintiff heard no signal whatever (pp. 65, 144, 145) before "the engine came ahead and made a jump and caught my hand in the knuckle" (p. 62); the fireman's and engineman's testimony negatived the possibility of a signal having been given (pp. 139, et seq., 147, et seq.); and Kerr and Redding omitted any mention of a signal, although Conductor Kerr heard the movement of the engine (p. 109). 10

VII.

There was no contributory negligence on plaintiff's part; if there had been, it would have operated only to diminish his recovery; but even that defense was barred by defendant's violation of the Safety Appliance Act. 20

See federal Employers' Liability Act, sec. 3 (*supra*).

See federal Safety Appliance Act, sec. 2 (*supra*).

VIII.

30

The alleged release is not a bar to the action.

The release is pleaded as a bar in the Sixth Defense of the answer (p. 12) and a copy is annexed (p. 14).

Plaintiff denied the allegations of the Sixth Defense, including execution of a release (p. 15, bott.), and in the First Separate Avoidance of this defense, alleged "that the pretended release 40

* * * was not and is not the act and deed of plaintiff" (p. 16, top),—*non est factum*.

10 On two occasions plaintiff was induced by various employees of defendant to write his own name on blank sheets of paper,—the first time about a week or ten days after he entered the hospital (p. 171), upon the statement of defendant's investigator that he would transcribe plaintiff's statement of facts above the signature (pp. 171, 172), and the second, when he called at Claim Agent Waller's office on May 29, 1926, to receive a check and was induced by one of the clerks in that office to write a sample signature with his uninjured left hand (pp. 101, 177-179, 183) to overcome an expression of doubt by the clerk as to whether he would be able to endorse the check without the use of his crippled and bandaged right hand (pp. 134, 177, 178, 191, 193) and whether the check would be of any use to him without being so endorsed (p. 177).

20 Plaintiff insisted throughout the trial that he never signed this or any release and it is evident that he did not regard the episode which involved the delivery of a check to him, and which defendant claims included also the signing of the purporting release, as constituting a settlement of his claim for damages, by his remark, before leaving the Claim Agent's office on the same occasion, "This doesn't pay me at all for my hand; I want to see Mr. Waller afterwards to make some kind of an arrangement after I see Mr. Smith" (p. 179) or, as the clerk, Korter, put it, "that amount didn't pay him and the railroad company better a d-- sight give him a job" (p. 133),—both versions negating the idea of a final settlement.

40 Plaintiff testified as follows:

Cross Examination by Mr. Hartpence:

"Q. I just want to ask you one or two questions about another paper, Mr. Steinert. I show you this other paper, and call your attention to the signature here, H. W. Steinert; that is your signature, isn't it? A. Never wrote that one.

10

"Mr. Winans: May that be marked for identification?

"Mr. Hartpence: I will have it marked.

"(Marked D-2 for Identification of this date.)" (P. 98.)

* * * * *

"Q. Did you not sign a paper at that time? 20

A. I did, sir, yes, sir.

"Q. What was the paper that you signed?

A. A blank piece of paper about the size or a little larger than a calling card.

"Q. That is all you signed? A. Yes, sir.

"Q. Didn't you at that time, when you accepted the check of \$1,800 in Mr. Waller's office, sign this paper which I again show you, which was marked D-2 for Identification, 'Howard W. Steinert'? A. No, sir.

30

"Q. Didn't you write on there, 'I have read—' A. I wrote that on that little piece of paper.

"Q. 'I have read and fully understand this release'; didn't you write that on there? A. No, sir; I never seen one of them things.

"Q. You did write 'I have read and fully understand' on this paper, on the little card?

A. On that piece of paper.

40

"Q. And then you signed that? A. I signed that piece of paper; not that.

"Q. Was the piece of paper you did sign white paper? A. Yes, sir, plain white paper. I picked it up and looked on both sides.

"Q. There was nothing on either side of it? A. No, sir.

10 "Q. You just signed a blank paper? A. Yes, sir.

"Q. How did you come to write on it, 'I have read—' A. The man told me to put that on there.

"Q. Who told you? A. The clerk in the office that was giving me the check.

20 "Q. Told you to write that on it? A. Yes; first asked me, 'Could I write with my left hand.' I said, 'I will try.' He said, 'Put your name on this,' and he handed me that piece of paper. Before I started to write my name, he said to me, 'Put on there—' what you have got on top there, 'I fully understand this,' whatever it is" (pp. 100, 101).

Re-direct Examination by Mr. Winans:

30 "Q. Now, you have testified that you had a conversation with some member or members of the claim department of the Pennsylvania Railroad previous to the time when they gave you that check for \$1,800. Have you told everything that was said between you and this representative of the claim department? A. No, sir" (p. 103).

In rebuttal, direct examination by Mr. Winans:

40 "Q. Did you tell Mr. Waller that you would or would not settle with the company for your injuries at the time? A. Yes, sir.

"Q. What did you tell him? A. I told him I would not settle anything until I had seen Mr. Smith, the superintendent" (p. 173).

* * * * *

"Q. What, if anything, did Mr. Waller do, while you were there, with reference to your desire to see Superintendent Smith? A. Well, he started talking about the Compensation Act again, and Interstate Commerce Laws, and I told him that I wanted to see Mr. Smith first; I asked him if he would make an appointment for me to see Mr. Smith. He said 'Why, certainly,' and he took the 'phone that was setting right on the desk, and called Mr. Smith. Mr. Smith must have told him to come over, because he told me to see Mr. Smith on Saturday morning at ten o'clock. 10 20

"Q. What day was this that Mr. Waller called upon the telephone for you? A. On Friday afternoon.

"Q. And when was the Saturday morning at ten o'clock you refer to? A. The next morning.

"Q. Did he tell you where to see Mr. Superintendent Smith at ten o'clock? A. Yes, sir. 30

"Q. Where? A. Baltimore" (p. 174).

* * * * *

"Q. When Mr. Waller spoke to you about compensation did he tell you whether compensation was paid in one payment or by instalments? 40

* * * * *

‘A. Mr. Waller told me that he could probably get me \$1,800, he said; and the rest of it would be paid by the week. He didn’t say how many weeks, or how long I was to get it or anything else. He told me he could possibly get me \$1,800 right now.

10

“Q. Did you tell him what you wanted that \$1,800 for? A. Yes, sir.

“Q. What was that for? A. For my family.

“Q. This was some weeks after the accident? A. Yes, sir.

“Q. Had the defendant paid you any money at all during the time you had these talks with Mr. Waller? A. Not a penny” (p. 175).

20

“Q. Were you, as a result of your going to Superintendent Smith’s office in Baltimore, to see him, referred by anybody there to any other place, yes or no? A. Yes, sir.

“Q. What place were you referred to? A. Calvert Station.

“Q. Where is Calvert Station located? A. Baltimore.

“Q. Did you go to Calvert Station? A. Yes, sir.

30

“Q. On the same day or another day? A. The same morning.

“Q. When you got there whom did you see? A. I met the gentleman who was on the stand yesterday, Mr. Kortor, and Mr. Gosnell.

“Q. You saw these gentlemen on the occasion that they both testified to? A. Yes, sir.

40

“Q. You heard them testify to having you sign the release? A. Yes, sir.

"Q. Will you tell us what was said and what was done when you reached that office that day and the eighteen hundred dollar check was given to you? A. When I went in the office I seen these two gentlemen sitting there at the desk, and I said, 'Good morning,' or something like that. They said, 'What is your name?' I told them. 'Oh, yes! you are here for the check,' and he started to give me the check, and he wanted to know how I can endorse the check, what good was the check if I could not endorse it. 10

"Q. Did they tell you any reason why they thought you could not endorse the check? A. They said, 'Your right hand is off, we don't know whether you can write with your left hand.' 20

"Q. Did you make any response to that? A. I said, 'Sure, I can try to write.' So Mr. Korter gave me a piece of paper about the size of a playing card, or probably a little longer than a playing card, about like a calling card, it was the same width, and he told me to sign my name on that. I looked at it, after I started to write he said, 'Put this at the top.' It went something like this—I can't repeat the exact words, I understood this is something about a release, and I wrote it as requested to write, as he told me to. 30

"Q. Whatever words you wrote, were they dictated to you, or did you compose the words yourself? A. No, he dictated them to me.

"Q. Did you write just what he told you? A. Yes, sir.

"Q. On what? A. On this piece of paper.

"Q. Now at the time you wrote your name and the other words dictated to you by Mr. 40

Korter on this piece of paper, was there any writing, printing or typewriting, or other marks on that paper? A. No. I picked it up specially, and looked at it to see if there was nothing on it.

“Q. Did you sign any release? A. No, sir.

10

“Q. Did you sign any release there at the time? A. No, sir.

“Q. Did any one of these men, Kortor or Gosnell tell you that they had a release for you to sign, or asked you to sign a release. A. No, sir.

20

“Q. One of these men, or possibly both of them said something about the payment not being for your hand; just what did you say there? A. Well, Gosnell or Kortor handed me the check. I went on out, and as I was going out I said, ‘This doesn’t pay me at all for my hand. I want to see Mr. Waller afterwards to make some kind of an arrangement after I see Mr. Smith,’ and I went on out” (pp. 177-179).

* * * * *

30

“Q. In what condition was your right hand at the time? A. I had it in a sling and also in splints about three inches projecting out from my hand, it was all wrapped up.

“Q. Were you able to hold anything in that hand? A. No, sir.

“Q. When you signed your name and wrote some other words, did Mr. Kortor hold the paper on which you did the writing? A. Mr. Kortor did” (p. 193).

Cross Examination by Mr. Hartpence:

40

“Q. Will you say whether or not you did write these words, ‘I have read and fully

understand this release, Howard W. Steinert,' on this Exhibit D-2, did you write that or not? A. Not on that piece of paper.

"Q. Will you say that this is not your signature? A. Not on this piece of paper. It is my signature, but not on this paper.

"The Court: Don't you get confused 10
between your name and your signature. Is
it your signature and not your name?

"The Witness: No, it is not my signature" (pp. 182, 183).

* * * * *

"Q. How did you know that this check of \$1,800 was going to be there for you? A. Mr. Waller told me on Friday evening when 20
he made the appointment to see Mr. Smith.

"Q. Told you what? A. If I wanted that money to go down to Calvert Station and get it" (pp. 183, 184).

The testimony concerning the alleged execution of a release was irreconcilably conflicting. Plaintiff's counsel was not afforded an opportunity to have an expert examination made (p. 98) and it was not offered in evidence until the close of defendant's case (pp. 165, 166). 30

However the name, as distinguished from the signature, of Howard W. Steinert came to be affixed to defendant's exhibit 2 (p. 215), it was not placed there by plaintiff with the knowledge or intention that apparent effect was being given to a purporting release of his cause of action.

The fraud in the attaching of plaintiff's name to the disputed document was matched by the 40
fraud which brought about his presence in the

Claim Agent's office that day and his willingness to supply a specimen of his writing with his left hand.

10 The reply set up, in the Second Separate Avoidance of Sixth Defense, that false representations were knowingly made by defendant, through its claim agent, and were believed and relied upon by plaintiff, and the subsequent "alleged execution and delivery of said pretended release" induced thereby (pp. 16-18), specifying the same false statements of fact as were disclosed by plaintiff's testimony, and no rejoinder was filed to plaintiff's reply. He testified as follows:

Direct Examination by Mr. Winans:

20 "Q. Did you have some conversations with claim agent Waller who was on the stand here this morning? A. Yes, sir.

"Q. Now, these conversations occurred, some at the hospital, and at least one of them at another place, is that right? A. Yes, sir.

"Q. When did Mr. Waller call on you at the hospital first? A. About a week or ten days after I was hurt.

30 "Q. Did you have a conversation with him then? A. Yes, sir.

"Q. When did he call upon you again? A. About eight or ten days later.

"Q. Where was that? A. In the hospital.

"Q. When did you see him the next time? A. I saw him the next time in Union Station, Washington" (p. 172).

* * * * *

40 "Q. On these occasions did you have a conversation with him about your injuries? A. Yes, sir.

"Q. Did you show him the right hand? A. Yes, sir.

"Q. Was it bandaged at the time? A. Yes, sir.

"Q. Did Mr. Waller on the occasion of these three talks you had with him about your injuries say anything about settling? A. He started telling me something about— 10

"Q. State yes or no? A. Yes, sir.

"Q. What did he say to you about settling A. He told me that he thought I didn't have any claim against the railroad, I was not working under the Interstate Act.

"Q. Did he tell you what Interstate Commerce consists of? A. First I told him I didn't understand anything about Interstate Commerce, and then he started to tell me that if a man was working on interstate, he would have to be out on road service going from state to state, and being that I worked in the yard—and he also asked whether I lived in the District of Columbia that night and I told him no. He told me I would be entitled to compensation. 20

"Q. Did he tell you that if you were working in a yard you were not entitled to a claim against the railroad company, except for compensation? A. Yes, sir. 30

"Q. And that you were not engaged in interstate commerce? A. Yes, sir" (p. 173).

"Q. Did you know at the time you were working in the yard, when you were hired, whether or not you were working in interstate commerce? A. No, sir.

"Q. Did you know at the time Mr. Waller made the statement to you that you were not engaged in interstate commerce, know 40

whether or not these statements were true?
A. No, sir, knew nothing about interstate
commerce.

“Q. Did you believe the statement that Mr.
Waller made to you? A. Yes, I thought that
he was telling me the truth.

10 “Q. Did you rely on the statement he made
to you? A. Sure.

“Q. Did you at the time of the accident, or
at the times of these conversations with Mr.
Waller that have been testified to, know
whether or not that a man working in a
freight yard is not engaged in interstate com-
merce? A. No, sir, I had no idea.

20 “Q. Did you know that a man must be
working on a road run in order to be in in-
terstate commerce? A. No, sir, not until
I was told.

“Q. Did you know that a man working in a
freight yard must take compensation in in-
stallment payments? A. No, sir.

“Q. Did you believe all these things when
Mr. Waller told you? A. Believe him, yes,
sir.

30 “Q. When did you first learn you were en-
gaged in interstate commerce? A. Through
my lawyer.

“Q. Was that long after you ceased deal-
ing with Mr. Waller? A. Yes, sir.

“Q. After you brought your suit? A. Yes,
sir.

40 “Q. Did you tell Mr. Waller whether or
not you knew anything about interstate com-
merce? A. I told him, yes, I didn't know
anything about interstate commerce” (pp.
175, 176).

Cross Examination by Mr. Hartpence:

"Q. I gather from what you said in answer to your counsel's question with regard to this statement that you say Mr. Waller said, that you believed what Mr. Waller told you about it; that is correct, isn't it? A. I believed what he was telling me.

10

"Q. You felt— A. The claim agent, he ought to know.

"Q. You felt that he was a man whose word was worthy of being taken? A. He told me himself that he would treat me the same as though he was my own son.

"Q. You felt what he said was worthy of being accepted by you? A. Sure" (p. 184).

* * * * *

20

"Q. What was this compensation act that was referred to which you say Mr. Waller told you about? A. Mr. Waller told me, as I said before, that if I had been working on the road service I would have come under the compensation law, and not working on the road service work, working in the yard that way, he told me that I was entitled to compensation, that I had to take compensation.

30

"Q. What did you understand compensation to be? A. Well, he explained it to me—

"Q. What did you understand compensation to be? A. What Mr. Waller told me.

"Q. Didn't you know that there was no such thing as the Workmen's Compensation Act in the District of Columbia? A. I told you before I knew nothing about compensa-

40

tion or interstate either. They were too high for me as a brakeman.

10 “Q. What was it that you thought you were entitled to in the railroad company because you were hurt? A. As compensation, as Mr. Waller told me, getting something for part payment for my injuries, and I was entitled to my wages. That is the way he explained it to me” (pp. 184, 185).

20 The falsity of Claim Agent Waller’s statements is obvious; especially that concerning plaintiff’s engagement in interstate commerce. That he was so engaged is admitted by the answer (*vide* complaint, paragraphs 7, 8, 9 and 10, at pp. 3 and 4; admitted in paragraph 1 of the First Defense of the answer, at p. 11). The court charged the jury, without exception, as follows:

 “The fact that they were both engaged in interstate commerce is admitted by the defendant in this suit, and therefore you need spend no time in determining that. That is an admitted fact—” (p. 194).

30 It therefore became the *law of the case* that the statements that plaintiff was not engaged in interstate commerce and that the work upon which he was engaged was of a purely intrastate character, when made (as plaintiff testified) by Claim Agent Waller, *were false*.

40 These were material statements concerning controlling facts, and not “an expression of opinion on a question of law, concerning which even the greatest legal minds differ” (Appt.’s br., top of p. 10). They were misrepresentations of the places of origin and destination of cars operated

and controlled by defendant, and of the shipments in them, concerning all of which defendant was required by the federal statute to keep strict records and to keep them intact and available for reference for at least six years.

Plaintiff was not chargeable with notice of the interstate or intrastate character of the cars upon which he worked, or of their contents, 10

Trowbridge vs. Kansas City & W. B. Ry.,
192 Mo. App., 52; 179 S. W., 777;

and had the right to rely on Waller's statements (pp. 175, 176, 184).

In *Fagan vs. Central R. Co. of N. J.*, 94 N. J. L., 454, it appeared that the plaintiff was "awfully sick," wanted to get home "in the worst way" and asked for "transportation"; that defendant's claim agent discussed with him the payment of compensation and represented that the plaintiff was not employed in interstate commerce, but entitled to payment only under the New Jersey Workmen's Compensation Act; that plaintiff was induced by these representations, which were false, to execute a release, pleaded as a bar to the action; and this court held, in an opinion by Trenchard, J., as follows: 20 30

"We therefore conclude that it was open to the jury to find that the release was procured by fraud.

"Now although, as a general rule, the affixing of a signature to a contract creates a conclusive presumption against the signer that he read, understood, and assented to its terms, yet this rule has one notable exception, viz.: where the signature was procured by 40

10 fraud or imposition practiced upon the signer with intent to deceive him as to the purport of the paper which he signs. And where, as here, the evidence tends to show that the defendant's agent knowingly induced the plaintiff to sign a release of all claims for damages by falsely representing to the plaintiff that it was merely a receipt for a partial payment, the question whether the plaintiff wrote above his signature, 'I have read the above and understand it,' and the fact that he would have discovered the fraud alleged to have been perpetrated upon him if he had not negligently failed to read the paper, are not in themselves sufficient reason for directing a verdict, but are merely additional circumstances for the consideration of the jury in determining whether the defendant's agent intentionally deceived the plaintiff into believing that the paper was a mere receipt for partial payment, and not a release of all claims. *Dunston Lithograph Co. vs. Borgo*, 84 N. J. L., 623; *Fivey vs. Penn. R. Co.*, 67 N. J. L., 627; *Alexander vs. Brogley*, 63 N. J. L., 307.

20
30 "We believe that the foregoing conclusions in effect dispose of all questions raised and argued which seem to merit remark."

The judgment in the plaintiff's favor was affirmed, with costs.

40 In *Palmer vs. Tomlin*, 104 N. J. L., 215, it was held that although it is a presumption of law that a release is a bar to a cause of action referred to therein, yet where it appears that the releasor was induced to sign the paper by fraud practiced upon him, such release is no bar to recovery; and

that in an action where a release is set up as a defense, the question whether it was fraudulently procured being in dispute, is for the jury.

In *McDonald vs. Cent. R. Co. of N. J.*, 89 N. J. L., 251, where defendant pleaded a release of plaintiff's cause of action, the judgment for defendant was reversed, this court holding that a fraudulent misrepresentation of the contents of the release, whereby plaintiff was induced to execute it, amounted to fraud in the execution of the release, even though the misrepresentation concerned a statement as to the consideration for the release. 10

In *Alexander vs. Brogley*, 63 N. J. L., 307, where defendants were induced to sign their names on a printed form of contract by a fraudulent representation made to one of them, that he was writing his name only to show how it was spelled, and to the other defendant, that he was signing only as an autograph; it was held that defendants were not bound, even though they were negligent in failing to ascertain the contents of the papers which they signed; and a judgment for defendants was affirmed. See also— 20

Dunston Litho. Co. vs. Borgo, 84 N. J. L., 623. 30

IX.

The trial was free from error, prejudicial to defendant.

Besides the questions involving its own negligence and the efficacy of the alleged release, defendant assigns eight other instances of alleged error, three of them in the admission of evidence 40

(Grounds of Appeal, Nos. 3, 4 and 5; at p. 44) and five in the charge (*ib.*, Nos. 6, 7, 8, 9 and 10; at pp. 44-47). Of these, Nos. 6, 8 and 10 were abandoned upon the brief.

(1)

10 *There was no error in the admission of evidence.*
 Defendant argues that in three instances there was error in the admission of evidence, viz.:

(a) That it was erroneous to permit plaintiff to testify to the representation made by defendant's claim agent, Waller, regarding compensation (Appt.'s br., p. 12);

20 (b) That it was erroneous to permit plaintiff to testify that he was personally *ignorant* of the subject of interstate commerce; not, as defendant phrases it, "regarding his own idea of interstate commerce" (*ib.*); and

(c) That it was erroneous to permit plaintiff to testify that a coupling pin can be lifted easily when it is in good order (Appt.'s br., Point VII, at p. 15; Case, pp. 168, 169).

30

(2)

There was no prejudicial error in the charge; if error occurred, it was harmless. In this category defendant argues that two instances of error occurred, viz.:

(d) That there was error in the charge regarding *assumption of risk* (Appt.'s br., Point
 40 VI, at pp. 13-15); and

(e) That there was error in charging the jury that it may (*not must*) regard *employee witnesses as being interested* (*ib.*, Point VIII, at pp. 15-18).

(a) Plaintiff's testimony concerning the fraudulent misrepresentations made by defendant's claim agent, Waller, is quoted almost at length, 10
on prior pages of this brief. Proof of the making of these representations by defendant's Claim Agent was necessary, relevant and material in support of the allegations of plaintiff's reply contained in paragraphs 1, 2 and 3 of the "Second Separate Avoidance of Sixth Separate Defense" of the answer (*vide*, reply, at pp. 16, 17). A case of false representations cannot be made out, in 20
absence of admission to the same effect, without proof of the words uttered, or their substance. Waller was the undoubted agent of defendant in the premises; this was not disputed throughout the whole case, and it affirmatively appears that he was the active agent in the procurement of the disputed release, which was prepared and awaiting execution in his office (*vide*, testimony of Korter and Gosnell; case, pp. 131-138; 187-191). Moreover, defendant speculated upon the testimony on this subject, by cross-examining plaintiff 30
(pp. 184, 185), and cannot complain now of the testimony which its counsel so largely elicited (*ib.*).

(b) It was equally relevant and material for plaintiff to testify that he had no knowledge as to whether or not his or defendant's work comprised interstate or intrastate commerce at the time of the accident. The mere fact of working in defendant's business did not charge plaintiff 40
with knowledge of the character of that business,

i. e., the places of origin and destination of the freight cars or of their contents.

Trowbridge vs. Kansas City & W. B. Ry.,
192 Mo. App., 52; 179 S. W., 777.

10 In his reply, plaintiff alleged, at paragraphs 7 and 8 of the "Second Separate Avoidance of the Sixth Separate Defense," that the false representations were made for the purpose and with the intent to induce plaintiff to believe same, to convince him of the truth thereof and cause him to rely thereon in the proposed execution of the pretended release; that plaintiff did so rely, believed said statements and had the right to rely upon them and that the alleged execution of the disputed instrument was induced thereby (p. 18).
20 This belief in and reliance upon Waller's statements is equivalent to an allegation of ignorance as to the true facts; and proof, by his own mouth, that plaintiff had no knowledge of the interstate or intrastate character of the work was therefore competent, relevant and material upon the questions so presented. Proof of plaintiff's receptiveness to the false statements was a necessary part of his *prima facie* case.

30 (c) In the course of plaintiff's testimony, the following occurred:

"Direct Examination by Mr. Winans:

* * * * *

"Q. Can a pin always be lifted easily when it is in order?

"Mr. Hartpence: I object to that as calling for a conclusion.

"The Court: Overruled.

40 "Mr. Hartpence: Exception.

"Q. What is the answer? A. Yes, sir"
(pp. 168, 169).

The sole ground of objection was that the proposed testimony called for a conclusion. It will be recalled that plaintiff qualified as an expert, by showing four years' service with defendant as a railway brakeman, one-half of which period was spent working in the yard (p. 59). Moreover, the question of his qualification as an expert rested exclusively in the trial judge, and is not subject to review, except in case of grave abuse. 10

Castner vs. Sliker, 33 N. J. L., 95.
Stillwell Mfg. Co. vs. Phelps, 130 U. S.,
527; 32 Law. Ed., 1035.

The testimony objected to did not state any conclusion of the witness. It was a statement of what he had observed, at first hand, in the course of his four years' experience as a brakeman. 20

Besides being entirely competent, the testimony was relevant, material and vital to plaintiff's case. The defective mechanism which was the occasion of plaintiff's receiving the injuries sued for, was a bent pin. The purpose of the testimony was to show that a pin in good order is distinguishable from a bent pin, which has the characteristic, as shown by the testimony of both Steinert and Kerr, of being difficult to raise and thereby obstructing the free opening of the coupler knuckle. Aside from this important aspect, the question was wholly harmless to defendant; it was merely equivalent to a statement that most of the pins on defendant's cars were in good order and readily handled. The crux lay in the fact that by further testimony it was shown that the pin 30 40

which played so important a part in the occurrence of the injuries, was bent and by reason thereof rendered the whole coupling device defective and a violation of the federal act.

10 (d) Defendant contends that there was prejudicial error in the charge of the court respecting assumption of risk and in support of this contention quotes an emasculated excerpt therefrom. This matter assumes a different aspect when reference is had to all that the learned trial judge said on this subject, viz.:

20 “Now, the next defence interposed, is what is known as the defence of assumption of risk, and upon that subject the law has laid down these rules:

“ ‘A servant assumes the usual and obvious risks of his employment, and those which he could discover with ordinary care, but not the negligence of his employer.’

30 “An employee assumes the risk, not only from facts known to him, but also such danger attending his work as he might discover by the exercise of ordinary care for his own safety.

“The doctrine of assumption of obvious risk by a servant applies as well to those which arise or become known to the servant during the service as to those in contemplation at the time of his original hiring.

40 “And the Supreme Court of the United States has laid down the rule in very clear language, and I am just merely going to repeat it:

“ ‘Some employments are necessarily fraught with danger to the workman, danger that must be and is confronted in the line of his duty. Such dangers as are normally, necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages, and a workman of mature years is taken to assume risks of this sort whether he is actually aware of them or not; but risks of another sort, not necessarily incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work, and suitable and safe appliances for the work. These the employee is not treated as assuming, unless he becomes aware of the defects or disrepair, or of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them. 10 20

“ ‘When the employee does know of the defects and appreciates the risk that is attributable to them, then if he continues in the employment without objection and without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master’s breach of duty’ ” (pp. 204, 205). 30

It is perhaps true that the charge failed to elucidate one phase of this subject, i. e., that a servant also assumes the risk growing out of negligence on the part of a fellow-employee, where that negligence has been observed by him or has 40

been so persistent as to charge him with notice. For a complete exposition of the subject of assumption of risk, something of this character might have been said; but it would have been wholly foreign to any fact in evidence in this case. No prior negligence of defendant or any of its employees was testified to or even suggested; hence the error in omitting this unimportant detail, if error it were, was wholly harmless. The other aspects of assumption of risk, i. e., open and obvious risks and those growing out of disrepair, previously observed by the injured employee or so persisted in as to have charged him with notice thereof, were sufficiently elaborated in the charge; the other, in its relation to this case, was academic.

20 (e) Defendant assigns error because the court charged that the jurors *could*, not that they *must*, find an employee witness to be interested. There is a class of cases where employees are obviously not interested, but this case is not of that type. As to the character of their testimony, defendant produced two classes of witnesses, if we except the yard trainmaster, Watkins, whose testimony was stricken out *in toto*, with the consent of defendant's counsel (p. 165), and the jury instructed to disregard (*ib.*). The first class comprised Fireman Jarvis, Engineman Gardener, Conductor Kerr and Rear Brakeman Redding, who testified only about physical occurrences leading up to the accident. As they participated in all that they testified about, the jury might properly regard them as interested. The other class comprised the claim agent, Waller, and his two clerks, Korter and Gosnell, who testified exclusively about obtaining the pretended release from Mr. Steinert,

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except testimony by Waller as to the false representations alleged. These witnesses testified to nothing save what they personally participated in, and therefore, as to what they did testify to, they might be regarded as interested witnesses. Here again, if there was error in the charge, it was purely harmless, since witnesses who, as a class, might be held disinterested as matter of law, did not exist. The charge referred to the witnesses who testified and whose testimony the jury was called upon to weigh;—not to the whole genus of employe witnesses. The distinction is clearly pointed out by the cases defendant chooses to cite under its Point VIII. 10

CONCLUSION.

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It is respectfully submitted that the appeal should be dismissed; or, if retained, that plaintiff-respondent's judgment be affirmed, with costs.

JOHN WINANS,
Attorney of and of Counsel
with Plaintiff-Respondent.

30

New Jersey Court of Errors and Appeals

HOWARD W. STEINERT,
Plaintiff-Respondent,

v.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant-Appellant.

Action at Law.

On Appeal from
Hudson County
Circuit Court.

BRIEF OF DEFENDANT-APPELLANT.

I.

Statement of Facts.

Plaintiff was employed by defendant as a freight brakeman at Potomac Yards, near Washington, D. C. The interstate character of his employment at the time of his injury is admitted (State of Case, pp. 3, 4, 11). He was injured April 17, 1926, shortly after 1:30 A. M. (Case, pp. 50, 52) by having his right hand caught in the coupler of a car which he was in the act of adjusting, through the sudden forward movement of a locomotive, resulting in practically the loss of the hand. Plaintiff contends that it was part of his duty to set the coupler on the standing car, and that the engine was moved forward without signal or warning to him. Defendant, on the contrary, contends that plaintiff voluntarily assumed to place himself in a position of danger while the engine stood within a short distance of the car, without being required by de-

fendant to do so, and without in any way apprising the operator of the engine of his intention to do so, or informing him of his presence in the dangerous position in which he placed himself (Case, pp. 12, 87, 88, 90, 91, 92, 93, 94, 97, 112, 127).

The testimony of plaintiff himself is to the effect that he had given the engine-man a signal to back up, after a car had been placed on the track where the accident occurred and uncoupled, but that no attention was paid to that signal; and that after he had waited about ten minutes without receiving any response to his signal, he concluded to adjust the coupler on the standing freight car. During that period he had been standing at the pilot end of the engine, which was next to the standing car, and which was but the engine's length from the cab. Nevertheless, he made no effort to ascertain why his back-up signal was not obeyed, nor to inform the engine-man of his intention to reach into the narrow space between the engine and the car to adjust the coupler. It was dark. Plaintiff testified that the engine-man did not know that he had placed his hand and arm in between the engine and the car, and that he would not have moved the engine had he known plaintiff was in that position (Case, pp. 93, 94). But suddenly the engine moved forward and caught plaintiff's hand in the coupler and injured it as above indicated. Plaintiff, in his reply, "admits that he went upon the track between the cars intended to be coupled together" (Case, p. 15).

Defendant subsequently paid plaintiff \$1,800 in settlement, and a release was given (Case, pp. 215-217; Exhibits D-2 and D-3). But notwithstanding this, plaintiff afterwards instituted the present suit under the Federal Employers' Liability Act. (*Act of April 22, 1908*, Chap. 149, U. S. Code, Title 45, Sec. 51.)

Federal Employers' Liability Act of 1908.

An Act relating to the liability of common carriers by railroad to their employes in certain cases.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED.

SECTION 1. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

SEC. 2. Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in

whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

SEC. 3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: PROVIDED, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

SEC. 4. In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

SEC. 5. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void; PROVIDED, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to

the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

SEC. 7. The term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. Nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employes under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled "An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employes," approved June 11, 1906.

Approved, April 22, 1908. 35 U. S. Stat. at L. 65 c. 149.

Federal Employers' Liability Act, Amendments of 1910.

An Act to amend an Act entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April twenty-second, nineteen hundred and eight.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That an Act entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read

SEC. 6. (As amended by act of April 5, 1910.) No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

SEC. 2. That said Act be further amended by adding the following section as section nine of said Act.

SEC. 9. Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury.

Approved, April 5, 1910.

The release was pleaded in bar (Case, p. 12), but plaintiff (Case, pp. 16-18) asserted that it was induced by fraudulent misrepresentations by defendant, and the trial court left to the jury the determination of its effect, and also the liability of defendant on the facts of the case (Case, pp. 192, 194, *et seq.*).

A verdict for \$25,000 was rendered in favor of plaintiff, but on rule to show cause this was reduced to \$15,000 (Case, pp. 21, 28). Later, plaintiff applied for a reargument of the rule to show

cause, and upon the reargument the amount of the verdict was fixed at \$20,000 (Case, pp. 23, 29, 34, 36). An order to that effect, and requiring plaintiff to elect regarding its acceptance, was entered May 8, 1930, in default of which acceptance the rule to show cause was to "be made absolute, said verdict be set aside and a new trial of the issues had in this cause" (Case, p. 36). On May 15, 1930, plaintiff filed his written election to accept said reduced verdict of \$20,000 (Case, pp. 37, 38). This, under the order of May 8, 1930, *supra*, operated to discharge the rule to show cause (Case, p. 36). On May 19, 1930, defendant served its notice of appeal to this Court, exceptions having been reserved in the rule to show cause (Case, pp. 39, 23).

II.

Questions Involved.

1. Should not the trial court have directed a verdict in favor of defendant, because—

(a) No negligence of defendant was shown as the proximate cause of the injuries complained of;

(b) The proximate cause of said injuries was plaintiff's own voluntary act in placing himself in a dangerous position without apprising the engine-man of his position;

(c) The release is a bar to plaintiff's alleged cause of action?

2. Did not the trial court err in submitting to the jury, under all the facts of the case,—

(a) The determination of the effect of the release;

(b) The determination of defendant's liability?

3. Did not the trial court err in permitting plaintiff to testify what Clarence C. Waller said about compensation?

4. Did not the trial court err in permitting plaintiff to testify regarding his knowledge of his working in interstate commerce?

5. Did not the trial court err in charging the jury that a servant does not assume the risk of the negligence of his employer?

6. Did not the trial court err in charging the jury, at plaintiff's request, that it might regard an employee as an interested witness?

III.

Appellant relies upon Grounds of Appeal Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 9 (Case, pp. 44-47).

ARGUMENT.

IV.

Appellant respectfully submits that the record shows that the proximate cause of plaintiff's injuries was his own unwise and careless act, voluntarily done on his own responsibility, and that no negligence of defendant is shown as the proximate cause. The verdict for the defendant should, therefore, have been directed by the trial court.

Sharp v. Durand, 71 N. J. Law 354, 356;
Mehl v. N. Y. Glucose Co., 83 N. J. Law
 630;
Coyle v. Iron Co., 63 N. J. Law 609;
McConnell v. Alpha Portland Cement Co.,
 74 N. J. Law 727;
Cases cited in Point VI, infra.

Plaintiff, in his reply, "admits that he went upon the track between the cars intended to be coupled together" (Case, p. 15).

He testified (pp. 87-94):

"Q. How did you come to go in there and proceed to open that knuckle, after you had given the signal to go back? A. After I had seen the man had not made any attempt to move, I just said to myself, 'Well, I am not going to stand here all alone; I will go open that knuckle and go inside the yard master's office where the rest of them are, somewhere around the grounds.' I stepped off and tried to open the knuckle. I had difficulty in raising the pin. After I got the knuckle open, it would not drop down as it should, in its proper position, and when the next car came it would close up that knuckle. Well, I was proceeding with the pin, the engine come and coupled it to me.

Q. I don't want to confuse you. I just want to get that clear. After the engine and the cars had been uncoupled and you said there was several feet intervened between them, and you gave your signal to go back and the fireman did not pay any attention to it, you got tired waiting and you made up your mind to do something else? A. Yes, sir.

Q. Now, as I understand you, you were standing on the step from the engine, on the right-hand side? A. Yes, sir.

Q. When you made up your mind you were going to open the knuckle? A. Yes, sir.

Q. You stepped down off the step on to the ground on the right-hand side? A. Yes, sir.

Q. And then you went in, or reached in and tried to lift the pin with your hand? A. Yes, sir.

Q. I understood you to say that it was dangerous to walk in between the engine and the cars? A. Certainly I did. That is the reason I didn't walk between them. I stood on my proper side to open that knuckle.

Q. There was just as much danger to your hand in putting it in the knuckle as there

would be to your body if your body had been in there? A. Absolutely sure.

Q. And yet you did that? A. Well, I had to put my hands there to open it.

Q. You didn't intend to do that when you gave your signal? A. No.

Q. You had not intended to open the knuckle when you gave your signal to go back? A. No, sir; I looked for the rear brakeman to do that.

Q. It was after you gave your signal to go back, at that time following the instructions of your conductor, and because he didn't go back that you made up your mind to go in and fix it up? A. After ten minutes had expired and he had not moved, yes, sir. Then I thought the man was never going to move.

Q. Let me ask you this: after ten minutes had gone by and the fireman didn't move his engine to go back, did you go to the cab to see why he didn't move it? A. No.

Q. You had given him the signal to go back, hadn't you? A. Yes, sir.

Q. After ten minutes had expired and he did not move, why didn't you go back and see why he didn't move? A. For the simple reason, he is an employee, same as me. If I am supposed to be on the job, why shouldn't he? Why should I take a special purpose going up to the cab and beg him to go back? That was that man's duty to go back. He got the signal. That was sufficient in order for him to move. He didn't move. Mostly any man would have done the same thing I had done after ten minutes had expired, go up and open that knuckle, or leave the engine and cars stand there or leave the knuckle closed. When Mr. Redding had passed me, I knew he was not going to do it, so I done it myself, and he pulls the throttle and bangs into me, and then this whole trouble got me.

Q. He didn't know you were in there? A. I don't think he did. If he did, I don't think the man would sit there and smash me up.

Q. Let me ask you along this line, Mr. Steinert. Ten minutes having elapsed after you had given the order, the signal, to go back, the fireman not moving the engine, and the order having been by Mr. Kerr, to go over to the highline and get cars, which the fireman heard as well as you, you went in there to open that knuckle and put your hand in there, did you tell the fireman you were going to do it?
A. No, sir.

Q. So, he didn't know you were engaged in opening that knuckle, and that your hand was in there? A. No, sir; he didn't know it. If he did, I said he would not have coupled up to me. He had no business moving the engine without giving a signal."

V.

The release is a bar to the action unless obtained by fraud and deceit in the execution.

McDonald v. C. R. R. Co., 98 Atl. Rep. 391;
Fivey v. P. R. R. Co., 67 N. J. Law 627;
Zdancewicz v. Trac. Co., 77 N. J. Law 10;
Vellekoup v. D. Fullerton & Co., 79 N. J. Law 16.

In this present case there was no evidence of fraud in the execution, competent for submission to the jury. And fraud in the consideration is not open to question in the action at law.

Connor v. Dundee Chemical Works, 50 N. J. Law 257.

Plaintiff contends that the execution and delivery of the release were induced by accident, mutual mistake of facts (neither of which can avail him at law), and fraud and deceit (Case, pp. 16-18). There is no proof whatsoever that the defendant or any one authorized to speak for it

made any misrepresentation, either as to fact or the legal effect of the release, which could vitiate it in law. Plaintiff's chief contention is that he was misled as to the nature of the employment in which he had been engaged, but does not show that any information or representation was made by defendant that was known to be false, of an existing fact, or that it was so made to induce the execution of the release. Even assuming that there was a misstatement in this respect (which is not the fact), it was at the most but an expression of opinion on a question of law, concerning which even the greatest legal minds differ, and was not a misrepresentation of fact. And the alleged misrepresentation of the legal effect of the release cannot avoid it.

Jackson v. P. R. R. Co., 69 N. J. Law 79;
26 *Corpus Juris*, 1207-1210.

It was erroneous to permit the plaintiff to testify what the Claim Agent, Waller, said about compensation, and to testify regarding his own idea of interstate commerce. Both were immaterial (Case, pp. 173-175). It is not what the plaintiff thought that could make a foundation to invalidate the release, nor what some other person thought about interstate commerce or compensation. It required a misrepresentation of a material fact by defendant, untrue and known to be untrue, made with the intention of having plaintiff act upon it to his disadvantage, and actually acted upon by plaintiff to such disadvantage. Plaintiff himself said in this respect (Case, pp. 98, 99):

"Q. You were paid \$1,800 by the Railroad Co. in settlement of this case? A. I was paid \$1,800, yes, sir.

Q. In settlement of your claim for the injuries you sustained? A. I didn't figure it was a settlement.

Q. You didn't what? A. I had no intention that was a full settlement.

Q. What was it ever paid to you for? A. I thought that was just part, like salary, some parts of my salary, figuring the length of time I would be out of work.

Q. Who told you anything like that? A. Nobody told me anything. That's just what I was figuring on.

Q. Who actually paid it to you, Mr. Steinert? A. Pennsylvania Railroad Co."

Plaintiff admitted endorsing the check for \$1,800 paid him in settlement (Exhibit D-3, Case, p. 216), and his ability to read the statement on the check for which it was so paid (Case, p. 186).

It is respectfully submitted that the release is a bar, and that the trial court erred in submitting the determination of its effect to the jury.

Cowley v. Smyth, 46 N. J. Law 380;

Lembeck v. Gerken, 86 N. J. Law 111, 114, 115;

Lams v. Fish, 86 N. J. Law 321, 323;

Mount v. Loizeaux, 86 N. J. Law 511, 513;

Feldman v. Halpin, 96 N. J. Law 75, 77.

VI.

The trial court erred in charging the jury that—

"A servant assumes the usual and obvious risks of his employment, and those which he could not discover with ordinary care, but not the negligence of his employer" (Case, p. 204).

In *Boldt v. P. R. R. Co.*, 245 U. S. 441, at 445 (62 L. Ed. 385), where the facts were similar to those in the present case, plaintiff's intestate having been caught between cars, where he had gone to adjust a faulty coupler, and killed, Mr. Justice McREYNOLDS, speaking for the United States Supreme Court, said:

"In *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, * * * we said: 'It seems to us that Sec. 4 in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action.' * * *

"At common law the rule is well settled that a servant assumes extraordinary risks incident to his employment, or risks caused by the master's negligence, which are obvious or fully known and appreciated by him."

In *Toledo, St. L. & W. Ry. Co. v. Allen*, 276 U. S. 165 (72 L. Ed. 513), Mr. Justice BUTLER said:

"Except as specified in Sec. 4 of the Act, the employee assumes the ordinary risks of his employment and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to the negligence of his employer and fellow employees."

This was reiterated by Mr. Justice BUTLER in *D. L. & W. R. R. Co. v. Koske*, 279 U. S. 7 (73 L. Ed. 578).

And in *C. & O. R. Co. v. Nixon*, 271 U. S. 218 (70 L. Ed. 914), it was held that—

"A section man engaged in maintaining a railroad track, assumes the risk of injury from negligence on the part of the train operators in failing to maintain a lookout for such employees along the track."

Mr. Justice HOLMES said:

"For reasons that the jury found insufficient to excuse the omission the engineer and fireman of the train were not on the lookout, and the question raised is whether as toward the deceased the defendant owed a duty to keep a lookout, or whether, on the other hand, the deceased took the risk.

"If the accident had happened an hour later when the deceased was inspecting the track,

we think that there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. * * *

"* * * It seems to us to have been no more than an extension of his ordinary rights and his usual risks."

These are all cases arising under the Federal Employers' Liability Act, *supra*.

It is respectfully submitted, therefore, that the charge of the trial court in this respect was erroneous.

VII.

There was no evidence produced to show that any violation of any statute enacted for the safety of employees contributed to the injury. The question: "Q. Can a pin be lifted easily when it is in order" (Case, p. 168) merely called for a conclusion, and should not have been sustained; but even if the conclusion was correct, there was no proof offered to show that any violation of any statute was involved.

VIII.

It was erroneous for the trial court to charge the jury, upon the request of the plaintiff, that—

"In determining the degree of credibility of a witness, the jury may take into consideration the fact of his being in the employ of a party to the suit, and if he is in such employ, may regard him as an interested witness" (Case, p. 209).

While the interest of a witness *may* be shown, and while the fact that a witness is an employee of a party to the suit *may* make him an interested

witness in behalf of that party (*Haver v. C. R. R. Co.*, 64 N. J. Law 312), it does not follow that, without having shown any such interest, the Court may properly charge the jury as an abstract proposition, that the mere fact that the witness *is* in the employ of the party, the jury has the *right* to regard him as an interested witness in behalf of that party (*Eissing v. Erie R. R. Co.*, 73 N. J. Law 343, 346; *Marquette, &c., R. R. v. Kirkwood*, 45 Mich. 51). The evidence is entirely barren of any attempt to show such interest on the part of defendant's witnesses, and to thus cast them all into the discard by one fell swoop, without any attempt to discredit them in any way, except to show that they were employees of the defendant, is unwarranted. If there had been a previous foundation laid for it, by the cross examination of the witnesses or otherwise, defendant would have had an opportunity to have shown that not only were the employees not interested in its behalf, but perhaps entirely hostile. No such opportunity was thereby afforded and the charge was vitally harmful to defendant. It is respectfully submitted that the trial court erred in charging the jury in this respect.

See also, *Ross v. Dir. Genl. R. R.*, 94 N. J. Law 295, at 298, where Mr. Chief Justice GUMMERE, speaking for the Supreme Court, said:

"All of these witnesses except the engineer—and, possibly, the fireman—would seem to have been disinterested unless the mere fact of their employment by the defendant justifies the opposite conclusion. We do not think it does. They had no personal interest in the result of the trial, and they were not in any way responsible for the happening of the accident. To declare that men in this situation are likely to commit perjury can only be explained on the theory that the person so declaring is prejudiced against the whole class

of railroad employes, quia their employment.

* * * While it is true that, as a general proposition, the mere fact that the witnesses on the one side outnumber those called by the other, will not justify the court in declaring that a finding of the jury based upon the testimony of the lesser number is against the weight of evidence, this general principle has no application to a case like the present, where the only witnesses who testify on the one side are parties to the litigation, and those on the other not only greatly outnumber them, but are most of them also, *so far as the case shows*, totally disinterested."

And *Lansberry v. D. L. & W. R. R. Co.*, 1 N. J. Misc. 585, at 587, where the Supreme Court, *per curiam*, Mr. Chief Justice GUMMERE and Justices MINTURN and BLACK sitting, said:

"No evidence was offered on the part of the plaintiff to controvert this testimony, *nor was there anything in the proofs to suggest that either of these witnesses was not disinterested, nor was there anything which directly or indirectly tended to discredit either of them.*"

As an abstract proposition the charge may savor of soundness, but its applicability must be based on concrete facts. As said by Mr. Justice SWAYZE, speaking for this Court in *Brooks v. P. R. R. Co.*, 92 N. J. Law 394, 396:

"These excerpts are enough to show that the trial judge was at some pains to state the abstract rules of law applicable to the establishment of a highway by adverse user. The difficulty we have is to find in the case proof of the concrete facts to which these legal principles are applicable."

And by Mr. Chief Justice BEASLEY, speaking for this Court in *P. R. R. Co. v. Matthews*, 36 N. J. Law 531, at 534:

"The question is, not whether this enunciation of legal principles is, in the abstract, correct in all its propositions, but whether it is so with respect to the precise legal principle involved in the case then in the course of trial."

And as stated by Mr. Justice STONE, speaking for the United States Supreme Court, in *St. L. S. F. Ry. Co. v. Mills*, 271 U. S. 344 (70 L. Ed. 979), to justify the submission of an issue to the jury

"the evidence must at least point to the essential fact which the jury is required to find in order to sustain the verdict."

IX.

It is respectfully submitted that the judgment under review should be reversed, and judgment directed to be entered in favor of the defendant.

WALL, HAIGHT, CAREY & HARTPENCE,
Of Counsel with Defendant-Appellant.

New Jersey Court of Errors and Appeals

HOWARD W. STEINERT, <i>Plaintiff-Respondent,</i> <i>v.</i> THE PENNSYLVANIA RAILROAD COMPANY, <i>Defendant-Appellant.</i>	}	Action at Law. On Appeal from Hudson County Circuit Court. On Motion to Dismiss Appeal.
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Brief of Defendant-Appellant in Opposition to Motion to Dismiss Appeal.

I.

Plaintiff-respondent has given notice of a motion to dismiss the appeal in above case, chiefly because he contends that the appeal was not taken within the one-year period prescribed by statute for the taking of an appeal.

Act respecting writs of error, 2 Comp.
 Stat. N. J. p. 2208, Sec. 2;
Practice Act, 1912 (P. L. p. 398, Rule 77);
 Supreme Court Rule 137 (Ed. 1929);
Williams v. White, 98 N. J. Law 140;
Haines v. Seabrook Farms Co., 99 N. J.
 Law 273.

On the opening day of the October Term, 1930, the motion was submitted on brief, by consent of counsel for the respective parties. The main case on appeal (No. 54) was submitted on briefs, subject to the motion to dismiss. The State of the Case and the briefs of appellant in the main case

have been filed with the Sergeant-at-Arms, pursuant to the rules.

The notice to dismiss is printed at page 3 of respondent's brief on the motion. The State of the Case on Appeal is therein made a part of the motion record.

The proceedings involved appear in respondent's brief on this motion, and in the State of the Case on appeal.

Briefly stated, a verdict was rendered in favor of plaintiff (respondent) and against defendant (appellant) for \$25,000 in the Hudson County Circuit Court, on March 14, 1929. A judgment was entered accordingly on March 15, 1929. On March 18, 1929, four days after the rendering of the verdict and three days after the entry of the judgment, defendant obtained and entered a rule to show cause why the verdict should not be set aside and a new trial granted, all exceptions being reserved (State of Case, p. 23). At page 2, line 10, of respondent's brief, it is stated that the argument of defendant's rule was waived. This is incorrect. The rule was argued formally in open court before the trial judge, who thereafter filed a memorandum reducing the verdict to \$15,000, stating that (Case, p. 28) :

"Under such circumstances I think the verdict of Twenty-five thousand (\$25,000.00) dollars is clearly excessive and if the plaintiff will accept the sum of Fifteen thousand (\$15,000.00) dollars, the verdict will be allowed to stand, otherwise the rule to show cause will be made absolute."

On page 2, line 15, of respondent's brief, it is stated that "Defendant omitted to enter a rule upon this decision, and under Supreme Court Rule 214, same became 'of no effect.'"

This statement is unwarranted. Rule 214 refers only to the necessity of entering an order within

the 10 days' period designated, after an order has been made and signed by the Court. Its express terms are as follows:

"214. Every rule taken in open court or allowed by a justice shall be entered in the minutes of the court, and shall take effect only from the time of such entry, and the true date of such entry shall be stated at the foot of such rule; *provided, however*, that the justice allowing such rule may nevertheless order in the said rule that the same shall take effect forthwith, in which case such rule shall take effect from the time of signing the same; and all rules, whether granted by the court or a justice, shall be entered in the minutes within ten days from the granting of the same, and in default thereof shall be of no effect. (Rule 40, 1905)."

It was not incumbent upon the defendant to enter a rule or to take any other action with regard to the Court's decision. The decisions of the courts often lie in the Clerk's offices for months before rules are actually entered upon them. On the contrary, it was incumbent upon the plaintiff either to accept the reduced verdict and to enter judgment final for the amount indicated, or to signify his refusal to accept it. Upon his indicating such refusal, the defendant would, of course, under the terms of the Court's memorandum, be entitled to enter a rule making the rule to show cause absolute. This is the age-old practice.

Defendant was under *no duty* to move upon the filing of the memorandum which put plaintiff to *his* election to accept or reject the reduced verdict. It had the right perhaps to ask the Court to fix a time within which plaintiff be required to elect and that in default of such election defendant's rule to show cause be made absolute. This, later on, was done (Case, p. 30).

The memorandum of the trial judge was filed in the clerk's office on July 1, 1929 (Case, p. 28). No action whatsoever was taken by plaintiff regarding it until January 15, 1930, when *plaintiff himself* applied for a reargument of *defendant's rule to show cause*, and obtained a rule directing the defendant to show cause why such reargument should not be had (Case, p. 29). This was served on the attorneys for the defendant on January 20, 1930. Defendant responded to the rule, and the original rule to show cause why the verdict should not be set aside was reargued accordingly. Meantime, on January 21, 1930, the day following the service of plaintiff's said rule, the defendant caused to be served on plaintiff's attorney a notice of a motion for an order directing plaintiff to elect to accept the verdict as previously reduced by the memorandum of July 1, 1929, or that defendant's said rule to show cause, in default of such election, be made absolute (Case, p. 30). Both the said rule to show cause of plaintiff and the motion of defendant were duly continued (Case, pp. 32, 33) and finally argued. The continuance, it will be noted, was on application of plaintiff. Upon the reargument of defendant's rule, which had been applied for by plaintiff, the trial court reconsidered his former action in reducing the verdict to \$15,000 and thereupon directed the verdict, originally rendered for \$25,000, be reduced to \$20,000, and a rule was accordingly made and entered to that effect (Case, pp. 34-36). That rule made it incumbent upon plaintiff to elect whether to accept the reduced verdict or to reject it within twenty days after the making and entry of the rule (Case, p. 35), otherwise the rule to show cause of defendant why the verdict should not be set aside, which had been thus reargued on plaintiff's own application, was to be made absolute (Case, p. 36). The rule was entered May 8, 1930 (Case, p. 36), and on

May 15, 1930, plaintiff filed his written election to accept the reduced verdict of \$20,000 (Case, pp. 37, 38). The rule of May 8, 1930, also specifically provided that in the event that plaintiff should so elect to accept the reduced verdict, defendant's rule to show cause should be discharged (Case, p. 36).

On May 19, 1930, four days after plaintiff had filed his election to accept the reduced verdict, defendant served a notice of appeal to this court; and on May 23, 1930, filed said notice and recognizance on appeal, as required by law.

Error Act, supra, 2 Comp. Stat. N. J., p. 2212, Sec. 18;

P. L. 1912, p. 398, Rule 77, *supra*; *Id.* p. 399, Rule 82;

Supreme Court Rule 137, supra; *Id.*, Rule 142.

Plaintiff-respondent contends that the time within which appeal could be taken ran from the entry of the judgment on March 14, 1929, and that it was not taken within a year thereafter. Defendant-appellant contends that the judgment did not become final until the rule to show cause why the verdict should not be set aside was discharged, which, assuming that the election to accept the reduced verdict had the effect *ex propria vigore* of discharging the rule, pursuant to the terms of the Court's previous order of May 8th (Case, pp. 35, 36) was on May 15th, 1930. The notice of appeal was served four days later, on May 19th, 1930, and filed in the Clerk's office on May 23rd, 1930 (Case, pp. 39, 40). The appeal was perfected by the filing of the recognizance within the fifteen-day period after the entry of judgment final prescribed by the statute (Case, pp. 40, 43) and the filing of the grounds of appeal within the thirty-day period thereafter, as provided by law (Case, p. 44).

II.

It seems too well settled in this State to require more than the statement of the fact, that an appeal will not lie until final judgment has been entered, and that if taken prior to such entry, the appeal will be dismissed. The statute so provides, and it has been so held without deviation from *Thompson v. Thompson*, 1 N. J. Law *p. 159 (reprint p. 184), to *Hickman v. Powell*, 99 N. J. Law 274.

See, also:

Error Act, supra, 2 Comp. Stat. p. 2207,
Sec. 1;

Eames v. Stiles, 31 N. J. Law 490, 494;

Cooper v. Vanderveer, 47 N. J. Law 178;

Parks v. State, 62 N. J. Law 664, 665;

Sautter v. Heptasophs, 74 N. J. Law 608;

MacMullen v. Kingsley, 82 N. J. Law 258,
259;

Allgair v. Hickman, 82 N. J. Law 369.

III.

That the judgment of March 15, 1929, became simply *nisi* upon the allowance and entry of defendant's rule to show cause why the verdict should not be set aside, and became final only upon the discharge of that rule, when the verdict was ultimately (after plaintiff's own re-argument of defendant's rule to show cause) reduced from \$25,000 to \$20,000, seems also to be so well settled that the mere statement of that proposition is sufficient.

See *Supreme Court Rules*, Nos. 128, 219, which read as follows:

"128. If a rule to show cause why the verdict of a jury or finding of a justice should not

be set aside and a new trial granted shall be discharged, the party entitled to the judgment shall be allowed to enter judgment final *nunc pro tunc* as of the time when judgment *nisi* was taken, and the execution thereon shall be endorsed to the effect that interest thereon shall be reckoned as from the date of the judgment *nisi*, but the date of the actual entry of the rule for final judgment shall be expressed therein. (Rule 39, 1905.)”

“219. The foregoing rules shall, so far as appropriate, be applicable to the practice of the several Circuit Courts. (Rule 89, 1905.)”

Respondent, at page 14 of his brief, cites the case of *Bauman v. District Court*, 49 N. J. Law 537, as authority in support of his contention that the time for appeal begins to run from the entry of the judgment, but does not state this pertinent part of the opinion of Mr. Justice REED, at page 540 of the report, in discussing the statute involved in that case:

“I think that the date of the entry of judgment is the point of time from which the period given for appeal commences to run. It may be that where the court, subsequently to the entry of judgment, grants a rule to show cause why a new trial should not be allowed, the judgment would be considered suspended during the pendency of the rule. Upon this point, no opinion is expressed.

“Here there was no rule to show cause allowed. The defendant, by permitting the statutory period to expire without perfecting his appeal, took the option of resting his right to a review in the trial court alone.”

And in *McNamara v. N. Y., L. E. & W. R. R. Co.*, 56 N. J. Law 56, cited by respondent at page 18 of his brief, Mr. Justice DEPUE said:

“It may be added that the proper practice under this rule is to enter judgment *nisi* on

the coming in of the *postea*, although the trial judge has previously granted a rule to show cause. Granting a rule to show cause suspends only the final judgment."

In *Patterson v. Loughridge*, 46 N. J. Law 138, a rule to show cause why a new trial should not be granted was discharged. Plaintiff entered the judgment as of the date of judgment *nisi*. No rule for final judgment was entered in the minutes.

The Court said, at page 139 of the Report, that:

"In ordering final judgment *nunc pro tunc* to be entered, the question presented is, what shall be the date of entry? Shall it be as of February Term, 1879, when the *postea* was filed and judgment *nisi* taken, or as of November Term, 1882, when the rule refusing a new trial was entered?

"On the part of the defendant it is moved that the entry of final judgment be as of the last named date. The motion is granted. Unless it be otherwise expressly ordered by the Court, a rule to show cause why there should not be a new trial supersedes the rule for judgment *nisi* entered upon the return of the *postea*." (Citing *Erie Railroad Company v. Ackerson*, 33 N. J. Law 33.)

In *Erie R. R. Co. v. Ackerson*, 33 N. J. Law 33, there was a verdict for plaintiff, and then a rule to show cause was allowed and entered by the defendant to set aside the verdict. The Court decided on the rule that a new trial would be granted unless plaintiff would accept a reduced verdict. Plaintiff accepted the reduced verdict and entered final judgment *nunc pro tunc* as of the date the judgment *nisi* was entered, and execution issued directing that interest be levied from that date.

The Court, at page 34 of the Report, said:

"The plaintiff's Attorney was wrong in entering his judgment *nunc pro tunc* without a special order of the Court."

And further, at page 35 of the Report, the Court said:

"* * * The rule to show cause, unless it be otherwise expressly ordered by the Court, supersedes the rule for judgment *Nisi Causa*, entered upon the return of the *postea*. If the rule to show cause is made absolute, and a new trial ordered, neither the verdict nor the judgment *Nisi* appears on the record, but the cause is properly continued until there is another verdict and judgment. If the rule to show cause is discharged, the cause is continued on the record by the entry of *curia advisare vult*, until the term when the opinion is pronounced, and a final judgment is entered of that date. Such is the form of the entry in the books of precedents, and such is properly the usage in the office of the Clerk of this Court." * * *

"The established practice of this Court is that the plaintiff may issue his execution immediately after the entry of the judgment *Nisi*, if he thinks proper to do so, at the risk, however, of having it rendered a nullity, by the rule to show cause being allowed absolutely and without directing the entry of a final judgment for the protection of the plaintiff; and subject, also, to the execution being superseded, if a writ of error is presented, and a recognizance of bail perfected, as required by the aforesaid Act. If no rule to show cause is allowed, a final judgment is entered, as a matter of course, of the same date as the judgment *Nisi*."

"Judgment *nisi* in favor of Jacob Pushcart was entered June 4th, 1912. A rule to show cause was allowed and undecided when he died December 17th, 1913. The rule was subsequently discharged, and judgment final was entered February 26th, 1914. Thereafter the administratrix was substituted as plaintiff, and an execution issued in her name."

Pushcart v. N. Y. Shipbuilding Co., 86 N. J. L. 444, at page 445.

"In *McNamara v. New York, Lake Erie and Western Railroad Co.*, 56 N. J. L. 56, it was held that whenever delay in entering a judgment is caused by the action of the court, judgment *nunc pro tunc* will be allowed as of the time when the party would otherwise have been entitled to it. And this doctrine is not to be held to include final judgments alone. The rule of practice is elastic enough to include any interlocutory order, as would appear from the broad language of Mr. Justice DAYTON in *Den v. Tomlin*, 18 N. J. L. 14, where he said that it is a rule of practice, as well as of common justice, that the action of the court shall not be permitted to work an injury to a party."

St. Vincent's Church v. Borough of Madison, 86 N. J. L. 567, at page 570.

"Where the plaintiff has a verdict and takes a rule to show cause why it should not be set aside as to damages only, and, the rule being made absolute, is awarded damages at the second trial, on which he enters judgment, the defendant is not on appeal from this judgment, deprived of the benefit of exceptions taken at the first trial, for he could not appeal until a final judgment was entered, and assessment of damages by the second jury merely completes the record upon which the judgment is founded."

Davis v. Tallon, 91 N. J. L. 618.

"It is quite plain to us that the termination of the suit connotes a final judgment, and that a verdict without more, not to speak of a verdict qualified by pending proceedings for a new trial, is not a final judgment; if in favor of the plaintiff, it is not a 'condemnation,' and if in favor of the defendant, it is not dispositive of the plaintiff's claim in favor of defendant. Many things might happen to deprive it of such efficacy—a new trial; a judgment *non obstante veredicto*: a waiver of the verdict, as by failure to file *postea* within the first ten days of the Supreme Court Term. Rule 117; *Weinberger v. Erie Railroad Co.*, 86 N. J. L. 259. If a rule to show cause is allowed, the *postea*, under the former practice, might, nevertheless, be filed and a judgment entered (rules 35 and 39 of edition 1905; *McNamara v. Railroad Co.*, 56 *Id.* 56), but it was only a judgment *nisi*, supplemented by final judgment *nunc pro tunc* in case of discharge of the rule to show cause, and by the same token a nullity if such rule be made absolute. Rule 35 has been abrogated, and in lieu thereof rule 116 provides that *postea* may be filed at once and judgment entered thereon, but execution may be stayed pending application for a new trial. Rule 39, however, relating to final judgment *nunc pro tunc* remains in force as rule 128. This may tend to greater simplicity of procedure; but the judgment entered pursuant to rule 116, on immediate filing of *postea*, is no more final than one entered under old rule 35. Until the determination of the rule to show cause by a discharge, it cannot be treated as a final judgment."

Morgan v. Bowman, 103 N. J. L. 542, at page 544.

"Of course, the failure to enter judgment at the proper time is always, in last analysis, attributed, at least in part, in theory and intendment of law, to the court."

Nitti v. Public Service Ry. Co., 104 N. J. L. 67, at page 76.

IV.

The question presented by the motion, therefore, is simply, when did the judgment of the Hudson Circuit Court become final,—on March 15, 1929, when it was originally entered, or on May 15, 1930, when plaintiff filed his election to accept the verdict as reduced by the Court, which, under the order of May 8, 1930, operated to finally discharge defendant's rule to show cause?

If the first date, then the taking of the appeal on May 19th-23rd, 1930, is beyond the one-year period required by law; if the latter date, then it is within time.

Manifestly, if a Notice of Appeal had been served and filed before the rule to show cause to set aside the verdict had been finally disposed of, it would have removed the cause to the Appellate Court's jurisdiction and the Court below would have lost jurisdiction and could have proceeded no further with the rule.

Williams v. White, 98 N. J. Law 140, at 142, *supra*;

Haines v. Seabrook Farms Co., 99 N. J. Law 273, *supra*.

But, until the rule to show cause had been disposed of by the Court below, there was no final judgment to review.

Cases cited, supra.

It is because of this very situation that the rule to show cause, or other action affecting the right of the verdict to stand, is held to supersede the finality of the judgment until the rule is disposed of.

As stated by Mr. Justice PARKER, in *Morgan v. Bowman*, 103 N. J. Law 542, at 545, *supra*,—

"Until the determination of the rule to show cause by a discharge, it cannot be treated as a final judgment."

V.

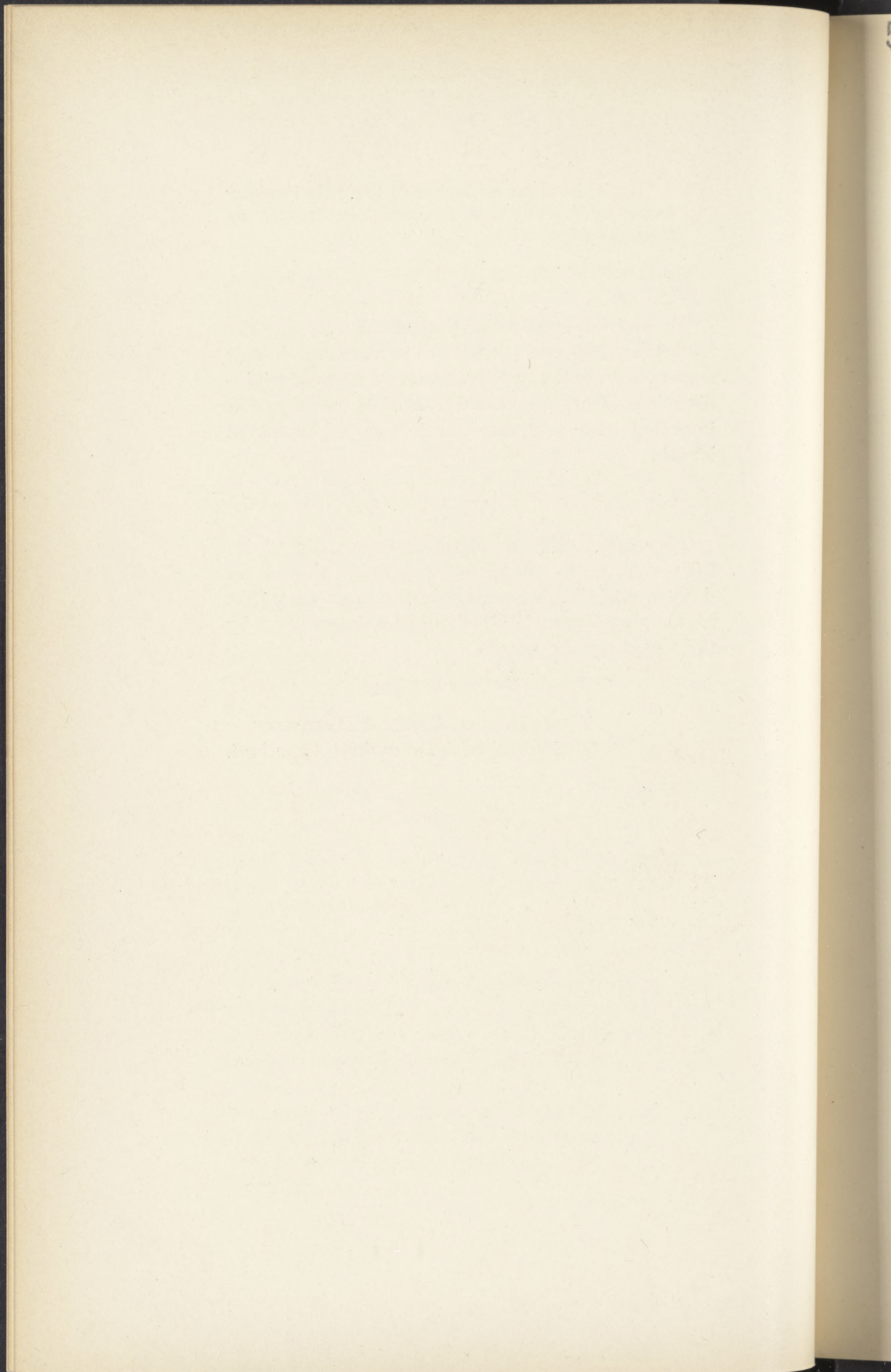
We had not considered that at this late day the accepted views and practice of generations in this respect were open questions, but in view of plaintiff's formal argument of his motion, we have felt impelled also to thus submit our argument at length.

VI.

It is respectfully submitted, therefore, that plaintiff's motion to dismiss the appeal should be denied, and that the appeal in the main case (No. 54, October Term, 1930) should be determined by the Court on the merits.

Respectfully submitted,

WALL, HAIGHT, CAREY & HARTPENCE,
Of Counsel with Defendant-Appellant.



New Jersey Court of Errors and Appeals

HOWARD W. STEINERT,
Plaintiff-Respondent, 10
 vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellant.

On Plaintiff's Motion to Dismiss Appeal.

BRIEF OF PLAINTIFF-RESPONDENT. 20

Statement.

The chronology of proceedings upon and after verdict is as follows:

- 1929
- March 14—Verdict of \$25,000 for plaintiff. 30
- “ 15—Rule for judgment in plaintiff's favor entered in court below (Case, pp. 20, 21).
- “ 15—Judgment final on verdict in plaintiff's favor for \$25,000, damages, and \$66.02, costs, entered in court below (p. 22).
- “ 18—Defendant-appellant took rule to show cause (within 6 days after verdict) why the verdict should not be set aside and a new trial granted,— 40

“on the grounds that said verdict is excessive, contrary to the charge of the Court, and the result of bias, prejudice and passion of the jury, reserving to the defendant all exceptions and objections noted” (pp. 23, 24).

- 10 July 1—Argument of defendant’s rule having been waived, a memorandum decision (afterwards, upon reconsideration, recalled and annulled) was made and filed by the learned trial judge (pp. 27, 28). (Defendant omitted to enter a rule upon this decision, and under Supreme Court Rule 214, same became “of no effect.”)
- 20 1930
Jan’y 15—Plaintiff took rule to show cause, why defendant’s rule to show cause should not be argued or reargued, the memorandum decision recalled and annulled, and defendant’s rule to show cause discharged.
- May 8—Arguments upon both rules having been had, a rule was entered on plaintiff’s motion, vacating the memorandum decision and directing that defendant’s rule to show cause be discharged, provided plaintiff stipulated for a reduction of verdict to \$20,000; otherwise that defendant’s rule be made absolute (pp. 34-36).
- 30 “ 15—Stipulation by plaintiff to accept reduction to \$20,000 filed in clerk’s office (pp. 37, 38).

1930

May 19—(1 year, 2 months, 4 days after entry of final judgment) defendant delivered to plaintiff's attorney a purporting notice of appeal (p. 39), service of which was declined because "not served in due time" (p. 40).

" 20—May, 1930, term of this court opened. 10

Oct'r 15—Plaintiff served notice of motion to dismiss appeal, returnable at opening of October, 1930, term, viz.:

Please take notice that on the third Tuesday of October (October 21st), 1930, at the opening of court on that day, or as soon thereafter as counsel can be heard, at the Court Room thereof, in the State House at Trenton, I will move this court, upon the certain affidavit made by John Winans, a copy of which is herewith served upon you, and upon defendant-appellant's proposed State of the Case, entitled as above, to dismiss the purporting appeal of the defendant, upon the grounds (1) that the same was not taken with in due time, (2) that no appeal is pending and (3) that said purporting appeal is without merit. 20 30

Facts.

Appellant's statement of facts (Appt.'s br., pp. 1, 2, 6, 7) is incomplete, misleading and in some respects inaccurate.

Contentions are no part of the facts in the case. 40
There is no evidence to justify the qualification

“without being required by defendant to do so” (Appt.’s br., foot of p. 1). Plaintiff testified that he “was supposed to open that knuckle” (Case, p. 59), and that it was his duty to open the knuckle on the nearest car (pp. 59-91).

10 Conductor Kerr testified that it was the duty of the switching crew, of which plaintiff was one (pp. 51, 52, 105, 118), to see that the knuckle was left open (p. 112); that as a rule the rear brakeman, on the ground making couplings, goes up and opens the knuckle, although it is “not particularly” his duty in the first place to do so (p. 111); that it “is up to the men, if they want to do it” (p. 112); that if they do, it is all right (*ib.*); that the witness had opened them and had never been criticized for doing so (*ib.*); and that
20 sometimes the knuckle jars open when the cutting lever is depressed, often it does not, and more often it is necessary to reach in to loosen the coupling on the next car (p. 117).

Rear brakeman Redding said that it was his duty to open the knuckle (pp. 120, 127); that he went away without having done so (p. 127) and that it then became the duty of “anybody that comes along,” “anybody that wants to volunteer” to open it (*ib.*).

30 Plaintiff was engaged, with the conductor and rear brakeman, in shifting cars from High Line No. 1 track (pp. 52, 58, 109, 119, 120), which lay to the left and rear (pp. 55, 56, 108, 125) of the engine, as it stood on track 9 (pp. 56, 87, 105, 120), just before the accident. This involved a reciprocating, forward-and-back, movement of the engine (pp. 54, 82, 85), as cars were successively brought in and coupled to cars previously
40 shifted. One or more cars had just been brought in, detached from the engine and coupled to the

string on track 9 (pp. 87, 105, 120). The engine stood, its front or pilot end pointing toward the car just uncoupled, at a distance therefrom variously estimated at 6 or 8 inches (pp. 113, 118, 126) or 3 or 4 feet (p. 58), but insufficient for a man to walk through (p. 130). The disparity is negligible, for a distance of "3 or 4 feet" (p. 58) between bumpers or end sills closely approximates "6 or 8 inches" (pp. 113, 118, 126) between the projecting couplers. 10

Defendant's statement that "*plaintiff voluntarily assumed to place himself in a position of danger*" (Appt.'s br., bottom of p. 1) is not justified by any evidence in the case. The indicated movement of the engine was to back away on track 9 (pp. 82, 87, 105, 120) and the oblique or "ladder" track (p. 56), a distance of 300 or 400 yards (p. 56, bottom), to the switch which united the latter with the High Line (pp. 55, 56); then to come forward a distance of 300 or 400 feet (p. 55) to the cars still remaining on High Line No. 1 track (pp. 58, 105, 124),—the reverse of the operation of bringing in the preceding car, as described in plaintiff's testimony (pp. 54-57). The switching and engine crews knew of this intended movement (p. 110); nevertheless Conductor Kerr signalled the fireman, who was running the engine (pp. 53, 83, 110, 128, 139, 145), to back up (pp. 109, 119), and gave oral instructions to go back to the High Line for the additional cars (pp. 58, 60, 84, 110, 119, 124). Plaintiff, standing at the head end of the engine (pp. 60, 83, 84, 86, 122, 129) gave the usual "back-up" signal with his lanterns (pp. 60, 61, 82, 84, 122) and Rear Brakeman Redding, when he returned from coupling the standing cars, asked plaintiff why the engine had not backed in response to his signal 20 30 40

(pp. 61, 122, 123), which the rear end man had observed (pp. 122, 123), and then banged on the side of the engine (pp. 61, 86, 123) and urged the fireman to back over to High Line for the other cars (pp. 61, 86). The brakeman, after first denying recollection of these acts (pp. 121, 122), admitted his conversation about the failure of the engine to move (p. 122) and his hanging on the cab (*ib.*), at a time when the conductor was within 3 or 4 feet of him (*ib.*); but fireman Jarvis denied that he received any "back-up" signal after the car was taken in on track 9 (pp. 140, 144, 145) and professed complete ignorance of any forward movement of the engine at the time of the accident (p. 140) or that the engine and car had been uncoupled at all (p. 142).

20 The expressions "*without in any way apprising the operator of the engine of his intention to do so, or informing him of the dangerous position in which he placed himself*" (Appt.'s br., pp. 1, 2), "*nor to inform the engine-man of his intention to reach into the narrow space between the engine and the car to adjust the coupler*" (*ib.*, p. 2) and "*the engine-man did not know that he had placed his hand and arm in between the engine and the car*" (*ib.*) contain an innuendo wholly at variance with the facts in the case, if we accept the testimony of Fireman Jarvis alone, who in effect denied that the accident resulted from any forward movement of his engine (Case, p. 140). The orders and signals given by the conductor, rear brakeman and plaintiff, and testified to by all of them (pp. 58, 60, 61, 82, 84, 86, 109, 110, 119, 122-124), were to *back* the engine, and the fireman's disregard of this duty and his recklessness in permitting the engine to come *ahead* (pp. 62, 93, 109, 119, 120) against cars where men were known to

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be at work coupling cars (pp. 59, 105, 110, 118, 129, 139, 144) was what created the "*dangerous position*" (*supra*), and formed the proximate cause of the accident.

Proof that the coupler on the near end of the car just brought in was defective, that the pin was bent and could be lifted only with difficulty by direct application of a man's hand (pp. 62, 87) 10 was not controverted in any way, but tacitly admitted by defendant's witness Conductor Kerr (pp. 112-114, 116); and it is not disputed that the ensuing coupling could not be made until its knuckle had been opened, which could only be accomplished by raising the pin (pp. 62, 87, 114, 115, 116, 117);—indicating *per se* a violation of the Federal Safety Appliance Act, the applicable portions of which are as follows: 20

FEDERAL SAFETY APPLIANCE ACT.

An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

* * * * *

30 Sec. 2. On and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled, or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going 40 between the ends of the cars (Act of Mar. 2, 1893, ch. 196, sec. 2, 27 U. S. Stat., 531).

This makes applicable also section 4 and the proviso of section 3 of the federal Employers' Liability Act, viz.:

FEDERAL EMPLOYERS' LIABILITY ACT.

10 An Act relating to the liability of common carriers by railroad to their employes in certain cases.

* * * * *

20 Sec. 3. * * * *Provided*, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

30 Sec. 4. In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe (Act of April 22, 1908, ch. 149, secs. 3 and 4, 35 U. S. Stat., 66).

40 The question of the non-applicability of defendant's defense of assumption of risk and contributory negligence as diminution are considered under Point V and Point IX, subdivision (2), paragraph (c)—*infra*.

Plaintiff, in his reply, admitted that "*he went upon the track between the cars intended to be coupled together*" (Appt.'s br., bottom p. 2; Case, 15); but it appears that the other car to be brought up and coupled to the one having the bent pin, was still at least 1,200 feet away (pp. 54-57), with the engine standing between them, and that the impact which resulted in the injury came from the engine and not from "the cars intended to be coupled together." Moreover, the presence of the injured employe upon a track is an incident of most coupling accidents, but this does not disparage his right of recovery, under the federal acts quoted above (*vide* Point V—*infra*). 10

It is not a *fact*, but was an issue in the case, whether "*a release was given*" (Appt.'s br., bottom, p. 2) and plaintiff not only pleaded (Case, pp. 15, 16, *et seq.*), but testified that he never executed (*vide* Point VIII—*infra*) the pretended release (Deft.'s exh. 2, at p. 215). 20

I.

The purporting appeal was not taken in due time, and should be dismissed. 30

The successive steps in the case, since verdict, are sufficiently set forth in the "Statement," at page 1, *et seq.* of this brief.

The right to appeal is not inherent and depends wholly upon the constitution and statutes of the state.

The Practice Act (1912), Schedule A, sec. 77, provides as follows:

"Sec. 77. Appeals shall be taken by notice, which shall be served on the adverse party 40

and filed *within the time limited for bringing writs of error*, and at least thirty days before the appeal is argued.

10 “The notice shall be entitled in the court from which, and shall state the court to which, the appeal is taken, and shall be filed with the clerk of the former court who shall forthwith transmit to the appellate court a transcript of everything required to be removed under section 26 of the Practice Act (1912, sec. 286), together with a certified copy of the notice of appeal” (P. L., 1912, p. 398, rule 77, as modified by S. C. R., 1913, rule 137). (Italics ours.)

20 An Act respecting writs of error (2 N. J. C. S., 2208, sec. 2) provides as follows:

30 “2. *Limitations; disabilities.*—No writ of error shall be brought or allowed on any judgment that shall have been or hereafter may be entered or obtained, unless the same shall be brought and allowed within six months after the judgment rendered in actions affecting the possession of or title to lands, or *within one year* in other cases; provided, where the person entitled to such writ of error be an infant, or insane, he or she shall have one year to bring such writ of error, after such disability shall be removed” (Rev., 1877, p. 373, as amended P. L., 1907, p. 453, and P. L., 1909, p. 149). (Italics ours.)

40 In *Prantl vs. Junk*, 93 N. J. L., 387, it was held, in the unanimous opinion of the Court of Errors and Appeals, by Walker, C., as follows:

"Appeals were substituted for writs of error by the Practice Act of 1912. In Rule 77 annexed to that act it is provided that appeals shall be taken by notice, which shall be served on the adverse party and filed within the time limited for bringing writs of error, which at the time of passage of that act was one year in the class of cases in which that at bar is one (2 N. J. C. S., 2208, sec. 2). Rule 137 of the Supreme Court, in its first paragraph, is a literal transcription of Rule 77 annexed to the Practice Act of 1912. The remaining portion of Rule 137 concerns matters of practice and procedure not involved in this motion."

It was held, in *Williams vs. White*, 98 N. J. L., 140, in the unanimous opinion of the Court of Errors and Appeals, per Walker, C., as follows:

"*Prantl vs. Junk*, 93 N. J. Law, 387, is relied upon by counsel for appellant as authority for the delay and inaction of the appellant in this matter, he claiming that he has one year from the date of entry of the judgment—that is, until April 5, 1923,—in which to proceed. That case is clearly distinguishable from the one before us. In *Prantl vs. Junk* the defendant one month after the entry of judgment against him served a notice of appeal upon the plaintiff, namely, on June 14, 1916, and on March 6, 1917, the plaintiff moved to dismiss the appeal because inter alia the defendant had not filed the notice, which was the fact; and we held that, as the statute gave one year in which a defeated litigant might appeal with-

out providing that he should file his notice of appeal in any prescribed time within that period, the appellant might delay perfecting the appeal so far as filing the notice would perfect it, until the last day on which an appeal would lie.

- 10 "Formerly appeals were taken by writs of error which invoked the action of the court out of which the writ issued. These writs were returnable on specified dates, and were required to be perfected and prosecuted within prescribed limits as to time after their return. Appeals are now substituted for writs of error, and they are taken by notice 'which shall be served on the adverse party and filed within the time limited for bringing writs of error,' which is one year (*Prantl vs. Junk, supra*, 93 N. J. Law, at p. 388). It will be noticed that an appeal has to be served and filed. It is the filing of the appeal which invokes the jurisdiction of the appellate court."
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- In the *per curiam* opinion of the Supreme Court, quoted by the Court of Errors and Appeals and unanimously affirmed in *Morley vs. McDonald*, 98 N. J. L., 275, it is stated:
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"Nor is there anything in the argument that by entering judgment July 12, 1921, the prosecutor lost his right to appeal, because his right began when the final judgment was entered."

- In *Plahn vs. Givernaud*, 85 N. J. Eq., 143, it was held by the Court of Errors and Appeals, reversing an order of the Court of Chancery which
- 40

attempted to extend the period within which an appeal might be taken, that *immunity from appeal*, after lapse of the period limited therefor, is a vested right which cannot be destroyed by act of the legislature or by order of the Chancellor, under assumed legislative sanction, and it was further held, in the unanimous opinion, per Gummere, C. J., as follows:

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“The decree having established the property right, and that right having become vested by the expiration of the time within which an appeal might have been taken, it could not thereafter be impaired by legislative enactment. * * * We are not to be understood as denying the power of the legislature to extend the time to appeal before that right has expired by limitation. What we do determine is that a statute like that which we have been discussing is unconstitutional, so far as it operates to revive a right of appeal after its expiration under the then existing law, and property rights have thereby become vested.”

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In *Smith vs. Walton*, 96 N. J. Eq., 421, it was held by Chancellor Walker:

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“Counsel for defendant in their brief concede the right of the Chancellor in the exercise of discretion to permit of an extension of time in which the complainant may appeal, but they object to the granting of the extension in this case upon factual grounds. While it may be that the leave requested should not be extended because of the facts adverted to in the brief, nevertheless, I am of opinion

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that leave should be withheld because of the existence of defendant's vested rights, as an act of the Legislature which would permit the Chancellor to extend the time after it has expired is, to that extent at least, unconstitutional."

10 See also

State Council, &c., vs. National Council, &c., 79 N. J. Eq., 193.

20 It seems, therefore, that the time limited for an appeal from a judgment at law, not involving the title or possession of land, is immovably fixed at one year; nevertheless, the defendant has contended that its prolonged and unsuccessful efforts to set aside plaintiff's verdict, and so annul the judgment have operated to extend its time for appeal. There appears no sanction, by statute or decided case, for any such contention.

30 In *State, ex rel. Bauman vs. District Court, &c., of Hoboken*, 49 N. J. L., 537, it appeared that after entry of judgment in a district court, the defendant filed a motion for a new trial, which was overruled by the court, and that thereafter, more than 10 days after entry of the judgment, but in less than 10 days after overruling the motion, he served a notice of appeal; and it was "*held*, that such appeal was not seasonably taken, under the (then) statute of New Jersey, which required an appellant from a district court to give notice of his appeal within 10 days after judgment."

40 In some later cases involving appeals from district courts, it has been held that the pendency of a rule to show cause for a new trial operated to enlarge the time for appealing; but it is so held

only because of section 213f of "An Act concerning district courts (Revision of 1898)," (2 N. J. C. S., 2017, sec. 213f), which provides as follows:

"213f. Rule to show cause why new trial should not be granted as waiver of appeal.— The granting, by a judge of a district court, of a rule to show cause why a new trial should not be granted shall, unless expressly stipulated in the rule to show cause, be a waiver of any grounds for appeal existing in favor of the party obtaining such rule; and, so far as concerns the time within which an appeal may be taken, judgment shall not be considered as entered until such rule to show cause has been disposed of, if the courts shall so order" (P. L., 1910, p. 497, sec. 3).

10

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Such a provision, in case of appeals taken from district court judgments, has merit because of the short period limited for appealing by section 213a of the District Courts Act,—originally 10 days, but now enlarged to 20 days after entry of judgment.

No similar provision is contained in the Practice Act, or in any statute or rule regulating practice in the higher courts.

30

That no implication exists under the Practice Act, or the rules thereunder, which enlarges the time to appeal, because of the pendency of a rule to show cause, is evident from the inclusion in the District Court Act of a provision to that effect, which negatives the idea of a necessary implication. Moreover, even in the District Court Act, the enlargement contended for exists only when so ordered by the court and there seems to be reason for this elasticity in the fact that the time

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for appeal in those courts is only 20 days (P. L., 1915, p. 549, ch. 305, sec. 1).

10 Under the Practice Act, the limit for an appeal is one year. In the instant case, an appeal could have been taken at any time between March 15, 1929, and March 15, 1930, and the pendency of the rule to show cause did not prevent appealing upon any question or questions sufficiently reserved by the rule. Defendant's right was not postponed until final disposition of the rule; if an appeal had been noticed, within time and before final disposition of the rule, that appeal could have been abandoned if the rule had been made absolute, or its prosecution continued upon discharge of the rule.

20 Defendant having enjoyed this *right to appeal* during the full statutory period of one year, cannot now successfully maintain an appeal, not from the determination on the rule, but from the final judgment entered in March, 1929, and enforceable by plaintiff at all times since that date, except during the pendency of defendant's several *ex parte* stays.

In Harris on Pleadings and Practice in New Jersey, page 637, sec. 674, it is stated:

30 "The appellant must serve a notice of appeal upon the adverse party and file a copy of such notice with the clerk of the court from which the appeal is taken, within one year after the entry of judgment. In the case of actions affecting the possession of, or the title to lands, the appeal must be brought within six months after entry of judgment. The notice must be entitled in the court from
40 which the appeal is taken and must state the court to which the appeal is taken. The ap-

appellate court acquires jurisdiction over the cause after the service of the notice of appeal and the filing of such notice with the clerk. If the notice of appeal has been served within a year after final judgment, but yet such notice has not been filed until after the expiration of a year after the entry of judgment, the right to appeal is lost. On the other hand, within the year limit, the appellant may file the notice of appeal at any time after serving the notice of appeal on his adversary. Once the two necessary requirements for perfecting the appeal have been met, the appellant must proceed in accordance with the rules of the appellate court, or else his appeal may be dismissed.” 10

Plaintiff was entirely within his rights in entering judgment on March 15, 1929, which was during the 4-day interval which defendant permitted to lapse, after verdict and before applying for his rule. 20

Supreme Court Rule 116 provides as follows:

“116. In actions in the Supreme Court, the postea may be filed immediately after relicta given or verdict obtained and judgment shall be entered forthwith. But the trial judge of the court, or any justice thereof, may stay execution pending an application for a new trial.” 30

The practice relative to entering judgments nisi, preliminary to final judgment, is not generally followed in circuit courts, and in all courts is permissive only. 40

“What is called a judgment nisi is nothing more than a rule to show cause why judgment should not be rendered.”

Young vs. McPherson, 3 N. J. L., 895, at page 897.

10 Supreme Court Rule 128 provides:

20 “128. If a rule to show cause why the verdict of a jury or finding of a justice should not be set aside and new trial granted shall be discharged, the party entitled to the judgment shall be allowed to enter judgment final *nunc pro tunc* as of the time when judgment nisi was taken, and the execution thereon shall be endorsed to the effect that interest thereon shall be reckoned as from the date of the judgment nisi, but the date of the actual entry of the rule for final judgment shall be expressed therein.”

30 No statute, rule or practice requires entry of judgment nisi; it is purely optional and affords an expeditious means of preserving a plaintiff's recovery and dating the accrual of interest thereon, pending subsequent taxation of costs and determination of a rule or motion for a new trial or in arrest of judgment. It is not the practice to enter such preliminary judgments in the Hudson County Circuit Court; the custom being to enter a rule for judgment, upon which the clerk taxes costs and enters final judgment. It is upon this entry of judgment that the time limited for appeal begins to run.

40 In *McNamara vs. New York, L. E. and W. R. Co.*, 56 N. J. L., 56, on application by plaintiff for

entry of his judgment *nunc pro tunc*, in order to forestall the rights of creditors under a receivership, while the application was denied, because of the intervening rights of third parties, the court nevertheless held, by Depue, J., as follows:

“The plaintiff would have had his judgment in the regular course of practice before the receiver was appointed, if there had been no delay incident to the granting and the hearing of the rule to show cause. The verdict here recovered has been sustained. Judgment entered at this time as of a prior day cannot, under the statutes referred to, have relation as a lien upon the defendant’s property prior to the date of actual entry; and, if execution be issued thereon, the command of the writ will be to levy upon the lands, tenements, and hereditaments whereof the defendant was seized at the time of the actual entry of the judgment. The defendant’s property is in the hands of the receiver, and under the control of the federal court. We think that if the plaintiff will derive any benefit in the administration of the affairs of the company by having his judgment *nunc pro tunc*, he is entitled to that advantage. Collection of interest from the date of judgment nisi by an endorsement on the execution would, in this case, be impracticable. An execution, if issued, would be of no avail against the defendant’s property.”

The same case held, further, that the holder of a verdict could as a matter of right enter judgment nisi, but not that he was obliged to do so.

It is contended that during the period of one year following entry of the judgment, defendant enjoyed, but failed to exercise, the limited right to appeal reserved to it by the rule; that its time to appeal expired on March 15, 1930; that subsequent service of a purporting notice of appeal did not operate to extend that time and defendant is now in default; and that plaintiff has acquired a vested right in his recovery, which cannot be impaired retroactively by the expedient of enlarging defendant's expired right of appeal.

II.

Defendant is not entitled to any enlargement of its time to appeal.

It is respectfully submitted, on the authority of cases cited under Point I (*supra*), that no power exists to annul or impair plaintiff's vested right to his recovery.

If power to extend the time to appeal was vested in any court, during the year following entry of judgment, it terminated with the expiration of that period, and defendant's rights at the same time, by its own laches.

It is respectfully submitted that the appeal should be dismissed, with costs.

JOHN WINANS,
Attorney of and of Counsel with
Howard W. Steinert.

