

NEW JERSEY

Court of Errors and Appeals.

<p>CHARLES F. McDONALD, Plaintiff-Appellant, vs. CENTRAL RAILROAD COMPANY, OF NEW JERSEY, a corporation, Defendant-Appellee.</p>	}	<p>Action at law on appeal from Supreme Court</p>
--	---	---

Brief on behalf of Plaintiff-Appellant.

The appeal to this Court presents the question as to whether upon the evidence there was a question for a jury to pass upon as to fraud in obtaining a release executed by the plaintiff, to the defendant.

STATEMENT OF FACTS.

The evidence shows that when McDonald called upon the general claim agent of the defendant that he was informed by him that his only ground and basis for damages for his injuries where such as were provided for by the State Compensation Act, which allowed him for a permanent injury fifty per cent. of his wages for three hundred weeks. McDonald says that he did not at the time know anything about the State Compensation Act; neither did he know that if he and the defendant were engaged in Interstate Commerce at the time of the accident that the State Compensation Act did not apply, and that he was not entitled to any compensation under it; but that his claim for damages was based entirely upon the Federal Statute. That he

was without any business experience, and in *signing the release, he relied upon the word and superior judgment of the claim agent.* The evidence further shows, that McDonald did not read the release, but that it was hurriedly read over to him, and that he did not know and understand what it contained, and was told that it was a mere matter of form, and that he was led to believe that it contained a provision: 1st. For a payment to him of \$6.20 for 300 weeks; and, 2nd. That it contained a provision for his continuous employment thereafter, and that in signing the release he did not understand what he was doing, and believed that he was signing something other than that which he really signed.

The release recites that it was given for two distinct considerations—one, in consideration of the defendant's promise to make such compensation as the plaintiff was entitled to under the State Act, and, two, "in addition thereto to pay plaintiff one dollar in discharge of any further right to compensation."

STATEMENT OF THE EVIDENCE.

CHARLES F. McDONALD, plaintiff, testified:

Q. After you left the hospital I believe you stated you went to the office of the railroad company. A. Yes, sir. About February 25th. I saw Mr. Giddes, a clerk in Mr. Lodge's office. Mr. Lodge is the claim agent of the Central Railroad. I just told him who I was; he asked me what I wanted. I gave him my name and told him I came down with reference to the accident of January 19th. He told me to sit down. In about fifteen minutes or so he came up to me again, and told me that he had some papers to make out; he went over to his desk; and if I would wait he would bring them over to me, that there was a few papers I

would have to sign before he could settle this compensation, as he called it.

Q. What compensation did he refer to, or did he state what the compensation was? A. He read from a kind of a pamphlet, I believe from the Employers' Liability Act, which he said that my injury came under. He had this pamphlet in his hand at that time.

Q. Did he give it to you to read? A. No, sir.

Q. Did he read any portions of it to you? A. Yes, sir.

Q. Can you recall what portion of it he read to you? Or what he read to you from this pamphlet?

A. Yes, sir; the portion that impressed me the most said I was entitled to three hundred weeks compensation.

Q. At how much a week? A. That was to be averaged out after, on the basis of half of what I were making, earning?

Q. At that time, or up to that time, had you ever seen a copy of the State Compensation Act? A. No, sir.

Q. Had you ever had this State Compensation Act read to you? A. No, sir.

Q. Did you have any notice or knowledge of the contents of the State Compensation Act? A. No, sir.

Q. Did you know there was such an act in existence until you were so informed by Mr. Giddes?

A. I knew there was such an act, but I never paid any attention to it.

Q. You had never seen it? A. No, sir.

Q. Never read it? A. No, sir.

Q. Never had it read to you? A. No, sir; except when Mr. Giddes read a portion of it.

Q. What was it Mr. Giddes said to you as to your compensation being due under the act? A. He said I was entitled to three hundred weeks'

compensation as long as I was unable to return to my regular job, braking. At that time then he had that paper; I asked him what it was. After Mr. Giddes made that statement to me, he brought this paper over from his desk.

Q. He brought over a paper? A. Yes, sir.

Q. Did he give you that paper? A. No, sir.

Q. Did he read that paper to you? A. Yes, sir.

Q. Do you know what he read to you? A. I could not tell hardly anything about it. He read it very rapidly, in such language that I could not comprehend it, and I told him so.

Q. When you say you told him, state precisely so far as you can recollect the precise words you said to him. A. I said to him, "I don't understand that."

Q. And what, if anything, did he say in answer? A. He said it was a mere matter of form, that it did not matter, and that everything would be all right.

Q. What else did Mr. Giddes say at that time, if anything? A. I asked him what I was receiving for signing that; he said three hundred weeks compensation; and I asked him how about my position; and he said that it was provided for in the paper.

Q. What did Mr. Giddes do then, if anything? A. He went over to his desk again; sat down there and worked on his typewriter.

Q. And how soon did he speak to you, afterward? A. About a half hour.

Q. And then what did he say? A. He beckoned to me to come with him to Mr. Lodge's office.

Q. And did you go? A. Yes, sir.

Q. And then what did you do; what occurred? A. I signed a paper which I believe now is the release.

Q. Is that paper which you signed the same

paper which he had previously read over to you hurriedly as you have described? A. I would not swear to that. It was out of my sight for fully twenty or thirty minutes between the time that I seen it first and the time I seen it in Mr. Lodge's office.

Q. Was the paper which you signed read over to you at the time you signed it? A. No, sir.

Q. Did you read it over yourself? A. No, sir.

Q. What, if anything, did Mr. Giddes say to you in connection with signing a paper as to what the paper was, or did he make any statement as to what the paper was? A. He said it was a mere matter of form, that everyone had to go through, that was injured on the railroad, and I signed it. In the presence of Mr. Lodge, in Mr. Lodge's office.

Q. I show you another paper which has been marked in evidence D 2, which purports to be a receipt dated February 25, for \$18.60. Was this paper handed to you by Mr. Giddes at the same time? A. No; that was made out after, after the release was signed.

Q. You signed this paper marked D 1 and left it with Mr. Giddes? A. Yes, sir.

Q. How long after that was it that you were requested to sign this paper which I have just called your attention to, this receipt for \$18.60 of February 25? A. About thirty-five or forty minutes, maybe.

Q. Who was that brought to you by? A. Mr. Giddes.

Q. And you were requested to sign that, which you did? A. Yes, sir.

Q. What was said, if anything, at that time as to your coming back again to the office of the claim agent or to Mr. Giddes' office? A. Mr. Giddes requested me to come back in a week, and at the expiration of a week, I went back there.

Q. I show you a receipt dated March 5, for \$6.20, and ask you if that is the paper you signed on your return there a week later? A. Yes, sir.

Q. What request, if any, was made for you to come back again? A. I was told I would have to come there every week to be examined by Dr. Washburn. I went there again on March 9, and received another check for \$6.20. I went again on March 23, and received another check for \$12.40. And again on March 31, I went there again and received another check for \$6.20. Those are all the checks and all the money which was paid me by the railroad company since my injury, except such as was paid to me while working in the capacity of bridgeman.

Q. This paper which has been marked D 1, recites that "in consideration of one dollar, in full satisfaction and discharge of any further right to compensation," that you have released; was that one dollar paid to you at that time? A. It was not.

Q. Was any money at that time paid to you—any money at all? A. No, sir.

Q. And nothing was paid to you except the items on the various dates which I have heretofore asked you about? A. Yes, sir; that's all.

Q. Did you at the time of the preparation and execution of this release or during any time during your interview with Mr. Giddes or any one else at the office of the railroad company on the 25th day of February, state that you were entitled to compensation under section 2 of chapter 25 of the laws of 1911? A. No, sir.

Q. Did you ever have any notice or knowledge of the existence of any such law? A. No, sir; I have not.

Q. And if such law was the basis of your compensation—the Employers' Liability Act of the

State of New Jersey—you had no notice or knowledge of it and made no statement— A. No, sir.

Q. Then the statement in this paper, D 1, that “Whereas I have requested that section 2 of chapter 25 of the laws of the State of New Jersey of 1911, apply to my said employment,” is an absolutely false statement of fact, is it not? A. It is false; I was wholly unaware of that paragraph in it.

Q. Did you at that time request the said railroad company to make compensation in accordance with the provisions of that act? A. No, sir.

Q. Then the statement contained in this receipt that you have “requested the said railroad company to make compensation in accordance with the provisions thereof” is unwarranted by the facts as they occurred at the time? A. Yes, sir.

Q. I should like to have you state as specifically as the facts warrant just exactly what you said to Mr. Giddes at the time he first brought this paper to you, as to other employment; you said something in a general way; state as specifically as you can exactly what you did say and what he said with reference to that. A. I asked him what the paper was; he told me it was a release, but a mere matter of form, and everybody had to go through the same thing.

Q. That was at the time he read it over to you hurriedly, as you say? A. Yes, sir.

Q. My question was, what was said by you at that time in reference to future employment by the company? A. I did not say anything just then, I asked him first—

Q. You asked him first, what? A. What I was receiving for signing the paper; I wanted to know what I was getting for it. He said, three hundred weeks' compensation—

Q. I am not asking you about that. When was

it you first spoke to him about future employment?

A. Just following that; following that statement I said to him, "How about my job?" He said that was provided for in the paper.

Q. Did he say anything further than that so far as you can recall? A. Nothing on that point.

Q. As to how they would treat you or— A. No, he just said I would receive compensation as long as I was unable to go back braking.

Q. This paper which I call your attention to, being the receipt for \$18.60, dated the same date as this other paper is dated, February 25, was that read over by you or read over to you by Mr. Giddes before you signed it? A. That was laid on the desk in front of me and I read that.

Q. That is also true, of the other drafts which you got at other subsequent weeks? A. Yes, sir.

Q. The last work you did I believe you said was the 10th of August, and you were examined by Dr. Washburn, the last time on the 9th of September. On this 9th of September did you have any conversation with Mr. Lodge or Mr. Giddes, or any gentlemen connected with the claim department as to any future payments being made to you? A. I had a conversation with Mr. Giddes. I asked him how about this compensation had ceased; he went to Mr. Lodge's office and came out and said the case was closed against me. He said they would make no further payment. That the case was closed, and that was the last payment I ever received.

Cross examination by Mr. Smith.

Q. Mr. McDonald, you can read and write? A. Yes, sir.

Q. And you can read the language of this paper?
A. I can read it.

Q. You read it? A. I did not read it at that time; no.

Q. Now, as a matter of fact, what you went to the office of the railroad company for, you say, was money compensation? A. I went for information.

Q. Compensation you said, didn't you? A. I went down to find out what I was entitled to.

Q. And you used the word compensation, didn't you? A. I did not use it to them; no, Mr. Giddes was the first to use the word compensation.

Q. Oh! You said you went down there to find out about your compensation, didn't you? A. Yes, sir; went down there for information; yes.

Q. As to your compensation,—didn't you? A. To find out what I was entitled to. You might call it compensation or wages or anything. To find out what I was entitled to.

Q. Entitled to for what? A. Entitled for what?

Q. Yes. A. To find out what I was entitled to under the law, whatever the law might be; I did not know what it was.

Q. You thought you were entitled to something under the law? A. I certainly did.

Q. Under what law? A. I did not know what law. I knew there was some such law, but I did not know anything about it.

Q. You knew there was a Workmen's Compensation Law, didn't you? A. I knew there was some such law.

Q. And you went to the office to find out what your compensation was. To find out what the law was? A. Yes.

Q. And when you got in there you spoke to Mr. Giddes about your compensation; isn't that so? A. Oh! no; no, sir.

Q. Didn't you? Didn't you say when you got

down there you saw Mr. Giddes? A. I saw Mr. Giddes; yes, sir.

Q. And he asked you what you wanted? A. Yes, sir.

Q. Isn't that right? A. Yes, sir.

Q. And you said you called to see him about the accident? A. With reference to the accident; yes, sir.

Q. That is right? A. Yes; with reference to the accident.

Q. Did you tell him why you came there? Did you just say, "I came to see you about the accident?" A. In reference to the accident; that is all. Mr. Giddes brought that conversation up himself as to compensation I was entitled to.

Q. What did you go to find out? A. Everybody has to go there that has been injured on the road that expects to—

Q. For that purpose? A. To find out what they are entitled to.

Q. Then when you went there you said you came to find out what you were entitled to, didn't you? A. I was looking for information.

Q. Then he asked you to sit down? A. He did.

Q. He left, and when he came back he said there were some papers that had to be made out and for you to wait; and you waited? A. Yes, sir.

Q. And then you say he came in and said to you that before he could settle he would have to find out what you were entitled to as compensation? A. Yes, sir.

Q. And something about the Employer's Liability Act, you say? A. Yes, sir; went down there for information; yes.

Q. As to your compensation—didn't you? A. To find out what I was entitled to. You might call

it compensation or wages or anything. To find out what I was entitled to.

Q. Entitled to for what? A. To find out what I was entitled to under the law, whatever the law might be; I did not know what it was.

Q. You thought you were entitled to something under the law? A. I certainly did.

Q. Under what law? A. I did not know what law? I knew there was some such law, but I did not know anything about it.

Q. You knew there was a Workmen's Compensation Law, didn't you? A. I knew there was some such law.

Q. And you went to the office to find out what your compensation was. To find out what the law was? A. Yes.

Q. And when you got in there you spoke to Mr. Giddes about your compensation; isn't that so? A. Oh! no; no, sir.

Q. Didn't you? Didn't you say when you got down there you saw Mr. Giddes? A. I saw Mr. Giddes; yes, sir.

Q. And he asked you what you wanted? A. Yes, sir.

Q. And you said you called to see him about the accident? A. With reference to the accident; yes, sir.

Q. Did you tell him why you came there? Did you just say, "I came to see you about the accident?" A. In reference to the accident; that is all. Mr. Giddes brought that conversation up himself as to compensation I was entitled to.

Q. What did you go to find out? A. Everybody has to go there that has been injured on the road that expects to—

Q. For what purpose? A. To find out what they are entitled to.

Q. Then when you went there you said you came

to find out what you were entitled to, didn't you?

A. I was looking for information.

Q. Looking for information. Then he asked you to sit down? A. He did.

Q. He left, and when he came back he said there were some papers that had to be made out and for you to wait; and you waited? A. Yes, sir.

Q. And then you say he came in and said to you that before he could settle he would have to find out what you were entitled to as compensation?

A. Yes, sir.

Q. And something about the Employers' Liability Act, you say? A. He did; yes, sir.

Q. So that you understand that you and he had a talk about the Employers' Liability Act? A. We did not have a talk about it at all.

Q. You did not understand it at all, did you? What did he say to you about the Employers' Liability Act? A. He told me my injury came under that act.

Q. You knew what he meant, didn't you? A. I knew it came under some act; as he had more experience in that than me, I took his word for it.

Q. Didn't you know it came under some act? A. I knew it came under some law, but what law I did not know.

Q. And then he was about half an hour in making out some papers? A. About that, I should judge; I did not have my watch in my hand to judge.

Q. Then you say he read to you from this book? A. A small pamphlet.

Q. What he said to you was this, that you were entitled to receive half of your weekly wages until you were able to go back to work— A. M-m-m-m-m m.

Q. (continuing)—not exceeding three hundred weeks? A. For three hundred weeks.

Q. Not exceeding three hundred weeks? A. That is the way I heard it—for three hundred weeks.

Q. Didn't he say to you that you were entitled to receive so much money a week, that is, half of your weekly wages during the time you were unable to go back to work, not exceeding three hundred weeks? A. He said for three hundred weeks; and I asked him too.

Q. Don't you know that is the very reading of the law? A. What the law read—I am telling you what Mr. Giddes said.

Q. Didn't you know what you were entitled to? A. I did not—no.

Q. You hadn't any idea, had you? A. No; I didn't.

Q. Not a thing? A. I thought I might be entitled to full wages, for that matter.

Q. You did; I see, A. Yes.

Q. And then you say he produced this paper that you have here, this release? A. H'm, h'm.

Q. Now, as a matter of fact didn't you read it? A. I did not.

Q. Well, you knew you were asked to sign it, didn't you? A. Of course I did.

Q. And you know you can read writing and printing? A. Yes.

Q. And you knew you had to sign this paper before you were going to get any money? A. H'm, h'm.

Q. You knew that getting that money depended on signing that paper? A. Yes.

Q. And you had not the slightest idea, had you, what you were signing? A. From Mr. Giddes' own reading; that is what I took my idea from.

Q. And what you read— A. I offered to take hold of the paper and he pulled it away and read it himself.

A. He pulled it away and read it himself? A. He certainly did.

Q. And then after it was signed you went in before Mr. Lodge? A. After it was signed?

Q. After you signed it? A. No; he brought the paper in and I signed it in Mr. Lodge's office. I did not sign it outside.

Q. In Mr. Lodge's office you then acknowledged you knew the contents of it? A. I do not acknowledge that I knew the contents of it.

Q. Didn't you take an acknowledgement? A. Mr. Lodge asked me if I knew what I was signing.

Q. And what did you say to him? You said, Yes, I know what I am signing? A. Yes, sir.

Q. And you said that was your signature? A. Of course it is my signature.

Q. Can you read the top of that? A. Of course I can.

Q. What does it say there? A. "Release and agreement for compensation"

Q. And can you read the big part on the back of it? A. Yes, sir.

Q. And could you not see that at the time? A. I knew it was a release, but I thought the company was going to live up to their agreement.

Q. But you knew it was a release? A. A sort of a release; he told me it did not amount to anything.

Q. Didn't you know when you signed it you released them from claims— A. From all further payment?

Q. From all claims that you had? A. I did not, or I would not have signed it.

Q. Didn't you know you released them from all claims you had, provided they paid you this weekly compensation? A. Provided they paid it.

Q. Did you know that? A. Provided they paid it.

Q. Did you know that? A. I did not know they were going to do what they did, no.

Q. Didn't you know that by signing that paper you released them from all claims or demands by reason of this accident in consideration of their promise to make compensation? A. No; I did not know I released them entirely; no, I did not. I always thought that I had a right to bring an action against them.

Q. What did you think a release was? A. A release is sort of an agreement that both parties should keep.

Q. What kind of an agreement? What were you to do on your part? A. Well, I would keep my part if they kept theirs.

Q. What would you keep? A. I would keep my part as far as I was concerned; I was supposed not to bring any action against them if they lived up to their part.

Q. Then you knew your part was to release them from all claims as to this accident? A. Provided they lived up to theirs.

Q. In consideration of certain things? A. Yes, sir.

Q. And you knew that at the time, didn't you? A. Yes, to a certain extent.

Q. Now, this release was dated the 25th day of February, wasn't it? A. Yes, sir.

Q. And on the same day you received a check, didn't you? A. Yes, sir.

Q. The same day; and you read that, couldn't you, and you did read it, didn't you? A. Yes, I read it.

Q. Now, you noticed it said there that you received three weeks' compensation in pursuance of the provisions of a deed of release executed by him—that is you—on February 25, 1914, covering

injuries sustained by him January 19, 1914? A. M-m-m.

Q. Is that right? A. Yes.

Q. And all that time that you were taking these checks and giving these receipts, you knew they were for your weekly compensation, didn't you?

A. Weekly compensation, yes.

Q. Now, you know that this is the paper you signed, because you identify your signature there, don't you? A. I suppose it is the paper I signed.

Q. Isn't that your signature? A. It is the signature, all right; but I don't swear to the paper.

Q. After March 30th, you did not go back to the railroad office until you applied for the job to Mr. Wahlmeyer, did you; as bridgeman? A. I was in the office first, the claim agent's office, and then I went to Mr. Wahlmeyer; I do not remember the exact date.

Q. The last time you were there and got weekly compensation was on March 21st, wasn't it? A. That was probably the day then.

Q. And you did not go back again until the first of April? A. The 5th of April—I did not go back at all—the 5th of April I went back to work at the bridges.

Q. On the first of April you applied to English for a job, didn't you, on the bridges? A. I applied to him, yes.

Q. And at that time, you knew, didn't you, that your compensation had ceased? A. I did not know it had ceased.

Q. Why did you apply for a job to English? A. Because \$63 a month was much better than \$6.20 a week.

Q. In other words, you thought you could get back to work as a bridgeman at \$63 a month, didn't you? A. No; that was supposed to be a temporary position.

Q. You did go back to it, didn't you? A. How could I go back to anything I hadn't been at?

Q. You went back to work and went to work as a bridgeman? A. I went as a bridgeman, yes.

Q. At the time you were taking your \$63 a month you did not make any application for compensation at all, did you? A. I did not have any time to; I was kept right busy on the job.

Q. You did not have any time at all; but Lodge's office was right there at the concourse? A. He had nothing to do with giving me compensation.

Q. Did Giddes have to do with it? A. Yes.

Q. Well, his office is right there, isn't it? A. It is far away. Mr. Lodge's office used to be inside.

Q. How far away was Giddes' office from Lodge's office? A. I can't say; one was way inside the depot and the other was out in the concourse. It might be five or six hundred feet, maybe more. I never measured it.

Re-direct examination by Mr. Hardenbrook.

Q. At the time you signed this release which Mr. Smith was asking you about, would you have signed that had you known that it did not contain in it a provision for the future employment? A. No, sir.

Q. Would you have signed that paper had you known that it did not contain a provision for compensation for three hundred weeks at \$6.20? A. No, sir.

Q. When you did sign the paper you relied on the statements which had been made by Mr. Giddes as to the contents of it? A. Yes, sir.

Q. And to the effect that it did provide for three hundred weeks at \$6.20? A. Yes, sir.

Q. And also that it provided for your future employment? A. Yes, sir.

Q. And relying on Mr. Giddes' statements as to that, you signed it? A. Yes, sir.

Q. And the only knowledge which you had that the amount of compensation was under this Compensation Act was such information as was imparted to you by Mr. Giddes? A. Yes, sir.

Q. And you knew nothing about it yourself? A. No, sir.

Q. And you relied on his statement and his judgment in the matter? A. Yes, sir.

W. W. GIDDES, defendant's witness, testified that he witnessed the release and that McDonald read it; but before signing the release, he had a conversation with McDonald, and that previously, he had looked into the case, *and decided that was what McDonald was entitled to under the New Jersey Compensation Act.* He explained to McDonald the amount he would be entitled to, and that the company would be liable for the hospital expenses for the first two weeks, but it was customary for the company to pay the entire hospital expenses, and that it would do so in his case, *and after the first two weeks, he would receive one-half of his wages during the period of his disability, not exceeding three hundred weeks.* That nothing was said to McDonald about being permanently employed, and he did not agree to give him compensation for three hundred weeks. I explained to him that it would be necessary for him to sign the receipt for the compensation from the expiration of the first two weeks up to the date of the execution of this paper, and while I held that in my hand, I read the *receipt* over, and then, usually, I read the release myself, but in this case, McDonald reached out and I handed him the release, and he sat down in the chair nearest the railing on the outside and read it himself. The reason I recall that is, that it is very seldom that any of those seeking compensation

read the releases themselves; they prefer to have it read by me, or whoever else may be settling the matter; but in this case he read it himself. After he was through reading the release, I took the release myself and, holding it, I said, "You understand, Mr. McDonald, that in this release it gives your name, residence, the date you were injured, how you were injured, and that under the New Jersey Compensation Act, in this release the railroad promises to pay you according to that Act, and in return you discharge the railroad company from any further right to compensation that you, your executors or administrators or any one may have, for this particular injury, or for any injury, prior to the date of this accident; in other words, the railroad promises to pay your hospital bill and \$6.20 per week, after the expiration of the first two weeks, until you are able to return to work, but not exceeding three hundred weeks."

After that he said it was all right. He seemed to be satisfied, and I went in to Mr. Lodge's office with the papers. In Mr. Lodge's private office, the release—the very same release—was executed by Mr. McDonald. I witnessed the release, the signature. Mr. Lodge took the acknowledgement at that time. At the same time Mr. McDonald signed the receipt for the three weeks' compensation that he was indu—entitled to on February 25th, and at that very same time received the check, or draft, as we call it, for the amount of compensation due at that time.

Q. Did he say to you at that time that he did not understand what you were reading to him? A. No; he did not say anything about not understanding.

Q. Did you tell him at that time that it was a mere matter of form? A. He referred to the one-dollar phrase—

Q. Did you tell him that the execution of that release was a mere matter of form? A. Absolutely not.

Q. Did he say anything at that time, or did you say anything as to form? A. He referred to the one dollar as he was reading the release over; wanted to know what that meant, and I told him it was in accordance with the New Jersey form; that the one dollar would of course be included in the compensation that he was entitled to.

Q. Did he afterwards sign these receipts (indicating D 2)? A. Yes, he signed those in my presence, and I delivered the draft on each occasion to him.

Cross-examination by Mr. Hardenbrook.

My position is special agent, and my work is in the settlement of cases coming under the Compensation Act of New Jersey. That is just my title on the payroll of the Jersey Central Railroad. My office is in the office of the claim department. I am under Mr. Lodge, the chief special agent. His title is chief special agent. A special agent is the agent to whom is delegated the work of settling the claims due injured employees. I have held that position since June 11th, 1912. *This printed form of release is such as I habitually use, and I formerly used with settlement of claims of that character since I have been with the road. This release is the one that has been in use, this form of release—and still is—ever since I came in the office.*

Q. A good many of your employees are of foreign birth and extraction, are they not? A. Many of them, large numbers of them do not read or write or speak the English language. Q. *And this is the form of a release such as any one of those persons who were injured would be called upon to sign, is*

it not? A. That is right—explained through an interpreter.

Q. I believe you stated in answer to a question asked you by your counsel—counsel for the road—what you explained to McDonald the nature and features of the Employers' Compensation Act? A. Just the features, the clauses under which he came.

Q. Is it customary, or did Mr. McDonald at that time state to you in terms or in substance that he was entitled to compensation under this compensation act? A. No.

Q. He didn't; then if he didn't, so much of this release as recites: "Whereas I—McDonald—have represented that Section II. of Chapter 95 of the Laws of New Jersey for 1911 apply to my said employment, and have requested the said company to make such compensation in accordance with the provisions thereof," is absolutely a false statement of fact, is it not? A. My answer was in reference to when he first came into the office; after I explained it to him he was satisfied with the compensation, and—

Q. Yes; he was satisfied; but you explained to him what that act was? A. Yes; what he was entitled to under the act. And he said he was willing to accept it, the provisions of it.

Q. Now, will you please state how this figure of \$18.60 is made up as appears in this first receipt dated February 25? A. Why, that was compensation for the third, fourth and fifth weeks after the accident, excluding the first two weeks. Three weeks' compensation at the rate of \$6.20 a week, making \$18.60; and the other receipts are also for \$6.20; two of them, and the fourth one is for \$12.40. Covering two weeks.

Q. Will you please look at those receipts and state wherein is there included in any of those

drafts the one dollar which you say is the consideration named for this release and which you paid together with the compensation, or paid in the compensation check? A. I did not—

Q. You say the dollar was included in those checks; please designate in which— A. No; I said represented— Q. What is that? A. I say the one dollar would be represented in the amount of the compensation. Q. Show me in which check that one dollar is represented. A. Well, in the compensation he received. Q. In which check is that dollar represented, which of those drafts? Is it represented in any of those drafts, the one dollar? A. In the first draft that he received it was. Q. In the first draft which is for three weeks at \$6.20, \$18.60; please tell me wherein in that first receipt the one dollar is included. A. It is included within the compensation. Q. Show me the check for it, or show the jury; they would like to know. Isn't it a fact that the dollar never was paid? A. Well, paid within the—er— Q. Isn't a fact that the dollar was not paid? A. Paid within the compensation itself, as is customary with releases. Q. Customary with releases in your company; and you followed out your usual custom in this case, to get the man to sign a receipt in consideration of one dollar, and which dollar you never gave him and never intended to give him? Isn't that the fact? A. No; because the consideration was the compensation he was entitled to.

I am an attorney since 1913, March 20th. I am familiar with the law governing causes of liability to injured employees upon my road, to some extent, generally speaking.

POINT I.

The evidence shows that the release was obtained by fraud.

The Supreme Court, in *Zdancewicz vs. Burlington County Traction Co.*, 77 N. J. L., 14 (Gummere, C. J.), held in substance:

“That a release, similar in form to that in the present case constituted no bar to an action for personal injuries where it had been obtained by fraud or deceit and that the question to be considered in the determination of this rule, is whether there is anything in the proofs submitted upon which fraud or deceit in obtaining the release may be predicated, and that where the case is barren of any evidence, which tends to support the averment of the plaintiff's replication, that the release pleaded by the defendant was obtained by fraud and covin, the Trial Court was justified in directing a verdict for the defendant.”

From this statement of the law, it appears very clearly, that *if there was sufficient evidence presented to the jury from which the jury could find that the release was obtained by fraud or deceit, the direction by the Court to the jury to find a verdict for the defendant was erroneous*, and the verdict for the defendant should be set aside.

It appears from the case just cited, that the question of fraud and deceit is a question of fact to be passed upon by a jury, and should not be decided by the Court, if there was sufficient evidence to go to the jury upon that question. And the Court will only be justified in directing a verdict in favor of the defendant, where the case (to quote the language of the Court), “*was barren of any evidence which tends to support the averment of the plaintiff's replication that the release pleaded by the defendant was obtained by fraud and covin.*”

As this case is not barren of any such evidence, and in fact much evidence was presented, tending to support the averment of the plaintiff's replication "that the release, pleaded by the defendant was obtained by fraud and covin," this issue of fact should have been allowed to go to the jury, and it was error on the part of the Court to direct a verdict for the defendant.

POINT II.

It being admitted that the plaintiff and defendant were both engaged in interstate commerce at the time of the accident, the Federal Act is exclusive of all other remedies.

The answer of the defendant admits, that at the time of the accident to the plaintiff, both plaintiff and defendant were engaged in interstate commerce, consequently, the Employers' Liability Act of this State has no application, as the Federal Act is exclusive of all other remedies (*Grybowsky vs. Erie R. R. Co.*, N. J. Sup. Ct., 95 Atlantic, 764; *Seaboard Air Line vs. Horton*, 233 U. S., 492), and precluded all liability to an injured employee under Ch. 95, Laws 1911, consequently any promise made by the defendant to pay to the plaintiff compensation under this act was necessarily void. The release recites that the plaintiff "represented that he was entitled to compensation under the State Act, and that the defendant has promised so to do." This promise of the defendant was to make such compensation to the plaintiff as he was entitled to under the State Act, and as he was not entitled to any compensation under the State Act, there is no consideration whatever for the release."

POINT III.

The release had no legal existence, as it was without any consideration.

The consideration named in the release of \$1 was not paid, hence the release, so far as it assumes to release "any further rights to compensation" is without any consideration to support it, and even where the release is under seal, testimony touching its consideration may be shown as an important part of the inquiry. *Want of consideration can be shown to prove that release had no legal existence. The non-existence of a consideration has always, in every trial, been considered as a factor of prime importance.*

Walm vs. Walm, 53 N. J. L., 429.

(See also Martin vs. Rechter, 10 N. J. E., 510.)

POINT IV.

A promise to make such compensation as provided by the State by the State Employers' Liability Act was absolutely void, and the release had no legal existence for want of consideration.

The release recites "that the defendant has promised to make compensations as aforesaid" (i. e., such compensation as the plaintiff represented he was entitled to under Sec. 2, Ch. 95, Laws 1911, Employees' Liability Act), and the release assumes to release the defendant from its "promise" to make such compensation "in consideration of its said promise."

POINT V.

This release appears by testimony of Giddes, the claim agent of the defendant (pp. 52 and 53, case),

to be a printed form which was used in all cases and had been since June 12, 1912, and it was the form all injured employees were requested to sign, many of whom could not read the English language.

This release was not specially gotten up to meet the injuries of the plaintiff, and to correctly recite what the plaintiff had said or claimed to be was his right, but boldly stated what the plaintiff had said and claimed, and was the printed form in general use, irrespective of whether it correctly or falsely stated what the plaintiff had claimed or asserted to be his right, and which, by the evidence of plaintiff appears to be an absolutely false statement of which he claimed to be his rights, as he had no knowledge whatever of what Section 11 of Chapter 95 of the Laws of New Jersey for 1911 was, or possibly could be—and all of which shows conclusively that the release was obtained by fraud and covin.

POINT VI.

The evidence of the claim agents (fol. 1 to 20, p. 52, case), admits that the statement in the release, "that the releasor represented that Sec. 11 of Ch. 95, Laws of New Jersey, 1911, applied to his employment," is false, and the evidence shows that the releasor had never seen, read, or heard of this act until the claim agent informed him of the fact.

POINT VII.

If the plaintiff had represented that the State liability act applied, it was a mistake of fact on his part, and it was also a mistake of fact on the part of the defendant, or a fraud on its part.

Where releasor can show that the release was executed by mutual mistake of an existing fact or

by mistake on his part and fraud on the part of the releasee he may avoid the same (34 Cyc., 1055).

A mistake of fact may occur on the part of one or both of the parties to a release. A unilateral mistake of fact, unmixed with any elements of fraud or duress, is not sufficient ground for the avoidance of a release; but where a mistake exists on one side known to and taken advantage of by the releasee or fraud by the releasee, relief will be granted in the absence of negligence on the part of the releasor. A release may, however, be avoided for a mutual mistake of a past or present fact, material to the agreement, but since such an effect is not produced by a mistake in prophecy, or in opinion, or by mistake in belief relative to an uncertain future event, as for instance the probable developments from and permanency of a known injury. Nor does conscious ignorance of a fact amount to mistake. A release set aside for mistake must be set aside as an entirety and cannot be affirmed in part and repudiated in part (34 Cyc., 1058).

An innocent misrepresentation by the releasee of a material fact, intended to be acted upon by the releasor and relied upon by him, is as effective to avoid a release induced thereby as a mutual mistake (34 Cyc., 1059).

POINT VIII.

The release must stand or fall upon the facts which occurred at the time it was procured and executed.

If it was (quoting the language in 77 N. J. L., 14), "obtained by fraud and deceit"—it is void and no subsequent payment of three small amounts to the plaintiff, at different subsequent dates, can have

the effect to give the release any vitality or binding force.

The defendant's defence is that instantly upon the executing and delivery of the release to it by plaintiff all claims of every kind which the plaintiff had against the defendant were wiped out, released, and forever discharged.

Such is the language of the release, and if such was not the intention of both parties, then in so far as the paper forever released and discharges any such liability, it was obtained and procured to be executed by fraud and covin, and it is void as not expressing the intention of the parties.

POINT IX.

To determine whether this release was obtained by fraud and covin, it is necessary that all the testimony of the plaintiff be considered.

While it is true that he stated as follows:

“Mr. McDonald, what did you think the release was? A. A release is a sort of an agreement that both parties should keep. Q. What kind of an agreement; what were you to do on your part? A. Well, I would keep my part if they kept theirs. Q. What would you keep? A. I would keep my part, as far as I was concerned. I was supposed not to bring any action against them, if they lived up to their part. Q. Then you knew your part was to release them from all claims as to this accident? A. Provided they lived up to theirs.”

Yet, he also stated folio 4 p. 46 and fol. 10 p 47 case), that at the time he signed this release, he would not have signed it had he known it did not contain a provision for future employment, and also a provision of compensation for 300 weeks at \$6.20 a week, and when he signed the paper, he relied upon

the statements which had been made to him by Mr. Giddes as to the contents, and that it provided for a payment to him of 300 weeks at \$6.20 a week and also for his future employment. He further says that the only knowledge he had for compensation under the Compensation Act, was such information as was imparted to him by Mr. Giddes, and that he knew nothing about it himself, and relied upon his statement and judgment in the matter (fol. 40, page 46, case), and (fol. 10 to 20, p. 47, case).

And all this testimony should be read together, and not an isolated question and answer or two to determine this fact.

The plaintiff obtained nothing for this release. He did not get the dollar in consideration of which he released all claims for liability other than that due him under the State Act, and he got a promise to pay what was due him under the State Act when nothing whatever was due to him or could be collected by him.

It appears that neither the plaintiff or defendant at the time the release was signed, regarded it as a release, and the defendant assured the plaintiff then and there that it was not a release, as the defendant an hour after it was signed, paid the plaintiff \$18.60, and which acts then and there amounted to a waiver of the provision of the release, and an election by the defendant to treat the release as a nullity, and which election, if the acts of the defendant amounted to an election, cannot afterwards be recalled or repudiated.

And it further appears that thereafter, the defendant did not regard the release as a release of all liability to the plaintiff, as it paid the plaintiff on March 5th, \$6.20; March 6th, \$6.20; March 25th, \$12.40; March 31st, \$6.20; and each of which checks recite that it is for an indebtedness due by the defendant to the plaintiff from certain dates to cer-

tain other dates. This release executed February 25th, is now claimed to be a full and complete release of all liability to the plaintiff after February 25th. Yet these payments by the defendant to the plaintiff clearly establish the fact that neither at the time of the execution or subsequent thereto, was it so regarded by either of the parties; and the fact that it appears on its face to be a full release, was a fraud upon the plaintiff, and if the release is to set aside as to one, as its provision, it must be set aside as an entirety, as it cannot be affirmed in part, and repudiated in part.

The evidence shows that so much of the release as is a general release of all further liability, was not only at the time of its execution treated and regarded as a nullity, but was so treated and regarded afterwards as the further payments to the plaintiff clearly established.

That the release was as the plaintiff testified he was told, when he signed it—a mere matter of form—and that it was regarded and treated by both parties as a nullity, is conclusively established by the evidence, which is that when plaintiff signed it, he was told to wait for more papers to be signed by him, an hour afterwards, a check was given him, and he was told to come back in a week for another check, and which he did, and continued to do on three occasions thereafter.

The release was not treated and regarded as a release, and was not intended to be such by either of parties, and so far as it is on its face a release, it was signed under a mistake of fact not only by the plaintiff, but also by the defendant.

POINT X.

The releasor was induced to sign the release upon a statement made to him that his right to any compensation was confined to that provided by the State Act of 1911.

To entitle a releasor to avoid a release on the ground of fraud he must have been induced in making the release to have acted to his damage upon the truth of a statement of a material fact, known by its maker to be false or recklessly uttered regardless of its truth, made by the releasee or another in his behalf, with the intention that it should be acted upon by the releasor in the execution of the release (34 Cyc., 1060).

The releasor has the right to rely upon the statements of the releasee, which a reasonably prudent man would rely upon. In the application of this test *the releasee undoubtedly has the right to rely upon the releasee's material statement of fact. The weight of authority sustains the right of the releasor to rely upon professional opinions furnished him by the adverse party. The releasor is not required to possess an unquestioning belief in its truth, provided that it was the inducing cause to the execution of the release; and the fraudulent statement, if the substantial, need not be the sole inducement for the execution of the release* (34 Cyc., 1061).

Each of these representations, being as to the existence of a present state of mind, constitutes a statement of fact, and if it be fraudulent and the releasor has the right to rely thereon, the release thereby is unavoidable. The repetition to the releasor by the releasee of a fraudulent *statement made by him by his agent, who knew it to be false, although the releasee believed it to be true, is a fraud, not a misrepresentation.* Unless a duty to disclose or a confidential relation exists, silence as to material facts

does not constitute fraud, provided that the non-disclosure is not equivalent to an actual falsehood, or that concealment does not so color the statement made as to produce a misleading false impression in regard to material fact, which would be as vicious as an express falsehood. *It is not necessary that the statement shall be known to be false; it is sufficient if it is made recklessly without regard to the truth.* A false representation of law, not being a matter of fact, does not generally vitiate a release; nor do false representations as to the legal effect of a release as the releasor is presumed to know the contents of the instruments signed by him, and has no right to rely upon the representations of the other party as to its legal effect. This rule is not applicable, *however, where the releasee induces the releasor to rely upon his superior's knowledge*, nor probably where the legal effect of the release is not disclosed on the fact of the release, as where the release of one of several parties under a joint liability releases all, nor where the releasor is himself unable to determine the true nature and effect of the release (34 Cyc., pp. 1061 and 1062).

POINT XI.

Grounds of Avoiding Release.

“A release may be impeached for fraud which inheres in the execution of the instrument; that is to say, where the signer of the instrument is deceived into signing it by the belief that he is signing something other than that which he really signs. Cases of this kind arise where the instrument is misread to the party signing it, or where there is a substitution of one paper for another or where by some trick or device a party is made to sign an instrument which he did not intend to execute. *Where a fraud of this kind exists, that is, fraud in*

the execution of the instrument itself, it may be shown in an action at law. Chicago St. Ry. Co. v. Unter, 3 St. Ry. Rep., 103, 212, Ill., 174, 176, 72 N. E., 195, 233 Ill., 161; 84 N. E., 198, 135 Ill. App., 86; 34 Cyc., 1068. "One who has executed a release of damages for bodily injuries has a right to disaffirm it, if he was the victim of a fraud in its execution, or if by reason of his lack of mental capacity at the time, he did not understand what he was doing." McLaughlin v. Syracuse Rapid Transit Ry. Co., 115 App. Div., 774, 101 N. Y. Supp., 196.

"Where a release was secured by fraud, in that the defendant did not provide for the employment of the releasor by the railway company, pursuant to a previous agreement, it was held that the release was void, and did not constitute a defense to an action for injuries received by the releasor." Hayes v. Atlanta & C. Airline R. R., 143 N. C., 124, 55 S. E., 437.

FALSE REPRESENTATIONS BY CLAIM AGENT—*If an agent for a street railway company as an inducement to the execution of a release, promised and induced the releasee to believe that if he would execute the release he would be given employment from the company permanently and such promise was not made in good faith, the release is voidable and subject to be set aside for fraud.* Rapid Transit R. R. Co. v. Smith, 3 St. Ry. Rep., 830 (Tex. 86 S. W., 332).

POINT XII.

Releases may be invalid for want of legal consideration, or by reason of the absence of real consent thereto, or owing to illegality (34 Cyc., pages 1055-1068).

By a preponderance of authority on one ground or another, however, such an attack is allowed, and

resort to equity for cancellation is not necessary. The technical common law rule does not apply where the issue is, or *where the releasor denies the receipt of any consideration for the release. Nor does the rule apply to receipts in full* (34 Cyc., p. 1072).

Where the claim agent purposely concealed from the releasor the nature of the instrument which she was called upon to execute, and she was deceived by his declarations of sympathy, etc., it was held that the release was invalid. *Chicago, R. I. & P. Ry. Co. v. Cain*, 84 S. W., 682. *Hidden v. Exeter, H. & A. St. Ry. Co.*, 72 N. H., 42.

REPRESENTING RELEASE TO BE RECEIPT—Where a person was induced by fraudulent statements of a claim agent to the effect that *the paper which she was about to sign was a receipt for a gratuity, while in fact it was a release of all claim*, it was held that the instrument was invalid. *Clayton v. Consolidated Traction Co.*, 204 Pa. St., 536; *Austin v. St. Louis Traction Transit Co.*, App., 342; *Chicago, R. I. & Pac. Ry. Co. v. Howard*, 14 App. cas. (D. C.), 262; *Jacques v. Sioux City Traction Co.*, 3 St. Ry. Rep., 249, 124 Iowa, 257, N. W., 1069.

Where a party was induced to sign a release by representations of the claim agent that it covered merely his claim for a month's time or where he signed it under such belief, said release is not a bar to an action for injuries, *Ill. Central Ry. Co. v. Welch*, 52 Ill., 183.

In *Vellekoup v. D. Fullerton & Co.*, 79 N. J. L., 16, the Court held there was no error, also in the manner in which the Trial Court dealt with the plaintiff's written release of his cause of action. The execution, acknowledgment, and delivery of such an instrument having been established *the legal effect of such documentary proof was for the*

Court, in the absence of testimony from which the jury could find that the execution of the release had been procured by fraud or deceit practiced upon the plaintiff by the defendant. There was no such testimony, and no such question was submitted to the jury. The testimony went no further than to show that *the plaintiff could not read writing, and had not read the paper that he signed; that it was not read to him; that its purport was not explained to or understood by him, and was in fact misunderstood by him.*

“Upon this testimony, the question that was submitted to the jury was whether or not the plaintiff understood that he was signing a release of his right of action against the defendant—an irrelevant matter.

“The ground, moreover, stated by the Court for denying the direction of a verdict, viz., that the jury might find that the plaintiff was ignorant of the effect of the release signed by him, presents the same irrelevancy. On this rule to show cause, the course pursued at the trial is justified by reference to a single case, viz., *Burik v. Dundee Woolen Co.*, 66 N. J. Law, 421, 49 Atl., 442, which, if it lays down the doctrine for which it is cited, must be deemed to be overruled by the latter cases of *Fivey v. P. R. R. Co.*, 67 N. J. Law, 627, 52 Atl. 472, 91 Am. St. Rep. 445, in the Court of Errors, and the case of *Zdancewicz v. Burlington County Tr. Co.*, 71 Atl., 123, in this Court.

These cases conclusively hold that in a court of law in a release such as that executed by the plaintiff is a complete bar to an action for damages unless procured by fraud or deceit.

The present case is barren of any testimony that would have supported a finding by the jury that the plaintiff's execution of the release had been procured by fraud or imposition if that question had been submitted to them, which it was not.

The finding of the jury that the plaintiff did not understand that he was signing a release, which was the matter submitted to them by the charge, is immaterial upon the question of the validity and effect of the release.

It appears by the foregoing case that fraud or deceit is necessary to be shown as in this respect stated by the Court in the foregoing case overrule and reverses the case of *Burik v. Dundee Woolen Co.*, 66 N. J. Law, p. 421.

"In the case of *Waln vs. Waln*, 58 N. J. Law, p. 640, the Court held: The release being under seal, the consideration could not be questioned, and while this may be true, in *Waln vs. Waln*, 53 N. J. Law, the Court held:

"But it is proper, and it may be important, as the case is to be tried again, to say that *even on the assumption that the instrument in question was, in point of law, a specialty, the testimony offered touching its consideration should not have been rejected.* It is certainly true that, in a court of law, when unassisted by a statute, neither the existence, not the bona fides of the consideration of a specialty can be drawn in question for the purpose of defeating the instrument on that ground; *but we also think that when the issue is as to the fact of the execution of the instrument, as for example, whether the name of the alleged maker of it is forged, or that it was fraudently obtained by a substitution of papers or otherwise, that in such an inquiry the absence or the character of the asserted consideration may be shown as an important part of the inquiry. The rule is, that the want of consideration cannot be shown for the purpose of destroying the legal effect of the specialty, but that it can be shown to prove that it has no legal existence. In such inquiries, the non-existence of a consideration, has always in every trial of the subject, been considered as a factor of prime importance.*

In the case of *Den. v. Shotwell*, 3 Zab., 471, Chief Justice Green, after stating the principle that evidence is not admissible to show the consideration is essentially different *from that recited in the deed, in order to defeat the effect and operation of the conveyance itself says*: "But this rule has never been extended to prevent a party from showing that the deed is void for fraud or illegality." See also, *Lessee of Ridgeway v. Underwood*, 4 Wash., C.C.R., 129; 4 Id. 189; *Garretson v. Kane*, 3 Dutcher, 209.

By this decision it seems that where there is testimony from which the jury could find that the execution of the release had been produced by fraud or deceit, the question should be submitted to the jury, and the question was only for the Court in the absence of such testimony. The judgment in this case was reversed, for the reason that there was no proof offered on the question of fraud or deceit in procuring the release. The only question being as to whether the plaintiff understood that he was signing the release, and this, the Court holds to be an irrelevant matter.

In the *Waln* case, 53 N. J. Law, p. 433, the Court of Errors and Appeals, held:

"That when the issue is as to the fact of the instrument or that it was fraudulently obtained, that such an inquiry the absence or the character of the asserted consideration may be shown as a part of the inquiry. The rule is, that the want of consideration cannot be shown for the purpose of destroying the legal effect of the specialty, but that it can be shown to prove that it has no legal existence. In such inquiries, the non-existence of a consideration has always, in every trial of the subject, been considered as a factor of prime importance."

It appears conclusively by the testimony that the defendant did not in fact execute the instrument he intended to execute. 34 Cyc., 1067; and also that

"The statement of the claim agent was a false statement as to the contents of the paper." Fivey vs. Penn. R. R. Co., 67 N. J. Law, 633, and also that *"Paper was of different character and import than that appearing on its face."* Van Deventer vs. Van Deventer, 46 N. J. Law, 460.

POINT XIII.

Plaintiff not required to reimburse defendant for amount paid to him.

The evidence shows that there was paid by the defendant to the plaintiff various small amounts between February 25th and March 31st, 1914, amounting in the aggregate to \$49.60.

The ruling of the Trial Court in directing a verdict for the defendant, holding that the retention by the plaintiff of the money received by him, was a bar to the action, we think was erroneous, for the reasons:

First—As no such defense is pleaded in defendant's answer, and to avail itself of such defense, we contend that it should have been specifically pleaded.

Second—This question was passed upon by the Supreme Court in Burik vs. Dundee Woolen Co., 66 N. J. Law, 423, in which the Court said:

"Credit on the possible damages, not reimbursement, was the right of the defendant."

"A suit may be brought without returning or offering to return the consideration for the release."

Wabash Valley Protective Union vs. Janes, 8 Ind. App., 449, 35 N. E., 919; O'Brien

v. Chicago, etc., R. Co., 89 Iowa, 644, 56 N. W., 425; Missouri Pac. R. Co. v. Goodholm, 61 Kan., 758, 60 Pac., 1066; Northwestern Mut. L. Ins. Co. v. Woods, 54 Kan., 663, 39 Pac., 189; Chicago, etc., R. Co. v. Doyle, 18 Kan., 58; Jones v. Alabama, etc., R. Co., 72 Miss., 22, 16 So., 379; Hayes v. Atlanta, etc., R. Co., 143 N. C., 125, 55 S. E., 437. See Hedlum v. Holy Terror Min. Co., 16 S. D., 261, 92 N. W., 31; Galveston, etc., R. Co. v. Cade (Civ. App., 1906), 93 S. W., 124; International, etc., R. Co. v. Shuford, 36 Tex. Civ. App., 251, 81 S. W., 1189.

“When a releasor who is himself free from negligence is deceived as to the nature of the instrument executed by him, as, for instance, where the release is represented to be a receipt for a gratuity, or for expense, for loss of time, for wages, to indicate absence, of any ill-will, or that it was a partial release, as that it was a release for damages, to clothing or property, and, in fact, included personal injuries, the consideration received need not be restored or tendered.”

See cases cited 34 Cyc., p. 1073.

“No tender is required if it is clear from the conduct of the releasee that it would be useless.”

Rabitte v. Alabama Great Southern R. Co. (Ala., 1908), 47 So., 573. See Girard v. St. Louis Car-Wheel Co., 123 Mo., 358, 27 S. W., 648, 45 Am. St. Rep., 556, 25 L. R. A., 514; Sanford v. Royal Ins. Co., 11 Wash., 653, 40 Pac., 609.

POINT XIV.

The letter of plaintiff, Exhibit D 3, p. 71 case, dated October 21st, 1914,—eight months after the date of release, can have no bearing whatever upon the question as to whether the release was obtained by fraud and covin.

POINT XV.

The judgment should be reversed.

Upon the evidence it appears that there is a question of fact as to fraud in the obtaining of the release which should have been submitted to the jury and the direction by the Court of a verdict for the defendant was erroneous and the judgment should be reversed.

Respectfully submitted,

CHARLES M. EGAN,

Attorney for Plaintiff-Appellant.

January 10th, 1916.

New Jersey Court of Errors and Appeals

CHARLES F. McDONALD, <i>Plaintiff-Appellant,</i> <i>v.</i> CENTRAL RAILROAD COMPANY OF NEW JERSEY, <i>Defendant-Appellee.</i>	}	Circuit. On Appeal from Hudson	10
--	---	--------------------------------------	----

BRIEF FOR DEFENDANT-APPELLEE.

The trial of the above entitled action came on to be heard before the Hon. William H. Speer, Judge of the Hudson County Circuit Court, to whom the same had been referred for trial, and a jury. The evidence of both parties was heard and the trial judge directed a verdict for defendant, basing his ruling upon the grounds, (a) that all the evidence of fraud concerned the consideration of the release, and that fraud in the consideration cannot be set up in a court of law; and (b) that by retaining the advantages that he obtained under the release, without returning or offering to return them, for such a length of time as he did, even after commencement of the action, plaintiff must be held to have ratified the release and validated it even if it were originally voidable. The case now comes up on plaintiff's appeal.

Facts.

Defendant operates a steam railroad and is engaged in both intrastate and interstate commerce. Plaintiff, on January 19, 1914, was an employee of defendant and was engaged on said date in in-

terstate commerce. While performing work in such commerce on said day plaintiff was injured. He instituted action against the defendant to recover damages for the injuries sustained by him.

Evidence.

Plaintiff testified that he was thirty-one years of age, and that he was in the employ of the defendant on January 19, 1914 as a yard brakeman in the passenger yard at Communipaw; that on the day in question while he was on one of the cars of a train the same was backed into a standing engine, and that in order to save himself he jumped from the car, injuring himself; that he went back to work for the Railroad Company in the capacity of bridgeman on April 5th and worked in such capacity until August 10th; that his hand and head were injured. It was admitted that plaintiff was employed by defendant in interstate commerce at the time of the injury received by plaintiff.

On cross examination he admitted that the paper shown him bore his signature (such paper being marked Exhibit D-1 for identification); that nine other papers joined together bore his signature, (which were marked D-2 for identification); that a certain other paper marked D-3 for identification bore his signature. Plaintiff then rested.

Defendant offered in evidence Exhibits D-1 for identification being a release under seal of all claims and demands arising out of said accident or otherwise; D-2 for identification being receipts and vouchers for compensation paid him under the "Workmen's Compensation Act" of New Jersey and D-3, for identification being a letter written by him to English, an employe of defendant, and rested.

In rebuttal plaintiff testified as follows: that after he left the hospital he went down to the

railroad office about February 25th, being the date of the release above mentioned, and that he saw there a Mr. Giddes, who was a clerk in the office of Mr. Lodge, the claim agent of the defendant; that he told Mr. Giddes who he was, and Mr. Giddes asked him what he wanted. He then said that he had "come down in reference to the accident of January 19th" (p. 30); that he was told to sit down, and that in about fifteen minutes Mr. Giddes told him he had some papers to make out and for plaintiff to wait and he would bring them to him; that there were a few papers plaintiff would have to sign before he could settle this "compensation", as he called it. He then testified as follows (pp. 30-48):

"Q. What compensation did he refer to, or did he state what the compensation was?
A. He read from a kind of a pamphlet, I believe from the Employers' Liability Act, which he said that my injury came under.

"Q. Did he have this pamphlet in his hand at the time? A. Yes, sir.

"Q. Did he give it to you to read? A. No, sir.

"Q. Did he read any portions of it to you?
A. Yes, sir.

"Q. Can you recall what portion of it he read to you? Or what he read to you from this pamphlet? A. Yes, sir; the portion that impressed me the most said I was entitled to three hundred weeks' compensation.

"Q. At how much a week? A. That was to be averaged out after, on the basis of half of what you were making, earning?

"Q. At that time, or up to that time, had you ever seen a copy of the State Compensation Act? A. No, sir.

"Q. Had you ever had this State Compensation Act read to you? A. No, sir.

"Q. Did you have any notice or knowledge of the contents of the State Compensation Act? A. No, sir.

"Q. Did you know there was such an act in existence until you were so informed by

Mr. Geddes? A. I knew there was such an act, but I never paid any attention to it.

"Q. You had never seen it? A. No, sir.

"Q. Never read it? A. No, sir.

"Q. Never had it read to you? A. No, sir; except—

"Q. And knew nothing about it? A. (No answer.)

"MR. SMITH: What was the 'except?'"

10 "A. Except when Mr. Geddes read a portion of it.

"Q. What was it Mr. Geddes said to you as to your compensation being due under the act? Just state it again, please. A. He said I was entitled to three hundred weeks' compensation *as long as I was unable to return to my regular job, braking.*

"Q. What did you say to him then, if anything? A. At that time then he had that paper; I asked him what it was.

20 "Q. Wait a minute. After Mr. Geddes made that statement to you, what did he do? A. He brought this paper over from his desk.

"Q. He brought over a paper? A. Yes, sir.

"Q. Did he give you that paper? A. No, sir.

"Q. Did he read from that paper—A. Yes, sir.

"Q. (continuing)—to you? A. Yes, sir.

30 "Q. So far as you can recall, what did he read to you; do you know what he read to you? A. I could not tell hardly anything about it. He read it very rapidly, in such language that I could not comprehend it, and I told him so.

"Q. When you say you told him, state precisely so far as you can recollect the precise words you said to him. A. I said to him, 'I don't understand that.'

"Q. And what if anything did he say in answer? A. He said it was a mere matter of form, that it did not matter, and that everything would be all right.

40 "Q. What else did Mr. Geddes say at that time, if anything? A. I asked him what I was receiving for signing that; he said three

hundred weeks' compensation; and I asked him how about my position; and he said that was provided for in the paper.

"Q. What did Mr. Geddes do then, if anything? A. He went over to his desk again; sat down there and worked on his typewriter.

"Q. And how soon after did he speak to you, if he did speak to you afterward? A. About a half hour.

"Q. And then what did he say? A. He beckoned to me to come with him to Mr. Lodge's office.

"Q. And did you go? A. Yes, sir. 10

"Q. And then what did you do; what occurred? A. I signed a paper which I believe now is the release.

"Q. Is that paper which you signed the same paper which he had previously read over to you hurriedly as you have described? A. I would not swear to that. It was out of my sight for fully twenty or thirty minutes between the time that I seen it first and the time I seen it in Mr. Lodge's office.

"Q. Was the paper which you signed read over to you at the time you signed it? A. No, sir. 20

"Q. Did you read it over yourself? A. No, sir.

"Q. What if anything did Mr. Geddes say to you in connection with signing a paper as to what the paper was, or did he make any statement as to what the paper was? A. He said it was a mere matter of form, that everyone had to go through, that was injured on the railroad.

"Q. And you signed it? A. In the presence of Mr. Lodge, in Mr. Lodge's office. 30

"Q. I show you another paper which has been marked in evidence D-2, which purports to be a receipt dated February 25, for \$18.60. Was this paper handed to you by Mr. Giddes at the same time? A. No; that was made out after, after the release was signed.

"Q. You signed this paper marked D-1 and left it with Mr. Giddes, is that right? A. Yes, sir.

"Q. How long after that was it that you 40

were requested to sign this paper which I have just called your attention to, this receipt for \$18.60 of February 25? A. About thirty-five or forty minutes, maybe.

"Q. Who was that brought to you by? A. Mr. Giddes.

"Q. And you were requested to sign that which you did? A. Yes, sir.

"Q. What was said, if anything, at that time as to your coming back again to the office of the claim agent or to Mr. Giddes' office?

10

"MR. SMITH: I object.

"Q. Was there anything said?

"MR. SMITH: I object. He is inquiring into the consideration, as I understand now, of the release.

"THE COURT: He has a right to inquire into it if the object is to show fraud in the execution.

20

"MR. SMITH: Oh, if it is to show fraud in the execution I haven't any objection to it.

"THE COURT: There isn't any question about that, and there isn't any doubt, no matter how much he inquires, if he does not make out fraud in the execution he cannot prevail in this action.

"MR. SMITH: Fraud in the execution, but not fraud in the consideration, as I understand it.

30

"THE COURT: As I understand it, he is basing his contention on the fact, as he claims, that there was fraud in the execution of the instrument. If he does not make that out there is no defense to the instrument.

"A. Mr. Giddes requested me to come back in a week.

"Q. At that expiration of a week did you go back there? A. Yes, sir.

"Q. I show you a receipt dated March 5, for \$6.20, and ask you if that is the paper you signed on your return there a week later?

40

A. Yes, sir.

"Q. What request, if any, was made for you to come back again? A. I was told I would have to come there every week to be examined by Dr. Washburn.

"Q. Did you go there again on March 9? A. Yes, sir.

"Q. And you received another check for \$6.20? A. Yes, sir.

"Q. You went again on March 23? A. Yes, sir.

"Q. And received another check for \$12.40? A. Yes, sir.

"Q. And again on March 31, you went there again and received another check for \$6.20? A. Yes, sir.

"Q. And those are all the checks for all the money which was paid to you by the railroad company since your injury, except such as was paid to you while you were working in the capacity of bridgeman, is it not? A. Yes, sir.

"Q. This paper which has been marked D-1 recites that 'in consideration of one dollar, in full satisfaction and discharge of any further right to compensation,' that you have released; was that one dollar paid to you at that time? A. It was not.

"Q. Was any money at that time paid to you—any money at all? A. No, sir.

"Q. And nothing was paid to you except the items on the various dates which I have heretofore asked you about? A. Yes, sir; that's all.

"Q. Did you at the time of the preparation and execution of this release or during any time during your interview with Mr. Giddes or any one else at the office of the railroad company on the 25th day of February, state that you were entitled to compensation under Section 2 of chapter 25 of the laws of 1911? A. No, sir.

"Q. Did you ever have any notice or knowledge of the existence of any such law? A. No, sir; I have not.

"Q. And if such law was the basis of your compensation—the Employers' Liability Act of the State of New Jersey—you had no no-

10

20

30

40

tice or knowledge of it and made no statement—A. No, sir.

“Q. Then the statement in this paper, D-1, that ‘Whereas I have requested that Section 2 of chapter 25 of the laws of the State of New Jersey of 1911, apply to my said employment,’ is an absolutely false statement of fact, is it not? A. It is false; I was wholly unaware of that paragraph in it.

10 “Q. Did you at that time request the said railroad company to make compensation in accordance with the provisions of that act? A. No, sir.

“Q. Then the statement contained in this receipt that you have ‘requested the said railroad company to make compensation in accordance with the provisions thereof’ is unwarranted by the facts as they occurred at the time? A. Yes, sir.

20 “Q. I should like to have you state as specifically as the facts warrant just exactly what you said to Mr. Giddes at the time he first brought this paper to you, as to other employment; you said something in a general way; state as specifically as you can exactly what you did say and what he said with reference to that. A. I asked him what the paper was; he told me it was a release, but a mere matter of form, and everybody had to go through the same thing.

“Q. That was at the time he read it over to you hurriedly, as you say? A. Yes, sir.

30 “Q. My question was, what was said by you at that time in reference to future employment by the company? A. I did not say anything just then, I asked him first—

“Q. You asked him first, what? A. What I was receiving for signing the paper; I wanted to know what I was getting for it. He said, three hundred weeks’ compensation—

40 “Q. I am not asking you about that. When was it you first spoke to him about future employment? A. Just following that; following that statement I said to him, ‘How about my job?’ He said that was provided for in the paper.

“Q. Did he say anything further than that

so far as you can recall? A. Nothing on that point.

"Q. As to how they would treat you or—
A. No, he just said that I would receive compensation as long as I was unable to go back
braking.

"Q. This paper which I call your attention to, being the receipt for \$18.60, dated the same day as this other paper is dated, February 25, was that read over by you or read over to you by Mr. Giddes before you signed it? A. This draft?

10

"Q. Yes. A. That was laid on the desk in front of me and I read that.

"Q. And that is also true, I suppose, of the other drafts which you got at other subsequent weeks? A. Yes, sir.

"Q. At the time you signed this paper did you know that there was in existence an act of Congress of the United States known as the Federal Employers' Liability Act—

"MR. SMITH: I object.

20

"Q. (Continuing)—relating to employees who are injured upon railroads engaged in interstate commerce?

"MR. SMITH: I object as immaterial and incompetent.

(Question withdrawn).

"Q. The last work you did I believe you said was the 10th of August, and you were examined by Dr. Washburn, the last time on the 9th of September. On this 9th of September did you have any conversation with Mr. Lodge or Mr. Giddes or any gentlemen connected with the claim departments as to any future payments being made to you? A. I had a conversation with Mr. Giddes.

30

"Q. What was said as to coming back for any future payments?

"MR. SMITH: I object.

"Q. What was said, if anything, at that time?

"MR. SMITH: I object to a conversation 40

had on September the 10th, which was after the date of the release.

"MR. HARDENBROOK: The whole thing was after the date of the release. The continuous payments week by week were all after the release.

"MR. SMITH: All right; then I haven't any objection.

10

"A. He went to—I asked him how about this compensation had ceased; he went to Mr. Lodge's office and came out and said the case was closed against me.

"MR. SMITH: The case was what?

"A. Closed.

"THE COURT: Closed against him.

"A. Closed.

"Q. Was anything said as to whether they would make you any further payments or not? A. He said they would make no further payment.

20

"Q. That the case was closed? A. Yes, sir.

"Q. And that was the last payment you ever received, was it not? A. Yes, sir; the last payment was in March.

"CROSS EXAMINATION BY MR. SMITH:

"Q. Mr. McDonald, you say you can read and write, can't you? A. Yes, sir.

"Q. And you can read, can't you— A. Yes.

"Q. (Continuing)—the language of this paper? A. I can't read it.

30

"Q. Just see if you can read it now. Read the words. A. I can read it.

"Q. You read it? A. I did not read it at that time; no.

"Q. I did not ask you that, did I? A. You asked me did I read it.

"Q. I said you can read it? A. I can read it.

"Q. Now, as a matter of fact what you went to the office of the railroad company for, you say, was money compensation? A. I went for information.

40

"Q. Compensation you said, didn't you?

A. I went down to find out what I was entitled to.

“Q. And you used the word compensation, didn’t you? A. I did not use it to them; no. Mr. Giddes was the first to use the word compensation.

“Q. Oh. You said you went down there to find out about your compensation, didn’t you? A. Yes, sir; went down there for information; yes.

“Q. As to your compensation—didn’t you? A. To find out what I was entitled to. You might call it compensation or wages or anything. To find out what I was entitled to. 10

“Q. Entitled to for what? A. Entitled for what?

“Q. Yes. A. To find out what I was entitled to under the law, whatever the law might be; I did not know what it was.

“Q. You thought you were entitled to something under the law. A. I certainly did.

“Q. Under what law? A. I did not know what law. I knew there was some such law, but I did not know anything about it. 20

“Q. You knew there was a Workmen’s Compensation Law, didn’t you? A. I knew there was some such law.

“Q. And you went to the office to find out what your compensation was. To find out what the law was? A. Yes.

“Q. And when you got in there you spoke to Mr. Giddes about your compensation; isn’t that so? A. Oh, no; no, sir.

“Q. Didn’t you? Didn’t you say when you got down there you saw Mr. Giddes? A. I saw Mr. Giddes; yes, sir. 30

“Q. And he asked you what you wanted? A. Yes, sir.

“Q. Isn’t that right? A. Yes, sir.

“Q. And you said you called to see him about the accident? A. With reference to the accident; yes, sir.

“Q. That is right? A. Yes; with reference to the accident.

“Q. Did you tell him why you came there? Did you just say, ‘I came to see you about the accident’? A. In reference to the acci- 40

dent; that is all. Mr. Giddes brought that conversation up himself as to compensation I was entitled to.

"Q. What did you go to find out? A. Everybody has to go there that has been injured on the road that expects to—

"Q. For that purpose? A. To find out what they are entitled to.

"Q. Then when you went there you said you came to find out what you were entitled to, didn't you? A. I was looking for information.

10

"Q. Looking for information. Then he asked you to sit down? A. He did.

"Q. He left, and when he came back he said there were some papers that had to be made out and for you to wait; and you waited? A. Yes, sir.

"Q. And then you say he came in and said to you that before he could settle he would have to find out what you were entitled to as compensation? A. Yes, sir.

20

"Q. And something about the Employers' Liability Act, you say? A. He did, yes, sir.

"Q. So that you understand that you and he had a talk about the Employers' Liability Act? A. We did not have a talk about it at all.

"Q. You did not understand it at all, did you? What did he say to you about the Employers' Liability Act? A. He told me my injury came under that act.

30

"Q. You knew what he meant, didn't you? A. I knew it came under some act; as he had more experience in that than me, I took his word for it.

"Q. Didn't you know it came under some act? A. I knew it came under some law, but what law, I did not know.

"Q. And then he was about half an hour in making out some papers? A. About that I should judge; I did not have my watch in my hand to judge.

"Q. Then you say he read to you from this book? A. A small pamphlet.

40

"Q. What he said to you was this, that you were entitled to receive half of your

weekly wages until you were able to go back to work— A. M-m-m m-m-m.

“Q. (Continuing)—not exceeding three hundred weeks? A. For three hundred weeks.

“Q. Not exceeding three hundred weeks? A. That is the way I heard it—for three hundred weeks.

“Q. Didn't he say to you that you were entitled to receive so much money a week, that is half of your weekly wages during the time you were unable to go back to work, not exceeding three hundred weeks? A. He said for three hundred weeks; and I asked him too.

10

“Q. Don't you know that is the very reading of the law? A. What the law read—I am telling you what Mr. Giddes said.

“Q. Didn't you know what you were entitled to? A. I did not—no.

“Q. You hadn't any idea, had you? A. No; I didn't.

“Q. Not a thing? A. I thought I might be entitled to full wages, for that matter.

20

“Q. You did; I see. A. Yes.

“Q. And then you say he produced this paper that you have here, this release? A. H'm h'm.

“Q. Now as a matter of fact didn't you read it? A. I did not.

“Q. Well, you knew you were asked to sign it, didn't you? A. Of course I did.

“Q. And you know you can read writing and printing? A. Yes.

“Q. And you knew you had to sign this paper before you were going to get any money? A. H'm h'm.

30

“Q. You knew that getting that money depended on signing that paper? A. Yes.

“Q. And you had not the slightest idea, had you, what you were signing? A. From Mr. Giddes' own reading; that is what I took my idea from.

“Q. And what you read— A. I offered to take hold of the paper and he pulled it away and read it himself.

40

"Q. He pulled it away and read it himself?

A. He certainly did.

"Q. And then after it was signed you went in before Mr. Lodge? A. After it was signed?

"Q. After you signed it? A. No; he brought the paper in and I signed it in Mr. Lodge's office. I did not sign it outside.

"Q. In Mr. Lodge's office you then acknowledged you knew the contents of it? A. I do not acknowledge that I knew the contents of it.

10

"Q. Didn't you take an acknowledgment A. Mr. Lodge asked me if I knew what I was signing.

"Q. And what did you say to him? You said, Yes, I know what I am signing? A. Yes, sir.

"Q. And you said that was your signature? A. Of course it is my signature.

"Q. Can you read the top of that? A. Of course I can.

"Q. What does it say there? A. 'Release and agreement for compensation.'

20

"Q. And can you read the big part on the back of it? A. Yes, sir.

"Q. And could you not see that at the time? A. I knew it was a release, but I thought the company was going to live up to their agreement.

"Q. But you knew it was a release? A. A sort of a release; he told me it did not amount to anything.

"Q. Didn't you know when you signed it you released them from claims— A. From all further payment?

30

"Q. From all claims that you had? A. I did not, or I would not have signed it.

"Q. Didn't you know you released them from all claims you had, provided they paid you this weekly compensation? A. Provided they paid it.

"Q. Did you know that? A. Provided they paid it.

"Q. Did you know that? A. I did not know they were going to do what they did, no.

40

"Q. Didn't you know that by signing that

paper you released them from all claims or demands by reason of this accident in consideration of their promise to make compensation? A. No; I did not know I released them entirely; no, I did not. I always thought that I had a right to bring an action against them.

“Q. What did you think a release was? A. A release is sort of an agreement that both parties should keep.

“Q. What kind of an agreement? What were you to do on your part? A. Well, I would keep my part if they kept theirs. 10

“Q. What would you keep? A. I would keep my part as far as I was concerned; I was supposed not to bring any action against them if they lived up to their part.

“Q. Then you knew your part was to release them from all claims as to this accident? A. Provided they lived up to theirs.

“Q. In consideration of certain things? A. Yes, sir.

“Q. And you knew that at the time, didn't you? A. Yes; to a certain extent. 20

“Q. Now this release was dated the 25th day of February, wasn't it? A. Yes, sir.

“Q. And on the same day you received a check, didn't you? A. Yes, sir.

“Q. The same day; and you read that, couldn't you, and you did read it, didn't you? A. Yes, I read it.

“Q. Now you noticed it said there that you received three weeks' compensation in pursuance of the provisions of a deed of release executed by him—that is you—on February 25, 1914, covering injuries sustained by him January 19, 1914? A. M-m-m. 30

“Q. Is that right? A. Yes.

“Q. And all the time that you were taking these checks and giving these receipts, you knew they were for your weekly compensation, didn't you? A. Weekly compensation, yes.

“Q. Now you know that this is the paper you signed, because you identify your signature there, don't you? A. I suppose it is the paper I signed. 40

"Q. Isn't that your signature? A. It is the signature, all right, but I don't swear to the paper.

"Q. You won't swear to the paper? A. You can duplicate signatures all right.

"Q. Is that a duplication of your signature or is that your signature? A. It is my signature; it looks like my signature.

"Q. Don't you know it is? A. It looks like it.

10 "Q. Will you swear it is? A. It looks like my signature.

"Q. Are these (indicating) your signatures? A. These look like my signatures, yes.

"Q. You won't even swear to those?

"MR. HARDENBROOK: He says they are his.

"A. You asked me before and I told you it was my signature? What's the use of asking me again.

20 "Q. Mr. McDonald, after March 30th, you did not go back to the railroad office until you applied for the job to Mr. Wahlmeyer, did you, as bridgeman? A. I was in the office first, the claim agent's office, and then I went to Mr. Wahlmeyer.

"Q. When was that? A. I do not remember the exact date.

"Q. The last time you were there and got weekly compensation was on March 21st, wasn't it? A. That was probably the day then.

30 "Q. And you did not go back again until the first of April? A. The 5th of April—I did not go back at all—the 5th of April I went back to work at the bridges.

"Q. On the first of April you applied to English for a job, didn't you, on the bridges? A. I applied to him, yes.

"Q. And at that time you knew, didn't you, that your compensation had ceased? A. I did not know it had ceased.

"Q. Didn't you know that? A. No.

"Q. Why did you apply for a job to Eng-

lish? A. Because \$63 a month was much better than \$6.20 a week.

"Q. I see. In other words, you thought you could get back to work as a bridgeman at \$63 a month, didn't you? A. No; that was supposed to be a temporary position.

"Q. You did go back to it, didn't you? A. How could I go back to anything I hadn't been at?

"Q. You went back to work and went to work as a bridgeman? A. I went as a bridge-
man, yes. 10

"Q. At the time you were taking your \$63 a month you did not make any application for compensation at all did you? A. I did not have time to. I was kept right busy on the job.

"Q. You did not have time at all; but Lodge's office was right there at the concourse? A. He had nothing to do with giving me compensation.

"Q. Did Giddes have to do with it? A. Yes. 20

"Q. Well, his office is right there, isn't it? A. It is far away. Mr. Lodge's office used to be inside.

"Q. How far away was Giddes' office from Lodge's office? A. I can't say; one was way inside the depot and the other was out in the concourse.

"Q. About how far? A. I don't know. It might be five or six hundred feet, maybe more; I never measured it.

"Q. It might be five or six hundred feet away; is that right? A. I don't know; I can't swear it. 30

"RE-DIRECT EXAMINATION BY MR. HARDEN-
BROOK:

"Q. At the time you signed this release which Mr. Smith was asking you about, would you have signed that had you known that it did not contain in it a provision for the future employment? A. No, sir.

"Q. Would you have signed that paper had you known that it did not contain a pro- 40

vision for compensation for three hundred weeks at \$6.20? A. No, sir.

"Q. When you did sign the paper you relied on the statements which had been made by Mr. Giddes as to the contents of it? A. Yes, sir.

"Q. And to the effect that it did provide for three hundred weeks at \$6.20? A. Yes, sir.

"Q. And also that it provided for your future employment? A. Yes, sir.

10 "Q. And relying on Mr. Giddes' statements as to that, you signed it? A. Yes, sir.

"Q. And the only knowledge which you had that the amount of compensation was under this compensation act was such information as was imparted to you by Mr. Giddes? A. Yes, sir.

"Q. And you knew nothing about it yourself? A. No, sir.

"Q. And you relied on his statement and his judgment in the matter? A. Yes, sir."

20 The defendant then produced on its part the following evidence (pp. 47-59):

"WILLIAM W. GIDDES, sworn.

"DIRECT EXAMINATION BY MR. SMITH:

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

"Q. And you are the Mr. Giddes that Mr. McDonald is speaking about? A. Yes.

30 "Q. And did you see Mr. McDonald relative to the making of this release? A. I did.

"Q. I show you a paper and ask you if you were present when that was signed? A. I was.

"Q. Was it witnessed by you? A. It is.

"Q. At the time that that was signed did you know whether or not Mr. McDonald read it? A. I did.

"Q. Do you know whether Mr. McDonald read it? A. Mr. McDonald read it.

40 "Q. Do you know whether or not after that you had any conversation with him re-

lative to it? A. Not relative to the release no, sir.

“Q. Did you before the signing of the release have any conversation with Mr. McDonald relative to his compensation? A. I did.

“Q. Will you tell us what that was? A. When the boy brought the papers to me in regard to this case I looked the case over and decided what McDonald was entitled to under the New Jersey Compensation Act. Then I went to the railing, which is inside of the office, and explained to Mr. McDonald the amount that he would be entitled to, and I told him at that time that the railroad would be liable for the hospital expenses during the first two weeks, but that it was the custom for us to pay the entire hospital expense and that we would do so in his case; after the first two weeks he would receive one-half of his wages during the period of his disability until not exceeding three hundred weeks.

10

“Q. Did you say anything to him at that time about his being permanently employed? A. Absolutely not.

20

“Q. Did you at that time agree to give him compensation for three hundred weeks? A. I did not.

“Q. After you had explained the matter to him what did he say relative to the release? A. After I had prepared the papers I went to the railing, he stood on the outside of the railing, and I explained to him that it would be necessary for him to sign the receipt for the compensation from the expiration of the first two weeks up to the date of execution of this paper, and while I held that in my hand he read the receipt over. Then—usually I read the release myself—

30

“Q. What did you do here? A. (Continuing)—but in this case McDonald reached out and I handed him the release and he sat down in the chair nearest the railing on the outside and read it himself. The reason I recall that is this, that it is very seldom that

40

any of those seeking compensation read the release themselves; they prefer to have it read by me or whoever else may be settling the matter; but in this case he read it himself. After he was through reading the release I took the release myself and holding it I said, 'You understand, Mr. McDonald, that in this release it gives your name, residence, the date you were injured, how you were injured, and that under the New Jersey Compensation Act in this release the railroad promises to pay you according to that Act, and in return you discharge the railroad company from any further right to compensation that you, your executors or administrators or any one may have for this particular injury, or for any injury prior to the date of this accident; in other words, the railroad promises to pay your hospital bill and \$6.20 per week after the expiration of the first two weeks, until you are able to return to work, but not exceeding three hundred weeks.

10

"Q. What did he then say to you? A. After that he said it was all right. He seemed to be satisfied, and I went in to Mr. Lodge's office with the papers.

20

"Q. And in there do you know whether or not he executed the release? A. In Mr. Lodge's office, his private office, the release—the very same release was executed by Mr. McDonald.

"Q. And did you witness it? A. I witnessed the release, the signature.

"Q. Did Mr. Lodge at that time take his acknowledgment? A. He took the acknowledgment at that time. At the same time Mr. McDonald signed the receipt for the three weeks' compensation that he was ind—entitled to on February 25th, and at that very same time received the check, or draft as we call it, for the amount of compensation due at that time.

30

"Q. Did he say to you at that time that he did not understand what you were reading to him? A. No; he did not say anything about not understanding.

40

"Q. Did you tell him at that time that it

was a mere matter of form? A. He referred to the one-dollar phrase—

“MR. HARDENBROOK: Answer the question, please.

“Q. Did you tell him that the execution of that release was a mere matter of form? A. Absolutely not.

“Q. Did he say anything at that time, or did you say anything as to a form? A. He referred to the one-dollar as he was reading the release over; wanted to know what that meant, and I told him it was in accordance with the New Jersey form; that the one-dollar would of course be included in the compensation that he was entitled to. 10

“Q. Did he afterwards sign these receipts (indicating D-2)? A. I believe they bear your signature. A. Yes, he signed those in my presence and I delivered the draft on each occasion to him.

“CROSS EXAMINATION BY MR. HARDENBROOK: 20

“Q. What is your position with the Central Railroad Company, Mr. Giddes? A. My position is special agent and my work is in the settlement of cases coming under the Compensation Act of New Jersey.

“Q. Special agent for what purpose? What special purpose? A. That is just my title on the pay-roll of the Jersey Central Railroad.

“Q. And your office is in the office of the claim department? A. It is. I am under Mr. Lodge, the chief special agent. 30

“Q. And he is the head claim agent? A. His title is chief special agent.

“Q. And a special agent is the agent to whom is delegated the work of settling the claims due injured employees, is it not? A. That is right.

“Q. How long have you held that position? A. Since June 11th, 1912.

“Q. And this printed form of release is such as you habitually use, and you formerly used with settlement of claims of that 40

character? A. It is, since I have been with the road.

"Q. This release is the one that has been in use, this form of release— A. Yes, it has been and still is.

"Q. (Continuing)—ever since you came in the office? A. Yes, sir.

"Q. A good many of your employees are of foreign birth and extraction, are they not? A. They are.

10 "Q. Many of them, large numbers of them do not read or write or speak the English language, do they? A. They do not.

"Q. And this is the form of a release such as any one of those persons who were injured would be called upon to sign is it not? A. That is right—explained through an interpreter.

20 "Q. Yes, through an interpreter. I believe you stated in answer to a question asked by your counsel—counsel for the road—that you explained to McDonald the nature and features of the Employers' Compensation Act? A. Just the features, the clauses under which he came.

"Q. You explained that; is it customary, or did Mr. McDonald at that time state to you in terms or in substance that he was entitled to compensation under this Compensation Act? A. No.

30 "Q. He didn't; then if he didn't, so much of this release as recites, 'Whereas, I—McDonald—have represented that Section 11 of Chapter 95 of the Laws of New Jersey for 1911 apply to my said employment, and have requested the said company to make such compensation in accordance with the provisions thereof,' is absolutely a false statement of fact, is it not? A. My answer was in reference to when he first came into the office; after I explained it to him he was satisfied with the compensation, and—

"Q. Yes; he was satisfied; but you explained to him what that Act was? A. Yes; what he was entitled to under the Act.

40 "Q. And he said he was willing to accept

it, the provisions of it? A. He said he was.

"Q. Now will you please state how this figure of \$18.60 is made up as appears in this first receipt dated February 25? A. Why, that was compensation for the third, fourth and fifth weeks after the accident, excluding the first two weeks.

"Q. It is three weeks' compensation at the rate of how much a week? A. \$6.20 a week.

"Q. Making \$18.60; and the other receipts are also for \$6.20; two of them, and the fourth one is for \$12.40. A. Covering two weeks. 10

"Q. Will you please look at those receipts and state wherein is there included in any of those drafts the one dollar which you say is the consideration named for this release and which you paid together with the compensation, or paid in the compensation check? A. I did not—

"Q. You say, the dollar was included in those checks; please designate in which— A. No; I said represented— 20

"Q. What is that? A. Would be represented in the amount of the compensation.

"Q. What is that? A. I say the one dollar would be represented in the amount of the compensation.

"Q. Show me in which check that one dollar is represented. A. Well, in the compensation he received.

"Q. In which check is that dollar represented, which of those drafts? Is it represented in any of these drafts, the one dollar? 30

A. In the first draft that he received it was.

"Q. In the first draft which is for three weeks at \$6.20; \$18.00; please tell me wherein in that first receipt the one dollar is included.

A. It is included within the compensation.

"Q. Show me the check for it, or show the jury; they would like to know. Isn't it a fact that the dollar was never paid? A. Well, paid within the—er—

"Q. Isn't it a fact that the dollar was not paid? 40

"MR. SMITH: Let him answer.

"MR. HARDENBROOK: I am going to let him answer.

"A. Paid within the compensation itself, as is customary, with releases.

"Q. Customary with releases in your company; and you followed out your usual custom in this case, to get the man to sign a receipt in consideration of one dollar and which dollar you never gave him and never intended to give him? Isn't that the fact?
10 A. No; because the consideration was the compensation he was entitled to.

"Q. Well, it is a long while since I was at school and studied arithmetic, but the jury may be able to figure it out; I can't.

"MR. SMITH: If you will look in the release you will find that he admits receipt of it.

"MR. HARDENBROOK: He admits that the Compensation Act applies to his case, and this witness says he never admitted it to himself, and the statement is false.
20

"MR. SMITH: Then you are trying to prove false statements by your own plaintiff.

"JOHN K. LARGE, SWORN.

"DIRECT EXAMINATION BY MR. SMITH:

"Q. You are in the employ of the Central Railroad Company? A. I am.
30

"Q. Are you a lawyer? A. No, sir; I am not.

"Q. Are you a master in chancery? A. I am.

"Q. Did you take the acknowledgment of Mr. Giddes to this paper? A. I took the acknowledgment of Mr. McDonald.

"Q. Mr. McDonald, I mean? A. Yes.

"Q. Did you at that time, or did he at that time understand the contents thereof upon your making the same known to him? A.
40 He did.

"Q. And did he acknowledge that he signed sealed and delivered the same for the use and purpose therein expressed? A. He did.

(No cross Examination.)

"WILLIAM GIDDES, recalled.

"FURTHER CROSS EXAMINATION BY MR. HARBENBROOK :

"Q. Are you an attorney, Mr. Giddes? A. 10
I am.

"Q. How long have you been an attorney?
A. Since 1913, March 20th.

"Q. And you are familiar with the law governing cases of liability to injured employees upon your road, are you not, to some extent, generally speaking? A. Yes, sir.

"Q. And you are familiar with the defense which has frequently been pleaded by your company in compensation cases in which you have pleaded that where your road is engaged in interstate commerce and the injured employee was also engaged in interstate commerce, that the State Compensation Act did not apply do you know that? 20

"MR. SMITH: I object.

"THE COURT: I will permit that to be answered.

"A. I am not very familiar—in fact, not familiar at all with any of the cases we have had along that line, for the reason that I am not in the law department but only to take care of the settlement of these cases on the Jersey City side, which is distinct from the legal department itself. 30

"Q. And you know as a matter of fact, do you not, that if a person sues, or brings suit, or makes a claim for compensation against your road, where your road is engaged in interstate commerce and the injured employee was engaged in interstate commerce, that he is not entitled to anything under the Compensation Act; do you not? A. If he is engaged in interstate commerce? 40

"Q. That where your road and the man that is hurt were both engaged in interstate commerce, that the State Compensation Act does not apply, that he cannot get any compensation under that Act?

"MR. SMITH: I object.

"A. It might apply in that same case according to my—

10 "MR. SMITH: I object to that as not cross examination. I have not examined this man as to his qualifications as a lawyer at all.

"THE COURT: No, I think Mr. Hardenbrook will be bound by the answer, whatever it is. I will permit him to ask it.

"Q. What is your answer to that? A. My understanding was that they could recover under the State Act, compensation.

20 "Q. Whether or not it was a fact that both the injured employee and your road were engaged in interstate commerce at the time of the accident? A. Yes, sir.

30 "Q. Aren't you aware of the fact that your claim department has interposed a defense in these words in the case of *Racis* against your Company, in which you say that if the petitioner was an employee of this respondent at the time that the accident occurred both the petitioner and this respondent were engaged in interstate commerce, that is, they were engaged in the movement of a shipment of beer kegs from the City of New York in the State of New York to points outside, or inside of the State of New Jersey? A. No, sir.

"MR. SMITH: I object.

"Q. Do you know of that defense being interposed by your company?

"MR. SMITH: I object.

40 "THE COURT: If you object I will sustain the objection. I do not see why you are objecting; he says he does not know anything about it.

"A. I do not know anything about it.

"THE COURT: He says now he does not know anything about it. I will permit him to answer it.

"A. I don't know anything about it.

"Q. You do not know as an attorney, as a matter of fact, that if McDonald and your road were engaged in interstate commerce at the time of this accident McDonald was not entitled to a dollar, and could not recover a dollar, under this Compensation Act or under the promise to pay him? You do not know that to be so, do you? A. No.

10

"Q. You are aware of the fact that in this action your company has admitted in its answer that at the time the accident happened both the plaintiff McDonald and your company were engaged in interstate commerce? A. I was not aware of it until you just spoke of it. I have not seen the pleadings, or the complaint.

"MR. SMITH: He has nothing to do with that; he is just in the claim department."

20

At the close of the case a motion was made by defendant for a direction of a verdict, upon the ground that the plaintiff was barred from recovery by reason of the release executed by him. The Court granted the motion upon the ground (a) that all the evidence of fraud concerned the consideration of the release, and could not be successfully set up in a court of law, and (b) that plaintiff by retaining the advantages that he obtained under the release, without returning or offering to return them, for such a length of time as he did, even after the commencement of the suit, must be held to have ratified and validated the release even if it were originally voidable.

30

Contentions.

Plaintiff contends that the release is invalidated and avoided by fraud, want of consideration and mistake. That this fraud consists (1)

40

of false statements concerning the nature and extent of his legal rights, and (2) false promises of future employment. The want of consideration is claimed to consist in (3) failure of defendant to pay the nominal consideration recited in the release; (4) failure of defendant to pay the compensation to which plaintiff's injuries entitled him; and (5) omission from the release by defendant of any promise of future employment and his subsequent discharge from defendant's employ.

10 The mistake is alleged to consist (6) misapprehension of the source of his legal rights, whether under the State Compensation Act or the Federal Employers Liability or mistake of law; (7) mistake of fact.

It is defendant's insistence that (1) this fraud, if any, was not such as a court of law may consider or submit to the decision of a jury, in that it affected, not the execution of the release, but

20 merely the consideration, making the question proper only for the Court of Chancery; that such fraud was in fact non-existent because defendant did not misrepresent plaintiff's legal rights to him and defendant acted in perfect good faith. (2) That there was no failure of consideration, because the considerations consisted of defendant's promise to pay, which is contained in the release, giving plaintiff his proper remedy by action for its non-

30 performance; that any non-payment of the nominal consideration is repelled by plaintiff's acknowledgment of its receipt; and that plaintiff did not fail to pay the agreed compensation and did not discharge plaintiff, but, on the contrary, paid him wages in excess of the statutory rate of compensation, and plaintiff voluntarily left its employ. (3) That there was no mistake of law or fact because plaintiff still has his rights under our State Compensation Act, and such mistake, if any, was not

40

mutual nor such as a court of law may relieve.

Plaintiff further alleges as error the trial court's instruction on its charge directing the verdict that plaintiff cannot claim the benefit of any invalidity in the release unless he has first returned the money which defendant paid him for it.

POINT I.

Fraud, if any proven, was fraud in the consideration only. (Plaintiff's Points I, X, XI.) 10

An examination of the plaintiff's evidence relative to the execution of the release develops (1) that plaintiff knew there was a law in New Jersey under which he was entitled to receive compensation for the injuries received by him in his accident (pp. 30-39); that on February 25, 1914, of his own volition, he visited the office of the claim department of defendant for the purpose of obtaining the compensation to which he was entitled under the law (p. 37); that everybody who has been injured on the road has to go there to find out what they are entitled to (pp. 40-41); that he there saw Mr. Giddes, a Clerk in the Claim Department, and told Giddes the same about the accident; that he was asked to sit down and some time later Giddes said papers would have to be made out and that before settlement could be made he would have to find out what plaintiff was entitled to as compensation under the law, or Workmen's Compensation Act (pp. 30, 40-41)—Giddes called it the Employers' Liability Act and told plaintiff his injury came under that act (p. 41); that Giddes read from a small pamphlet and told him "he was entitled to receive half of his weekly wages until he was able to go back to braking work" for 300 weeks (pp. 30-31); 20 30 40

that Giddes then brought over a paper which he read over hurriedly but which plaintiff claims he did not comprehend (p. 32); that Giddes said it was only a matter of form and everything was all right; that plaintiff asked what he was receiving for signing that and Giddes replied, "300 weeks' compensation just as long as I was unable to go back braking" (p. 35). Plaintiff then said, "How about my position?" and Giddes replied, "That is provided for in the paper" (pp. 32-36); that he asked Giddes what the paper was and was told it was a release; that he offered to take it and read it but Giddes pulled it away and read it to plaintiff (p. 43); that he then went into Mr. Lodge's office. Mr. Lodge asked him if he knew what he was signing and he said, "Yes," and then signed the paper in the presence of Mr. Lodge (pp. 32, 33, 42); that he can read and write and being shown the release admitted he could read it, and did, in

10

20

30

the Court Room, read part of it aloud (p. 43); that when he signed it he knew it was a release and that thereby he released the company from all claims he had for this accident, provided they paid the weekly compensation (pp. 44-45); that a release "is a sort of an agreement that both parties should keep" (p. 44); that in this instance "he was supposed not to bring any action against them if they lived up to their part, and to release them from all claims as to this accident if they lived up to their part (p. 44); that he would not have signed it if he had known it did not contain a provision for future employment or that it did not contain a provision for compensation for 300 weeks at \$6.20 and that relying on Mr. Giddes that he was to receive such compensation and future employment he signed the release (p. 46).

That at the time of executing the release he also signed a receipt acknowledging the receipt of

40

\$18.60 "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" (p. 33); that on March 5, 1914, he signed a similar receipt for \$6.20 and was told to come every week to be examined by Dr. Washburn. March 9, 1914, March 23, 1914, and March 31, 1914, he signed similar receipts (p. 15). On April 1st he applied to Mr. English for a job on the bridges, and on April 5th he went to work as bridgeman for defendant at \$63 per month (p. 14), because \$63 a month was much better than \$6.20 a week (p. 46), and worked until August 10th, when he had a quarrel with his boss and was laid off (p. 26), and later saw Mr. English, passenger train master, about the matter and was told the position had been done away with (p. 26); that on September 9th he was examined by Dr. Washburn (p. 16), and on that day he talked with Mr. Giddes about compensation in the future and was told the case was closed against him and no future payments would be made (p. 37); that he, in September, applied to defendant for leave of absence for thirty days and obtained same and went to California and in October wrote to defendant (or its employe) and resigned (p. 25, Exhibit D-3); that from April 1st when he went to work as bridgman no compensation was paid him, and he never applied or asked for the same although Giddes' office was in the same concourse where he was employed on the bridges (p. 21), because he did not have time to ask or inquire about it (p. 46).

Assuming that, although the matters testified to by plaintiff as to the consideration to be paid to him for the execution and delivery of the release were distinctly denied, the jury might have the right to find them true, a summary then, of the

10

20

30

40

evidence discloses that plaintiff, being an intelligent man, able to read and write, with knowledge as to the nature of a release and intending to execute such an instrument, signed, sealed and acknowledged a release wherein he released the defendant from all claims and demands for injuries arising out of the accident on January 19, 1914, which form the basis of the case at bar, and alleges he was told that as a consideration for executing such instrument he was to receive “\$6.20 per week for 300 weeks and his job was provided for,” and that he now claims he did not receive the consideration promised.

10

That plaintiff was fully aware of the contents of the release and the effect thereof is conclusively shown by his own evidence; he not only testifies that he knows the nature and purpose of a release (giving a description of such) and that he knew at the time he was signing a release and thereby he released the defendant from all claims as to the accident in question (p. 43), but he admits that upon being interrogated by the Master in Chancery taking his acknowledgment, as to whether or not he knew the contents of the paper to which he affixed his signature, he stated that “he knew what he was signing” (p. 44).

20

If from the evidence fraud of any kind could be inferred, we submit it was only such as affected *the consideration* and not *the execution* of the instrument.

30

Under such circumstances the release, at law, is a bar to a recovery, and relief from its effect must be sought in a court of equity.

40

“Whether a release tainted by fraud can be set aside and declared void in a court of law, or whether the assistance of a court of equity is necessary, depends upon the nature of the fraud. Where the fraud is practiced in the execution of the instrument—as where it is

misread to the releasor, or where there is a surreptitious substitution of one paper for another, or where a party is tricked into signing an instrument which he did not intend to execute, or where advantage is taken of the mental or physical condition of the releasor—in all such cases a court of law may take cognizance of the fraud on the ground that the legal existence of the instrument is in question. The question is, whether the writing in the form of a release has acquired original validity as a contract, and is a legal question. 10

“But where the releasor knows the character of the instrument he signs, and intends when he signs and delivers it that it shall have the effect and purpose which the law imputes to it, but there is fraud in the representations used to induce him to agree to a settlement of his claims—such as false statements as to the nature and value of the consideration, or as to the extent of his injuries—in all such cases the instrument must be held valid in a court of law, and relief from its effect must be sought in a court of equity.” 20

24 Am. & Eng. Encyc. of Law, 318 (“Release and Discharge”).

And see

- Connor v. Dundee Chemical Works*, 21 Vr., 257;
Waln v. Waln, 53 N. J. L., 429;
Fivey v. Penn. R. R. Co., 66 N. J. L., 23-24; 30
Zdanciewicz v. Burlington Co. Trac. Co., 77 N. J. L., 10;
Rogers v. Colt, 1 Zab., 18, 704;
Stryker v. Vanderbilt, 1 Dutcher, 482;
Hudson v. Inhabitants of Winslow, 60 Vr., 437.

Appellant seems, under his Point I, to place great reliance upon an expression of the Supreme 40

Court in the Zdancewicz case, above cited, as establishing a rule that requires the trial court to submit to the jury the issue of fraud in the execution of a release unless the case is "barren of any evidence" which "tends to support" the claim of fraud in the execution of the release.

10 It is respectfully submitted that this language has not the effect of setting up a rule of special strictness in this class of cases, and that the test here is in no respect different from that governing all other cases of directions of verdicts, viz: that if the evidence will not support a reasonable inference of fact of fraud in the execution, the case must be withdrawn from the jury; and the expression "barren of evidence" does not narrow the rule but is simply equivalent to "admitting of no reasonable inference." The rule governing the withdrawal of cases from the jury is well settled in this State.

20

N. J. School, etc. Co. v. Bd. of Education, 58 Law (29 Vr.) 646; 35 Atl. 397;

Consol. Trac. Co. v. Chenowith, 61 Law (32 Vr.) 554; 35 Atl. 1067;

Sutphen v. Hedden, 67 Law (38 Vr.) 324; 51 Atl. 74;

Mumma v. Easton etc. R. R. Co., 73 Law (44 Vr.) 653; 65 Atl. 208;

30

Hummer v. Lehigh Valley R. R. Co., 65 Atl. 126;

Nolan v. Bridgeton etc. Trac. Co., 74 Law 196; 65 Atl. 992;

Dederich v. Central R. R. Co., 74 Law 424; 65 Atl. 833;

Weston v. P. R. R. Co., 65 Atl. 1015;

Carroll v. Central R. R. Co., 80 Law 403; 79 Atl. 293.

40

Spargo v. C. R. R. Co., 86 Atl. 385;

"The rules relating to the * * * sufficiency of evidence in civil actions generally apply to actions involving a release."

34 Cyc ("Release") 1103.

The release then, in a Court of law, must be upheld, and the trial court did not err in directing a verdict for defendant.

Plaintiff also sets forth on Point X various excerpts from Cyc with the correctness of which we have no quarrel, but we hold that these rules have no application to the case at issue. 10

Plaintiff knew there was a Workmen's Compensation Act (pages 30-38) under which he was entitled to compensation (p. 37), but he had never seen it nor had it read to him (p. 30) and his object in going to the office of the Company was to ascertain how much he was entitled to under the law (p. 38). He further testifies that Mr. Giddes read the law to him from a pamphlet of the "Employers' Liability Act", which Giddes said his injury came under. 20

There was no false statement made. No testimony was offered that Mr. Giddes represented that plaintiff's rights were "*confined*" to the terms of the Workmen's Compensation Act. The allegation is that Giddes "read from a kind of pamphlet, I believe from the Employers' Liability Act, which he said that my injury came under." 30

However, if it were true that Mr. Giddes had so represented, such representations constitute no defense, for if made they were merely the expression of an opinion upon the part of the person taking the release, or at most a mistake of law, and cannot avoid the same. 30

34 Cyc., 1058;

Chicago, etc., R. Co. v. Wilcox, 116 Fed., 913;

Valley v. Boston & R. Co., 103 Me., 106-110; 68 At., 635.

And if Giddes had actual knowledge of the falsity thereof such representations constitute a *false representation of law*, and do not vitiate a release.

Upton v. Tribilcock, 91 U. S., 45; 23 Law. Ed., 213.

- 10 Again, the representations on this point, if made, were representations as to liability of defendant and would not vitiate the release.

Pacific Mut. L. Ins. Co. v. Webb, 157 Fed., 155;

Hill v. Northern P. R. Co., 113 Fed., 914;

Vanderveldon v. Chicago & N. W. R. Co., 61 Fed., 54.

- 20 Plaintiff also under Point XI sets forth citations from various cases in other states, none of which, however, are applicable to the case at bar.

The evidence in this case is distinct and definite. Plaintiff applied for compensation under the compensation law; he was told he would have to sign a release upon the Company agreeing to pay him according to the terms of the Employers' Liability Act; he knew what a release was and the purpose thereof; he knew the paper which

- 30 he was asked to sign was a release; he can read and write; he signed it knowing it to be a release and that he knew at the time that he "was supposed not to bring any action against them if they lived up to their part."

The alleged false statements are (1) that "Giddes told him he was to receive compensation for 300 weeks, and (2) that his job was provided for."

- 40 The plaintiff's own evidence establishes that

what Giddes said to him (according to his, plaintiff's, version) is that the consideration to be paid him for signing the release was "300 weeks' compensation *just as long as I was unable to go back braking* (p. 36).

Had Giddes used these exact words no unconditional promises to pay compensation for 300 weeks existed, but simply a statement that plaintiff was entitled to compensation *as long as he was unable to go back braking, but not to exceed 300 weeks*. This was in exact accordance with the law (See Compensation Act, Sec. 11, sub. div. (a) as amended, Laws 1913, p. 302), and affects the consideration only. 10

The second alleged false representation was that when Giddes told plaintiff the amount of compensation which he was entitled, plaintiff said "How about my position?" and Giddes replied, "That is provided for in the paper." The evidence of plaintiff on this point will be found on pages 32 and 36 of the printed book. 20

Plaintiff states (p. 32) :

"Q. What else did Mr. Giddes say at that time, if anything? A. I asked him what I was receiving for signing that; he said three hundred weeks' compensation; and I asked him how about my position, and he said that was provided for in the paper."

(P. 36.) 30

"Q. My question was, what was said by you at that time in reference to future employment by the company? A. I did not say anything just then; I asked him first—

"Q. You asked him first, what? A. What I was receiving for signing the paper; I wanted to know what I was getting for it. He said, three hundred weeks' compensation.

"Q. I am not asking you about that. When was it you first spoke to him about future employment? A. Just following that; follow- 40

ing that statement I said to him, 'How about my job?' He said that was provided for in the paper.

"Q. Did he say anything further than that so far as you can recall? A. Nothing on that point."

This does not, in any sense, constitute an *agreement* for future employment. No time of employment is stated, nor job or position named, nor rate of wages or compensation fixed, nor the nature of work specified. If it was intended to apply to a position of brakman, then plaintiff was able to perform the duties thereof and needed no agreement, and if it was to apply to any other job or position then no evidence was given as to the time, wages, etc. It is plain that no "future employment" was contemplated by either party in the matter of release.

The release, then, in a Court of law, must be upheld, and the Trial Court did not err in directing a verdict for defendant.

POINT II.

Fraud on the part of defendant was not proved by the evidence; defendant did not misrepresent plaintiff's legal rights to him (Answering plaintiff's Points II, XIV).

But if the court had passed this point and arrived at the question as to the existence of fraud in the execution of the release, we contend that after the whole case was in it was impossible for a jury to find fraud, either in the consideration or the execution of the instrument, had the matter been submitted to them.

The first ground of fraud alleged by plaintiff in his Point II is that defendant misrepresented plaintiff's legal rights to him during the conversation which preceded the signing of the release,

in that plaintiff was told that his rights arose under the State Workmen's Compensation Act, whereas he had no rights thereunder, but only under the Federal Employers' Liability Act, plaintiff and defendant being engaged in interstate commerce at the time of the accident.

The complete answer to this argument is that the law of this state is as defendant represented. The fact that defendant was engaged in interstate commerce in the particular operation in which plaintiff was injured, does not exclude the operation of our State Compensation Act. In *Rounsville vs. Central R. R. Co.*, 94 Atl. 392, our Supreme Court recently said:

"Nor would that double recovery have been illegal, however unjust it might be and was in fact considered to be by the Legislature, for compensation by way of pension from the master is quite different in character from compensation by a tort-feasor, master, or third person, for a wrong not arising out of contract.

"We think it clear that the act of Congress deals with an entirely separate matter from the act of our own Legislature."

This decision was followed by the Supreme Court in *West Jersey Trust Co. v. Phil. & R. Rwy. Co.*, in 95 Atl. 753. These decisions were affirmed in the recent decision of this Court in *Winfield v. Erie Railroad Company*, where Chief Justice Gummere said:

"The question then is whether the widow of an employee of a common carrier by railroad which is engaged in interstate commerce, who comes to his death while he is employed by such carrier, in such commerce, must in all cases bring her action to recover compensation under the Federal Employers' Liability Act. This question, we think, must be answered in the negative," etc.

Under the law of this State therefore, defendant correctly represented plaintiff's legal rights.

The recent case of *Grybowski v. Erie Railway*, 95 Atl., 764, in the Supreme Court, cited by plaintiff on page 24 of his brief insofar as it seems to hold contrary to the still more recent *Winfield* case, in this Court, must be regarded as overruled.

Nor was there any fraudulent representation
 10 as to the *extent* of his legal rights, the amount of
 the compensation due him. Plaintiff's whole
 argument was that upon Mr. Giddes reading to
 him from the pamphlet containing the Employer's
 Liability Act, the part that impressed him was
 the one-half of his weekly compensation for three
 hundred weeks. It is evident that had any at-
 tempt been made by Mr. Giddes to defraud plain-
 tiff as to the compensation to which he was en-
 20 titled, Mr. Giddes would not have told him that he
 was entitled to *more* than the act provided. If a
 fraud was intended and plaintiff was relying upon
 the statements of Mr. Giddes as to the amount to
 which he was entitled, the natural thing for Mr.
 Giddes to do would have been to *underestimate*
 the amount to which plaintiff was entitled, and
 thus secure an advantage to his employer. The
 statement of Mr. Giddes is that he read from the
 pamphlet containing the compensation act and
 30 told plaintiff that he would be entitled to receive
 as compensation one-half his weekly wages during
 the time of his disability, not exceeding three
 hundred weeks, and in this he is borne out by
 plaintiff's own testimony as he testifies (p. 36)
 that Giddes told him he was entitled to "300 weeks
 compensation just as long as I was unable to go
 back braking." It must be remembered that at
 this time there had been no determination by the
 physicians as to the exact length of time the in-
 40 jury of plaintiff would prevent him from return-

ing to "braking." The evidence shows no fraudulent representations as to compensation.

Plaintiff recognized the validity of the release and accepted payments thereunder, to wit, the sum of Forty-nine dollars and sixty cents (\$49.60), paid to him at various times, until upon his own application he was placed upon the payroll of defendant at \$63 per month as a bridgeman, which sum per month (\$63) was greater than the amount of monthly payments namely, (\$49.60) he had been receiving under the terms of the agreement or release. 10

These payments are evidences of good faith on defendant's part.

The other alleged fraudulent representation set up in appellant's brief is that he was promised a *permanent job* if he would settle his case. But there is not to be found in his testimony any claim that he was to have a *permanent job*. No agreement for permanent employment was testified to by either plaintiff's or defendant's witnesses. All the testimony of McDonald is that after it was explained how much he was entitled to under the State Compensation Act, he said "How about my job?" and Giddes said, "Oh that is provided for." This evidence discloses no agreement for future employment other than as appellant was then employed, to wit, as brakeman. It must be remembered that at this time there had been no determination by the physicians as to the exact length of time the injury would prevent appellant from returning to "braking". What then, was this employment or job appellant was referring to? The only reasonable conclusion to be arrived at is that, if such conversation were had, it was in reference to appellant returning to "braking". No other job or employment was mentioned, nor time of employment fixed, nor rate of wages or compensation determined upon. Surely if 20 30 40

appellant was contracting for future employment at something other than "braking", the elements of time, work to be performed, wages etc. would have been mentioned by him. Giddes denies that anything was said about future employment, save that the compensation was to continue until appellant "*was able to return to work*, but not exceeding 300 weeks" (p. 49). But if an agreement or promise for future employment could, by any possibility, be held to have, existed, defendant performed its promise when it subsequently employed appellant as bridgeman at a wage acceptable to him. Nor does the fact that plaintiff subsequently ceased to work for defendant as bridgeman raise any inference of fraud in the original negotiations.

Furthermore, it must also be remembered that plaintiff was not discharged as "brakeman"; he resigned and his reason for so doing is given in his own handwriting, namely, the letter written by him in October and wherein he says, "I have decided that as I cannot get back to Jersey City before that leave of absence runs out I will formally resign, so kindly consider this my resignation" (Exhibit D-3).

Contrary to appellant's argument in his Point XIV we submit that this letter is of decisive significance as showing defendant's good faith in giving him employment as promised (if a promise could be spelled out of plaintiff's testimony) at a rate in excess of the compensation.

The above evidence, it is submitted, falls far short of the degree of proof of fraud required to invalidate a release.

"To establish such fraud or mistake as will warrant the avoidance of a written release, the proof must be clear, unequivocal and convincing."

In *Fivey v. Penn. R. R. Co.*, 67 Law 627, at 634 this court held:

“In considering this question it should also be observed that a charge of fraud must be clearly and distinctly proved by the party who asserts. The presumption is in favor of innocence, and fraud is not to be assumed on doubtful evidence.”

POINT III.

There was no lack or failure of consideration avoiding the release (Answering plaintiff's Points III, IV). 10

The consideration of the release appears plainly upon its face and in its language: It reads that the defendant “has *promised* to make compensation in accordance with the terms” of the Compensation Act, “and in addition thereto, to pay the sum of one dollar;” and that “in consideration of the above *promise* to make compensation as aforesaid and one dollar” plaintiff has released defendant. The consideration is thus *not* the payment of compensation but the *promise* to do so. Plaintiff does not seem to be aware (cf. page 28 of his brief) that it is perfectly valid and legal to grant away his rights *in presenti*, as in a release, in return for a promise to be performed *in futuro*. Failure to perform the promise is not a failure of the consideration; performance of the promise is not an implied condition subsequently revoking the grant. For failure to perform the promise plaintiff's remedy is not to attempt to set aside the instrument but to proceed upon the promise. 20 30

But plaintiff cannot even claim non-performance of the promise, under the evidence in this case.

The promise of compensation was performed by the payments of which receipts were produced 40

in evidence (Exhibits D-2 and D-3). The first payment was made at the execution of the release (record page 33) and comprised the compensation due him from February 3, 1914, a point two weeks after the accident, to the date of the release (February 25). Thereafter payments were made at the rate of \$6.20 per week, the amount fixed by the Act, until March 31, 1914. This was certainly performance of the promise to pay.

10 On April 5th (record, page 20) appellant at his own request was put to work as bridgeman at \$63. per month, or about \$15. per week. The weekly payments under the Act totalled, as already mentioned, only \$49.60 per month. This salary was paid plaintiff until August 10th, making twenty-six weeks in all, during which he received payment from defendant. On that day he asked for a day off; and being refused became impudent and defied his immediate superior (p. 20 26) and was laid off as bridgeman (pp. 21, 22): he stayed around for a while, saw he was getting no work and asked for a leave of absence obtained the same and went to California (record, page 22, line 20): and from San Francisco wrote the letter D-3, stating that he would "formally resign" and asking that the letter be considered his resignation.

30 This certainly was a bona fide performance by defendant of a promise which plaintiff alleges to have been to give him "300 weeks compensation just as long as I was unable to go back braking."

40 Plaintiff argues on page 29 of his brief that the payment of the compensation of \$18.60 was a waiver of the release and election by defendant to treat it as a nullity. This argument rests on the same confusion of mind as the notion that a promise may not form the consideration of the release—the performance of the promise certainly is not an abandonment of that which formed its consideration—the release.

Plaintiff also claims non-payment of the nominal consideration of one dollar as a fatal want of consideration invalidating the release. In the first place, the payment of the one dollar was only part of the consideration; the main consideration was the promise to pay the compensation "just as long as plaintiff was unable to go back braking;" the promise was sufficient and it was performed. Again, plaintiff admits in the release that he received the one dollar, and acknowledges over his signature and under his seal, the payment thereof to him. 10

There having been a consideration for the release, the Court will not inquire into the adequacy of such consideration.

9 Cyc ("Contracts") 365;

6 Am. & Eng. Encyc. Law ("Consideration") 694.

Even in a court of equity, which will relieve for fraud in the consideration, the rule is that the inadequacy must be so great as to shock the conscience of the court. 20

"This court would not declare it (a mortgage) void merely for want of consideration, nor will it permit the consideration to be inquired into with a view to setting aside the instrument on that ground."

Shotwell v. Shotwell, 24 Eq. (9 C. E. Gr.) 378, 385. 30

"Even in ordinary cases * * * mere inadequacy of consideration is not a ground even for refusing a decree for specific performance of an unexecuted contract; and still less can it be a ground for rescinding an executed contract."

Ready v. Noakes, 29 Eq. (2 Stew.) 497, 499.

“Unless the inadequacy is such as to shock the conscience of the court and in itself amount to conclusive and decisive evidence of fraud in the transaction, a defense to such an action as this is, based in that alone, will not avail.”

Shaddle v. Disborough, 30 Eq. (3 Stew.)
370, 384.

And as to releases, our Supreme Court has decided:

10

“The plea fails to aver any consideration for the release and since a valid release may be executed without any consideration, it is not necessary to assume that there was any. A release may well be voluntary.”

Jersey City v. N. Jersey St. Ry. Co.,
78 Law (49 Vr.) 72, 74.

The ruling in *Waln v. Waln*, 58 Law 640 of the other cases quoted by plaintiff on page 36 etc. of his brief has no application here because, the execution of the instrument is not here in issue.

20

POINT IV.

The validity of the release is not affected by preliminary recitals contained therein, nor by plaintiff's intention
(Plaintiff's Points V, VI, IX and XII.)

Plaintiff claims in Points V and VI that the correctness of the recitals in the instrument have some effect upon its operation; and that because they are a stereotyped form the release must fail in all cases where they do not exactly conform to the facts, and that such a situation obtains in the case at bar.

30

These recitals do not form the gist of the instrument, nor give it its character; they are mere matters of inducement, and are obviously inserted in the release simply to serve as a record of the

40

negotiations leading up to the execution of the release. It is absurd to contend that in a printed form, which in the great majority of cases represents the exact negotiations, a trivial inconsistency of such a recital with the particular facts should destroy its validity. Falsity in the recitals concerns merely the consideration and not the execution of the release.

But further defendant denies that these recitals are false. Plaintiff knew of the existence of the State Compensation Act and demanded under the law to be paid for his injuries; he was told that his claim was governed by the Compensation Act, which was true. There is thus no extraordinary falsity in the recital that he represented that his claim was governed by the Compensation Act. 10

Plaintiff further contends that his intention at the time when he executed the releases is the test of its validity and if the language of the instrument does not agree with that intention, then, although he understood the language and its legal effect, the instrument is void; and that his intention must be collected from his testimony. 20

Plaintiff's testimony that he would not have signed the release had he known that it did not contain a contract of employment is quite without effect to avoid it; such a contract, if inserted, would simply be additional consideration for the release, and its absence would at most simply be evidence of fraud in the consideration, which is not for a court of law to adjudge; the omission of the contract would not make the remaining consideration (the promise to pay compensation) so inadequate that a law court would take notice of the fact. Moreover, the presence or absence of a contract of employment does not alter the character of the instrument as a release, and it nowhere appears that plaintiff thought he was sign- 30
40

ing a contract of employment, but on the contrary fully understood that he was releasing his claim.

10 Plaintiff intended to execute a release exactly as was admitted in evidence, but he says that the instrument does not set forth the consideration agreed upon and that he would not have signed it had he known it did not provide for "300 weeks at \$6.20 per week and for future employment," yet he acknowledges the paper before a Master of the Court of Chancery and admits he told the Master he knew what he was signing.

It is apparent from a reading of the evidence that at the time plaintiff intended to do exactly what he did, to wit, receive compensation according to the terms of the Compensation Act and to release the defendant from all claims and demands accordingly.

20 Plaintiff's argument that neither plaintiff nor defendant at the time regarded the paper as a release is specious. Plaintiff testified he *intended* to sign a release, with a full and complete understanding of the nature thereof, and defendant intended to *take* a release and the paper executed and delivered *was* and is a release and states in large type-written letters across the top, "RELEASE AND AGREEMENT FOR COMPENSATION," and plaintiff testified he knew it was a release (p. 43), and stated to the Master in Chancery taking his acknowledgment that he "knew what he was signing" (p. 43).

30 The cases cited under plaintiff's Point XII are therefore entirely inapplicable; the instrument was not represented to be anything but what it actually was, a release.

40 Plaintiff lays great stress upon the payment by defendant to plaintiff after the execution of the instrument of various sums and alleges that these

payments indicate that the instrument was not considered by either party as a release. Plaintiff misapprehends the question. The release provides that "in consideration of the *promise* of defendant to make payments in accordance with the terms of the Workmen's Compensation Act" plaintiff releases the defendant from all claims and demands &c. The payments of the moneys mentioned by plaintiff in his brief were made by defendant in carrying out this promise, i. e., to make payments under the terms of the Act. 10

POINT V.

There was no mistake either of fact or of law, such as would operate to avoid this release (Plaintiff's Points VII, VIII, XI).

Plaintiff in his brief on Point VII sets forth various excerpts from Cyc. which state the general rule as to "Mistake of Fact", "Innocent Misrepresentations", "Fraud", etc. We do not dispute the correctness thereof, but we submit they have no bearing upon the case at bar. There was no mistake of law. The "Workmen's Compensation Act" did apply. 20

Rounsavelle v. Central R. R. Co., 94 Atl., 392;

New Jersey Trust Co. v. Phil. & R. Ry. Co., 95 Atl., 753; 30

Winfield v. Erie R. R. Co. (above).

Plaintiff's Point VIII completely begs the question which is now before the Court. Assuming the fraud and assuming that it is such as a law court can consider, and assuming also that if correctly submitted to the jury, the weight of evidence was such that they must find such fraud, then plaintiff argues that no subsequent payments could validate it. The subsequent payments were 40

performances of the promise which constituted its consideration; one who claims the benefit of a promise is surely estopped to question it by his acceptance of its performance.

POINT VI.

Plaintiff's acceptance of employment operated as a novation, and accord and satisfaction, replacing the arrangement represented by the release.

10

The evidence is that on the first of April he applied for a job on the bridges "because \$63 a month", (the salary of a bridgeman) "was much better than \$6.20 a week" (page 46, line 1, ff.). This is the only testimony in the case on the point, and it is plaintiff's own.

It is submitted that no better evidence could be produced in proof that plaintiff made an election, and a novation, because he elected to substitute a new arrangement for the old one under the release and to take the position of bridgeman and receive the greater sum as wages rather than to continue to receive the compensation of \$6.20 per week under the lease. This arrangement was accepted and acted on by both parties and terminated only when plaintiff "asked for leave of absence" and then wrote his letter of resignation (Exhibit D-3).

20

30

POINT VII.

The Court did not err in stating that plaintiff was required to reimburse defendant for amount paid to him in order to attack the release (Plaintiff's Point XIII).

Although plaintiff says that defendant never pleaded this as a defense or in its rejoinder, yet neither does plaintiff allege this statement as error in his grounds of appeal. The question therefore may not properly be before this court at all. 10

The general rule undoubtedly supports this statement of the trial court.

"It is generally held that if a person enters into a release and afterward seeks to avoid the effect of it on any ground that will entitle him to rescind it, he must first restore what he has received." 20

34 Cyc. ("Release") 1071.

This is especially true where the ground of attack is, as here, one of equitable cognizance exclusively.

"It is sometimes said to be a general rule that one who seeks to avoid or rescind a release must restore the consideration paid therefor, or otherwise put the other party in statu quo. The plaintiff cannot be allowed both to affirm and disaffirm according as the case may terminate; he cannot affirm for what he has received, and disaffirm and repudiate the release as to the difference between that amount and what he might expect to recover by the verdict of the jury; he must disaffirm and rescind the release in toto. But the rule is not a general one. The true rule as gathered from the cases is that in those cases where a court of law would be authorized to declare a release void, as above 30 40

set forth, a return of the consideration is not necessary; but where the releasor would go into a court of equity to have the release set aside or annulled, he must restore to the other party the consideration received therefor."

24 Am. & Eng. Encyc. Law ("Release and Discharge") 320.

10 The exception to this rule mentioned in Cyc and quoted by plaintiff, where the releasor has been deceived as to the nature of the instrument has obviously no application here.

POINT VIII.

20 Finally, we submit that what plaintiff is seeking to accomplish is not to prove fraud in either the consideration or execution of the instrument, but rather to vary or contradict the terms of a written instrument by oral testimony.

The Judgment should be affirmed.

Respectfully submitted,

GEORGE HOLMES.

Attorney of Defendant.

EDWARDS & SMITH,

Of Counsel.

30

40

INDEX.

	PAGE
Notice of Appeal	1
Complaint.	2
Answer	6
Reply	8
Answer to Reply	10
Stipulation	10
Proceedings at Trial.	11
Motion for Direction of Verdict... ..	56
Opinion of Court on Granting Motion to Direct Verdict	63
Verdict.....	67
Judgment.....	72

TESTIMONY.

FOR PLAINTIFF:

CHARLES F. McDONALD.

Direct.	11
Cross	18
Re-direct	25
Re-cross.....	27
Re-called in rebuttal—Direct	28
Cross	37
Re-direct.....	46

SUR-REBUTTAL FOR DEFENDANT.

WILLIAM W. GIDDES.

Direct	47
Cross	50
Re-called—Cross	57

JOHN K. LARGE.

Direct	55
--------------	----

EXHIBITS.

	PAGE
D 1—Release. Marked for identification. Offered in evidence at page 29; printed at.....	68
D 2—Checks and Receipts. Marked for identification at page 29	69
D 3—Letter. Marked for identification. Offered in evidence at page 29; printed at....	71

NOTICE OF APPEAL.

New Jersey Supreme Court.

CHARLES F. McDONALD, Plaintiff-Appellant, vs. CENTRAL RAILROAD COMPANY, OF NEW JERSEY, a corporation, Defendant-Respondent.	}	On Appeal to Court of Er- rors and Ap- peals. 10 Notice and Grounds of Appeal.
--	---	--

*To George Holmes, Esq.,
Attorney of Defendant:*

Take notice, that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds: 20

1. The Trial Court erroneously granted defendant's motion for a direction of a verdict in favor of the defendant, and against the plaintiff, whereas, said Court should have denied such motion, and have submitted to the jury, the question of fact as to whether there was sufficient evidence of fraud on the part of the defendant in procuring the plaintiff to execute the release. 30

2. The Trial Court erroneously granted defendant's motion for a direction of a verdict in favor of the defendant, and against the plaintiff, whereas, the said Court should have denied such motion, and have submitted to the jury, the question of fact as to whether there was sufficient evidence of fraud in the consideration mentioned in said release.

CHARLES M. EGAN,
Attorney of Appellant.

Dated December 20th, 1915.

COMPLAINT.

Filed January 9, 1915.

NEW JERSEY SUPREME COURT.

HUDSON CIRCUIT.

10

CHARLES F. McDONALD

Plaintiff,

v.

CENTRAL RAILROAD COMPANY OF
NEW JERSEY,

Defendant.

At Law.

On Certified
Case.

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

20

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

30

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. As such common carrier, defendant was engaged in carrying passengers and freight to and from the State of New Jersey from, and to and from the State of New York, and Pennsylvania, and other states of the United States, and was engaged in Commerce between the States of New Jersey, New York and Pennsylvania, and other states of the United States.

40

4th. Said defendant then and there owned, possessed and had the management and control

COMPLAINT

of a certain railroad, with its appurtenances, which was operated and used by it in such business of common carrier, and in such commerce as aforesaid; that as part of said railroad, defendant maintained certain tracks, side tracks and switches at what is known as Communipaw yard, in the City of Jersey City, Hudson County, New Jersey, where the said defendant sorted out and arranged its incoming and outgoing trains of freight and passenger cars which were used by it in such commerce between the States of New Jersey, and the States of Pennsylvania, New York and other states of the United States. 10

5th. That the said defendant then and there employed divers large numbers of servants and agents to manage, operate and run its said railroad in its business of common carrier as aforesaid and in commerce as aforesaid, and that the plaintiff was on the said January 19th, 1914, employed in such commerce by the defendant in the capacity of a brakeman at said Communipaw yard, City of Jersey City, under the orders and directions of the said defendant and being so employed the plaintiff was engaged in such commerce, in sorting out and arranging its incoming and outgoing trains of freight cars engaged in such commerce, and that the injuries hereinafter mentioned were received and suffered by the plaintiff while employed in such commerce and were inflicted by the said defendant through its officers, agents and employees while the said plaintiff was so employed in such commerce by the said defendant as such common carrier in such commerce between the aforesaid states. 20 30

6th. That it then and there became and was the duty of the said defendant to provide and 40

COMPLAINT

maintain and operate a proper system of signals and warnings in the operation and management of its said railroad and to carefully and properly protect, guard, notify and warn the plaintiff of the probable dangers of his said employment and to give him warning and notice thereof, before the said
10 probable dangers became actual dangers, so that plaintiff might not be subjected and exposed to extreme and unnecessary dangers of life and bodily peril not required nor contemplated by his same employment.

7th. Yet the said defendant, then and there disregarded its duty in this behalf in that it did not provide, maintain and operate a proper system of signals and warnings in the operation and manage-
20 ment of its said railroad in that it did not carefully and properly protect, guard, notify and warn the plaintiff of the probable dangers of his said employment and in that it did not give the plaintiff reasonable warning and notice thereof before the said probable dangers became actual dangers, and thereby the plaintiff was subjected and exposed to extreme and unnecessary danger of life and bodily peril not required, nor contemplated, by his said employment and thereby, while the plaintiff was
30 so employed in such commerce as aforesaid, at the place aforesaid, and while the said defendant was such common carrier and engaged in commerce between the aforesaid States, and while the plaintiff was engaged in his work as a brakeman under the orders and directions of the defendant, by its agents, servants and employees, the said defendant negligently caused and permitted an engine with cars attached thereto, to be moved with great force to and against, and come in collision with four cars loaded with express matter, upon
40

COMPLAINT

which the plaintiff was employed, and who at that moment was standing upon the rear end of the last of said cars, loaded with said express matter as aforesaid, and that while the plaintiff was in such position he saw an engine and cars rapidly approaching on this same track, upon which the express cars were, on which he was employed and standing as aforesaid, and knowing that a collision was inevitable and seeing and believing that he would be in greater danger by remaining on said car than by jumping therefrom, and to save himself from such serious injury, he jumped from the rear of the car on which he was standing as aforesaid to the ground and just in time to avoid a collision between the engine of said approaching cars with the car on which he was standing.

10

20

8th. That by reason whereof, the plaintiff's left wrist and third finger of left hand was broken and dislocated; his right ankle sprained and wrenched, and certain bones therein broken; his right forehead severely cut, his nose broken, and his eyesight weakened, and which injuries he is informed and believes are permanent in character.

9th. That by reason whereof, the plaintiff has from thence hitherto, been subjected to great pain and suffering and has been prevented from carrying on his usual business as a brakeman as aforesaid, and has been compelled to expend large sums of money in an attempt to heal himself of said injuries.

30

10th. That this action was commenced within two years from the time the said cause of action accrued.

11th. That by virtue of an act of Congress of the United States of America, entitled "An Act relating to the Liability of Common Carriers by

40

ANSWER

10 railroad to their employees in certain cases," being a public act and approved April 22, 1908, and the supplements thereto, and amendments thereof, and action has accrued to the said plaintiff to demand and have of and from the said defendant the sum of money herein demanded in manner and form as is demanded.

12th. Plaintiff demands \$15,000.00.

ANSWER.

Filed January 23, 1915.

20 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, County of Hudson and State of New Jersey, says:

30 It admits that it is a common carrier of passengers and freight engaged in interstate commerce; that Charles F. McDonald, the above named plaintiff was employed by it and that said plaintiff was injured on January 19, 1914, while he was employed by this defendant in such commerce. It denies, however, that the injuries sustained by said plaintiff were the result of any negligence on the part of this defendant, its agents, servants or employees, and denies that any injuries sustained by said plaintiff are permanent.

40 As a separate defense, this defendant says that after the occurrence of said accident, to wit, on the twenty-fifth day of February, nineteen hundred and fourteen, said plaintiff by an instrument in writing under seal, for a good and valuable consid-

ANSWER

eration, released this defendant of and from all claims and demands, which he then had, or which his heirs, executors or administrators thereafter might have, by reason of the injuries occurring to him on the nineteenth day of January, nineteen hundred and fourteen, mentioned in the complaint.

As a second separate defense this defendant alleges that after the occurrence of the accident mentioned in the complaint, the plaintiff represented to this defendant that he was entitled to the benefits conferred by the Second Section of Chapter 95, of the laws of New Jersey for 1911, and the acts amendatory thereof and supplementary thereto, which acts are commonly known as the Workmen's Compensation Act of New Jersey, and the said plaintiff thereupon requested this defendant to compensate him for his said injuries in accordance with the provisions of said Act, and agreed that if this defendant would do so, he would receive the same as full satisfaction and discharge of any further right or rights of compensation which he might have thereafter, and this defendant alleges that it thereafter paid to the plaintiff the amounts provided for by said Compensation Acts, and that said plaintiff accepted the same as full satisfaction and accord of all claims which he might have against this defendant because of the injuries mentioned in the complaint.

As a further separate defense, this defendant says, that said plaintiff is estopped from recovering any damages under the act mentioned in the complaint because of the representations made by him and acted upon by this defendant mentioned in the second separate defense herein.

10

20

30

40

REPLY.

Filed February 2, 1915.

10 Plaintiff for a reply to the 1st separate defense of defendant's answer, denies that the said alleged release was for a good and valuable consideration, and alleges that the same was procured and obtained by the defendant from the plaintiff by fraud and false representations and pretenses:

20 1st. By inducing the plaintiff to sign the same upon the representation that he would receive as consideration therefor the sum of \$6.20 per week for the ensuing 300 weeks thereafter; when the defendant had no intention to pay the same to the plaintiff, and that the defendant paid to the plaintiff the sum of \$6.20 from the 2nd day of February, 1914, until the 28th day of March, 1914, at which time the defendant refused to make any further payments to the plaintiff, and since which time the said defendant has made no payment to the plaintiff of any amount whatsoever.

30 2nd. That prior to, and at the time of the signing of said release the defendant agreed that employment of the plaintiff by the defendant would be furnished and given to him, and which the defendant has since the obtaining of the said release, failed, neglected and refused to give to or provide for the plaintiff, and that said release was secured by fraud in that it did not provide for the employment of the plaintiff by the defendant pursuant to such aforesaid previous agreement, and that said release was fraudulently obtained upon a false and fictitious promise to the plaintiff that he would be given employment by the defendant permanently and which promise the defendant
40 had no intention at the time or at any time from

REPLY

thence hitherto of complying with, except from April 5th, 1914, to August 10th, 1914, since which time the defendant has refused to give the plaintiff any employment whatsoever, notwithstanding the fact that the plaintiff was ready and willing at all times to accept such employment and faithfully perform the work incident thereto, and that such promise for future employment was not made in good faith, but was fraudulently made for the purpose of procuring such release from the plaintiff. 10

3rd. That the said release is fraudulent, in the consideration given by the defendant to the plaintiff for such release.

The plaintiff for a reply to the second separate defense of defendant's answer denies that the plaintiff represented to the defendant that he was entitled to compensation under the Compensation Act of the State of New Jersey, and denies that the plaintiff requested the defendant to compensate him for his injuries in accordance with the provisions of said act, and denies that he agreed that he would receive such compensation in full satisfaction and discharge of any future right to compensation, which he might have, and denies that the defendant has paid to the plaintiff the amount provided by said Compensation Act, and denies that the plaintiff accepted the same or any part thereof in full satisfaction and accord of all claims which he might have against the defendant, and alleges that it was the defendant who stated to the plaintiff that his only right to compensation was under the State Compensation Act, and which statement was false and untrue, and made with intent to deceive the plaintiff for the reason that the plaintiff and defendant at the time of the hap- 20 30 40

ANSWER TO REPLY

STIPULATION

pening of the accident alleged in the complaint were both engaged in interstate commerce, and being engaged in such commerce, all his rights to compensation were based upon what is known as the "Federal Employer's Act," and the provisions of which act are exclusive of all other remedies, and which fact was well-known to the defendant at the time of procuring the plaintiff to sign the said alleged release.

And for a reply to the further separate defense, the plaintiff denies every allegation contained therein.

Answer to Reply.

Filed February 6, 1915.

By way of answer to reply heretofore filed herein the defendant denies that the release mentioned in its answer was obtained by fraud and false representation and pretenses; and it denies that plaintiff was induced to sign the same upon the representations mentioned in the reply; and it denies that the said release is fraudulent in the consideration given by the defendant to the plaintiff for such release.

It denies the allegations contained in the reply to the two separate defenses.

Stipulation.

It is hereby stipulation and agreed that on the trial of this action the following facts shall be admitted as true in lieu of proof of same.

1st. That the plaintiff was injured on January 19th, 1914, at 4.05 A. M., while in the employ of the defendant at or near Jersey City, by reason

PROCEEDINGS AT TRIAL

CHARLES F. McDONALD—Direct

of passenger drill engine 93 or 94, in charge of engineer Whitman, enroute to train shed with express car for train 651, was run in track 3, instead of track 15, and against drill engine 83 which was lying on that track against train 520, and collided with same injuring driller McDonald. 10

The accident was caused by leverman Ellwood in tower No. 1 failing to put in mechanical lever No. 40.

Proceedings at Trial.

This action came on for trial before the Hon. William H. Speer and a jury on Nov. 29, 1915. 20

Charles M. Egan and Frank M. Hardenbrook appeared for the plaintiff.

Edwards and Smith, by Edwin F. Smith, appeared for the defendant.

The said plaintiff to maintain the issues on his part, called:

CHARLES F. McDONALD, sworn.

Direct examination by Mr. Hardenbrook. 30

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

Q. How old are you? A. Thirty-one.

Q. And you were in the employ of the Jersey Central Railroad on the 19th of January, 1914, last, were you? A. Yes, sir.

Q. In what capacity were you working for them? A. Yard brakeman.

Q. Brakeman? A. Yes.

Q. On what kind of a train? A. Well, passenger yard. 40

CHARLES F. McDONALD—Direct

Q. How long had you been in the employ of the Central Railroad? A. Since March 4th, 1913.

Q. And doing what kind of work? A. Well, part of the time I was in the yard as freight brakeman, and then I transferred into the passenger yard.

10 Q. But the work that you did was always exclusively braking, was it not, freight or passenger trains? A. Yes, sir.

Q. Before going to work for the Central Railroad what work had you done, if any, in other capacities, before going on the Central? (No answer.)

Q. Just before you went to work for the Central Railroad? A. Well, I worked for the Pennsylvania Railroad and the government in the Panama Canal.

20 Q. The work you did for the Pennsylvania Railroad consisted of what? A. I fired a locomotive at one time for them, and broke it—brakeman—also.

Q. And the work which you did on the Panama Canal, what kind of work was that? A. I was pipe fitter's helper there, and also journeyman.

30 Q. Aside from this work you have testified you did at Panama and for the Pennsylvania Railroad and subsequently for the Central Railroad, have you had any other business experience of any kind or character? A. No, sir.

40 Mr. HARDENBROOK—"In lieu of proof it is admitted that the plaintiff was injured on the 19th of January, 1914, at 4.05 o'clock A. M. while in the employ of the defendant, at or near Jersey City, by reason of passenger drill engine 93 or 94, in charge of engineer Whitman, en route train shed with express car number 651, was run in track 5 instead of track 15, and against drill engine 83,

CHARLES F. McDONALD—Direct

which was lying on that track, against train 520, and collided with the same, injuring driller McDonald. The accident was caused by leverman Elwood, in tower number 1, failing to put in mechanical lever number 40.”

10

Q. At the time of this accident, or immediately before the happening of this accident on this night, what were you doing; what position were you in?

A. At the time of the accident?

Q. Yes. A. I was what is known as headman, head brakeman.

Q. What part of the train were you on that night? A. We had hold of one car backing down to the station, and I was on the east end of that car.

Q. And the east end would be the rear end? A. 20
Toward the station.

Q. And was the engine on which you were, moving backward rapidly or slowly? A. Rapidly.

Q. And while you were standing in that position on the rear of this platform, or this car, what, if anything, did you see on the track ahead of you?

A. Well, before we started to back down I got the clear signal, two white—

Q. Answer my question, what did you see ahead of you, anything? A. Nothing. It was night, 30
dark.

Q. Was there any train on the track ahead of you that you were backing into? A. There is a net work of tracks there.

Q. While you were standing on the platform of this car what happened to you? A. We started to back down, and as we were supposed to go clean across the crossovers, instead we ran down this track number five, and there I seen this engine 40
standing there.

CHARLES F. McDONALD—Direct

Q. What engine? You say "this engine," you have not told us anything about it. A. This drill engine 83.

Q. Where was this engine standing? A. Number five.

10 Q. On the track which you were going in on?
A. On the track we were going on.

Q. How close up to that engine did your car get before you—did you jump off of that platform? A. It was not a platform; I dropped off the end sill. It was a car with an end sill.

Q. You dropped off the end? A. Yes.

Q. How close was the car on which you were standing to this engine at the time you jumped off? A. About anywhere from fifteen to twenty feet.

20 Q. You jumped free from the platform? A.
Dropped right off.

Mr. SMITH—He said he was on the end sill, not the platform.

THE WITNESS—The end sill.

Q. What happened immediately afterwards? A. The car and this engine came together.

Q. What happened to the car—A. The east end of it—

30 Q. (continuing)—on which you were standing?
A. (continuing)—was smashed in, caved in.

Q. To what extent was it smashed in? A. I don't know, just from what I was told, that's all; I couldn't say from actual—

40 Q. When you jumped from the train, or from the end of this car, what happened to you, if anything? A. Why, as I dropped off in the dark I dropped as near erect as possible; my foot caught in the railroad, that is the crossover timber they call it, and I pitched forward on my face. My head

CHARLES F. McDONALD—Direct

struck the rail and it wrenched my ankle at the time; it struck my hand down somewhere.

* * * * *

Q. Did you subsequently go back to work for the railroad company? A. As a brakeman?

Q. Now, you heard my question. Answer it. I did not ask you "as a brakeman." A. Yes. 10

Q. Or as a fireman, or as president of the road. A. Yes.

Q. I asked you if you subsequently went back to work for the railroad company? A. Yes, sir.

Q. When? A. April; I believe April 5th.

Q. And what position, if any, did they put you to work at? A. As a bridgeman on the upper course at the ferries.

Q. In the performance of that work was it necessary that you use this wrist or arm, this wrist that had been injured? A. Well, it was very light work. 20

Q. Light work? (No answer).

Q. How long were you kept to work by the railroad company in this position of bridgeman? A. Until August 10th, I believe.

Q. From what date in April do you say? A. From April 5th.

Q. From April 5th until August 10th, and which compensation did they pay you as bridgeman? A. Sixty-three dollars a month. 30

Mr. SMITH—Was that as brakeman?

A. No; as bridgeman.

Q. And what were you earning as brakeman at the time of the injury? A. Well, about \$100 to \$110, if given the opportunity.

Q. Now see if you can answer the question more specifically—or less specifically—How much were 40

CHARLES F. McDONALD—Direct

you earning at the time you were hurt? A. Well, I should judge about one hundred or one hundred and ten dollars.

Q. One hundred to one hundred and ten dollars? A. Yes.

10 Q. A week, or a month, was it? A. Oh, a month.

Q. Are you acquainted with a Doctor Washburn? A. Yes, sir.

Q. When did you first become acquainted with Doctor Washburn; when did you first see him? A. In Mr. Lodge's office some time in February; I do not remember the exact date.

Q. Did he come to see you at the hospital while you were at St. Francis Hospital? A. Yes, sir.

20 Q. Then you saw him before you saw him at Mr. Lodge's office? A. Yes.

Q. My question was, when did you first see him? A. I thought you meant after I went down to the office.

Q. Never mind. Answer what I ask you and nothing else. When did you first see Dr. Washburn? A. St. Francis Hospital.

Q. While you were confined there as a result of the injuries? A. Yes, sir.

30 Q. About how many days had you been in the hospital before Dr. Washburn came to see you? A. About three.

Q. Did you know who he came from? A. I did not know him at all at the time.

Q. Did he state who he was and who he came from? A. He just asked me for a statement. He did not give me his name; he did not tell me who he was at the time.

40 Q. He did not tell you who he was; when did you next see Dr. Washburn? A. At Mr. Lodge's office.

CHARLES F. McDONALD—Direct

Q. When? I asked you. A. About February 25th.

Q. Where? A. Mr. Lodge's office.

Q. And who is Mr. Lodge? A. The claim agent, and so forth.

Q. And where is Mr. Lodge's office? A. In the Central Railroad building at Communipaw. 10

Q. Did you talk with Dr. Washburn at that time? A. I just said hello to him; he made a kind of greeting to me.

Q. Did he have an office there in the office of the claim agent of the company? A. He had a desk there.

Q. About how many times in all did you see Dr. Washburn at this office of Mr. Lodge in the depot building, if you saw him at all at any further time? A. About— 20

Q. About how many times in all did you see him there? A. About five or six times.

Q. Did you talk with him on these various occasions? A. Yes, sir.

Q. Did he make any examination of you? A. Yes, sir.

Q. For and on behalf of the railroad company? A. Yes, sir.

Q. The last you saw him was when? About when? What month? A. It was either the latter part of August or in September, I ain't sure, the first part of September. 30

Q. The latter part of August or the latter part of September? A. Or the first part of September.

Q. At this same office? A. He had another office then in the concourse, a new office he had.

Q. In the depot building? A. Yes, sir.

Q. Did Dr. Washburn make an examination of

CHARLES F. McDONALD—Cross

your wrist and arm on this day in August? A. Yes, sir.

Q. Did Dr. Washburn in your presence make out a written report—A. Yes, sir.

Q. (continuing)—of what his investigation was at that time? A. Yes, sir.

10 Q. What did he do with that written report? A. Placed it in an envelope and gave it to me.

Q. And told you to do what with it? A. Take it to Mr. Lodge's office.

Q. And what did you do with it? A. Went to Mr. Lodge's office and there saw Mr. Giddes.

Q. Who is Mr. Giddes? A. A clerk in Mr. Lodge's office.

Q. The office of the claim department? A. Yes, sir.

20 Q. What did Mr. Giddes do with this report of Dr. Washburn after you gave it to him? A. He opened the envelope, took the report out and read it to himself, and then read part of it to me.

Q. Did he read any part of it to you? A. Just a small part.

Q. You stated, I believe, that you worked for the Central Railroad Company up to what date in August? A. August 10th.

30 Q. And since the 10th of August last, that is August 10th, 1914? A. Yes, sir.

Q. Since the 10th of August last, what work have you been doing, if any? A. Not any.

Q. Have you made an effort to secure work of some kind or character? A. Yes, sir.

Q. And have been unsuccessful? A. Unsuccessful.

Cross-examination by Mr. Smith.

40 Q. Mr. McDonald, this accident happened January the 19th, didn't it? A. Yes, sir.

CHARLES F. McDONALD—Cross

Q. And you were in the hospital until January the 26th, weren't you? A. About that time.

Q. And you went down to Mr. Lodge's office on February 25th, didn't you? A. Yes, sir.

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

10

Marked D 1 for identification.

Q. I show you another paper and ask you if that is your signature? A. Oh, yes, sir.

Q. And another one and ask you if that is your signature? A. Yes, sir.

Q. Another one and ask you if that is your signature? A. Yes, sir.

Q. Another one and ask you if that is your signature? A. Yes, sir.

20

Q. You will have to speak. A. Yes, sir, all right.

Q. Another one and ask you if that is your signature? A. Yes, sir.

Q. Another one and ask you if that is your signature? A. Yes, sir.

Q. Another one and ask you if that is your signature? A. Yes, sir.

Q. Another one and ask you if that is your signature? A. Yes, sir.

30

Q. Another one and ask you if that is your signature? A. Yes, sir.

Papers marked D 2 for identification.

Q. I show you another paper or letter and ask you if that is in your handwriting. A. It certainly is.

Q. Is that your signature? A. Yes, sir.

Q. Is the envelope in your handwriting? A. Yes, sir.

40

CHARLES F. McDONALD—Cross

Marked D 3 for identification.

Q. Mr. McDonald, on April 1st, you went back to work for the company, didn't you? A. April 5th

10 Q. And you went back to work as a bridgeman?
A. Yes.

Q. And you applied then and were taken on by a man by the name of English? A. Yes, sir.

Q. He is in charge of the men there? A. Yes, sir.

Q. And you worked as a bridgeman? A. Yes, sir.

Q. What did you have to do as bridgeman? A. Just raise and lower the hand bridges there.

20 Q. What do you mean by the hand bridges?
A. Bridges connected the upper deck of the ferry boat to the concourse.

Q. How did you raise and lower them? A. Why, with my hand.

Q. By hand. A. Yes, sir.

Q. What do you mean by that; how did you do it? A. By the handle there; I used this one hand, raised and lowered them.

Q. Never used two hands. A. Did not have to.

Q. Opened gates? A. Opened gates.

30 Q. One hand? A. I did not need two—just shoved it back like that (illustrating), that is all.

Q. You did not have to use your hand at all? A. There was no strength needed on that.

Q. Did you ever pull the chains, raising or lowering the bridges? A. Nothing to do with them at all.

40 Q. All you had to do then as this bridgeman was to simply sit there or stand there and use one hand with a lever and push the gate back, is that it? A. Outside of sweeping a little.

CHARLES F. McDONALD—Cross

Q. What did you do with sweeping? A. Sweep up a little and keep the place reasonably clean.

Q. One hand? A. It does not require no strength of two hands on a broom.

Q. I did not ask you that. One hand to sweep?
A. Two hands.

Q. Two hands, sure? A. H'm. If you call it two hands, one to guide the broom.

Q. Sure; but you used two hands, didn't you? You did not go around with one hand sweeping up (illustrating)? A. I could have done it.

Q. Could you have done it with your left? A. No, sir.

Q. You could not have done it with your right, could you? A. Yes, sir; I could have done it with my right; yes, sir.

Q. Was that all you did? A. Wipe windows off, that's all; keep the windows clean, and the doors, that's all.

Q. You did that with one hand? A. Yes, sir.

Q. Always? A. Yes, sir.

Q. And did you clean off the brass? A. Yes, sir.

Q. One hand again? A. You don't need two hands to clean brass.

Q. You did it with one hand? A. Yes, sir.

Q. Any other work there? A. That is all I recollect.

Q. That is all you did? A. All I recollect, yes.

Q. You worked then until August the 10th, didn't you? A. Yes, sir.

Q. And you went away on your vacation, didn't you? A. I was laid off.

Q. For what purpose? A. Reduction of the force, I was told.

Q. Because you had a quarrel with the man, Mr.

CHARLES F. McDONALD—Cross

English, didn't you? A. I did not have any quarrel with Mr. English whatsoever.

Q. Weren't you laid off because you had a quarrel with Mr. English? A. No, sir.

Q. With a station man named Walling? A. I had a slight quarrel with him, but to no great extent.

Q. And he was the man that laid you off, wasn't he? A. Yes, sir.

Q. And you were laid off because you would not do your work? A. No, sir.

Q. And wasn't he finding fault with you all the time because you would not do your work? A. No, sir.

Q. And laid you off? A. He never found fault with me, not up to that day. Because I asked him for a day off, that was why.

Q. And then you took a vacation? A. I seen I was getting no work and I asked for a leave of absence; I did not take no vacation.

Q. You took a leave of absence? A. Yes, sir.

Q. Where did you go? A. California.

Q. And you stayed out in California, didn't you, on a vacation? A. On a vacation, looking for work.

Q. Looking for work? A. Yes, sir.

Q. What kind of work did you look for? A. Work I could do.

Q. What kind of work did you look for? A. Any kind of work I could do; no particular kind of work.

Q. Tell me where you applied for a job, to whom? A. I applied to different places.

Q. To whom? Name me one of them. A. Well, I applied to people I was acquainted with out there.

Q. Tell me the name of one of them? A. I went

CHARLES F. McDONALD—Cross

to a relative, McDonald, the same as my own.

Q. What is that? A. I applied to a person the same name as my own.

Q. McDonald; what was his business? A. Chief engineer.

Q. Of what? A. Chief engineer on a steamboat. 10

Q. Of what? A. The Admiral Line.

Q. What position did you apply for? A. As a steward or something of that kind.

Q. You did not go in and say, "Give me a steward or something of that kind?" A. I told him I wanted something light, something I could handle.

Q. What did you apply for? A. I applied for light work.

Q. What? A. No particular work; light work. 20

Q. In other words, you went around to men, saying, "Give me light work; I want a job; I want light work?" A. What I could handle. I never applied for a job I could not handle.

Q. What did you apply for? A. I have no trade; I have nothing outside of railroad; and I did not apply for a railroad job.

Q. What did you apply for; what kind of work? A. No particular work; something I could do. I asked them if they had something I could do, and told them my condition. 30

Q. I see. You went in to a place and said, "Have you anything I can do?" A. I told them I hadn't—

Q. What places did you go to? A. I went to several places in Los Angeles and San Francisco, Fresno.

Q. Tell me the names of them? A. What?

Q. Of these people you applied to. A. I made a few dollars with the Kalem Moving Picture Company in Los Angeles. 40

CHARLES F. McDONALD—Cross

Q. Anybody else? A. I applied to stores. I do not recollect their names just now; just went in and asked them and walked out again. If I had thought I would need it I would put down the name of every place so I could tell you.

Q. Did you tell them what job you wanted? A.
10 No particular job; I wouldn't take any heavy work, though.

Q. Did you go in and tell them any kind of a job at all? A. No; because I had no trade at all.

Q. You did not go in and say, "I would like to get a job as a porter?" A. No, sir, I could not handle it.

Q. You did not say, "I would like to get a job as so and so?" A. No, sir.

Q. You just went in and said, "Have you got
20 any kind of work I can do?" A. Any kind of work I could do.

Q. Now, as a matter of fact you went to California to visit your folks, didn't you? A. Not particularly.

Q. Didn't you visit your folks there? A. My father, that's all.

Q. Isn't your father, any of your folks, or don't you recognize him? A. He is, he is the only one. He is not there now, though.

30 Q. How long did you stay there? A. About a week.

Q. Then where did you go? A. Down to Los Angeles.

Q. How long did you stay there? A. About three or four weeks, I guess.

Q. Who with? A. I stayed with myself.

Q. You stayed with yourself; that's good. A. Yes, myself.

40 Q. Did you stay with any relatives of yours there? A. No, not at Los Angeles.

CHARLES F. McDONALD—Re-direct

Q. And didn't you go back to your father's place? A. No.

Q. And you only stayed at San Francisco—is that where your father was? A. At San Francisco.

Q. One week? A. One week, that's all.

Q. Can you tell me what week that was? A. I can't. 10

Q. What time did you get there? A. To San Francisco?

Q. What date? A. To San Francisco?

Q. Yes. A. Got there some time in October; I could not tell you what date; I did not put it down at the time.

Q. Only some time in October? A. In October.

Q. And that is the nearest you can get it? A. That is about it, about the first part of October.

Q. Now, in "some time in October" how long a leave of absence did you get? A. I was granted thirty days leave of absence. 20

Q. And in October you sent a letter resigning from the company, didn't you? A. Yes, sir.

Q. When you worked as bridgeman the biggest part of your work was standing up, wasn't it? A. Well, I could sit down once in a while.

Q. The biggest part of your work was standing up, wasn't it? A. Yes, sir.

Q. I think that's all. 30

Re-direct examination by Mr. Hardenbrook:

Q. You were asked some questions as to Mr. English. What connection did he have with the defendant company? A. Passenger trainmaster.

Q. What? A. Passenger trainmaster.

Q. State the circumstances incident to your leaving the employ of the defendant on the 10th of August. Just tell the jury what happened, how you came to leave there on that date. A. I went 40

CHARLES F. McDONALD—Re-direct

down that morning to apply for a day off. I had not had a day off in about three months, and I thought I was entitled to it; no regular days off in this position, and I went down and applied to Mr. Wahlmeyer, the station master, for a day off, and he said he had nobody to put in my place. I said, 10 "you manage to find a man to put in anybody's place you want to favor." That led to some words I couldn't just recollect; he said, "I'll put a man in your place for good." I said, "You can do it; I'll go up and see Mr. English about it." So he did put a man in my place, and I went up to see Mr. English.

Q. What did you say to Mr. English, do you remember? A. The same day?

Q. What did you say to Mr. English, and what 20 did Mr. English say to you? A. He said I could take a few days off and he would sift the matter out and let me know.

Q. Two or three days later did you see Mr. English again? A. Yes, sir.

Q. What did he say to you? A. He said the job had been done away with; there was no job existing there; they had taken men off—reduction of force.

Q. So that the job you had been filling, that 30 was done away with? A. Yes, sir.

Q. You were asked some questions by the counsel as to a letter of resignation written by you?

Mr. HARDENBROOK—What was that date, Mr. Smith?

Mr. SMITH—I did not ask him any date, but I will tell you the date; October 21, 1914.

40 Q. You were asked about a letter of resigna-

CHARLES F. McDONALD—Re-cross

tion which you wrote in October, 1914. Had you had any employment by the railroad company from this tenth of August when you were laid off as you say, up to this time you wrote this letter of resignation? A. No, sir.

Q. What was the object and purpose, if any, in writing a letter of resignation? A. Because I still had hopes of going back working if my hand or ankle permitted it, so I took this here leave of absence in the hopes of finding light work, in the meantime, to keep myself going; I had board to pay. 10

Q. What was the condition of your hand in October when you wrote this letter of resignation? A. Just the same as it was before I wrote it.

Q. You knew then in October that you were not able to take your work as brakeman? A. Yes, I knew then I would not be able to go back, and I resigned so as to bring action against the Central Railroad Company. 20

Re-cross examination by Mr. Smith.

Q. Did you state in your letter, "I have decided that as I can't get back to Jersey City before that leave of absence runs out, I will formally resign, so kindly consider this my resignation?" A. Yes, sir.

Q. Then the reason you resigned was because you did not expect to get back to Jersey City before your leave of absence ran out, wasn't it? A. That was one of the reasons, yes, sir. 30

Q. Oh, one of my reasons.

Q. Then you did not state all your reasons in here? A. Hardly; I could have wrote a book if I had.

Q. You would have written a book? A. I could have.

Q. You can read and write? A. Yes, sir. 40

CHARLES F. McDONALD, recalled—Rebuttal—Direct

Q. Read writing and read printing? A. Yes, sir.

Q. Understand it well? A. Yes, sir.

Q. Were you telling the truth when you wrote this letter, that the reason you resigned was because you— A. That was the principal reason.

10 Q. That was the principal reason? A. It certainly was.

Q. That you could not get back to Jersey City before your leave of absence ran out? A. Yes.

Q. Now, leave of absence is granted on request, isn't it? A. Yes, sir.

Q. And you requested the leave of absence? A. Yes, sir.

Q. And you requested it in September, didn't you? A. Yes, sir.

20 Q. And immediately upon the granting of that leave of absence you went to San Francisco, didn't you? A. Not right away I didn't.

Q. Within how many days? A. Within a few days, I could not say exactly.

Q. Three days? A. About that.

30 Mr. SMITH—I offer in evidence paper identified as containing the signature of Mr. McDonald, Exhibit D 1 for identification; also Exhibit D 2, consisting of some checks and receipts; also D 3, consisting of a letter.

REBUTTAL.

CHARLES F. McDONALD, recalled.

Direct examination by Mr. Hardenbrook.

Q. After you left the hospital I believe you stated you went to the office of the railroad company. A. Yes, sir.

40 Q. About what was the first date that you went

CHARLES F. McDONALD, recalled—Rebuttal—Direct

to the office of the railroad company after the accident? A. About February 25th.

Q. February 25th. A. Yes.

Q. That was the date on which this paper which has been marked in evidence, D 1, was signed by you? A. Yes, sir.

Q. Whom did you see when you went to the office of the company; who was the first one you saw? A. I seen the office boy first. 10

Q. Who? A. The office boy came to me first and asked me what I wanted.

Q. After you got through with the office boy, then whom did you see? A. Mr. Giddes.

Q. And who is Mr. Giddes? A. A clerk in Mr. Lodge's office.

Q. Who is Mr. Lodge? A. Claim agent of the Central Railroad. 20

Q. Did you have any conversation with Mr. Giddes at that time? A. I just told him who I was; he asked me what I wanted.

Q. Mr. Giddes asked you what you wanted; what did you say to him in answer? A. I gave him my name and told him I came down with reference to the accident of January 19th,

Q. Then what did Mr. Giddes say to you? A. Told me to sit down. 30

Q. And did he some little time afterward come to see you or call to you? A. In about fifteen minutes or so—he spoke to Mr. Lodge.

Q. He came up to you again; what did he say to you again? A. He told me that he had some papers to make out; he went over to his desk; he has some papers to make out, and if I would wait he would bring them over to me; that there was a few papers I would have to sign before he could settle this compensation, as he called it. 40

Q. What was that? A. He said there were some

CHARLES F. McDONALD, recalled—Rebuttal—Direct

papers I had to sign before he could settle his compensation.

10 Q. What compensation did he refer to, or did he state what the compensation was? A. He read from a kind of a pamphlet, I believe from the Employers' Liability Act, which he said that my injury came under.

Q. Did he have this pamphlet in his hand at the time? A. Yes, sir.

Q. Did he give it to you to read? A. No, sir.

Q. Did he read any portions of it to you? A. Yes, sir.

Q. Can you recall what portion of it he read to you? Or what he read to you from this pamphlet?

20 A. Yes, sir; the portion that impressed me the most said I was entitled to three hundred weeks compensation.

Q. At how much a week? A. That was to be averaged out after, on the basis of half of what you were making, earning?

Q. At that time, or up to that time, had you ever seen a copy of the State Compensation Act?

A. No, sir.

Q. Had you ever had this State Compensation Act read to you? A. No, sir.

30 Q. Did you have any notice or knowledge of the contents of the State Compensation Act? A. No, sir.

Q. Did you know there was such an act in existence until you were so informed by Mr. Giddes? A. I knew there was such an act, but I never paid any attention to it.

Q. You had never seen it? A. No, sir.

Q. Never read it? A. No, sir.

40 Q. Never had it read to you? A. No, sir; except—

CHARLES F. McDONALD, recalled—Rebuttal—Direct

Q. And knew nothing about it? A. (No answer.)

Mr. SMITH—What was the “except?”

A. Except when Mr. Giddes read a portion of it.

Q. What was it Mr. Giddes said to you as to your compensation being due under the act? Just state it again, please. A. He said I was entitled to three hundred weeks' compensation as long as I was unable to return to my regular job, braking. 10

Q. What did you say to him then, if anything?

A. At that time then he had that paper; I asked him what it was.

Q. Wait a minute. After Mr. Giddes made that statement to you, what did he do? A. He brought this paper over from his desk.

Q. He brought over a paper? A. Yes, sir. 20

Q. Did he give you that paper? A. No, sir.

Q. Did he read from that paper— A. Yes, sir.

Q. (Continuing)—to you? A. Yes, sir.

Q. So far as you can recall, what did he read to you; do you know what he read to you? A. I could not tell hardly anything about it. He read it very rapidly, in such language that I could not comprehend it, and I told him so.

Q. When you say you told him, state precisely so far as you can recollect the precise words you said to him. A. I said to him, “I don't understand that.” 30

Q. And what, if anything, did he say in answer?

A. He said it was a mere matter of form, that it did not matter, and that everything would be all right.

Q. What else did Mr. Giddes say at that time, if anything? A. I asked him what I was receiving for signing that; he said three hundred weeks compensation; and I asked him how about my 40

CHARLES F. McDONALD, recalled—Rebuttal—Direct

position; and he said that it was provided for in the paper.

Q. What did Mr. Giddes do then, if anything?
A. He went over to his desk again; sat down there and worked on his typewriter.

10 Q. And how soon after did he speak to you, if he did speak to you afterward? A. About a half hour.

Q. And then what did he say? A. He beckoned to me to come with him to Mr. Lodge's office.

Q. And did you go? A. Yes, sir.

Q. And then what did you do; what occurred?
A. I signed a paper which I believe now is the release.

20 Q. Is that paper which you signed the same paper which he had previously read over to you hurriedly as you have described? A. I would not swear to that. It was out of my sight for fully twenty or thirty minutes between the time that I seen it first and the time I seen it in Mr. Lodge's office.

Q. Was the paper which you signed read over to you at the time you signed it? A. No, sir.

Q. Did you read it over yourself? A. No, sir.

30 Q. What, if anything, did Mr. Giddes say to you in connection with signing a paper as to what the paper was, or did he make any statement as to what the paper was? A. He said it was a mere matter of form, that everyone had to go through, that was injured on the railroad.

Q. And you signed it? A. In the presence of Mr. Lodge, in Mr. Lodge's office.

40 Q. I show you another paper which has been marked in evidence D 2, which purports to be a receipt dated February 25, for \$18.60. Was this paper handed to you by Mr. Giddes at the same

CHARLES F. McDONALD, recalled—Rebuttal—Direct

time? A. No; that was made out after, after the release was signed.

Q. You signed this paper marked D 1 and left it with Mr. Giddes, is that right? A. Yes, sir.

Q. How long after that was it that you were requested to sign this paper which I have just called your attention to, this receipt for \$18.60 of February 25? A. About thirty-five or forty minutes, maybe. 10

Q. Who was that brought to you by? A. Mr. Giddes.

Q. And you were requested to sign that, which you did? A. Yes, sir.

Q. What was said, if anything, at that time as to your coming back again to the office of the claim agent or to Mr. Giddes' office? A. Mr. Giddes requested me to come back in a week. 20

Q. At that expiration of a week did you go back there? A. Yes, sir.

Q. I show you a receipt dated March 5, for \$6.20, and ask you if that is the paper you signed on your return there a week later? A. Yes, sir.

Q. What request, if any, was made for you to come back again? A. I was told I would have to come there every week to be examined by Dr. Washburn.

Q. Did you go there again on March 9? A. Yes, sir. 30

Q. And you received another check for \$6.20? A. Yes, sir.

Q. You went again on March 23? A. Yes, sir.

Q. And received another check for \$12.40? A. Yes, sir.

Q. And again on March 31, you went there again and received another check for \$6.20? A. Yes, sir.

Q. And those are all the checks or all the money 40

CHARLES F. McDONALD, recalled—Rebuttal—Direct

which was paid to you by the railroad company since your injury, except such as was paid to you while you were working in the capacity of bridge-man, is it not? A. Yes, sir.

10 Q. This paper which has been marked D 1, recites that "in consideration of one dollar, in full satisfaction and discharge of any further right to compensation," that you have released; was that one dollar paid to you at that time? A. It was not.

Q. Was any money at that time paid to you—any money at all? A. No, sir.

Q. And nothing was paid to you except the items on the various dates which I have heretofore asked you about? A. Yes, sir; that's all

20 Q. Did you at the time of the preparation and execution of this release or during any time during your interview with Mr. Giddes or any one else at the office of the railroad company on the 25th day of February, state that you were entitled to compensation under section 2 of chapter 25 of the laws of 1911? A. No, sir.

Q. Did you ever have any notice or knowledge of the existence of any such law? A. No, sir; I have not.

30 Q. And if such law was the basis of your compensation—the Employers' Liability Act of the State of New Jersey—you had no notice or knowledge of it and made no statement— A. No, sir.

Q. Then the statement in this paper, D 1, that "Whereas I have requested that section 2 of chapter 25 of the laws of the State of New Jersey of 1911, apply to my said employment," is an absolutely false statement of fact, is it not? A. It is false; I was wholly unaware of that paragraph in it.

40 Q. Did you at that time request the said railroad

CHARLES F. McDONALD, recalled—Rebuttal—Direct

company to make compensation in accordance with the provisions of that act? A. No, sir.

Q. Then the statement contained in this receipt that you have "requested the said railroad company to make compensation in accordance with the provisions thereof" is unwarranted by the facts as they occurred at the time? A. Yes, sir. 10

Q. I should like to have you state as specifically as the facts warrant just exactly what you said to Mr. Giddes at the time he first brought this paper to you, as to other employment; you said something in a general way; state as specifically as you can exactly what you did say and what he said with reference to that. A. I asked him what the paper was; he told me it was a release, but a mere matter of form, and everybody had to go through the same thing. 20

Q. That was at the time he read it over to you hurriedly, as you say? A. Yes, sir.

Q. My question was, what was said by you at that time in reference to future employment by the company? A. I did not say anything just then, I asked him first—

Q. You asked him first, what? A. What I was receiving for signing the paper; I wanted to know what I was getting for it. He said, three hundred weeks' compensation— 30

Q. I am not asking you about that. When was it you spoke to him about future employment? A. Just following that; following that statement I said to him, "How about my job?" He said that was provided for in the paper.

Q. Did he say anything further than that so far as you can recall? A. Nothing on that point.

Q. As to how they would treat you or— A. No, he just said I would receive compensation as long as I was unable to go back braking. 40

CHARLES F. McDONALD, recalled—Rebuttal—Direct

Q. This paper which I call your attention to, being the receipt for \$18.60, dated the same date as this other paper is dated, February 25, was that read over by you or read over to you by Mr. Giddes before you signed it? A. This draft?

10 Q. Yes. A. That was laid on the desk in front of me and I read that.

Q. And that is also true, I suppose, of the other drafts which you got at other subsequent weeks? A. Yes, sir.

20 Q. The last work you did I believe you said was the 10th of August, and you were examined by Dr. Washburn, the last time on the 9th of September. On this 9th of September did you have any conversation with Mr. Lodge or Mr. Giddes, or any gentlemen connected with the claim department as to any future payments being made to you? A. I had a conversation with Mr. Giddes.

Q. What was said as to coming back for any future payments?

Mr. SMITH—All right; then I haven't any objection.

30 A. He went to—I asked him how about this compensation had ceased; he went to Mr. Lodge's office and came out and said the case was closed against me.

Mr. SMITH—The case was what?

A. Closed.

THE COURT—Closed against him.

A. Closed.

40 Q. Was anything said as to whether they would make you any further payments or not? A. He said they would make no further payment.

CHARLES F. McDONALD, recalled—Rebuttal—Cross

Q. That the case was closed? A. Yes, sir.

Q. And that was the last payment you ever received, was it not? A. Yes, sir; the last payment was in March.

Cross examination by Mr. Smith.

Q. Mr. McDonald, you say you can read and write, can't you? A. Yes, sir. 10

Q. And you can read, can't you— A. Yes.

Q. (continuing)—the language of this paper? A. I can't read it.

Q. Just see if you can read it now. Read the words. A. I can read it.

Q. You read it? A. I did not read it at that time; no.

Q. I did not ask you that, did I? A. You asked me did I read it. 20

Q. I said you can read it? A. I can read it.

Q. Now, as a matter of fact, what you went to the office of the railroad company for, you say, was money compensation? A. I went for information.

Q. Compensation you said, didn't you? A. I went down to find out what I was entitled to.

Q. And you used the word compensation, didn't you? A. I did not use it to them; no, Mr. Giddes was the first to use the word compensation. 30

Q. Oh! You said you went down there to find out about your compensation, didn't you? A. Yes, sir; went down there for information; yes.

Q. As to your compensation,—didn't you? A. To find out what I was entitled to. You might call it compensation or wages or anything. To find out what I was entitled to.

Q. Entitled to for what? A. Entitled for what?

Q. Yes. A. To find out what I was entitled to 40

CHARLES F. McDONALD, recalled—Rebuttal—Cross

under the law, whatever the law might be; I did not know what it was.

Q. You thought you were entitled to something under the law? A. I certainly did.

Q. Under what law? A. I did not know what law. I knew there was some such law, but I did
10 not know anything about it.

Q. You knew there was a Workmen's Compensation Law, didn't you? A. I knew there was some such law.

Q. And you went to the office to find out what your compensation was. To find out what the law was? A. Yes.

Q. And when you got in there you spoke to Mr. Giddes about your compensation; isn't that so? A. Oh! no; no, sir.

Q. Didn't you? Didn't you say when you got
20 down there you saw Mr. Giddes? A. I saw Mr. Giddes; yes, sir.

Q. And he asked you what you wanted? A. Yes, sir.

Q. Isn't that right? A. Yes, sir.

Q. And you said you called to see him about the accident? A. With reference to the accident; yes, sir.

Q. That is right? A. Yes; with reference to
30 the accident.

Q. Did you tell him why you came there? Did you just say, "I came to see you about the accident?" A. In reference to the accident; that is all. Mr. Giddes brought that conversation up himself as to compensation I was entitled to.

Q. What did you go to find out? A. Everybody has to go there that has been injured on the road that expects to—

Q. For that purpose? A. To find out what they
40 are entitled to.

CHARLES F. McDONALD, recalled—Rebuttal—Cross

Q. Then when you went there you said you came to find out what you were entitled to, didn't you?

A. I was looking for information.

Q. Looking for information. Then he asked you to sit down? A. He did.

Q. He left, and when he came back he said there were some papers that had to be made out and for you to wait; and you waited? A. Yes, sir. 10

Q. And then you say he came in and said to you that before he could settle he would have to find out what you were entitled to as compensation? A. Yes, sir.

Q. And something about the Employer's Liability Act, you say? A. Yes, sir; went down there for information; yes.

Q. As to your compensation—didn't you? A. To find out what I was entitled to. You might call it compensation or wages or anything. To find out what I was entitled to. 20

Q. Entitled to for what? A. Entitled for what?

Q. Yes. A. To find out what I was entitled to under the law, whatever the law might be; I did not know what it was.

Q. You thought you were entitled to something under the law? A. I certainly did.

Q. Under what law? A. I did not know what law? I knew there was some such law, but I did not know anything about it. 30

Q. You knew there was a Workmen's Compensation Law, didn't you? A. I knew there was some such law.

Q. And you went to the office to find out what your compensation was. To find out what the law was? A. Yes.

Q. And when you got in there you spoke to Mr. 40

CHARLES F. McDONALD, recalled—Rebuttal—Cross

Giddes about your compensation; isn't that so? A. Oh! no; no, sir.

Q. Didn't you? Didn't you say when you got down there you saw Mr. Giddes? A. I saw Mr. Giddes; yes, sir.

Q. And he asked you what you wanted? A. 10 Yes, sir.

Q. Isn't that right? A. Yes, sir.

Q. And you said you called to see him about the accident? A. With reference to the accident; yes, sir.

Q. That is right? A. Yes; with reference to the accident.

Q. Did you tell him why you came there? Did you just say, "I came to see you about the accident?" A. In reference to the accident; that is all.

20 Mr. Giddes brought that conversation up himself as to compensation I was entitled to.

Q. What did you go to find out? A. Everybody has to go there that has been injured on the road that expects to—

Q. For what purpose? A. To find out what they are entitled to.

Q. Then when you went there you said you came to find out what you were entitled to, didn't you? A. I was looking for information.

30 Q. Looking for information. Then he asked you to sit down? A. He did.

Q. He left, and when he came back he said there were some papers that had to be made out and for you to wait; and you waited? A. Yes, sir.

Q. And then you say he came in and said to you that before he could settle he would have to find out what you were entitled to as compensation? A. Yes, sir.

40 Q. And something about the Employers' Liability Act, you say? A. He did; yes, sir.

CHARLES F. McDONALD, recalled—Rebuttal—Cross

Q. So that you understand that you and he had a talk about the Employers' Liability Act? A. We did not have a talk about it at all.

Q. You did not understand it at all, did you? What did he say to you about the Employers' Liability Act? A. He told me my injury came under that act.

10

Q. You knew what he meant, didn't you? A. I knew it came under some act; as he had more experience in that than me, I took his word for it.

Q. Didn't you know it came under some act? A. I knew it came under some law, but what law I did not know.

Q. And then he was about half an hour in making out some papers? A. About that, I should judge; I did not have my watch in my hand to judge.

20

Q. Then you say he read to you from this book? A. A small pamphlet.

Q. What he said to you was this, that you were entitled to receive half of your weekly wages until you were able to go back to work— A. M-m-m-m-m-m.

Q. (continuing)—not exceeding three hundred weeks? A. For three hundred weeks.

Q. Not exceeding three hundred weeks? A. That is the way I heard it—for three hundred weeks.

30

Q. Didn't he say to you that you were entitled to receive so much money a week, that is, half of your weekly wages during the time you were unable to go back to work, not exceeding three hundred weeks? A. He said for three hundred weeks; and I asked him too.

Q. Don't you know that is the very reading of the law? A. What the law read—I am telling you what Mr. Giddes said.

40

CHARLES F. McDONALD, recalled—Rebuttal—Cross

Q. Didn't you know what you were entitled to?

A. I did not—no.

Q. You hadn't any idea, had you? A. No; I didn't.

Q. Not a thing? A. I thought I might be entitled to full wages, for that matter.

10 Q. You did; I see, A. Yes.

Q. And then you say he produced this paper that you have here, this release? A. H'm, h'm.

Q. Now, as a matter of fact didn't you read it? A. I did not.

Q. Well, you knew you were asked to sign it, didn't you? A. Of course I did.

Q. And you know you can read writing and printing? A. Yes.

20 Q. And you knew you had to sign this paper before you were going to get any money? A. H'm, h'm.

Q. You knew that getting that money depended on signing that paper? A. Yes.

Q. And you had not the slightest idea, had you, what you were signing? A. From Mr. Giddes' own reading; that is what I took my idea from.

Q. And what you read— A. I offered to take hold of the paper and he pulled it away and read it himself.

30 A. He pulled it away and read it himself? A. He certainly did.

Q. And then after it was signed you went in before Mr. Lodge? A. After it was signed?

Q. After you signed it? A. No; he brought the paper in and I signed it in Mr. Lodge's office. I did not sign it outside.

Q. In Mr. Lodge's office you then acknowledged you knew the contents of it? A. I do not acknowledge that I knew the contents of it.

40 Q. Didn't you take an acknowledgement? A.

CHARLES F. McDONALD, recalled—Rebuttal—Cross

Mr. Lodge asked me if I knew what I was signing.

Q. And what did you say to him? You said, Yes, I know what I am signing? A. Yes, sir.

Q. And you said that was your signature? A. Of course it is my signature.

Q. Can you read the top of that? A. Of course I can. 10

Q. What does it say there? A. "Release and agreement for compensation "

Q. And can you read the big part on the back of it? A. Yes, sir.

Q. And could you not see that at the time? A. I knew it was a release, but I thought the company was going to live up to their agreement.

Q. But you knew it was a release? A. A sort of a release; he told me it did not amount to anything. 20

Q. Didn't you know when you signed it you released them from claims— A. From all further payment?

Q. From all claims that you had? A. I did not, or I would not have signed it.

Q. Didn't you know you released them from all claims you had, provided they paid you this weekly compensation? A. Provided they paid it.

Q. Did you know that? A. Provided they paid it. 30

Q. Did you know that? A. I did not know they were going to do what they did, no.

Q. Didn't you know that by signing that paper you released them from all claims or demands by reason of this accident in consideration of their promise to make compensation? A. No; I did not know I released them entirely; no, I did not. I always thought that I had a right to bring an action against them.

Q. What did you think a release was? A. A 40

CHARLES F. McDONALD, recalled—Rebuttal—Cross

release is sort of an agreement that both parties should keep.

Q. What kind of an agreement? What were you to do on your part? A. Well, I would keep my part if they kept theirs.

10 Q. What would you keep? A. I would keep my part as far as I was concerned; I was supposed not to bring any action against them if they lived up to their part.

Q. Then you knew your part was to release them from all claims as to this accident? A. Provided they lived up to theirs.

Q. In consideration of certain things? A. Yes, sir.

Q. And you knew that at the time, didn't you? A. Yes, to a certain extent.

20 Q. Now, this release was dated the 25th day of February, wasn't it? A. Yes, sir.

Q. And on the same day you received a check, didn't you? A. Yes, sir.

Q. The same day; and you read that, couldn't you, and you did read it, didn't you? A. Yes, I read it.

30 Q. Now, you noticed it said there that you received three weeks' compensation in pursuance of the provisions of a deed of release executed by him—that is you—on February 25, 1914, covering injuries sustained by him January 19, 1914? A. M-m-m.

Q. Is that right? A. Yes.

Q. And all that time that you were taking these checks and giving these receipts, you knew they were for your weekly compensation, didn't you? A. Weekly compensation, yes.

40 Q. Now, you know that this is the paper you signed, because you identify your signature there, don't you? A. I suppose it is the paper I signed.

CHARLES F. McDONALD, recalled—Rebuttal—Cross

Q. Isn't that your signature? A. It is the signature, all right; but I don't swear to the paper.

Q. You won't swear to the paper? A. You can duplicate signatures all right.

Q. Is that a duplication of your signature or is that your signature? A. It is my signature; it looks like my signature. 10

Q. Don't you know it is? A. It looks like it.

Q. Will you swear it is? A. It looks like my signature.

Q. Are these (indicating) your signatures? A. These look like my signatures, yes.

Q. You won't even swear to those? A. You asked me before and I told you it was my signature? What's the use of asking me again.

Q. Mr. McDonald, after March 30th, you did not go back to the railroad office until you applied for the job to Mr. Wahlmeyer, did you; as bridge-man? A. I was in the office first, the claim agent's office, and then I went to Mr. Wahlmeyer. 20

Q. When was that? A. I do not remember the exact date.

Q. The last time you were there and got weekly compensation was on March 21st, wasn't it? A. That was probably the day then.

Q. And you did not go back again until the first of April? A. The 5th of April—I did not go back at all—the 5th of April I went back to work at the bridges. 30

Q. On the first of April you applied to English for a job, didn't you, on the bridges? A. I applied to him, yes.

Q. And at that time, you knew, didn't you, that your compensation had ceased? A. I did not know it had ceased.

Q. Didn't you know that? A. No.

Q. Why did you apply for a job to English? A. 40

CHARLES F. McDONALD, recalled—Rebuttal—Re-direct
Because \$63 a month was much better than \$6.20 a week.

Q. I see; in other words, you thought you could get back to work as a bridgeman at \$63 a month, didn't you? A. No; that was supposed to be a temporary position.

10 Q. You did go back to it, didn't you? A. How could I go back to anything I hadn't been at?

Q. You went back to work and went to work as a bridgeman? A. I went as a bridgeman, yes.

Q. At the time you were taking your \$63 a month you did not make any application for compensation at all, did you? A. I did not have any time to; I was kept right busy on the job.

Q. You did not have any time at all; but Lodge's office was right there at the concourse? A. He had
20 nothing to do with giving me compensation.

Q. Did Giddes have to do with it? A. Yes.

Q. Well, his office is right there, isn't it? A. It is far away. Mr. Lodge's office used to be inside.

Q. How far away was Giddes' office from Lodge's office? A. I can't say; one was way inside the depot and the other was out in the concourse.

Q. About how far? A. I don't know; it might be five or six hundred feet, maybe more; I never
30 measured it.

Q. It might be five or six hundred feet away; is that right? A. I don't know; I can't swear it.

Re-direct examination by Mr. Hardenbrook.

Q. At the time you signed this release which Mr. Smith was asking you about, would you have signed that had you known that it did not contain in it a provision for the future employment? A. No, sir.

40 Q. Would you have signed that paper had you

WILLIAM W. GIDDES—Sur-Rebuttal—Direct

known that it did not contain a provision for compensation for three hundred weeks at \$6.20? A. No, sir.

Q. When you did sign the paper you relied on the statements which had been made by Mr. Giddes as to the contents of it? A. Yes, sir.

Q. And to the effect that it did provide for three hundred weeks at \$6.20? A. Yes, sir.

Q. And also that it provided for your future employment? A. Yes, sir.

Q. And relying on Mr. Giddes' statements as to that, you signed it? A. Yes, sir.

Q. And the only knowledge which you had that the amount of compensation was under this Compensation Act was such information as was imparted to you by Mr. Giddes? A. Yes, sir.

Q. And you knew nothing about it yourself? A. No, sir.

Q. And you relied on his statement and his judgment in the matter? A. Yes, sir.

REBUTTAL CLOSED.

SUR-REBUTTAL.

Defendant called the following witnesses :

WILLIAM W. GIDDES, sworn.

Direct examination by Mr. Smith.

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

Q. And you are the Mr. Giddes that Mr. McDonald is speaking about? A. Yes.

Q. And did you see Mr. McDonald relative to the taking of this release? A. I did.

Q. I show you a paper and ask you if you were present when that was signed? A. I was.

Q. Was it witnessed by you? A. It is.

Q. At the time that that was signed did you

WILLIAM W. GIDDES—Sur-Rebuttal—Direct

know whether or not Mr. McDonald read it? A. I did.

Q. Do you know whether Mr. McDonald read it?
A. Mr. McDonald read it.

10 Q. Do you know whether or not after that you had any conversation with him relative to it? A. Not relative to the release, no, sir.

Q. Did you, before the signing of the release, have any conversation with Mr. McDonald relative to his compensation? A. I did.

20 Q. Will you tell us what that was? A. When the boy brought the papers to me in regard to this case I looked the case over and decided what McDonald was entitled to under the New Jersey Compensation Act. Then I went to the railing, which is inside of the office, and explained to Mr. McDonald the amount that he would be entitled to, and I told him at that time that the railroad would be liable for the hospital expenses during the first two weeks, but that it was the custom for us to pay the entire hospital expense and that we would do so in his case; after the first two weeks he would receive one-half of his wages during the period of his disability until not exceeding three hundred weeks.

30 Q. Did you say anything to him at that time about his being permanently employed? A. Absolutely not.

Q. Did you at that time agree to give him compensation for three hundred weeks? A. I did not.

40 Q. After you had explained the matter to him what did he say relative to the release? A. After I had prepared the papers I went to the railing, he stood on the outside of the railing, and I explained to him that it would be necessary for him to sign the receipt for the compensation from the expiration of the first two weeks up to the date of execu-

WILLIAM W. GIDDES—Sur-Rebuttal—Direct

tion of this paper, and while I held that in my hand he read the receipt over. Then—usually I read the release myself—

Q. What did you do here? A. (Continuing.)—but in this case McDonald reached out and I handed him the release and he sat down in the chair nearest the railing on the outside and read it himself. The reason I recall that is this, that it is very seldom that any of those seeking compensation read the releases themselves; they prefer to have it read by me or whoever else may be settling the matter; but in this case he read it himself. After he was through reading the release I took the release myself and holding it I said, “You understand, Mr. McDonald, that in this release it gives your name, residence, the date you were injured, how you were injured, and that under the New Jersey Compensation Act in this release the railroad promises to pay you according to that act, and in return you discharge the railroad company from any further right to compensation that you, your executors or administrators or any one may have for this particular injury, or for any injury prior to the date of this accident; in other words, the railroad promises to pay your hospital bill and \$6.20 per week after the expiration of the first two weeks, until you are able to return to work, but not exceeding three hundred weeks.

Q. What did he then say to you? A. After that he said it was all right. He seemed to be satisfied, and I went in to Mr. Lodge’s office with the papers.

Q. And in there do you know whether or not he executed the release? A. In Mr. Lodge’s office, his private office, the release—the very same release was executed by Mr. McDonald.

Q. And did you witness it? A. I witnessed the release, the signature.

WILLIAM W. GIDDES—Sur-Rebuttal—Cross

10 Q. Did Mr. Lodge at that time take his acknowledgment? A. He took the acknowledgment at that time. At the same time Mr. McDonald signed the receipt for the three weeks' compensation that he was indu—entitled to on February 25th, and at that very same time received the check, or draft, as we call it, for the amount of compensation due at that time.

Q. Did he say to you at that time that he did not understand what you were reading to him? A. No; he did not say anything about not understanding.

Q. Did you tell him at that time that it was a mere matter of form? A. He referred to the one-dollar phrase—

20 Mr. HARDENBROOK—Answer the question, please.

Q. Did you tell him that the execution of that release was a mere matter of form? A. Absolutely not.

30 Q. Did he say anything at that time, or did you say anything as to form? A. He referred to the one dollar as he was reading the release over; wanted to know what that meant, and I told him it was in accordance with the New Jersey form; that the one dollar would of course be included in the compensation that he was entitled to.

Q. Did he afterwards sign these receipts (indicating D 2)? I believe they bear your signature. A. Yes, he signed those in my presence, and I delivered the draft on each occasion to him.

Cross-examination by Mr. Hardenbrook.

40 Q. What is your position with the Central Railroad Company, Mr. Giddes? A. My position is special agent, and my work is in the settlement of

WILLIAM W. GIDDES—Sur-Rebuttal—Cross

cases coming under the Compensation Act of New Jersey.

Q. Special agent for what purpose? What special purpose? A. That is just my title on the payroll of the Jersey Central Railroad.

Q. And your office is in the office of the claim department? A. It is. I am under Mr. Lodge, the chief special agent. 10

Q. And he is the head claim agent? A. His title is chief special agent.

Q. And a special agent is the agent to whom is delegated the work of settling the claims due injured employees, is it not? A. That is right?

Q. How long have you held that position? A. Since June 11th, 1912.

Q. And this printed form of release is such as you habitually use, and you formerly used with settlement of claims of that character? A. It is, since I have been with the road. 20

Q. This release is the one that has been in use, this form of release— A. Yes, it has been and still is.

Q. (Continuing.) —ever since you came in the office? A. Yes, sir.

Q. A good many of your employees are of foreign birth and extraction, are they not? A. They are. 30

Q. Many of them, large numbers of them do not read or write or speak the English language, do they? A. They do not.

Q. And this is the form of a release such as any one of those persons who were injured would be called upon to sign, is it not? A. That is right—explained through an interpreter.

Q. Yes, through an interpreter. I believe you stated in answer to a question asked by your counsel—counsel for the road—that you explained to 40

McDonald the nature and features of the Employers' Compensation Act? A. Just the features, the clauses under which he came.

10 Q. You explained that; is it customary, or did Mr. McDonald at that time state to you in terms or in substance that he was entitled to compensation under this Compensation Act? A. No.

Q. He didn't; then if he didn't, so much of this release as recites, "Whereas, I—McDonald—have represented that Section 11 of Chapter 95 of the Laws of New Jersey for 1911 apply to my said employment, and have requested the said company to make such compensation in accordance with the provisions thereof," is absolutely a false statement of fact, is it not? A. My answer was in reference to when he first came into the office; after I explained it to him he was satisfied with the compensation, and—

20 Q. Yes; he was satisfied; but you explained to him what the act was? A. Yes; what he was entitled to under the act.

Q. And he said he was willing to accept it, the provisions of it? A. He said he was.

30 Q. Now will you please state how this figure of \$18.60 is made up as appears in this first receipt dated February 25? A. Why, that was compensation for the third, fourth and fifth weeks after the accident, excluding the first two weeks.

Q. It is three weeks' compensation at the rate of how much a week? A. \$6.20 a week.

Q. Making \$18.60; and the other receipts are also for \$6.20; two of them, and the fourth one is for \$12.40. A. Covering two weeks.

40 Q. Will you please look at those receipts and state wherein is there included in any of those drafts the one dollar which you say is the consideration named for this release and which you paid

WILLIAM W. GIDDES—Sur-Rebuttal—Cross

together with the compensation, or paid in the compensation check? A. I did not—

Q. You say the dollar was included in those checks; please designate in which— A. No; I said represented—

Q. What is that? A. Would be represented in the amount of the compensation. 10

Q. What is that? A. I say the one dollar would be represented in the amount of the compensation.

Q. Show me in which check that one dollar is represented. A. Well, in the compensation he received.

Q. In which check is that dollar represented, which of those drafts? Is it represented in any of these drafts, the one dollar? A. In the first draft that he received it was. 20

Q. In the first draft which is for three weeks at \$6.20; \$18.60; please tell me wherein in that first receipt the one dollar is included. A. It is included within the compensation.

Q. Show me the check for it, or show the jury; they would like to know. Isn't it a fact that the dollar was never paid? A. Well, paid within the— er—

Q. Isn't it a fact that the dollar was not paid? A. Paid within the compensation itself, as is customary, with releases. 30

Q. Customary with releases in your company; and you followed out your usual custom in this case, to get the man to sign a receipt in consideration of one dollar and which dollar you never gave him and never intended to give him? Isn't that the fact? A. No; because the consideration was the compensation he was entitled to.

Q. Well, it is a long while since I was at school 40

WILLIAM W. GIDDES—Sur-Rebuttal—Cross

and studied arithmetic, but the jury may be able to figure it out; I can't.

Q. Are you an attorney, Mr. Giddes? A. I am.

Q. How long have you been an attorney? A. Since 1913, March 20th.

10 Q. And you are familiar with the law governing cases of liability to injured employees upon your road, are you not, to some extent, generally speaking? A. Yes, sir.

20 Q. And you are familiar with the defense which has frequently been pleaded by your company in compensation cases in which you have pleaded that where your road is engaged in interstate commerce and the injured employee was also engaged in interstate commerce, that the State Compensation Act did not apply; do you know that? A. I am not very familiar—in fact, not familiar at all with any of the cases we have had along that line, for the reason that I am not in the law department but only to take care of the settlement of these cases on the Jersey City side, which is distinct from the legal department itself.

30 Q. And you know as a matter of fact, do you not, that if a person sues, or brings suit, or makes a claim for compensation against your road, where your road is engaged in interstate commerce and the injured employee was engaged in interstate commerce, that he is not entitled to anything under the Compensation Act; do you not? A. If he is engaged in interstate commerce?

40 Q. That where your road and the man that is hurt were both engaged in interstate commerce, that the State Compensation Act does not apply, that he cannot get any compensation under that Act? A. It might apply in that same case according to my—

JOHN K. LARGE—Sur-Rebuttal—Direct

Mr. SMITH—I object to that as not cross-examination. I have not examined this man as to his qualifications as a lawyer at all.

THE COURT—No, I think Mr. Hardenbrook will be bound by the answer, whatever it is. I will permit him to ask it. 10

Q. What is your answer to that? A. My understanding was that they could recover under the State Act, compensation.

Q. Whether or not it was a fact that both the injured employee and your road were engaged in interstate commerce at the time of the accident?

A. Yes, sir.

Q. You do not know as an attorney, as a matter of fact, that if McDonald and your road were engaged in interstate commerce at the time of this accident McDonald was not entitled to a dollar, and could not recover a dollar, under this Compensation Act or under the promise to pay him? You do not know that to be so, do you? A. No. 20

Q. You are aware of the fact that in this action your company has admitted in its answer that at the time the accident happened both the plaintiff McDonald and your company were engaged in interstate commerce? A. I was not aware of it until you just spoke of it. I have not seen the pleadings, or the complaint. 30

JOHN K. LARGE, sworn.

Direct examination by Mr. Smith.

Q. You are in the employ of the Central Railroad Company? A. I am.

Q. Are you a lawyer? A. No, sir; I am not.

Q. Are you a master in chancery? A. I am.

Q. Did you take the acknowledgment of Mr. 40

MOTION TO DIRECT VERDICT

Giddes to this paper? A. I took the acknowledgement of Mr. McDonald.

Q. Mr. McDonald, I mean? A. Yes.

Q. Did you at that time, or did he at that time understand the contents thereof upon your making the same known to him? A. He did.

10 Q. And did he acknowledge that he signed, sealed and delivered the same for the use and purpose therein expressed? A. He did.

(No Cross-examination.)

TESTIMONY CLOSED.

MOTION FOR DIRECTION.

20 Mr. SMITH—I move for a direction of a verdict on the ground that the plaintiff is barred by the release executed by him with knowledge that he thereby released the defendant from all claims or demands by reason of or arising out of this accident, and that therefore no recovery can be had in this case.

30 THE COURT—This, as I understand it, is the rule, and this is the way it is stated in the 24th volume of the American and English Encyclopedia of Law under the title “Release and Discharge,” page 318; and it is the rule that is supported in the case of *Waln v. Waln*, 24 Vroom, which you have cited to me on your brief; it is supported strongly in the Court of Errors in *Fivey v. P. R. R.*, 38 Vroom, and in the *Zdancewicz* case it is strongly supported, and in the last case which you have handed up here, which I have read carefully, since the case of *Ville-*
40 *koup v. D. Fullerton Co.*, 74 Atl., 793. The

~~MOTION TO~~ DIRECT VERDICT

rule I am about to indicate is sustained either expressly or by inference in all those cases, and it is expressly applied in *Den v. Schreiber*, which is a very ancient case and which is cited in *Waln v. Waln*. Now this is what I understand to be the rule: that

“Whether a release tainted by fraud can be set aside and declared void in a court of law, or whether the assistance of a court of equity is necessary, depends upon the nature of the fraud. Where the fraud is practiced in the execution of the instrument, as where it is misread to the releasor, or where there is a surreptitious substitution of one paper for another, or where a party is tricked into signing an instrument which he did not intend to execute, or where advantage is taken of the mental or physical condition of the releasor, in all such cases a court of law may take cognizance of the fraud on the ground that the legal existence of the instrument is in question. The question is, whether the writing in the form of a release has acquired original validity as a contract, and is a legal question.”

That is the first situation. The second is this:

“But where the releasor knows the character of the instrument he signs, and intends when he signs and delivers it that it shall have the effect and purpose which the law imputes to it, but there is fraud in the representations used to induce him to agree to a settlement of his claims, such as false statements as to the nature and value of the consideration, or as to the extent of his injuries, in all such cases the instrument

MOTION TO DIRECT VERDICT

must be held valid in a court of law, and relief from its effect must be sought in a court of equity."

10 Now that is the point that I wanted to direct your attention to, Mr. Hardenbrook, and that seems to be the rule that is adopted in all of the cases. In the case of Fivey against the Pennsylvania Railroad in effect the same statement was made, at least partially, to Fivey as was made to McDonald in this case, assuming McDonald to tell the truth about it, that the release was a mere matter of form, that it did not bind at all, that there was nothing to it; and the court held that such statement did not invalidate the release, that when a party affixed his name to an instrument in the absence of fraud or deceit he was conclusively presumed to know and appreciate and assent to the contents of the instrument. Now in 20 this case Mr. McDonald himself says that he knew the instrument was a release. Those are his own words, that he knew; and the thing that he says he was misled in was that they told him he would be paid for three hundred weeks, and that the matter of his job, the continuance of his employment was taken care of in the paper itself. Now he claims "I wouldn't kick about the release now if those statements about the consideration were in there. That is what I wanted; that is what I thought I was to get; that is what I thought I got." He says, "Now I see I did not get that at all; what I got was a mere husk, when I had a right to expect these larger things." 30 Now as I understand the rule—I may be 40

~~MOTION TO~~ DIRECT VERDICT

mistaken about it, but as I understand it the rule is that he would then have a right to go into the court of chancery, if there be either a mutual mistake between the parties or a mistake on one side and fraud on the other—he would have a right to go into the court of chancery and ask them there to reframe that instrument or to declare it to be void as against him; and if the instrument were entirely without consideration—we may look at that point for a minute. Assume for the sake of the argument—I think Mr. Giddes is mistaken when he says that that one dollar was ever given by those checks to Mr. McDonald. It never was; there is no question about that; and we then come to a very interesting point about this matter of the Workmen's Compensation Act. There is even a deeper point than either of you counsel has yet raised, in my mind, and that point, one that is perfectly plain, is this: that if the parties, the railroad company and McDonald, were both engaged in interstate commerce at the time of the happening of the accident, there is not any doubt in the world that the interstate commerce act applies and wipes out altogether all antagonistic and inconsistent state legislation. That is perfectly settled. That the claim agent did not know it I do not think affects the case one way or the other; it is perfectly clear that that is the law. This point, however, that is being raised here is not with respect to the state legislation; it is with respect to a contract between these parties, a contract that is raised by implication of law, and if you

10

20

30

40

~~MOTION TO~~ DIRECT VERDICT

10 will look at the Workman's Compensation Act, which I have looked at here in a hurry while we have been going through with it, you will find that the provision is not that the law says a man shall get some payment; the law is that a contract shall exist. That contract is raised by implication of law under the 7th section, for the language is, a contract. "When the employer and employee shall by agreement either expressed or implied, as hereinafter provided, accept the provisions of section 11 of this act, compensation for personal injuries to or for the death of such employee 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 eleven." Then it goes on to say, under section IX, "Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section 11 of this act, unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section 11 of this act are not intended to apply."

20

30

40 Now, then, you see, either by express contract or by implied contract, these parties agree upon a method of compensation, the method provided in section 11. Now, assume for the sake of argument—of course I do not overlook the fact that if the

MOTION TO DIRECT VERDICT

Federal Employers' Liability Act takes effect, it might prevent the arising of any implied contract, because it does away with all inconsistent legislation; but let us assume for the sake of the argument that it is arguable; that it does not do away with this implied contract; then manifestly what happens is this: after you have gotten rid of the release, section V of the Employers' Liability Act provides that "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void; Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Now you can readily see that this is a release on the face of it. It was intended to be a release by the company that took it and the man who gave it; and the thing that he claims with reference to the fraud is that he was deluded by statements with respect to the consideration; that he thought he was getting something of consequence and that he got something that was very trivial. Now he says that is the fraud; and every bit of that fraud goes to the consideration of this instrument and not to

~~MOTION TO~~ DIRECT VERDICT

10 its execution. He executed it and they meant he should. He understood what a release was and they understood what a release was and that instrument they both intended to execute; they did execute it; but the trouble with the situation was, as I understand it, that he was defrauded—assuming his evidence to be correct—he was defrauded with respect to the thing that he was to get under that paper; in other words, with respect to the legal effect of it so far as the consideration was concerned. Now that is the point I wanted to hear you on, and that is the extent of the remarks I wanted to make.

20 Now, as I understand the rule, going way back to *Lord v. Brookfield*, in 8 Vroom, and down through all the following cases—there are two kinds of fraud known to the law; one is fraud in the execution; and the other is fraud in the consideration. If there is fraud in the execution it voids the contract; if there is fraud in the consideration it does not; and that has been followed right through from *Lord v. Brookfield* down to to-day in unbroken continuity. In this case every
30 piece of evidence as I understand it has been directed to showing that if there was fraud it was fraud in the consideration of this instrument. Every piece of evidence is directed to showing that this man thought he was getting one thing but that he got another by way of consideration for the instrument. The release was there but the consideration of it was misrepresented and he was defrauded with respect to it
40 so that he got very much less than he be-

~~MOTION TO~~ DIRECT VERDICT

lieved he was getting and than he had a right to get. If that is all so, then the courts all hold that the appropriate tribunal to adjudicate the question as to whether or not that release represents the true contract between the parties with respect to its consideration and whether it should be reformed or annulled is the court of chancery—that the question is one that in the first instance must be determined by that court. 10

I think that all the evidence that has been introduced in the case is evidence that relates to an alleged fraud in the consideration of the release, and in the light of the fact that he says the release was read to him, and in the light of the testimony which is found in the case, especially on pages 44 and 45 of the printed case, where he says on cross-examination: "Mr. McDonald, what did you think the release was? A. A release is a sort of an agreement that both parties should keep. Q. What kind of an agreement; what were you to do on your part? A. Well, I would keep my part if they kept theirs. Q. What would you keep? A. I would keep my part as far as I was concerned. I was supposed not to bring any action against them if they lived up to their part. Q. Then you knew your part was to release them from all claims as to this accident? A. Provided they lived up to theirs."—so that that seems to me to be a clear announcement of his notion that he understood there was a release and intended to be bound by it, provided they lived up to what he said was their part of it; and when he talked about their part of it he was speaking simply about the consideration 20 30 40

~~MOTION TO~~ DIRECT VERDICT

which moved him to execute the release.

10 Another matter which appeals to me is that if there be any misrepresentation that appears in the case it would be a misrepresentation of the legal effect of the document, which would not invalidate a release; and the next thing which appeals to me is this, that he retained in this case the money which he received by virtue of this release and did not return it, and it seems to me that the authorities are uniformly clear on the proposition that the retention of the money for an unreasonable length of time is consistent only with an intention to ratify the release; and that doctrine is found quite clearly
20 enunciated in the 34th volume of Cyc., under the title "Release," at page 1066, where it says that "The releasor is entitled to the consideration of the release only in the event that the release is valid, his retention and use of any part of it as his own for an unreasonable length of time after the removal of his disability or the discovery of the invalidating facts is consistent only, except in rare cases, with an intention to ratify the release." Now, I am perfectly well
30 aware that in the State of New Jersey, under the case of Burik vs. Dundee Woolen Co., 66 N. J. Law, 420, the Court says, where the evidence showed that there was paid by the defendant to the plaintiff various small sums, amounting in the aggregate to \$69.80, "Credit on the possible damages—not reimbursements—was the right of the defendant." I am well aware that in New
40 Jersey that has been stated to be the rule; and I am well aware that you show me a

~~MOTION TO~~ DIRECT VERDICT

memorandum now, Vol. 34, page 1067, where—I do not find it.

This is a case under the Federal Employers' Liability Act, and my impression is that inasmuch as this must in all likelihood eventually be decided by the United States Supreme Court, the rule of the United States Supreme Court as I have enunciated it from Cyc. is the rule that I should apply. 10

Now it might be said possibly that the Employers' Liability Act, Section 5, would seem to militate against this view. That provides that "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void; provided that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, said common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." That provision of course has no application whatever to an effort made after the injury has happened to settle the suit by a payment of money in virtue of a contract which results in the giving of a release. The object of that section is to prevent any previous device the effect of which would be to act in the nature of an anticipatory release, so that that has no bearing; and I simply put this view in, not as if I were hearing this case now as a Judge whose duty it was 20 30 40

~~MOTION TO~~ DIRECT VERDICT

10 to give to the jury the rule that was to govern them; I put this in as the rule which I think is the rule that would be likely to govern in the United States Supreme Court in the construction of that statute, and which is not the rule which would govern in this State if it were a case brought under the law of this State. I put it in for that reason so that they may pass upon it and say whether they want to decide that a man can receive and take money and keep it and at the same time not return it before he brings suit, because you can readily see that that is my point, that the jury might find that the release was void and the jury might find that he was entitled to nothing. What would be

20 the situation of the defendant under those circumstances, if the defendant were irresponsible? The result would be that the defendant would be in a rather awkward position. What I wanted to call specific attention to was that all the cases that I have found in our own State and elsewhere seem to bear out the rule that where the representations which are laid as the basis for fraud or a charge of fraud which were alleged to have been used to induce the party to agree to a settlement of his claim, such as false statements as to the nature and value of the consideration or as to the extent of his injuries, in all such cases the instrument must be held valid in a court of law and release from its effects must be sought in a court of equity. That is the whole point that I primarily and fundamentally rest this decision on; and then you of course will take

30

40 an objection on the record to the ruling.

~~MOTION TO~~ DIRECT VERDICT

I direct a verdict in favor of the defendant, basing my adjudication upon the ground that you cannot attack a release by showing misrepresentation with respect to the nature or value of the consideration. In other words, you cannot successfully in a court of law attack it for fraud in the consideration; and secondly, putting it upon the ground that even if you could attack it for fraud in the consideration, the party by retaining the advantages that he obtained under the release, without returning or offering to return them, for such a length of time as he did in this case, even after the commencement of the suit, must be held to have ratified the release and validated it even if it were originally voidable.

That is the ground upon which I direct the verdict, and you may have an objection entered to the ruling in the nature of an exception.

Mr. HARDENBROOK—I ask that our objection be noted.

30

40

EXHIBIT D 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
10 Railroad Company of New Jersey while drilling cars in the Jersey City Passenger Yard near Fiddlers, and

WHEREAS, I have represented that Section II. 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
20 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,

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 America to me in hand paid by The Central Railroad Company
30 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 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
40 any matter, cause or things whatsoever, from the

EXHIBIT D 2—Voucher and Receipt

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.

Charles F. McDonald, (L. S.)

Dated, this 25th day of February, 1914.

Signed, sealed and delivered

10

in the presence of

William W. Giddes.

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss.:

BE IT REMEMBERED that on this 25th day of 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.

20

John K. Large,

M. C. C. of N. J.

30

D 2. VOUCHER AND RECEIPT.

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.

40

EXHIBIT D 2—Voucher and Receipt

THE CENTRAL RAILROAD OF NEW JERSEY.

Payment No. 3.

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

10 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.

To Treasurer of

The Central Railroad Company of New Jersey,
143 Liberty Street, New York, N. Y.

20 Collect through

The Coal and Iron National Bank
in the City of New York.

John K. Large,
Chief Special Agent.

SETTLED PAID Registered
Feb. 27, 1914 Vo. 8045
Treasurer's Office Comptroller
1914
C. R. R. of N. J.

30

Endorsed:
Charles F. McDonald.

RECEIPT.

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

40 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

EXHIBIT D 3—Letter

the compensation *to which I am entitled the reunder 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.

WITNESS

William W. Giddes

10

Charles F. McDonald

Similar Voucher and Receipt dated March 5, 1914
for \$6.20

Similar Voucher and Receipt dated March 9, 1914
for \$6.20

Similar Voucher and Receipt dated March 23, 1914
for \$12.40

Similar Voucher and Receipt dated March 31, 1914
for \$6.20

20

EXHIBIT D 3, LETTER.

San Francisco, Cal.

Oct. 21, 1914.

Mr. C. H. English,
Passenger Train Master,
C. R. R. of N. J.

Dear Sir:

I have decided that as I cannot get back to Jersey City before that leave of absence runs out I will formally resign, so kindly consider this my resignation and if it is no trouble to you I wish you would forward my clearance to my Aunt's address which is Mrs. R. MacDonald 299 Barrow St. Jersey City, N. J.; as I do not expect to stay in San Francisco, it is better to send it to her and she can send it to me latter.

30

Yours respectfully,
Chas. F. MacDonald

40

JUDGMENT.

Entered December 13, 1915.

NEW JERSEY SUPREME COURT.

10

 CHARLES F. McDONALD,
 Plaintiff,

vs.

 CENTRAL RAILROAD COMPANY OF
 NEW JERSEY, a corporation,
 Defendant.

20

This action was tried before the Hon. William H. Speer, Judge of the Hudson County Circuit Court, to whom the said cause had been referred for trial, with a jury, at the Hudson Circuit on November 29, 1915.

30

The evidence of the respective parties having been heard, and the Court being of opinion that the plaintiff had failed to prove a cause of action against the defendant, directed the jury to find a verdict in favor of the defendant, and the jury having retired, come again into Court, and on their oaths, say, that they find the defendant, Central Railroad Company, of New Jersey, not guilty of the matters charged against it by the said plaintiff, Charles F. McDonald.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed, and that the defendant recover of the plaintiff, its costs, which are taxed at thirty-nine dollars and ten cents.

Costs, \$39.10.

Judgment entered December 13, 1915.

WM. S. GUMMERE, C. J.

