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Notice of Appeal.

(Filed October 25, 1917.)

New Jersey Supreme Court

HUDSON COUNTY.

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CHARLES F. McDONALD, <i>Plaintiff,</i> vs. CENTRAL RAILROAD COMPANY OF NEW JERSEY, <i>Defendant.</i>	}	Action at Law.
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To CHARLES M. EGAN, Attorney of Plaintiff:

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TAKE NOTICE, That the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. That the Court erred in refusing to non-suit the plaintiff when requested so to do by the defendant upon the ground that no enforceable contract had been proven by plaintiff inasmuch as it appeared from the evidence that there was no consideration for the alleged promise of defendant.

30

2. That the Court erred in refusing to direct a verdict for defendant when requested so to do, upon the ground,

(a) That no enforceable contract had been proven by plaintiff inasmuch as it appeared from the evidence that there was no consideration for the alleged promise of the defendant.

40

(b) That the payment of compensation under

the alleged contract was to be made under the terms of the "Workmen's Compensation Act" of New Jersey (Section 2, Chapter 95, Laws of 1911), which act prescribes a new right and a remedy for its enforcement, and such remedy is exclusive and confers upon plaintiff no right enforceable in the New Jersey Supreme Court, in an action to recover under such alleged contract.

- 10 3. That said alleged contract was subsequently, by agreement between the parties, abrogated by the plaintiff requesting to be employed, and defendant employing plaintiff as "bridgeman."

Yours respectfully,

CHARLES E. MILLER,
Attorney of Appellant.

Summons.

- 20 THE STATE OF NEW JERSEY, to the CENTRAL RAILROAD COMPANY OF NEW JERSEY:

You are summoned to answer the annexed complaint of Charles F. McDonald, in an action at law, in the New Jersey Supreme Court, and TAKE NOTICE that unless you file your answer to the said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon
30 you of this writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court at Trenton, this 25th day of September, 1916.

WILLIAM C. GEBHARDT,
Clerk.

CHARLES M. EGAN,
Attorney.

Complaint.**NEW JERSEY SUPREME COURT.**

HUDSON COUNTY.

CHARLES F. McDONALD,
Plaintiff,
vs.
 CENTRAL RAILROAD COMPANY OF
 NEW JERSEY,
Defendant.

10

The plaintiff, residing in Jersey City, Hudson County, New Jersey, says:

1st. That at all the times hereinafter mentioned, the defendant was and now is a corporation organized and existing under the laws of the State of New Jersey.

20

2nd. That before and at the time of the committing of the grievances hereinafter mentioned, to wit, on January 19th, 1914, at the City of Jersey City, Hudson County, New Jersey, the defendant was and still is engaged in the business of common carrier of passengers and freight by railroad.

3rd. That at said time and place, and for some months prior thereto, the plaintiff was in the employ of the defendant as a yard brakeman or driller.

30

4th. That at said time and place the said plaintiff, while so employed, received in his said employment, certain injuries to his right ankle and the bones in his left hand and wrist.

5th. That on the 25th day of February, 1914, and within one year after the accident in which the said plaintiff received the injuries hereinbefore stated, the said plaintiff and defendant agreed upon a claim for compensation, under what is known as the New Jersey State Compensation Act.

40

Complaint.

6th. That at said last mentioned date the said defendant contracted and agreed to and with the plaintiff to pay to him the sum of \$6.20 a week, during a period of such disability, not, however, beyond 300 weeks.

7th. That the aforesaid injuries to the plaintiff produced a disability, partial in character, but permanent in quality in this, that his right ankle is disabled and weak, and the movement of his left wrist impaired and diminished.

8th. That under and by virtue of the aforesaid agreement, the said defendant paid to the plaintiff, the sum of \$6.20 for the period of eight weeks, amounting in the aggregate to the sum of \$49.60.

9th. That the said defendant has failed, neglected and refused to pay to the plaintiff under its said agreement, any sum of money, except as stated in the last paragraph of this complaint.

10th. That at no time since the said 25th day of February, 1914, has the said agreement of compensation been modified.

11th. That at no time since said last mentioned date has the said agreement been reviewed upon the application of either party on the ground that the incapacity of the plaintiff, the injured employee, has subsequently diminished.

12th. That there became and is due and owing to the plaintiff under said agreement, compensation for the period of 137 weeks, at \$6.20 per week, amounting in the aggregate to the sum of \$849.40, upon which there has been paid to the plaintiff the sum of \$49.60, as aforesaid, leaving a balance due, owing and unpaid to the plaintiff under the aforesaid agreement, \$799.80.

Plaintiff demands judgment for \$799.80, with interest and costs.

CHARLES M. EGAN,
Plaintiff's Attorney.

Answer.

(Filed Sept. 13, 1917.)

NEW JERSEY SUPREME COURT.

HUDSON CIRCUIT.

<p style="text-align: center;">CHARLES F. McDONALD,</p> <p style="text-align: right;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CENTRAL RAILROAD COMPANY OF NEW JERSEY,</p> <p style="text-align: right;"><i>Defendant.</i></p>	}	10
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The answer of the Central Railroad Company of New Jersey, a corporation of the State of New Jersey, having its principal office for the transaction of business in the City of Jersey City, in the County of Hudson and State of New Jersey, says:

I. That it admits the allegations contained in the 1st, 2nd, 3rd, 5th, 8th, 9th, 10th and 11th paragraphs of the complaint.

II. That it denies the allegations contained in the 6th, 7th and 12th paragraphs of the complaint.

III. That it admits plaintiff was injured on January 19th, 1914, but denies that he received any injuries to his right ankle and the bones of his left hand and wrist.

BY WAY OF ANSWER, defendant says that the facts set out in the complaint do not constitute a cause of action against it cognizable by the Supreme Court.

CHARLES E. MILLER,
Attorney of Defendant.

Postea.

(Filed October 2, 1917.)

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10 CHARLES F. McDONALD,
Plaintiff,

vs.

20 CENTRAL RAILROAD COMPANY OF
 NEW JERSEY,
Defendant.

20 This case was tried before Judge William H. Speer with a jury at the Supreme Court, Hudson County, on September 25th, 1917.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for Five Hundred and Two Dollars and Twenty Cents (\$502.20), and interest at 6% from September 25, 1916, amounting to Thirty Dollars and Twelve Cents (\$30.12), aggregating Five Hundred and Thirty-two Dollars and Thirty-two Cents (\$532.32).

WILLIAM H. SPEER,
 Judge.

30

40

Judgment.

\$532.32 Damages
 47.38 Costs
 —————
 \$579.70

Whereupon it is adjudged that the plaintiff Charles F. McDonald do recover against the said defendant Central Railroad Company of New Jersey Five Hundred Thirty-two Dollars and Thirty-two Cents damages and his costs, which have been taxed at the sum of Forty-seven Dollars and Thirty-eight Cents, making in the whole the sum of Five Hundred Seventy-nine Dollars and Seventy Cents. 10

Judgment entered October 4, 1917.

WM. S. GUMMERE,
 C. J. 20

NEW JERSEY SUPREME COURT.**Testimony.**

CHARLES F. McDONALD,
Plaintiff,
vs.
 CENTRAL RAILROAD COMPANY OF
 NEW JERSEY,
Defendant.

Action at
 Law. 30

Tried September 25, 1917, before SPEER, J., and a jury.

APPEARANCES :

CHARLES M. EGAN and F. M. HARDENBROOK, for
 the Plaintiff. 40

EDWARDS & SMITH, for the Defendant.

John J. Mooney—Direct.

BE IT REMEMBERED, that on this 25th day of September, Nineteen Hundred and Seventeen, at a Circuit Court, holden at Jersey City in and for the County of Hudson, before his Honor, William H. Speer, Judge of the Hudson County Circuit Court, to whom the issue above joined had been referred for trial the said issue between the parties

10 (pro ut the proceedings), came on to be tried by a jury for that purpose, duly empanelled, and thereupon the plaintiff and defendant offered evidence as hereinafter set out to maintain the issue on their respective parts as follows:

MR. HARDENBROOK: It is admitted on the record that at the time of this accident described in the complaint the plaintiff and the defendant were engaged in interstate commerce.

20

MR. SMITH: Yes; I will admit that on the record if you want it.

JOHN J. MOONEY, sworn.

DIRECT EXAMINATION BY MR. HARDENBROOK:

Q. You are a licensed practising physician in the State of New Jersey? A. I am.

30 Q. And have been for how many years? A. About twenty years.

Q. Are you the chief surgeon in charge of St. Francis Hospital? A. Yes.

Q. Are you acquainted with Mr. McDonald, the plaintiff in this suit? A. I am.

Q. Did you make an examination of his wrist and ankle some few days ago? A. I did.

John J. Mooney—Direct.

Q. Will you state to the jury what condition you found existing? Take one at a time, the ankle, for instance, first. A. Well, he had an injury to his right ankle and laceration of the ligament, the external ligament of his right ankle, which allowed of motion laterally more than would be normal. In his wrist he had a fracture of the second metacarpal bone with considerable deformity and a loss in the flexion and extension of his hand, particularly in extension of his hand. He was unable to get it back this way. He had a laceration of his right eyebrow about an inch and a half in extent, and he had a small discolored laceration on his nose. 10

Q. That condition you have described as to the ankle you found existing on what day, Doctor?
A. On September the 22nd. 20

Q. This year? A. This year. 20

Q. And this condition which you find existing as to the wrist you found existing on the same day? A. The same day.

Q. What would you say as to whether those conditions which you now find, assuming that the cause had been created in January, 1914, what would you say as to the permanent character of those? A. I would say that they were permanent.

Q. The injury to the ankle is disability impairing the full function and use of it, is it not? A. It interferes with his ankle, interferes with him only in case he gets on uneven ground or does climbing or such things as that. On an even surface I believe the man can walk pretty well. I believe if he were on an uneven surface— 30

Q. But he could not climb or travel over an uneven surface as well? A. I think he would be very inclined to re-sprain his ankle again. 40

John J. Mooney—Cross.

MR. SMITH: What is that?

THE COURT: He would be very apt to re-sprain his ankle again if he were to climb or travel over an uneven surface.

Q. And this condition of his wrist, do you regard that as permanent? A. That is a permanent condition.

10 Q. And that interferes, as you have described it, with the movement up and down? A. Up and down of his wrist—particularly the moving back.

CROSS EXAMINATION BY MR. SMITH:

Q. Doctor, this lateral movement is sideways? A. Yes.

20 Q. You cannot state to any degree that that interferes with him? A. I believe it interferes with him when he walks on uneven surfaces or would attempt to climb; I believe he would be very apt to turn on his ankle.

Q. What do you mean by climb; walking upstairs, do you mean? A. No; I mean working at what he worked at before—working as a brakeman.

Q. You do not know that he climbed, working as a brakeman? A. Why, I believe they do considerable climbing as brakemen.

Q. Do you know? A. Yes, I do.

30 Q. Do you know? A. Yes.

Q. Did you ever see McDonald do any climbing? A. No; but I have seen others climb—brakemen.

Q. You mean climbing up the side of a car, on a ladder? A. Yes.

Q. And you think that might have a tendency to give him a weak ankle? A. Yes.

Q. That is what you mean? A. Yes, sir.

40 Q. But so far as ordinary walks in life, that is not any disability as you call it, is it? A. No.

John J. Mooney—Cross.

Q. He walks along the street just the same as you walk, without a limp? A. Yes, sir.

Q. For the ordinary occupations it is not any disability, is it? A. Well, not unless he gets on an uneven surface, and then he would be more apt to sprain that ankle again than one who did not have that disability.

Q. And that is all? A. That is all. 10

Q. Now, Doctor, his wrist, is it the right wrist or the left wrist? A. Left.

Q. Can you tell me as to what degree it interferes with flexion and extension? A. It is the extension that it affects mostly.

Q. The extension? A. The extension; and I would say about twenty-five per cent.

Q. About twenty-five per cent? A. As far as extension is concerned.

Q. That is twenty-five per cent. of that motion? 20
A. Yes.

Q. That is not twenty-five per cent. of the use of the hand? A. Oh, no.

Q. You cannot tell us as to what degree or percentage of the use of the hand is affected, can you? A. Why, that would depend upon his occupation.

Q. Well, take writing, for instance? A. I do not think it would affect him whatever.

Q. Would it affect him as a letter-carrier? A. 30
I believe so.

Q. It would not affect him as to—well, it is the left hand, isn't it? A. Left hand.

Q. It would not affect him as to painting? A. I think it would.

Q. Do they paint with their left hand? A. If he attempted to I think it would.

Q. Would it affect him holding anything that way (illustrating)? A. No.

Q. Would it affect him doing anything with his 40
hand that way—flexion? A. Yes.

Charles F. McDonald—Direct.

Q. How much? A. About ten per cent. or twenty per cent.

Q. Then the other is the extension, as you call it, twenty-five per cent? A. Yes.

Q. And that is all? A. Yes.

Q. It does not interfere with his grip at all? A. No, sir.

10 Q. When did you last find that, Doctor? A. September 22nd, this year.

Q. This (indicating) is what you call the second metacarpal? A. Yes.

Q. That is the extension of the index finger? A. Yes; way back here in the wrist.

Q. But it is the extension of the index finger? A. Yes.

Q. It is the one that comes back from the end of the index finger back here? A. Yes.

20 Q. And the fracture or dislocation is back at the wrist? A. Back at the wrist.

Q. Back at the wrist? A. Yes.

CHARLES F. McDONALD, SWORN.

DIRECT EXAMINATION BY MR. HARDENBROOK :

Q. You are the plaintiff in this case? A. Yes.

30 Q. And previous to the 19th of July, 1914, you were in the employ of the Central Railroad Company of New Jersey, were you not? A. Yes.

Q. As a brakeman. And on that day you met with a certain accident due to a collision? A. Yes.

Q. On the 25th day of February of that year you were at the office of the claim agent of the company, were you not? A. Yes.

Q. And you signed certain papers at that time? A. Yes.

40 Q. I show you a paper dated the 25th of Feb.

Charles F. McDonald—Direct.

ruary, 1914, and ask you to look at it and state whether that is your signature. A. That is my signature.

Q. And signed and executed by you on that day? A. Yes, sir.

Q. And delivered by you to the railroad company on that day? A. Yes.

MR. HARDENBROOK: I offer it in evidence. 10
Marked P-1.

Q. This paper was prepared by whom? A. By Mr. Giddes, I believe, to the best of my knowledge.

Q. In the office of the Central Railroad Company of New Jersey? A. Yes.

Q. And after it was prepared by him it was given by him to you to sign? A. Yes.

Q. And you signed it then and there? A. Yes, 20
sir.

Q. At the time you executed this paper and delivered it to them were there any other papers or memorandums or anything given to you and signed by you at that time? A. Well, there was quite a few papers there I signed—receipts and—

Q. I show you a paper and ask you if that is your signature? A. Yes.

Q. Signed by you on the 25th of February, the same day this other paper was signed? A. Yes. 30

Q. And delivered by you to Mr. Gillies at the company office? A. Yes.

Paper offered in evidence and marked P-2.

Q. And at the time that was given to you was there anything else given to you? A. Why, drafts, I believe.

Q. You mean a draft for money? A. Yes.

Q. I show you what looks like a draft; is that the draft you refer to? A. That is the same. 40

Charles F. McDonald—Direct.

Offered in evidence and marked P-3.

Q. Again, on March 5, did you obtain another check from them? A. I did.

Q. Is this the check? A. Yes.

Q. And on that same day, March 5, did you also sign another receipt? A. Yes.

10 Q. In the same terms as the last one to which I called your attention? A. Yes, sir.

Q. Is that the receipt? A. Yes.

Check and receipt marked Exhibits P-4 and P-5.

Q. On March 9 did you receive still another check from them? A. Yes, sir.

Q. I show you a check and a receipt dated March 9, and ask you if that is your signature? A. Yes.

20 Q. You signed that receipt and received the check now shown to you dated the same day for the sum of \$6.20? A. Yes.

Papers marked P-6 and P-7.

Q. On the 23rd of March did you receive another one? A. Yes.

Q. I show you a check and receipt dated March 23, two weeks later, for \$12.40; that is your signature to that receipt? A. Yes.

30 Q. And you received at that same time this check for \$12.40? A. Yes.

Marked P-8 and P-9.

Q. On the 31st of March did you receive still another check? A. Yes.

Q. And signed the receipt now shown you? A. Yes.

Papers marked P-10 and P-11.

40 Q. And on the 5th of April were you in any

Charles F. McDonald—Direct.

employment—or did you do any work between the date of the accident in January, down to the 5th of April? A. No, sir.

Q. And on the 5th of April you were given a position as bridgeman, were you not, by the defendant railroad company? A. Yes.

Q. And you retained that position up until the 10th of August? A. 10th of August. 10

Q. What occurred on the 10th of August with reference to that position? A. Why, I had asked for a day off to—

Q. Never mind. Get right down to it; were you discharged or were you not? A. When I reported for work I was told that the position no longer existed.

Q. And since the 10th day of August you did nothing for them? A. No, sir.

Q. About that time, or just after the 10th day of August, did you see anybody in the railroad company office in regard to the future payments to you of your compensation? A. Yes, sir. 20

Q. And who did you see and what was said to you? A. I saw Mr. Giddes and Mr. Lodge.

Q. What did they say to you as to paying further compensation to you? A. They said the case was closed against me; there would be no more compensation paid.

Q. Since that time they have paid you nothing? A. No, sir. 30

Q. At the time of this accident what injuries did you receive in a general way? A. I received a fractured wrist.

Q. Left wrist? A. Left wrist. Fractured left wrist, and an injury to my right ankle and a laceration of the hand.

Q. What has been the condition of that right ankle from that time down to the present time? Just state to the jury in a general way. A. Well, that ankle has been weak ever since, and it has a 40

Charles F. McDonald—Direct.

tendency to turn over on me if I walk on an uneven ground or step in anything loose; I have to be very careful where I step; and I wore braces on it and elastic stockings and tape, adhesive tape—at present I haven't anything on.

Q. You say it has a tendency to turn over? A. Yes.

10 Q. Has it ever turned over on you? A. Yes.

Q. State as near as you can about how many times and how recently? A. It turned over three times since I have been in the mail service.

Q. And you went in the mail service when? A. June the 1st, 1915, I think—1915.

Q. And about what intervals existed between those three occasions when your ankle turned over on you? A. What difficulties?

20 Q. No. How long a time elapsed between those three occasions? You say three times it has turned over on you. A. Well, about a couple of weeks or a month, say, between each one.

Q. What was the last time that you recall? A. The last snow storm we had last winter.

Q. Were you laid up any time by reason of it? A. About a couple of weeks.

30 Q. Two weeks that you were unable to walk or get around on it. Now the time before that was about how long before that? A. The first time I sprained it I was laid up a week.

Q. And then the other time? A. About a couple of days. I did not turn it so bad.

Q. Now what trouble have you experienced with that wrist since the accident—or I will ask you now, what is the present condition of that ankle? A. Of the ankle?

Q. Yes. A. Well, it is just the same as it was before.

40 Q. When you say the same as it was before, what do you mean by that? A. Why, I cannot depend

Charles F. McDonald—Direct.

on it. As long as I keep on even ground and watch where I am stepping—it has a tendency to turn over just as it always did.

Q. When you say “as it always did”, you refer to what time, since your birth or since the accident? A. No—since the accident.

Q. Now as to your wrist; what is the present condition of that? A. That at times—it becomes almost useless to me. **10**

Q. In what way is it almost useless to you? A. The whole hand becomes numb during cold weather or change of weather, and it pains all through it.

Q. How frequently have you noticed that since the accident? A. That has been on and off, every change in the weather—storm.

Q. When did you last notice that? A. Here the other day I had it. A cold snap came up; I had it. **20**

Q. When you say the other day, what do you mean by that? A. A couple of days ago, when a cold spell came on.

Q. What other trouble have you with that wrist other than this numbness and pains which you express? A. I have no strength in my grip—in my hand. I haven't the grip that I had before that.

Q. How about the movement of it up and down? A. Well, it is restricted; it is ankylosed there. **30**

Q. Can you put it up as far as you could before you were hurt? A. That is as far as I can move it up. I can move the other one up all the way. The bone catches there some way. If I go down, it catches here on the downward movement.

Q. The bone catches on the back of your wrist? A. On the back of the wrist. **40**

Charles F. McDonald—Cross.

Q. And where underneath, do you say? A. That is the only place it catches, there.

Q. And that condition exists down to the present time? A. Yes.

CROSS EXAMINATION BY MR. SMITH:

10 Q. Mr. McDonald, this paper that Mr. Hardenbrook showed you, that you call a release, did you know at the time that that paper was signed as you say that it was a release? A. No, sir.

Q. You did not, did you? A. I did not know it was a release.

Q. Did you know at the time that that paper was signed what it contained? A. I did not.

20 Q. Did you know then at that time that the paper you signed contained any agreement between you and the company? A. I suppose it did.

Q. Did you know it did? A. I supposed it did; I was told it did.

Q. Who told you it did? A. Giddes.

Q. Haven't you said that that paper did not contain the agreement entered into between you and Mr. Giddes at the time you say it was signed—in this court room?

30 MR. HARDENBROOK: I object as immaterial, irrelevant and incompetent under the issues in this action.

(Objection overruled)

A. I do not recollect saying anything like that.

Q. You do not recollect it? A. No, that that paper did not contain any agreement.

Q. Did not contain the contract you say was entered into between yourself and Mr. Giddes on the 25th of February? A. I do not understand what you mean.

40 Q. Haven't you already testified in court that that paper was obtained from you by fraud? A. Yes.

Charles F. McDonald—Cross.

Q. And that it did not contain the agreement you made? A. Oh, it is not what I thought it was. Now I understand. Yes.

Q. Therefore that paper does not contain the agreement that you thought you made with Mr. Giddes, does it? A. Yes.

Q. Does it? A. No, it does not; not now, no.

Q. Then as a matter of fact that is not any agreement that you made with Mr. Giddes, is it? A. No; not at that rate. 10

Q. Now, Mr. McDonald, you went down to the office of the company on February 25, didn't you? A. I did.

Q. And you went down there because of your injury? A. Yes.

Q. And did you go down there for the purpose of finding out if you were entitled to compensation? A. I went down there for information as to that. 20

Q. For information as to whether you were entitled to compensation? A. To find out what I was entitled to.

Q. You thought you were entitled to something? A. Certainly.

Q. And at that time you made some sort of agreement, did you, with Mr. Giddes? A. I made no agreement with Mr. Giddes.

Q. You made no agreement with him, did you; you are sure of that, are you? A. Except the paper I signed which I thought contained the agreement. 30

Q. You said you thought that did not contain the agreement. You say in your complaint that at that time you made this agreement with Mr. Giddes that at said last mentioned day the said defendant contracted and agreed to and with the plaintiff to pay him the sum of \$6.20 a week during a period of such disability not however 40

Charles F. McDonald—Cross.

beyond three hundred weeks; is that true? A. Up until three hundred weeks; that is as I understood it.

Q. Your complaint says "not however beyond three hundred weeks;" is that true? A. The way they word it, the way I understood was up until three hundred weeks.

10 Q. Then in other words, what you say is that you had a totally different contract with Mr. Giddes, or the railroad company, than as is set forth in your complaint? A. If I had read that contract I could have told you that, but as I did not read it I can't tell you.

Q. Well, your complaint says that you had an agreement with him that they were to pay you \$6.20 a week during a period of such disability, not however beyond three hundred weeks. A.

20 Yes.

Q. Did you have such a contract, that you were to be paid \$6.20 a week during your disability? A. That is what I understood.

Q. Did you? A. Yes.

Q. Didn't you already testify in this court that your contract was to pay you \$6.20 a week for three hundred weeks? A. Why, certainly.

Q. I see. A. That is the way I understood it.

30 Q. Then it was not during your disability, was it? A. Up to three hundred weeks. If I was disabled longer than that then I was not to be paid any more. That is the way I understood it.

Q. Didn't you understand, and didn't you testify at the trials before this, of your case against the company? A. Yes.

Q. That you were to be paid \$6.20 a week for three hundred weeks? A. Yes.

Q. Is that right? A. Yes, I did.

40 Q. There was not any period of the disability in there at all, was there? A. Well, that was understood.

Charles F. McDonald—Cross.

Q. Oh, that was understood? A. They ain't paying you something for nothing.

Q. But your testimony at your last trial was that it was distinctly for three hundred weeks, no period of disability was there? A. Three hundred weeks, as I understood it, up to three hundred weeks.

Q. For three hundred weeks? A. That is the way I understood it. 10

Q. That is not the way you testified before. A. That is how I always understood it; up to three hundred weeks.

Q. Didn't you testify in this court room, not once or twice, but three times, that your contract with that company was for three hundred weeks; not up to but for three hundred weeks? A. What's the difference?

Q. What do you think is the difference? A. I do not think there is any difference; up to three hundred weeks, and for three hundred weeks, seems the same to me. 20

Q. Then you think that is the same? A. I do.

Q. And it did not include any period of disability? A. That is what they were paying me for; they were not paying me because they liked me or something.

Q. Not because they liked your looks, no. Now I want to know whether or not your understanding at that time was that it was during a period of disability that you were to be paid or was it for three hundred weeks that you were to be paid—which? A. Well, three hundred weeks. 30

Q. Three hundred weeks; you are sure of that, are you? A. During my disability not exceeding three hundred weeks. Well, they would not pay me any more after three hundred weeks, would they? 40

Q. But did you say anything at all in your

Charles F. McDonald—Cross.

other trials about your period of disability? A. For three hundred weeks; it is all the same thing to me.

Q. I do not question it is all the same to you; I am asking you the question as to what it was.

A. I am telling you.

Q. Then it was for three hundred weeks? A. **10** For three hundred weeks, yes.

Q. That is right; it was not for any less period, was it? A. Not for any less, no.

Q. Now after you had signed this paper that Mr. Hardenbrook has offered as his contract, you at the same time signed a receipt, didn't you, for compensation? A. Yes.

Q. Under the compensation act of New Jersey? A. Yes, sir.

Q. Is that right? A. Yes.

Q. And you got three weeks pay at \$6.20 a week? A. Yes. **20**

Q. And then every two weeks after that you went back again, didn't you? A. Yes.

Q. And you got more money under this compensation? A. Yes, sir.

Q. Until what time? A. Until—I forget the last date in March.

Q. Until some time in April, wasn't it, or was it in March? A. March.

Q. And then after that you went down to the company and you went to Mr. English, didn't you? A. No, sir; I went to Mr. Giddes' office. **30**

Q. You went to Mr. Giddes' office? A. I had trouble getting at them. Every time I went there I never could see either Doctor Washburn or Mr. Giddes; always somebody out. So I asked Mr. Giddes if he thought I could secure a position with the company.

Q. You asked Mr. Giddes if he thought you could secure a position? A. Yes. **40**

Charles F. McDonald—Cross.

Q. Then where did you go? A. Told me to see the head of my department.

Q. Who was the head of your department? A. Mr. English.

Q. When you say you went to Mr. Giddes and asked him if he thought you could secure a position what did you mean? A. I wanted something better than \$6.20 a week; and I was not getting that even. 10

Q. You wanted something better than \$6.20 a week? A. Which I was not getting. It had stopped then; I did not receive it.

Q. Then as I understand you, this payment of \$6.20 a week had stopped? A. They had not given it to me.

Q. You had not received it? A. No.

Q. Then you went down to Mr. Giddes, and did you say this compensation had stopped? A. Well, he had seen me coming there trying to get the checks, and I could not get them. 20

Q. Then you went to Mr. Giddes, and you said "Now I would like to get a job, something better than \$6.20 a week," didn't you? A. Tried to get something better, yes.

Q. That is what you said to him? A. I wanted to secure a position.

Q. And Mr. Giddes said to you, "You will have to see the head of your department?" A. Yes, sir. 30

Q. So you went to the head of your department? A. Yes, sir.

Q. And who was that? A. Mr. English.

Q. And when you went to Mr. English you asked him for a job on the bridges, didn't you? A. I did not ask him for a job on the bridges; I just asked him for a job. I just asked him for a job that I could handle. 40

Q. Now you applied to Mr. English on the

Charles F. McDonald—Cross.

first of April, didn't you, for that job? A. Yes.

Q. And so you testified at your last trial, didn't you? A. I believe that was the date.

Q. And you got the job as a bridgeman? A. Yes.

Q. And do you remember my asking you at that trial "Why did you apply for a job to English?" and your saying "Because \$63 a month was much better than \$6.20 a week?" A. It was.

Q. And you said that, didn't you? A. Yes.

Q. And that was the reason you applied for that job, wasn't it? A. Naturally.

Q. Yes; so that at that time the compensation as you say had ceased? These payments had ceased? A. Yes, sir.

Q. And you went to Mr. Giddes, and then to Mr. English, and you said "I want a job," and you did that because \$63 a month was better than \$6.20 a week? Isn't that right? A. It got to be nothing a week. Then it was not even \$6.20.

Q. Well, aside from what you swore to at the last trial, you now say it got to be nothing at all? A. Yes, sir.

Q. Although at the last trial you said that \$63 was better than \$6.20 a week? A. It was; it is yet. \$63 is better all the time.

Q. So that you went to English and got this job at \$63 a month because it was better than nothing or \$6.20 a week; is that right? A. Yes.

Q. And you took that job? A. Yes, sir.

Q. And you drew your salary, didn't you? A. Yes, sir.

Q. And how long did you stay there at \$63 a month? A. I was there up till the first of August, or something like that; I do not know the right date.

Q. The first of August; is that right? A. About that time; about the third or fourth, may be.

Charles F. McDonald—Cross.

Q. And then some time in August you had some trouble there with Mr. Wallauer, didn't you? A. Yes, sir.

Q. And Mr. Wallauer at that time after your trouble with him discharged you from his department? A. No; he did not discharge me. He told me he would put a man in my place there and I had to see Mr. English about it. And Mr. English told me to come around about it in three or four days. When I did see Mr. English he told me the position had ceased to exist; so I do not call that discharge. 10

Q. In other words, Mr. Wallauer told you he had put another man in your place? A. Temporarily, yes, sir.

Q. And he said that to you at the time you and he were having this trouble? A. Over a day off, yes. 20

Q. Then you said to him "You can't do it; I will go and see Mr. English," didn't you? A. I did.

Q. So you did go to Mr. English? A. I said he could put a man in my place; I said "Go ahead and put a man in my place; I will see Mr. English."

Q. You said "Go ahead and put a man in my place and I will go and see Mr. English?" A. Yes; that is what I said. 30

Q. So he did put you out of your place, whether he did put another man in there or not? A. He did put a man in, I believe; I am not sure.

Q. And then you went to see English? A. Yes.

Q. And didn't Mr. English tell you to report to Mr. Norris? A. He certainly did not at that time.

Q. When? A. About—after I found out that this position was abolished then I saw Mr. English and he told me to go and see Mr. Norris and see if he could do something for me. 40

Charles F. McDonald—Cross.

Q. You never went to Norris? A. I did.

Q. You did go to Norris? A. Yes; I am positive.

Q. When? A. I went there about two days following. I do not remember the exact day. And there are men in that yard that saw me going in there too.

10 Q. And you saw Mr. Norris? A. I certainly did see Mr. Norris.

Q. What did Mr. Norris say to you? A. I told him I came down to see if he had anything to do outside of braking; I could not go back to that.

Q. What did he say to you? A. He said there was nothing he knew of. I asked him that same day if Mr. English had telephoned down and he said "No."

20 Q. Then you went from there where? A. What do you mean; that day?

Q. The same day or the next day or two days afterward? A. I went home.

Q. And from there you went where? A. Anywhere in particular.

Q. You went to California, didn't you? A. Oh, yes; I went to California, yes.

Q. Is that right? A. I did.

Q. And you asked for a leave of absence to go, didn't you? A. Yes.

30 Q. And when you were in California you wrote a letter, didn't you? A. Yes, sir.

Q. And you resigned from the employment of the company, didn't you? A. Yes, sir.

Q. I show you a letter and ask you if that is the letter. A. I see it is; it is; that is my handwriting.

Q. And that is the envelope you sent it in? A. Yes.

40 (Letter and envelope marked D-1-a and D-1-b for identification.)

Charles F. McDonald—Re-Direct.

Q. After you resigned from the company you then started your suit? A. Yes.

Q. Now, Mr. McDonald, all the time you were working as a bridgeman you never went down to that office or asked for any compensation, did you? A. I thought it had ceased; I was not going to go for something I could not get.

Q. And you thought it had ceased at the time you applied for a position as bridgeman? A. I was not getting it anyway. 10

Q. But you thought it had ceased then, didn't you? A. Yes.

Q. And with that in your mind you applied for this position as bridgeman? A. Yes, sir.

Q. You are working now as a letter-carrier, aren't you? A. Yes.

Q. How long have you been working at that? A. Two years. 20

Q. In Jersey City? A. Yes.

Q. Are you one of the wagon men or one of the footmen as we call them? A. Footman. I work on the wagon and foot both; extra letter-carrier.

RE-DIRECT EXAMINATION BY MR. HARDENBROOK:

Q. Who was it you say you went to about getting your position back or getting another position after you had lost the position as bridgeman? A. I went to see Mr. English first, and Mr. English sent me to Mr. Morris—or Norris. 30

A. I went to see Mr. English first, and Mr. English sent me to Mr. Morris—or Norris.

Q. And what was it Mr. Norris said to you? A. He said he did not have anything.

Q. Did he say anything as to whether the bridge job existed, or otherwise? A. No, sir.

Q. Was there anybody that stated to you whether the job had been wiped out of existence?

A. Why, Mr. English said that. 40

Charles F. McDonald—Re-Cross.

Q. What did Mr. English say in connection with that? A. He said when I came around to see him on August the 10th, he said "That job no longer exists. It is abolished," he said.

Q. Did he make any statement as to why it no longer existed? A. No, sir.

10 Q. Was there anything said as to reduction of the force? A. There was something said to the effect of reduction of force.

Q. Who made that statement? A. I believe Mr. English made that statement.

Q. And was that stated as a reason why the job no longer existed, or not? A. I understood it that way.

RE-CROSS EXAMINATION BY MR. SMITH:

20 Q. I want to ask you a question I overlooked. When you say you had a contract with Mr. Giddes on the 15th of February, what did you give Mr. Giddes—anything? A. What did I give him?

Q. Yes— anything? Did you pay him anything? A. No.

30 Q. Did you agree to do anything for him? A. I thought I was signing a regular formula, what everybody went through that was ever hurt or injured on the railroad. He told me it was a matter of form, that everyone went through; I was just following a regular routine.

Q. You thought it was no contract, just a matter of form? A. I think it was some form—I did not think it was a contract as it was—entirely.

Q. But you did not give him anything? A. Why, no.

40 Q. And you did not agree to do anything for him? A. Not in particular.

Motion for Non-Suit.

Q. Or for the company? A. It seemed as though—

Q. I did not ask you that; I asked you if you agreed to do anything for the company? A. Verbally? No, I did not.

Q. And so far as you knew at that time you neither gave him anything nor agreed to do anything for the company; isn't that right? A. 10
Right.

Q. And you made no promise at that time? A. I did not.

 PLAINTIFF RESTS.

MR. SMITH: I move for a nonsuit on the ground that there has been no contract set up whereby the plaintiff could recover against 20
the defendant, inasmuch as there has been no consideration shown for the making of any contract.

THE COURT: What have you got to say about that, in the light of the witness' last statements? He neither gave anything, nor intended to give anything, nor did he think he had given anything, nor did he think he was bound by what he had done. A contract is a meeting of the minds of the parties on 30
terms which are mutually binding. In this case one of the parties comes in and says he did not bind himself or think he had bound himself or agreed to bind himself.

MR. HARDENBROOK: But nevertheless he did bind himself.

THE COURT: That is not the proposition, that he did bind himself. If he says he didn't and the jury has to pass upon the question here where is there any evidence that he did 40
bind himself?

Motion for Non-Suit.

10 MR. HARDENBROOK: The evidence is before the court that he bound himself in this release. At the time this release was signed he had a valid cause of action against this railroad company for damages under the federal act, and in consideration of his waiving his cause of action under the federal act he agreed to accept compensation—

THE COURT: He does not say so. He says he did not intend to do that or mean to do it.

20 MR. HARDENBROOK: As a part and parcel of that same agreement made and entered into at the same time this release was signed, what was done? A check was given to him and a receipt was signed by him for two weeks compensation at the rate of \$6.20 a week.

30 THE COURT: That is all very true, those things appear to have occurred; but you are now trying to prove a contract, and what I want to find out is what evidence you have of a contract which the parties entered into and intended to enter into that was binding upon them. You have certain papers in evidence here that indicate that he received certain sums of money and that certain things were written in certain releases and receipts, but his own statement is that he never contracted or meant to contract in any binding way upon himself.

40 MR. HARDENBROOK: At the time this release was signed he signed this: "Received from the Central Railroad Company \$18.60 in pursuance of the provisions of a certain deed of release executed by me on the 25th of February"—the same date—"being the compensation to which I am entitled there-

William J. Arlitz—Direct.

under for three weeks from the third day of February to the 24th day of February.”

THE COURT: I suppose your position is, that he has not any right, in the absence of fraud, to repudiate those things, and that whether he meant to give them or not is to be determined by the fact of what actually occurred; that these people got these things and kept them and relied upon them and that therefore having kept them a contract arises. I suppose that is your contention. 10

MR. HARDENBROOK: Yes, your honor.

THE COURT: I think I will hold that good, Mr. Hardenbrook, as against this motion and deny the motion on the ground indicated.

MR. SMITH: Objection.

20

WILLIAM J. ARLITZ, sworn.

DIRECT EXAMINATION BY MR. SMITH:

Q. Doctor, you are a practising physician and surgeon in this state? A. I am, sir.

Q. Practised how long? A. Twenty-seven years.

Q. Have you had much experience in surgical matters? A. I have been practising surgery about all of that time.

Q. Are you connected with any institutions, Doctor? A. I am a consultant of the North Hudson Hospital; I am a surgeon at the Moses Taylor Hospital; I am visiting surgeon of St. Mary's Hospital, and I was formerly surgeon of the State Hospital. 30

Q. Now, Doctor did you examine Mr. McDonald on numerous occasions? A. I did, sir.

Q. When did you first examine him? A. February the 18th, 1915. 40

Q. Will you tell us what you found as a re-

William J. Arlitz—Direct.

10 sult of your examination at that time? A. I found a scar on the left brow line. This scar was the result of a laceration. It was not adherent, and did not present any evidence of injury to the bone beneath the scar. I found that he had good control of his muscles. I found that he had a slight deformity of the ring finger of the left hand some thickening at the base of the second metacarpal bone of the same hand. This deformity that he had of the left hand is similar to that that is found in many men who follow boxing as a vocation; it is called a prizefighter's hand.

Q. Called what? A. A prizefighter's hand.

20 Q. Doctor, was there anything there that you found in your examination of him at that time which would in any way interfere with his following his usual occupation? A. None so far as I could determine.

Q. Did you examine his ankle at that time? A. I did not; I started to examine the ankle and he mentioned the fact that he had made a good recovery and it was not necessary to examine it.

Q. Mr. McDonald did? A. Yes.

30 Q. When next did you see him, Doctor? A. I saw him in November of the same year; the 20th of November of the same year, 1915.

Q. Did you examine him then, Doctor? A. Yes.

40 Q. Will you tell us what your examination consisted of and what you found? A. I found at that time that his right ankle was about a quarter of an inch larger than the left ankle. There did not seem to be any abnormal limitation of motion. I again found the thickening of the metacarpal bone and I also found the scar

William J. Arlitz—Cross.

in the left brow line—the scar was not adherent and there was no indication of bony injury in that area. So far as I was able to determine at that time there was nothing in the case that would prevent him from performing any and all of his usual duties.

Q. Now Doctor, at any time that you examined him, either in February, 1915, or in November, 1915, was there anything the matter with him which would in any way incapacitate him from performing his usual occupation? A. Not so far as I could determine. 10

Q. Was your examination such that you could make a reasonably certain prognosis—diagnosis?

A. My examination was the examination that a surgeon would make to determine if any disability existed. 20

CROSS EXAMINATION BY MR. HARDENBROOK :

Q. You found in November the injured ankle was a quarter of an inch larger than the other?

A. Yes.

Q. And that was due to what? A. Why, that might have been perfectly normal because ankles as a rule have not the same measurement.

Q. He might have been born that way? A. And it might have been due to the fact that at some time he had an injury. 30

Q. Now this thickening of the bone in the wrist which you found in November, 1915, in your opinion was due to what? A. It may have been to a fracture and it may have been due to a bony inflammation.

Wickes Washburn—Direct.

WICKES WASHBURN, sworn.

DIRECT EXAMINATION BY MR. SMITH:

Q. Doctor, you are a practising physician and surgeon? A. Yes.

10 Q. And you are employed by the Central Railroad Company, are you? A. Yes.

Q. And were you so employed in 1914 and 1915? A. Yes.

Q. Did you examine Mr. McDonald? A. Yes.

Q. Where did you first examine him? A. I first examined him at the hospital. I made no examination on that day.

Q. Where did you first examine him? A. I first examined him March 9, 1914.

20 Q. And where? A. At the emergency hospital of the Central Railroad at Jersey City Terminal.

Q. At that time what did you find his condition to be? A. You refer to the wrist, I suppose. That is all I examined.

Q. Whatever you examined. A. I examined the wrist.

Q. What did you find his condition to be? A. I found a thickening on the fourth metacarpal bone—the left hand.

30 Q. All right; and what effect did that have upon the use of his hand at that time? A. It did not seem to have any.

Q. Did you test it? A. I did.

Q. Did you look for any other injury there? A. Yes.

Q. What did you look for? A. For any there might be. I found this enlargement which I believe to be an injury to the periosteum.

40 Q. Of what? A. Of the bone; of his fourth metacarpal bone.

Q. Now did you find anything the matter with the ankle? A. I never examined the ankle.

Wickes Washburn—Cross.

Q. Did he make any complaint to you of having any trouble with his ankle? A. He did not.

Q. Is that the only examination you made, Doctor? A. No, sir.

Q. When did you make any other examination? A. The 23rd of December.

Q. Of what year? A. 1914.

Q. Now, Doctor, when after your first examination did you determine, if you did determine, that Mr. McDonald was in condition to return to work? A. I found that he was able to do light work at that time. 10

Q. At what time, the first examination? A. The first examination.

Q. That was in March? A. Yes.

Q. On your second examination, in December, 1914, what did you find his condition to be? A. Much the same as before. I did not mention the fact that the muscles of that arm were not as well developed as they should—as the other one, because of lack of use, as I believed; and then that was somewhat improved, the condition of the muscles. 20

Q. Was there anything, Doctor that you discovered there that would in any way incapacitate him from performing his work? A. No, sir. 30

CROSS EXAMINATION BY MR. HARDENBROOK:

Q. This last examination that you made, Doctor Washburn, of McDonald was on what date? A. On the 9th of December, I believe.

Q. About the 9th of December? A. I think so.

Q. And do you recall that when that examination was over you gave a paper to Mr. McDonald to take to Mr. Giddes? A. I do not, but I presume I did. 40

Wickes Washburn—Cross.

Q. And do you recall what that paper was?

A. To the effect of what I have just stated, yes.

Q. And what did the paper state, so far as you recall it now? A. What I have just stated now about the condition of his hand.

Q. What was that? A. About the thickening of the tissues on the fourth metacarpal bone.

10 Q. Did you state in that paper as to whether or not McDonald was able to do manual work or not? A. I do not believe I did on that examination.

Q. Do you recall making any statement in that paper as to the kind and character of work which McDonald was able to do? A. I do not. I had already done so once you remember.

20 Q. You gave that paper to McDonald and told him to take it to Mr. Giddes, did you not? A. I presume I did. I cannot swear that I did. That is the usual course.

MR. HARDENBROOK: I call upon the defendant's counsel to produce, under the notice to produce which has been served, a written report as to injuries of the plaintiff, made by one Doctor Washburn, from August 1st to October 1st, 1914.

MR. SMITH: I have not any such paper.

30 Q. I will ask you, Doctor Washburn, if you read over this paper to McDonald which you handed to him then and told him to take it to Mr. Giddes. A. If I read it over?

Q. Did you read it to McDonald, what you had written? A. I do not suppose I did.

Q. You just simply told McDonald to take it to Mr. Giddes? A. I expect so.

40 Q. Did McDonald read it over in your presence, so far as you know? A. No; not the usual thing. A. Isn't it a fact, Doctor, that you stated in this

Henry Wallauer—Direct.

written report that you then and there handed to McDonald and told him to take to Mr. Giddes—that you stated that he was unable to do manual labor? A. I do not believe I did.

Q. Will you swear you did not so state? A. To the best of my knowledge and belief, yes, sir.

Q. You have not seen that report since? A. I do not think I have. 10

Q. Have you looked for it; has your attention been called to it? A. I have never been requested to get it.

Q. You have not been requested? A. I think not.

Q. You know that a notice to produce it was served on the company some time ago, do you not? A. Pardon me, but that is not on myself.

Q. That is all. 20

HENRY WALLAUER, SWORN.

DIRECT EXAMINATION BY MR. SMITH:

Q. You are employed by the Central Railroad Company? A. I am.

Q. And you were employed by them in 1914? A. I was.

Q. And what was your position? A. Station-master. 30

Q. Do you remember Mr. McDonald coming to you around the first of April for a position? A. About that time.

Q. What position did he have? A. He was sent to me by Mr. English to be placed on the bridges in an easy position.

Q. Did you place him there? A. I placed him there, yes.

Q. How long did he stay there? A. I do not recall the actual time he was employed there; 40

Henry Wallauer—Direct.

I do not think it was more than a couple of months.

Q. During the time he was there did you have any trouble with him? A. Constantly.

Q. In what way? Just tell us what trouble you had.

10 MR. HARDENBROOK: I do not see how this is relevant or material. I would like to interpose an objection to it.

20 THE COURT: I suppose the contention of the other side is—I have not heard it opened that way, but I suppose the contention is that Mr. McDonald made an agreement with the company after this alleged agreement of February 25 which abrogated the agreement of February 25 and gave him employment and that the reason why he was discharged from that employment is a relevant element tending to show the good faith of the company in its transactions with him—in other words, if a contract was made after the 25th of February, 1914, in which he preferred to get \$63.20 a month, or whatever it was, instead of \$6.20 a week, that abrogates this contract and there is no action here. I presume that is Mr. Smith's contention.

30 MR. HARDENBROOK: There is no such defense pleaded.

THE COURT: There doesn't have to be.

MR. HARDENBROOK: Whether it is necessary or not I do not know. All right; go ahead.

(Question repeated.)

40 A. I could not keep him on his job; I could not keep him on the bridges; the other men on the bridges complained to me constantly that he was not there doing his work.

Henry Wallauer—Cross.

MR. HARDENBROOK: I object.

MR. SMITH: I consent that that be stricken out.

Q. What do you mean by saying you could not keep him on the bridges? A. Well, he was not there to take care of the boats when they came in, and I went for him several—quite a number of times, and the last time—the last day that I had the trouble with him I discovered him down in the train shed instead of being up on the bridges where he belonged, so I called him for not being on his job and he got very abusive to me. 10

Q. What did he do; what did he say? A. Well, as I recall he said I could not fire him; he would do as he pleased, or something to that effect. I could not say the actual words; and I said "Well, you leave the bridges right now." 20

Q. Yes. A. And I discovered in his being absent from his work at the times that he was that I could do with one man less, and I have been ever since that day.

Q. I see; and did you then discharge him from your department? A. From my department; and I sent him to Mr. English.

Q. Mr. English was the man who was in charge of his department, as he calls it? A. Yes. 30

CROSS EXAMINATION BY MR. HARDENBROOK:

Q. Did he state to you the reason why you could not fire him, as he expressed it? A. Yes.

Q. When? A. He told me on account of him being injured the company had to take care of him.

Q. Did he say for how long? A. No.

Q. He was sent to you with instructions to 40

Charles H. English—Direct.

give him an easy job, you say—an easy position?

A. He was.

Q. Was any reason given to you as to why it was necessary to give him an easy position?

A. If I recall—I do not know whether the matter was stated to me, although I knew he had been injured in the yard service.

10 Q. And you knew he was under disability at the time you gave him the easy position? A. I did.

CHARLES H. ENGLISH, SWORN.

DIRECT EXAMINATION BY MR. SMITH:

Q. You are in the employ of the Central Railroad Company aren't you? A. Yes.

20 Q. And you know Mr. McDonald here? A. Yes, sir.

Q. Was he under your employ in 1914? A. He was employed in the Central Railroad Company, yes, the same company that I was.

Q. In April of that year, or in March—April I think it was—do you remember Mr. McDonald coming to you relative to securing work aside from brakeman? A. Yes.

30 Q. What did he say to you and what did you say to him? A. He was looking for employment and he was offered this position on the bridges.

Q. Did you know at that time that he had been a brakeman? A. Prior to that he had been a brakeman.

Q. Did you know at that time that he was receiving compensation, or had been receiving compensation under the Compensation Act? A. I knew nothing about that. That is, nothing
40 about the detail.

Charles H. English—Direct.

Q. And he came to you for employment on the bridges or a light job? A. I do not remember just what the conversation was, but he wanted some employment, and there was such a vacancy or would be a vacancy within a short time after he had been to see me. That is the way I recall it, that the bridges were opened shortly after that visit.

10

Q. And whom did you send him to? A. The stationmaster.

Q. Who was the stationmaster? A. Mr. Wallauer.

Q. Subsequently to that did you have any talk with Mr. McDonald relative to some action on the part of Mr. Wallauer? A. About some of the troubles he had had, yes.

Q. What was that, do you know? A. Well, he would absent himself from duty, leave the bridges; that was some of the troubles. Prior to the day he had the last trouble he asked to be relieved and it led to some words.

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Q. Did he come to you direct from Mr. Wallauer? A. I do not recall whether he came that same day or not, but if not soon afterward.

Q. Now at that time had he been retained in the employment of the company as a brakeman; had he ever been discharged as brakeman? A. No, sir.

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Q. After he came to you with a complaint about Mr. Wallauer, at that time what did you do? A. He wished to be relieved, and it was a question of some one being available to relieve him at that time, and that led to the controversy. He then was relieved, and I do not recall how long he was to be off at that time, but after that time the place was—the position was abolished. That is we found we could get along with one less man.

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Charles H. English—Cross.

Q. Did he subsequently come to you and ask for leave of absence? A. Yes.

Q. Did you grant it to him? A. I did.

Q. I show you a letter and envelope, D-1 and D-1a, and ask you if you received it from him.

A. Yes; through the United States mail.

10 MR. SMITH: I offer these in evidence.
(D-1 and D-1a, marked in evidence.)

Q. Did you at any time prior to receiving that letter take his name off as an employee of the company? A. No, sir.

CROSS EXAMINATION BY MR. HARDENBROOK:

20 Q. From the time that he was discharged from this job on the bridge until the time that this letter was received, that has just been offered in evidence, McDonald was on the roll of the railroad company? A. In answer to that I will say he was not on any roll because he did not not received any compensation. He was not working; but he was still retained on what we call the seniority list in the other department where he was employed prior to going on the bridges.

30 Q. As a brakeman? A. Yes. Well, they call them brakeman or yard drillers; I think he signed himself as yard driller.

Q. He was still on the list which would entitle him to preference in employment as a brakeman or yard driller, is that the list that he was on? A. Yes, he was on—well, you say employment—

Q. From the time he was relieved or discharged from this job of bridgeman he received no compensation at all? A. That I cannot answer.

40 Q. And the only object of him remaining on this list was to have him have a preference for work of a brakeman or yard driller? A. If he wished to retain—

Charles H. English—Cross.

Q. Were you familiar with the character of the injuries he had received? A. No, sir.

Q. And you do not know whether or not at that time that he wrote this letter or at any time after he had been discharged as a bridgeman he was able to do the work of a yard brakeman or a driller, do you? A. I do not.

Q. You do not know anything about the physical capacity of his wrist or anything about that? A. No, sir. 10

Q. Now when he came to see you and complained about Mr. Wallauer having removed him—discharged him from this job on the bridge—did he make any complaint to you as to how he had been treated there? A. He—

Q. What did he say? A. He thought he was not treated fair; he thought he should be relieved. 20

Q. He wanted to be relieved; relieved from what? A. I think he wished time off, that is a few days off, I do not remember the period.

Q. Relieved from what? He was no longer bridgeman, and he had no other position, did he? A. No.

Q. Then what did he want to be relieved from? A. I say that he asked, as I recall it, to be relieved from duty for a certain period, whether a day or two days or a month of time— 30

Q. Duty from what position? A. As bridgeman.

Q. He had already been discharged as bridgeman when he came to see you and complained to you about Wallauer having discharged him, did he not, and at that time he asked to be relieved, you say? A. No; I do not agree with you as to his being discharged. He asked to be relieved and— 40

Charles H. English—Cross.

Q. Asked for what? A. He asked the stationmaster Mr. Wallauer, to relieve him.

Q. Who is the stationmaster? A. Mr. Wallauer.

Q. To relieve him? A. To relieve him from duty.

10 Q. You heard Mr. Wallauer testify, did you not, that he was abusive or something and he discharged him? A. That was the result--

Q. You heard Mr. Wallauer testify, didn't you?

MR. SMITH: Let him answer.

THE COURT: Yes; let him answer. He may have an idea as good as yours.

20 A. I try to answer any question. That was the result of the conversation as between McDonald and Mr. Wallauer, because McDonald asked to be relieved for possibly a day or two days, I do not recall now just how long he wished to be off, and there was no extra man at the time to relieve him.

30 Q. Now isn't it a fact that when he came to you he came to you and stated to you that Mr. Wallauer had discharged him as bridge-man? A. No; I do not think he did. He had relieved him, but I do not think Mr. McDonald said Mr. Wallauer had discharged him.

Q. He had relieved him but he had not discharged him; and when he relieved him what do you mean by that; taking the job away from him temporarily? A. Complying to McDonald's request.

40 Q. Never mind about McDonald's request; but when you say Wallauer did not discharge him but Wallauer had relieved him, what do you mean by relieving him—he could not go back to work, could he, on the bridge? A. No; not after having been relieved.

Motion for Direction of Verdict.

Q. Now when he came to you and made this statement about Wallauer having discharged him as he said and Wallauer having relieved him, as you put it, what complaint did he make to you as to his treatment while on the bridge? A. He thought that he should be relieved just the same as any other man who might ask to be relieved for a certain period. 10

Q. Isn't it a fact that he stated that Wallauer had compelled him to work for twelve hours a day and had given him no time to get anything to eat? A. No.

Q. You do not recall that? A. No.

Q. You won't say that he did not make that statement to you? A. No, I do not recall it, but he would have his hours the same as any other man. 20

 DEFENDANT RESTS.

MR. SMITH: I move for a direction of a verdict on the ground, first, that there has been no contract established by the plaintiff, inasmuch as there has been no consideration shown by him for the making of the alleged payments by the company; second, that there has been no breach of the contract established; third, that there has been no contract shown which could be enforced in this court in this kind of an action, and, fourth, that the payment of compensation to be made under the alleged contract was to be made under the terms of the workmen's compensation act of this State, which prescribes a new right different from the right under the common law and a remedy for the enforce- 30 40

Motion for Direction of Verdict.

ment of that right, and that such remedy is conclusive and confers upon the plaintiff no right that could be enforced in this court under the kind of action herein brought.

10 THE COURT: I think I must deny the motion that is made, and inasmuch as the case is one of somewhat novel impression I think I will give my reasons for it, for they seem to me to be absolutely conclusive against the motion you have made.

20 The first question that would naturally appeal here is, is this action based upon the statute, the workmen's compensation act, or is it based upon a contract? If it is based upon the statute then the court would be obliged to assume that the remedy furnished by the statute is exclusive and this court would be without jurisdiction. But the complete answer to that notion that this action is based upon the statute is found in the fact that it is admitted in this case that the plaintiff and the defendant company at the time of the happening were engaged in interstate commerce, and the United States Supreme Court has decided that where the interstate commerce act is applicable it is exclusive and the state compensation act has no place whatever. That being so, what took place between Mr. McDonald and Mr. Giddes at the time this alleged contract was made, even if it be construed as an effort on their part to bring themselves within the provisions of the State compensation act, would be conspicuously without force to oust this court of jurisdiction for the obvious reason that the general principle of the law is unquestioned wherever the common law is administered that consent cannot confer juris-

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Motion for Direction of Verdict.

diction where jurisdiction does not exist without that consent; so in this case it is manifest that there can be no jurisdiction taken away from this court by the alleged effort on the part of Mr. Giddes and Mr. McDonald to consent that the matter should be brought within the purview of the compensation act where it cannot be brought by reason of the fact that the Federal act is solely and exclusively applicable. The contention however on the part of the plaintiff is that the action is based upon a contract and that the only function of the statute, that is the State compensation act, is as an agreed measure of the compensation. If that contention is borne out by the facts it is perfectly sound in law, and the case is no different than if the parties had agreed that the payments should be determined by reference to a table in the possession of some third party or that they should abide the result of a similar suit pending in some other court and be based upon the findings therein. Such agreement would not constitute such table or such other case the basis of the suit but it would merely refer thereto as furnishing the measure by which the compensation could be determined under the contract; and so to go back to the original proposition it is this: Is this suit founded upon a contract or is it founded upon the statute? And the answer is that it is founded, so the jury at least may find, that it is founded upon a contract and that it is not and cannot be founded upon the statute, and therefore the statute being inapplicable the court cannot be ousted of jurisdiction even though the parties had sought, if they did seek, to consent that such

Motion for Direction of Verdict.

jurisdiction might be invoked, because the jurisdiction is special; it refers only to the cases that arise specially within it, and the parties cannot bring themselves within it by consent but only by facts which give rise to such an action. Now one ground upon which the motion is made is that there is not any contract here. The answer to that is that the jury may find that there is a contract and that the testimony of Mr. McDonald in which he said that he did not intend to bind himself is merely his construction of the legal effect of facts which actually occurred between the parties. Whether a contract arose or not depends upon the facts and not upon his understanding of them. If a man performs acts which have legal consequences, the legal consequences attach whether he thinks they do or not. If a man enters into a negotiation which results in law in a contract the fact that he did not think it was going to be attended with contractual obligations is a matter of supreme inconsequence. These principles you will find at least hinted at in *Five vs. Pennsylvania Railroad*, where the court said that if a man signs, with his eyes open, a contract, without fraud being practiced upon him he will not be heard to say that he did not mean to be bound, but he will be bound whether he thought he was or not, and whether he says he thought he was or not. So in this case the sole inquiry is whether or not McDonald performed acts and made statements and did things which in legal contemplation give rise to a contract. Now the jury may conclude in this case that he did and that having done those acts those acts would be attended

Motion for Direction of Verdict.

with the legal consequences that always attend acts of that character and will give rise, if their tendency is to give rise to a contract.

Now the second ground is that there is not shown to be any breach of it. Of course if the contract was made and if this contract was to pay compensation during disability, not to exceed three hundred weeks, it would follow necessarily that if there is any evidence in the case tending to show that there was disability for a longer period than he actually received pay, that there must be evidence of a breach and consequently I cannot say that there is no evidence of a breach if there be evidence of that character in this case. 10

The next ground which was urged was that this court has no jurisdiction. I have already completely disposed, I think, of that point by the statement and the argument that the parties themselves, if a contract existed, have a right to come into this court which has jurisdiction to hear cases on contract, and that if the statute does not apply, as it manifestly does not, because this is by admission an employers' liability case under the Federal statute which is exclusive, manifestly they have a right to come here to have that contract enforced. 20 30

And the last ground urged is, or the last point is that the payment of the alleged compensation could only be made under the State act and that this court has no right to enforce it. That I have already disposed of.

MR. SMITH: I want to add one other ground. If there was an agreement made it 40

Charge.

was abrogated by the plaintiff in applying for and obtaining a position of bridgeman.

10 THE COURT: Yes. Now as to that point, I overrule the motion on that ground also because there does not appear to have been any contract or meeting of the minds between the parties in which there was an intention on the one part to abrogate his previous acts in consideration of the fact that he would be given a job; no one has testified that any such conversation took place, and in the absence of evidence I cannot consent that such a situation existed.

So I will deny the motion and you may have your objection entered on the record.

Exception noted by defendant.

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Charge.

GENTLEMEN OF THE JURY:

30 This suit is brought by Charles F. McDonald against the Central Railroad Company of New Jersey, and the claim that Mr. McDonald makes is that on January 19, 1914, at Jersey City the defendant was engaged in the business of a common carrier of passengers and freight by railroad, that at that time and place and for months prior thereto the plaintiff was in the employ of the defendant as a yard brakeman or driller, that at that time and place the plaintiff while so employed received in his employment certain injuries to his right ankle and the bones in his left hand and wrist; that on the 25th of February, 1914, and within one year after the accident in which the said plaintiff received the injuries
40 hereinbefore stated the plaintiff and defendant agreed upon a claim for compensation under

Charge.

what is known as the New Jersey State compensation act; that at the last mentioned date the defendant contracted and agreed to and with the plaintiff to pay to him the sum of \$6.20 a week during the period of such disability, not however beyond three hundred weeks, and that the injuries to the plaintiff produced disability partial in character but permanent in quality in this, that his right ankle is disabled and weak and the movement of his left wrist impaired and diminished; that by virtue of the agreement he received \$49.60 in part payments and that the defendant has failed to make any further payments to him, and that at no time has the agreement for compensation been modified, and that therefore he claims to be entitled to recover \$798.80 with interest and costs by virtue of this agreement. 10

The defendant admits by its answer that it made this contract with him, the answer providing that defendant admits the allegations contained in the first, second, third, fifth—which is the one containing the alleged contract—eighth, ninth, tenth and eleventh paragraphs of the complaint. Now the defendant contended that such a contract could not be enforced in this court for the reason that the State compensation act is a special act giving rise to a special remedy to be enforced in a particular court other than this one. You have nothing to do with that contention because I have decided that if there was a contract entered into between these parties that that contract is the basis of the suit and not the State compensation act, and if that contract as alleged was made between the parties and if the contract provided as the plaintiff contends it did in his sixth paragraph, which is not admitted by the answer of the defendant, that at said last mentioned date the said de- 20 30 40

Charge.

defendant contracted and agreed to and with the
 plaintiff to pay to him the sum of \$6.20 a week
 during the period of such disability not however
 beyond three hundred weeks—if, I say, the plain-
 tiff has made out the fact of such a contract by
 the greater weight of the evidence he would be
 entitled to your verdict and to have you assess
 10 his damages in this case. Now this contract the
 plaintiff claims is admitted also by a release
 and agreement for compensation which has been
 offered in evidence in the case and which bears
 date the 25th day of February, 1914, wherein it
 is recited that the plaintiff, Mr. McDonald, has
 represented that section two of chapter ninety-
 five of the laws of New Jersey for 1911—which
 is the State compensation act—apply to my said
 employment, and has requested the said railroad
 20 company to make compensation in accordance
 with the provisions thereof; and then the agree-
 ment produced from the custody of defendant
 recites that the railroad company has promised
 so to do. If you believe, as I say, that this con-
 tract was made, you then come to the question
 as to what the nature of this disability is—
 whether it still exists; whether there has been
 any abrogation of this contract on the part of
 the plaintiff and the defendant, and whether any
 30 compensation is now due the plaintiff under the
 contract.

Now in the first place we have got to see what
 the State compensation act provides in the par-
 ticular upon which the plaintiff in this suit
 relies. The act provides that for disability par-
 tial in character but permanent in quality the
 compensation shall be based upon the extent of
 such disability; and the plaintiff in this case says
 40 that it was agreed between him and the railroad
 company that the injury produced a disability
 which entitled him to recover \$6.20 a week; and

Charge.

if that contract was made between these parties the act further provides that in no case shall the total number of weekly payments be more than four hundred—but the plaintiff himself by his own written complaint has stated and thereby limited himself in his right of recovery, that the agreement between the parties was that the disability, however, and the payment therefor, should not extend beyond three hundred weeks; but that matter has very little to do in this case because if the plaintiff is entitled to recover here he is only entitled to recover compensation for the period between the time of his injury when the contract was made, that is the 25th of February, 1914, and the 25th day of September, 1916, when this action was started. That is the limit of his right to recover if he is entitled to recover at all. And that brings us to consider whether he is entitled to recover at all, and that you can readily observe, gentlemen, depends upon the question as to whether or not there still exists in him a disability partial in character but permanent in quality. Now upon that subject there has been a considerable amount of evidence introduced, and the law has laid down the rule that “the term disability is not restricted to such disability as impairs present earning power at the particular occupation, but embraces any loss of physical function which detracts from the former efficiency of the body or its members in the ordinary conditions of life.” Now the plaintiff says that he suffers from such a disability and he has produced a doctor here to testify in his behalf. The defendant asserts that he is laboring under no such disability and has not been for a considerable period of time past and that therefore, there being no disability there can be no payment because payment depends, under the very contract that the plaintiff relies upon, upon

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Charge.

an existing disability—existing during the period for which he seeks to have recovery in this action, and the defendant has produced a doctor here who says that no such disability exists. Now the burden of showing that such disability does exist and the extent of it rests upon the plaintiff, and he must make it out by the greater weight of evidence. If he has made it out and has made out the contract here under the rules which I have given you, and its breach, then he would be entitled to have your verdict to the extent to which he has shown disability to exist, not beyond the 25th of September, 1916. If he has not made it out by the greater weight of the evidence, why manifestly the verdict under such circumstances would have to be for the defendant.

Now the defendant makes another contention. Defendant says that Mr. McDonald abrogated this contract which he claims to have with the railroad company by taking other employment because he considered that that employment at some sum amounting to something more than \$60 a month was more valuable and better to him than the \$6.20 a week, and that the fact that he intended to abrogate it and that the company intended to abrogate it is manifest by the manner in which they both dealt with it, because the company did not pay it any more and they claim that McDonald did not make any demand for it any more. Now one of the means of determining whether a contract exists or has been abrogated is to look at the manner in which the parties treated the matter themselves, and see whether they treated it in a manner to indicate its further continuance or its abrogation. Now to establish that the contract which the plaintiff relies upon was abrogated, if the plaintiff has made out that such a contract existed, the burden rests upon

Exhibits.

the defendant, and the defendant must show by the greater weight of the evidence, if he relies upon that as a defense, that there was such an abrogation. If the defendant has thus shown it it would be a complete defense in this suit. If he has not shown it of course it would have no effect upon the suit whatever and the plaintiff would be entitled to recover if he has made out his action. 10

Now you will take the case under these rules and decide it.

Exhibit P-1—Release.

WHEREAS I, Charles F. McDonald, of the City of Jersey City, in the County of Hudson and State of New Jersey, was injured on the nineteenth day of January, Nineteen hundred and fourteen, in the course of my employment as driller for the Central Railroad Company of New Jersey while drilling cars in the Jersey City Passenger Yard near Fiddlers, and 20

WHEREAS, I have represented that Section 11 of Chapter 95 of the Laws of New Jersey for 1911 applied to my said employment and have requested said Railroad Company to make compensation in accordance with the provisions thereof, and

WHEREAS, said Railroad Company has promised so to do, and in addition thereto, to pay me the sum of One Dollar (\$1.00) in full satisfaction and discharge of any further right to compensation which I, my executors, administrators or assigns, or any other person, now has, or may have, by reason of the premises, now, therefore 30

KNOW ALL MEN BY THESE PRESENTS, That for and in consideration of the above promise to make compensation as aforesaid and One Dollar (\$1.00) lawful money of the United States of 40

Exhibits.

America to me in hand paid by The Central Railroad Company of New Jersey, the receipt whereof is hereby acknowledged, I have remised, released and forever discharged, and by these presents do for myself, my heirs, executors and administrators, remise, release and forever discharge The Central Railroad Company of New Jersey, its successors
 10 and assigns, of and from all claims and demands whatsoever which against the said Railroad Company I ever had, now have, or which my heirs, executors or administrators hereafter may have by reason of any matter, cause or things whatsoever, from the beginning of the world to the date of these presents and particularly, but without limitation of the foregoing general terms, by reason of the aforesaid injuries so occurring to me as aforesaid.

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CHARLES F. McDONALD. (L.S.)

Dated, this 25th day of February, 1914.

Signed, sealed and delivered

in the presence of

WILLIAM W. GIDDES.

STATE OF NEW JERSEY, }
 County of Hudson. } ss.:

BE IT REMEMBERED, that on this 25th day of
 30 February, Nineteen hundred and fourteen, before the subscriber, a Master in Chancery of New Jersey, personally appeared Charles F. McDonald, the person described in and who executed the within release, to me personally known to be, and who I am satisfied is such person, and I having made known to him the contents thereof, he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

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JOHN K. LARGE,
 M. C. C. of N. J.

*Exhibits.***Exhibit P-2—Receipt.**

Jersey City, N. J., February 25, 1914.

RECEIVED FROM THE CENTRAL RAILROAD OF NEW JERSEY, Eighteen and 60/100—Dollars—(\$18.60) in pursuance of the provisions of a certain Deed of Release executed by me on the 25th day of February, Nineteen hundred and fourteen, being the compensation to which I am entitled thereunder for three weeks from the 3rd day of February, Nineteen hundred and fourteen, to the 23rd day of February, Nineteen hundred and fourteen, both inclusive. 10

CHARLES F. McDONALD.

Witness:

WILLIAM W. GIDDES.

Exhibit P-3—Voucher.

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THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

Memo of Draft.

Drawn by Chief Special Agent on Treasurer.

Dated, February 25, 1914.

In favor of Charles F. McDonald.

Paid Feb. 27, 1914.

Treasurer's Office.

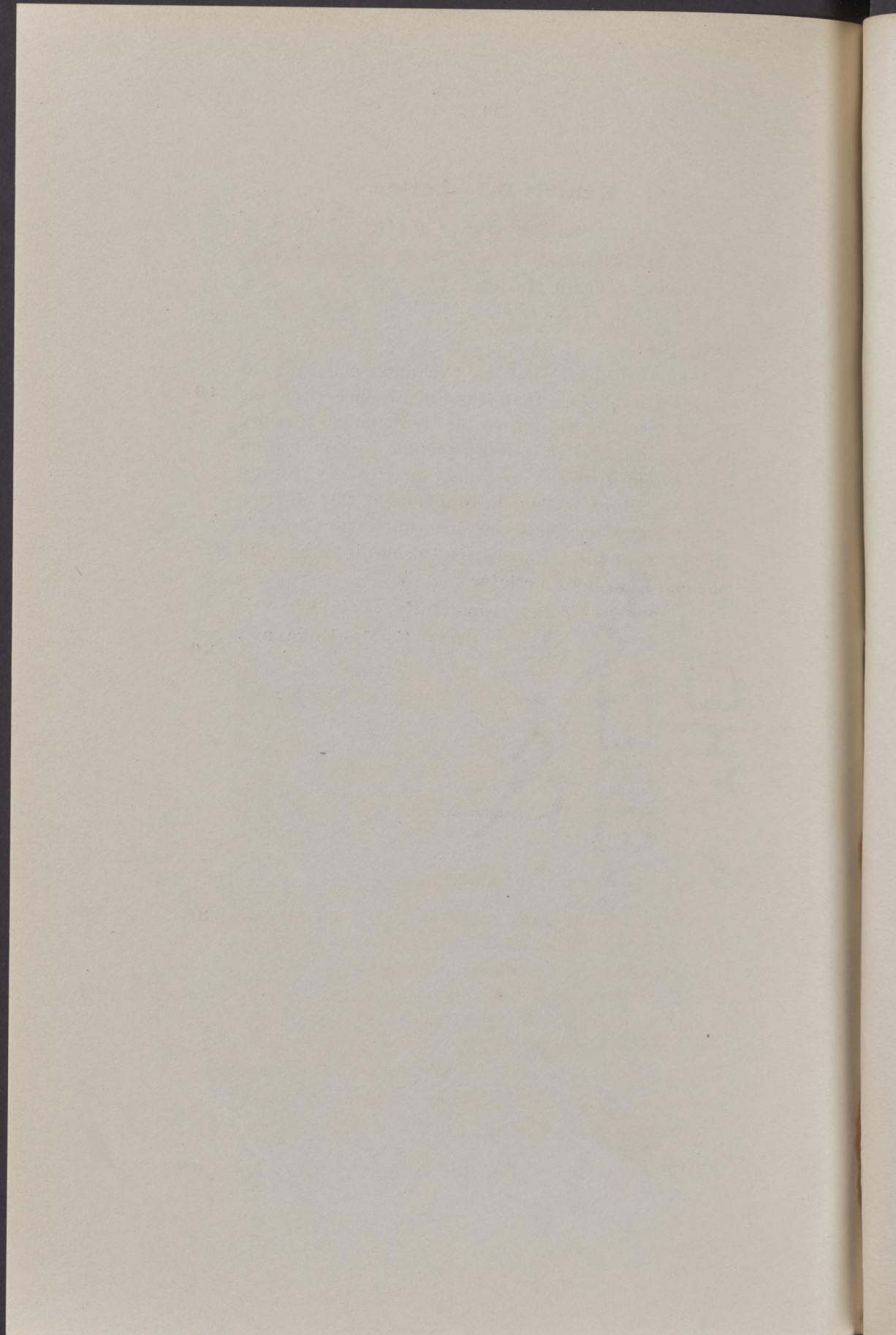
Amount of Draft, \$18.60.

THE CENTRAL RAILROAD OF NEW JERSEY. 30

Payment No. 3.

Jersey City, N. J., February 25, 1914.

Pay to the order of Charles F. McDonald \$18.60 Eighteen and 60/100.....Dollars for three weeks' compensation from February 3, 1914, to February 23, 1914, in pursuance of the provisions of a Deed of Release executed by him on February 25, 1914, covering injuries sustained by him January 19, 1914. 40



New Jersey Court of Errors and Appeals.

CHARLES McDONALD,
Plaintiff-Appellee,
vs.
CENTRAL RAILROAD COMPANY OF
NEW JERSEY,
Defendant-Appellant.

At Law. 10

BRIEF FOR DEFENDANT-APPELLANT.

Statement.

This case was tried in the New Jersey Supreme Court (Hudson Circuit) before the Honorable William H. Speer, to whom the same was referred for trial, and a jury. It resulted in a verdict for plaintiff in the sum of Five Hundred Two Dollars (\$502). The case now comes before this Court on appeal. 20

Facts.

Defendant owns and operates a railroad engaged in Interstate Commerce. Plaintiff was employed by defendant in Interstate Commerce as a brakeman. While so employed he received an injury. After the injury and on February 25, 1914, plaintiff went to the office of the Company at Communipaw, Hudson County, New Jersey, and there consulted with a Mr. Giddes, an employe of the defendant, as to whether he was entitled to com- 30

10 pensation for his injuries. There he executed a paper called "Release and Agreement for Compensation", wherein it is set forth that plaintiff, having represented that the Workmen's Compensation Act applied to his employment, requested the Company to make compensation in accordance with the provisions thereof, and the Company agreeing so to do and to pay him \$1.00 in satisfaction of any further right to compensation he had against the Company, he did release it from all claims he had, or could have, against it. Plaintiff, thereafter, received from the Company the sum of \$6.20 per week for eight weeks and executed receipts therefor.

20 On April 5, 1914, plaintiff went to a Mr. English, the head of the department he had been working for, and asked for employment, and he was given a position on the bridges which connect the upper decks of the ferryboats with the ferryhouse. His pay was \$63.20 per month. He worked as such bridgeman for four months or more, when he was discharged from that department for not attending to his work.

He then applied for leave of absence and went to California, and in October wrote to his superior officer and resigned from the service of the company.

30 Shortly thereafter he commenced an action against the defendant under the Federal Employer's Liability Act. Defendant answered setting up, among other things, the release above mentioned. Plaintiff replied alleging that such alleged release was obtained from him by fraud and did not represent the alleged agreement made between the parties and was no contract. After several trials the jury returned a verdict for defendant.

40 Plaintiff thereupon brought the action now under consideration.

Present Action.

Plaintiff alleges in his complaint that on February 25, 1914, plaintiff and defendant agreed upon a claim for compensation under the terms of the New Jersey State Compensation Act, whereby defendant contracted and agreed to and with plaintiff to pay him the sum of \$6.20 per week during a period of disability, not, however, beyond 300 weeks. That plaintiff's injuries were permanent and still exist. That defendant paid him \$49.60 and refuses to pay him any more; that there is due to plaintiff from defendant \$799.80. 10

Defendant, answering the complaint, denied the injuries alleged, or the making of the alleged agreement, and alleged that the facts set out in the complaint do not constitute a cause of action cognizable by the Supreme Court.

The case came on for trial and was submitted to the jury, which returned a verdict for \$502.20. 20

ARGUMENT.

POINT I.

Plaintiff failed to establish the contract relied upon.

The contract relied upon by the plaintiff was the paper entitled "Release and Agreement for Compensation", offered by plaintiff on the trial and marked "P-1" (see Record, p. 55). The testimony of plaintiff on the subject of this alleged contract was that at the time of the execution thereof, he did not give the railroad company anything, nor agreed to do anything for it (pp. 28, 29), and that he did not sign it with knowledge of its contents (p. 19), and that he did not agree as therein set forth, and that it did not set forth his alleged contract with defendant (p. 19), and that it was obtained from him by fraud (p. 18). 30 40

It can hardly be argued that by such evidence a valid contract entered into between the parties was established. The Court refused to non-suit the plaintiff or direct a verdict for defendant upon the ground that no enforceable contract had been proven and stated its reasons to be as follows:

10 “Now one ground upon which the motion is made that there is not any contract here. The answer to that is that the jury may find that there is a contract and that the testimony of Mr. McDonald in which he said that he did not intend to bind himself is merely his construction of the legal effect of facts which actually occurred between the parties. Whether a contract arose or not depends upon the facts and not upon his understanding of them. If a man performs acts which have legal consequences, the legal consequences attach whether he thinks they do or not. If a man enters into a negotiation which results in law in a contract the fact that he did not think it was going to be attended with contractual obligations is a matter of supreme inconsequence. These principles you will find hinted at in *Five vs. Pennsylvania Railroad*, where the Court said that if a man signs, with his eyes open, a contract, without fraud being practiced upon him, he will not be heard to say that he did not mean to be bound, but he will be bound whether he thought he was or not, and whether he says he thought he was or not. So in this case the sole inquiry is whether or not McDonald performed acts and made statements and did things which in legal contemplation give rise to a contract. Now the jury may conclude in this case that he did and that having done those acts those acts would be attended with the legal consequences that always attend acts of that character and will give rise, if their tendency is to give rise to a contract.”

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The Court thus permits the jury to find that the plaintiff may recover upon a contract which he insists he never intended to make, did not make,

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never acted under, did not consider binding upon him and positively and distinctly repudiates. Such cannot be done. Plaintiff must recover, if at all, upon the contract alleged. He claims under the paper dated February 25, marked Exhibit P-1. He testifies Exhibit P-1 is not his contract and that the writing is not any agreement he made with defendant (through Mr. Giddes). He neither alleged nor proved any other contract.

The trial court, however, insists that the matter was not to be governed by the testimony of plaintiff that the paper relied upon was not his contract, but by the actions of the parties, and that from the fact that defendant paid certain moneys to plaintiff under the terms of the alleged contract, which payments plaintiff received, the jury would be justified in finding that a contract existed, and that such contract was Exhibit P-1. 10

While it may be true that where there is a dispute as to the existence of a contract—one side alleging the making, existence and validity thereof, and the other denying the same or asserting the invalidity thereof—the jury may, from facts and circumstances, find the making, existence and validity thereof, or vice versa, yet, we insist, where, as in this case the person in whose behalf the alleged contract is offered distinctly and positively denies the making, existence and validity thereof, and the other side does not seek to hold him to the terms thereof, the jury cannot be permitted to find the making, existence or validity of a binding contract and award damages to the plaintiff thereunder. 20 30

To permit such is to permit a jury to award damages to a plaintiff upon an alleged contract which he insists he did not make and under which he acquired no rights.

POINT II.

Unless the plaintiff be held to have given up or waived all rights against the defendant under the Federal Employers' Liability Act, there was no consideration for the making of the said alleged contract, and, therefore, no enforceable contract exists.

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Plaintiff testifies that he did not pay to Mr. Giddes, the agent of defendant, anything; nor give him anything, nor agree or promise to do anything for the defendant at the time of the making of said alleged contract (record pp. 28-29). Ordinarily under such circumstances, it is apparent that said alleged contract was without consideration and unenforceable.

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It may be said, however, that plaintiff, at the time of entering into said alleged contract, was possessed of a right of action against the defendant under the terms of the Federal Employers' Liability Act, and that by entering into said alleged contract with defendant, plaintiff gave up or waived any right or cause of action he may have had against the defendant under the terms of said Federal Employers' Liability Act, and that such was a valuable consideration for the entering into of said contract.

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If this be held, then, a consideration (provided it can lawfully be held that the contract alleged and offered in evidence, was the valid contract of plaintiff) would apparently have been given. Unless it is so held it is apparent that no consideration was given.

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POINT III.

No breach of the alleged contract was shown.

Assuming the binding face of the alleged contract upon the parties, we submit there was no breach thereof by defendant.

By the terms of the alleged contract defendant agreed to pay to plaintiff compensation according to the provisions of Section 11 of Chapter 95 of the Laws of New Jersey for 1911 (commonly known as the "Workmen's Compensation Act"). Under this act plaintiff would be entitled to 50% of his daily wages during the term of his disability not exceeding 300 weeks. The weekly amount payable would be \$6.20. Such is not disputed. The remaining question is "for how long a time should compensation be paid". The answer depends upon how long the disability lasted. The alleged contract was dated February 25, 1914. Compensation was paid to him every two weeks thereafter at the rate of \$6.20 per week. The last receipt signed by him was dated March 31, and was for compensation for one week to that date (record pp. 14-58).

On April 1st plaintiff applied to the head of his department for a position and was given a position as bridge man (record p. 37) and on April 5, 1914 went to work as such (p. 15). Plaintiff testifies that he *applied* for the position (record p. 23) (defendant did not offer it) and that he applied for it because "\$63 a month was better than \$6.20 a week" (record p. 24). He worked as bridgeman from April 5th to August 10th, when he was laid off for refusing to perform the work assigned to him (record pp. 38-39). He later resigned from the employment of defendant (record p. 26).

Up to the time, then, that plaintiff applied to it for employment (April 1st) defendant had paid him compensation. Plaintiff then did not desire to continue on at \$6.20 per week but desired to make a new arrangement with defendant and sought from it employment at a figure greatly in excess of \$6.20 per week. He was given such employment and from the date of his employment as bridgeman up to the time he was laid off from that department—a *period of more than four months*—he never once asked for compensation under the terms of his alleged contract—although the office of Mr. Giddes, where he had been accustomed to go for his checks was in the same building in which he worked (record page 27). Plaintiff admits that during all this time he thought the compensation payments had ceased and, in fact, it was with that thought in his mind that he applied for a position as bridgeman (record p. 27). It is true that plaintiff *states* that he had not been receiving his compensation for some time prior to his applying for a position, but an examination of the vouchers submitted in evidence by his counsel discloses that he was paid compensation regularly from February 3, 1915, to March 31, 1915, and that on April 1st, or the day after he received his last compensation payment, he applied for the position as bridgeman. If he had knowledge then that his compensation payments had ceased, he must have acquired such knowledge on March 31st, because had the defendant determined prior to March 31st that his compensation had ceased, it would not have paid him *up to March 31st*. Defendant evidently considered plaintiff fit to return to work. On that date his compensation payments ceased. Evidently this was *by agreement*. Plaintiff knew it because he admits it. Defendant paid no further compensation.

On April 1st the parties with knowledge that compensation payments ceased on March 31st, entered into a new arrangement, to wit, employment of plaintiff by defendant as bridgeman at \$63. per month. Plaintiff accepted the employment at such figure and defendant paid him the wages agreed upon.

There was no proof of any breach of the contract relied upon.

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POINT IV.

The contract alleged was an agreement between the parties that their relations were governed by the terms of the "Workmen's Compensation Act" (section 2, chapter 95, laws of 1911) and payments to be made by defendant to plaintiff should be made under the terms of said act: Said act provides a remedy for the enforcement of the terms thereof, and such remedy is exclusive, and the contract confers upon the plaintiff no right enforceable in the New Jersey Supreme Court in an action to recover compensation.

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The contract between the parties, assuming it to be a valid contract, is plain. After setting forth that the relation of master and servant existed between them at the time of the injury to plaintiff, it is expressly agreed that the terms of Section 2, Chapter 95 of the Laws of New Jersey for 1911 (being the Workmen's Compensation Act) applied to their relations, and it is agreed that compensation shall be paid to plaintiff by defendant in accordance with the terms of such act. The relation of the parties therefore, and their rights, are to be determined by the terms of the Act.

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By Section 18 of the Act, it is provided that:

10 “In case of a dispute, or the failure to agree upon a claim for compensation between the employer and the employe, *
 * either party may submit the claim, both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefore according to the schedule herein provided, to the judge of the Court of Common Pleas of such county as would have jurisdiction in a civil case, or, where there is more than one judge of said court then to either or any of said judges of such court which judge is hereby authorized to hear and determine such disputes in a summary manner, and his decision as to all questions of fact shall be conclusive and binding.”

20 Section 20 provides the procedure to be followed—The statute thus provides a remedy for the recovery of the compensation for injuries received by the employe arising out of and in the course of his employment, and the forum and procedure wherein and whereby such remedy is enforceable. Such remedy is exclusive.

Paragraph 7, (Section 2) of the Act provides:

30 “When employer and employe shall, by agreement, either express or implied as hereinafter provided, accept the provisions of Section 2 of this Act compensation for personal injuries to, or for the death of, such employe by accident arising out of and in the course of his employment, shall be made by the employer without regard to the negligence of the employer according to the schedule contained in Paragraph 11 etc.”

And paragraph 8 (Section 2) provides:

40 “Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof, than

as provided in Section 2 of this Act, and shall bind the employe himself, and for compensation for his death, shall bind his personal representatives, his widow and next of kin as well as the employer and those conducting his business during bankruptcy or insolvency."

In the case of *Gregutis v. Waclark Wire Works*, 86 N. J. L. page 610 (at 613) the Court of Errors and Appeals said: (Italics ours)

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"Now Paragraph 7 (Section 2) of the Workmen's Compensation Act (Pamphlet Laws 1911, page 136) provides that—'When employer and employe shall, by agreement either express or implied as hereinafter provided, accept the provisions of Section 2 of this Act, compensation for personal injuries to, or for the death of such employe by accident arising out of and in the course of his employment, shall be made by the employer without regard to the negligence of the employer according to the schedule contained in Paragraph 11, etc.' and Paragraph 8, (Section 2) provides that—'Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof, than as provided in Section 2 of this Act, and an acceptance of all the provisions of Section 2 of this Act, and shall bind the employe himself, and for compensation for his death shall bind his personal representatives, his widow and next of kin as well as the employer and those conducting his business during bankruptcy or insolvency.'

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"By force of these provisions therefore, the decedent, if he had suffered an injury not resulting in death, would have been limited to the recovery of the compensation provided for in Section 2, and by the procedure and in the forum provided in the *Workmen's Compensation Act*, and he could not have brought suit for his injury in disregard of that Act."

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In the case of *McRoberts v. National Zinc Co.*, (1914) 93 Kansas, 364, 144 Pac. 247, it is held that where the employer and employe have elected to act within the provisions of the Compensation Law, that law is exclusive.

In the case of *King v. Viscoloid Co.*, 219 Mass., 420, 106 N. E. 988, the Court said:

10 “Legislature by the Compensation Act intended to take away from employes who should become subject to its provisions all other remedies that they had against their employers for injuries happening in the course of their employment and arising therefrom, and to substitute for such remedies the wider right of compensation given by the act.”

20 The trial court assumed the position that the action was based upon a *contract* and not upon the statute, and that, therefore, “the only function of the statute, that is the State Compensation Act, is an agreed measure of compensation” (record p. 47) and that the parties could not by agreement oust the Supreme Court of jurisdiction.

30 The trial court seeks to apply one portion of the statute to the case at bar and to exclude the others, but this cannot be done without doing violence to the contract. The agreement was that compensation should be made in accordance with (all) the provisions thereof. One of the provisions of *such statute* is that the extent and effect of the injuries to plaintiff shall be determined by the Court of Common Pleas of such county as would have jurisdiction in a civil case. The court could not apply one of the provisions of the statute to the case at bar and refused to apply the other provisions thereof directly applicable thereto. Such would

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work great injustice to defendant and be in direct violation of the terms of the agreement.

While we admit that parties cannot, by contract, oust the court of jurisdiction, we submit that no attempt has been made in this case to do so. No agreement was made ousting any court of any jurisdiction.

The agreement was that the parties should be bound by the terms of the *statute*, and the *statute* determines the *forum* in which the rights of the party shall be determined and the *procedure* to be following therein. Nor does the agreement attempt to give the Court jurisdiction by consent. The statute *invests* the Court of Common Pleas of the county which would have jurisdiction in a civil case with jurisdiction to determine the rights of the parties. The agreement confers no jurisdiction nor attempts so to do.

While it may be true that the plaintiff had a right or cause of action against defendant under the terms of the Federal Employer's Liability Act, such right or cause of action might be waived by plaintiff, and in entering into the terms of the contract set forth such waiver is implied, and we see no objection to the parties agreeing to be bound by the terms of the Workmen's Compensation Act.

We submit that the parties having agreed that the employment of plaintiff by defendant should be covered by the terms of the Workmen's Compensation Act, and that act conferring jurisdiction over all disputes between the parties upon the judge of the Court of Common Pleas of such county as would have jurisdiction in a civil case, which jurisdiction the Court of Errors and Appeals of the State of New Jersey has held

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to be exclusive, no right was conferred by such contract or statute upon plaintiff whereby he could have his rights, or the rights and liabilities of defendant, under such contract determined by any other court.

We respectfully submit that the Court erred in refusing to non-suit the plaintiff and direct a verdict for the defendant.

10 CHARLES E. MILLER,
Attorney of Defendant-Appellant.

EDWIN F. SMITH,
Of Counsel.

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NEW JERSEY
Court of Errors and Appeals.

CHARLES F. McDONALD,
Plaintiff-Respondent,

vs.

CENTRAL RAILROAD COMPANY
OF NEW JERSEY,
Defendant-Appellant.

*On Appeal from
New Jersey
Supreme Court.*

Brief on Behalf of Respondent.

STATEMENT OF FACTS.

1. This action is upon a contract made Feb. 25, 1914, by which defendant agreed to pay to plaintiff under the State Compensation Act \$6.20 a week, and which was to be continued during the period of disability, not to exceed four hundred weeks, and which contract was agreed to by the plaintiff.

2. On the trial the plaintiff *testified* that the payments were to continue during disability not to exceed *three* hundred weeks and not *four* hundred weeks as alleged in the complaint.

3. It was admitted on the trial that at the time of the accident to the plaintiff, Jan. 14, 1914, the plaintiff and defendant were engaged in interstate commerce (fol. 20 p. 8 case.)

4. The making of this contract sued upon is alleged in the 5th paragraph of plaintiff's complaint

and is admitted by the 1st allegation of defendant's answer. See also, ptffs Ex. 1, p. 13 case.

5. On Feby. 25, 1914, defendant paid to the plaintiff, \$18.60, three weeks' compensation, at the rate of \$6.20 a week; on March 9th, 1914, paid to him one weeks' compensation, \$12.40; and on March 23, 1914, two weeks' compensation, \$12.40; and on March 31st, 1914, one weeks' compensation, \$6.20; i. e., \$49.60 in all. See plffs Ex. 2, 3, 4, 5 and 6, p. 55⁵⁸ case.

6. At the time of the accident, Jany. 14, 1914, plaintiff was a brakeman employed by the defendant, and on April 5th, 1914, plaintiff was given a light position as bridgeman, and which position he held until August 10, 1914, when he was discharged, and was then told that "the job no longer existed, owing to a reduction of force by the defendant."

7. Plaintiff's left ankle and right wrist were fractured at the time of the accident, and are both, at the time of the trial, in a disabled condition. From the testimony of the plaintiff (fol. 167, case) and his physician, Dr. Mooney (fol. 20, p. 9 case) it appears that his disability still continues, which makes the defendant liable to the plaintiff for \$6.20 a week, from March 31st, 1914, the date of the last payment to him, down to the date of the commencement of this action, Sept. 25, 1915.

8. On Sept. 9th, 1914, the plaintiff demanded of the defendant the compensation of \$6.20 a week which had been paid him to March 31st, 1914, when the payment ceased, but was, on this date, told that no further payments would be made to him. (See fol. 20, p. 15 case.)

I.

The Supreme Court had jurisdiction to try this action.

By Section 18 of the Employers' Liability Act, it is provided, in case of a dispute or failure to agree upon a claim for compensation, either party may submit the claim to the Judge of the Court of Common Pleas, and who is authorized to hear and determine such dispute. Section 20 provides for the procedure in case of dispute, and provides that the petition should state the matters in dispute, and the contention of the petitioner, with reference thereto.

This section further provides, that upon the presentation of such petition—*i. e.*, a petition presenting the matters in dispute—Common Pleas should fix a time for hearing, and that the answer shall state the contention of the defendant with reference to the matters in dispute, and that on the hearing, the Judge, in a summary manner, shall decide the merits of the controversy.

We think, that from the foregoing statement of the statute, that where the amount to be paid has been agreed upon between the parties, and that there is no matter of dispute between them, and that the agreement of the defendant to pay compensation has not been performed, an action at law lies for such an amount as is due under the agreement.

By the State Compensation Act, it is provided, among other things:

“For injury producing temporary disability, fifty per centum of the wages received at the time of the injury, subject to a maximum compensation of ten dollars

per week and a minimum of five dollars per week; provided, that if at the time of the injury the employee receives wages of less than five dollars per week, then he shall receive the full amount of such wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks."

"For disability partial in character but permanent in quality, the compensation shall be based upon the extent of such disability.

"In all other cases in this class, or where the usefulness of a member or any physical function, is permanently impaired, the compensation shall bear such relation to the amounts stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule."

"Compensation for all classes of injuries shall run consecutively and not concurrently, as follows: First two weeks, medical and hospital services and medicines, as provided in paragraph fourteen. After the first two weeks, compensation during temporary disability. Following both, either or none of the above, compensation consecutively for each permanent injury. In no case shall the total number of weekly payments be more than four hundred.

On a motion made before the trial, Judge Speer decided:

"In this case objection is made that the complaint does not state facts sufficient to constitute a cause

of action in this Court for the reason that the sole jurisdiction is vested in the Court of Common Pleas."

"I have concluded that the complaint is sufficient. There is here no effort to usurp any of the legitimate functions of the Court of Common Pleas. There is "no dispute" here for that Court to determine, or of which it is the sole judicial arbiter. The parties have, by contract, determined a certain sum to be due from one to the other and this is an effort to enforce performance of that contract. Of such a matter this Court, it seems to me, has jurisdiction and nothing in the Employer's Liability Act ousts it thereof. The question at issue will be contract or no contract; if a contract, was it performed or not?"

II.

There was ample consideration for the promise of the defendant.

It appears by the admission of the defendant (fol. 20 p. 8 case), that at the time the accident happened to the plaintiff, the plaintiff and the defendant were each engaged in interstate commerce. This, under the recent decisions of the Supreme Court of the United States, vested a cause of action in the plaintiff against the defendant under the Federal Act and which cause of action was exclusive of the State Employers' Liability Act.

It appears from the plaintiff's Exhibit, #1, p. case, that the plaintiff released all causes of action which he had against the defendant, including the cause of action for damages under the Federal Act in consideration of the defendant's agreement to pay to the plaintiff such compensation as was provided for by the Employers' Liability Act. The release of this cause of action certainly was ample considera-

tion for the defendant's promise to pay. There is also in plaintiff's Exhibit, #1, mutual promises, one by the plaintiff to accept compensation under the State Compenations Act, and the other by the defendant to pay to the plaintiff compensation under the State Compensation Act and which mutual promises also constituted ample consideration for the defendant's promise to pay.

III.

The question as to whether the contract was abrogated by an agreement between the parties was a question of fact which was submitted to the jury. The jury, by the verdict, decided this question of fact in favor of the plaintiff against the defendant. The jurisdiction of this Court is confined to a review of questions at law; *Klitch vs. Betts*, 98 Atlantic, 427.

IV.

The defense that the contract of the defendant was abrogated by a subsequent agreement must be pleaded.

The defendant by claiming that the contract was abrogated by a subsequent agreement of the parties (aside from the admission in the defendant's answer that it made the contract with the plaintiff) admits the making of such contract. The claim that the contract was abrogated by a subsequent agreement is a defense in confession and avoidance of the contract, and being in the nature of a confession and avoidance, it is necessary under the Practice Act that such a defense should be pleaded in the defendant's answer. This was not done. Sec. 58, in the Practice Act provides that the answer must specifically state any defense which is consistent with the truth of the material allegation of

the complaint, and any defense which, if not stated, would be likely to cause a surprise, or would raise issues not arising out of the complaint. For instance, the statute of frauds, or of limitations, releases, payment, performance, or facts showing fraud, illegality, or contributory negligence. (Rule 40, Pr. Act, 1912.)

The defense raised on the trial, without being pleaded in the answer, that the contract, and which was admitted by the answer was abrogated by a subsequent agreement, was certainly a defense "Which if not stated would be likely to cause a surprise and one which would raise an issue not arising out of the complaint." The plaintiff on the trial objected to any such evidence by the defense on the ground that it was not pleaded in the answer. (See fol. 30, p. 38, case.)

"A plea in confession and avoidance is necessary only when defendant proposes to admit the truth of a material allegation made by plaintiff, and to avoid liability thereon by affirmative proof of matters which destroy the effect of the allegations admitted." (81 Cyc.), 215.

* * * * *

"It should fairly apprise plaintiff of the facts relied on as a defense." (81 Cyc.), 216.

* * * * *

Avoidance. "A plea in confession and avoidance or, as it is frequently called, a special plea, must set up matter which, if true, affords a full and complete answer to the action. A plea which confesses without avoiding is bad." (81 Cyc.), 217. * * * * *

New matter under the Codes. "The ordinary provision of the codes is that the answer may contain a statement of any new matter constituting a defense. * * New matter must always be specially pleaded. * * New matter means extrinsic to the matter which is set up in the complaint as the basis of the cause of action." (81 Cyc.), 218-219.

V.

The contract of the defendant was not abrogated by any subsequent agreement.

The fact that the defendant gave to the plaintiff after the accident employment as a bridgeman could not of itself work an abrogation of the contract made with plaintiff. And there is no evidence in the case that the giving of such employment to the plaintiff and his acceptance of such employment was ever treated, urged or agreed to between the parties to be in abrogation of the previous contract.

VI.

The judgment of the Supreme Court should be affirmed.

Respectfully submitted,

CHARLES M. EGAN,

Attorney for Respondent.

Nov. 1, 1917.

